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

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 12 and 13 May 2009

Mr *C. Kwaramba*, for the applicants
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) (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 Section 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 8 May 2009, the applicants were before me applying for bail pending trial. The respondent then raised a point in *limine* arguing that the applicants were not properly before the court due to a pending appeal in the High Court and also due to the fact that the revocation of bail in terms of s 66(2) of the Act did not apply to the applicants since they were already in lawful custody. I listened to arguments on the issue and on 11 May 2009, I dismissed the respondent's objection in *limine.* I then indicated that the applicants could proceed to argue their fresh application for bail. The matter was then postponed to 12 May 2009 to allow respondent to file its response to the merits of the application. The respondent duly filed its response on 12 May 2009 and the matter was then argued.

I must hasten at this point, to mention that at the hearing on 8 May 2009, where the point in *limine* was raised, I pointed out that the norm in this court is that when an objection in *limine* is raised, a party is normally enjoined to also address the merits of the matter before the court. I believe that if that procedure had been adhered to, this matter would have been

disposed of on 12 May 2009. As I indicated to the parties when I delivered my ruling on the preliminary issue, this piecemeal approach to issues that are brought before the court cannot in any way serve to promote the interests of justice. Legal practitioners should appreciate that once a judge is seized with a matter, he/she dictates how the matter should be handled. The common practice of presenting arguments on the issues in *limine* and on the merits of the case in the same breadth should remain the norm.

As already indicated, the applicants, having been indicted for trial in the High Court on 4 May 2009, are now applying for bail pending trial.

Apart from noting that the applicants were, unlike their co-accused once denied bail on 11 February 2009 but were later grated bail on 9 April 2009, which bail was later revoked by the filing of an appeal in the Supreme Court by the respondent, I believe that there will be no legal value in this court delving into the details of the applicants' previous efforts to be admitted to bail. Their indictment dictates that they apply for fresh bail on the basis of the facts indicated in the indictment papers.

In support of the bail application, the applicants, in paragraphs 18.7-18.11 of their bail statement, submit as follows:

> "18.7 It is not alleged in the indictment what each applicant did in relation to the bombings and where, by whom and from whom the bombs were procured. There is no suggestion as to who did what. There is no suggestion as to how they entered all the premises, some of which are guarded twenty-four hours a day. There is no indication in the State papers of how they evaded the security placed at police stations.
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> 18.8 None of the witnesses will directly link the applicants to the offence. In addition there is no indirect (*sic*) or circumstantial evidence linking the applicants to the offence. We now know that in the so called video evidence, none of the applicants are implicated.
>
> 18.9 There is not even a scant suggestion of how exactly each accused participated in the offence. The allegations are so vague that it makes it very difficult for the applicants to proffer any meaningful defence save to state that they deny the allegations. There is no indication of whose plan it was to commit the offence. There is no indication of how connected these accused persons were. In fact, most of these applicants together with those who appear on CRB 8894-95/08 did not know each other until they met at court on 29 December 2008. The State has not even shown that these accused persons who are being jointly charged knew each other before they met at court. Is the State suggesting that the applicants and their so called co-accused simply met at the place of the

alleged commission of the offences? Is it being suggested that all of a sudden people who did not know each other found themselves at one place, intending to do the same thing and went on to agree to do it?

18.10 What we have are dangerous, unsubstantiated generalisations. If indeed the State is relying on a lawfully extracted confession it has no excuse. The allegations levelled against the applicants ought to have been precise and to the point, clad with specifics as to what each applicant did. Each of the applicants needs to know with certainty what he is alleged to have done. It is understandable why the State has over generalised. It is difficult to knit or to interweave a false story. None of the applicants were involved.

18.11 There is no independent witness to testify in the case. The State seeks to rely on a confession allegedly extracted from first applicant implicating the applicants, allegations he denies even in his warned and cautioned statement. Instead, he has given in his detailed affidavit evidence of brutal assault and torture by his captors who he alleges include the police (a fact confirmed in the indictment). Torture, inhuman and degrading treatment vitiates any confession made under those circumstances".

The applicants go on to submit that the law should treat them in the same way as their co-accused who are out on bail. They see no reason for their being treated differently when they are jointly charged and also when they totally deny possession of offensive weapons. Furthermore upon their temporary release from 17 April 2009 to 20 April 2009 they did not abscond. They argue that they are responsible citizens who are employed and have family responsibilities they cannot run away from. They all have fixed aboards. They have no previous convictions and are not under any investigations for any other charges. All in all, the applicants submit that there is no direct or circumstantial evidence linking them to the charge. They therefore submit that they are suitable candidates for bail.

The respondent on its part argues that, apart from the charges being serious, there is overwhelming evidence against the applicants- which evidence will certainly lead to their conviction. In the main, the respondent states that if the applicants are admitted to bail, the following consequences will ensue:

"(a) That the applicants are highly likely to abscond and evade justice.

(b)The applicants are likely to commit similar offences if released on bail.

(c) That the admission of the applicants to bail is likely to prejudice our bail system.

(d) That the admission of the applicants to bail will endanger the the maintenance of Law and Order and National Security.

The respondent also argues that previous findings of fact by KARWI J and OMERJEE J. cannot b e ignored. The respondent states the following in paragraph 7 of its response to the application:

> "It is submitted that the fact that these applicants in *casu* were found in possession of offensive items in form of explosive devices stood judicial imprimatur in this Honourable Court. Whilst it is now clear and settled that s 66 of the Criminal Procedure and Evidence Act has the effect of terminating the existing bail, it is submitted that the judgment of MTSHIYA J that articulates the interpretation of s 66 does not hold that previous findings of fact by the same court are automatically terminated. The said judgment pronounces the position that only bail prior to indictment will be terminated thereby entitling the accused to position the court for bail. However in deciding the suitability or otherwise of the accused persons to bail, this honourable court, it is submitted must not pay lip service to previous findings of fact by this Honourable Court. In essence therefore, KARWI J's finding that the offences are serious, that the accused persons are likely to commit similar offences still stand. Further, OMERJEE's finding that the three accused persons in *casu* were found in possession of offensive items still stand as confirmed by the Supreme Court in case number SC 35/09".

Admittedly, and as pointed out by the respondent, a bail application does not graduate to a trial of the accused. That should be avoided and I have indeed warned myself not to turn this into a trial of the applicants. However, in considering a bail application, the court is guided by the respondent's allegations and the nature of the evidence in support of such allegations. In *casu*, the court's task is even made easier in the sense that it has before it, the indictment papers. It is on the basis of the evidence from those papers that this court is being called upon to consider the applicant's bail application.

In our law, entitlement to bail is regulated by s 117 of the Criminal Procedure and Evidence Act [*Cap 9:07*] ("The Act"), particularly, subss (1) and (2) which provide as follows:

> "(1) 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 interests of justice that he or she should be detained in custody.

(2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established-

(a) where there is likelihood that the accused, if he or she was released on bail, will-

(i) endanger the safety of the public or any particular person or will commit an offence referred to in the first schedule; or
(ii) not stand his or her trial or appear to receive sentence; or
(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
(iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system including the bail system;

or

(b) where in the exceptional circumstances there is likelihood that the release of the accused will disturb the public order or undermine public peace or security".

In order to properly address this application I shall quote extensively from *Aitken and Anor v A-G* 1992 (1) ZLR 249 where GUBBAY CJ, as he then was, had this to say:

"The basic purpose from society's point of view of the procedure known as "bail" is to strike a balance between two competing interests – the liberty of accused, and the requirement of the State that he stand trial to be judged and that the administration of justice be safeguarded from interference or frustration. This proposition is amply supported by authority. See, for instance, *Lobel & Anor v Chaassen N O* 1956(1) SA 531(W) at 432 in fine 533A; *S v Essack* 1965(2) SA 161(D) at 162C-H; *S v Bennett* 1976(3) SA 652 (C) at 654G-H; *S v Chiadzwa* 1988(2) ZLR 19 (S);*S v Matagoge & Ors* 1991 (1) SACR 539(B) at 542d-f. The system allows advantages to both the accused and the State. The accused is permitted to keep the fabric of his life intact, to continue with his employment or occupation, to support his dependants, and be accorded the fullest opportunity of preparing his defence free from restraint. It spares his family the hardship and indignity of enforced separation and, perhaps, reliance upon welfare. The State, on the other hand, secures the attendance of the accused at the trial without the cost of having to maintain him in prison.

