

ANESU MAFOKOSHO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 14 February 2019 and 25 July 2019

Bail Pending Trial

Ms T Fusire, for the applicant
M Musarurwa, for the respondent

MWAYERA J: On 14 February 2019 I dismissed a bail application filed by the applicant outlining the reasons for such a disposition. The applicant has by letter dated 2 July 2019 requested for the written reasons for my disposition. These are they.

The applicant is being charged with the offence of murder as defined in s 47 (1) (a) or (b) of the Criminal law (Codification and Reform) Act [*Chapter 9:23*]. The brief facts informing the charge are as follows. On 24 December 2018 at around 1300 hours the now deceased and the accused who although estranged were husband and wife went to shop clothing items for their 3 year old daughter. Upon their return the two proceeded into their bedroom. A misunderstanding ensued and accused picked an axe from under the bed and struck now deceased 5 times at the back and on the neck. Shortly after striking, the accused closed the door and fled away from the scene. The accused notified her sister by sending a text message notifying her of what she had done. A report was then made to the police. After follow ups the accused was arrested on 4 January 2019.

The respondent opposed the application for bail on the basis that the admission to bail was viewed as prejudicial to the interest of administration of justice. Among other reasons the state buttressed its position by the fact that after the alleged commission of the offence the applicant fled and was residing in the forest. Such conduct of being a fugitive from justice weighed heavily against the admission of the applicant to bail. The respondent argued that the applicant was likely to abscond and thus jeopardise the interest of administration of justice.

Although applicant's counsel sought to underplay the conduct of fleeing by the applicant after the alleged commission of the offence by pointing out that she was scared. It remained a fact the applicant fled from the scene and stayed in the bush.

In applications for bail pending trial, the court considers the interests of administration of justice anchored on the societal interests of having matters prosecuted to their logical conclusion on one hand, and also on the other hand the court has to consider the right to individual liberty as provided for in s 49 of the Constitution. Indeed every person has the right to personal liberty which includes not to be detained without trial and not to be deprived of their liberty arbitrarily or without just cause. This right is anchored on the hallmark of the presumption of innocence until proven guilty by a competent court of law. The applicant has to be released on bail as of right unless there are compelling reasons justifying continued detention. See *S v Felody Munsaka* HB 55/16. The court thus has to seek to strike a balance between the interests of administration of justice and the right to liberty. In so doing the circumstances of the allegations, nature of allegations, personal circumstances of the applicant and nature of defence of the applicant fall into consideration.

The applicant is facing a murder charge which is a serious charge. I am alive to the fact that the seriousness of a charge on its own cannot be ground for denial of bail. See *S v Hussey* 1991 (2) ZLR 187. The circumstances have to be considered cumulatively. In this case the manner in which the murder was allegedly committed connotes premeditation as the lethal weapon was concealed under the bed. Upon being retrieved therefrom the axe was allegedly used 5 times on the neck and back, vulnerable parts of the body. That the circumstances of the alleged murder depict a well-orchestrated offence and that the accused fled the scene and stayed in the forest are factors militating against admission of the applicant to bail. In the event of conviction given the circumstances the likely sentence is lengthy imprisonment and that to an individual who is said to have fled after the alleged offence will act as an inducement to abscondment. The state case from the circumstances appears to be strong especially when one considers it in conjunction with the accused defence that she alleges she was mentally unstable at the time contrary to doctors who examined her who expressed opinion that she is mentally sound. See *Sibangani Dube v The State* wherein MAKONESE J emphasised the likely imprisonment sentence acting as an inducement to abscond.

Also militating against the applicant's admission to bail are the circumstances in which the allegations arose and surfaced. After fleeing from the scene when the police came to apprehend the applicant the latter had to be fished from under a bed. The propensity to flee is quite marked given the initial flight to reside in the forest. This is a case where upon considering all the circumstances cumulatively given the manner the offence was allegedly committed and the subsequent tip off leading to arrest it would not be proper to admit the applicant to bail. The nature and circumstances under which the offence was committed induces a sense of shock and outrage in the community in which the offence was committed. Admission of applicant to bail in the circumstances would undermine and jeopardise the public confidence in the criminal justice and bail delivery system. Section 117 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is instructive.

I am conscious of the fact that the applicant is presumed innocent since this is an application for bail pending trial. I am further alive to the fact that the court should always lean in favour of granting bail provided that the interests of justice are not prejudiced. (underlining my emphasis). In this case the propensity to flee demonstrated by the applicant when conjunctively assessed with the other relevant factors such as the seriousness of the offence the strength of state case and the likely sentence militate against applicant's admission to bail. The relevant factors in this case speak loudly of prejudice to the interest of administration of justice if an applicant who has shown propensity to abscond is admitted to bail.

Upon considering the nature of allegations severity of likely punishment apparent strength of the state case, accused's conduct after alleged commission of the offence and the nature of defence of the applicant it is apparent in this case that there are compelling reasons justifying detention of the applicant in custody. The likelihood of abscondment given the applicant's previous conduct are real moreso given the strength of the state case and the likely sentence in the event of conviction. See *S v Nichas* 1977 (1) SA 257. The temptation to abscond is high in this case as there appears to be no motivation to stand trial given the line of defence sought to be relied on. The risk of abscondment must be measured along with the number of factors which point to the real possibility of the applicant absconding. In this case fears of jeopardising interests of justice by absconding are not farfetched as the likelihood of abscondment is high. See *State v Sibanda* HB 11/19.

Accordingly the application for bail is dismissed.

Mangwana & Partners, applicant's legal practitioners
National prosecuting Authority, state's legal practitioners