TICHAONA SODA
and
ASSAN CHIKWANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 24 January & 5 February 2020

Bail pending trial

Applicants in person
Mr *A Masamha,* for the respondent

TSANGA J: The two applicants seek bail pending a trial *de novo* as a result of their choice to be tried by two assessors following the death of one of the assessors who died in 2017. They face a charge of murder under aggravated circumstances as the murder occurred in the course of an armed robbery in which they are alleged to have all acted in common purpose. They were originally five accused persons but one has since died. Some background is necessary to this bail application.

All the accused were arraigned before the courts and their trial commenced in 2017 before it was stalled by a trial within a trial. Soon thereafter, pending the ruling in the trial within a trial, the Investigating Officer was seconded to perform foreign duties and was unavailable. The assessor also died in early 2017 during the time the trial within a trial which had been at the applicant's behest was still being handled.

The partly heard matter was ready to resume for completion in November 2019, upon return of the Investigating Officer. However, the applicants herein elected for a trial *de novo* before two assessors rather than proceed with one assessor. Materially, the state case was virtually at its tail end as the only witness left was the Investigating Officer who needed to complete his testimony on ballistics following the finding in the trial within the trial that his evidence was admissible.

Where one of the assessors has died, s 8 of the High Court Act provides as follows:

"8. Incapacity of assessor in criminal trial

(1) If at any time during a criminal trial in the High Court one of the assessors dies or becomes, in the opinion of the judge, incapable of continuing to act as assessor, **the judge may, if he thinks fit, with the consent of the accused and the prosecutor, direct that the trial shall proceed without that assessor.**
(2)……..
(3) If, in the circumstances referred to in subsection (1)—
(*a*) the judge does not, in terms of that subsection, direct that the trial shall proceed without the assessor referred to in that subsection; or
(*b*) ……
the accused, **unless already on bail**, shall remain in custody and may be tried again:

Provided that a judge of the High Court may, in terms of Part IX of the Criminal Procedure and Evidence Act [*Chapter 9:07*], release the accused on bail."

Whilst the provision is clear that the judge may direct that the trial proceeds with one assessor, this has to be with the consent of the accused and the prosecutor. I was the trial judge and in this instance indeed sought the consent of the accused and prosecutor to proceed to completion given the fact that the state case was virtually at its tail end. The prosecutor was willing whilst the two applicants through their lawyers were not willing to have the matter proceed with only one assessor. The other two accused were not averse to proceeding with one assessor.

The above provision is also clear that unless the accused is already on bail, where the judge does not direct that the trial should proceed, then an accused **shall remain in custody and may be tried again. In other words, it is mandatory that an accused remains in custody unless granted bail.** Bail may obviously be granted in appropriate circumstances as per the usual considerations articulated in s117 (2) of the Criminal Procedure and Evidence Act [*Chapter 9: 07*]. The key point, however, is that where an accused person has already been previously denied bail and is in custody, there would need to be compelling changed circumstances for bail to be granted pending the trial *de novo*.

Suffice it to point out that both applicants were in custody as bail had been previously denied before trial. The state in this instance is opposed to their bail applications on the basis that there are no changed circumstances justifying the granting of bail. I agree. Whilst indeed they have been in custody for a long time, as the state explains in its response, when they were to be first tried in 2012, the applicants had other cases of armed robbery which had commenced and this trial for which they seek bail had to be shelved. The trial then commenced in 2017. At that time only one of the five accused was on bail. The state is therefore correct that there are no changed circumstances to justify bail in their case other than the fact that they opted for a trial *de novo* before two assessors. Their previous

applications for bail when the case was in limbo due to the absence of the Investigation Officer were denied on the basis of the evidence that had been led against them and the conclusion that they indeed have a case to answer.

The applicants are aware of the exact nature of the state's evidence against them due to the fact that they have opted for a trial *de novo* against the backdrop where the state was virtually complete with all its evidence. They are a major flight risk at this point more so than ever.

Moreover the state says it already has set aside dates for their re-trial in May 2020. The dates indicated are 14 and 15th May 2020. Given that they are both a major flight risk and that they are unlikely to stand trial if granted bail, it would not be in the interests of the administration of justice to grant them bail at this point.

Accordingly the application for bail pending a trial *de novo* is dismissed for both applicants.

National Prosecuting Authority: State's Legal Practitioner.