IGNATIOUS BUMHIRA
and
THE STATE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 18 January 2023

Bail Application

Ms C Maheya, for the applicant
Mr B Murevanhema, for the respondent

CHINAMORA J

Factual background

This is a bail application lodged by the applicant after his first application was refused by this court. The first application was refused on the 3 November 2022. The applicant, who is jointly charged with other persons, now seeks bail based on changed circumstances. The applicant and his co-accused are charged with one count of robbery as defined in section 126 (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Code)".

At the initial bail application, the charge that had been preferred against the applicant was that of robbery in aggravated circumstances in terms of s 126 (3) (b) and (c). Important to note is the fact that the charge has since been changed to robbery (i.e. ordinary robbery) in terms of section 126 (1) of the Criminal Code. In addition, the applicant submits that his co-accused, namely, David Nyakauru ("Nyakauru") and Susan Nyakurimwa ("Nyakurimwa") who are facing the same charge based on the same evidence have since been granted bail by this court. In that connection, he contends that if consideration is given to the principle of parity of treatment of people in a similar situation, he deserves to be granted bail like his co-accused. Simply put, his argument is that there is no rational basis for distinguishing his case from that of Nyakauru and Nyakurimwa. Thus, he

asserts that he ought to be accorded the same treatment. Let me examine the relevant law before I make a decision on his application.

Applicable law

The basis for an application for bail based on new facts is created by the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In this regard, *proviso* (ii) to s 116 (c) of the Criminal Procedure and Evidence Act, 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."
> **[My own emphasis]**

The law on the subject is a well-beaten path. For example, the requirements for an application for bail based on changed circumstances are clearly stated in *S v Barros & Ors* 2002 (2) ZLR (H) at 20B-C, where the court ruled that 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. Consequently, for an applicant to succeed in such an application he or she must show that the bail is based on facts which were not placed before the initial judge or magistrate who denied him or her bail.

The position on the law regarding the principle of equality of treatment is settled in this jurisdiction. Where a co-accused is granted bail it generally follows that both accused should be admitted to bail unless there are compelling reasons as to why the same treatment should not be preferred. The principle of equal treatment as enunciated by BHUNU J in *S* v *Dhlamini & Ors* [2009] ZWHHC 57 aptly states that equal treatment before the law should be observed and where there are no compelling reasons to be treated differently, co-accused should be admitted to bail. In *S v Lotriet & Anor* 2001 (2) ZLR 225 (H), BLACKIE J as he then was had this to say:

> "It is vital that in the administration of justice there does not appear any form of discrimination, particularly in a matter where the liberty of a person is involved."

Also see *S v Munsaka* HB 53-10

Analysis of the case

In *casu* the applicant submitted that after the dismissal of his initial bail application by MANYANGADZE J, two significant developments occurred. The first is that his co-accused have since been admitted to bail. Secondly, investigations established that no firearm was used, necessitating the change of the charge to robbery. It was submitted that this makes the offence less serious since the option of paying a fine is provided in the penal provisions. These developments will be dealt with herein and I will address other issues which I may consider relevant to the disposal of this case. In my view, the State has not led compelling evidence to the effect that there are compelling reasons differentiating the applicant from his co-accused. I therefore find no reason for denying the applicant bail since his co-accused were admitted to bail.

The applicant also averred that the original charge preferred of robbery in aggravating circumstances in terms of section 126 (3) (b) of the Criminal Law Codification and Reform Act has since been altered to Robbery as defined in section 126(1) of the same and as such, he should be allowed bail. While s 117 (3) (b) (iv) of the Criminal Procedure and Evidence Act dictates that when looking at the likelihood of abscondment, the courts should consider the nature and gravity of the offence or the nature and gravity of the likely penalty, a plethora of cases have ruled that the seriousness of an offence should not in itself be a ground for refusal of bail. See *S* v *Hussey* 1991 (2) ZLR 187 (SC) also see *Cainos Chingombe* v *The State* HH 16-21. To place emphasis on the seriousness of the offence in the circumstances would amount to a miscarriage of justice.

It is also noteworthy that the record discloses that applicant has his roots attached in Zimbabwe. In this respect, he does not have travel documents and is a family man. Besides, no evidence has been placed on record to show that applicant has at any point tried to escape or abscond. In my view, there is no likelihood of abscondment. While the investigating officer's recommendations are not binding on the court, I find it significant that he conceded that applicant could be admitted to bail on stringent conditions, namely, that he reports at CID Homicide in Harare twice a week; remains at the given address and does not interfere with state witnesses. I am therefore persuaded that the imposition of the suggested conditions would allay the fear that applicant may abscond.

I must address the argument by the State that the applicant has previous convictions dating back to 2003, and should be refused bail on that ground. This concern has previously confronted

this court. Particular attention should be drawn to the case of *Sikhanyiso Ndlovu* v *The State* HB109/22 wherein MAKONESE J aptly stated that:

> "the mere fact that an accused has been previously convicted of an offence does not mean that he is deemed to have a propensity of committing other offences … Such a position would be absurd and untenable as every person with a previous conviction would be presumed guilty and not entitled to his liberty pending trial if he appears on fresh charges."

At any rate, s 117 (3) (a) (v) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides as follows:

> "3. In considering whether the ground to referred to in –
> a. Subsection (2) (a) (i) has been established, the court shall, where applicable, take into account the following factors; namely-
> … … …
> (v) <u>any evidence that the accused previously committed an offence referred to in the First Schedule while released on bail.</u>"
> **[My own emphasis]**

In this matter, no evidence was presented by the State indicating that applicant committed any offence whilst on bail. Further, no evidence was placed before the court to show that applicant once failed to comply with bail conditions. Invariably, the police would have such information if that was the case. Thus I can safely say that nothing adverse has been availed to the court which impinges on my ability to favourably consider the question of the applicant's bail application. In fact, the concessions by the investigating officer under oath fortify my view. I am therefore satisfied that the applicant cannot be refused bail on the assumption that he has propensity to commit other offences, which has not been substantiated. To do so would be a classical travesty of justice.

Disposition

1. The application for bail be and is hereby granted in respect of CRB No Hre 1532/22
2. The applicant shall deposit in the sum of ZWL 200,000-00 with the Clerk of Court, Harare Magistrates Court.
3. The applicant shall reside at Number 610 Budiriro 1 until the matter is finalized.
4. The applicant shall report twice a week on Mondays and Fridays at CID Homicide at Harare Central Police Station, between 6.00 am and 6.00 pm.

5. The applicant shall not interfere with State witnesses or evidence.

Maseko Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners