ALPHA ELLARD
versus
THE STATE

CHARLES MUSONA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 23 November & 23 December 2015

Bail Application

Applicants in person
B Murevanhema for the respondent

ZHOU J: This judgment is in respect of the two bail applications filed by the two applicants separately under Case Nos. B999/15 and B1000/15. The two applicants, together with two other accused persons, are being jointly charged with the offence of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The trial matter commenced but was postponed indefinitely due to the insufficiency of the time which had been allocated to it. At the time that the trial was postponed the State had closed its case and the first accused person, Alpha Ellard, had opened his defence case and was being cross-examined.

The right of an accused person who has not been convicted to be admitted to bail is enshrined in s 50(1) (d) of the Constitution which provides as follows:

> "**50 Rights of arrested and detained persons**
> (1) Every 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 continued detention".

Section 117(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides as follows:

> "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 has appeared in court on a charge and before sentence is imposed unless the court finds that it is in the interests of justice that he or she should be detained in custody."

In terms of s 117(2) of the Criminal Procedure and Evidence Act:

> "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 is 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 objective or proper functioning of the criminal justice system".

The question of interference with witnesses or evidence does not arise *in casu* as the prosecution has already led all its witnesses and has closed its case. Also, no suggestion was made that the release of the applicants would constitute a danger to the safety of any person or the public or that the applicants, if released, would commit other offences. The opposition to the admission of the applicants to bail is predicated upon the contention that the applicants will abscond because of the seriousness of the offence and the likely penalty in the event that they are convicted. The factors which a court will take into account in assessing the risk of abscondment of an accused person if he or she is admitted to bail are elegantly and succinctly set out in the judgment of Chidyausiku CJ in the case of *S* v *Jongwe* 2002 (2) ZLR 209(S) at 215B-C, as follows:

> "In judging the risk that an accused person would abscond the court should be guided by the following factors:
> (i) The nature of the charge and the severity of the punishment likely to be imposed on the accused person upon conviction;
> (ii) The apparent strength or weaknesses of the State case;
> (iii) The accused's ability to reach another country and the absence of extradition facilities from the other countries;
> (iv) The accused's previous behaviour;
> (v) The credibility of the accused's own assurance of his intention and motivation to remain and stand trial."

The seriousness of the charge is not on its own a ground for denying a person who has not yet been convicted the right to be admitted to bail. It was submitted on behalf of the State that the evidence led showed a strong case against the two applicants. In oral argument Mr *Murevanhema* conceded that, in respect of Charles Musona, the evidence led was not that strong and the State would be prepared to have him admitted to bail. The concession was

properly made in that respect. However, I do not believe that the evidence led revealed any stronger case against Alpha Ellard than against Charles Musona. Rather, evidence led seemed to suggest that the fourth accused person in the main matter inflicted heavy blows upon the deceased. He is the one who locked the door to the house in which the deceased and the other accused persons were. According to the evidence led, he is the one who struck the deceased on the head with a pump.

There are also no facts, neither is there evidence, to suggest that the applicants will abscond if they are released on bail. The applicants were only detained in custody following their indictment. Prior to their indictment they were out of custody but did not abscond although they were aware of the seriousness of the allegations which they were facing. I do not believe that the evidence led is strong enough to induce a change of attitude on the part of the applicants. As noted above, the evidence does not reveal a strong case against these two applicants and their co-accused, Rosaria Musona who has been admitted to bail. There are no compelling reasons for treating these two applicants from Rosaria Musona. The State witness to the events of the two days in which the deceased was assaulted was intoxicated on one of the days, and did not adequately explain a lot of unsatisfactory features of his evidence, such as the reason why Charles Musona and Rosaria Musona helped the deceased to escape from the house in which Alpha Ellard and the fourth accused person were sleeping if indeed they were involved in assaulting him. Thus insofar as it relates to the applicant and Rosalia Musona, the State case is very weak. This court does not doubt the credibility of the assurances given by the applicants that they will attend to stand trial even if they are to be released on bail. See *S* v *Jongwe* 2002 (2) ZLR 209(S) at 215B-C.

Both applicants have offered to deposit a sum of US$20. That amount is too little in my view. The applicants have not suggested that they cannot afford a reasonably higher figure than that. Given the circumstances of this case, especially the nature of the offences alleged, it seems to me that a sum of US$100 would be appropriate.

In the result, IT IS ORDERED THAT:

1. The two applicants, namely, Alpha Ellard and Charles Musona, be and are hereby admitted to bail subject to the following conditions:
    1.1 Each of the applicants shall deposit a sum of US$100 with the Registrar of this Court at Harare.
    1.2 The applicants shall continue to reside at their respective residences at Serui

Source Farm Compound, Norton, until the trial has been finalised.

1.3 The applicants shall report once every fortnight on a Friday at ZRP Norton Rural Police Station between the hours of 0600 and 1800 hours.

National Prosecuting Authority, respondent's legal practitioners