

1. TUNGAMIRAI MADZOKERE
 2. LAST MAENGEHAMA
 3. LAZARUS MAENGEHAMA
 4. STANFORD MAENGEHAMA
 5. GABRIEL SHUMBA
 6. PHINIEAS NHATARIKWA
 7. STEFANI TAKAIDZWA
 8. STANFORD MAGURO
 9. YVONNE MUSARURWA
 10. REBECCA MAFUKENI
 11. SYNTHIA FUNGAI MANJORO
 12. LINDA MUSIYAMHANJE
 13. TAFADZWA BILLIAT
 14. SIMON MUDIMU
 15. DUBE ZWELIBANZE
 16. SIMON MAPANZURE
 17. EDWIN MUINGIRI
 18. AUGUSTINE TENGANYIKA
 19. FRANCIS VAMBAI
 20. NYAMADZAWO GAPARE
 21. KURINA GWESHE
 22. MEMORY NCUBE
 23. LOVEMORE TARUVINGA MAGAYA
 24. ODDREY SYDNEY CHIROMBE
 25. ABINA RUTSITO
 26. TENDAI MAXWELL CHINYAMA
 27. JEPHIAS MOYO
 28. SOLOMON MADZORE
 29. PAUL NGANEROPA RUKANDA
- versus
THE STATE

HIGH COURT OF ZIMBABWE
BHUNU J

HARARE 12th March 2012 and 15th March 2012 and 21st March 2012 and 22nd March 2012
and 5th April 2012 and 19th April 2012.

ASSESSORS:

1. **Mr. Msengezi.**
2. **Mr.Mhandu**

Opposed Court Application

E Nyazamba and Mr. P Mpofu, for the State.
Kwaramba and Mr.Hwacha,for the 1st to 26th accused.
Mutisi and Mr.Zhuwarara,for the 27th to 29th Accused.

Application for Leave to Appeal

BHUNU J: The 29 accused persons are charged with murder as defined in section 47 of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*]alternatively public violence as defined in s 36 of the Act. They are alleged to have killed a policeman on dutyin the course of politically motivated violence on 29 May 2011.

The bulk of the accused persons having previously been granted bail are in custody by operation of law in that they were remanded in custody interms of s66 of the Criminal Procedure and Evidence Act [*Cap. 9:07*]. The section requires that an accused person be remanded in custody upon indictment to the High Court for trial.

The accused persons appeared before this Court for trial on 12March 2012. Although the State was ready and prepared to proceed to trial, all the accused persons objected to take the plea saying that they needed more time to prepare their respective defences. This necessitated the postponement of the trial for more than a month to next term.

Having declined to take the plea the accused persons mounted an application for bail pending trial premised on the alleged weaknesses of the State Case. Both the State Case and the defence cases were however, not before the Court for assessment. That being the case, the Court found it inappropriate if notimpossible to assess the relative strength of the state case against the defence case. For that reason the Court ruled in terms of s 117 (6) as read with Part one of the Third Schedule to the Criminal Procedure and Evidence Act [*Cap. 9:07*] that the bail application be held in abeyance until such time that the accused will have pleaded and the Court furnished with the accused's respective defence outlines so as to make a value judgment on the merits in respect of each accused person's entitlement to bail.

It is pertinent to note that the section gives special exceptional protection to law enforcement officers such as the police, public prosecutors and judges against being murdered in the course of duty or circumstances related thereto. This is because their employment exposes them to the danger of being murdered in the course of duty as happened in this case.

The law therefore requires that where an accused person is alleged to have murdered a law enforcement officer in the course of duty and in this case a police officer, the accused be detained in custody until such time he has proved to the presiding judge's satisfaction that there are exceptional circumstances justifying his release on bail. This is for the simple but reasonable justification that law enforcement officers operate in dangerous environs prone to violent reprisals. The section provides as follows:

“(6) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in—

(a) Part I of the Third Schedule, the judge or (subject to proviso (iii) to section 116) the magistrate hearing the matter shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the judge or magistrate that exceptional circumstances exist which in the interests of justice permit his or her release;”

Part one of the Third Schedule reads:

**“THIRD SCHEDULE (S 32, 116, 117(6) and 123)
OFFENCES IN RESPECT OF WHICH POWER TO ADMIT PERSONS TO BAIL
IS EXCLUDED OR QUALIFIED**

PART I

1. **Murder, where—**

(a)

(b) the victim was—

(i) a law enforcement officer or public prosecutor performing his or her functions as such, whether on duty or not, or a law enforcement officer or

public prosecutor who was killed by virtue of his or her holding such a position,”

I understand the term “*exceptional circumstances*” to mean extraordinary factors or state of affairs outside common human experiences. What this means is that the applicants in this case bear a higher onus of proof than those in an ordinary murder case not involving the killing of a law enforcement officer or police officer.

It is self evident that while Section 117 confers the right to bail on an accused person detained in custody, that right is not absolute but a qualified privilege which can either be granted or denied by the courts depending on the exigencies and circumstances of each given case and the prevailing law.

