THEMBINKOSI MATHUTHU
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 23 November 2016, 7 December 2016,
29 December 2016 and 17 March 2017

Bail Application

Applicant in person
S W Munyoro, for the respondent

CHITAPI J: The applicant faces allegations of murder committed in the course of a robbery. He applies for bail pending trial on the basis of changed circumstances. His previous bail attempts before this court were dismissed by ZHOU J on 5 August, 2015 and 20 July, 2016 and written reasons were supplied by the learned judge. In the reasons for dismissing his application handed down on 20 July, 2016, it was noted that the trial of the accused and his accomplices had failed to commence on 23 May, 2016 through circumstances beyond the control of the National Prosecuting Authority in that the applicant's *pro-deo* counsel was unwell or indisposed.

The learned judge referred to his judgment in HH 700/15 in which he made a finding that the evidence against the applicant appears to be overwhelming. Notably, the learned judge observed that the murder for which the applicant awaited trial was committed in the course of an armed robbery. The fire arm used in the commission of the offence was recovered from the applicant. The applicant was identified by witnesses at an identification parade. The conclusion reached by the learned judge was that the strength of the State case was so strong that the applicant was likely to be induced by the prospects of an assured conviction to abscond. In dismissing the application, the learned judged further commented that the applicant had not established or suggested that the State case against him had become any weaker than previously adjudged when his bail application was dismissed.

On 10 November 2016, the applicant filed this bail application with which I am seized citing changed circumstances. In the application, the applicant avers that when the case was postponed on

23 May, 2016 owing to the indisposition of *pro-deo* counsel, the arrangement was what it would be reset for hearing in the third term. He submitted that he appeared in court with his *pro-deo* counsel on 7 November, 2016 but that the matter was struck off the roll without reasons given. The applicant averred that all that he wanted was for the justice system to take its course and that his constitutional rights be safeguarded.

The application was first heard before me on 23 November, 2016. I postponed the application to 24 November, 2016 and directed the prosecution to establish whether the indictment of the applicant was still holding and to file a comprehensive response to the application.

In a response field on 24 November, 2016, the prosecutor submitted that the trial had not commenced on 7 November, 2016 owing to non-availability of witnesses. It was further submitted that a key witness who had not been located had since been located with the result that the trial was now to be set down in the first term of 2017 "before the lapse of the current indictment period." It was further submitted that the applicant was indicted on 30 September, 2016 and that the indictment period would lapse on 30 March, 2017 by which time the trial will have commenced. I pause here to make a minor correction that if the applicant was indicted on 30 September, 2016, the indictment will expire on 31 March, 2017 and not 30 March 2017. An indictment lapses after six months and a month is a calendar month.

The prosecutor also attached an affidavit from the investigating officer confirming the availability of the key witness. He also deposed that a pistol recovered from a co-accused of the applicant, Justin Momela had been examined by CID Forensic Ballistic experts. The pistol matched several outstanding armed robbery cases. The applicant was said to have been charged for these offences. I pause here to comment that the issue of the applicant facing other charges was not an issue raised at this initial bail application. It would be remiss of the court to consider the new issue and taking it into account. The applicant has petitioned the court to review its initial dismissal of his application and the court will limit itself to considering whether there has been any change in the circumstances which it made a finding upon, such as would persuade it to disturb its earlier ruling.

On 20 December, 2016, before a ruling on his application which had been reserved was made, the applicant filed yet another application which he headed "application for bail owing to enhanced circumstances" (*sic*). In the application, the applicant averred without providing further detail that he had been acquitted of other pending cases. He made reference to an application he made for bail in 2012 and cited case No. B 1060/12. As it was not clear as to what relevance the application had to the application for which I had reserved judgment, I caused the matter to be set down on 29 December, 2016. The

applicant then withdrew his application which in any event should have been dealt with under case No. B 1060/12 to which it related.

The applicant was denied bail on the basis of the seriousness of the offence coupled with the overwhelming evidence against him which was determined to be such that a conviction was assured and the likely sentence being heavy. In fact, in the event of the applicant being found guilty of murder committed in the cause of a robbery, he runs the risk of the death sentence being imposed upon him. The court determined that the applicant was a likely flight risk and would abscond if released on bail.

Admittedly, the passage of time since the last application was determined will, depending on the circumstances of each case amount to a fact arising since the last determination of the dismissed bail application. The passage of time does not constitute an automatic entitlement to bail. Each case is dealt with on its own merits. In *casu*, the state case has not been weakened by the passage of time. The applicant has not shown in what way the passage of time must entitle him to be released on bail. It must be emphasized that the applicant bears the burden to show on a balance of probabilities that it is in the interests of justice that he be released on bail (see s 115 (c) (2) (a) (ii) (A) of the Criminal Procedure & Evidence). The onus or burden does not shift when the applicant repetitions the court to release him on bail on the basis of changed circumstances. This is the position with respect to offences falling under Part 1 of the Third Schedule to the Criminal Procedure & Evidence Act.

Section 117 (b) (a) places an even more onerous burden on the applicant seeking admission to bail on a Part 1 Third Schedule listed offence. The applicant is required upon being given a reasonable opportunity to do so, to adduce evidence to the satisfaction of the judge that exceptional circumstances exist which in the interests of justice permit the release of the applicant to bail. The applicant in making this application did not adduce any evidence, let alone allege that the failure of the trial to commence constituted an exceptional or extra-ordinary circumstance permitting the applicants release on bail. The accused's indictment has not lapsed or he has not in any event alleged so. Had it lapsed, one could then have considered the legality of the applicant's continued detention and whether it amounted to a special circumstance entitling the release of the applicant from pre-trial detention.

On its part, the prosecution needs to be reminded that the applicant cannot be incarcerated indefinitely without trial. The provisions of s 160 of the Criminal Procedure & Evidence Act provides for a dismissal of an indictment which is not prosecuted within 6 months of the accused being indicted unless the failure to prosecute the accused attributable to circumstances beyond the control of the Prosecutor-General. An accused person has a constitutional right to have the case against him or her prosecuted within a reasonable period. Section 160 provides a safeguard against the abuse of the right to a trial within a reasonable period save where the accused person is to blame for the trial not taking off or other circumstances beyond the control of the prosecutor render the holding of the trial within the 6 months life span of the indictment impossible.

I am satisfied that the applicant has not discharged the burden to satisfy me that there has been an exceptional change in circumstances warranting that I review in his favour the order previously made by this court denying the applicant bail pending trial. I however warn the Prosecutor General that the State's response indicated that the applicant was to be tried during the lifespan of the indictment which expires on 31 March, 2017. The prosecutor submitted that all the witnesses were available and the case was ready to commence. Hopefully the undertaking to bring the applicant to trial will be fulfilled. It is important that serious cases are properly tracked and monitored to safeguard the interests of justice and it should be remembered that the applicant is entitled to justice as well and to demand for it.

The Registrar should forward a copy of this judgment to the Prosecutor General for him to note the courts' observations and concerns especially as in this case where an undertaking to bring an accused or the applicant to trial is made to this court but it is not fulfilled.

For the avoidance of doubt however, my determination is that the applicant's application for bail pending trial herein is dismissed.

National Prosecuting Authority, respondents' legal practitioners