

BRIAN CHIKANYA
versus
THE STATE

HIGH COURT OF ZIMBAWE
MATANDA-MOYO J
HARARE, 17 April 2015

Application for Bail Pending Appeal

M Jonhasi, for the applicant
A Muzive, for the respondent

MATANDA-MOYO J: This is an application for bail due to changed circumstances. The applicant was arraigned before the court on charges of murder it being alleged that, at Ushangani Village, Chief Musana, Bindura, the applicant internationally caused the death of one Lancelot Chikanya, through assault indiscriminately over the body. The said Lancelot Chikanya died due to severe injuries occasioned by the assault.

The applicant applied for bail pending trial in February 2015 under B 82/15. Such application failed for the following reasons;

- 1) That the applicant killed his own brother and releasing him on bail was dangerous. The court remanded him in custody for his own safety;
- 2) That applicant was facing a very serious offence where evidence against him was overwhelming;
- 3) Applicant was likely to abscond as it would be difficult for him to stay with his own family. His family was no longer comfortable staying with applicant; and
- 4) The witnesses in the trial are all applicant's relatives and if released on bail applicant was likely to interfere with evidence.

The applicant has now approached this court seeking bail pending trial claiming the existence of changed circumstances. The applicant submitted an affidavit by one John Zigwatire, applicant's brother-in-law who is willing to stay with applicant at his home

Number 28819 Unit L Extension, Seke, Chitungwiza. The said Zigwature is offering applicant accommodation until his matter is finalised.

The applicant submitted that the fact that he would no longer be staying in Ushongani Village is a valid changed circumstance upon which this court should grant him bail. He submitted that the change in place of residence also cures the State's fears of abscondment and interference with state witnesses, including applicant's own safety. He would be away from his family and place of the alleged murder.

The State opposed the application on the basis that the changed circumstances as provided by the applicant do not address one of the reasons for the refusal of bail by this court. This court also denied applicant bail on the basis of the seriousness of the offence coupled with strong evidence linking the applicant to the offence. Applicant did not allege that the state case has been weakened since his last appearance. The State also submitted that the applicant relies upon the affidavit of his sister's husband Zigwature who did not state that he does not reside with applicant's sister who is a potential witness in the matter. The risk of interference has not been cured.

The State also submitted that the accused ran away from the police at the time of arrest and that the police had information that the applicant intended to flee to Mozambique. I shall not place much reliance on the above submissions without substantiation by the State. They represent bald assertions with no proof at all.

Section 116 (1) Proviso (ii) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides as follows:

- “1. Where an application in terms of s 117 A is determined by a Judge or Magistrate a further application in terms of s 117 A may only be made --- if such application is based on facts which were not placed before the Judge --- who determined the previous application and which have arisen or been discovered after the determination.”

The applicant bears the onus to produce evidence which satisfies me that exceptional circumstances exist which in the interest of justice permit his release. Even if I accept that there are new circumstances or changed circumstances, I am still obliged to consider all the facts before me, new and old and on that basis decide whether applicant is a good candidate for bail. See *S v Petersen* 2008 (2) SACR 355 (C).

The applicant was denied bail on the basis that he is facing a serious offence which if convicted attracts capital punishment. That, coupled with the strength of the state case might induce applicant to abscond if granted bail. The applicant has not attempted to address me on

that point save to say he is coming up with a new defence of self defence. The issue of “seriousness of the offence coupled with strength of the state case” has not been adequately dealt with by the applicant and still remains. I am of the opinion that owing to the strength of the state case applicant could well be persuaded to act otherwise and attempt to evade trial should he be granted bail. Furthermore this information was available to the Judge who refused bail at the previous bail hearing.

Whilst it is true that the provision of alternative address by applicant’s brother-in-law represents changed circumstances, such circumstances must be considered in light of other relevant factors for bail. The provision of alternative accommodation, away from the scene of the crime is indeed a valid changed circumstance. However that alone is no compelling reason to disregard the other factors above.

For the above foregoing reasons I am satisfied that the changed circumstances do not warrant the granting of bail to applicant. Accordingly the application for bail fails and is hereby dismissed.

Tadiwa & Associates, applicant’s legal practitioners
The Prosecutor General’s Office, respondent’s legal practitioners