

TONDERAI MARABWA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 22 MARCH 2018 AND 29 MARCH 2018

Bail Application – changed circumstances

D. Abraham for the applicant
Ms S. Ndlovu for the state

MAKONESE J: This is an application for bail premised on the basis that there are changed circumstances. The applicant first lodged an application for bail pending trial on the 19th December 2017. The application was heard by my brother judge BERE J on the 29th December 2017. The application for bail was refused. Applicant avers that during the course of the hearing of the initial application for bail the Judge intimated that it was premature to grant the application for bail. He indicated relatives of the deceased would find it insensitive for the accused to be released before the deceased was even buried. It is argued on behalf of the applicant that with the passage of time there now exist changed circumstances that would allow this court to grant the application for bail. It is noted that the trial in this matter has been set down for the 24th and 24 July 2018. Applicant's legal practitioner has indicated that although no written reasons for refusal of bail were given at the time the Judge did express his view and that this court could reconsider the issue of bail at a later stage in the event of changed circumstances. The changed circumstances, it has been argued, are that the deceased has been buried and the investigations are now complete. The applicant avers that the interests of justice will not be compromised if the applicant is granted bail.

Factual background

The applicant is facing a charge of murder. It is alleged by the state that on 10th December 2017 the applicant strangled the deceased with a head scarf before setting her ablaze.

The brief circumstances as gleaned from the Form 242 (Request for Remand Form) are that on the 10th December 2017 the applicant phoned the deceased and they agreed to meet in Bulawayo. The deceased was applicant's girlfriend. Applicant travelled from Lalapanzi to Bulawayo. The deceased and applicant later met in the city centre in Bulawayo. They resolved to book a room at Esikhosini Guest Lodge in Khumalo. The two put up at the lodge for the night and had sexual intercourse. At around 0400 hours the parties had a misunderstanding after the deceased indicated that she was pregnant and was demanding that applicant must take her to her family for introductions. The applicant who had another girlfriend refused. The parties squabbled over the issue. Eventually applicant strangled the deceased using her head scarf. Applicant placed a mattress on the deceased and set her ablaze before locking the door from outside. The accused fled from the scene. A post mortem examination conducted on the remains of the deceased revealed that the cause of death was asphyxia and strangulation. The applicant confessed to having been with the deceased on the night in question.

Whether there are changed circumstances

This application has been brought in terms of section 117 (6) (a) of the Criminal Procedure and Evidence Act (Chapter 9:07). The section provides as follows:

- “117. (6) Notwithstanding any provisions of this Act, where an accused is charged with an offence referred to in –
- (a) Part 1 of the Third Schedule, the judge or (subject to proviso (iii) to section 116), the magistrate hearing the matter shall order the accused to be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the judge or magistrate that exceptional circumstances exist which in the interests of justice permit his or her release; ...” (my emphasis)

It is noted that section 116 (c) (ii) sets out the circumstances in which an application for bail on changed circumstances may be brought in the following terms:

- “116 (c) ...
...
(ii) 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; ...”
(my emphasis)

In my view the premise on which this application has been made is not well grounded. It has not been suggested that there were facts which were not placed before the judge in the previous application for bail. There are no new facts which have arisen or have been discovered. It is trite that where the evidence against an accused person is very strong the likelihood of abscondment is high. The explanation given by the applicant as the basis of this defence to the charge is that the deceased could have been murdered by someone else or that she committed suicide. The applicant is entitled to this defence and he is presumed innocent until proven guilty. In considering whether the interests of justice will not be compromised if applicant is admitted to bail, the court may not in my view, close its eyes to the strength of the state case. A trial date has been set in this matter and applicant will be tried on the 24th and 25 of July 2018. The state witnesses have been duly warned and the applicant will have his day in court during the course of the next term. The fact that a trial date has been set will not on its own defeat an application for bail pending trial. The court is however required to balance the interests of the applicant and the proper administration of justice.

I have had occasion to consider the judgments of this court on changed circumstances, see *Munyaradzi Kereke v Francis Maramwidze* HH-792-16; *Bongani Moyo v The State* HB 95-08; *Nhachi v The State* HH-7-10; *Mapika v The State* HH-127-10.

In the case of *Daniel Range v The State* HB-127-04, CHEDA J remarked at page 2 of the cyclostyled judgment that;

“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.”

As I have indicated earlier, the applicant avers that during the course of the initial bail application the learned judge expressed the view that it would be too insensitive to release the applicant even before the burial of the deceased. I do not think the changed circumstances as envisaged under section 117 (6) (a) of the Criminal Procedure and Evidence Act, have been established by the applicant. If anything, the strength of the state case, weighed against the defence proffered by the applicant militate against the granting of bail. The interests of justice will be greatly compromised if the accused were granted bail at this stage. There are no new facts which have been discovered which would tilt the balance in favour of the applicant.

In my view, there are no new circumstances placed before the court to indicate that exceptional circumstances exist that are compelling for the release of the applicant on bail.

In the result, the application for bail pending trial on changed circumstances is hereby dismissed.

Tanaka Law Chambers, applicant’s legal practitioners
National Prosecuting Authority, state’s legal practitioners