

ROWAN DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 12 OCTOBER 2004 AND 20 JANUARY 2005

N Mazibuko for applicant
A Gaibie for respondent

Bail Application

NDOU J: The applicant was charged and convicted on two counts. On one of the charges he was jointly charged with one Benjamin Maketo and on the other with one Joseph Nyoni. Following his conviction on the charge where he was jointly charged with Joseph Nyoni, he filed an application for bail pending appeal. That application was dismissed in this court. The applicant was then subsequently convicted on the charge where he was being jointly charged with Benjamin Maketo. He then applied for bail pending appeal in the latter matter and in this application he was successful.

The applicant now files this fresh application for bail pending appeal, in the matter where he is jointly charged with Joseph Nyoni and in which his application was previously dismissed by this court. He says, in support of this fresh application, that it is fair that he should be admitted to bail because on the matter in which he was granted bail, the subject matter is substantially similar. He submits, further that it is unjust and unfair for him to remain in custody whilst his co-accused have been released on bail pending appeal. The basis of the application is that there are changed circumstances. This is so because this court dismissed his previous application

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arising from these same facts. The question is whether this fresh application is properly before this court in view of the fact that this court adjudicated upon the same facts. This court found then that there were no reasonable prospects of success on appeal. Generally, the proper procedure to have followed upon the dismissal of the application was to appeal to the Supreme Court. The applicant did not follow this route.

I hold the view, however, that where new circumstances exist indicating that there is reasonable prospect of success on appeal then this court grant bail pending appeal. In the present application, the applicant highlights irrelevant circumstances which have no bearing at all on his prospects of success on appeal. The granting of bail to co-accused refers only to on one of the charges that they are jointly charged. It is not a relevant consideration on prospects of success. Because this court previously found that there were no reasonable prospects of success, this fresh application, on the basis of changed circumstances, such changed circumstances should show that there now exists a reasonable prospect of success. The alleged changed circumstances do not do anything of the sort. It should be borne in mind that in bail pending appeal the presumption of innocence no longer exists. In *casu*, in the absence of positive grounds for granting bail, it should be refused – *S v Tengende & Ors* 1981 ZLR 445(S) and *Mahachi v S* HB-111-04. The onus is on the applicant to show that he should be admitted to bail. He has failed to discharge this onus as highlighted above.

Accordingly this application is dismissed.

Calderwood, Bryce Hendrie & Partners applicant's legal practitioners
Criminal Division, Attorney General's Office respondents' legal practitioners