

MVUSI NYATHI

AND

VALENTINE NYATHI

AND

ACKIM NYATHI

AND

BHEKINKOSI SIBANDA

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 14 MAY AND 19 JUNE 2014

Mr *Ngwenya* for the applicants
Miss *Ndlovu* for the respondents

Bail Application

MOYO J: The four applicants are charged with murder as defined in Section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 12th of April 2014 at about 2200hours the for applicants together with Mgcini Mabhena assaulted the now deceased, Ayibongwe Ncube using bricks, fists and booted feet at a birthday party at House No. 2787 Emakhandeni in Bulawayo.

1st and 3rd Applicants are siblings they reside with their parents at House No. 708 Emakhandeni in Bulawayo. The 4th Applicant resides with his maternal uncle at House No. 70290 New Lobengula in Bulawayo. The State was initially unopposed to bail but later withdrew the non opposition and filed an opposition to the application.

The Applicants are of fixed abode, they are not employed although they are majors they are still under the care of their parents. The four Applicants aver that they have a strong defence to the charges that they are facing and that the State case is very weak as against them and that in fact the State should have taken them as witnesses against their co-accused one Mgcini Mabhena instead of charging them. They aver that in defence to the murder charge that they are facing they

will state that one Mgcini Mabhena their co-accused, assaulted the 2nd Applicant with a button stick over 1st Applicant's cellphone which Mgcini Mabhena was refusing to return to its owner. They will state that Mgcini Mabhena then picked a brick and threw it in a bid to hit the 2nd Applicant. They state that the brick missed the 2nd Applicant who had ducked to avoid it and it then hit the now deceased who was trying to restrain Mgcini Mabhena from assaulting the 2nd Applicant further. The 4th Applicant will state in his defence that he was just seated at a distance from the braai stand where the alleged fight took place and that he did not participate in it at all as he absolutely had no reason to. The State Counsel had serious problems with the State case. The State case as presented in the investigating officer's affidavit is that the 3 siblings fought with the now deceased over their cellphone that was in the possession of the deceased from one Clinton Ncube. The State Counsel also conceded that the investigating officer made mention to her of the fact that it also looks like the deceased was indeed hit whilst he was trying to quell a fight. She also told the court that she is yet to establish what exactly the true version of the State case is and whether indeed there were eye witnesses in this matter.

I find that the defence proffered by the Applicants as against the version given as being the State case, minimise the risk of absconding by the Applicants as obviously the allegations they face at the moment are watery to such an extent that irregardless of the seriousness of the charge they face, they might have no reason at all to avoid standing trial. I can not find any incentive to abscond trial in this matter.

The Applicants are of fixed abode. Refer to *S v Ndlovu* 2001 (2) ZLR 261 wherein the court held that in deciding whether there is a risk to abscond, the court should consider such factors as the seriousness of the offence, the likely sentence and the incentive to abscond, the accused's mobility and access to cross-border travel, as well as the strength of the prosecution case. The accused's defence is of great importance and is often decisive in the exercise of the court's discretion.

I accordingly find that the defence proffered by the Applicants as balanced against the state case, warrants an exercise of my discretion in favour of the Applicants. I accordingly grant the application in terms of the amended draft order.

T. J Mabhikwa and partners, applicants' legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners