HOPEWELL CHIN'ONO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 27, 28 August and 2 September, 2020

Appeal against refusal to grant bail section 121 (1) of Criminal Procedure and Evidence Act [*Chapter 9:07*]

N. Nyamakura with *T. Mapuranga*, for the appellant
E. Makoto with *W. Mabhaudhi*, for the respondent

CHITAPI J: This is an appeal against the judgment of the learned magistrate N. Nduna Esquire made on 24 August, 2020. In the judgment how on appeal the learned magistrate dismissed the appellant's application for bail made in terms of s121 (1) (b) as read with the proviso (ii) to subsection (c) of s 116 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. The bail application which was dismissed by the learned magistrate was a second attempt following the dismissal of his initial bail application by the same learned magistrate on 24 July, 2020. An appeal noted against the initial application was dismissed on appeal in a judgment HH 579/20 which I prepared and delivered on 6 August, 2020.

In regard to the dismissed follow up application, the appellant relied on the provisions of proviso (ii) to subsection (c) of s 116 which read as follows-

> "(c) (ii) 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 the determination."

In regard to section 117A referred to in the quoted proviso, its provisions read as follows-

"(1) Subject to the proviso to section 116; an accused person may at any time apply verbally or in writing to the judge or magistrate before whom he or she is appearing to be admitted to bail immediately or may make such application in writing to a judge or magistrate."

The rest of the subsections of 117A being subsections 2 to 9 are not relevant to explaining the nature of the application envisaged in subsection 116. I propose to unpack the provisions quoted for guidance where after I will then relate to the facts of the application made before the learned magistrate and the grounds of appeal.

The points to note from section 116 is that it is intended to give the person whose bail has been refused an opening or openings to repetition the judge or magistrate to reconsider a decision previously made to deny the accused bail. For such an application to be competent; the application must be based on facts which were not placed before the judge or magistrate who presided over the dismissed prior application. Secondly, the facts relied upon must have arisen or been discovered after the previous determination. In short, the facts which ground the application must not have been available to the accused person at the time of making the prior application and been deliberately withheld or not been pleaded. If such facts are shown to have been available, the accused is not entitled to base the application on the known facts. Thirdly where facts relied upon are discovered after the prior determination, such facts will form a proper ground for determination of the fresh application. The application has now become generally known in legal parlance as a bail application based on changed circumstances.

In terms of handling the application, the judge or magistrate before whom such an application is placed for disposal will only assume jurisdiction to determine the application if the applicant established on a balance of probabilities the existence of what may be called new fact which were not placed before the judge or magistrate in the previous determination or been discovered after the determination. What constitutes a new fact is a factual consideration. Such new facts must be related to the circumstances of the case or the applicant. Once the new facts have been alleged, the onus shifts to the prosecution to disprove that the fact or facts are new. The onus on the prosecution is discharged on a balance of probabilities as well. In the case if *S* v *Barros & Ors* 2002 (2) ZLR 17 HLATSHWAYO J (as then he was) reasoned that the purpose of s 117A was 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." (See p 20 B-C). I agree. However, I would

add that the section must be seen as promotive of the rights of an accused person to continue to have access to the court to apply to be liberated from custody unless there exists compelling reasons to deny the accused admission to bail for as long as the accused is in custody pending trial. What invariably happens is that upon being brought to court, certain allegations as ground a reasonable suspicion that the accused person committed the offence charged are made against the accussed and if ruled to ground the reasonable suspicion the accused is placed on remand. If he or she is remanded in a custody a bail application is then made before the remand court or the High Court, the choice being a matter of the jurisdiction of the two courts. If bail is refused, it is denied on the allegations made. The allegations with time will continue to be considered and where they have altered to the extent that the alterations impact on the reasons and/or basis for denying bail in the initial application, the altered facts amount to changed circumstances.

Once the applicant has established changed circumstances which are determined as such on a case by case basis, the judge or magistrate will reconsider whether bail should still be granted or continue to be denied given the altered scenario or new facts. In the case of *Daniel Range* v *S*, HB 127/04 CHEDA J stated on p 2 of the cyclostyled judgment that

> "In determining changed circumstances, the court must go further and enquire as to whether the changed circumstances have changed to such an extent that they warrant the release of the suspect on bail without comprising the reasons for the initial refusal of the said bail applications."

See also *Mavabwa* v *S* HB 89/18 *per* MAKONESE J and cases therein cited.

A changed circumstance before it can persuade a change of the prior bail refusal must be of such a nature and quality that it impacts substantially on the grounds for the refusal of bail being revisited.

The last point I must interrogate is that once the judge or magistrate determines that the facts alleged by the applicant are new or have been discovered after the previous determination, the prosecution's onus to establish compelling reasons to deny the applicant bail must be discharged before the bail application can again be refused. The onus in this case upon a reading of the provisions of s 115C of the Criminal Procedure & Evidence would be on the prosecution.

Reverting to the facts of this matter, they are set out in the judgment of the learned magistrate date 24 July 2020 and repeated in my judgment on appeal case No. HH 519/20. They are further repeated in the judgment of the learned judgment dated 24 August 2020 which is subject

to this appeal. There is in such a case no need to regurgitate the facts. It is common cause that the appellant was denied bail on a charge of incitement to commit public violence as defined in s 187 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] as read with s 36 which defines Public Violence, criminalizes it and provides for a penalty upon conviction.

The first point to note is that this matter is on appeal before me. As I pointed in judgment *Chin'ono* v *State* No. HH 519/20, and relying on various judgment which are set out therein, the learned magistrates judgment can only be interfered with if the learned magistrate committed a misdirection or an irregularity or exercised his or her discretion so unreasonably or improperly as to vitiate the decision reached. On appeal the appeal judge is limited to considering the four corners of the record of proceedings on appeal.

In *casu,* the operative part of the learned magistrate's judgment read as follows:

> "I accordingly refuse the application and dismiss the bail reapplication on the basis that it is devoid of any new facts or circumstances warranting the court to reconsider its initial decision."

The long and short of the above finding was that the learned magistrate determined that the provisions of proviso (ii) to s 116 (C) were not satisfied in that there was no change in the situation as it existed when the prior bail application was made and in the follow up dismissal application.

The main issue on appeal was therefore whether or not the learned magistrate misdirected himself in making the findings or order he made. If he was misdirected, in law, fact or both then I will assume jurisdiction to reappraise the facts and determine whether bail should be granted. If I agree with the learned magistrate, then the appeal would be dismissed. The appellant in the application made orally before the learned magistrate submitted a number of factors which he said, constituted new or changed facts as follows

i) Firstly, that the period that police had indicated as required to complete investigations had passed without a trial date having been allocated for the matter.

ii) Secondly, that the 31st July 2020 being the date pencilled for the incited demonstrations had come and gone with no incident of either protests or violent demonstrations. The argument made was that the danger which it was feared would take place on 31 July 2020 no longer existed.

iii) Thirdly, that there were health concerns obtaining in prisons where appellant is held because COVID 19 W.H.O. protocols were not being observed as would contain

the spread of the COVID virus and that the appellant was entitled to his rights to health in terms of s 76 of the Constitution. In this regard, reliance was placed on the case *Kettles* v *State* HB 119/20 where the risk of contracting the COVID virus in prison was considered as a factor to be invoked in favour of granting bail to an accused person.

In regard to the non-completion of investigations as undertaken in the Form 242, the learned magistrate in his judgment did not advert to this fact or its relevance and impact as a new factor to be considered. When an accused is brought before the court on initial remand and an application for a remand in custody is made and granted, with bail having been denied, it is a relevant consideration when determining bail to take into account the nature of investigations to be conducted and their complexity as well as the time which the police indicate as the estimated time to complete investigations. The importance of this factor is easily understood if one considers the provisions of s 117 (2) (a) (iii) which provides that it will be in the interests of justice to deny bail where there is a likelihood that the accused will "attempt to influence or intimidate witness or to conceal or destroy evidence, "what is implicit in the quoted text is that where police have had the time they asked for to wrap up investigations, the fear of witness intimidation and concealment of evidence will have been taken care of since investigations would have been completed. In argument before me, the prosecution did not albeit acknowledging that the issue was raised, submit on whether the passage of time was a changed circumstance. The passage of time is always a changed circumstances depending on the circumstances of each case see *State* v *Mathuthu* HH 182/17. The passage of time may combine with other factors to constitute a persuasive factor to move the judge or magistrate to consider granting bail to avoid pre-incarceration prejudice without movement in the holding of a trial within a reasonable period as provided for in s 69 of the Constitution. The learned magistrate was misdirected in law in not making a ruling on whether or not the passage of time constituted a new factor warranting a reconsideration of the bail suitability of the appellant. The passage of time would have been considered against the backdrop that the police had undertaken to complete investigations within "3 weeks" as endorsed on the request for remand (Form 242) but had not done so with no explanation given or proferred.

The learned magistrate related the passage of time to the key circumstances raised by the appellant that the 31st July 2020 had come and gone. The appellant argued that bail had been denied

at the initial hearing because it was considered that the date on which the incited demonstrations were pencilled for had come and gone without demonstration. The prosecution argued that the passage of time in this regard was not a new circumstance or fact. The crux of the prosecution argument made before the learned magistrate and persisted on an appeal before me was that, whilst the call for the demonstration was made for that date, the aim was to remove the government from power. It was therefore argued that because the government which was intended to be removed from power was still in power, the proposed violent demonstrations remained pending. The learned magistrate accepted the prosecution argument

The learned magistrate stated that the initial decision to deny the appellant bail was not to be restricted to what was intended to be done on 31 July, 2020. He reasoned that the condition precedent to the stoppage of the violent protest which the applicant was accused of formenting, being the removal of government, had not been achieved. Further he reasoned that the appellant and other "proponents" whom he did not name had not denounced the calling for violent demonstrations. The 31st July, 2020 according to the learned magistrate lost its significance. The learned magistrate concluded that the violent demonstrations remained pending and that the demonstrations were to be considered as a process and not an event. He reasoned that the 31st July was the date of commencement of the process. Significantly, the learned magistrate stated as follows on page 14 of his judgment.

> "It is on the pendency of the planned demonstration until the government is removed that the date of 31st July, 2020 should be accessed. It therefore remains today as necessary as it was on 22 July 2020 when the initial decision was delivered to limit applicant's right to liberty."

The learned magistrate found that the state's argument on continuity of the intended demonstration pencilled for 31st July, 2020 accorded with "common sense and logic." In particular, the learned magistrate stated on page 14 of his judgment as follows:

> "Accordingly, even if that date has passed by, it does not in the totality of facts remove the compelling reason initially advanced by the State so as to found authority for the court to interfere with its previous decision to refuse bail."

The learned magistrate then dismissed the application and stated as follows:

> "I accordingly refuse the application and dismiss the bail reapplication on the basis that it is devoid of any new facts or circumstances warranting the court to reconsider its initial decision."

As already indicated the appellant argues that the learned magistrate erred in fact in dismissing the issue of the passing of 31st July, 2020 as an event which amounted to a changed circumstance. A holistic consideration of the previous application and judgment in my view undoubtedly show that the 31st July, 2020 was key in that it was demonstration day. I did not find anything from the tweets attributed to the appellant to show that the demonstrations should continue beyond that date. There is no doubt that the tweets were threats to remove ZANU PF from government and by parity of reasoning, the encumbent government through the 31st demonstration. The main reason for seeking the removal of government was given in the tweets as that they were looters of public funds who not only rig elections but would have the backing of the judiciary to sanitise the looting and election rigging. Further the tweets complained that citizens were dying in their homes without health care or clean water due to looting and corruption.

In the previous judgment, the learned magistrate properly held that the tweets should not be read independently of each other but as a whole. I agreed with this construction or approach in the appeal judgment HH 519/20. The learned magistrate was also correct in his reasoning that by discounting elections as a method of removing government from power, it was reasonable to infer the use of non-constitution means to remove the government. There is however no reference in the tweets nor in the previous ruling to indicate that continuity of demonstrations beyond 31st July, 2020 was advocated for. The 31st July 2020 was D. Day so to speak. It is a common cause fact that the learned magistrate ought to have taken judicial notice that the nation was on edge on 31st July, 2020 because of uncertainly on what would happen in regard to the threatened demonstrations. The government commendably and rightfully addressed the citizenry through media and other communication means to go about their business as usual and not engage in violent demonstrations. I have said that the government acted commendably because it acted by dissuading the citizenry from engaging in public violence which is a punishable crime. The 31st July indeed came and is gone. It is certainly a new fact warranting the court to reconsider the previous decision. It is so, despite the fact that the flopping of the demonstrations would not have been attributed to the appellant since he never called them off. It is therefore clear on the evidence that it was all about 31st July 2020 and the fact that nothing happened and the day has passed is a new fact. It is improper in my view for a court to anticipate the future events unless there are definite pointers or plans put in place to happiness in the future. I therefore determine that the

learned magistrate was misdirected in fact and consequently in law to hold that the passing of 31st July 2020 was not a new circumstances impacting on bail.

The ground of appeal relating to the prison conditions was dealt with. I was informed that the appellant had obtained relief in this court in regard to his complaint on prison conditions in which he was lodged in case no. HC 4248/20. I do not consider it necessary to go into depth on that in any detail save to state that the health condition of an accused person is a relevant factor to be taken into account when considering bail in terms of section 117 (4) (e) of the Criminal Procedure and Evidence Act. In regard to this ground of appeal, it was submitted that the learned magistrate erred at law in not considering the lengthy testimony of the appellant which was given in court. In fact the learned magistrate erroneously noted that the appellant had after indicating that he would testify refrained or capitulated from doing so after a ruling was made to record the appellant's testimony in camera. The learned magistrate commented that the applicant had capitulated because his intended audience had been cleared from the court room. In reasoning so, the learned magistrate was misdirected because the appellant in fact gave evidence. It is trite that a judicial officer commits a serious misdirection which vitiates the judgment reached where the judicial officer omits to deal with evidence led and proceeds to give judgment oblivious of such evidence. In this case it was worse because the learned magistrate actually mentioned that there was no evidence led yet there was.

Having found that the learned magistrate misdirected himself. I am empowered to interfere with the learned magistrate's judgment if I consider that this is warranted. Appellants counsel submitted that the appellant was arrested for using his twitter account to reach out to the people. The applicant offered not to use the twitter to incite people or to use it at all. The 31st July, 2020 has come and gone. It is a fact that appellant is on remand on reasonable suspicion that his twitter chats constituted an offence. It would be foolhardy for the appellant to apply for bail, be granted bail and go out of prison to do the same thing for which the appellant was arrested and incarcerated. He has in proposed bail conditions in his draft order undertaken not to engage in the use of the twitter account. It appears to me that although the applicant does not consider that he is guilty and has every right to profess his innocence until found guilty, he must desist from further offending or engaging in similar conduct until the charges he presently faces are disposed of.

The prosecution submission that the applicant has not accomplished his mission and will persist in inciting people to violently demonstrate as I l have noted is not backed by facts but is an inference. The inference is hardly the only reasonable one which can be drawn. There would need to be evidence of other pointers or facts proving that there is a plan by the appellant to pursue his agenda further through further incitement. It cannot be said that after the D. Day of 31 July, 2020 passed without incident which clearly meant that the appellant failed to achieve his purpose, he had any plans for follow up demonstrations.

The appellant can only continue to be incarcerated without bail if there is shown compelling reasons for his pre-trial detention to be perpetuated in the light of the changed circumstances. I am persuaded that no such compelling reasons can still be said to exist and the interest of justice will be served by the appellant's admission to bail, however on conditions which are stringent enough to ally fears of the appellant absconding or engaging in the same conduct for which he was arrested. The appellant attached a draft order to his application and the conditions proposed thereon are reasonable. I will adopt them with an upward variation of the bail amount to $10 000.00 from $5 000.00 and impose a condition barring him from calling for mass demonstrations through twitter or other means pending the disposal of this case.

Accordingly, the following order is made.

1. The appeal against the refusal by the court of the Magistrate sitting at Harare to admit appellant to bail on the 24 August 2020 be and is hereby granted.
2. The judgment by the Regional Magistrate's Court, dismissing the applicant's application for bail pending trial based on changed circumstances handed down on 24 August 2020 is hereby set aside.
3. Consequently, the appellant is admitted to bail on the following conditions:
   3.1. The appellant shall deposit the amount of ZWL10 000-00 (ten thousand Zimbabwe dollars) with the Clerk of the Regional Court at Harare Magistrate Court.
   3.2. The applicant shall deposit his passport with Clerk of the Regional Court at Harare Magistrate Court.
   3.3. The appellant shall surrender his title deed to the property namely, certain piece of land situate in the district of Salisbury called [redacted]

[redacted] held under deed of transfer No. [redacted] to the Clerk of the Regional Court at Harare Magistrate Court.

3.4. The appellant shall continue to reside at No. [redacted] Harare for the duration of the criminal proceedings.

3.5. The appellant shall not post on his Twitter handle, namely @daddyhope or create any new twitter account for the use to incite the holding of mass demonstrations for whatever purpose until the case against him is finalized..

3.6. The appellant shall report at [redacted] Police Station every Mondays and Fridays between 06.00hrs and 18.00hrs.

Mtetwa and Nyambirai, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners