MOTION JAKOPO

and

SIMON MAFUNDA

and

MICHAEL MAKWALO

and

LEE MAKOPE

and

BENEDICT TAPFUMA

and

BLESSING SAIDI

versus

THE STATE

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 12 April 2012

**Bail Application**

*ZRK Kajokoto*, for the applicants

*E Makoto*, for the respondent

MATHONSI J: The applicants are facing a charge of murder it being alleged that on 17 March 2012 and at Ashley Compound in Shamva they assaulted the deceased, Luxmore Chivambo using baton sticks, booted feet and clenched fists. They allegedly later took him, along with other individuals they had arrested, to Shamva Police Station where they continued the assault before detaining the deceased whose condition later deteriorated and he died on 18 March 2012 at Shamva District Hospital. They are also accused of violating s 89 (1) (a) of the Criminal Law Code [*Cap 9*:*23*].

All the applicants are police officers who were then based at Shamva Police Station but have since been transferred to various stations around the country presumably because of the incident which led to the charges they are now facing. It would appear that all the applicants are junior police officers as their tenure in the police force is generally one year with only the second and third applicants being relatively senior at seven years and three years in the force.

The State alleges that they were instructed by their officer in charge, one Aspias Shumba, who is not a party to these proceedings, to raid Ashley Compound in search of a culprit who had allegedly pick pocketed the erstwhile officer-in-charge’s wife and made away with her $100-00. It is alleged that their misadventure resulted in the death of the deceased aforesaid.

All the applicants vehemently deny the charge and have stated in their application that the allegations against them are fabricated and do not come anywhere near the truth. They claim that the matter has been terribly influenced by the media which has tended to sensationalise an otherwise straight forward matter, where they had acted on instructions of their superiors to raid what is a well-known violent compound to suppress the endless vices being perpetrated at that place.

According to the applicants, Ashley Compound is the devil’s den and an extremely difficult place to police given that the residents of that area are well known for violence and their lack of respect for the law. This, they say is evidenced by the fact that constable Sakhile Shelter Ncube was murdered there in late 2010 when she went there to serve a summons. There are a lot other cases.

The applicants further stated that on the fateful day they raided the compound under an operation code named “Terera Mutemo Pahwahwa” OP Order No 14/24. The operation targeted illegal shebeens and beer outlets. They have actually produced admission of guilty forms showing that some of the people (seven of them) allegedly arrested with the deceased admitted guilt to crimes mainly under the Liquor Act [*Cap 14*:*12*] and for Public Nuisance.

According to the applicants, while on duty policing the area, the residents of the area including the deceased resisted the operation and started attacking the officers for carrying out their duties. The deceased allegedly held one of them by the throat choking him, as other residents cheered resulting in them using minimum force to rescue their colleague and to subdue the deceased. Unfortunately the deceased sustained fatal injuries aforesaid.

The applicants now seek their release on bail arguing that they are good candidates for bail as the death of the deceased arose from the discharge of lawful duties where they were forced to defend themselves against unlawful attacks. They state that having been transferred from Shamva, they cannot possibly influence witnesses or investigations given that they are now scattered around elsewhere.

The State strongly opposes bail on the grounds *inter alia* that the offence the applicants are accused of is of a serious nature. In his response to the application, Mr *Makoto* for the State argued in para(s) 4 to 6 as follows:

“4. In *casu*, the circumstances under which the offences were committed are rather exceptional in that, the applicants themselves are police officers who are charged with the strict observance and enforcement of the law to which society expects them to obey and exercise their functions within its confines.

4.1 The offences they stand charged are very serious which induce a sense of shock and outrage not only within Shamva area but throughout the whole country. It is a notorious fact that soon after the alleged commission of the offence, the Ashley Community demonstrated against the police whose otherwise good public image got dented in the process.

4.2. It is within this context that it is submitted that if released on bail, their release will undermine or jeopardise the public confidence in the criminal justice system.

5. It is further submitted that through their positions in society, the applicants are likely to interfere with investigations which are still yet to be concluded.

6. The respondent further submits that it is also in the applicants’ interests that their own safety be guaranteed since the situation in Shamva where they all reside is still volatile by remaining in custody at this stage.”

The foregoing submissions by the State completely miss the point and the reason for the grant or otherwise of bail to an accused person. It is a cardinal principle of our law that an accused person is presumed innocent until proven guilty. It is also a seminal principle of our justice system that in considering an application for bail the court is enjoined to strike a balance between the administration of justice and the liberty of the individual. It has never been a concept of our criminal justice system that an accused person be subjected to pre-trial incarceration merely to boost public confidence. In my view public confidence will most certainly be boosted by treatment of accused persons as fairly as possible and with visible respect until they are given a fair trial by a competent tribunal.

I am sure the applicants are indebted for the benevolence of the State in wanting to ensure their “interests” and “safety” but they are unlikely to be so indebted as to desire to remain in custody before they have been convicted.

The concern of the State regarding interference with investigations is not justifiable given the fact that the applicants have already been removed from the “volatile” situation in Shamva. I am persuaded that the applicants are good candidates for bail especially as the State has not even suggested that they will not stand trial if granted bail. The extraneous submissions presented on behalf of the State cannot deny them their liberty as they still enjoy the benefit of the presumption of innocence until proven guilty.

In the result, the six applicants are all admitted to bail on conditions set out in the respective draft orders filed of record.

*Kajokoto & Company*, applicants’ legal practitioners

*Attorney General*’s *Office*, respondent’s legal practitioners