

**BRIAN MOYO**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 26 JUNE 2003

*J James* for the applicant  
*L Masuku* for the respondent

Bail Application

**CHEDA J:** Accused applied for bail under case number 82/03 on 9 April 2003 another on 21 May 2003 and another application on case number HC 103/03 was filed. These two applications were filed by different legal practitioners.

The brief facts are that applicant in the company of one Wisdom (who is still at large) and Butholezwe Nyathi (who is now deceased) proceeded to a house in Hillside, Bulawayo where they pretended to be police officers. They requested for permission to enter into the premises, permission was granted and they then robbed the complainant of cash amounting to \$750 000 and jewellery valued at \$10 000 000. The amount of \$295 470,00 and jewellery was recovered through indications made by applicant. A CZ pistol was used in that robbery and was also recovered.

Admission to bail is a constitutional right to an accused person and our courts will always lean in favour of the accused on the basis of the hollowed principle of the presumption of innocence until proven guilty. This, is however, a general rule whose exception is that applicant should not be admitted to bail if this would result in the frustration of the proper administration of justice. *Mr Masuku* for respondent argued that if applicant is released on bail he is likely to abscond and therefore will not stand

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trial.

The court in determining the question of release on bail is indeed guided by the provisions of the Criminal Procedure and Evidence Act [Chapter 9:07]

particularly section 116 (7) which states:-

“Subject to subsection (4) of section 13 of the constitution in any case in which the judge or magistrate has the power to admit such person to bail, he may refuse to admit such person to bail if he considered it likely that if such person were admitted to bail he would –

(a) not stand trial ...”

It is applicant’s duty to convince the court on a balance of probabilities that he will stand trial in the event that he is admitted to bail.

In the present case, applicant has given two conflicting statements to his legal practitioners with regards to his involvement and/or participation in this offence.

Under case number HC 82/03 he stated,

Paragraph 4. “Applicant will deny the charge levelled against him and state that he and the co-accused were involved in the business of loaning money to members of the public. He will state that sometime in September 2002 they were approached by some Nigerians who wanted money from them and were offering some jewellery as security. Applicant will state that they took the jewellery for evaluation and assessment and that is when they were arrested.”

This application was brought before me, the respondent at the time raised certain issues pertaining to his erstwhile legal practitioner *Mr Hare*, which remained unresolved until the matter re-surfaced when *Mr James* represented him. I should point out that *Mr James* made his submissions carefully and professionally, and the fact that he did not want to refer and/or use the previous application speaks volumes about the original application and the character of the applicant as highlighted *infra*.

Under case number HCB 103/03 applicant stated –

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“5. The applicant will state at his trial that he knew the deceased, Butholezwe Nyathi as a taxi driver, who used to convey him to and from work, and they became fairly well acquainted.”

It is clear that applicant had now changed his personal knowledge of Butholezwe Nyathi. Why he has decided to give conflicting instructions is not clear. The court relies on applicant’s credibility and integrity in this application, he, therefore, has the onus to make a clean breast of his involvement in the offence in order for the court to make a free and informed decision. An applicant in my view who chooses to mislead the court, should not expect sympathy from the court from which he expects to determine his liberty as his continued detention or release largely depends on his truthfulness.

Applicant, it is submitted by respondent made indications to the police which led to the recovery of a pistol and part of the stolen goods. If this is true, applicant is indeed linked to the crime and as such he will have to extricate himself from this matter in view of the doctrine of recent possession more particularly with regards to the pistol.

It is on the basis of applicant being not candid with the court that his release will result in him failing to stand trial. The application is accordingly dismissed.

*James, Moyo-Majwabu & Nyoni* applicant’s legal practitioners  
*Attorney-General’s Office* respondent’s legal practitioners