

## **OLIVER JOHN IRWIN v THE PEOPLE (1993 - 1994) Z.R. 54 (H.C.)**

HIGH COURT  
B.M. BWALYA, J.  
23RD MARCH AND 15TH APRIL, 1993.

### **Flynote**

Bail - Murder charge - Considerations to be taken into account.

### **Headnote**

The accused, who was charged with murder, applied for bail.

### **Held:**

Bail could be granted in the Court's discretion, because there were no consideration to seriously impede such a grant or raise the possibility of the applicant failing to attend Court and avoid trial. (HP/3 of 1993)

### **Cases referred to:**

- (1) Oliver John Irwin v The People S.C.Z. appeal no. 10 of 1993.
- (2) The People v Mweemba (1972) Z.R. 292.
- (3) The State v Gopolong Mackenzie [1968-70] Botswana Law Reports pp. 308-9.

### **Work referred to:**

Archibold Criminal Pleading, Evidence and Practice 36th ed. para. 203-205.

For the appellant: G.K. Chilupe, Chilupe & Co, with J. Naik of Jitesh Naik & Co.

For the respondent: J.C. Godwin, Senior State Advocate.

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## **Judgment**

**B.M. BWALYA, J.:**

On 23rd March ,1993, I granted the order admitting the applicant, Oliver John Irwin [1], to bail upon the following conditions and indicated that I would give the reasons for the order later:

- (i) K100,000.00 cash bail;
- (ii) the applicant to surrender his passport to the police;
- (iii) two working sureties on their own recognisance for K10, 000.00 each;
- (iv) the Applicant to be at liberty to apply to Court for leave to travel abroad if there be need to get urgent medical treatment.

I now proceed to give my reasons for granting the order admitting the applicant to bail. It will be noted that the applicant faces a charge of murder. The learned Senior State Advocate has not opposed the application as such but has put forward conditions for such bail should the Court be inclined to granting the application. These conditions are:

1. that there be a *quantum* of bail commensurate with the offence charged;
2. the passport of the accused be impounded;
3. that if the accused seeks access to specialist medical treatment abroad urgently the applicant should seek permission of the Court for such medical treatment;
4. that the accused should report to the nearest police station on a day specified by Court once a fortnight or once a month;

5. that the applicant provide two acceptable sureties; and
6. that if the accused is not admitted to bail the State has no objection to the accused staying in hospital until the conclusion of the case.

The learned counsel for the applicant submitted that the test to be applied by Court in an application for an order admitting the applicant for bail pending trial is the likelihood by the applicant to attend Court when required to do so. It was further submitted that the applicant is a Zambian citizen, an accountant and businessman, a director of several companies and aged 65 years. It was also pointed out that although charged with murder and considering the death took place six years ago the applicant has submitted himself to the authorities and is willing to raise independent and reliable working sureties to ensure his appearance at the trial which starts on 5th April, 1993, and that he shall adhere to conditions attached to bail. The learned counsel further submitted that the applicant's health has continued to deteriorate and refusal to grant him bail would be prejudicial to the applicant's health. The learned counsel relied on the case of *The People v Mweemba* [2] and Archibold 34th ed. paras 201-205 especially para. 203.

I have considered submissions and arguments advanced by both learned counsel in this case. In deciding a bail application five considerations to be taken into account are clearly spelt out in Archibold, 36th ed. and amplified in the case of *the State v Gopolong Mackenzie* [3] and these read as follows:

- (i) the nature of the accusation against the applicant and the severity of the punishment which may be imposed;
- (ii) the nature of the evidence in support of the charge;

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- (iii) the independence of sureties if bail were to be granted;
- (iv) the prejudice to the applicant (accused) if he is not admitted to bail;
- (v) the prejudice to the State if bail is granted.

The foregoing considerations do not bar the applicant from raising any other special circumstances for the Court to take into consideration, which special circumstances may be peculiar to a particular applicant.

Looking at the five considerations to be taken into account in determining whether or not to grant or refuse bail, I must point out here that the State has not opposed the application but left it to the discretion of the Court but proposed certain conditions to be attached to the granting of bail should this Court be inclined to granting bail.

The applicant faces a charge of murder. It is needless here to over-emphasise the severity of punishment such an accusation, if established, could attract. Be that as it may, I am satisfied that the applicant's probability to attend affidavit evidence and submissions made to this Court. I have therefore seen no possibility of the applicant failing to attend Court to avoid trial. Here a cash bail not amounting to punishing the applicant before trial could probably meet what the learned Senior State Advocate termed bail commensurate with the alleged offence but I must hasten to say that loss of life (murder) will always both find such a commensurate amount in terms of money in a criminal offence - it is therefore best left to the Court's discretion.

The second consideration is better left out here as whatever evidence is available may be unsatisfactory as might be unfair to the applicant. It may also not be prudent here to comment

on the deposition of State witnesses at the PI save to say that the alleged offence took place six years ago - the time factor has its attendant problems for the prosecution. In the circumstances of this case the second consideration cannot stand in the way of the applicant to be granted bail.

The third consideration on independent sureties, here there is no strong opposition at all. The applicant has shown to the satisfaction of this Court that the sureties are available.

Fourthly, there is no doubt that the continued incarceration of the applicant shall be prejudicial to the applicant in many respects: his health is deteriorating as evidenced by the fact that he is already in hospital and prison authorities have expressed concern in this regard. The State has indicated in their submissions that some State witnesses are abroad and that it may take time to bring them here. This in itself, if the applicant is denied bail, may cause great anxiety on his part and aggravate the already deteriorating state of the applicant's health. These in my view are legitimate special circumstances warranting the Court to exercise its discretion in favour of admitting the applicant to bail.

Finally the consideration of the possible prejudice to the State does not arise here. There shall be no such prejudice to the State.

Having taken all the considerations into account as shown above and in the exercise of my discretion I find this a legitimate case in which to admit the applicant to bail as already indicated in the order issued by this Court on 23rd March,1993.

Application granted.

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