MUSYOBO WEMBE

And

MAKANI MUNKULI

And

MWAMBE MUNKULI

And

PROMISE MULEYA

And

ADVISE MUNKULI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 5 May 2023 & 18 May 2023

Application for bail pending trial

K. Ngwenya, for the applicants
Ms. C Mabhena, for the respondent

DUBE-BANDA J:

[1] This is a bail application pending trial. The applicants are charged with the crime of attempted murder as defined in s 189 as read with s 47 of the Criminal Law (Codification and Reform Act) [Chapter 9:23]. It being alleged that on 5 March 2023 the applicants acting in common purpose unlawfully attempted to cause the death of the complainant by assaulting him with logs and open hands all over the body.

[2] In support of this application the applicants filed a bail statement and supporting affidavits. In general, it is contended that the interests of justice permit the release of the applicants on bail pending trial. It is contended that the State does not have a strong *prima facie* case against them. The first and the fifth applicants aver that he did not take part in the assault of the complainant, and the second and third applicants aver that they were not even present at the

scene of crime. The fourth applicant avers that he did not assault the complainant but he witnessed a fight between the complainant and one Thulani Munenge. In further support of this application and to demonstrate that the State case is weak against them, the second and third applicants filed supporting affidavit from their father to the effect that at the relevant date and time they were working on the fields and nowhere close to the scene of crime. The fourth respondent filed an affidavit from a witness whose effect is to exonerate them from the commission of this offence. It is contended further that the applicants are not a flight risk. They were arrested approximately two weeks after the incident, and each voluntarily surrendered himself to the police.

[3] This application is opposed. In support of its opposition the respondents filed two affidavits, i.e., one deposed to by the investigating officer and the second by a witness. It is contended that the State has a strong *prima facie* case against the applicants. It is further contended that the matter has been provided with a trial date. It has been set down for trial 16 May 2023 at the Regional Court, Hwange. It is argued that the applicants are not good candidates for bail and their release will undermine or jeopardize the objectives or proper functioning of the criminal justice system including the bail system.

[4] It is trite law that bail is a right enshrined in the Constitution, and that bail proceedings must be looked at through a constitutional lens.

[5] It is trite law that the court should always grant bail where possible and should lean in favor of the liberty of the subject provided that the interests of justice will not be prejudiced. See: *S v Smith* 1969 (4) SA 175 (N) 177E-F; *S v Hlongwa* 1979 (4) SA 112 (D) 113G-H; *S v Bennet* 1976 (3) SA 652(C). The prime consideration in a bail application is the question whether the accused will stand his trial. See: *S v Vermaas* 1996 (1) SACR 528 (T). No doubt that the applicants are undoubtedly facing a very serious charge. It is trite law that the seriousness of the offence is not in itself a reason to refuse bail. The fact that the charge is a serious one and would attract a lengthy prison term if the accused is convicted, is only a factor to be considered together with other factors in deciding whether the accused should be kept in custody until his trial. See: *S v Hussey* 1991(2) ZLR 187 (S).

[6] The State presented an affidavit by the investigating officer detailing the circumstances under which the applicants were arrested. The investigating officer says that on arrest the applicants admitted to assaulting the complainant. Further the medical affidavit shows that as

a result of the assault the complainant suffered very serious injuries. I am therefore unable to conclude that the State's case against the applicants is non-existent, or that it is subject to some serious doubt.

[7] The accused has been provided with a set down date for trial. The trial of the matter has been set down for 16 May 2023, which is about eleven days after the date of the hearing of this bail application, and five days after the date of this judgment. It is common cause that the applicants all reside in the communal lands of Binga, Matabeleland North Province. The case has been transferred from Binga Magistrates' Court to the Regional Court at Hwange for trial.

[8] The fundamental question is whether this is a case where the fact that the trial has been set down may be taken into account in considering where the interest of justice lies? In *S v Chiadzwa* 1988 (2) ZLR 19 (S), the court said:

> In my view, it is not proper to refuse bail just because the court has set down the date of hearing of the case. It does not seem to me that that approach safeguards the liberty of the accused., who must decide whether to attend his trial when out on bail or to remain in custody for reasons beyond his means control. In the instant case the 19th September 1988 was far away. There may be exceptional cases when the date set down for trial is a few days away and the releasing of the accused would create transport or accommodation problems for him. This reason alone is not good enough. There must be other reasons which, when coupled with a fixed date, compel the court to refuse bail.

[9] In such case the court must weigh the interests of justice against the right of the accused to their freedom and in particular the prejudice that they will suffer if bail is refused. The trial date is a mere few days away. I take judicial notice of the fact that the distance from Binga to Hwange is approximately 211km. On the facts of this case and the circumstances of the applicants, it is apparent that the release on bail would create transport and accommodation problems for the applicants. There is a real possibility that should the applicants be released on bail; the trial might stall because they would have failed to travel and to secure accommodation in Hwange. I also factor into the equation that it is only a few days between the date of this judgment and the trial date, this mitigates the prejudice on the accused.

[10] The fact that the trial date is just a few days away and the releasing of the applicants would create transport or accommodation problems for them, coupled with the fact that the applicants are facing a serious offence and that there is a strong *prima facie* case against them, and if convicted they likely to be sentenced to a prison term might incentivise them to abscond trial.

[11] It is a fundamental principle of the administration of justice that an accused person should stand trial and if there is any cognizable indication that he will not stand trial if released from custody, the court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence. See: *S v Fourie* 1973 (1) SA 100 (D) 101g. The interests of justice tilt the pendulum in favour of refusing this application. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

In the result, it ordered as follows:

The bail application be and is hereby dismissed.

Mvhiringi And Associates, applicants' legal practitioners
National Prosecution Authority, respondent's legal practitioners