Judgment No. HB 20/2004
Case No. HCB 39/2004

FLETCHER DULINI NCUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 3 & 25 MARCH 2004

J Tshuma for applicant
H S M Ushewokunze III for the respondent

Bail Pending Trial

CHEDA J: Applicant applied for the variation of bail conditions pending the completion of his trial. Applicant together with 6 others are facing a charge of murder before the High Court, Harare. They pleaded not guilty and they challenged the admissibility of warned and cautioned statements. As a result of this a trial-within-a-trial was held. Evidence has also been led in the main charge although the state has not closed its case.

Applicant through his legal practitioners submitted that he would like to uplift his passport in order to travel overseas to see his children who are studying there. He further suubmitted that if he is authorised to uplift his passport he will return to stand his trial and will in fact report once a month at the police station as has been the case. It is respondent's contention that if bail conditions are altered he is unlikely to stand trial as he is facing a serious offence.

In my view bail pending trial or pending appeal can be entertained by any judge in chambers or in court. While there is no legal constraint that a judge can also hear a bail application for the variation of bail conditions during the trial as a result of changed circumstances, such application should be placed before that judge or court

which is seized with the matter. It is this judge or court who is privy to evidence led and is therefore better placed to determine the strength and weakness of the case against the applicant. Any attempt, in my view, to determine such application is to say the least futile as there is a real likelihood of arriving at a decision bereft of relevant facts adduced during the trial.

While I was in the middle of writing this judgment Mr *Tshuma* for applicant asked for permission to see me for further submissions. I acceded to his request and he together with Mr *Ushewokunze* came to my chambers and made further submissions.

Mr *Tshuma*'s submission in brief is that at the time of the initial application the trial judge was outside the country, she is however, now back and has delivered her judgment in the trial-within-a-trial. The operative paragraph of the said judgment reads:

> "In conclusion I would comment that overall the evidence of the state witnesses who are police officers is fraught with conflict and inconsistencies. The witnesses conducted themselves in a shameless fashion and displayed utter contempt for the due administration of justice to the extent that they were prepared to indulge in what can only be described as works of fiction as is especially illustrated by the state of the investigation diary. The fears expressed by the defence, albeit at time exaggerated, were not without substance as the witnesses showed signs of having colluded. In fact it was at times beyond doubt that the evidence adduced from a particular witness was discussed outside the courtroom.
>
> The magnitude of their capacity was such as put paid to this court attaching any weight to the truth or accuracy of their statements. The ultimate result was that when considered alongside the evidence adduced by the defence this court had little but to find that the allegations by the accused of threats and assaults were likely to be true.
>
> In the result the warned and cautioned statements, indications statements and video recording sought to be produced by the state against each of the accused are ruled to be inadmissible."

It is clear that the warned and cautioned statements and other related evidence which the state sought to adduce is inadmissible. It is in light of this new development that Mr *Tshuma*'s submission that there were changed circumstances, in that the state's evidence has collapsed at the trial-within-a-trial stage. I agree with Mr *Tshuma* but sight should not be lost, that, the collapse is *prima facie*. In my view the matter goes deeper than that, for the reason that, the trial-within-a-trial is part of the evidence which the state relies on and therefore is not the only evidence which the court will rely on in the final determination of the main trial.

The trial court has had the privilege, not only of hearing and recording evidence but also of observing the conduct and behaviour of witnesses thereby enabling itself to deal with the question of demeanour.

Mr *Tshuma* has further submitted that the learned trial judge is due to leave for the United Kingdom over the week-end and depending on how she responds to treatment, she might be back in the country in May or June 2004 to deal with the matter failing which she will do so in August 2004.

Mr *Ushewokunze* on the other hand has argued that to vary the applicant's bail conditions at this stage is tantamount to pre-empting the trial court's decision on the main trial. I do not agree with this suggestion because no court is influenced by another with the same jurisdiction.

However, I find that as the trial judge is still in the country, the proper approach is for this application to be placed before her at an earliest convenience.

I therefore direct that it be placed before Mrs Justice Mungwira for her determination.

Webb, Low and Barry applicant's legal practitioners
Attorney-Generals' Office respondent's legal practitioners