

COLLEN KANDAWASVIKA
and
TAKAWIRA MANDERA
versus
THE STATE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 16th August 2004

Bail Application

Mr *Mtombeni*, for the applicants
Ms *Dube*, for the respondent

BHUNU J: The two applicants were arrested and detained in custody together with one Nicholas Nziramasanga who has since been granted bail.

Both applicants unsuccessfully applied for bail in the magistrate's court during the first week of July 2004. No appeal has been lodged against the magistrate's decision to refuse the applicants bail. No misdirection has been alleged against the magistrate in reaching the decision which he did.

Once bail had been refused by the magistrate the proper procedure would have been to appeal against the magistrate's refusal to grant bail. If the granting of bail to the applicant's co-accused constituted a changed circumstance then, an application for bail should have been made in the magistrate's court on the basis of the changed circumstances.

This court cannot simply usurp the functions of the magistrate's court and interfere with their judgements without just cause.

No record of proceedings pertaining to the bail application in the magistrate's court has been filed. We therefore do not know why the

magistrate dismissed the bail application. The magistrate's decision is lawful and binding until such time it is properly set aside by a competent court of competent jurisdiction following proper appeal or review procedures.

Bail having been refused by the magistrate it was remiss for counsel for the applicant to simply lodge a fresh application in the High Court without following the proper appeal or review procedures. This should really be the end of the matter but because the liberty of the subjects is at stake I am inclined to have a look at the merits.

The applicants seek bail on the basis that their co-accused Nicholas Nziramasanga has since been granted bail by this court.

A perusal of the record shows that Nicholas was granted bail because it was considered that the state case against him was extremely weak. The facts however disclose that the state has a strong case against the applicants. Nicholas was merely implicated by the two applicants whereas the second applicant was positively identified by the two complainants.

Both accused are facing a serious charge of armed robbery involving the use of a firearm. Such an offence invariably attracts a severe penalty upon conviction. There is therefore a real prospect of applicants facing a custodial sentence which factor may prompt them to abscond.

The case of *Joyce Nyambuya and 2 others vs The State* HH 56-03 is authority for the proposition that, it is not in the best interest of the due administration of justice to grant an accused person bail where the charges against him are serious and there is overwhelming evidence against him.

In this case while I am alive to the doctrine of the presumption of innocence as submitted by counsel for the applicant the mere fact that

it is not in dispute that there are two eye witnesses against the second applicant puts a different complexion to that presumption.

In respect of the 1st applicant, the mere fact that he implicated Nicholas suggests that he has something to do with the commission of the offence.

That being the case the application cannot succeed. It is accordingly ordered that the application be and is hereby dismissed.

Mtombeni, Mukwasha and Associates, the applicants' legal practitioners
Civil Division of the Attorney-General's Office, the respondent's legal practitioners