

GIFT MOFFAT
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 13, 14, 21 & 27 April 2021 and 12 May 2021

Bail Pending Trial

C. Tafirei, for the applicant
D.H. Chesa, for the respondent

MUSITHU J:

INTRODUCTION

Applicant applies for bail pending trial based on changed circumstances. The application was made in terms of section 116(c)(ii) of the Criminal Procedure and Evidence Act.¹ He was arrested on one count of armed robbery together with his co-accused, one Brown Mubaiwa under CRB HREP 1062-63/21. He seeks his release on bail on conditions on the following conditions:

“IT IS HEREBY ORDERED THAT:

Applicant is hereby admitted to bail on the following conditions: -

1. Applicant be and is hereby ordered to deposit ZWL 10 000.00 with the Clerk of Court, Harare Magistrates Court.
2. The Applicant be and is hereby ordered to reside at number 3850 Warren Park D, Harare until the matter is finalized.
3. Applicant be and is hereby ordered to report once every Fridays at Warren Park police station between 0600 hours and 1800 hours until the matter is finalized.
4. Applicant be and is hereby ordered not to interfere with State witnesses and investigations until the matter is finalized.”

The application was opposed.

BACKGROUND

The allegations as set out in the Request for Remand, Form 242, were as follows.

“On 2 February 2021 at around 1900 hours, the two accused persons and their accomplices Anold **Kwarira**, Costa **Basiyawo** and Cain **Gambara** who are still at large hatched a plan to rob the complainant, Zhang **Guanghai**. In pursuance of their plan, the first accused person drove his getaway motor vehicle a Mazda Attenza silver in colour on registration numbers AFB 2234 in the

¹ [Chapter 9:07]

company of Anold Kwarira who is still at large and picked their accomplices in the city centre. They then drove and parked their getaway car motor vehicle at Chicken Inn, Pomona, Harare. Four of the accused persons including the second accused person disembarked and proceeded to the complainant's place of residence leaving accused person number one in the motor vehicle. Armed with two unidentified pistols, a pair of catapults, they arrived at the complainant's place of residence where they scald over the precast wall to gain entry into the premise. Whilst inside the premise, they manhandled the guard, complainant and five other Chinese nationals. They further tied the complainant with cables and assaulted him before robbing him of the property namely 600Grammes of Gold, an 3 I-Phone, one Huawei cellphone, one Gold chain, cash **US\$10 000.00** all valued at **US\$50 000.00**. The accused persons left the premise and boarded their getaway motor vehicle which was now parked at **CBZ** Pomona, Harare and drove away”.

Attached to the Form 242 was an affidavit by the investigating officer, Detective Sergeant David Chikungwa opposing bail. He opposed bail for the following reasons: the accused persons were facing a serious offence which attracted a lengthy custodial sentence. That was likely to induce them to flee. Investigations were still to be completed. Some of the property stolen during the robbery was yet to be recovered. The accused persons' accomplices were still at large and there was a likelihood that if bail was granted, they would regroup and commit similar offences. Further, the firearms that were used in the commission of the offence had not been recovered yet, and there was a likelihood that these could be used to commit similar offences.

The Form 242 summarized the evidence linking the accused persons to the commission of the offence as follows. The applicant led to the recovery of the Mazda Atteza used as the getaway car. The vehicle was also captured by a CCTV at Chicken Inn Pomona and CBZ Pomona, at the time the offence was committed. The applicant also led to the recovery of a red and black power bank which was stolen from the complainant during the robbery. It was positively identified by the complainant. A sum of US\$200.00 which the applicant allegedly benefited from the offence was also recovered from him. There were call records that placed both accused persons at or near the scene of the crime on the day the offence was committed.

The applicant approached this court on 11 February 2021, seeking his release on bail pending trial. His application was dismissed **MUNANGATI-MANONGWA J.** The learned judge considered the evidence linking the applicant to the offence as set out in the Form 242, and reasoned that:

“Whilst he seeks to say the recovered power bank belongs to his in-law the fact that he did indications points to participation. Taken in totality, the applicant's provision of transport to the other accused persons, his hasty retreat by car from the scene, recoveries made at his home on his indications, the state case is strong and there is a high possibility of a conviction. There exists an

incentive to abscond. It is applicant's evidence that his brother in law absconded to South Africa and the like hood of him absconding given the seriousness of the offence and the overwhelming evidence is highly probable".²

THE APPLICATION FOR BAIL ON CHANGED CIRCUMSTANCES

The application was filed on 8 April 2021. Applicant claims that there has been a change in circumstances since the dismissal of his first application. He summarized the changed circumstances as follows. It had been more than a month since his bail application had been dismissed, but the Police were yet to arrest the other co-accused or secure the CCTV footage. The matter was therefore not yet ripe for trial. Applicant also contended that the lapse of time in investigating the matter constituted a change in circumstances.

Further, applicant contended that his co-accused Brown Mubaiwa (Mubaiwa) was granted bail by this court on 1 April 2021 under B379/21. He submitted that it was not proper for him to be denied bail when his co-accused was granted bail yet their circumstances were similar. A perusal of the Form 242 showed that Mubaiwa was one of the people who allegedly entered the complainant's premises. There was no reason why he should be treated differently. He referred the court to the sentiments of BLACKIE J in *S v Amos & Another*³. Applicant submitted that his entitlement to bail at this stage was premised on two fundamental principles. These were his fundamental right to liberty and the perception that justice must be evenly distributed.

RESPONDENT'S RESPONSE

In response, the respondent averred that in dismissing the first application, this court considered: the seriousness of the offence; the strength of the prosecution case; the possibility of a lengthy custodial sentence in the event of a conviction; the connections applicant had with people outside the country. All these factors, when taken cumulatively, were likely to act as an inducement to abscond. The court also considered the complexity of the investigations which required some technical expertise. The present application was anchored on two grounds, namely: that investigations had not been completed as yet, and that his co-accused was admitted to bail.

² Page 1 of the bail judgment of *Gift Moffat v The State* B242/21 handed down on 11 March 2021.

³ 2001 (2) ZLR 225 where the court said:

"it is vital in the determination of justice that this does not appear to be any form of discrimination, particularly where the liberty of a person is involved. Where a number of persons is involved in the same offence apply for bail. It is not proper for one of them to be released on Bail and others kept in custody unless good and sufficient reason is shown for a distinction to be made."

Concerning the progress of investigations, the respondent stated that hardly a month had lapsed since the dismissal of the last application and the filing of the new application. Police were still on the case, as they were still to recover the firearms used and some of the property that was stolen during the robbery. Progress had been made in the extraction of the CCTV clips and having them converted into formats that were compatible with court video machines. Respondent further contended that it was not in the interests of justice to release the applicant on bail for the following reasons: firstly, the applicant was more connected to the offence than his co-accused. His vehicle was captured by the CCTV. Some recoveries were made from him, but nothing was recovered from Mubaiwa.

Secondly, applicant was related to Anold Kwarira (Kwarira), one of the suspects on the run. Applicant had told the court that his involvement in the offence was through Kwarira who happened to be his brother in law. Applicant claimed that he was arrested after he went to Pomona shops to pick up Kwarira and his friends who were stranded after their vehicle developed a mechanical fault. He did not know that Kwarira and his friends had committed an offence. Applicant told the court that Kwarira was ordinarily resident in South Africa, but would stay with the applicant when he was in Zimbabwe. Kwarira was suspected to have skipped the border into South Africa. According to the respondent, if applicant was admitted to bail, he was likely to turn to Kwarira for refuge and become a fugitive from justice. No serious or reliable external connections were established with regards to Mubaiwa. Their circumstances were therefore distinguishable. Nothing had changed in respect of the applicant.

THE EVIDENCE OF THE INVESTIGATING OFFICER

The parties appeared before me for arguments on 15 April 2021. I noted that there was need for the respondent to avail the investigating officer, Detective Sergeant Chikungwa, to explain his attitude to the applicant's application considering that Mubaiwa had since been granted bail. The investigating officer was only availed on 27 April 2021 as he was on leave. His evidence was as follows. All the recoveries made were through the applicant. It was the applicant who implicated Mubaiwa leading to his arrest. Nothing was recovered from Mubaiwa.

The investigating officer told the court that the applicant was arrested through a tracking device that was in a cellphone stolen from the complainant during the robbery. The tracker was used to locate the applicant's residence. The police proceeded to the applicant's residence using

the tracker and arrested the applicant. They also found the vehicle used in the robbery at the same place. The investigating officer told the court that they had failed to obtain the CCTV footage because of some technical glitches. That evidence was not going to be available at the trial. That left call logs and recoveries made from the applicant as the only evidence linking the applicant to the offence.

Under cross examination, the investigating officer denied that the power bank recovered from the applicant belonged to Kwarira, insisting that it was recovered from applicant's bedroom. He also insisted that the US\$200.00 recovered from the applicant was part of the proceeds of the robbery. He further contended that no stringent reporting conditions would allay his fears of abscondment by applicant.

The investigating officer stated that he was not aware that Mubaiwa had been admitted to bail, and neither could he comment on the circumstances under which he was granted bail. He told the court that investigations had been concluded and the matter was ready for trial.

THE SUBMISSIONS

Mr *Tafirei* for the applicant submitted that the unavailability of the CCTV footage effectively weakened the State's case. There was no evidence that the applicant sped off from the scene of the crime as had been alleged earlier by the respondent when opposing the initial bail application. He further submitted that the applicant had properly explained his possession of the power bank. Although he was tracked by a mobile tracker inserted in a cell phone, that cell phone was not recovered from him. The money allegedly recovered from him was part of his personal savings. It could not be linked to the robbery because it was not serialized. The respective denominations of the amount stolen were also unknown.

Mr *Tafirei* further submitted that it was illogical that the applicant would put his life at risk just to steal a power bank and US\$200.00, as alleged by the investigating officer. Further, the fact that applicant did not try to hide his vehicle which was allegedly used in the robbery, let alone tamper with in any way showed that he was only a victim of a criminal venture that he unknowingly participated in. Counsel also submitted that nothing was placed before the court to show that the applicant was a flight risk. He never attempted to flee.

For the respondent, Mr *Chesa* submitted that the applicant was the principal actor in the whole criminal enterprise. He was found in possession of part of the stolen property, and his car

was used to flee from the scene of the crime. He had connections outside the country in the form of Kwarira who was now a fugitive from justice. Kwarira was ordinarily resident in South Africa. Mr *Chesa* by and large relied on the respondent's response and the evidence of the investigating officer.

At the conclusion of the oral submissions I asked both counsel if they had checked whether Mubaiwa was complying with his bail conditions following his release on bail. They had not verified. Counsel agreed that the court could establish the position through the Zimbabwe Republic Police (ZRP) Member in Charge at the High Court. On 27 April 2021, I instructed the registrar to request the Member in Charge to verify with the Officer in Charge, ZRP Guruve if Mubaiwa was reporting at Guruve Police Station as directed by the bail order. On 28 April 2021, the Member in Charge advised as follows:

“RE; REQUEST ON BAIL REPORTING CONDITIONS IN RESPECT OF BROWN MUBAIWA AT GURUVE POLICE STATION.”

1. I liaised with the Officer-in-Charge ZRP Guruve, Chief Inspector Benett contactable on 0774 415 143 who managed to check for me. It was established that his bail Order is at station but however BROWN MUBAIWA has not yet reported at the station with his bail receipts hence his Bail Reporting File has not yet opened.”

Further enquiries were made with the Zimbabwe Prisons and Correctional Services officials at the High Court, and they confirmed that Mubaiwa was released from custody following his admission to bail.

THE LAW

Proviso (ii) to section 116 (c) of the Criminal Procedure and Evidence Act⁴ (the Act), 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.”

In *S v Barros and Ors*⁵, HLATSHWAYO J (as he then was) said of the proviso:

“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

⁴ [Chapter 9:07]

⁵ 2002 (2) ZLR 17 (H) at 20B-C

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*⁶, CHEDA J remarked:

“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.”

THE ANALYSIS

For the application to succeed, the applicant must demonstrate that there exist facts which were not placed before the judge who determined the previous application, which arose or were discovered after that determination. In dismissing the applicant’s first application, MUNANGATI-MANONGWA J considered: the existence of evidence in the form of CCTV footage showing the applicant’s motor vehicle being hastily driven away from Chicken Inn Pomona; the recovery of a power bank and US\$200.00 from the applicant; call records showing that applicant was close to the scene of the crime; the fact that applicant’s brother in law had absconded to South Africa; the seriousness of the offence and the overwhelming evidence that would motivate the applicant to flee once he was granted bail. In the present application, applicant contends that the following factors constitute a change in circumstances: the lapse of time since the dismissal of his first bail application; that the police had failed to arrest the other co-accused persons or secure the CCTV footage. That the matter was therefore not yet ripe for trial. The court was also urged to consider that Mubaiwa was granted bail by this court on 1 April 2021.

This court is not satisfied that there has been a material change in applicant’s circumstances to justify his admission to bail. Although the investigating officer told the court that the CCTV footage will not be produced at the trial, there still remains evidence linking the applicant to the offence. In paragraph 4 of his first bail application, the applicant all but confirmed that Kwarira was involved in the robbery. He is the one who informed the court that Kwarira is ordinarily resident in South Africa. He came to Zimbabwe during the festive period and was staying at the applicant’s place when the offence was committed. The applicant also told the court that the power bank stolen from the complainant, but found in his possession belonged to Kwarira. These were

⁶ HB-127/04 at page 2 of the judgment

some of the factors that informed the decision of the court in dismissing the first bail application. The failure by the respondent to produce the alleged call records and the CCTV footage during the bail hearing cannot in my view be construed as constituting a change in applicant's circumstances. That evidence is crucial at the trial and not at the bail hearing. The applicant was placed on remand on the basis of these allegations and he did not challenge them at that stage.

The lapse of time also does not help the applicant's cause. The investigating officer told the court that investigations were completed and the matter is now ripe for trial. On his part, the investigating officer maintained that it was not in the interests of justice that the applicant be released on bail even though Mubaiwa had since been admitted to bail by this court. Their circumstances were different. It was the applicant who assisted the police recover the property that was stolen during the robbery. It was the applicant who caused Mubaiwa's arrest. Nothing was recovered from Mubaiwa. Brown Mubaiwa had connections outside the country. For the applicant it is different. His brother in law, who was living under his roof was involved in the robbery. He resides in South Africa. According to the respondent, Kwarira is likely to have skipped the border into South Africa.

This court is persuaded by Mr *Chesa's* submission that the likelihood of the applicant absconding to South Africa once granted bail is not a remote possibility. The seriousness of the offence, the evidence linking him to the offence and the likelihood of a lengthy prison term in the event of a conviction are factors likely to induce him to abscond and seek refuge from Kwarira in South Africa. The applicant's circumstances are clearly distinguishable from those of Mubaiwa. The fact that Mubaiwa, whose level of participation in the commission of the offence was perhaps inconsiderable as compared to the applicant, has violated his bail conditions is a cause for concern. Granted, the applicant should not be made to pay for the turpitudes of his co-accused, but it just goes to show that the motivation to abscond is not farfetched.

The alleged weakness in the State's case as a result of the unavailability of the CCTV footage; the fact that there is nothing to show that the \$US200.00 recovered from the applicant was part of the money stolen from the complainant and the explanation for the possession of the power bank, do not amount to a change in circumstances in this court's view. These facts were known to the court when it considered the first bail application.

In the final analysis, the court is not satisfied that there has been a change in circumstances justifying the admission of the applicant to bail at this stage.

DISPOSITION

Accordingly, it is ordered that:

The application for bail pending trial based on changed circumstances is hereby dismissed.

Tafirei and Company, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners