ALBERT MUGOVE MATAPO
and
NYASHA ZIVUKU
and
ONCEMORE MADZURAHONA
and
EMMANUEL MARARA
and
PATSON MUPFURE
and
SHINGIRAYI WEBSTER MUTEMACHANI
and
RANGARIRAYI MAZIVOFA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 5 and 15 February and 8 March 2010

Bail Application

Mr C Warara for the 1st, 3rd, 4th 6th and 7th applicants.
2nd and 5th applicants in person.
Mr T Zvekare for the respondent.

MAKARAU JP: On the turn, I dismissed the above bail application and indicated that my reasons would follow. I now set them out.

The applicants are facing one count of contravening section 20 of the Criminal Law (Codification and Reform) Act [Chapter 9.23]. They were arrested on the charge in May 2007. It is alleged against the applicants that during the period extending from 2006 to 2007, the first applicant who is a former member of the Zimbabwe National Army, connived and conspired with the other six applicants and other persons to overthrow the Government of Zimbabwe through unconstitutional means.

The trial of the matter was set down for 7 July 2008. At the commencement of the trial, the applicants raised a constitutional issue for determination by the Supreme Court sitting as the Constitutional Court. The question was whether or not the arrest, detention and indictment of the applicants under the Criminal Law (Codification and Reform) were

constitutional. The question was duly referred for answering under section 24 of the Constitution of Zimbabwe, resulting in the stay of the criminal trial.

Pending determination of the constitutional question, the applicants applied for bail. The application was dismissed. In dismissing the last application, the court was of the view that it was not in the interests of justice to grant the applicants bail in view of the seriousness of the charge they were facing and in view of the fact that the applicants were a high flight risk as they are facing a capital punishment offence.

On 7 December 2009, the Supreme Court sitting as the Constitutional Court answered the constitutional question raised by the applicants. It unanimously concluded that the Criminal Law (Codification and Reform) Act under which the applicants were charged was not *ultra vires* the Constitution of Zimbabwe in whole or in part and that consequently, the arrest, detention and prosecution of the applicants under that law did not constitute a breach of their rights under the Constitution. The reasons of the order handed down were not immediately given and were awaited at the time of the hearing of the bail application before me. Following the handing down of the order by the Supreme Court, the 2nd and 5th applicants filed an application for bail pending trial, citing changed circumstances. This they did on 4 January 2010. The other applicants filed a similar application on 3 February 2010. For convenience and with the consent of the parties, I consolidated the hearings of both applications.

Central to both applications is the delay that has ensued between the time the applicants were arrested and the anticipated date of their trial. A period in excess of 30 months has since elapsed since their arrest without the applicants being tried. It was submitted by *Mr Warara* that since the court roll for the first term ending on 2 April had been settled without including the resumption of the trial of the applicants, there will be a further delay in the setting down of the matter for trial which can only be scheduled for the second term at the earliest.

In his oral submissions, *Mr Warara* made three main points. He submitted firstly that circumstances in the matter had changed since the last bail hearing in the matter in that the State was not ready to proceed with the trial of the matter immediately after the handing down of the order by the Supreme Court. He further submitted that there was doubt that the trial would commence if set down as one of the key state witnesses was no longer available to

testify and finally, he submitted that even if the trial commenced, there were doubts that the trial would be concluded due to the nature of the evidence available to the State.

In opposing bail the State denied that it was responsible for the delay that has ensued in the matter between the arrests of the applicants and their possible trial dates. Further, *Mr Zvekare* was adamant that it was only the State that could comment on whether or not it was ready to proceed with the trial and in this case, the State was ready and believed it has adequate evidence to secure a conviction. Finally, he submitted that the risk of absconding by the applicant had been amplified by the ruling of the Supreme Court which had the effect of sanctioning the prosecution of the applicants under the challenged law.

It is trite that the procedure of bail is meant to strike a balance between the rights of the individual to his or her freedom and the interests of the due administration of justice. While the right of the individual to his or her freedom is easy to identify and give content to, the interests of the due administration on the other hand are not so easy to define or give expression to as these encompass a number of separate but interrelated factors. The law has attempted in section 117 (2) of the Criminal Procedure and Evidence Act [Chapter 9.07] to codify the considerations that the court must take into account in assessing whether or not the interests of justice will be defeated if the applicant is allowed bail. The list is not intended to be exhaustive and is indeed not exhaustive. Bail is always in the discretion of the court hearing the application.

I have always viewed the procedure of bail pending trial as a system where, because the applicant is at law innocent, he or she must be admitted to bail unless the due administration of justice will thereby be prejudiced. Indeed the wording of section 117 (1) of the Criminal Procedure and Evidence Act appears to reinforce my view of bail. It provides:

"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 interest of justice that he or she should be detained in custody."

Where however, as in *casu*, the applicant has been denied bail once or twice before, the position changes somewhat. In denying the applicant bail in the first or subsequent instance, the court would have in essence held that it is not in the interests of justice to admit the applicant to bail. For such an applicant to be admitted to bail thereafter, he or she must perforce demonstrate there has been a change in the circumstance of the matter to such an extent that the threat to the due administration of justice found by the previous court has been

removed and that the due administration of justice is now safeguarded from interference or frustration.

There is no codified list of the circumstances that will be regarded by the court as sufficient to remove the threat to the due administration of justice. The finding that such circumstances exist is in the discretion of the court.

In *casu,* the applicants have alluded to the passage of time since their respective arrests on the charge. That a period in excess of 30 months has elapsed is not in dispute. It is further not in dispute that the larger portion of the time constituting the delay was as a result of the referral of the constitutional question to the Supreme Court for answering. This is a delay caused by the system of justice delivery and is attributable neither to the applicants nor to the respondent. It is a systemic delay which though regrettable, is at times unavoidable.

In my view, a systemic delay may constitute a change in circumstances for the purposes of removing a threat to the due administration of justice where it is coupled by a resultant weakening of the State case or the ability of the State to proceed with the prosecution of the applicant. Where for instance, the systemic delay has caused all or the key witnesses of the prosecution to become unavailable through either death, relocation or any other cause, such a delay, can in my view, validly constitute a change of circumstance that removes the threat to the due administration of justice. It appears to me that where the State case has been weakened through the loss of key witnesses, the likelihood on the part of the applicants to abscond or interfere with or frustrate the due administration of justice diminishes.

In *casu,* the systemic delay in the matter has indeed led to the loss of two State witnesses through death and abscondment. The State has however reassured the court that notwithstanding the loss of the two witnesses, it has enough evidence from the remaining witnesses to secure a conviction of the applicants. I do not deem it advisable at this stage of the proceedings to embark upon an analysis of the evidence that the two State witnesses would have led in the matter and which other evidence the state has in lieu of such. I however wish to place reliance on the assurance received from the Attorney-General that indeed he will proceed with the prosecution of the applicants and that he has adequate evidence to secure a conviction. In this regard, I wish to reiterate the age old practice of this court to generally place reliance on the assurances of the Attorney- General and the underlying belief of the court that such is not given lightly in an attempt to secure a short –term gain from the courts. In my view, the trust that the courts reposes in the word of the Attorney-General is one to be cherished.

I am constrained to make these remarks in this matter as one or two unsavoury features have presented themselves in the hearing of the bail application and to which I draw the attention of the Attorney- General. Firstly, the hearing of this matter was postponed on a number of accessions at the instance of the respondent due to the alleged unavailability of the record of proceedings in earlier bail applications. The officer representing the Attorney-General in the matter on the first day of the hearing, (not *Mr Zvekare*), advised the court that he could not proceed with the matter as staff at this court were failing to locate the records of the previous bail applications. From the notes in the record of both matters, the respondent had managed to have the hearing of the applications postponed on two previous occasions for the same reason. Administrative inquiries by my office revealed that the records have never gone missing and were always available to the knowledge of the respondent's representatives

Secondly, in the written response that was filed on behalf of the State was an allegation that the applicants had on an earlier occasion attempted to flee from custody and were to be charged with that offence shortly. At the hearing of the matter, it emerged that these allegations were first made in 2008 in a response to a bail application filed by the applicants. The matter was not tried and was only brought up again when the applicants filed the bail application before me, giving rise to the impression that the charge, if at all valid, is used routinely to wave a red flag at the court that the applicants are a high flight risk.

Mr Zvekare conceded that the applicants were not on remand for the allegations and that the information had simply been brought up for the information of the court. This in my view should have been the mainstay around which bail was opposed and should have been pursued with the vigor that it deserves. That it was not gives some credence to the submissions by the second applicant that it is a convenient old allegation that is always brought up and dusted to defeat any attempts by the applicants to secure their liberty. He maintains that it is not a charge that the State ever intends to proceed with as it is without merit.

The office of the Attorney-General is generally viewed by this court as a dependable office whose integrity and impartiality is above reproach. Conduct such as I have referred to above has the effect of diminishing the trust that the court reposes in this office and is to be regretted.

I now return to dispose of this application on its merits.

As I have indicated above, at this stage, I am considering in the main whether after the last refusal of bail, circumstances have changed to such an extent that the threats to the due

administration of justice should the applicants be granted bail have been completely removed or lessened to an insignificant level. I am of the view that there been no such change notwithstanding the loss of two witnesses by the State.

It is on the basis of the foregoing that I dismissed the application for bail.

Warara and Associates, 1st, 3rd, 4th 6th and 7th applicants' legal practitioners.
Office of the Attorney-General, respondent's legal practitioners.