

DISTRIBUTABLE (1)
Judgment No. SC. 2/07
Crim. Application No. 317/2006

PETER MICHAEL HITSCHMANN v THE STATE

SUPREME COURT OF ZIMBABWE
HARARE, JANUARY 31 & FEBRUARY 2, 2007

E Matinenga, for the applicant

V Shava, for the respondent

Before: GWAUNZA JA; In Chambers, in terms of r 31 of the Supreme Court Rules.

After hearing argument from both counsel in this matter, I dismissed the appeal and indicated the reasons would follow. These are the reasons.

The applicant is appealing, with leave of the High Court, against that court's refusal to grant him bail pending finalisation of his criminal trial.

The applicant was arraigned before the High Court facing charges under s 10 of the Public Order and Security Act [*Cap 11:17*]. This followed the discovery by the police of a large assortment of weapons at his residence in Mutare. The charge preferred against the applicant was of conspiracy to possess weapons of insurgency, banditry, sabotage and terrorism in contravention of the section referred to.

Following his arrest and detention, the applicant unsuccessfully applied to the High Court for bail. He thereafter made three other applications for

Comment [PD1]:

the same relief, on the basis of changed circumstances, but was unsuccessful in all attempts. The last of these three applications was made after the commencement, but before the end, of the trial, which started on 31 October 2006. It was not possible to complete the trial during the High Court circuit in Mutare, a circumstance that led to its adjournment until the next circuit session.

In the court *a quo*, the “changed circumstances” that the applicant relied on were essentially -

(a) the delay in the commencement of the trial, necessitated primarily by the eleventh hour amendment by the State, to the charge sheet;

(b) an amendment to s 27 of the Criminal Law Codification Reform Act, [Cap 9:23], whose effect was to give the court the discretion to sentence an accused person convicted of the same charges as those being faced by the applicant *in casu*, to life imprisonment or a lesser term; and

(c) the fact that, unlike in the case of the earlier applications, the applicant at the time if his fourth application for bail, had filed his defence outline, that is, an answer to the charges that he was facing.

The learned Judge in the court *a quo*, while finding that indeed, some circumstances had changed, was not satisfied that the changes warranted the admission of the applicant to bail. The learned Judge *a quo* found no merit in the argument concerning the delay in the taking off of the trial, and noted with displeasure that the trial had been allocated two days, a period he felt would in any case have been too short for a trial of that nature. Thus, even if the trial had taken off in earnest, it would still have had to be adjourned until further notice at the end of the two days. Given this state of affairs, it was the learned Judge’s

view that the applicant could not have been any more prejudiced than he would have been had the trial taken off without any initial delays.

The learned trial Judge's reasoning, in my view, cannot be faulted. Before me, the submission was made for the respondent (and was not decisively refuted by the applicant) that the trial of the accused was set to resume during the first term of the 2007 Court calendar. This translated to a few weeks at the most, and I am not, therefore, persuaded enough of a delay has been proved to merit interference with the determination of the court *a quo*.

Concerning the amendment to s 27 of the Criminal Law Codification and Reform Act [*Cap 9:23*] it was the learned Judge's view that the amendment in question did not in any way reduce the seriousness of the offence with which the appellant was charged, since the maximum sentence remained the same.

I can, again, find no fault with the reasoning and conclusion of the court *a quo* on this point. My view is that the amendment in question can only be seen in the light of an acknowledgment, by the lawmakers, of the fact that the circumstances of each case generally differ and, therefore, that the maximum penalty of life imprisonment may not be the appropriate sentence in all cases in which a conviction is secured.

The charges that the applicant is facing appear to be quite serious. For instance, he has submitted that among the weapons in his possession were some that had been "dumped" at his premises by people who were themselves afraid to surrender them to the police. For purposes of the charges the applicant is facing, such weapons would not be regarded as licensed.

The seriousness with which the legislature or the court view a crime is, in any case, not the only factor taken into account in assessing an applicant's suitability for bail. This is illustrated by the fact that applicants facing very serious charges like murder have in many cases been admitted to bail while others facing less serious offences have been denied bail.

Therefore, even were the amendment to the law in question to be taken as an indication that the offence was no longer viewed as serious, that in itself would not have absolved the applicant from proving his suitability for bail on other grounds. There is, in my view, therefore, no merit in the applicant's contention that the amendment to s 27 of the Criminal Law Codification and Reform Act had the effect of constituting changed circumstance meriting interference with the determination of the court *a quo*.

The applicant argues further that his submission of a defence outline should be viewed as a changed circumstances. The learned Judge court *a quo* was, in my view, correctly not swayed by this argument. I agree with the Judge's observation, and conclusion, that a defence outline, by its nature has to be tested through the process of cross-examination, before its credence can be said to have been established.

The purpose of a defence outline is, basically, to provide an accused person with the opportunity to explain his attitude in relation to the charge he is facing, or to indicate the basis of his defence¹. It is only after a trial that the court can determine whether or not an accused person has proved the defence set out in his defence outline. Before the defence outline is tested thus, it would be, in my view, be difficult to attach such weight to it as would constitute

¹ *Criminal Procedure in Zimbabwe* by John Reid Rowland at pp 16-34

a changed circumstance meriting interference with an earlier determination concerning bail.

I was in the final analysis not satisfied the applicant had established any misdirection on the part of the learned Judge *a quo*, as to warrant interference with his determination.

Hence my dismissal of the appeal.

Henning, Lock Donagher & Winter, applicant's legal practitioners

Attorney-General's Office, respondent's legal practitioners