LAUD DUMISANI NGULUBE

And

TOBIAS DUBE

And

NKOSILATHI NCUBE

And

GIVEMORE NGWENYA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 21 JUNE 2021 AND 1 JULY 2021

Application for bail pending trial

Applicants in person
Maduma, for the respondent

DUBE-BANDA J: This is an application for bail pending trial. Applicants appeared before this court without legal representation. They are charged with the crime of murder as defined in section 47(1) (a) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23]*. It being alleged that they struck Ernest Dube (deceased) with axes and machetes all over the body resulting in his death. They stole a service rifle, Nokia cell phone and house keys.

In support of their application, and in their bail statement, applicants contend that they are of fixed abode; they are family men; they are citizens of Zimbabwe by birth and their interest are in this country; they have strong ties to this country and no contacts outside the country; they neither have passports nor any travel documents to enable them to abscond.

Further, each applicant testified in support of the bail application. The 1st to testify was Loud Dumisani Ngulube. He told the court that he was born on the 29 December 1983. He resides at house number 1550 Pelandaba West, Bulawayo. Prior to his arrest, he was self-

employed, repairing televisions and radios. Sometimes he would work at the mines. He is married with three minor children. This applicant argued that in the event he is admitted to bail, he will not abscond. He is the sole provider of his family. His father is late, he looks after his mother. The rifle was not recovered from him. The 2nd to testify was Tobias Dube. He is 26 years old. Resides at house number 19975 Cowdry Park, Bulawayo. He is married with a seven year old child. His wife is also expecting. He is an Omnibus driver. Sometimes he goes to the mines for gold panning. He explained that if he is released on bail, he will not abscond. The 3rd to testify was Nkosilathi Ncube, he is 22 years old. He resides at number 111 Old Magwegwe, Bulawayo. He helps the family at the communal home. He told the court that if admitted to bail he will not abscond, and will attend the trial until it is finalised. The last to testify was Givemore Ngwenya. He is 24 years old. He resides at Jiba Village, Headman Mpala, Chief Mabhikwa, Lupane. He is married. Got a four year old child. He told the court that if released on bail, he will not abscond.

The application is opposed and the State contends that they are compelling reasons for the continued pre-trial incarceration of the applicants. It is contended that applicants are facing a very serious offence and the evidence against then is so overwhelming such that a conviction is almost guaranteed; after the commission of the alleged offence, the police recovered from the applicants the stolen rifle, house keys, blood stained clothes, blood stained axe and a machete. It is contended that the State has a very strong *prima facie* case against the applicants such that nothing can stop the applicants to abscond trial once freed on bail; applicants have no defence to the charge they are facing. It is thus in the interests of justice that applicants remain in custody pending trial.

The opposition by the State is anchored on the fact that applicants are flight risks. If admitted to bail, they will abscond and evade their trial. Section 117 (2) (a) (ii) of the Criminal Procedure and Evidence Act [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 a likelihood that the accused, if he or she were released on bail, will— not stand his or her trial or appear to receive sentence. Section 117 (3) (b) (iv) and (v) of the CPE Act provides that in considering whether the ground referred to in subsection (2) (*a*) (ii) has been established, the court shall take into account, *inter alia* - the nature and gravity of the offence or the nature and gravity of the

likely penalty therefor; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account.

It has repeatedly been held that in assessing the risk of flight, courts must take into account not only the strength of the case for the prosecution and the probability of a conviction, but also the seriousness of the offence charged and the concomitant likelihood of a severe sentence. The obvious reason of this approach is that the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the applicant to abscond. In *S v Nichas*1977 (1) SA 257 (C) 263G-H, the court said, if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. In *S v Hudson* 1980 (4) SA 145 (D) 164H, the court held that the expectation of a substantial sentence of imprisonment would undoubtedly provide incentive to the accused to abscond and leave the country. In *S v C* 1995 SACR 639 (C) 640 H, it was said that whilst the possibility of absconding is always a very real danger, it remains the duty of the court to weigh up carefully all the facts and circumstances pertaining to the case.

The four applicants are jointly charged and they have filed a joint application. It is significant that when persons are jointly charged and apply for bail together, fair trial requires that their individual's cases be carefully evaluated. Treating them as a group might deny the court the opportunity to see beyond the group, and then paint all the applicants with one colour. In *casu*, their personal circumstances are similar, and the grounds upon which their release on opposed is opposed are the same. There would be no prejudice to anyone of the applicants in considering their application to treat them as a group.

According to Form 242, there is evidence linking the applicants to the commission of the offence. It alleged that: the deceased's rifle a 303 serial number 1086, lanyard and house keys were found in possession in possession of the applicants upon their arrest; they were found with blood stained clothes, blood stained machete and an axe; accused persons made positive indications at the scene of crime. Again, it is contended that applicants were arrested after a high speed chase with police officers who had to summon police patrol dogs for assistance. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

On the facts placed before court by the respondent, I find that the State has a strong *prima facie* case against the applicants. Applicants are facing a serious charge of murder. It is trite that the seriousness of the offence charged standing alone, cannot be a ground to refuse to release an applicant to bail pending trial. This is so, because, no matter the seriousness of the charge, the presumption of innocence still operates in favour of the accused. See: *Mlilo v The State* HB 49 / 18. There must be something more than the mere seriousness of the charge, for the court to refuse to admit an accused to bail. In *S v Acheson* 1991 (2) SA 805 Nm, the court said the key consideration is whether or not the accused will return to court if released and ultimately whether they will stand trial. On the facts of this case, if convicted, applicants are most likely going to be sentenced to a lengthy custodial term, thus they will be tempted to abscond and not stand trial. At arrest they attempted to flee. The temptation for the applicants to abscond if granted bail is real. See: *S v Jongwe* SC 62/2002.

Where there is a cognisable indication that an accused person would evade his trial if released from custody, the bail court would be serving the interests of justice by refusing bail. The liberty of an accused person would, in such circumstances have to give-way to the proper administration of justice. See: *S v Dial and Another* 2013 (2) SACR 665 (GNP). On the facts of this case, admitting applicants to bail will undermine the objectives of bail and the criminal justice system.

Therefore, upon careful consideration of all the facts and the circumstances based on the facts and evidence before me, weighing up the interests of justice against the right of the applicants to their personal freedom and any potential prejudice because of their detention pending trial, I am satisfied that the interests of justice do not permit their release from custody. There is a likelihood that the applicants will abscond and evade trial.

Disposition

On a conspectus of the facts and all the evidence placed before court, I am of the view that it is not in the interests of justice to release the applicants on bail pending trial.

In the result, I order as follows: the application for bail is dismissed.

National Prosecuting Authority, respondent's legal practitioners