

LIFE SHUMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 23September 2021 & 13 October 2021.

Bail application

Mr T.T Musina, for the applicant
Mr E. Mbavarira, for the State

WAMAMBO J: The applicant is applying for bail pending trial citing changed circumstances.

The applicant applied for bail before ZISENGWE J who dismissed the application. The facts, circumstances and reasons for dismissing the application are contained in HMA 44/21.

The learned Judge found *inter alia* that the evidence against applicant appeared serious, taking into account a number of pieces of evidence allegedly implicating the applicant. At page 10 of the judgement under HMA 44/21 ZISENGWE J said

"The conclusion was premised upon an impression created by an assessment of the following pieces of evidence among others, the identification of the motor vehicle at both scenes of crime, the fact that applicant was implicated by alleged fellow accomplices, the fact that he was identified at the scene of the crime by the various complainants and the fact applicant allegedly made informal statements wherein he admitted having committed the offences. Having found that the state case against the applicant was fairly strong I concluded therefore that there was a well grounded risk of him taking flight."

The Learned Judge also found that the investigating officer through his evidence had established that the firearm used in the commission of the offence is believed to be in applicant's possession. Further that an identification parade was yet to be conducted.

In this application *Mr Musina* for the applicant advanced a number of factors which he submitted amounted to changed circumstances.

It was his main contention that the investigating officer lied to the court and took advantage that witnesses' and co-accused statements had not been available to the defence.

The state was opposed to the application.

Mr Musina argued that the following amounted to changed circumstances which I will deal with presently: -

The passage of time from the time of the initial bail application of over two months amounts to a changed circumstance.

The state on this ground advanced the argument that although it is true that some time had elapsed between the initial bail application and this application it should be noted that the lockdown due to the COVID 19 scourge had crippled court operations and prisons visits. Further that the investigating officer was at an advanced stage of organising transport and other logistics for the identification parade.

Indeed I take note that the COVID 19 scourge affected the court system and indeed investigations processes.

In *Tichaona Katsambo v The State HH 642/15 ZHOU J* at page 3 said the following:

"The passage of time may be considered as a fresh fact which has arisen after the previous decision. See State v Aitken (2) 1992 (2) ZLR 463 (S), State v Stouyannides 992 (2) ZLR 126(S), State v Murambiwa S -62-92. Also the postponement of a trial may constitute a change in circumstances entitling a court to reconsider the question of bail.

I thus find that the passage of time amounts to fresh facts not placed before the court in the initial bail application. The next question however is that should bail be granted in the circumstances taking into consideration among other factors the period that elapsed between the initial application and this application.

I also take into consideration the fact that the COVID 19 and its restrictions has impugned on court operations and investigative processes and this has affected virtually every

case on the roll. This matter is no peculiar exception. I am mindful that the investigations should be finalised as early as possible. However in the circumstances I find that the passage of time in the context of this application does not amount to a changed circumstance warranting the granting of bail.

Mr Musina also advanced the argument that he is now in possession of applicant's co-accused warned and cautioned statements and that same do not implicate the applicant. Further that one of the co-accused admitted to possession of the firearm and that the firearm belongs to one Madonola. The State's position is that the fact that the co-accused person's warned and cautioned statements do not implicate applicant is not the end of the matter. That the co-accused could have supplied "implicatory information against applicant" which was not necessarily encapsulated in the warned and cautioned statements.

My reading of the evidence tendered does not suggest that applicant's co-accused implicated him in their warned and cautioned statements. Indeed to buttress this position the investigating officer's statement does not talk to applicant's co-accused implicating him in their statements. In fact the investigating officer avers as follows in his statement in paragraph 3.

"During the course of the investigations we established that the accused is the mastermind of the robberies and he always ferried the bunch of marauding robbers to rob their victims under the leadership and direction of the accused."

To that end I find that the oral evidence and affidavit tendered by the investigating officer did not change in any substantial manner.

I thus find that the allegation that the investigating officer lied in the manner alleged is not only untrue but also that it does not amount to a changed circumstance.

The other changed circumstance advanced by applicant is that Reason Mbedzi, complainant in counts 6 to 14 who is said to have identified applicant's car at the scene of crime does not say so in his statement. Again the investigating officer's statement does not quite identify Reason Mbedzi in the manner alleged. At paragraph 4 of his affidavit the investigation officer says

"4 There is a witness who managed to identify the accused person's motor vehicle leaving the scene and witness statement is yet to be finished after an identification parade is carried out."

I also find that there is no changed circumstance in this instance as advanced.

The last alleged changed circumstance is that the investigating officer lied under oath when he testified that applicant is feared and dangerous as he threatens fellow villagers. This clearly does not amount to a changed circumstance. This allegation may well form part of the evidence to be tendered at trial, if relevant or necessary. It may well be that the aspect as alleged may come through in the course of other evidence. What is clear to me however is the fact that applicant is now presented as a peaceful and serene person does not amount to a changed circumstance.

I am mindful of the findings of ZISENGWE J in HMA 44/21 and the grave allegations against applicant.

I am also cognisant that our law allows the granting of bail where there are changed circumstances as provided for in section 117 A (c) (ii) as follows: -

"(ii) Where an application in terms of section 117 A is determined by a judge or magistrate, a further application in terms of section 117 A may only be made whether to the Judge or magistrate who has determined the previous application or to any other judge or magistrate, if such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after that determination in the circumstances."

I find that no circumstances have arisen or been discovered after the determination of the initial bail application justifying the granting of bail. See *Madalisto Ranch v The State HH 68/19, State v Barros & Others 2002 (2) ZLR 17 (H)*.

In the light of the above I order as follows:

The application for bail be and is hereby dismissed

WAMAMBO J.....

Garikayi & Company, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners