

DOUGLAS TAPFUMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 11 December 2019 & 20 December 2019

Bail Appeal

TTG Musarurwa, for the appellant
E Mavuto, for the respondent

MUSITHU J: This is an appeal against the decision of the Magistrates Court which dismissed the appellant's application for bail pending trial based on changed circumstances. The appellant has had two appeals against refusal of bail by the magistrates' court dismissed by the High Court. An application for bail based on changed circumstances was struck off the roll by CHITAPI J on the basis of a procedural impropriety. The present appeal arises from the following brief factual background.

The appellant was charged with criminal abuse of duty as a public officer as defined in section 174(1) (a) of the Criminal Law Codification and Reform Act¹ (the Act). The State has since applied to include an alternative charge of fraud as defined in section 136 of the Act. On 14 November 2019, the appellant appeared before a trial magistrate for the commencement of his trial. The matter was postponed to 3 December 2019 primarily for two reasons, firstly because the appellant's legal practitioners had been served with the alternative charge a day before the

¹ [Chapter 9:23]

scheduled trial date, thus according them inadequate time to amend the appellant's defence outline; and secondly because the appellant's counsel of choice was not available.

After the postponement was granted, the appellant's counsel made an application for bail before the trial magistrate based on changed circumstances. The changed circumstances were firstly that although the postponement of the matter was at the appellant's instance, it had been occasioned by the State's failure to serve the alternative charge timeously. Reliance was placed on the judgment of CHITAPI J and his finding that there was no longer any sound reason to continue incarcerating the appellant. Secondly, it was submitted that the inclusion of the alternative charge of fraud which had previously not been considered in the bail appeal that was heard by MUZOFA J constituted a changed circumstance. It was argued that the alternative charge was a tacit admission by the State that its case was not as strong as earlier envisaged and there was the possibility that the appellant could now be convicted of fraud which under the circumstances was a lesser offence than the main charge of criminal abuse of duty.

The learned magistrate in the court *a quo* dismissed the application on the basis that the reasons cited by the appellant as constituting changed circumstances were not such as to persuade the court to grant bail. It is this decision of the learned magistrate which is the subject of the present appeal. The appellant submitted that the lower court misdirected itself in dismissing the application on the basis that there were no changed circumstances. The respondent argued that there were no changed circumstances.

Proviso (ii) to s 116 (c) of the Criminal Procedure and Evidence Act², which grounds an application of this nature provides as follows:

“Where an application in terms of section 117A is determined by a judge or magistrate, 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 an application is based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or have been discovered after that determination.”

² [Chapter 9:07]

In *S v Barros and Ors*³, HLATSHWAYO J (as he then was) commented as follows on the above section: “The meaning of the above provision is quite clear. Where an application for bail has been refused, a further application for bail may only be made if such application is based on changed circumstances, that is, 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. The reason for this rule is obvious. It is meant, among other things, to obviate the presentation of the same facts or variants thereof, over and over again, in a bid to obtain bail and helps in achieving finality in the matter.”

In *Daniel Rance v The State*⁴, CHEDA J remarked as follows at page 2 of the cyclostyled 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.”

This court is required to consider whether the appellant placed before the lower court such facts which constituted changed circumstances, and in respect of which the court committed a misdirection when it dismissed the appellant’s application which was based on the new facts. I have highlighted earlier in this judgment that the appellant advanced two factors as constituting changed circumstances. The first pertained to a postponement of the matter whose trial had failed to take off on 14 November 2019. The applicant’s counsel argued that the matter was postponed after the respondent failed to timeously serve the appellant’s legal practitioners with the new alternative charge. The alternative charge had been served a day before the hearing thus denying the appellant’s legal practitioners time to consult with the appellant, as well as amend the appellant’s defence outline. Reliance was also placed on the judgment by Chitapi J, in which although the learned judge struck off the bail application before him on the basis of a procedural

³ 2002 (2) ZLR 17 (H) at 20B-C

⁴ HB-127/04

flaw, he stated that there was no longer any sound reason to continue incarcerating the appellant. It was submitted on behalf of the appellant that the CHITAPI J judgment made both a legal and factual finding in favour of the appellant. It was therefore a misdirection for the learned magistrate to disregard the findings of a high court judge without concisely setting out her points of departure from that judgment. Doing so was a violation of the sacrosanct *stare decisis* rule.

In his judgment on the bail application by the appellant based on changed circumstances⁵, CHITAPI J took exception to the manner in which the respondent appeared to be prevaricating and dithering with regards to the commencement of the appellant's trial in the lower court. The learned judge had considered the failure of the trial to take off on 29 October 2019 at the instance of the State, and the further failure of the trial to commence on 4 November 2019, after the respondent's counsel sought to amend the charge by including an alternative charge of fraud. The appellant's counsel had come prepared for the commencement of the trial, but the matter had to be postponed yet again. The honorable judge then went on to make the following comments which were drawn to my attention by Advocate *Musarurwa* for the appellant⁶:

“It cannot accord with real and substantial justice for the court to continue to hold the applicant in custody where the State prevaricated on what charges to prefer. Mr *Mavuto* did not dispute that the amended charges were not available on the date of trial and neither were they available when this application was being argued. When I asked Mr *Mavuto* to advance compelling reasons for denial of bail in the light of the prosecution's failures and unpreparedness for trial, counsel said that he had nothing further to submit beyond the trial prosecutor's affidavit, a clear sign that he could not support the continued denial of bail”

It is the alleged failure by the learned magistrate to take into account these observations by CHITAPI J that appellant's counsel had serious misgivings with.

For the respondent it was argued that the trial could not take off on 28 October 2019, because the appellant argued that the documents served on him by the respondent were not

⁵ HH 740-19 on page 5 of the judgment.

⁶ Last paragraph of page 5 and first paragraph of 6 of the judgment, being pages 14 and 15 of the record.

certified. The matter was postponed to 4 November 2019 to allow the respondent to address the anomaly. On 4 November 2019 the respondent preferred an alternative charge of fraud. The trial failed to kick off as the appellant requested for more time to amend its defence outline in view of the alternative charge. The matter was postponed to 14 November for commencement of trial. On 14 November the matter failed to take off as the appellant's counsel of choice had travelled to South Africa on medical grounds. It was postponed to 3 December 2019 for trial by consent. Still on this day the matter did not take off as the appellant's counsel was appearing at the High Court bail court to argue the appellant's bail appeal following the dismissal of his application for bail based on changed circumstances. The trial has since been set for 14 January 2020.

Regarding the comments by the Honourable CHITAPI J which were highlighted on behalf of the appellant, Mr *Mavuto* for the respondent argued that the comments were made in the context of a matter that was not properly before the judge as he proceeded to strike it off the roll. Further, he argued that the comments had been made before the appellant made a fresh application for bail based on changed circumstances. His comments were therefore not binding on the lower court as circumstances had changed necessitating the dismissal of the fresh application by the lower court. The learned magistrate found as follows regarding the comments by CHITAPI J:

“Justice Chitapi’s views on the matter cannot be taken as changed circumstances warranting the release of the accused on bail. My view is that this court should be slow to grant the 2nd application of an accused for bail where the earlier application was decided on the merits and there is no substantial change of circumstances”⁷

Regarding delays in the commencement of the trial the learned magistrate made the following remarks:

“It is also necessary to point out that the trial failed to kick off mainly because of the non-availability of accused counsel of choice. It is true that the state had failed to serve the papers necessary for purposes of preparation for trial as in terms of the law. However, both parties conceded that the papers were ready well in time for trial as is required by the law. The State relied on mutual trust that counsel for the accused was making arrangements to

⁷ Paragraph 3 on page 3 of the ruling being page 21 of the record.

collect the papers to no avail. The State, therefore, cannot be held entirely to blame for the delay”

I see no reason to interfere with the learned magistrate’s factual findings in this regard. She found that delays in the commencement of the trial could not be entirely blamed on the respondent. The sentiments by CHITAPI J, limited as they were to the State’s unpreparedness for trial as at the time the bail application was argued before him, cannot in my view, be construed as binding on the lower court. The sentiments were expressed in the context of circumstances prevailing then. The circumstances had since changed at the time that a fresh application was made before the lower court. The State, as the lower court found, was not entirely to blame for the delays. There had been subsequent developments which the lower court was privy to.

The second factor submitted by Advocate *Musarurwa* was that the introduction of an alternative charge was a tacit admission by the respondent that the facts as they stand may not constitute the charge of criminal abuse of office. He further submitted that the appellant had always maintained that everything he did was sanctioned by his superiors. The alternative charge was therefore an admission of the appellant’s defence. He further submitted that the alternative charge was less serious considering the extent of prejudice as set out in the main charge. The alternative charge did not even state the extent of prejudice. Further, the charge was excipiable on the basis that the prejudice is alleged to have been suffered by the department of State residencies, when in fact if any prejudice occurred, it was to the Revenue Authority or the State. Mr Mavuto for the respondent argued that the respondent had the prerogative to introduce an alternative charge for as long as the accused had not yet pleaded to the charge. No prejudice was occasioned by the introduction of the alternative charge. He further submitted that the alternative charge was even more serious and that the extent of prejudice suffered was not the sole determinant of the sentence to be imposed in the event of a conviction. He argued that it was for the trial court to determine whether or not the alternative charge was defective when the trial commenced. He urged the court to dismiss the appeal since no misdirection had been established. The lower court had made the following conclusion on this factor:

“In the case of *Kereke v Maramwidze* HH 792/16, it was said that such an application is based on facts which were not placed before the judge or magistrate who determined the

previous application which has arisen or discovered after the determination of the application. Can it be said that the inclusion of the alternative charge could have influenced the decision in accused favour? My view is that the arguments advanced by counsel for the accused do not amount to the envisaged changed circumstances in section 116 of the CP&EAct. The inclusion of the alternative charge is not a fact which would tilt the balance in favour of the accused person. The filing of the alternative charge does not amount to exceptional circumstances even after the dismissal of the initial bail application because it does not work in his favour.”

I have no cause to find fault with the decision of the learned magistrate on the second factor. In my view the learned magistrate properly applied her mind to the two factors that were placed before her as reasons justifying the granting of bail based on changed circumstances. She found that these did not constitute changed circumstances for reasons that I have highlighted. I am inclined to agree with her decision that there were no changed circumstances.

In the circumstances the appeal is dismissed.

Venturas & Samkange, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners