

PIUS NYARUMBWA  
and  
AUSTIN MHARAKURWA  
Versus  
THE STATE

HIGH COURT OF ZIMBABWE  
WAMAMBO J  
MASVINGO, 12 AND 18 MAY 2020

### **Bail application**

*O. Mafa* for the applicants  
*M. Mutumhe* for the respondent

WAMAMBO J: On 21 April 2020 I presided over a bail application by the applicants under B 84/20. I dismissed the application. This application is a follow up application citing changed circumstances.

The applicants face 5 counts that were allegedly committed on 5 and 7 April 2020 in the surrounds of Masvingo city.

Count one (robbery as defined in section 126 (1) of the Criminal Law (Codification and Reform Act) [Chapter 9:23] was allegedly committed at Beep One Mountain, Wimpy Area Masvingo where it is alleged that the applicants pointed on AK 47 and an A3 rifle at the complainant to induce him to relinquish gold and through these threats the applicants obtained gold ore valued at US\$52.00

Count two the applicants face the same offence as in count one on the complainant goes by a different name from that in count one. However it is alleged that the offence was committed by the two applicants at the same location namely Beep One Mountain, Wimpy Area Masvingo. The

two allegedly used the same weapons as in the first count and obtained the same amount of gold ore worth US \$52.00

In count three it is alleged that on 7 April 2020 the applicants committed extortion in contravention of section 134 of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] at Manyama Business Centre, Masvingo. It is alleged that they exerted illegitimate pressure on the complainant by demanding US \$10 after complainant had failed to produce mining documents.

In count four on 7 April 2020 at Manyama Business Centre, Masvingo the applicants are alleged to have contravened section 27(b) of the Firearms Act [*Chapter 10:09*] (pointing a firearm). The complainant and thus counts three and four is the same person.

In Count 5 it is alleged that the applicants on 7 April 2020 at Manyama Business Centre pointed a firearm at the complainant and thus contravened section 27(b) of the Firearms Act [*Chapter 10:09*].

The State outline provides more details as follows: -

The applicants are police officers stationed at Bravo Troop Support Unit, Buchwa who at the time of the alleged commission of the offences were attached to ZRP Support Unit, Zimuto, Base, Masvingo.

The complainant in the 5<sup>th</sup> count is Detective Inspector Gonye who was telephonically contacted by the complainant in counts 3 and 4 to intervene as a senior police officer in charge of CID Masvingo Minerals, Flora and Faura. According to the State Detective Inspector Gonye along with his team approached the applicants at Manyama Business Centre where they interviewed them and placed them under arrest. The applicants apparently made a demand to converse with Detective Inspector Gonye and the complainant in counts three and four away from other police officers. At this secluded place the applicants cocked their rifles and pointed them at Detective Inspector Gonye and the complainant as aforementioned, then fled into the night. In a bid to make good their escape one of the applicants dropped cell phones which were recovered at the scene. At ZRP Support Unit, Zimuto Base a roll call revealed that the applicants were missing from the parade. This roll call was done after the applicants allegedly fled and Detective Gonye had returned to the Zimuto Base, from Manyama.

*Mr Mafa* for the applicant's argued forcefully that the applicants are good candidates for bail. He cited sections 50 and 70 of the Constitution of Zimbabwe and case Law including *S v*

*Chipetu* HMA 06/17, *S v Nyengera* HB 7/15. According to *Mr Mafa* applicants deny the allegations and say that the allegations are fabricated. It is noteworthy that the applicants place themselves at the scene though they proffer an innocent explanation for being present thereat. It was further argued that applicants are police officers who will not abscond as they are also family men. They apparently cooperated with the authorities and do not intend to endanger the safety of the public. *Ms Mutumhe* opposed the granting of bail citing the seriousness of the offence, strength of the State case and that the applicant's release may cause the public to lose confidence in the criminal justice system.

The above was what I considered in B 84/20 and dismissed the application. I found favour with the States submissions. I found that in the circumstances of the case a combination of the following disentitled the applicants from being granted bail namely the seriousness of the offence, the strong evidence apparently implicating the applicants and the apparent danger to members of the public in the light of the violent disregard of the law apparently exhibited by the applicants to miners and fellow police officers whilst being police officers.

I have traversed the events in the earlier application so as to set a background to this application.

In this application *Mr Mafa* avers that there are changed circumstances. The State is opposed to the application. The initial application was heard on 21 April 2020 and this application was heard on 13 May 2020 and this passage of time is said to be one of the changed circumstances. The other circumstances are said to be the fact that there is no remand or trial date and that investigations have been finalised. Apparently as further submitted by *Mr Mafa* the COVID 19 pandemic has also negatively affected the applicants in that the proceedings in the courts have been disturbed to the extent that applicants have not been supplied with the next remand or trial date.

The applicants now propose to report three times a week as opposed to the initial application where they offered to report once every fortnight. They also now propose to RTGs \$2 500.00 as bail deposit whereas in the earlier application they offered to deposit RTGs \$1 000.00

*Ms Mutumhe* was of the view that there are no changed circumstances. According to her the applicants have not been provided with a trial date because of the national lockdown. She undertook to provide a trial date soon. The fact that applicants now propose to report more

frequently and to make a larger bail deposit is just a calculated tactic to obtain freedom so says *Ms Mutumhe*. She concedes that applicants have established changed circumstances but that due to the peculiar circumstances of the case the public may lose confidence in the justice system if applicants are granted bail. That the investigations are complete, amounts to a changed circumstance. Other circumstances such as the COVID pandemic have intervened resulting in the disturbance of the court rolls. The case of *Tichaona Katsamba v The State* HC 642/15 was cited as authority that the passage of time can amount to a change in circumstances.

ZHOU J who presided over the application said as follows at page two: -

*" 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 has been made. Proviso(ii) to Section 116 of the Criminal Procedure and Evidence Act [Chapter 9:07] provides as follows:- "Where an application in terms of section 117 A is determined by a Judge or Magistrate , a further application in terms of Section 117 A 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."*

I am not prepared to accept that proposing to deposit a higher sum as bail deposit or offering to report to the police once frequently is a changed circumstance. These are clearly not matters which have arisen or been discovered after the previous determination. I agree with *Ms Mutumhe* that the proposals are designed to obtain freedom for the applicants.

The passage of time, though it may amount to changed circumstances has to be considered in its proper context. It has to be considered how long it is between the previous application and the application for changed circumstances. The explanation of why there has been a delay also has to be considered. In the *Tichaona Katsamba v The State (supra)* the application for bail on changed circumstances was made seven weeks after the dismissal of the previous application. The Honourable Judge, ZHOU J still found in the particular circumstances of that case, that although the passage of time amounted to a changed circumstance bail could still not be granted to the applicant.

I have considered the application in the light of the fact that I have to weigh the interests of justice against the right of applicants to their personal freedom and the prejudice they may suffer if detained in custody. The period between the initial bail application and this application is 21 days. It is not unduly lengthy I also take into account that there may be no trial date set yet because of the intervening COVID 19 epidemic which necessitated some changes and shifts to the normal roll of courts. I do not find in any case that three weeks amounts to a changed circumstance such as to enable applicants to be granted bail.

I am mindful that the allegations are quite serious and that there appears to be strong evidence against the applicants. Nothing in the nature of change to the extent that it affords applicants the granting of bail has been brought to my attention. I noted earlier that applicants are police officers who allegedly targeted mines and flowing therefrom also committed an offence against one of their own a senior police officer.

The brazen attitude combined with the interests of public safety is at risk in the light of the allegations the applicants face.

I find that no changed circumstances that incline me towards the granting of bail have been proven.

I further am not attracted to the proposition in the circumstances of this case, that more frequent reporting conditions and a large sum of bail deposit would guard the interests of justice I am also mindful that applicant allegedly employed the unlawful use of government rifles towards the public and a fellow police officer.

In the circumstances I find that the applicants are not good candidates for bail. I order as follows: -

The application for bail is dismissed.

*Mutendi, Mudisi and Shumba*, applicants' legal practitioners

*National Prosecuting Authority*, respondent's legal practitioners