

JEALOUS MUTUKURI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 7 December 2016

Bail application

Applicant in person
H.M. Muringani, for the respondent

MAWADZE J: This is a bail application premised on changed circumstances.

The applicant is facing a charge of murder as defined in s 47 of the (Criminal Law Codification and Reform) Act [*Chapter 9:23*].

The charge is that on 29 September 2013 at Hidden Valley Farm Mazowe, the applicant in the company of his brother who is at large one CHIDOPE MUTUKURI unlawfully and with intent to kill caused the death of STANLEY TEMBO by striking him with a stone in the head causing injuries from which he died.

The facts giving rise to this charge are that on 29 September 2013 the applicant, his brother Chidope Mutukuri and the deceased were drinking beer at Blue Ridge Bar in Mazowe. The State alleges that deceased quarrelled with both the applicant and the applicant's brother as deceased alleged the applicant and his brother had caused the arrest of deceased's friend. It is alleged that the applicant and his brother decided to way lay the now deceased who left the bar late at night going home. The applicant and his brother are alleged to have fatally attacked the now deceased whose body was only discovered the following day. It is the State case that the applicant was linked to the offence when missing buttons from his shirt and that of his brother were found at the scene of crime.

The applicant denies the charge and his basic defence is that his brother Chidope Mutukuri is the one who was assaulted by one John Katiyo a member of the Zimbabwe National Army causing him to bleed. The applicant said his shirt was blood stained as he

tried to help his brother. After this assault the applicant said he accompanied his brother to Mazowe Police Station to report the assault hence they left Blue Ridge Bar. The applicant said since it was late they were not able to go to the clinic that day for his brother to be treated after being given some medical forms by the police but decided to do so the next day. The next morning the applicant and his brother said they passed through a place where people had gathered after the discovery of the deceased's body. The applicant said he was surprised when he was arrested as suspect when in fact he never assaulted the now deceased. He denied that any buttons from his shirt were picked at the scene of crime. Instead he said the blood on his shirt was from his brother and not the now deceased.

On 27 January 2015 I admitted the applicant to bail pending trial. The applicant was later indicted for trial and remanded in custody. Coincidentally the trial of the applicant commenced before me on 17 May 2016. The applicant's alleged accomplice who is his brother is at large and the State decided to proceed against the applicant alone.

The applicant was represented by *pro deo* counsel Mr B. Chipadza. The State led evidence from all the State witnesses. The evidence of Daniel Ndlovu who discovered the deceased's body, Junior Chimupi, who was alerted by Daniel Ndlovu and in turn advised the deceased's parents and Dr Mapunde who carried out the post mortem and compiled the report was all admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Kudakwashe Chiweza, Assistant Inspector Musosonora and Cst Temba gave *viva voce* evidence.

In brief Kudakwashe Chimedza the bar man at Blue Ridge Bar said the applicant, his brother and the now deceased were at drinking beer at Blue Ridge Bar. He said an altercation arose involving the now deceased on one side against the applicant and his brother on the other side. He said this caused him to close the bar and he heard the applicant and his brother plotting to waylay the now deceased. He even warned the now deceased of this nefarious plan but the now deceased seemed unperturbed. He only heard that the now deceased had been found dead the next morning.

Assistant Inspector Musosonora and Cst Tembo are the police details who attended the scene of crime and investigated the case. They noted the injuries on the now deceased. They are the officers who recovered the shirt buttons on the scene and later the shirts the applicant and his brothers were wearing. They said the buttons matched those on the shirts of

the applicant and his brother which shirts also had missing buttons. They said the shirts were also blood stained.

The State also produced by consent exh 1 being the post mortem report showing that deceased died due to head injuries. Exhibit 2 (a) to (d) were also produced being the applicant's shirt exh 2 (a) which had a missing button and exh 2 (b) being the white button matching the shirt recovered at the scene. Exhibit 2 (c) is a shirt, belonging to applicant's brother with 4 missing buttons and exh 2 (d) are 3 buttons recovered at the scene of crime matching exh 2 (c).

After the trial commenced on 17 May 2016 we postponed it to 18 May 2016 for continuation of trial. On 18 May 2016 just before the state closed its case the applicant raised issues which then stalled the trial.

The applicant indicated that he no longer wanted to be represented by the *pro deo* counsel but by a legal practitioner of his choice as he was able to pay for the legal practitioner of his choice. The applicant asked the matter to be postponed to 26 May to allow him to engage his legal practitioner. Mr *Chipadza* who in my view had done his best to represent the appellant as a *pro deo* counsel took this apparent humiliation in his stride and recused himself. I then postponed the matter to 26 May 2016 to allow applicant to engage the legal practitioner of choice and enjoy his constitutional right.

On 26 May 2016 the applicant was singing a different tune. He said he was not able to engage counsel of his choice as he had no means to do so and wanted Registrar to appoint another *pro deo* counsel to represent the applicant. Again the court had to accede to this request in order to allow the applicant to enjoy his constitutional right and ensures he received a fair trial. This necessitated the postponement of the matter *sine die* to allow the relevant logistics to be put in place. The Registrar had to find another *pro deo* counsel and the record of proceedings had to be transcribed. The matter was then postponed *sine die*.

The applicant on 21 July 2016 filed this bail application which was only brought to my attention on 7 December 2016 as I had transferred to Masvingo.

In his application the applicant alleged that he should be admitted to bail as there are now changed circumstances. The applicant alleged that the trial had stalled and that it had been postponed *sine die*. The applicant said it would therefore take long to complete the trial which would be prejudicial to the applicant.

On 7 December I came to deal with the trial but I was not able to do so. One of the assessors Mr Chidyausiku was said to be indisposed.

Further the Registrar had not managed to find a *pro deo* counsel for the applicant nor to have record transcribed. The applicant meanwhile persisted in his bail application.

The application for bail is vehemently opposed by the State. This is clear from the State's response filed on 1 August 2016 and the submissions the state made in court on 7 December 2016.

To be fair to the applicant I believe he is the author of his own problems. From the history of the matter I explained the applicant is the one who stalled this trial. After successfully stalling the trial he proceeded to apply for bail citing his very conduct as changed circumstances. This is like having his cake and eating it.

In his wisdom or lack thereof the applicant believed he could engage in these gymnastics and still be admitted to bail. To my mind I do not believe that the applicant created these problems in good faith but to hold this court to ransom and then seek to be admitted to bail.

From the evidence placed before me a strong case has been made against the applicant by the State. It is very likely that the applicant decided to stall these proceedings after realising that the tide was now too strong for him. One cannot help to think that the applicant simply want to avoid the consequences of this trial. In that vein therefore the likelihood that the applicant would abscond is very real. The applicant fully appreciates the evidence against him.

As I have already directed in the main matter, the trial should proceed during the first term vacation in 2017 when I will be available.

It is not in the interest of justice to admit the applicant to bail at this stage. Consequently the application for bail is dismissed.

National Prosecuting Authority, respondents' legal practitioners