KHOLWANI DONGA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 18 AND 25 FEBRUARY 2021

Bail application

Ms T.F Nyathi, for the applicant
B. Maphosa, for the respondent

TAKUVA J: This is an application for bail pending trial. Applicant is on remand on one count of murder and six counts of attempted murder. The allegations are that on 9 February 2021 at approximately 01:00 hours, the applicant proceeded to the complainant's homestead where upon arrival sprinkled some inflammable liquid around a three bedroomed house and set it on fire. Inside the house were 7 occupants sleeping in different rooms. One of the complainants Robert Donga a 75 year old man was seriously burnt and he died the following day. The other six who are aged 51 years, 22 years, 19 years, 18 years, 8 years and 7 years respectively escaped from the inferno.

The applicant has applied for bail pending trial on the following grounds;

1. In terms of s50(1)(d) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 the accused has a fundamental right to be released pending trial except where there are compelling reasons for his continued detention. Section 50(1) states;

   "Any person who is arrested

   (a) ……
   (b) …….
   (c) …….
   (d) must be released unconditionally or on reasonable conditions pending a charge or trial unless there are compelling reasons justifying their further detention."

Reliance was also placed on the case of *Bakani Khumalo* v *The State* HCB 243/15 where this court held that;

> "It is no longer business as usual for the police and indeed the prosecution because it is now a fundamental right of any accused person to be released pending a charge or trial except where compelling reasons for continued detention exist. You do not just lackadaisically allege seriousness of the offence or unsubstantiated risk of abscondment or that co-accused is in custody in order to deny a person a fundamental constitutional right …"

2. The seriousness of the offence taken in isolation should not suffice to deny the applicant a constitutionally guaranteed right to liberty and freedom.

3. The applicant has a valid defence of an alibi in that he was sleeping at his homestead in Lupane on the night in question and only learnt of the fire the following morning.
4. The applicant has a constitutional right to be presumed innocent until proven guilty by a competent court.
5. The applicant is a perfect candidate to be admitted to bail as there are no compelling grounds upon which to deny him bail.
   Reliance was placed on the following cases:
   S v *Ncube* 2000 (2) ZLR 556 (S)
   S v *Mwonzora & Ors* HH-72-11
   S v *Biti* 2002 (1) ZLR 115 (H)

The application is opposed by the State on the following grounds:

1. The applicant is likely to abscond since he is facing numerous very serious offences in which upon conviction he is likely to face lengthy prison sentences including the capital punishment since the murder was committed in aggravating circumstances as provided in section 47(2)(a)(iv) of the Criminal Law (Codification and Reform) Act (Chapter 9:23).
2. The applicant resides in South Africa and only came to Zimbabwe in January 2021 to attend to his father's funeral. Accordingly, he is likely to flee to that country if granted bail.
3. The applicant is likely to interfere with evidence in that the applicant is related to the key State witness Ayanda Donga who saw the applicant at the scene. It is further contended that the applicant is likely to intimidate this witness as he is of a violent disposition.
4. Applicant resisted arrest and was subdued by six police officers.
5. The State case is very strong such that the applicant is likely to be convicted of all seven counts. In such a case the applicant is most likely to be sentenced to a lengthy prison term and that can be an incentive for him to abscond.
6. Reliance was placed on: (1) *S* v *Biti supra;* (2) *Makamba* v *S* SC-30-04

The Law

Dow Discretionary Justice (1981) 59 states:

> "The criminal justice process is such that there is an incredible lapse of time between the arrest of the offender and his subsequent trial. Congested criminal court rolls and completion of police investigations are the main factors that contribute to this state of affairs. And indeed an accused person also has a right not to have an immediate trial: he should be given a reasonable opportunity to prepare his defence and consider his position."

Pre-trial incarceration presents a special problem in the criminal justice system in that the accuse is being deprived of his liberty in circumstances where the court of law has not pronounced him guilty and the presumption of innocence operates in his favour. But at the same time there is a possible risk that an accused person who is released pending trial might abscond. This in many cases is a very real risk. However, the ideal situation is that pre-trial liberty should be the norm and that pre-trial release should be refused only in those instances

where the accused will not stand his trial or would otherwise interfere with the administration of justice.

What should be borne in mind is that the power to refuse or grant bail is essentially a judicial one. However, in exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safe guarding the proper administration of justice – see *S* v *Smith* 1969 (4) SA 175N.

Since the fundamental consideration is the interest of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this.

In our jurisdiction the right to bail is recognized in section 50(1)(d) of the Zimbabwean Constitution quoted earlier. While this right is a fundamental one, it is far from absolute and bail may be refused in appropriate circumstances. The words "unless there are compelling reasons justifying their further detention" is proof of this.

By way of statutory provisions the right to bail is contained in s117 of the Criminal Procedure and Evidence Act (Chapter 9:07) which states;

117. **Entitlement to bail**

(1) Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that he or she should be detained in custody.

(2) 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) …

(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 objections or proper functioning of the criminal justice system, including the bail system;

(b) …

(3) In considering whether the ground referred to in –

(a) …

(b) subsection (2)(a)(ii) has been established, the court shall take into account –

(i) the ties of the accused to the place of trial;

(ii) the existence and location of assets held by the accused;

(iii) the accused's means of travel and his or her possession of or access to travel documents;

(iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefore.

(v)The strength of the case for the prosecution and the corresponding incentive of the accused to flee;

(vi)…

(vii) any other factor which in the opinion of the court should be taken into account;

(c) Subsection (2)(a)(iii) has been established; the court shall take into account –

(i) Whether the accused is familiar with any witness or the evidence;

(ii) Whether or any witness has made a statement;

(iii) Whether the investigation is completed;

(iv) The accused's relationship with any witness and the extent to which the witness may be influenced by the accused;

(v) …

(vi) …

(vii) …

(d) …

(e) …

(4) In considering any question in subsection (2) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors; namely …"

Application of the law to the facts

In terms of these provisions, once any of the grounds in subsection (2) is established, the detention of an accused shall be in the interests of justice. Put differently once this subsection is satisfied the State will have shown compelling reasons justifying the accused's further detention in terms of s50(1)(d) of the Constitution. Once again, the overriding principle is the maintenance of a balance between the interests of justice against the right of the accused to his liberty or freedom.

In casu, the State opposed bail firstly on the ground that the applicant if released on bail might not stand trial and secondly that there is a likelihood that he will attempt to influence or intimidate witnesses. As regards the 1st ground it is clear that the applicant is facing very serious offences for which he is likely to end up receiving very grave penalties, thereby creating a corresponding incentive to abscond. The nature and gravity of the offences speak for themselves. In respect of the strength of the case for the prosecution the applicant has sought to down play the weight and reliability of the evidence of the eye witness one Ayanda Donga. Applicant has also attacked the evidence of this witness as "uncorroborated evidence of a single witness".

What I find surprising is applicant's silence on the respondent's assertion that he is indeed related to this witness. If this is true, then there is absolutely no question of mistaken identity as Ayanda alleged that she talked to the applicant before he disappeared into the

darkness. The fact that the case for the prosecution hinges entirely on the evidence of a single witness cannot be said to render that case weak in view of the provisions of section 269 of the Criminal Procedure and Evidence Act (Chapter 9:07). See also *S* v *Mokoena* 1932 OPD 79 at 80. The point is, such evidence may be sufficient to sustain a conviction on a charge of murder or attempted murder as *in casu.*

Further the witness appears to be credible in my view in that she does not say she saw the applicant torching the house. All she said is she saw applicant at the scene of crime in the wee hours. As against this evidence the applicant's defence is that of an alibi. He claims to have been sleeping at his home in the neighbourhood. Strangely, he does not divulge who was in his company at the material time. For these reasons, I find that the case for the prosecution against the applicant is strong.

The other ground relied upon by the State is that the applicant is a flight risk who does not ordinarily reside in Zimbabwe but resides in South Africa. He was also said to have come to Zimbabwe to bury his father in January 2021. Instead of being candid with the court about this crucial piece of evidence, the applicant opted to keep mum. This is surprising indeed and I can only infer that such silence confirms the truthfulness of the allegation. I find therefore that applicant has no strong ties to Zimbabwe. I also find that applicant lives in South Africa where he owns some assets. As a result applicant is likely to flee to South Africa if released on bail. His failure to at least mention his South African connection increases the risk of abscondment.

Further, it is noteworthy that the applicant is not in gainful employment either formerly or informerly in Zimbabwe. He admits to own an "immovable property" at Thabani Donga's homestead, Mpofu Village, Lupane. Firstly, applicant does not describe this property. Secondly, he does not describe the nature of his right and title to this property. Thirdly and most importantly the immovable property is situated at someone's else's homestead i.e Thabani Donga. Finally, the value is given in general terms as "significant value". The questions that remained unanswered become, 'Is it brick and mortar? Is it a simple hut in a rural area?

Applicant offered to surrender his passport in a bid to allay the State's fears of abscondment. In my view such a condition is not effective in view of the fact that the applicant can easily cross the border between Zimbabwe and South Africa through the bush. It is a notorious fact that this border is porous.

After weighing the interests of justice against the right of the applicant to his personal freedom, I come to the conclusion that there is a likelihood that the applicant if he were released on bail will not stand his trial. In my view, it is in the interests of justice that applicant should be detained in custody pending his trial.

In the circumstances, the application is hereby dismissed.

Makiya & Partners, applicant's legal practitioners
National Prosecuting Authority, state's legal practitioners