KISIMUSI DHLAMINI 1st Applicant
and
GANDHI MUDZINGWA 2nd Applicant
and
ANDRISON MANYERE 3rd Applicant
versus
STATE Respondent

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 8 and 11 May 2009

Mr *A. Muchadehama*, for the applicant
Mr *C. Mutangadura*, for the respondent

MTSHIYA J: The applicants, who are all members of the Movement for Democratic Change-Tsvangirai (MDC-T), face charges of insurgency, banditry sabotage or terrorism under s 23(1)(a)(i)(ii) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] or alternatively aggravated malicious damage to property in terms of s 143 of the same Act.

On 4 May 2009, the applicants were indicted for trial in the High Court in terms of s 66 of the Criminal Procedure and Evidence Act [*Cap 9:07*] ("the Act"). The lower court then correctly proceeded to commit the applicants to prison as required by subs (2) of s 66 of the Act.

On 9 April 2009, prior to their being indicted for trial, this court had granted the applicants bail. The respondent, however, appealed against this court's decision to grant the applicants bail and the appeal is still pending in the Supreme Court .

On 17 April 2009, the same date when the respondent was granted leave to appeal against this court's order of 9 April 2009, the applicants were released from custody on the basis of the reason that the respondent had not filed its appeal within 7 days as stipulated in s 121 of the Act. The respondent, however, contested the release of the applicants and caused their re-arrest on 22 April 2009.

Following their indictment, the applicants now approach this court for fresh bail on the basis of changed circumstances.

In response to the application, the respondent has raised a point *in limine* arguing that pending the determination of the appeal against bail filed in the Supreme Court by the respondent on 17 April 2009, the applicants cannot bring a fresh application for bail. The

applicants, it is argued, are therefore not properly before the court. Furthermore, the respondent argues that as far as the issue of bail is concerned, the applicants do not fall under the ambit of s 66 of the Act. This, the respondent submits, it because following the appeal to the Supreme Court, this court's Order of 9 April 2009 which granted the applicants bail, was automatically suspended. That being the case, argues the respondent, the applicants were in lawful custody at the time of their indictment. There was therefore, in the view of the respondent, no need for the lower court to issued an Order for their commitment to prison.

In response to arguments in support of the point *in limine*, the applicants submit that following the release of the applicants from custody on 17 April, 2009 the respondent has not been able to legally reverse the act of their release. The applicants therefore submit that at the time of their indictment they were still on bail, which bail was only revoked upon their indictment for trial in the High Court in terms of s 66 of the Act. The applicants further submit that the new circumstances brought about by the indictments against them necessitates that they make fresh applications for bail. The applicants argue that even if the Supreme Court were to rule in their favour, the operation of s 66 would not avail them the benefit of the bail granted by this court on 9 April 2009. That bail, having been granted prior to indictment, would not escape automatic cancellation/revocation under subs (2) of s 66.

It is, in my view, quite clear that the point *in limine* arises out of different interpretations being given to s 66 of the Act. The relevant subsections, namely subss (1) and (2), provide as follows:

> "(1) If the Attorney-General is of the opinion that any person is under reasonable suspicion of having committed an offence for which the person may be tried in the High Court, the Attorney-General shall cause written notice to be served on
>
> (a) A magistrate for the province within which the person concerned resides or for the time bring is present, or
>
> (b) Any magistrate before whom the trial of the offence could be held in respect of the offence concerned, informing the magistrate of his or her decision to indict the person concerned for trial before the High Court and of the offence for which the person is to be tried.
>
> (2) On receipt of a notice in terms of subs (1), the magistrate shall cause the person the person concerned to be brought before him or her and, notwithstanding any other provision of this Act, <u>shall forthwith commit the person for trial before the High Court and grant a warrant to commit him or her to prison, there to be detained till brought to trial before the High Court for the offence specified in</u>

> the warrant or till admitted to bail or liberated in the course of law". (My own underlining).

The language in the above provisions is quite clear and, in my view, leads to no ambiguity.

