

DISTRIBUTABLE (67)

NEVERSON MWAMUKA
v
THE STATE

**SUPREME COURT OF ZIMBABWE
12 MAY & 28 MAY 2021**

T. Zhuwarara with E Mavuto, for the appellant

F. I. Nyahunzvi, for the respondent

IN CHAMBERS

MAVANGIRA JA:

**Judgment No. SC 69/21
Civil Appeal No. SC 92/21**

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- [1] The appellant faces one count of robbery as defined in s 126 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He and accomplices allegedly conspired to rob a ZB bank cash in transit truck that was transporting cash amounting to US\$2 775 000 to the bank's branches in Chinhoyi, Kadoma, Gweru, Bulawayo, Gwanda and Zvishavane.
- [2] He applied to be admitted to bail by the High Court. His application was dismissed by CHITAPI J on 16 February 2021. He thereafter petitioned the High Court again, seeking to be admitted to bail on the basis of alleged changed circumstances. The application was dismissed by FOROMA J on 31 March 2021. Aggrieved, he noted this appeal in terms of r 67 (1) of the Supreme Court Rules, S.I. 84/18 (the Rules). He prays that this Court admits him to bail.

[3] In dismissing the first application CHITAPI J found that the appellant was a flight risk as the police arrested him after having been tipped of his intention to leave the country. The appellant was said to have been arrested after being ambushed at a toll gate where he was found in possession of a substantial amount of money in United States dollars. Upon his arrest he allegedly led to the recovery of US\$48 000 which he could not account for and which was alleged to be his share of the crime proceeds.

[4] In his reasons for judgment CHITAPI J stated *inter alia*:

“The second applicant is a demonstrated flight risk who was caught while in the process of leaving Harare. The applicant is not only a flight risk but his release on bail given the serious uncontroverted allegations which were not challenged upon his remand will undermine the objective and proper functioning of the criminal justice system and the bail institution.”

[5] In his judgment FOROMA J stated *inter alia*:

“Despite these positive findings against applicant another attempt at getting his freedom was made by applicant on 18 February 2021 which was an application for bail pending appeal based on changed circumstances. Civil Application No. SC 9221 of 2021 before me on 25 February. It was opposed by the respondent on the basis that there were no changed circumstances. I did not find any changed circumstances and accordingly dismissed the application.”

[6] Before FOROMA J the changed circumstances were alleged to be that because the investigating officer had since considered that the appellant’s residential address as indicated to the police by an informant was incorrect, it therefore followed that the police’s failure to locate the appellant at that address could not be support for the contention that the appellant was on the run or that he was a flight risk.

[7] FOROMA J noted in his judgment that the alleged changed circumstance was placed before CHITAPI J and was therefore not indicative of any change in circumstances subsequent to CHITAPI J’s judgment.

[8] In *Daniel Range v S* HB-127-04 the following was stated at p2 of the judgment:

“In determining changed circumstances the court must go further and enquire as to whether the changed circumstances have changed to such an extent that they warrant the release of a suspect on bail without compromising the reasons for the initial refusal of the said bail application.”

[9] The court in *S v Brian Makanya* HH15/15 had this to say:

“The applicant bears the onus to produce evidence which satisfies me that exceptional circumstances exist which in the interest of justice permit his release. Even if I accept that there are new circumstances or changed circumstances, I am still obliged to consider all the facts before me, new and old and on that basis decide whether the applicant is a good candidate for bail.”

[10] The dismissal of the appellant’s application before CHITAPI J was on the basis that he was a flight risk as demonstrated by the circumstances of his arrest. The issue of the wrong residential address was before CHITAPI J and he considered and dealt with it. It was not the reason for the denial of bail. The dismissal of the application was on the basis, primarily, that he had been arrested while in the company of a co-accused. **Judgment No. SC 69/21** Civil Appeal No. SC 92/21 is what swayed CHITAPI J to deny the appellant bail. This aspect was also found to justify the different treatment that was received by the appellant’s co-accused who were admitted to bail. Their circumstances differ materially from the appellant’s in this respect.

[11] It is trite that this Court will interfere with a decision of a judge of the High Court in a bail application only if the judge *a quo* committed an irregularity or misdirection or exercised his or her discretion so unreasonably or so improperly as to vitiate his or her decision. See *Remember Moyo & Ors v The State* SC 106/2002, citing with approval *S v Chikumbirike* 1986 (2) ZLR 145 (S) at 146 E-F; *S v Barber* 1979 (4) SA 218 (D) at 220 E-G.

[12] On the facts related to above I find no misdirection on the part of the court *a quo* in its dismissal of the application based on changed circumstances. None has been established. In the circumstances, the appeal has no merit.

[13] It is accordingly ordered as follows:

The appeal be and is hereby dismissed.

Maposa & Ndomene, appellant's legal practitioners

Prosecutor-General's Office, respondent's legal practitioners

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