TAPIWA MAKORE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 14 September 2021 & 22 September 2021

BAIL APPLICATION

T S Mujungwa, for the applicant
L Masango, for the respondent

Mhuri J: On the 25th of September 2020, applicant was arrested for a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. On 29 September, 2020 he was placed on remand where upon he was advised to apply for bail at the High Court as he was facing a third schedule offence. This is his application for bail pending trial.

It was submitted on behalf of applicant that every person enjoys a right to bail despite the nature, the seriousness of the offence or conclusions or inferences by the public and media. The presumption of innocence which entails that a person is presumed innocent until proven guilty beyond any reasonable doubt operates in applicant's favour. It was also submitted that two of his accomplices, namely Thanks Makore and Maud Hunidzarira were granted bail hence he should also be treated the same. Applicant also contended that the State's response opposing bail was premised only on two issues, namely, the seriousness of the offence and the likelihood to abscond induced by the seriousness of the offence. These reasons, applicant submitted, are not compelling, as seriousness alone is not a determining factor in granting or refusing bail. Reliance was made on the cases of *S* v *Hussey* 1991 (2) ZLR 187 (S) and *S* v *Tsvangirai* HH 100-2003. As regards fear of abscondment, applicant submitted that, there is no real risk of absconding as he is

58 years, has a family, is of a fixed abode and can surrender his passport. Stringent reporting conditions can allay the State's fear. Applicant's further submission was that, the State's case was not strong as the evidence by the Police was the white blood stained trousers that was found in applicant's kitchen which trousers do not belong to applicant but co-accused Tafadzwa Shamba, as shown in paragraph 12 of the annexure to Form 242, which reads:

"On the same date, Tafadzwa Shamba removed his pair of white trousers which had some blood stains and placed it in the accused person's kitchen hut."

Confessions by an accomplice have no probative value against another, so applicant submitted.

In conclusion, applicant submitted that he is a proper candidate for bail. It is in the interest of justice and administration of sound criminal justice system that he be set at liberty pending his trial. His prayer was that he be admitted to bail pending trial on the following terms:

1. That he deposits a sum of ZWL10000 with the clerk of Court Murehwa Magistrates Court.
2. That he continues to reside at number 2 Mukonde Street Mufakose Harare until the matter is finalised.
3. That he does not interfere with state witnesses or evidence.
4. That he reports at Mufakose Police Station once a week on Fridays between 6am and 6pm until the matter is finalised.
5. That he surrenders his passport to the clerk of court Murehwa Magistrates Court until the matter is finalised.

The State is opposed to the granting of bail in this matter. It submitted that s 117 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] has laid down a number of guidelines that the court can consider when faced with whether or not to grant an applicant bail. In ss 3 the consideration whether there is a likelihood that the Applicant will abscond if granted bail, the court is directed to take a number of factors into account. These include the nature of the offence, gravity of the likely penalty as well as the strength of the case and the corresponding incentive to flee. It relied on the case of *S* v *Ndlovu* 2001 (2) ZLR at 261.

It was its submission that the applicant is facing serious allegations, which in terms of s 47 (4) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] one can be sentenced to

death, imprisonment for life or imprisonment for any definite period of not less than twenty years or to imprisonment for any definite period. It contended that, if convicted applicant is unlikely to escape a custodial sentence. This will therefore, likely induce applicant to abscond. It submitted further that, applicant's two co-accused persons were granted bail. However, the law does state that the accused persons are to be treated the same unless there are cogent reasons to differentiate them. *In casu*, the two accused persons were granted bail on the evidence of implication alone, whereas the applicant's case is definitely stronger with the role he played.

It was submitted that the applicant was the master mind behind the heinous crime. The applicant led the police to the recovery of a small animal tail that is said to have been used to deep into deceased's blood whilst applicant made some incantations. That there is a witness who will attest to the fact that the applicant was part of the horrendous plan to kill the deceased, and that the deceased was actually kept in the applicant's house prior to him meeting his demise, and that applicant tried to conceal evidence by giving Maud Hunidzarira the blood stained mats to wash. With this, respondent submitted that it had sufficient evidence to link the applicant to the offence and believes applicant is likely to be convicted.

It is a trite position of the law that an accused person is presumed innocent until proven guilty. See **s 70 (1) (a) of the Constitution of Zimbabwe** which reads as follows:-

> "1. Any person accused of an offence has the following rights—
> *a)* To be presumed innocent until proved guilty..."

Section 50 (1) (d) provides that any person who is arrested must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention.

Section 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides as follows:-

> "(1) Subject to this section and s 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 it is in the interest of justice 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 interest 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) ……"

Applicant is facing a murder charge of a juvenile aged 7 years which as submitted by the applicant's counsel was a gruesome murder. Murder by its nature is a very serious offence which invariably calls for a very severe penalty, and as submitted by respondent may attract a death penalty, life imprisonment or very long definite prison term. Accepted, it is a trite position of the law that seriousness of the offence alone cannot be a basis for denying bail. In this case however, I find that there are other factors which if looked at in conjunction with the seriousness of the offence, bail can be denied. As submitted by the respondent applicant is linked to the offence and in my view a conviction of murder is inevitable. That being the case either a death penalty or a very lengthy prison term will be imposed. This will induce applicant to abscond. Granted, applicant's co-accused persons were granted bail. Applicant's case however is different from the two co-accused persons cases in that Maud's involvement was washing the blood stained mats which applicant directed her to wash, and in Thanks' case there was no actual evidence to link him to the offence as he had been linked by Tafadzwa as the one who had been given the deceased's head but the head has not been found until now.

Balancing the interests of the criminal justice system and that of the applicant it is my considered view that it will not be in the interest of justice to grant applicant bail. Granting applicant bail will lead the public to lose confidence in the criminal justice system.

I am persuaded that there are compelling reasons not to grant applicant the liberty he is seeking pending his trial.

To that end therefore, I will not grant the indulgence he is seeking. It is, in the result ordered that the application for bail pending trial be and is hereby dismissed.

Tavenhave & Machingauta, Applicant's Legal Practitioners.
National Prosecuting Authority, Respondent's Legal Practitioners.