BERNARD CHIWENGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 27 November 2015, 2 December 2015, 10 August 2016

BAIL APPLICATION

T Kasema, for the applicant
T Mutevere, for the respondent

CHIGUMBA J: The question that the court must determine in this matter is whether it is in the interests of justice that the applicant be detained in custody because the concerns raised by the state have merit, that he is likely to interfere with witnesses, and or that he is likely to abscond and not stand trial. In other words, the court must consider the evidence tendered on behalf of the state, to substantiate these allegations. It is only where the court makes a finding that the state's allegations are well founded, and the applicant fails to discharge the onus on him to establish that he is a good candidate to be admitted to bail, that a finding can be made that it is in the interests of justice that the applicant be detained in custody. In the advent of the new Constitution regard must be had to a new dispensation which demands that the court, in an application of this nature, be satisfied that there are compelling reasons justifying the continued detention of the applicant pending trial.

It is my view that the test is the same as that emanating from s117 of the Criminal Procedure and Evidence Act, except that s50 of the Constitution makes it clear that the reasons for denying admission to bail must be compelling. In my view this means that the state now has the onus of providing cogent evidence to support its allegations against an applicant for admission to bail. A certain level of proof of the allegations made by the state in opposing admission of an applicant to bail must now be met. It is my view that compelling reasons for refusal to admit to bail must be such allegations that are more likely than not to be true, on a

balance of probabilities. The standard of proof is not beyond a reasonable doubt at this stage, it is based on a preponderance of probabilities.

The applicant applied to be admitted to bail pending trial. On the 2nd of December 2015, the application was dismissed for the reason that the applicant was not a suitable candidate for admission to bail. The court stipulated that its reasons for this finding would follow. These are the reasons. This is an application for bail pending trial, in which the applicant seeks to be admitted to bail on the following conditions:

1. That he deposits US$50,00 with the clerk of court, Murehwa Magistrates Court
2. That he resides at Nyamandoro School in Mudzi
3. That he reports on every Friday at Mudzi Police Station between 6am and 6pm
4. That he be ordered not to interfere with any state witnesses.

Applicant was charged with murder, as defined in s 47 of the Criminal Law, Codification and Reform Act [*Chapter 9:23*] (the CODE), it being alleged that, on the 17th of October 2015, at 1800 hours, in Dzapasi village, Chief Mangwende village in Murehwa, he murdered Vaidah Mubaiwa.

According to the form 242 request for remand form, the accused was positively identified by three witnesses who are closely related to him, shoe prints at the scene of the crime were found to match the shoes that the accused was wearing when he was arrested, and the victim had positively identified the accused as the person who had waylaid and tried to ambush her at some point, before her demise. According to the outline of the state case, the accused was arraigned before the regional court at Murehwa on a charge of the rape of the deceased victim. He was remanded to 16 November 2015 for trial. It is alleged that, on 17 October 2015, the accused tried to waylay and abduct the deceased victim while she was alone at home. The deceased managed to escape, and reported the incident to a neighbor. Maud Mufandaedza Chivengwa who is the mother of the accused person. The accused's mother instructed Chengetai and Chantel Chivengwa to accompany the deceased victim to identify if indeed it was the accused person who had tried to abduct her. They proceeded to a storm water drain where he had hidden and positively identified him.

It is alleged further, that the accused was waiting to pounce on the deceased victim at her home and that, later on that day when she went back home to secure the doors, he tried to grab her and she escaped. She was in the company of Chengetai and Shantel Chivengwa. The two again positively identified the accused as their uncle, and they reported this to their grandmother, as well as the fact that he tried to abduct the deceased victim again. On 18 October 2015, the deceased's body was found in a gum tree plantation in the same village. The shoe prints at the scene of the crime were uplifted as evidence. The accused's shoes were taken as evidence when he was arrested. The affidavit of the Investigating Officer, Detective Sergent Benjamin Thamangani of the Zimbabwe Republic Police, Criminal Investigations Department, makes interesting reading.

He avers that he received a report that the body of a fourteen year old girl had been found in a gum tree plantation in Chief Mangwende's village. She had allegedly been kidnapped from her home. Her remains were dumped on a pathway to the communal borehole. Her body had no visible marks. It was noted that two witnesses had been with her when she screamed for help while a kidnap attempt had been made on her. It was noted that the accused was on a rape charge in which the deceased was the complainant, on CRB 480-15. The implication was that the pending rape trial was the motive for the murder, to silence the complainant and prevent her from testifying against the accused. It was averred that the witnesses were closely related to the accused, and that he had already threatened one of them over the phone. Messages had been found in the accused person's mobile phone in which he had intimated that he was preparing to flee to South Africa to escape justice.

Applicant in his bail statement submitted that applications of this nature are governed by s 117 of the CPEA. He referred the court to the case of *Ian Makone* v *The State*[1] where this court stated that bail should be allowed in the interest of individual liberty unless it is not in the interests of justice, and that each individual case must be dealt with on its own merits. That case cited the case of *S v Essack*[2], in which the following *dicta* appears;-

> "…in dealing with an application of this nature it is necessary to strike a balance as far as that can be done between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice".

[1] B439-07
[2] 1965 (2) SA 161D @ 162D

The applicant referred the court to s50 of the Constitution,[3] which in 50(1) (d) which states that;-

> "**50 Rights of arrested and detained persons**
>
> (1) 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 continued detention; and…"(my emphasis)

The applicant denied that he murdered Vaida Mubaiwa as alleged. It was submitted on behalf of the applicant that he resides in Dzapasi village under Chief Mangwende, and that he is 48 years old, and that has never shown any willingness to endanger the safety of any member of the public, and that he cooperated fully with police investigations. It was submitted further that the applicant was not likely to abscond because he has family ties here and no means of escaping from this jurisdiction. He is a family man of fixed abode with a large family which depends on him. The court was urged to follow the dicta in the case of *S v Benataar*[4] that the chances of abscondment can be minimized by the imposition of suitable conditions. The court in that case said that;-

> "…in striking a balance between the liberty of a subject and the proper administration of justice, the imposition of conditions in an application for bail can be decisive, where bail can be granted subject to safeguarding conditions, the court should if possible lean in favor of doing so…"

The court was asked to note that the applicant had not breached his bail conditions on the rape charge, an indication that he was willing to stand trial and to clear his name. It was submitted that the allegations against the applicant were manufactured in an attempt to 'fix' him by witnesses whose evidence is unreliable and unbelievable. It was submitted that the evidence of the shoe prints was unreliable from a forensic point of view. The evidence of interference with witnesses and intention to flee the jurisdiction was not buttressed by any documentary evidence such as phone records. It was submitted that there is no *prima facie* evidence that it was the accused who murdered the deceased.

[3] Constitution of Zimbabwe Amendment number 20 Act 2013

[4] 1985 (2) ZLR 205 (HC)

Applicant assured the court and undertook not to interfere with any of the witnesses if admitted to bail. The court was urged to be guided by the case of *S* v *Bennet*[5], where it was stated that;-

> "…it appears to me that as applicants have not interfered with investigations the proper approach should be that unless the state can show that there is a real risk that the accused will, not merely may, interfere, there does not appear to me to be a reasonable possibility of such interference. In any event the applicant can be dissuaded from such interference by the imposition of suitable conditions. In reality if the police experience or encounter any such interference that is fertile ground to apply for re-arrest and cancellation of bail".

It was submitted that the applicant is aware of the seriousness of the charge that he is facing, but that, this alone is not enough to deny him his constitutionally guaranteed right to liberty. The court was urged to rely on the case of *S* v *Hussey*[6],as authority for this proposition. The court in that case said that the mere fact that an offender is facing a serious charge, albeit of a prevalent offence, does not justify his incarceration pending trial, and that seriousness of an offence is clearly a factor which should be taken into account together with other factors, but not the only factor to determine whether a person should be incarcerated. The court went to say that;-

> "….it is a well-established principle of our law that a man is innocent until proven guilty. To disregard this very well founded principle and to incarcerate an individual purely because he faces a serious offence would be to disregard this very valid and important principle and to weaken respect for the law and the social condemnation of those who break it…"

On the purpose of bail, it was submitted that the court must, in an application for bail, strike a balance between the interests of society that accused should stand trial and that there should be no interference with the administration of justice, and the liberty of an accused who, pending the outcome of his trial is presumed innocent. See *Kisimusi Dhlamini v The State* [7], *S* v *Achison* [8], *S* v *Dube* [9], *AG* v *Phiri*[10], *S* v *Chiadza* [11], *S v Matagoge & Ors* [12], *and S* v *Fourie* [13].

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[5] 1976 (3) SA 653 (H)

[6] 1991 (2) ZLR 187 (S)

[7] HH57-2009

[8] 1991 (2) S 805

[9] HB 9-03

[10] 1998 (2) ZLR

Finally, it was submitted that the applicant had discharged the onus of showing that he was a suitable candidate for admission to bail, on a balance of probabilities.

The state opposed the admission of the applicant to bail on the basis that the evidence against him was overwhelming. The court was referred to the case of *S* v *Aitken*[14], as authority for this proposition. It was submitted on behalf of the respondent that the allegations against the applicant had been substantiated by the affidavit of the investigating officer, in the outline of the state case, and on the form 242 request for remand form. It was submitted further that there are compelling reasons justifying the continued detention of the accused in terms of s50 (1) (d) of the constitution.

Courts are guided in their consideration of the suitability of any candidate for admission to bail pending trial, by the provisions of s 117(1) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*], hereinafter referred to as the CPEA, which provides that:

> "**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 it is in the interests of justice that he or she should be detained in custody." (my emphasis)

The court, in an application of this nature, must be satisfied that there are compelling reasons justifying the continued detention of the applicant pending trial. Some of the factors that the court ought to consider in establishing whether the state's allegations are well founded are set out in s 117 of the CPEA in considering whether it will be in the interests of justice to detain the accused in custody on the basis of cogent evidence that if released on bail he is not likely to stand trial, or that he will attempt to influence and intimidate witnesses, the court is enjoined to consider the following factors:

Where it is alleged that accused will abscond and not stand trial:

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[11] 1988 (2) ZLR (S)

[12] 1991 (1) SACR 539B @ 542 D-F

[1313] 1993 (1) ZLR 100 (S)

[14] 1992 (1) ZLR

(i) the ties of the accused to the place of trial; the evidence on record is that the accused person's family homestead is in this area, his mother and his brother live there, and that he is the headmaster of a local school. Accused has lived in this area all his life. I am satisfied that his ties to this area are binding and substantial.

(ii) the existence and location of assets held by the accused; there was no evidence in the accused applicant's papers on this aspect, or in the state papers. The accused will be taken as not having any assets for purposes of this application, because of the paucity of evidence.

(iii) the accused's means of travel and his or her possession of or access to travel documents; there. There was no evidence in the state papers, except an allegation that accused'smobile phone contained messages to the effect that he was preparing to flee this jurisdiction.

In *S* v *Hudson (supra)* at p 149, the court stated that*:*

> "Where an accused applies for bail and confirms on oath that he has no intention of absconding due weight has of course to be given to this statement on oath. However, since an accused that does have such an intention is hardly likely to admit it, implicit reliance cannot be placed on the mere say-so of the accused. The court should examine the circumstances."

We note that no sworn statement was filed of record on behalf of the accused. The accused did not take the court into his confidence as to whether he has a valid passport, nor did he tender it to the court. Accused is employed as a teacher so we can find that he has the means to travel should he wish to do so. Accused has not discharged the onus of showing that he is not a flight risk. The state's statement on oath by the investigating officer constitutes *prima facie* evidence of its averments. It is cogent evidence unless it is discredited. On a balance of probabilities, balancing that statement against the bald assertion of 'fixing' made on behalf of the accused, it is more likely than not that the sworn statement contains true averments.

I am satisfied that it is more probable than not, that the accused indeed indicated that he intended to flee this jurisdiction via messages on his mobile phone. There is no reason why, from the record of proceedings, and in the absence of evidence other than a bald averment, the court should come to the conclusion that the investigating officer, who is an officer of the court, was not telling the truth in a sworn statement. We find further, on a preponderance of probabilities,

that, it is more likely than not, that the accused has no travel documents otherwise he would have offered to surrender them in an effort to persuade the court that he intends to stand trial and not flee.

(iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefor; murder is a capital offence which can attract the death penalty if committed in aggravatory circumstances, will attract a custodial sentence of at least twenty years. There is no doubt that the prospect of being incarcerated for a long period is very real in these circumstances, upon conviction.

(v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee; It is an indictment on the accused that the witnesses against him are all members of his family. There is no evidence on record that there is bad blood between the accused, his mother, his brother's wife and or his nieces. A bald statement of their intention to 'fix' him forms part of the record. In the absence of a better explanation as to why all these witnesses, including two minor children would 'collude' against him, the probabilities support the assertion that the witnesses may indeed have seen what they claim to have seen. They did not see the accused murder the victim, but their evidence of the kidnapping and abduction attempt by the accused will have to be refuted at the trial, or by tangible evidence of its unreliability or inconsistency. For purposes of this application, we accept that it is more likely than not that the state case against the accused is strong. The accused was charged with the rape of a minor and admitted to bail pending trial. The parties all lived in the same community, and were neighbors. While on bail pending trial for rape, it is alleged the accused was seen attempted to kidnap the victim, by members of his own family. The victim had earlier on sought refuge at his mother's homestead ,alleging that he was lurking about her homestead and that she had fled in fear after he tried to abduct her. In these circumstances, the accused's incentive to flee is strong.

(vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions; the accused is a teacher who will be able to afford the proposed deposit. The proposed conditions are not onerous, that are similar to the ones imposed when the accused was admitted to bail on the

rape charge. We accept that the accused faithfully adhered to those conditions. There is no cogent evidence on record to justify a contrary conclusion.

(vii) any other factor which in the opinion of the court should be taken into account;". The court considered that the victim of rape and subsequently murder was a minor whose life was cut short in the most callous manner after being subjected to sexual violence. The court also considered that the victim and the accused were neighbors, and that these cumulative offences against the victim will have traumatized to community.

The court also took into consideration the following factors;-

(i) whether the accused is familiar with any witness or the evidence; as previously stated, the accused is closely related to all the witnesses and if admitted to bail at the address proffered, is likely to and reside in the same community as those witnesses, which is not desirable.
(ii) whether any witness has made a statement; it is common cause that the witnesses are closely related to the accused person, and that the minor witnesses claim to have seen him hiding in a storm water drain after allegedly attempting to abduct the victim from her home. There are no witness's statements in the record.

(iii) whether the investigation is completed; it is common cause that the investigations are not yet complete.

(iv) the accused's relationship with any witness and the extent to which the witness may be influenced by the accused; it is common cause that the witnesses are closely related to the accused and that, some of them being his nieces are likely to be respectful and deferential to him in accordance with our African culture. The minors are the ones who are eyewitnesses, and are more likely to be susceptible to undue influence.

(v) the efficacy of the amount or nature of the bail and enforceability of any bail conditions; this has been discussed above.

(vi) the ease with which any evidence can be concealed or destroyed; there is no indication that the police are searching for any evidence that is likely to be tampered with forensic or otherwise.

It is this court's view that the state's fears that the applicant will attempt to interfere with witnesses is well founded by the averments in the affidavit of the investigating officer. The close family ties between the accused and the witnesses does not bode well for peaceful co-existence pending trial or even during trial. One of the witnesses is the accused's own mother. How will they look each other in the eye pending the resolution of this matter? They all reside in Chief Manwgende's village and fetch water from the same well. There is a real risk that the accused will interfere with his relatives because of the nature of the allegations, the family ties, and the importance of their eyewitness accounts to his conviction or acquittal. The imposition of bail conditions in this case is not likely to deter the applicant from absconding, for reasons which the court has already canvassed above. We find that there are compelling reasons why the accused cannot be admitted to bail and should not be admitted to bail, at this stage. It is for his own protection, as well as the safety and protection of the witnesses. After all, in the circumstances of this case, the victim was apparently killed to prevent her from giving evidence on the rape allegations. Accused has not been proved to be the perpetrator of this violence upon the person of another, but his release back to the community in these circumstances may not be in the interests of justice.

The court must weigh the interests of justice against the right of the accused to his personal freedom, with particular emphasis on the likely prejudice he would suffer were he to be detained in custody. In its analysis, and balancing act, the court is enjoined to consider:

> " (*a*) the period for which the accused has already been in custody since his or her arrest; (*b*) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (*c*) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (*d*) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (*e*) the state of health of the accused; (*f*) any other factor which in the opinion of the court should be taken into account."

The applicant has been in custody since October 2015. There is no trial date. The accused is a family man who is has previously been convicted of domestic violence. Both crimes

that he stands currently accused of involve elements of physical violence against the person of another. The court finds that the interests of justice would be prejudiced by the admission of the accused to bail, because there is cogent evidence that he has not been candid with the court in various material respects, the prosecution case against him is strong, the penalty severe, the court is not satisfied that he intends to stand trial, the court is not satisfied that the accused has sufficient incentives to stay in Zimbabwe until the finalization of the trial. The court is satisfied that, the imposition of bail conditions would not be a sufficient deterrent to keep the applicant in Zimbabwe, because of the severity of the sentences that are likely to be meted out to him if he is convicted. The applicant failed to discharge the onus on him, to place sufficient evidence before the court, to satisfy the court that, on a balance of probabilities, he will stand his trial if released on bail. This means that he is not a suitable candidate for admission to bail. The application for bail is dismissed for these reasons.

Muchineripi & Associates, Applicant's Legal Practitioners
National Prosecuting Authority, Respondent