

**KHUMBULANI MPOFU**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 6 APRIL & 4 MAY 2023

**Bail Application**

*T. Runganga* for the applicant  
*K. M. Nyoni* for the respondent

**MAKONESE J:** This is an application for bail brought in terms of section 116 (2) (ii) of the Criminal Procedure and Evidence Act (Chapter 9:07). The applicant is facing one count of robbery as defined in section 126 (1) of the Criminal Law Codification and Reform Act (Chapter 9:23). Applicant denies the allegations and maintains that he has been wrongly implicated. Applicant and his co-accused filed an application for bail in this court on 17<sup>th</sup> February 2023. Under HB-38-23 DUBE-BANDA J dismissed the application for bail on the grounds that applicants were a flight risk given the fact that they faced serious allegations involving the use of a rifle, pistol and other dangerous weapons used in the commission of the robbery. This application has been made on the premise that there has been a change of circumstances in that certain vital information which had not been brought to the attention of the court in the first bail application has now been discovered.

The allegations against the applicant are that on the 22<sup>nd</sup> December 2022 and at around midnight, and in the company of his co-accused they hatched a plan to steal from the complainant. It is alleged that applicant and his co-accused proceeded to the complainant's mine at Ansh Red Mine, Selukwe Park Shurugwi armed with a rifle, pistols, machetes, a Columbia knife, axes and other dangerous weapons. Acting in common purpose, with one Misheck Deta (now deceased) applicant and his co-accused tied the mine workers and security guards with shoe laces and a cable. They opened the carbon room and loaded 400kg of gold carbon in 50kg bags. The state alleges that applicant and his accomplices were arrested following a hot pursuit. Bail was denied on the grounds that the applicant and his colleagues were a flight risk and that there was evidence linking them to the offence.

This application is made in terms of the proviso in section 116 (1) (c) of the Criminal Procedure and Evidence Act where it is provided that:

“where an application in terms of this subsection is determined by a Judge or Magistrate, a further application in terms of this sub-section 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 the facts which were not placed before the Judge or Magistrate who determined the previous application and which have or been discovered after that determination.”

Applicant contends that during the initial bail application, he had sought for a call history location from the network service provider to establish that at the time of the alleged robbery he could not have been at the scene of the crime as he was in Bulawayo. Applicant failed to secure the co-operation and assistance of the Investigating Officer in the case. The previous bail hearing was concluded without a call history location from Econet. Applicant avers that he has now obtained the call history location which shows that during the period in question he was in fact in Bulawayo. He was using a mobile number 077 351 023 at the relevant time.

In its response to this fresh bail application the state avers in its written submissions that:

“The call history was not produced or shown to the court since it was not there and now call history is available which shows that at the time of the commission of the offence the applicant was in Bulawayo. The offence was committed on the 22 December 2022 and applicant was only arrested on 24<sup>th</sup> December 2022. The applicant was not arrested at the scene but the vehicle which was recovered belonged to the applicant.”

The state goes on to state in its response as follows:

“The Investigating Officer’s attitude for the applicant only, has changed” and is stating that he has assets in Bulawayo and is unlikely to abscond trial. Also the non-production of the CCTV footage (at the toll gate) and now the availability of the call history has weakened the state case against the applicant as the call history shows that at the relevant time, the applicant was in Bulawayo.”

Further, the state proposed that if the court is minded to grant applicant bail, the order should include a requirement that applicant must surrender his passport to the court as part of the bail conditions.

In closing that state makes the following submissions in its response;

“It is submitted in opposition to this application that the above noted changed circumstances cannot stand as they are bringing in evidentiary issues which are triable in court and not at this stage. It is submitted that the call history now attached can only be interpreted by the service provider and is the only competent witness to testify. The absence of the CCTV can also be testified about by witnesses who were manning the CCTV at the toll gate.”

Faced with this rather peculiar stance adopted by the state, I quizzed *Mr Nyoni*, appearing for the state who confirmed that inspite of the change of circumstances that were noted and conceded by the Investigating Officer, the state was opposed to the granting of bail.

*Mr Runganga* appearing for the applicant argued that the Investigating Officer was deliberately concealing the call history in the first bail application in order to prejudice the applicant. He further averred that the arrest of the applicant was stage managed and the state case was not strong and initially alleged by the state.

In determining changed circumstances, the court must enquire whether the changed circumstances have changed to such an extent that they warranted the release of a suspect on bail without compromising the reasons for the initial refusal of bail pending trial. See *Daniel Range v The State* HB-127-02.

In *S v Burrow & Ors* 2002 (2) ZLR 17 (H), HLATSHWAYO J (as he then was) held that the purpose of the equivalent on changed circumstances, is to obviate the presentation of the same facts or various thereof, order and over against in a bid to obtain bail, and also helps in achieving finality in the matter. See also *S v Percy Mugariri* HB-06-22 and *S v Chin'ono* HH-67-20.

Having decided that the location call history that has been presented before the court constitutes facts which were not placed before the learned judge in the previous bail application, I must consider whether such new facts warrant the release of the applicant without compromising the reasons for the initial refusal. In spite of the concessions made by the State, in the previous bail application the Investigating Officer testified that seven individuals including the five applicants, armed with a pistol, a rifle, machetes, wooden sticks, knives and an electric shocker executed a robbery at Ansh Red Mine in Shurugwi. They searched the workers and confiscated money and cell phones. They forcibly took 400kgs of carbon. As a result of further investigations the police staged an ambush at Toll Gate on the Gweru-Shurugwi Road. Accosted by the police the applicant and his co-accused became defiant and attempted to escape by driving off the scene. A scuffle ensued and the

police fired and deflated two front tyres of the vehicle used by the applicant and his co-accused. The shooting was occasioned by the applicant and his co-accused attempt to escape arrests. The applicant and his co-accused were arrested except one Misheck Deta who was shot and killed at the scene. The reason for his shooting was that he had drawn a pistol and tried to shoot at the police. The motor vehicle, a Ford Ranger that was used by the applicant and his co-accused was searched, the police found seven machetes, a black satchel, one four pound hammer, three axes, one Colombia knife, twenty-four size spanners and 50 kgs bags of carbon.

Having regard to the evidence of the Investigating Officer in the previous bail application, I am not satisfied that the changed circumstances alluded to by the applicant would amount to changed circumstances that would warrant the release of the applicant on bail pending trial.

In the result and accordingly, the application for bail on changed circumstances, is hereby dismissed.

*Tanaka Law Chambers*, applicant's legal practitioners  
*National Prosecuting Authority* respondent's legal practitioners