

HB 17/19
HCB 26/19
X REF HCB 01/19;
CRB ZVI 1445/18

ISAAC KAWUNDURA

And

MOSES KARUMBIDZA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 6 & 14 FEBRUARY 2019

Bail Application – Changed Circumstances

L. Mcijo for the applicants

K. Jaravaza for the respondent

MAKONESE J: This is an application for bail pending trial. The applicants allege that there are changed circumstances, which if properly considered, would entitle them to bail pending trial. On the 10th February 2019 an application for bail pending trial was brought before me by the applicants and their co-accused. I declined the application and gave my reasons in judgment HB-04-19. I am informed that an appeal has been lodged to the Supreme Court against that judgment.

An application for bail pending trial on changed circumstances is governed by the provisions of section 116 (c) (11) which provides that:

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“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 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 ...”

Before I deal with the merits of this application it is necessary to set out the circumstances surrounding this offence. The applicants face a charge of armed robbery as defined in section 126 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). The state alleges that the applicants in the company of other accomplices connived to rob Camlark Investments (Pvt) Ltd, a gold mine situated on the outskirts of Zvishavane town. It is alleged that the applicants acquired two motor vehicles a Toyota Hilux pick-up truck and a Toyota Fun Cargo bearing registration number ADL 1349. The applicants drove to Mimosa turn-off along the Zvishavane – Bulawayo highway where they parked their motor vehicles. The applicants then proceeded to Camlark Investments. They were armed with a rifles and pistols. On approaching the mine complex they confronted two security guards and held them captive. The applicants then forced the customers who had gone to the mine to mill their ore to surrender cash and other valuables. Applicants then force marched the security guards to the Chinese personnel’s places of residence where they forced entry by cutting the padlock to the gate using a bolt cutter. They fired two shots from a rifle and pistol killing a dog at the premises. One of the complainants Zhang Ren Lon heard the gun shots and got out of the house to ascertain what was happening. Zhang was immediately manhandled by the applicants. Other Chinese nationals were forced into a room before they were

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searched and stripped of valuables including mobile phones and cash. The applicants and their associates then proceeded to the company's offices where they broke window panes before gaining entry into the premises. The applicants, it is alleged, then stole an Isuzu King Cab vehicle which was later retrieved through indications made by the applicants. A total of US\$8 820, \$6 800 (bond), and 42 155,00 Chinese Yaun was stolen during the course of the robbery. A number of cell phones were stolen from the complainants. Some of them were recovered from the applicants during the course of investigations.

As indicated, I declined bail in respect of all the applicants as I considered that they were a flight risk. The applicants are linked to these offences through the recovery of the stolen motor vehicle and mobile phones. Two of the suspects Thulani Nkala and Taurai Matarirano have been positively identified by witnesses. Thulani Nkala implicated his co-accused and Taurai Matarirano has also been linked to some of the outstanding cases of similar nature.

This fresh application for bail is premised on the following grounds:-

- (a) The police have now completed their investigations.
- (b) The police conducted an identification parade and the applicants in this present application were not identified by any of the complainants.
- (c) The applicants' former legal practitioner failed to address some crucial issues, particularly that nothing was recovered from the two applicants in this matter.

I hold the view that, the fact that the police have completed investigations on its own does not constitute changed circumstances warranting the granting of bail pending trial. By its very nature robbery is a violent crime which is invariably carefully planned and executed. While investigations may be complete this court cannot ignore the fact that the applicants were implicated by their co-accused. Whether or not the confessions made by Thulani Nkala or any other accused person in this matter are credible and admissible are a matter for the trial magistrate. This court, sitting as a bail court, may not delve into the issues of evidence. In the end, to secure a conviction, the state must prove its case beyond reasonable doubt. In the same breath, issues of the identification parade, are issues for trial. There is evidence placed before this court that Taurai Matarirano was positively identified by a state witness as one of the persons who participated in the armed robbery. In my view the issue of the identification parade is not a changed circumstance. This simply confirms that one of the co-accused played a role in the robbery. Beyond that the trial court, would have to determine whether the state can convict the accused persons on the evidence adduced in court. It was argued by the applicants' legal practitioner *Mr Mcijo* that the fact that a call register with the police indicates that there was telephonic communication between Thulani Nkala and the applicants is of no relevance as it does not show that the two applicants in the present application participated in the robbery. At this stage of the bail application this court may not go into that evidence not only because it is not before the court, but those are issues for trial. The call register simply implies that the applicants were in communication with persons whose role in the robbery is beyond dispute. One of those suspects made indications that led to the recovery

of the Isuzu King Cab truck. One of the suspects was found in possession of the stolen cell phones. A strong *prima facie* case has been established and a *nexus* has been proved by these telephonic communications. Their probative value is a matter for the trial court.

Lastly, a curious issue was raised by *Mr Mcijo*, in this application. He contended that the court must consider it as a changed circumstance, the fact that the applicant's former legal practitioner failed to address some crucial issues in the initial bail application. In terms of section 50 (1) (b) (1) of the Constitution of Zimbabwe (Amend No. 20) 2013, every person who is arrested is entitled to consult in private with a legal practitioner of their own choice. The right to legal representation is closely linked to the right to access legal advice. Any arrested person who elects a lawyer of his choice gives a mandate to such legal representative to act on behalf of the arrested person. It cannot be a changed circumstance for the purpose of a bail application, that the legal practitioner of one's choice did not bring to the attention of the court an issue which might or could be deemed relevant to an issue before the court. In this application in support of the application for bail on changed circumstances, the applicants aver in that regard as follows;

"... the applicant's former lawyer could not adequately address because he was conflicted as he also represented Taurai Matarirano. From the foregoing, it is submitted that there are changed circumstances warranting the matter for bail being reconsidered are there no compelling reasons anymore warranting the applicant's continued incarceration."

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I did not find any apparent conflict of interest as alleged by the applicants. As I have stated before, the issue of the role of applicants, if any, in this matter, is a matter for the trial court. This court in considering bail, balances the interests of the individual applicant and that of the due administration of justice. The applicants have not raised any issues that could possibly amount to changed circumstances. The approach in such applications has been laid down in a number of decided cases. I shall only mention a few; see *Marisa v The State* HH-831-16; *Matukuri v The State* HH-779-16 and *Mazarira v The State* HB-301-17.

I am satisfied, that the application for bail on changed circumstances is not merited. It is not in the interests of justice to admit the applicants to bail at this stage.

Consequently, the application for bail pending trial is dismissed.

Liberty Mciyo & Associates, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners