

NKOSANA NCUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE

NDLOVU J

BULAWAYO 24 & 30 DECEMBER 2021 AND 6 JANUARY 2022

Application for bail pending trial

N. Ncube, for the applicant

K. M. Guveya, for the respondent

NDLOVU J: This is an application for bail pending trial, launched on the basis of perceived changed circumstances since the failure of the previous application in September 2021. The main reason for refusing to admit the applicant to bail by my sister KABASA J was that the applicant was in her reasoning a flight risk, see HB-163-21.

In this application, the applicant has in brief relied on 3 developments as changed circumstances, namely that:

1. The sketchy evidence in the Form 242 has since been fleshened and distilled by way of a full docket containing a summary of each state witness' evidence and indications at the crime scene. Critical and central in this regard is that all the state witnesses point to someone else as having committed the crime except one who states that applicant in fact tried to stop his co-accused from assaulting the now deceased and this is in tandem with the applicant's defence.
2. Since the last failed attempt at bail, the applicant has since filed his defence outline whose contents are plausible and concur with the critical aspects of his involvement that all he ever did was to try and stop his co-accused from acting in a manner that led to the death of the now deceased.

3. The trial was set to commence sometime in November 2021 but the matter was removed from the roll after the state failed to subpoena its witness.

It is the thrust of the applicant's submissions both on papers and orally that the above 3 developments negate any fears that the applicant is a flight risk and if anything the applicant is eager to have his day in court to show that he is not guilty of this offence or any he can legally be convicted on these charges.

The state has opposed this application arguing that the applicant has basically taken the same facts he relied on previously before KABASA J and placed them before this court. As far as the respondent is concerned the applicant was and still is a flight risk.

Section 116 (c) (ii) of the Criminal Procedure and Evidence Act provides as follows:

- “(ii) ... a further application in terms of section 117A 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 ...”
(my emphasis)

CHEDA J had the following to say in *Daniel Range vs The State* HB-127-04 when dealing with the issue of 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.”

In casu, what the applicant has put forward as changed circumstances or facts, was before KABASA J who also went on to comment on it in her judgment refusing the applicant bail.

In paragraph 4 on page 2 of the cyclostyled judgment HB-163-21 the court noted as follows:

“... Nomalanga Sibanda in her sworn statement mentions that one of the assailants was standing at a distance and imploring the others not to kill but just to take the property. This person was the applicant ...”

The applicant was arrested after 5 (five) months of the police searching for him without success. He was in fact evading the police as he had changed his sleeping arrangements in order to circumvent the nocturnal raids by the police at his father’s homestead.

Tellingly, on the night of his arrest the applicant fled, gun shots could not deter him from his flight for freedom. His resolve to flee was cut short by a fence that tripped him leading to his arrest.

Clearly, besides the passage of time, no fact or circumstance has changed in this matter at this stage. The deferment of the trial date cannot qualify as a fact amounting to changed circumstances to warrant admission to bail. The state has not said it is unable to try the applicant. Failure or omission to subpoena witnesses is not an unusual occurrence in a criminal court in this jurisdiction, unwelcome as it might be.

The fear of abscondment is therefore in my view still present and so is the possibility of a lengthy imprisonment term in the event of a conviction on the applicant.

The application is accordingly dismissed.

Ncube & Partners, applicant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners