KHOLWANI DONGA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 11 OCTOBER 2021 & 14 OCTOBER 2021

Application for bail on changed circumstances

K. Ngwenya, for the applicant
Maduma, for the respondent

DUBE-BANDA J: This is a bail application lodged by the applicant after the first application was dismissed by this court. He is now applying for bail on the basis of new facts, i.e. changed circumstances. He is charged with one count of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act (Chapter 9:23), and six counts of attempted murder as defined in section 189 as read with section 47(1) of the same Act. It being alleged that on the 9 February 2021, at approximately 01:00 hours, applicant proceeded to the complainant's homestead where upon arrival sprinkled some inflammable liquid around a three bedroom house and set it on fire. Inside the house were seven occupants sleeping in different rooms. A seventy-five year old man suffered serious injuries and died the following day. The six other occupants of the house escaped the inferno.

In his bail statement applicant contends that new fact have arisen which entitles him to have his bail application re-heard by this court. He contends that:

1. Applicant submits that the inordinate delay by the State in setting his matter for trial, which is now eight months is a changed circumstance which entitles him to have his bail application heard by the Honourable Court again. Applicant has asserted his desire to have his day in court but the State has been coming up with excuses which are not sustainable at law and one of its responses has been that applicant should apply for bail before this Honourable Court.

2. Applicant is mindful of the major reason that led to the dismissal of his earlier application by the Honourable Court and states that the fear that the Honourable

Court had that applicant could escape to South Africa can be settled by applicant surrendering his passport to the Registrar of the High Court and that applicant reports two times a week on Monday and Friday at Tshabalala Police Station. This should be adequate to ensure that applicant stands his trial and that he will not interfere with the main state witness Ayanda Donga who lives in Lupane. The fear must also be weighed against the fact that the delay is not of applicant's making and the fact that State has not given any indication as to when his trial might take place and the State conceded that applicant can apply for bail in the meantime.

3. It is also stated on behalf of applicant that South Africa is not a safe haven for a criminal as the Honourable Court can take judicial notice of the fact that South Africa has an extradition treaty with Zimbabwe.

4. The Honourable Court is also humbly implored to consider that the delay in bringing the matter to trial is not of applicant's making and keeping him in custody without trial is akin to punishing him before he is convicted by a court of law not withstanding that the presumption of innocence still applies to him.

Mr *Ngwenya,* counsel for the applicant in addressing the court repeated the grounds as indicated in the written notice of the bail application. He emphasised more on the fact that applicant has not been provided with a trial date and that the situation is now different from when bail was initially heard and refused in this court.

In its opposition to this application respondent contends that there are no new facts in this matter which warrants a hearing on the basis of changed circumstances. It is argued that applicant is a flight risk. Again, it is argued that the delay in setting down applicant's matter for trial has been caused by Covid 19 Lockdowns and its associated restrictions. It is contended that applicant's case will be provided a set-down date.

This court in *Donga v The State* HB-128-21 (1st application), found that the State has a strong case against the applicant. The court then stated as follows:

Applicant offered to surrender his passport in a bid to ally the State's fears of abscondment. In my view such a condition is not effective in view of the fact that the

> applicant can easily cross the border between Zimbabwe and South Africa through the bush. It is notorious fact that this border is porous.
>
> After weighing the interests of justice against the right of the applicant to his personal freedom, I come to the conclusion that there is a likelihood that the applicant if he were released on bail will not stand his trial. In my view, it is in the interests of justice that applicant should be detained in custody pending his trial.

This application has been brought in terms of section 116 (c) (ii) of the Criminal Procedure and Evidence Act (Chapter 9:07) (Act). The section provides that:

> …where an application in terms of section 117 A 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, 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 that determination…

The import of the above provision was explained in *S* v *Barros and Ors* 2002 (2) ZLR 17 (H) in the following terms:

> The meaning of the above provision is quite clear. Where an application for bail has been refused, a further application for bail may only be made if such application is based on changed circumstances, that is, facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after that determination. The reason for this rule is obvious. It is meant, among other things, 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.

Once this court has heard a bail application and made a determination, it ceases to have jurisdiction to re-hear the matter except on the basis of a narrow window provided for by section 116 (c) (ii) of the Act. The jurisdiction of a court to re-hear the application is anchored on the existence of changed circumstances, that is, new facts which were not placed before the judge who determined the previous application and which have arisen or been discovered after that determination.

An accused cannot be allowed to repeat the same application for bail based on the same facts. This would be an abuse of the process of this court. Should there be nothing new to be said the application should not be repeated and the court should not entertain it. See: *S v Vermaas* 1996 (1) SACR 528 (T). The new facts must be placed before court and must be such that they are related and change the basis on which bail was initially refused. See: *S v De*

Villiers 1996 (2) SACR 122 (T) at 126 e-f. In *Rance v The State* HB-127-04 the following was stated at p2 of the judgment:

> 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 a suspect on bail without compromising the reasons for the initial refusal of the said bail application.

In the first application this court ruled that there is a strong case against the applicant. Again it found that he is a flight risk. This court held that that the offer to surrender his passport in a bid to ally the State's fears of abscondment is itself not enough. He could still easily cross the border between Zimbabwe and South Africa through the bush. It is notorious fact that this border is porous. It concluded that it is not in the interests of justice that applicant be released on bail.

In this application applicant is merely re-cycling the same issues this court determined in the first application. The issues regarding surrendering his of passport and the existence of an extradition treaty between South Africa and Zimbabwe are not new facts. It is incorrect to allege that applicant has been detained without trial, that his right to a trial within a reasonable time has been violated, and that his right to be presumed innocent has been violated. These are not new facts but ordinary consequences of incarceration. Again applicant has been deprived of his personal liberty according to procedures established by law.

The only issue that may be considered to be a new fact is that he has now been in custody for a period of eight months and that he has not been provided with a trial date. Mr *Maduma*, counsel for the respondent submitted that the delay in setting down applicant's matter for trial has been caused by Covid 19 Lockdowns and its associated restrictions. Applicant's case has joined the queue and once its turn comes it will be provided with a trial date. I agree with this submission.

The point that he has been in custody for eight months is a new fact, but it does not address the issue of the change in circumstances which would sway the pendulum in favour of his release on bail. This new fact does not address the issue of public interest or interest of the administration of justice and it has not changed the basis upon which bail was initially refused, i.e. that the State has a strong *prima facie* case against the applicant and that he is a flight risk.

Disposition

In the result, the application for bail based on change of circumstances be and is hereby dismissed and applicant shall remain in custody.

Mvhiringi & Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners