GEORGE FRANCIS LOVELL
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 20 March and 15 May 2015

Bail Application

T. Mpofu, for the applicant
A. Masamha, for the respondent

MUSAKWA J: The applicant is undergoing trial on a charge of murder. The trial was adjourned in September 2014. The applicant now seeks to be admitted on bail.

This being a second application, at the hearing the court was not favoured with the record of the previous proceedings. Despite several directives, the applicant's legal practitioners did not avail the record until 6 May 2015.

In his affidavit the applicant avers that prior to the coming into operation of the present constitution an applicant seeking bail was required to show exceptional circumstances entitling him to bail. This is in terms of s 117 (6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The applicant further avers that with the advent of the current constitution, the requirement to demonstrate exceptional circumstances has now fallen away. Reference is made to s 50 of the Constitution.

The applicant adopts his defence outline and the challenge to the admissibility of the warned and cautioned statement that the state is seeking to rely on as part of its evidence. It may be pointed out that at the time the proceedings were adjourned a separate trial on the admissibility of the warned and cautioned statement was being conducted. Two Police officers are yet to testify.

The applicant's defence is a denial of the allegations. He believes that the deceased was killed by persons with whom a deal he was conducting went sour. He contends that

Police have investigated this aspect and established the truth but are not forthcoming with their findings. That is why he claims he was tortured to induce a confession.

The facts of the matter are that the applicant and the deceased were known to each other. Following the deceased's disappearance his body was subsequently found stashed in the trunk of his motor vehicle. On the day he disappeared the applicant was alleged to have been seen driving a vehicle similar to that of the deceased. The description of the vehicle was based on its model and colour.

So far no evidence has been led regarding the fingerprints that were uplifted from the deceased's vehicle. There is no reference to any forensic evidence relating to the vehicle. The same applies to a crow bar that the applicant is said to have pointed as the murder weapon.

The applicant contends that he has no motive to abscond. He is keen to clear his name and resume his business. This will also enable him to adequately prepare his defence. He intends to consult specialists in light of the findings of the pathologist who conducted the deceased's autopsy.

In his submissions Mr *Mpofu* pointed out that the averments by the applicant have not been specifically rebutted by the state. He thus submitted that no compelling reasons were advanced why the applicant should be denied bail. The threshold that was required to be met by the state was not reached.

It turns out that upon his arrest the applicant sought bail and it was denied. A subsequent application was withdrawn. Mr *Mpofu* contended that the constitutional considerations for bail were not flagged in the previous hearing. He considers that as a changed circumstance. In any event, he submitted that the law regarding changed circumstances needs to be aligned with the constitution.

Mr *Mpofu* submitted that the previous application was determined before any evidence had been heard. Now that the trial has commenced, he contended that certain concessions have been made and that constitutes changed circumstances. He further submitted that there have been delays in the conclusion of the trial, some of which are attributable to the defence. There is the possibility of a pathologist who is not in the country being called to testify. The indications were that the trial may resume during the second term of 2015. Account must be taken when trial adjourned.

Mr *Masamha* submitted that the situation prevailing prior to trial has to be revisited. The matter has progressed and it is certain that the trial will be finalised. The applicant absconded for nine months and cannot be trusted with his liberty. His reasons for leaving the

country were fear of a hit man. There is no indication whether that fear has dissipated. The applicant handed himself to Police because the net was closing in on him. He was in contact with Police when he was out of the country. He should have disclosed the issue of the hit man to Police.

Regarding medical evidence Mr *Masamha* submitted that problems have been encountered in securing the pathologist who relocated to Cuba. He intends to call another pathologist. On this aspect he submitted that whether or not the defence objects will be determined by the trial court. Mr *Masamha* was of the firm view that no amount of security will secure the presence of the applicant. Police have not accessed the applicant's passport. The applicant claims he lost the passport and it is not clear how he travelled. He might use the same illegal means of travel. Finally, he submitted that being a man of means, the applicant may be able to sustain himself outside the court's jurisdiction.

Section 50 (1) (d) of the constitution states that

"Any person who is arrested—

(a) must be informed at the time of arrest of the reason for the arrest;
(b) must be permitted, without delay—

(i) at the expense of the State, to contact their spouse or partner, or a relative or legal practitioner, or anyone else of their choice; and
(ii) at their own expense, to consult in private with a legal practitioner and a medical practitioner of their choice; and must be informed of this right promptly;

(c) must be treated humanely and with respect for their inherent dignity;

(d) **must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention**; and

(e) must be permitted to challenge the lawfulness of the arrest in person before a court and must be released promptly if the arrest is unlawful."

On the other hand s 50 (6) provides that-

"Any person who is detained pending trial for an alleged offence and is not tried within a reasonable time must be released from detention, either unconditionally or on reasonable conditions to ensure that after being released they—

(*a*) attend trial;
(*b*) do not interfere with the evidence to be given at the trial; and
(*c*) do not commit any other offence before the trial begins."

The present application is premised on changed circumstances. Therefore, s 50 of the Constitution is not applicable. Where bail has been denied a further application can only be

made in terms of s 116 (c) (ii) of the Criminal Procedure and Evidence Act whose proviso states that-

> "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;."

In reapplying for bail, an applicant must lay before the court new facts which have arisen or been discovered subsequent to the previous determination. The new facts have to be viewed with other relevant factors, both adverse and favourable in determining whether they significantly reverse the reasons for which bail was denied. In this respect see *S* v *Aitken* 1992 (2) ZLR 463 (SC). In that case the passage of time and the failure in the strengthening of the state case were held to be new factors entitling the appellant to reapply for bail.

In HH 430-13 Dube J denied the applicant bail on the basis that he was a flight risk. The court took into account the applicant's movements between Zimbabwe, Mozambique and Zambia. There was also an allegation that the applicant called a witness whilst he was in Zambia and informed him that he was in Burma where he was participating in jihad. Apart from the likelihood of abscondment the court was also of the view that the applicant might interfere with investigations. This was premised on the lack of clarity regarding the circumstances under which the applicant lost his passport.

Whilst Mr *Masamha* submitted that it is not clear how the applicant returned to Zimbabwe, documents annexed to the withdrawn application in B 390/13 show that he was issued with a temporary travel document by the Zimbabwean Consulate in South Africa on 4 April 2013. He then entered the country through Beitbridge on 6 April 2013.

In my view, the present application falls for determination on two issues. These are the passage of time and whether the case against the applicant has firmed. Taking into account that trial was adjourned in September 2014 there is no doubt that the passage of time of six months constitutes a new development warranting a reconsideration of whether the applicant is entitled to bail. The passage of time has to be considered in light of the trial that has commenced but adjourned.

The trial of this matter has not progressed expeditiously. It was initially set down for 5 May 2014. However, the applicant through his legal practitioners sought a postponement. This was on account of their quest to access the record of remand proceedings from the

Magistrates Court. This is despite the fact that the applicant had been committed for trial on 27 February 2014. Nonetheless the court indulged the defence in order to enable the applicant to fully prepare his defence.

The matter was then deferred to 12 May 2014. For that week the court only sat for two days, that is on the 12th and the 14th. Apparently, Mr Mpofu was engaged in another matter and he juggled between the two cases. I had occasion to point out that such a scenario had adverse effects on the flow of the trial. This is especially so when it is known that criminal matters before the High Court usually set down well in advance.

Trial next resumed on 10 June 2014, having initially been slated for the 9th. Unfortunately there was a power outage on the 9th and the court never sat as a result. Having continued on the 11th the matter was deferred to 17 June. Mr Mpofu was not available. The same applied on 9 July 2014. Then on 8 September 2014 the state sought a postponement on account of the absence of its witnesses. Trial then resumed on 9 September and continued up to 12 September. It is pertinent to note that on the 12th the court sat later than the normal time and the session was brief. It turned out that the remainder of state witnesses were not available. Despite directing the defence counsel and state counsel to attend in chambers on the 15th to map the way forward, none of them turned up.

The state is *dominus litis* in criminal proceedings. However, to re-set the matter down for continuation without liaising with the defence will be futile. It is obvious that defence counsel might turn out to have other commitments. So far the preponderance of blame relating to the slow progress of the trial should be shouldered by the defence.

Coming to the evidence some aspects of the state case are circumstantial. I have previously remarked that no forensic evidence has been led on whether the applicant had any contact with the recovered motor vehicle. So far there does not appear to be evidence that the killing was perpetrated in furtherance of or to suppress robbery. This is because anomalies arose on the evidence regarding the deceased's personal effects. It emerged that he had his wrist watch. At the time he disappeared he had borrowed US$20 000-00 from his brother. Chances are that he placed the money in a satchel that he carried. The satchel was identified by way of a photograph that was produced as exh 2. No one has explained as to what became of the real exhibit. The plain observation is that when the scene was attended the deceased's satchel was recovered by Police Officers but no one has accounted for it.

Then there was the unsolicited donation of a desk to one of the state witnesses by the applicant. This was the same witness the applicant visited whilst driving a motor vehicle that

was similar to that of the deceased. The witness found the desk on the lawn. It had broken drawers and a torn inlay. He took it to Mbare for repairs.

The same witness told the court that when the applicant visited him they had last met three months previously. When the witness arrived home with a friend they parked by the gate and started chatting. The applicant arrived on foot. When he invited him to the house the applicant said he was attending to something and proceeded on his mission. The witness found a Toyota Corolla that was parked in the driveway. He established that it had been left by the applicant as he had run out of fuel.

Later the applicant returned and asked for some money. The witness did not have any. The applicant later drove away, indicating that someone had promised him $50-00. He did not see the vehicle being refuelled. Later the witness received a call from the applicant who was in Zambia. On another occasion the applicant called from Mozambique.

At the material time the witness knew that the applicant was importing motor vehicles. Of the motor vehicles that the applicant drove, he knew of a Pajero and a Mercedes Benz. He was not sure whether he had previously seen the Toyota Corolla. He described the Toyota Corolla that he saw the applicant driving as one hundred per cent similar to the one depicted in exhibit 2.

During the course of investigations Police Officers checked on the call history of the deceased's Econet line. They did not do so in respect of the Net One line which they were not apparently aware of. They followed up on people who had last communicated with the deceased. One of them was the applicant whom they did not find at his home. They established through his wife that he had left home after a minor tiff.

The applicant called one of the officers from Zambia. He claimed that he had fled Zimbabwe because of a gold deal that had gone sour. Thus he claimed that his life was in danger. He would not be returning home soon. Then the deceased's vehicle was found at the corner of Mazowe Street and Herbert Chitepo Avenue.

It would not suffice to comment on the strength of the entire state case. This is largely because the trial within a trial has not been concluded. The conclusion of the trial within a trial may have a strong bearing on whether the case for the state is substantially strong. Obviously, if an alleged confession is held to be admissible it has a strong bearing on the strength of the state case. The cororally applies if the statement is held to be inadmissible.

Issues of the constitutionality of certain provisions of the Criminal Procedure and Evidence Act do not constitute new facts that have arisen since the previous bail application. The argument should have been advanced at the previous hearing. Therefore the passage of time is not a new fact that works in the applicant's favour. This is because the defence has not availed itself for the expeditious disposal of the matter.

Therefore the application is hereby dismissed.

Hamunakwadi, Nyandoro & Nyambuya, applicant's legal practitioners
Prosecutor-General's Office, respondent's legal practitioners