REPORTABLE (52)

Judgment No S.C. 62\2002
Crim. Appeal No 251\2002

LEARNMORE JUDAH JONGWE v THE STATE

SUPREME COURT OF ZIMBABWE
HARARE AUGUST 5 & 8, 2002

J. Samkange, for the appellant

M. Nemadire, for the respondent

Before: CHIDYAUSIKU CJ, in Chambers, in terms of section 121(2)(a) of the Criminal Procedure and Evidence Act [Chapter 9:07]

The appellant in this case is facing a charge of murder. He applied to the High Court for admission to bail pending his trial. MATIKA J, dismissed the bail application. The reasons for judgment are attached to the notice of appeal in this matter. The appellant was aggrieved by the dismissal of the bail application and now appeals to a judge of this Court in terms of section 121(2)(a) of the Criminal Procedure and Evidence Act [Chapter 9:02]. It is apparent from the reasons for judgment that bail was refused for the following reasons:

(a) that the appellant was facing a very serious offence for which, upon conviction, he is likely to be sentenced to a long term of imprisonment

and that the evidence against the appellant was overwhelming. The above factors were an inducement for the appellant to abscond to avoid the trial;

(b) that the appellant was likely to commit suicide to avoid trial;

(c) that the appellant could be harmed by members of his deceased wife's family;

(d) that the appellant might interfere with investigations.

The grounds of appeal are set out in the notice of appeal which provides as follows:-

"1. On the 24th of July 2002, the Appellant made an application for bail pending trial. The case was initially set down for hearing on the 25th of July 2002. It was then postponed at the request of the state which wanted to submit opposing papers. The matter was then postponed to the 26th of July 2002 for hearing before Mr Justice Matika. After hearing arguments by counsel, the Court refused bail on the following grounds:-

a) That the Appellant is facing a serious charge;

b) That the Appellant is likely to commit suicide;

c) That the Appellant is likely to abscond;

d) That the Appellant is likely to be harmed by members of his deceased wife's family and, finally

e) That the investigations are still pending.

After refusing bail, an application for leave to appeal was made and the application was granted.

2. The Court found that the State had made general submissions. It however felt that there was a resemblance of the truth in that the Applicant was not denying that he had stabbed his wife which resulted in her passing away.

3. It is respectfully submitted that the Court did not consider any of the submissions made by the Appellant namely:

   a) That the Appellant in his favour surrendered himself to the Police;

   b) That it was a domestic dispute resulting in the unfortunate death of his wife;

   c) Although he had traveled to Zhombe to his communal lands, upon hearing that his wife had passed away, he immediately made arrangements to return and surrender himself to the Police;

   d) That he has co-operated with the Police in their investigations.

4. The Honourable Judge erred in not placing sufficient weight on the fact that the Appellant, well aware of the charges he was likely to face, surrendered himself to the Police and had stated under oath his desire to stand trial and clear his name.

5. The Honourable Judge erred in refusing the Appellant bail when there was no evidence that he will abscond and not stand trial.

6. Appellant is a young man with a 7 month old child. He has a fixed board and he is a registered legal practitioner and member of parliament.

7. That he had shown that he had no desire to abscond but to stand trial and that he wishes to be given an opportunity to be heard.

8. WHEREFORE, Appellant prays that the judgment of the High Court to the extent that it denied him bail be set aside and that he be admitted on bail on the terms set out in the draft order annexed hereto."

It is a matter of regret that the notice of appeal does not set out the grounds of appeal succinctly and clearly as is required by the Rules. Although bail was refused for a number of reasons the notice of appeal challenges only one ground, namely, the learned judge's conclusion that the appellant is likely to abscond if granted bail and his reasons for so concluding. The confusion is compounded by

counsel for the appellant's written and oral submissions attacking the other grounds for refusing bail which have not been appealed against in terms of the above notice of appeal. Be that as it may, in my view this matter can be disposed of on the basis, the main ground for the refusal of admission to bail and in respect of which an appeal has been noted, namely, that the appellant is likely to abscond if granted bail.

Thus, the critical issue that falls for determination in this appeal is whether the learned judge in the court *a quo* erred in concluding that the appellant was likely to abscond if granted bail.

The facts of this case are briefly as follows:

The appellant is aged about 28 years old. He is a legal practitioner and a Member of Parliament for the constituency of Kuwadzana. Although the appellant and the deceased have only been married for a year it seems like their marriage was not a happy one. The marriage appears to have been rocked by domestic violence and allegations and counter-allegations of infidelity culminating in the tragic death of the deceased, the appellant's wife. She too, was a lawyer, having recently graduated from the Law School.

Most of the facts of this case are common cause. In particular, there is no dispute that the deceased died as a result of the stab wounds inflicted upon her by the appellant. The only dispute of facts relates to what transpired when the appellant visited or returned to the offices of Muskwe and Associates on the day that the appellant stabbed the deceased. The appellant's version of what happened on that

occasion is set out in his warned and cautioned statement to the police which reads, in part, as follows:-

> "Question: Do you understand the nature of the allegations? Yes.
>
> **ACCUSED PERSON REPLY IN ENGLISH VERSION**
>
> I deny the charge of Murder. What happened is that on Friday the 19th of July we were walking in town with my wife. Immediately after 2 pm she said that she wanted to see her friend, one Jacqualine who works for a law firm called Muskwe and Associates. I left her at the firm and went to my office. Later on after about 30 to 40 minutes, I went to Muskwe and Associates and asked Jacqualine where my wife was. Jacqualine told me that she was in consultation with Donald MASHINGAIDZE a lawyer in the next office. I opened MASHINGAIDZE's door and saw the two making love on top of a table. I could just not believe it. At about 3.30 pm I then asked my wife who was sitting in the lounge eating oranges what it is that she was doing with MASHINGAIDZE. She answered as follows: 'What you saw is correct. In fact he is a better man. I long told you that our marriage is not working'. At this stage, I got extremely provoked and took a knife which was on a coffee table and stabbed her.
>
> Signed LEARNMORE JONGWE".

This version of events by the appellant is disputed by the State. The State contends that when the appellant called at the offices of Muskwe and Associates the deceased was not in Mr Mashingaidze's office as alleged by the appellant but in Ms Makoni's office. According to the summary of the State case the following are the events leading to the stabbing of the deceased by the appellant.

On 19 July 2002 the appellant left home in the company of his wife Rutendo Jongwe nee Muusha going to town for shopping. While in town the wife asked to be dropped at Globe House, corner Jason Moyo Avenue and First Street, where she wanted to see a friend Jacqualine Makoni of Muskwe and Associates Legal Practitioners. This was at about 1400 hours.

The appellant later returned and walked into the office of Donald Mashingaidze a lawyer at that company, looking for his wife who by then was with Jacqualine Makoni in her office.

When the appellant entered Donald Mashingaizde's office he saw him drafting a letter of demand and at that time he realised for the first time that his wife was not on a casual visit, but was instead instituting divorce proceedings.

There was a heated exchange of words between the appellant and the lawyer, in which the appellant threatened that the case was going to "soil a lot of people."

The appellant went out of the office and joined his wife who was in the office of Jacqualine Makoni and both husband and wife left for their home at about 1520 hours.

When the couple arrived home, the appellant took his mother to Wilkins Hospital to see a sick brother leaving his wife at home with their seven-month old baby and a maid.

The appellant returned home alone and upon arrival at about 1600 hours he quarreled with his wife over the pending divorce proceedings. During the argument the appellant grabbed a kitchen knife and brutally stabbed his defenceless wife eight times in the chest, neck, face and forearms.

He left her bleeding profusely and drove away. The wife struggled to the main gate calling for help where she collapsed. Mrs Dembo, a neighbour who heard the cry for help immediately rushed her to Avenues Clinic where she died on 20 July 2002 as a result of the wounds inflicted upon her by the appellant.

Thus, the issue is whether the appellant found his wife, the deceased, being intimate with Mr Mashingaidze or that allegation is false as she was with her friend Ms Makoni upon the appellant's return to Muskwe and Associates.

This dispute of fact is critical to the defence of provocation raised by the appellant. If indeed the appellant found the deceased being intimate with Mashingaidze that would enhance the appellant's defence of provocation. It is pertinent to observe at this point that the State version of events leading to the killing of the deceased as set out above is plausible and has a ring of truth while the appellant's version as set out in his warned and cautioned statement is riddled with improbabilities. According to the affidavit of the investigating officer the deceased had met the alleged paramour only once previously. The two hardly knew each other. The deceased was a professional woman. She was married with a seven month old baby. The question is, is it likely that a professional woman would desire to be laid on a desk by a man she hardly knew? The door to the office was unlocked and that is why, on the appellant's version, he was able to enter and see his wife being intimate with the paramour. This incident is alleged to have occurred during working hours when the risk of the parties being caught in the act was extremely high. The appellant's own reaction seriously undermines his own story. Given the brutal manner in which the appellant killed the deceased for whatever reason it is difficult to

believe that he would simply walk away from a man he finds ravishing his wife. It is common cause that he reacted very violently and killed his wife to provocation that must be less than the provocation of seeing his wife being intimate with another man.

The trial court will have to consider the above strengths and weaknesses of both the State case and the defence case and resolve the dispute of fact. If the appellant's version of events is found to be false and the State version is found to be correct then the inescapable conclusion is that the appellant killed his wife because she had commenced divorce proceedings against him. If he could not have her then no one else was going to have her would be the most logical motive. Such a finding would leave the appellant with very little prospects of success in establishing a defence to a charge of murder and the existence of extenuating circumstances in order to avoid the imposition of the death sentence. The appellant is a legal practitioner who, I have no doubt, would be familiar with the strengths and weaknesses of his case and would stand guided or influenced by those considerations in deciding what chances he should take.

This Court has had occasion to set out principles that should guide a court in determining an application for bail.

In the case of *Aitken & Another v Attorney-General* 1992 (1) ZLR 249 (S) this Court reviewed a long line of cases and laid down the following guiding principles for determination of bail applications:-

(a) That the Supreme Court can only interfere with a High Court decision if there has been a misdirection or irregularity in the High Court or if

the judge had exercised his discretion in a manner which was so unreasonable as to vitiate the decision reached.

(b) That when dealing with the matter of bail the court had to strike a balance between the liberty of accused and the State's need to ensure that the person stood trial and did not interfere with the course of justice.

(c) That the *onus* is on the accused to show on a balance of probabilities why it was in the interests of justice that he should be freed on bail, but that amount of evidence necessary for him to discharge this *onus* would vary according to the circumstances of each case.

(d) That in judging the risk that an accused person would abscond the court should be guided by the following factors:

(i) the nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction;

(ii) the apparent strength or weaknesses of the State case;

(iii) the accused's ability to reach another country and the absence of extradition facilities from the other countries;

(iv) the accused's previous behaviour;

(v) the credibility of the accused's own assurance of his intention and motivation to remain and stand trial;

(e) that the risk of interference with investigation if alleged must be well founded and not based on unsubstantiated allegation and suspicion.

The majority of the above principles have no relevance to the present case. However, the principle set out in paragraph d is apposite. The court *a quo* found that the appellant was facing a very serious charge and that upon conviction he faces a lengthy term of imprisonment. On this basis the court *a quo* concluded that the appellant was likely to abscond. In my view this was a proper exercise of the learned judge's discretion and the decision cannot be said to be irrational.

Although the learned judge did not comment in any detail on the strength or otherwise of the State case the facts of this case are as set out above. As I said earlier this case turns of the risk of abscondment by the appellant. In *Aitken's* case, *supra*, GUBBAY CJ at p 254D-G sets out how the court should assess the risk of abscondment. He had this to say:-

"THE RISK OF ABSCONDMENT

In judging this risk the court ascribes to the accused the ordinary motives and fears that sway human nature. Accordingly, it is guided by the character of the charges and the penalties which in all probability would be imposed if convicted; the strength of the State case; the ability to flee to a foreign country and the absence of extradition facilities; the past response to being released on bail; and the assurance given that it is intended to stand trial."

It is quite clear from the above remarks that the critical factors in the above approach are the nature of the charges and the severity of the punishment likely to be imposed upon conviction and also the apparent strengths and weaknesses of the State case.

In the present case there is no doubt that the offence with which the appellant is charged is very serious. Murder is a very serious offence for which an accused is required by law to be sentenced to death unless extenuating circumstances are found to exist. Thus, if the court concludes that no extenuating circumstances exist in this case the appellant faces the prospects of the death sentence.

In this case the evidence against the appellant is very cogent, if not, overwhelming. The appellant admits inflicting the wounds found on the deceased. The post mortem report clearly establishes the nature and the multiplicity of the stab wounds that he inflicted. The post mortem report clearly establishes that this was a savage and brutal attack on the deceased. According to the post mortem report the following injuries were found on the deceased:-

"Front:

- Sharp incised stab wound 8,5cm (original = 4cm according to surgeon) on right breast (upper outer quadrant) sutured 7 sutures.
- Round sharp stab wound 0,5cm diameter lateral right chest wall
- Sharp therapeutic drain wound 10th intercostal space 2 x 1cm (drain site) unsutured
- Clean therapeutic wound in 6th ICS 20cm with 14 sutures (site of thoracotomy)

- Sharp incised stab wound left breast (upper outer quadrant) 2,5cm sutured (2 sutures)

- 0,5 cm diameter round stab wound on left breast (upper inner quadrant) approximately 1cm deep
- Clean sutured wound 2,5 cm (1 suture) (left submammary adjacent to lower outer quadrant)
- 2,5cm sharp incised wound left shoulder 2 sutures approximately 2cm deep
- 2,5 cm incised stab wound left wrist unsutured approximately 0,2 cm deep
- L-shaped wound 3 x 1,5cm on right side of face. (5 sutures approximately 0,5cm deep
- 1,5cm incised stab wound right neck (1 suture) approximately 1cm deep
- Pointed 0,3cm diameter wound left side of neck approximately 0,5cm deep
- 16 cm healed surgical scar on lower abdomen (pfannensteil Caesarean scar)"

The weapon used is described in the post mortem report as:-

"'Prestige stainless Rostfrei Inox' kitchen knife with a 13x3x2cm black handle and a 16x3x0,1cm serrated singled-edges cutting flat blade."

The doctor's conclusion was:-

"The deceased was a 23 year old female who sustained a bilateral haemothraces following fatal stab chest wounds during a domestic dispute with the husband. At autopsy there were two main fatal wounds through the breasts each in the 3rd intercostal space associated with incised lung left upper lobe, lung right upper lobe, right heart atrial appendage, a fractured left 3rd rib and a combined total of 1,1 litres of blood in the pleural cavities. Both wounds were approximately 14cm deep from the skin surface of breasts to the endocardium of right atrium and the incised lung on the left.

Bilateral hemothoraces due to the stab wounds with a single-edged 16cm flat-bladed kitchen knife was the cause of death."

Thus, the post mortem report reveals that the appellant inflicted on the deceased multiple stab wounds. According to the diagram not less than eight stab wounds were inflicted on the deceased. Of these, two stab wounds were particularly serious and fatal. These two fatal wounds were to the chest just below each of the breasts. These stab wounds were directed at a very vulnerable part of the body.

These two stab wounds were each 14cm deep from the skin surface to the endocardium and pierced the lung.

The kitchen knife used to inflict the wounds, from its description in the post mortem report, is a formidable weapon.

Given the nature and the seriousness of the wounds; the vulnerability of the part of the body to which the stabbing was directed; the degree of force that must have been required to inflict such wounds; the inevitable inference is that whoever inflicted those wounds must have intended to bring about the death of the deceased by his action or, at least, foresaw the death of the victim a virtual certainty.

The appellant raised the defence of provocation. I have already commented on the respective merits of the defence case and the State case in this regard. The *onus* to establish the defence of provocation and extenuating circumstances is on the appellant. Should the trial court reject his version of events the appellant will have problems establishing extenuating circumstances.

For the above reasons I am satisfied that the evidence against the appellant is overwhelming and the prospects of conviction for an offence involving the death of the deceased is a virtual certainty. I am also satisfied that the prospects of the appellant receiving a long prison term or even the death sentence, if convicted of murder, are real.

I am equally satisfied that because the prospects of conviction and upon conviction the imposition of a long prison term, indeed, even the death sentence are real, the temptation for the appellant to abscond if granted bail is irresistible. On this basis alone I would dismiss the appeal. The need to consider the other grounds for the refusal to grant bail fall away.

Byron Venturas & Partners, appellant's legal practitioners