Judgment No S.C. 61\2002

Crim Appeal No. 217\2002

EDWARD MORRIS BARROWS v THE STATE

SUPREME COURT OF ZIMBABWE
HARARE JULY 24, 2002

J. Samkange, for the appellant

N.J. Mushangwe, for the respondent

Before ZIYAMBI JA, in Chambers in terms of Rule 5 of the Supreme Court Bail Rules

The appellant and six others are jointly charged with the crime of armed robbery. Their trial commenced before the High Court on the 18th February 2002 and was adjourned on the 22nd February 2002. An application for bail pending the resumption of the trial was denied by the learned presiding judge.

On the 17th June 2002, on which date the trial was scheduled to continue, the appellant and two of his co-accused made an application for a postponement on the grounds that " there had been no proper consultation for this date between the Attorney- General's office and the legal practitioners representing the

accused persons". The learned judge postponed the matter to the 5-9th August 2002 whereupon the appellant and his two co-accused immediately applied for bail on the basis that the postponement just granted amounted to changed circumstances justifying a reconsideration of their bail applications.

In that regard, it was submitted on behalf of the appellant and the other two applicants that three of their co-accused, who had been on bail pending their trial, had not absconded and the applicants were prepared to be bound by more stringent conditions than those imposed on their co-accused.

The learned trial judge, relying on subparagraph (ii) of s. 116(1) (c) of the Criminal Procedure and Evidence Act, [Chapter 9:07] (the Act), held that the initial application for bail having been refused by the High Court, a further application could only be made if based on changed circumstances. He found that the fact of the grant of bail to the appellant's co-accused was a factor which was known at the time of the denial of bail to the appellant. He considered the question whether a postponement could be regarded as a change in circumstances and concluded that each case must be considered on its own facts and in the present case the postponement could not be regarded as a change in circumstances warranting a reconsideration of bail.

Mr *Samkange*, who appeared for the appellant, while not alleging any misdirection on the part of the learned judge, submitted that the fact of the postponement and the length of time the appellant has been in custody constituted a changed circumstance within the meaning of s 116 (1) (c) (ii) of the Act and that the

learned judge had erred in taking a different view. Mr *Mushangwe*, who appeared for the State, submitted that the learned judge "may have misdirected himself in not giving adequate weight to the time lapse". However, he submitted that if there was a misdirection in this regard it was not of such a nature as would vitiate the decision of the learned judge to deny bail to the appellant.

It is trite that the power of this Court to interfere with the decision of the High Court in a bail application is limited to the finding of a misdirection or irregularity or an improper exercise of the lower Court's discretion in circumstances such as to vitiate the Court's decision.

It is not apparent from the record of proceedings whether the fact of the time lapse standing on its own was raised by the appellant as a changed circumstance. What appears to have been the issue was the fact of the postponement and this was considered by the learned judge who concluded that it did not amount to a change in circumstance within the meaning of s 116(1) of the Act.

In any event, the learned judge was alive to the fact of the appellant's incarceration since his arrest but found that he could only interfere if there were changed circumstances warranting a reconsideration of his bail application.

I am unable to find any misdirection on the part of the learned judge. The possible misdirection alluded to by Mr *Mushangwe* has not been substantiated and even if it had been, is not of such a nature as to vitiate the court's decision to deny bail to the appellant.

Accordingly, the appeal is dismissed.

Byron Venturas & Partners, appellant's legal practitioners