HB 43/19
HCB 27/19
X REF HCB 170/18 & HCB 211/18

TINASHE TADZIWANI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 7 FEBRUARY & 21 MARCH 2019

Bail Application

L. Mcijo for the applicant
Mrs C. Muhwadavaka for the respondent

TAKUVA J: This is the 3rd bail application the applicant has filed. He was unsuccessful in the first two and has decided to try his luck one more time. The application is made on the basis that there has been "a change in the circumstances" since the dismissal of the last application.

The facts

The accused is alleged to have murdered is mother on 16 August 2018 by striking her with an unknown object several times all over her body resulting in her death. He then left her inside the house and went away. Upon his arrest the police recovered his blood stained T-shirt and noticed that he had wounds on the neck. The deceased was found with cuts on the face. The State opposed the granting of bail on the following grounds:

(i) The accused is likely to abscond;
(ii) The accused is likely to interfere with witnesses; and
(iii) The community might vent their anger on the accused.

The application which was filed under HCB 170/18 was dismissed by this court per MABHIKWA J on 28 September 2018. The applicant was not legally represented. On 23 October 2018 he filed a second application under HCB 211/18 this time with the assistance of his

legal practitioner of record. The application was dismissed again by MABHIKWA J on 27 November 2018. As I indicated above, this is his 3rd application which he has filed under HCB 27/19 dated 30 January 2019.

In his bail statement he contends that there are changed circumstances justifying the consideration of the bail application. He listed the changed circumstances as follows:

(a) when he was initially denied bail the investigations into the matter were still emerging. However all the investigations are now complete and all witnesses' statements have by now been recorded, hence there is no likelihood of interference with any state witnesses.

(b) while not admitting any guilt, the anger alleged by the Investigating Officer by the local community would have lapsed by now. In actual fact his entire family has been visiting him in prison including his mother's relatives, that is his uncles and aunts and there is no anger or enmity to talk about anymore.

The State opposed the application on the grounds that there is no change in circumstances especially on the reasons given by the state on the previous applications namely that the applicant was likely to abscond and that the State has a strong *prima facie* case given that the applicant was arrested after leaving the house where deceased was found, wearing a blood stained T-shirt.

The competence of a renewed bail application pursuant to the discovery of new facts or changed circumstances arising appears from section 116 (c) (ii) of the Criminal Procedure and Evidence Act (Chapter 9:07) which reads as follows:

"116 (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 that determination".

It is trite that a judge hearing a new application is entitled and indeed obliged to have regard to all the circumstances which impact on the issue when the new application is heard. In *S* v *Vermaas* 1996 (1) SACR 528 (1) 531e – f, it was stated that, "obviously an accused cannot be allowed to repeat the same application for bail based on the same facts week after week. It would be an abuse of the proceedings. Should there be nothing new to be said the application should not be repeated and the court will not entertain it. But it is a *non sequitur* to argue on that basis that where there is some new mater the whole application is not open for reconsideration but only the new facts. I frankly cannot see how this can be done. Once the application is entertained the court should consider all facts before it, new and old, and on the totality come to a conclusion". See also *S* v *Barros & Ors* 2002 (2) ZLR 17 (H). As regards the procedure for renewed applications, it is evident that an application for bail may employ the usual modes of presenting evidence like leading *viva voce* evidence, on affidavit and by the submission of documentary and real evidence. Once that is done, the court is called upon to decide whether or not those facts are new facts and next if the court indeed finds that they are new facts, then it may consider the renewed bail application on the grounds of new facts and decide whether the new facts are of such a nature that bail ought to be granted or not – see *S* v *Devilliers* 1996 (2) SACR 122 T.

In casu, the applicant has presented the facts in his bail statement. The facts are however disputed by the State which has filed a notice of opposition together with an affidavit from the Investigating Officer. That affidavit challenges the applicant's assertion that investigations have been completed. Instead, the Investigating officer states that the State is waiting for DNA results on the blood found on applicant's T-shirt. Further the applicant's contention that his relatives

who happen also to be deceased's relatives have "forgiven" him is incorrect in that his aunt has filed an affidavit incriminating the applicant.

During the hearing I enquired from applicant's legal practitioner why he has failed to file even a single affidavit from applicant's relatives stating that the family can allow applicant to reside in deceased's house or in any other house. No convincing explanation was proffered. Counsel appeared contended to ring-fence his presentation with mere arguments based on disputed facts.

In my view, there are no new facts *in casu* in that the applicant is simply reshuffling the old evidence. In any event even if they are considered new and relevant they are not of such a nature that in the totality of all circumstances including of course the risk of abscondment, that bail ought to be granted.

The State's *prima facie* case remains solid and is likely to be further strengthened by the DNA results. The applicant's defence is a bare denial. As it stands, the applicant has no place to call home. Faced with the overwhelming evidence coupled with the seriousness of the offence and the attendant lengthy sentence the likelihood to abscond is a genuine and reasonable fear.

In the circumstances, the application for bail pending trial is dismissed.

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