JOHN CHIPANERA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 14, 18, 23 and 30 March 2016, 1 April 2016,
27 May 2016, 1, 6, and 8 June 2016

Bail Application Pending Trial

Applicant in person
D.H Chesa, for the respondent

CHITAPI J: The applicant applies to be admitted to bail pending his trial on a charge of robbery and murder as defined in ss 47 and 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. On 8 June, 2016, I dismissed his application after several postponements and indicated that my reasons for the dismissal would be availed in due course. These are they.

The applicant filed his application as a self-actor on 8 March, 2016, it was served upon the respondent on 9 March, 2016. The application was set down for hearing on 14 March, 2016 before PHIRI J and was postponed to 18 March, 2016 to enable the respondent to file its response. Several postponements followed and the application remained pending until I disposed of it on 8 June, 2016. Disposing of a bail application pending trial nearly 4 months after it was filed amounts to serious indictment on the administration of justice. *Prima facie*, such length of delay offends against the notion of the presumption of innocence until one is proven guilty in that a lengthy deprivation of an accused's liberty without the court ruling on his release pending trial is infringes on the accused's rights. The delay offends s 117 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and s 50 (d) of the Constitutions of Zimbabwe Amendment (No 20) Act 2013. Whether there is justification or not for a delay in a particular matter is circumstantial. In other words each case is adjudged taking into account its peculiar facts.

For completeness of record the sections of the law which I have cited in turn read as follows:

> **"117 Entitlement to bail**
> (1) Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail; at any time after he or she has appeared in court on a charge and before sentence is imposed unless the court finds that it is in the interests of justice that he or she should be detained in custody.
>
> (2) …….. (a) ……..
> ……
>
> **50 rights of arrested and detained persons**
>
> (1) Any person who is arrested.
>
> (a-c) …….
>
> (d) must be released unconditionally or on reasonable conditions pending a charge or trial unless there are compelling reasons justifying their continued detention; and
>
> (e) ……..
>
> (z) …….. (a)"

The provisions of s 50 (1) (d) of the Constitution and s 117 (1) of the Criminal Procedure and Evidence Act are consistent with each other. Whilst argument can be proffered on whether the provisions of the two enactments are in sync with each other, my interpretation is that once compelling reasons for continued detention have been established; it necessarily means that the interests of justice would similarly be prejudiced by an admission of an accused to bail in such a scenario. The reference to compelling reasons for the continued detention of an accused as provided for in the Constitution and denial of bail in the interests of justice are complementary and intended to achieve the same result. I turn to deal with the application before me.

Background

The applicant and two accomplices Christopher Makumbo and Hamuza Kaitano were arrested on 27 November, 2015. They face one count of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and a second count of robbery as defined in s 126 of the same Act.

The state allegations as outlined in court when the applicant appeared for initial remand with his accomplices on 28 November, 2015 are that they waylaid the deceased on 21 November, 2015 at Mukuvisi Bridge, near Croco Motors along Seke Road at about 1850hrs. The deceased, a male adult called Gift Mutinhira was in the company of Eunice Kanhukamwe and Denfod Huta.

The applicant and his accomplices still at large are alleged to have struck the deceased on the back of the head using an unknown object, whereafter they searched him after he had fallen to the ground and robbed the deceased of his cellphone. They also attacked Denford Huta by hitting him with an unknown object and he too fell to the ground whereafter they searched him and robbed him of $46.00.

Part of the gang then advanced towards Eunice Kanhukamwe and robbed her of her handbag which contained her clothes and $10. The gang then fled from the scene along Mukuvisi River heading for Mbare suburb. Gift Huta and the deceased were referred to Parirenyatwa Hospital for treatment but the deceased died of his injuries resulting from the attack upon him by the gang.

The applicant was arrested after being implicated by his co-accused Christopher Makumbo. The remand record names the perpetrators of the offences in their order as;

Accused 1: Christopher Makumbo aged 21 years: National Registration 04-117542 N 04 of no fixed abode.

Accused 2: Hamuza Kaitano aged 27 years: national Registration: nil of no fixed abode.

Accused 3: John Chipanera (i.e applicant herein): 25 years: national Registration: nil: no residential address

All the accused are described as unemployed.

On evidence linking the accused to the commission of the crime, the remand form reads as follows:

Accused 1 identified by complainant Eunice Kanhukamwe

Accused 2 led police to the recovery of the sim card belonging to the deceased.

Accused 2 and 3 (Applicant) implicated by Accused 1

When the applicant and his accomplice appeared in court on remand, the magistrate remanded them in custody and advised them to approach this court for bail application since they faced a Third Schedule Offence for which the magistrate did not have jurisdiction to entertain a bail application without the personal consent of the Prosecutor-General as provided for in s 116 of the Criminal Procedure & Evidence Act. Looking at the aspects of the pre-trial incarceration and bail, the first point to note is that the applicant herein only filed his application for bail on 8 March, 2016 after his remand on 28 November, 2015. The initial delay from the date of first remand to the date of filing this application was that of the applicant. He waited for 3 months before filing this application.

Events post the application:

1. The application was initially set down on 14 March, 2016. The hearing was postponed to 18 March 2016 at the request of the State which asked for time to prepare and file a response. The application had however been served on the State on 9 March, 2016.
2. On 18 March, 2016 the State had still not filed a response. The hearing was postponed to 23 March, 2016 at the request of the state.
3. On 23 March, 2016 the State had again not filed a response. The matter was postponed to 30 March, 2016 for the State's response. The court further endorsed on the record that the applicant had indicated that he claimed to have been arrested on 21 November, 2015 and detained at Harare Central Police Station and released on 2 December, 2015. In other words the court was indicating that the State needed to check the applicant's alibi.
4. On 30 March, 2016, the State filed a response. However the application could not be dealt with because the court needed time to consider the response and the State counsel seized with the matter was not available. The hearing was postponed to 1 April, 2016.
5. On 1 April, 2016, PHIRI J dismissed the application. The reason for dismissing the application was endorsed as "No proof provided that applicant was detained at Harare Central on the date of the murder." The State had in its response filed on 30 March opposed the application on several grounds which included the following factors:
   (i) that the applicant was facing a serious charge of murder committed in the course of a robbery which offence attracted the capital sentence if not a long custodial term.
   (ii) that there was strong evidence linking the applicant to the offence since the applicant was positively identified by one of the complainants
   (iii) that the applicant's *alibi* that when the offence was committed on 21 November, 2015 he was in custody and that it was on a Saturday was untrue because 21 November, 2015 was a Sunday.
   (iv) that the applicant was not only of no fixed abode but he did not have identification particulars.

(v) that in all the circumstances of the case the applicant was likely to abscond and not stand trial.

As indicated, PHIRI J dismissed the application for the reason that I have quoted above.

The dismissal of the application had the effect that the applicant in terms of the proviso to s 116 (c) (i) of the Criminal Procedure and Evidence Act, the applicants' right to make a further application for admission to bail on the same charge became qualified. The qualification provided by the said *proviso* is that a further application for admission to bail can be made properly if it is grounded on facts which were not placed before the judge when he dismissed the first or earlier application. Further, the facts sought to be placed before the court should have been discovered or arisen post the making and determination of the earlier application. See *S. Murambiwa* SC 62/92; S v *Aitken* 1992 (2) ZLR 463 (S). The subsequent application has evolved to the colloquially referred to as an application for bail based on "changed circumstances." *S* v *Edward Barrows* SC 61/02; *Daniel Rance* v *S* HB127/04;

On 12 May, the applicant filed another bail application headed "APPLICATION FOR BAIL PENDING TRIAL CHANGED CIRCUMSTANCES." He submitted that the allegation by the state in the previous application that there was strong evidence against him was not true because there was no other evidence linking him to the offence except that he was implicated by Kaitano who alleged that the applicant was the one who sold him a buddie line which was said to belong to the deceased. This of course is not a new fact which did not exist before the first bail application was determined. The form 242 used to remand the applicant on the charge and which the applicant attached to his first bail application clearly indicated that part of the evidence against him related to the Buddie line which evidence he seeks to place before the court.

The applicant averred that on 21 November, 2016 he was under police custody having been arrested at 1850 hours. He averred that he was incarcerated at Harare Central Police cells. He stated that PHIRI J had advised him to present the detention book to court to prove his assertions. He averred that this was impossible because of his incarceration at prison as he could not attend at the police station or make arrangements for the detention book to be availed. He suggested that prison rehabilitation officers should be directed to confirm his *alibi* and submit their findings to court.

The applicant also submitted that the fact that his co-accused was identified and that the co-accused then implicated him should not be a good reason for seeking to punish him. This averment does not quite make sense for bail purposes and amounts to argument which the applicant can present at his trial. The other issue of the applicant's identification which the applicant raised was considered by PHIRI J and nothing has changed with regards that issue.

The State in its response submitted that there were no changed circumstances warranting the court to review its earlier ruling made by PHIRI J on 1 April, 2016. State counsel submitted as follows in para(s) 4 and 5 of his response.

> "4. Applicant was not alone when he committed the offences and his co-accused are strongly linked to the offence and are the ones who implicated him. The defence of alibi is easy to prove especially in his case where he alleges he was detained in police cells at Harare Central Police.
> 5. Applicant has failed to provide evidence to support his case, evidence which is easily accessible at station he alleges he was detained at."

The State also submitted that the docket would be available in June, 2016 when the accused's case would then be considered for trial.

When PHIRI J denied the applicant bail, he gave his reason as that there was no proof provided that the applicant was detained at Harare Central on the date of the murder. The accused in the present application stated that he could not access the police station and obtain the records of his detention because he was in remand prison. He proposed that the prison officers be directed to check and obtain this information and forward it to the court. The fact that the applicant was in custody and had limitations of accessing police records was not challenged by the State. It was not an issue which was argued before PHIRI J. I felt constrained to lean towards upholding the liberty of the applicant. This could only be achieved and a proper discretion exercised if all relevant facts were to hand. Mr *Chesa* accepted that it would not be easy for the applicant to access the records at the police station. He admitted that it would be easy and more practical for the investigating officer to check the veracity of the information. State counsel further accepted that where an alibi is raised, the police had a duty to investigate it. I therefore considered that the applicant's inability to access police records to confirm his alibi was a circumstance which was not canvassed at the initial application and that it was in the circumstances proper to reconsider the application for bail.

I directed the State counsel to cause the investigating officer to check on the applicant's alibi and to report his findings to the court. I also directed that the address given by the accused as his residential address where he would reside if granted bail be checked at the same the time. This was necessitated by the fact that the applicant was said to be of no fixed abode in the request for remand form. The applicant had given his address as 1074 Chiororo Road, Unit G Chitungwiza. I postponed the application to allow the State to check on the alibi and the address given by the applicant.

The State subsequently filed an affidavit prepared by the investigating officer. The investigating officer confirmed that he had checked the records at Harare Central Police Station and the applicant was not listed as having been a detainee at the said station on the date of the alleged offence as claimed by him. The investigating officer further made checks at No. 1074 Chiororo Road, Unit G Chitungwiza where he interviewed the owner of the House, a Mr Edwell Mazivarimwe who has resided at the premises since 2009. The owner of the premises did not know the applicant nor persons called Dadirai and Daniel Dick whom the applicant claimed to be his relatives and occupants at the said address.

The cornerstone of bail does not only lie in the applicant's right to liberty arising from the presumption of innocence until proven guilty. What is critical is that in the observance of these principles, the applicant for bail should attend his trial. Where the applicant applies for bail and lies about material facts which bear on whether he can be trusted to stand his trial, bail must be refused or denied. The applicant alleged a change in circumstances in that he could not access records at Harare Central Police Station because he was in custody. The court directed the State to do the investigation and report to court. The applicant's alibi was disproved. He is also given to lying because he gave a false address as his residential address. The applicant will try every trick he can master to gain his freedom and abscond.

The applicant's application on the basis of changed circumstances as herein discussed is hereby refused. The application is therefore dismissed. For record purposes it should be noted that the applicant's follow up applications filed on 12 July 2016 and 23 August, 2016 were withdrawn by him on 15 September, 2016 when he appeared before me at his request because he said that his reasons for making them were that he was following up on the reasons for judgment which I had reserved on 9 June, 2016 when I dismissed his application. He indicated that he

would decide on how to proceed after getting the reasons for judgment. The Registrar is directed to ensure that a copy of this judgment is availed to the applicant.

National Prosecuting Authority, state's legal practitioners