

TICHAONA SODA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 3 September 2020 and 21 September 2021

Bail pending trial based on changed circumstances

D Muunganirwa, for applicant
A Masamha, for the respondent

CHINAMORA J: On 9 October 2020, I granted the applicant's application for bail based on changed circumstances. Not satisfied with my order, the State requested that I supply my reasons for granting bail. I now provide the reasons.

The background to this matter is that the applicant was arrested on 26 July 2009 on allegations of murder and armed robbery together with three accomplices. (See CRB No. 14/16). One of the co-accused, Tendai Jongwe, was granted bail by this Court under B 1227/16. The applicant was indicted for trial before this Court on 25 January 2012. The trial matter commenced 25 January 2017 before TSANGA J, but before it had progressed to any notable degree, one of the assessors passed away. In consequence, the trial was ordered to start *de novo*. The matter was then re-set down for trial on 14 May 2020, but was postponed to 27 July 2020. On that date, a new trial date was given as 28 September 2020.

The State argued that the applicant should have applied for bail before the judge seized with the trial. This is an argument which is being made far too often in the bail court once a date for trial has been set. I have not found any law which precludes a judge or court from hearing a matter which has come before him/her in bail court on the simple basis that it has been set down for trial. Indeed, Mr *Masamha* for the State conceded that no such law existed. I therefore found no merit in that submission. Having decided that nothing precludes me from hearing the application in *casu*, I now have to determine whether a change in circumstances exists to justify this court in considering the applicant's release on bail.

This application has been brought in terms of section 116 (c) (ii) of the Criminal Procedure and Evidence Act (Chapter 9:07). The section provides as follows:

“...where an application in terms of section 117 A 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, 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...”

The import of the above provision was explained in *S v Barros and Ors* 2002 (2) ZLR 17 (H) in the following terms:

“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.”

As the matter was postponed once again to a later date, there seemed no basis for not considering the issue of bail on the basis of changed circumstances. I note that the change in dates was not at the instance of the applicant, but the State. In my view, the bail application before me is indeed based on changed circumstances if the chronology of events is carefully examined. The trial started on 25 January 2017 but could not continue after the death of one of the assessors, as it was ordered to start *de novo*. It is common cause that the trial was re-set down for continuation on 14 May 2020. It could not take off and was postponed to 27 July 2020, when it was further postponed to 28 September 2020. The failure of the trial to take off on all the aforesaid occasions was not through any fault or instigation by the applicant. The applicant was on those days prepared for the commencement of the trial.

I am in agreement with the sentiments expressed by CHITAPI J in *Hopewell Chin'ono v The State* HH 567-20, that once the applicant has established changed circumstances, the judicial officer can reconsider whether bail should still be granted or continue to be denied given the altered scenario or new facts. As I was satisfied that new facts had arisen constituting a change in circumstances, I was at large to consider the question of bail. In submissions, Counsel for the State did not submit that there were any compelling reasons militating against grant of bail to the applicant. Further, I took into account that the applicant's co-accused had been granted bail by this court,

In the result, after hearing argument from the State and the defence, I granted the following an order admitting the applicant to bail on the following conditions:

1. That he deposits \$1000-00 with the Registrar of the High Court.
2. That he resides at 243 Chizunga Road, Epworth, Harare, until this matter is finalized.
3. That he reports at Domboramwari Police Station twice a week on Mondays and Fridays between 6.00 am and 6.00 pm.
4. That he does not interfere with witnesses.

Sinyoro & Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners