PERCY MUGARI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 31 DECEMBER 2021 & 6 JANUARY 2022

Application for bail based on changed circumstances

L. Mcijo for the applicant
T.M. Nyathi for the respondent

DUBE-BANDA J: This is a bail application lodged by the applicant after the first application was refused in this court. The first application was refused on the 10th May 2021. The applicant is now applying for bail on the basis of new facts. He is jointly charged with other persons. The applicant and his co-accused are charged with two counts of robbery as defined in section 126(b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (Criminal Code), and one count of attempted murder as defined in section 189 as read with section 47 of the Criminal Code.

In count 1 it is alleged that on the 22 February 2021 at around 2000 hours applicant in the company of his alleged accomplices and acting in common purpose and armed with various weapons ranging from fire arms, machetes, iron bars, axes and knives robbed complainant of US$3000.00, a 303 rifle and groceries. In count 2 it is alleged that on the 8th March 2021, at around 2100 hours applicant and his co-accused armed as in count one robbed complaint of US$800.00, Samsung cell phone, Itel A56 cell phone, a pair of safety shoes and a reflective jacket. In count 3 it is alleged that in the course of an armed robbery applicant and his co-accused hit complaint on the left side on the head with an axe and she fell unconscious. They then searched the house and stole US$4000.00, 3 by 2 kg of sugar, 3 by 2 kg rice, and a packet of meat.

The applicant advanced his case in the bail statement as follows: that his co-accused persons have been released on bail in this court siting in Harare. It is contended that the two

co-accused who have been released on bail are facing the same charges and same evidence as the applicant. It is argued that accused persons facing same charges must as a general rule be treated the same. Further it is contended that the State has failed to provide a trial date since April 2021. It is then argued that these constitute new facts which entitle applicant to be released on bail pending trial.

Both parties i.e. counsel for the applicant Mr *Mcijo* and Mr *Nyathi* for the respondent agreed that in refusing to release applicant on bail this court in an *ex tempore* judgment held that he was facing a very serious charges, and that there is a strong *prima facie* case against him and that in the event of a conviction he was likely to be sentenced to a long prison term and this might induce him to flee and evade justice. This court took judicial notice of the fact that at the time there was prevalence of armed robbery cases in the country and therefore there was need to arrest this `tide.

The proviso (ii) to section 116 (c) of the Criminal Procedure and Evidence Act [Chapter 9:07, which anchors this court's jurisdiction to consider such an application, 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.

Section 116 (c) (ii) of the Act gives this court jurisdiction to re-hear a further bail application emanating from an applicant – whose previous application has been refused. To activate such jurisdiction, the applicant must put himself squarely within the parameters of the empowering provision. Firstly, such an application must be based on new facts; secondly, the facts relied upon must have arisen or been discovered after the first determination. Thirdly, such new facts must not have been available to the applicant at the time of making the first application. See: *S v Chin'ono* HH 567-20. In *S v Barros & Ors* 2002 (2) ZLR 17 the court reasoned that the purpose of these requirements is to obviate the presentation of the same facts or variants thereof, over and over again in a bid to obtain bail, and also helps in achieving finality in the matter.

Once the applicant has established the existence of new facts, the court will then reconsider whether bail should still be refused or granted in the light of the new circumstances. In the case of *Daniel Range* v *The State* HB 127/04 the court said 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 compromising the reasons for the initial refusal of the bail application.

Applicant's co-accused persons Panashe Tyson Bhunu and Chriswell Mhuru were released on bail by this court sitting in Harare. I accept for the purposes of this application that the fact that applicant's two co-accused have been released on bail and that no trial date has been provided from April 2021 constitute facts which were not placed before this court when the first application was determined.

However these new facts do not tilt the pendulum in favour of releasing applicant on bail. I say so because the reasons this court refused to release applicant on bail have not changed, the charges against him are still serious, the State still has a strong *prima facie* case against him, in the event of a conviction he is still likely to be sentenced to a long prison term and this might still induce him to flee and evade justice. Nothing has been placed on record to show that the risk of absconding has been reduced. Applicant is still a flight risk as he was when this court refused him bail on the 10th May 2021. The release on bail of his co-accused is inconsequential. The fact that he has not been provided with a trial date is equally inconsequential.

The applicant was denied bail because it was not in the public interest or interest of administration of justice to do so. It is still not in the public interest or in the interest of justice to release him on bail. Furthermore, the applicant is not only a flight risk but his release on bail given the serious allegations against him of use of a fire arm in the alleged commission of the offences will undermine the objective and proper functioning of the criminal justice system and the bail institution. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

Having given due consideration to the facts of this case and the applicable legal principles, I am convinced that these new facts have not changed the basis upon which bail was initially refused. It is for these reasons that this application must fail.

Disposition

In the result, I order as follows: the application for bail be and is hereby dismissed and applicant shall remain in custody.

It is so ordered.

Liberty Mcijo & Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners