

ISHEUNESU NDLERA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 15 NOVEMBER 2016 AND 24 NOVEMBER 2016

Bail Application

N Mlala for the applicant
T Muduma for the respondent

MOYO J: The applicant in this matter faces a charge of murder. It being alleged that on 3 April 2014, the now deceased was at Museche area, Limpopo river where he was a leader of a cigarette smuggling gang. The applicant and others were also present. A misunderstanding arose between the now deceased and the applicant, a leader of another smuggling gang. The misunderstanding was over why applicant's gang had refused to go over to the South African side to attack the soldiers that had robbed now deceased of his cigarettes.

The now deceased assaulted applicant with open hands and then later stabbed him with a knife on the left upper side of the left eye. Applicant then mobilized the five other accused persons and others still at large to attack the now deceased. The now deceased tried to escape and dived into the Limpopo river intending to cross over to the South African side. The five accused persons and others still at large attacked the now deceased with stones all over the body resulting in him drowning.

The applicant denies in his defence outline that he incited the other accused persons and pleads his innocence as a result.

He however acknowledges being part of a syndicate of cigarette smugglers who would cross to the South African side on this business. He also states in his defence outline that he crossed over to South Africa after being attacked by the deceased to seek medical treatment.

He now seeks bail pending trial.

Obviously, the presumption of innocence is operating in the applicant's favour at this stage. The presumption of innocence entails that the accused person is denied innocence until proven guilty. That is in accordance with section 70 (1) of the Constitution of Zimbabwe. Section 50 (1) of the Constitution also provides that a person can only be denied bail where there are compelling reasons to incarcerate him pending his trial. Where there are no compelling reasons then the applicant should get his freedom.

From the facts as presented by both the state and the applicant in his defence outline one can deduct the following:

- (a) The applicant faces a serious charge of murder.
- (b) There is seemingly overwhelming evidence as against the applicant in that there are eye witness accounts as to what transpired, there are witnesses who will allegedly testify to the utterances by the applicant while mobilizing the other accused persons.
- (c) There is evidence by both the state and the applicant, to the effect that the applicant was engaged in criminal activities (cigarette smuggling) across the Limpopo, crossing the river into South Africa through undesignated points.
- (d) Obviously applicant has contacts in the Republic of South Africa due to the nature of his business, even after being assaulted, he alleges that he simply crossed into South Africa to look for medical treatment.

The main principle in a bail application which guides the court are the interests of justice. The court must take into account various factors in striking a balance between the protection of the liberty of an individual and the proper administration of justice. Refer to the case of *Malunjwa v S* HB 34/03 wherein it was held that in bail applications the court must strike a balance between the interests of society, (that applicant should stand trial and that there should be no interference with the administration of justice), and the liberty of an accused person (who, pending the outcome of his trial, is presumed innocent).

In the case of *Jongwe v S*, CHIDYAUSIKU CJ indicated that when assessing the risk of an applicant for bail absconding before trial, the court should be guided by:

- (1) the character of the charges and the likely penalties if convicted.
- (2) the strength and weaknesses in the state case.
- (3) the accused's ability to flee to a foreign country.
- (4) the past response to being released on bail (if an accused person has been so released)
- (5) the assurance that the accused person will indeed attend trial.

The applicant in this matter faces serious charges, the likely penalty is a stiff one, the state has a *prima facie* strong case as the state summary includes testimonies of witnesses who give eye witness accounts. The allegations arose when the applicant, deceased and others were by the Limpopo river engaged in a cigarette smuggling business. The applicant thereafter crossed to South Africa to look for treatment. The accused person frequented the Limpopo river and crossed illegally into South Africa while in the cigarette smuggling syndicate. He thus has contacts in South Africa and has the know how to cross into that country through non-conventional means.

In other words he can quietly sneak into South Africa and disappear there, where he obviously has contacts since he has been doing illegal trade there.

In the case of *Chiadzwa v S* 1988 (2) ZLR 19 (S) it was held that a combination of factors would make international flight likely and that where a person faces a serious charge which will lead to a lengthy imprisonment term on conviction and the evidence against him is strong such that conviction is probable, and that the person has capacity to leave the country and has some contacts across the border, there will be a risk of external flight. The same principle was enunciated in the case of *Ndlovu v S* 2001 (2) ZLR 261 (H).

The applicant before me faces a serious charge, there are eye witness accounts in the state summary meaning that the state has a strong *prima facie* case. The likely sentence is a stiff one. The accused has frequented the Limpopo river, and South Africa being part of a smuggling syndicate, and it follows that he obviously has contacts therein with whom he was plying the

illegal trade. He has been exiting the country through unorthodox means. I believe the risk to abscond as a result of the aforestated factors cannot be underestimated.

In fact accused persons should be treated in the same manner save for where there are reasons to treat them differently. Accused number four Lungisani Ndlera sought bail in HB308/16 and was denied same for the reasons more or less like the ones given herein. The applicant falls in the same boat as already explained herein, there are no reasons to treat him any differently.

I am aware that accused number two Pardon Ndlera Machekeche, was granted bail in HCB 177/16. I cannot be persuaded to follow that case as the bail application was granted by consent and there is no judgment to assist me to follow the reasoning therein. In fact, even the state's response to that application does not explain why the state is consenting to bail, so it is difficult to follow that precedent as I am not aware as to what information was placed before his Lordship in favour of that particular applicant. I am therefore not persuaded by that order as the facts before me point to a completely different picture with regard to the applicant before me.

It is for these reasons that I will not exercise my discretion in applicant's favour. The bail application is accordingly dismissed.

Sansole and Senda, applicant's legal practitioners
National Prosecuting Authority, state's legal practitioners