The notion that an accused is presumed innocent until proven guilty is the cornerstone in an application for bail. Consequently, it is the tradition of our courts to lean in favour of and not against the liberty of the subject, and to grant bail where possible. But though the presumption of innocent operates in favour of an accused even where the case against him appears strong, too much emphasis should not be placed upon it. The ends of justice would not be served if there were some "cognizable indications" that the accused would not abide by the conditions of the bail recognisance. See *S v*

> *Fourie* 1973(1) SA 100(D) at 101G; A-G, *Zimbabwe v Phiri* 1987 (2) ZLR 33 (H) at 38; 1988 (2) SA 696 (ZH) at 700B.
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> The onus is upon the accused to show on a balance of probabilities why it is in the interests of justice that he should be freed on bail. See *De Jager v A-G, Natal & Anor* 1967 (4) SA 143 (D) at 149G-H; *S v Chiadzwa supra* at 21F. This is the all embracing issue the court is enjoined to address. Simultaneously it has to determine whether any objection to bail can be obviated by the imposition of appropriate conditions pertaining to release. See *S v Bennett supra* at 656D-E".

I agree with the principles that emerge from the above paragraphs and allow myself to be guided by them.

It is indeed true that the applicants face serious charges, but this application should be viewed in terms of the principle spelt out in passages quoted above. The applicants who face serious charges remain innocent until proven guilty. A plethora of cases (e.g. *State v Hussey* SC 181/91) emphasize the principle that the seriousness of an offence alone should not be used to deny a person bail. In *casu* the State concedes, though not directly, that there is no direct evidence linking the applicants to the charges and hence the submission that:

> " …. At this stage of proceedings, the State alleges the above facts which manifest that as a matter of circumstancial evidence together with cumulative facts alluded to herein above, a reasonable court will convict the accused persons."
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> The facts alluded to are the disputed video evidence and confession

The evidence given in the indictment papers indicates in my view that to a large extent, and due to the absence of direct evidence linking each applicant to the offence, the respondent will rely mainly on circumstancial evidence. Apart from the common fact of belonging to the same political party, there is nothing so far in the papers to show that there was agreement for a common purpose, namely to commit a crime on the part of the applicants. The fact that some of the applicants did not even know each other until they appeared in court was not disputed.

In looking at the strength of the respondent's case I receive comfort from SANDURA JA who in *S v Ncube* 2001 (2) ZLR 556 (S), had this to say:

> "I should add that in determining a bail application the strength of the case for the prosecution should be assessed. As MILLIN J said in *Liebman v Attorney-General* 1950 (1) SA 607 (W) at 609:

> The court looks at the circumstances of the case to see the person concerned expects or ought to expect, conviction. If it is found on circumstances disclosed to the court that the likelihood of his conviction is substantial, that the person ought reasonable to expect conviction, then the likelihood of his absconding is greatly increased. Thus the court goes into the circumstances of the case that is, evidence at the disposal of the crown. Where there has been a preparatory examination that is the material which is used. Where no preparatory examination has yet been held the court has to consider such material as is furnished to it by the accused himself (the applicant) or by the Attorney –General or his representative".

I am not persuaded to accept that both KARWI J and OMERJEE J's findings were findings of fact. They were dealing with bail applications where they expressed their opinions in support of the use of their discretions. Those findings, in my view, cannot be used against the applicants. The fact that the applicants face serious charges is common cause.

As for the issue of offensive weapons, given the circumstances of this case, one cannot easily dismiss the probability of the truth of the explanations of each applicant. I would therefore place the applicants in the same position as their co-accused who are now out on bail.

That being the case, I would find no justifiable cause to treat the applicants differently from their co-accused. Accordingly, I find no basis in saying the applicants unlike their co-accused, if granted bail would abscond, commit similar offences, prejudice the bail system and/or endanger the maintenance of law and order and national security. The respondent has not made a case in respect of all its fears. There is no evidence to support those fears.

As was submitted by the respondent, this is not the applicants' trial. What one has to examine at this stage is whether or not the applicants should be denied bail in terms of s 117 (2) of the Act.

Given the circumstances of this case I strongly believe that is not in the interests of justice to treat the applicants differently from their co-accused. The distinction would have made sense if the respondent had through evidence shown the individual roles played by each of the seven (7) co-accused persons in the execution of the common purpose which resulted in the commission of the offences they face. The mere fact that the other four accused were not found in possession of the weapons allegedly used in common purpose in committing the offence does not render them clean in a joint charge. In any case the applicants deny possession of those weapons, which for all intents and purposes would have been for a common purpose.

The principle of equal treatment before the law should be observed. There are no compelling reasons for the applicants to be treated differently from their co-accused. In *S v Lotriet & Anor* 2001 (2) ZLR 225 (H) BLACKIE J as he then was said:

> "Notwithstanding the significance of the other factors in this case, the applicants are entitled to bail. They are so entitled because of two principles of fundamental importance: the right of the individual to liberty and the perception that justice is evenly administered. It is vital that in the administration of justice there does not appear any form of discrimination, particularly in a matter where the liberty of a person is involved. On the papers before me, neither of these principles appears to have been adequately considered and both have been inadequately observed".

I agree with the above.

In the result, I therefore believe that it is in the interests of justice to render equal treatment to all the co-accused persons.

The position further tilts in favour of the applicants in that when released on 17 April 2009 to 20 April 2009, the applicants did not abscond. The charges had not been withdrawn. They had ample time to arrange their escape and indeed if, as alleged, this was a politically motivated crime, there is a great possibility that their political sympathisers would have willingly assisted them to escape. They did not escape. They adhered to the conditions of bail that applied to them. That to me is a clear demonstration that the applicants are good candidates for bail. The mere fact of their good conduct after their temporary release, in my view, changes the way this court should look at their application in the face of the opposition from the respondent. Their conduct upon release and the apparent weakness in the respondent's case leads me to the conclusion that they have discharged their onus, on a balance of probabilities that they are good candidates for bail. Their conduct upon temporary release has in my view, decimated the fears of the respondent. The indictment cannot erase that good conduct.

Furthermore the mere fact of the extension of bail for their co-accused after indictment, operates in the applicants' favour. Their co-accused have not breached their bail conditions and as would have been expected did not collude with the applicants to commit further crimes upon the temporary release.

I am, in the main, generally in agreement with the applicants that, apart from the alleged implicating confession from the first applicant, there is no direct evidence linking the applicants to the offences. The confession is, however also denied. Furthermore, the absence

of independent witnesses throws a damp on the respondent's evidence. All in all, the respondent is relying mainly on the evidence of security personnel. There is no evidence of a joint scheme/plan by the applicants, who in any case appear not to have known each other until they appeared in court.

In view of the foregoing, I find the applicants to be suitable candidates for bail. Having reached that decision, I see no reason why they should not be released on the same conditions that HUNGWE J. had granted them. They never breached those conditions upon their brief release.

Accordingly, I order the grant of bail as follows:

IT IS ORDERED THAT:

1. The applicants be and are hereby granted bail

2. The applicants shall each deposit USD 1000 with the Clerk of Court, Harare Magistrates' Court as bail. If bail has been retained in terms of this court's order of 9 April 2009 such bail shall be considered adequate for the purposes of this order.

3. The applicants shall continue to reside at,
   a. First Applicant-10 Sandy Lane, Ashdown Park, Harare
   b. Second Applicant- House No. 12, Rosedene Gardens, Ashdown Park, Harare
   c. Third Applicant- 3 Ashmore Close, Mabelreign, Harare

4. The applicants shall not interfere with witnesses or investigation.

5. The applicants shall report once a week on Fridays, between the hours of 6am and 6pm at Mabelreign Police Station until the matter is finalised.

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