While the special protection given to law enforcement officers might seem discriminatory to the ordinary man, this is justifiable discrimination sanctioned by the law. Judicial officers have no option but to interpret and apply the law as it is. The postponement of the bail application and invitation to provide the required information was therefore not a denial of bail or punitive measure but an essential procedural step prescribed by law. I might as well mention in passing that the same protection is accorded to witnesses who might be murdered for being witnesses.

The Court adopted this procedure because the section is couched in peremptory terms. In all their submissions not once did I hear counsel making reference to the existence or otherwise of exceptional circumstances justifying the release of any of the accused persons on bail. In fact by adopting that procedure the Court was going out of its way to afford the applicants a chance to comply with the law otherwise it could simply have dismissed the bail application for want of compliance with the law.

The second reason is that, although the accused persons are jointly charged the Court has to determine each accused person’s entitlement to bail individually on the merits because their circumstances are different. The Defence however made a blanket application for bail without specifying the merits of each applicant’s entitlement to bail individually, case by case. The mere fact that the accused are jointly charged does not mean that they are subject to mass trial.

The Court believes that it gave each accused person a reasonable opportunity to prove that there are exceptional circumstances justifying his or her release on bail. This is because

the time within which the accused are required to plead and furnish the required information relating to the existence of exceptional circumstances justifying their release on bail is something that is entirely within their knowledge and control. Deserving accused persons are therefore in control of their destiny in this respect. The longer it takes them to provide the required information the longer it will take them to earn their release on bail. The choice is entirely their own.

Aggrieved by my order postponing the bail application and inviting the accused to plead and furnish the required information to enable the Court to make a just determination of this matter the applicants now seek leave to appeal to the Supreme Court.

Their main complaint is that the Court erred at law in failing to consider the bail application in terms of s 167 as read with s 117 of the Criminal Procedure and Evidence Act. The appeal is premised on the assertion that the Court erred in postponing the matter and inviting the accused to provide the required information. They however acknowledge that the information requested by the Court is necessary for the just determination of the case but argue that such information can be gleaned from elsewhere other than the pleas and defence outlines. They do not however state or specify where in this case the information can be gleaned from. They also do not state who is to glean such information from the bits and pieces of unsubstantiated data presently before the Court.

It appears the applicants are now casting the onus on the Court to forage and scrounge for the requisite information from unspecified sources of questionable authenticity. I have however already demonstrated beyond question that the law casts a heavy burden on the applicants to satisfy this Court and not the Supreme Court, not only that they are entitled to bail, but that there are exceptional circumstances entitling them to bail.

In my view it is remiss of defence counsel to run to the Supreme Court when asked to provide information that may result in his clients being granted bail by this Court. It is plainly obvious that the Supreme Court cannot provide the required vital information required by law. It is only the applicants who bear the burden of providing such information. They cannot avoid discharging that onerous duty by hiding behind the Supreme Court.

It is therefore, my considered view that whatever prejudice deserving applicants may have suffered and continue to suffer arising from the delay in determining this matter is self

inflicted. Had the required information been furnished they would long have been out on bail as soon as the required information was made available to the Court's satisfaction.

In any case, the purported appeal to the Supreme Court arises from a complaint that this Court adopted the wrong procedure in calling for information through pleas and defence outlines when it could forage and scrounge for such information from some other unspecified sources. It is trite that alleged procedural irregularities are dealt with by way of review and not appeal. It is not necessary to cite any authorities for such a well established rule of law. It is therefore; manifestly clear that counsel adopted the wrong procedure in approaching the Supreme Court such that the purported appeal to the Supreme Court is vitiated by irregularity and is unlikely to see the light of day.

Again the delay and resultant prejudice in this respect is self inflicted. Had counsel adopted the correct procedure he would have found his way to the Supreme Court long back without first seeking the leave of this Court and hopefully his complaint would, by now have been addressed and redressed if there was any merit in the complaint.

I now turn to consider the relief that the applicants are seeking in the purported appeal. They seek an order directing this Court to determine the bail application within 48 hours. Such an order will be a *brutum fulmen*, that is to say, a harmless thunderbolt of no force or effect. In the unlikely event that such an order was ever to be given the end result will be highly predictable and of no benefit to the applicants. As long as the information requested has not been furnished, this Court is likely to dismiss the application for failure to discharge the onus reposed on the applicants by the law I have already adverted to above.

Having said that, and in the final analysis I come to the conclusion that there is absolutely no merit in this application. I can perceive no prospects of success on appeal. It is in the best interest of the applicants that they should furnish the required information without any further delay. I cannot perceive a situation where the Supreme Court will force this Court to determine any bail application without the requisite information prescribed by law. The applicants must provide the required information according to law and await my determination. It is only then that those aggrieved by my determination in this respect may approach the Supreme Court.

Approaching the Supreme Court at this juncture cannot in my view save any useful purpose except to cause further prejudice to the applicants in terms of expense and further detention to those applicants who can prove the existence of exceptional circumstances to this Court's satisfaction which entitles them to bail.

For the foregoing reasons the application for leave to appeal to the Supreme Court cannot succeed. It is accordingly ordered that the application for leave to appeal to the Supreme be and is hereby dismissed.

Zimbabwe Lawyers for Human Rights, legal practitioners for the 1st to 27th applicants.
Musendekwa – Mutisi, legal practitioners for the 28th to 29 applicants.
The Attorney General's office, legal practitioners for the respondent.