TICHAONA KATSAMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 16 & 17 July 2015

Bail Application

Applicant in person
AMasamha, for the State

ZHOU J: This is an application for bail pending trial. The applicant is facing a charge of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged that on 22 November 2014 along Upper East Road, Avondale, Harare, the applicant in the company of two accomplices hatched a plan to rob commuters in and around Harare of their valuables whilst being armed with a firearm and a knife. The applicant and his accomplices allegedly drove in a minibus to a commuter omnibus rank known as Coppa Cabbana, and picked the complainant and other commuters on the guise that they were taking them to Marlborough East. On the way one of the accomplices of the applicant who was driving the minibus diverted the route and turned into Upper East Road towards Mount Pleasant. Another of the accomplices produced a knife and ordered all the passengers to keep quiet. The applicant is alleged to have then produced a pistol which he pointed at the passengers and demanded their bags. The complainant is alleged to have lost her handbag which contained cash in the sum of US$440 and a Samsung Galaxy S4 cellular phone. After stealing the property the applicant and his accomplices allegedly pushed the complainant out of the moving motor vehicle before they drove off at high speed along Pendennis Road in Mount Pleasant.

This is not the first time that the applicant is making an application to be released on bail pending trial. The first application which he made was dismissed by this court (per MAWADZE J) on 23 April, 2015. On 15 June 2015 the applicant instituted the instant

application. The application is opposed by the respondent on the basis that it discloses no changed circumstances upon which it may be entertained.

The applicant states that since 4 May 2015 his matter has been remanded six times at the Magistrates Court. At the last date the trial was due to commence but was postponed because one of his co-accused persons had not been brought to court. The trial has not commenced to date. He further states that he will not abscond if he is released on bail, as he is a family man, and does not know the complainant. He argued that it was not his fault that the other accused person was not brought to court on the date that the trial was due to commence. He further said that his residence is within walking distance of the court. He only implicated the other accused persons because he had been assaulted by the police. His matter was remanded to 20 July 2015 for trial at the Magistrates Court.

Mr *Masamha* for the respondent submitted that quite apart from the fact that the applicant had not established changed circumstances, he was not a proper candidate for bail because investigations revealed that he is the one who had sold the cellular phone stolen from the complainant during the robbery to third parties. It was also pointed out that the fact that the applicant admitted to implicating his co-accused made him the principal offender.

Where bail has previously been refused and a further application is instituted, such an application can only be entertained if it is predicated upon changed circumstances, by which is meant that there must be fresh facts which were not placed before the court previously and were found out after the previous determination had been made. Proviso (ii) to s 116 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] 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 the case of *S v Barros and Ors*2002 (2) ZLR 17(H) at 20B-C, Hlatshwayo J (as he then was) commented as follows on the above section:

> "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."

The passage of time may be considered as a fresh fact which has arisen after the previous decision. See *S* v *Aitken* (2) 1992 (2) ZLR 463(S); Sv*Stouyannides*1992 (2) ZLR 126(S); *S* v *Murambiwa* S – 62 – 92. Also, the postponement of a trial may constitute a change in circumstances entitling a court to reconsider the question of bail. See *S v Barros & Ors (supra).* The application *in casu* was made some seven weeks after the previous application was dismissed. The applicant has also stated that that since the last application for bail was determined his matter has been postponed six times. I am therefore prepared to accept that the application has been properly made based on fresh facts which were not placed before the court when it determined the previous application.

Once the court is satisfied that the application can be entertained, what has to be considered is whether bail should, in fact be granted having regard to the circumstances of the case, including the length of the postponement. The applicant submitted that thedate to which the matter was postponed is 20 July 2015. That date was not more than five days away on the date that this matter was heard. The charge faced by the applicant is a serious one, and the applicant, if convicted, faces a lengthy term of imprisonment. In the previous judgment in which this court dismissed the application for bail on 23 April 2015 it was found that the applicant did not contest the facts which sufficiently link him to the offence. That situation still obtains in this application. The applicant admits that he implicated his co-accused persons. He states, however, that he implicated them as a result of the assaults perpetrated upon him by the police. Those are allegations which would have been investigated had they been made before the Magistrates Court at the time that the applicant was remanded by that court. There is no evidence of such allegations having been placed before the Magistrates Court. The applicant does not dispute that the complainant's mobile phone was sold by him to the persons from whom it was recovered. That fact links him to the offence. It is therefore not entirely correct that the case against him is weak. The applicant has not, therefore, rebutted the allegations against him in order to show that he should be granted bail. See *S* v *Makamba*(3) 2004 (1) ZLR 367(S). The applicant has not disputed that he sold the cellular phone belonging to the complainant to the person mentioned in the outline of the state case.

In all the circumstances of this case, I am not convinced that the applicant is a suitable candidate for release on bail at this stage.

In the premises, the application for bail is dismissed.

National Prosecuting Authority, respondent's legal practitioners