

SHADRACK SIBANDA

versus

THE STATE

**HIGH COURT OF ZIMBABWE
SIZIBA J
BULAWAYO 9th & 15 AUAUGST 2024**

APPLICATION FOR BAIL PENDING TRIAL

Applicant in person
Ms D.E Kanengoni for the State

SIZIBA J

Introduction

The applicant is seeking to be released on bail pending trial in terms of section 117A (1) of the Criminal Procedure and Evidence Act (Chapter 09:07). He is facing a charge of murder in terms of section 47 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). In terms of the form 242, it is alleged that on the 6th of January 2024, the applicant and his brother one Pilate Ndlovu assaulted the deceased Siphon Mpofu with stones and bricks and thereby causing his death. It is common cause that the quarrel with the deceased was over the issue of beer change during a drinking spree on that fateful evening.

The facts and issues

The applicant's version is that he did not assault the deceased as alleged. He says that it is his brother Pilate Ndlovu who perpetrated the assault whilst he himself was inside the house. The State opposes bail mainly on one ground. State counsel has submitted that the applicant may abscond and not stand trial due to the prospect of a lengthy imprisonment that may result from the serious offence that the applicant is facing. This assertion by the State is premised upon the fact that there is overwhelming evidence that links the applicant to the perpetration of the offence. There is a statement of one Kevin Ncube which is attached to the State's response to the bail application. The applicant does not deny that he was present at the crime scene which

is plot 16 Nkulumane, Bulawayo. The said plot is owned by the witness Kevin Ncube who was the landlord for the applicant and his brother Pilate Ndlovu. The applicant does not deny that this witness Kevin Ncube was present when the deceased was assaulted. According to this state witness, when the altercation over the issue of change started, he intervened to take the knife which had been produced by the deceased and he also disarmed Pilate Ndlovu who was armed with bricks and stones. He put the knife at his room and the drinking spree continued. At 2100 hours, there was an altercation again which led to applicant and Pilate Ndlovu assaulting the deceased with stones and bricks all over his body. The deceased ran towards the maize fields but unfortunately, he fell down. Applicant and Pilate Ndlovu kicked the deceased all over his body. The witness tried to intervene but he was grabbed by the applicant whilst urging Pilate Ndlovu to severely assault the deceased. Pilate Ndlovu cut a mopane tree branch which he used to assault the deceased all over his body while the deceased was screaming and warning that they were going to hurt him. Pilate Ndlovu then told the applicant to release the witness as he was done with the deceased. The witness then used the deceased's torch to check him and observed that the deceased was bleeding on the forehead, ear, and at the back of the head. He was in pain all over his body. The witness took the deceased to Nkulumane Police Station whereupon he was then ferried by an ambulance to the hospital. The sole issue for determination is whether on these facts, the applicant should be released on bail pending trial or not. The State's assertion that the applicant was on the run prior to his arrest is not supported by any evidence and it is accordingly dismissed as mere speculation.

Application of the law to the facts

In terms of section 50 (1) (d) of the Constitution of Zimbabwe Amendment (No.20) Act, 2013, every arrested person must be released on bail pending a charge or trial unconditionally or upon conditions unless there are compelling reasons to justify their further detention. This means that where there are no such compelling reasons to further detain a suspect after his arrest, bail is now a fundamental right in this jurisdiction. In terms of section 115C (1) of the Criminal Procedure and Evidence Act (Chapter 09:07), the compelling reasons which justify a refusal of bail pending a charge or trial are specified in section 117 (2) of the same Act as follows:

“The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established

a) where there is a likelihood that the accused, if he or she were released on bail, will

i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or

(ii) not stand his or her trial or appear to receive sentence; or

(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system;

or

(b) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.”

In the case at hand, the State’s fears are that the applicant may abscond and not stand his trial if released on bail pending trial because there is evidence linking him to the commission of an offence of murder which carries a sentence of death, life imprisonment or a lengthy prison term. This submission is being properly made in my view in the context of this case. Where the applicant for bail pending trial faces the prospect of a lengthy prison term steaming from a serious charge in a case where there is strong evidence linking him to the perpetration of the offence, his release on bail will not be in the interests of justice as it might tempt him or her to flee and not stand trial. In any event, there would be no logical reason in releasing a suspect on bail where he is facing an offence punishable with a lengthy prison term where he or she is properly linked to the offence. A person facing a serious charge which carries a lengthy prison term should only be released on bail pending trial where the evidence linking him or her to the offence is very weak or where there is clear evidence of exceptional circumstances that will justify a lesser form of punishment or a lesser verdict. This view is in line with what the courts in this jurisdiction have already cautioned about in several cases including those of *Jongwe v The State* SC – 62 – 02 and *Moyo v The State* HB – 25 – 22.

Conclusion

The case at hand is a typical case where it can be safely concluded that the applicant has failed to discharge the evidential burden which rests on him to show on a balance of probabilities

that it is in the interests of justice to release him on bail pending trial as envisaged by section 115C (2) (a) (ii) of the Criminal Procedure and Evidence Act (Chapter 09:07). The State has overwhelming evidence linking him to the perpetration of an offence of murder. The circumstances in which the deceased was assaulted may justify a verdict of murder with constructive intent on the part of the perpetrators if one is to go by the detailed events as narrated by Kevin Ncube whom the applicant concedes as having witnessed the crime scene. It is for such reason that the applicant cannot be released on bail pending trial as the likelihood of abscondment is very high and such prospect will defeat the interests of justice. It is accordingly ordered as follows:

1. The applicant's application for bail pending trial be and is hereby dismissed.

National Prosecuting Authority, respondent's legal practitioners