My clear understanding of the above provisions is that, in terms subs 2 above, even if the applicants were on bail prior to their indictment on 4 May 2009, such bail fell away as a result of the indictment i.e bail was revoked. That would place the applicants in the same position as one who had been denied bail. The respondent has correctly conceded that the invocation of s 66(2) of the Act automatically cancels any existing bail. Furthermore, s 66(2) of the Act also compels the magistrate to grant a warrant for his/her committal to prison till brought to trial. Even if the person is already in custody/prison the magistrate is, in my view, under a legal obligation to pronounce that the indicted person shall remain in prison till brought to trial before the High Court. This, it was submitted and not disputed, is what actually happened in *casu*.

The wording in s 66(2) – "till admitted to bail or liberated in the course of law" can only be taken advantage of by an indicted person in the court before which that person has been indicted. In this case it is the High Court and indeed the High Court can consider a fresh bail application if the person committed to prison makes such a fresh application for his/her liberation. In this regard, it is important to note that, subject to the provisions of s 117 of the Act, the law allows for any person who is in custody to apply for bail at any time.

It appears to me that when the Attorney-General makes a decision in terms of s 66 of the Criminal Procedural and Evidence Act, a totally new situation is ushered in. The parties accept that position. Once indicted, as already stated, any existing bail is revoked. Accordingly, my assessment of the position is that the anticipated ruling of the Supreme Court on bail, either way, would not affect the mandatory operation of s 66(2). In terms of that provision of the law, the applicants cannot avail themselves to the pre-indictment bail unless the High Court extends that bail. For the purposes of this application therefore, the appeal in the Supreme Court is rendered academic. This is so because the pre-indictment bail has been overtaken by events. As the position stands now my understanding of the legal position is that applicants, like all other persons who are immediately committed to prison upon indictment can only be liberated on the basis of fresh application(s) for bail. The applicants cannot therefore await a decision which they know even if in their favour will not render them their

liberty in the sense that in terms of s 66(2), the bail that is the subject of appeal in the Supreme Court would not apply to the new situation unless extended by the High Court. The order which granted them bail only applied to the period prior to indictment, namely 9 April 2009 to 4 May 2009. This position is fortified by the fact that the operation of s 66(2) would, in all cases, lead to the revocation of any bail granted prior to indictment.

My clear understanding of the meaning of s 66(2) of the Act is that any bail granted by any court to an accused person prior to indictment, unless extended by the High Court, ceases to operate as soon as the accused person is indicted for trial. The accused person can, however, upon indictment, make a fresh bail application before the High Court. Upon application by the indicted person, it then becomes the prerogative of the High Court, taking into account the contents of the indictment papers to either extend the pre-indictment bail or grant new bail or even deny bail completely. The Act, in my view, envisages this fresh application and hence the phrase "till admitted to bail or liberated in the course of law".

There can be no doubt therefore, in my view, that the very process of indictment ushers in new circumstances which entitle an accused person, who, through the indictment papers, now knows what awaits him/her on the trial date, to properly re-assess his/her position. This includes his/her suitability as a candidate for bail under the changed circumstances. To that end the applicants in *casu* are exercising their legal right to make fresh bail application(s) under the changed circumstances. The applicants are fully aware that in terms of s 66(2) of the Act, their pre-indictment bail, which is the subject of appeal in the Supreme Court, will not in any way save them from the strict operation of s 66(2) of the Act, so as to grant them their liberty. In *casu* therefore, other than merely relying on the question of changed circumstances as ordinarily applicable in bail situations, the applicants are approaching the court upon the dictates of s 66(2) of the Act. The applicants can only do so through this court which is now seized with their trial. As already pointed out, the Supreme Court's ruling, either way, will not affect their committal to prison. They can only seek their liberation through making a fresh application before the High Court where they have been indicted for trial. Accordingly I do not agree that in the circumstances of this application, the applicants are necessarily estopped by the pending appeal in the Supreme Court to proceed to make fresh application(s) for bail. As I have already stated elsewhere in this ruling, that appeal, in my view, has become of academic interest due to its having been overtaken by events.

In view of the foregoing, my finding is that the applicants are properly before the court and can therefore proceed to argue their case for bail.

Accordingly the point *in limine* is dismissed.

Mbidzo Muchadehama & Makoni, applicants' legal practitioners
The Attorney-General's Office, respondent's legal practitioners