

DUMOLWENKOSI NCUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 8 & 14 JULY 2022

Bail Application

Mrs S. Mkwanzani, for the applicant
T. Muduma, for the respondent

MAKONESE J: This is an application for bail pending trial. The application is opposed. The applicant is facing one count of murder as defined in section 47 (1) (a) of the Criminal Law Codification and Reform Act (Chapter 9:23). The applicant avers that he is a suitable candidate for bail.

Background Facts

The allegations against the applicant are summarized in Form 242, Request For Remand Form. The State alleges that on the 11th of May 2022, the applicant was in the company of the now deceased Mayibongwe Hlongwane and Fortune Moyo. They were walking from Tshelanyemba business center proceeding to their homestead. A dispute arose over a cellphone. Applicant had taken the deceased's cellphone and refused to give it back to him. Applicant stabbed the deceased once on the left thigh, once under the left armpit and once on the forehead leading to his death.

Submissions by the Applicant

In his bail statement, applicant avers that he and the deceased fought after the deceased had accused applicant of stealing his cellphone. He states that the deceased person in the company of one Fortune took his bicycle and started walking towards their village. Applicant then followed behind pleading with them to take the phone instead of the bicycle as he stayed far from where they were. They had walked for about 8 km when Fortune got annoyed by applicant's pleading, lifted the bicycle and hit the Applicant with it. Applicant

fell on his back. With the bicycle still on top of him, they both started hitting him with fists and kicking him. Applicant thought they were using stones. It was dark. Applicant further states that there are witnesses who witnessed the whole incident as it unfolded. While they continued beating him, applicant then withdrew a knife with his left hand and stabbed the deceased, once on the left thigh, then on his right thigh. Applicant stabbed deceased and the knife landed on his left diaphragm. The deceased fell. Applicant stood up, took his bicycle and fled the scene. The next morning applicant saw a car belonging to one Mzingaye who was friends with the deceased and Fortune. He assumed that they were coming to continue the fight. He fled to a nearby river to hide. Around 11:00am applicant received a call informing him that the deceased had passed on. Applicant states that he feared reporting to the nearest police station at Sun-yet-san as it meant him passing through the village where the deceased came from. The group of deceased's friends in that area are friends and drinking buddies with the police officers stationed at Sun-yet-san. Applicant then cycled to Kezi Police station where he handed himself over to the police.

During oral submissions, *Mrs Mkwanzzi* submitted that the applicant was defending himself from two aggressors. She stated further that applicant is not a flight risk. Upon receiving information about the demise of the deceased, he never attempted to flee, instead he handed himself over to the police.

Submissions by the State

The State argues that there are compelling reasons warranting the incarceration of the applicant pending his trial. *Mr Muduma*, appearing for the State submitted that applicant relies on the defence of self defence and defence of person. The force used by applicant was not proportionate to the attack. The state has a *strong prima facie* case against the accused. There is a high possibility that a conviction would be secured. The likely penalty can serve as an inducement for the applicant to abscond.

Analysis of the law

The law regarding bail pending trial is now established in this jurisdiction. Section 117 (2) of the Criminal Procedure and Evidence Act (Chapter) 9:07 provides that:

“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 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;”

In the case of *Aitken & Anor v Attorney General 1992 (1) ZRL 249 (S)*, the guiding principles in the determination of bail applications were laid down as:

- (a) The courts ought to strike a balance between the liberty of the accused and the administration of justice.
- (b) The accused must show on a balance of probabilities that it is in the interests of justice that he should be released on bail.
- (c) In assessing the risk of the accused absconding, the nature of the charge and the severity of the sentence must be examined. The apparent strength or weakness of the state case must be examined.

In this particular case, I am satisfied that the applicant is not a suitable candidate for bail for the following reasons:

- (a) the state has a strong case against the applicant. Applicant has admitted to stabbing the deceased. The state has overwhelming evidence against the applicant.
- (b) the applicant faces serious charges and in the event of a conviction he is likely to be sentenced to a lengthy custodial sentence.
- (c) It is not in the interests of justice to grant bail in the circumstances.
- (d) Applicant has only proffered a partial defence to the charges.

In the result, and accordingly the application is hereby dismissed.

Sasole & Senda, applicant’s legal practitioners
National Prosecuting Authority, state’s legal practitioners