FELIX BIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 13 & 17 October 2022

Bail pending trial

D Marange, for the applicant
Ms *A Mupini*, for the respondent

MUREMBA J: The applicant is facing a charge of public violence as defined in s 36(1) (a) of the Criminal (Codification and Reform) Act [*Chapter* 9:23]. The allegations as depicted in the Form 242 are that on 14 June 2022, the applicant in the company of accomplices, some of whom were arrested and are now on remand and others who are still at large, conspired to avenge the murder of one Moreblessing Ali. They resultantly engaged in acts of public violence in Nyatsime area in Beatrice. They burned down the house of ZANU PF Chairperson for Nyatsime area, one George Murambatsvina. At Chibhanguza Shopping Complex they torched a gazebo and destroyed windows of 13 shops and 4 beerhalls. They also looted groceries and electrical gadgets. They damaged motor vehicles and houses too. Further, they assaulted members of Nyatsime Community. It is alleged that they caused massive destruction of property and inflicted serious injuries on the people they assaulted. They fled from the scene when the police reaction group arrived.

The Form 242 shows that the applicant was arrested on 29 September 2022. He appeared at Harare Magistrates Court on 1 October 2022 where he was placed on remand. He was remanded in custody to 11 October 2022. On 5 October 2022 he filed his application for bail in this court. In response to the application Ms *Mupini* for the respondent averred that the offence the applicant is facing is not a third schedule offence and as such the Magistrates Court has jurisdiction to hear the bail application as a court of first instance. She further averred that the High Court can be approached on an appeal basis should the application be dismissed by

the Magistrates Court. In the applicant's bail statement, it is averred that the applicant elected to approach this court for bail application because during his court appearance at the Magistrates Court, several individuals wearing ZANU PF party regalia were milling in the courtyard threatening to burn down the courthouse if the applicant was granted bail. Citing the case of *Chauya Shopa & 13 Others* v *The State* HH 665-22, it was averred that this court has concurrent jurisdiction with the Magistrates Court to hear bail applications as a court of first instance.

Ms. *Mupini* was correct in submitting that the Magistrates Court has jurisdiction to grant bail in offences of Public Violence. This is because generally, a magistrate may grant bail in respect of all crimes except those which are specified in the Third Schedule of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (CPEA). In relation to such offences specified in the Third Schedule, a magistrate may only grant bail if the Prosecutor General has personally consented to the magistrate granting bail or hearing an application for bail for such an offence. See s 116 (b) of the CPEA. Admittedly, public violence is not listed in the Third Schedule and as such the Magistrates Court has jurisdiction to hear an application for bail by an applicant charged with public violence. What was incorrect is the submission by Ms. *Mupini* that an applicant facing a charge of public violence can only approach this court (the High Court) on an appeal basis. I say this because our criminal justice system does not provide for a category of offences where power to admit to bail is restricted to the Magistrates Court only. In terms of s 171 (1) (a) of the Constitution of Zimbabwe "*The High Court has original jurisdiction over all criminal matters throughout Zimbabwe*." S 23 of the High Court Act also provides that "*subject to this Act and any other law, the High Court shall have full original criminal jurisdiction over all persons and over all matters in Zimbabwe."* What this means is that the High Court can deal with any criminal offence, third schedule and non-third schedule offences, as a court of first instance in respect of bail applications. Section 116 (a) of the CPEA puts this position beyond doubt. It reads:

> **"116 Power to admit to bail**
> Subject to this section and sections 32 and 34, a person may, upon an application made in terms of section 117A, be admitted to bail or have his or her conditions of bail altered—
> *(a)* in respect of any offence, by a judge at any time after he or she has appeared in court on a charge and before sentence is imposed."

When the High Court deals with a bail application as a court of first instance, its decision is appealable to the Supreme Court. See s 121 (2) (a) of the CPEA. It should however be noted

that in practice the High Court deals with bail applications in respect of offences that are specified in the Third Schedule of the CPEA which offences include murder, treason, rape, aggravated indecent assault, and robbery. This is done purely for the practical reason of not overburdening the High Court with applications which ordinarily fall within the jurisdiction of the Magistrates' Court. There are only 5 High Court stations in this country *viz*, Harare; Bulawayo; Masvingo; Mutare and Chinhoyi. If accused persons facing non- third schedule offences were to apply for bail in the High Court, the 5 High Court stations would obviously not cope with the workload. This is more so in view of the fact that in terms of s 121 (2) (b) of the CPEA all appeals against decisions on bail by magistrates are made to the High Court. The general practice therefore is to discourage accused persons facing charges other than those listed in the Third Schedule from applying for bail in the High Court. It is only in exceptional circumstances that the High Court accepts to deal with bail applications for offences other than those listed in the Third Schedule. The person applying for bail therefore needs to give justifiable reason(s) for approaching the High Court instead of making his or her bail application in the Magistrates Court.

In *casu* it was averred in the applicant's bail statement that the applicant elected to approach this court for bail application because during his first court appearance at Harare Magistrates Court, several individuals wearing ZANU PF party regalia were milling in the courtyard threatening to burn down the courthouse if the applicant was granted bail. Ms. *Mupini* made no submissions to dispute this and I decided that the applicant had proffered a justifiable reason for approaching this court. I thus directed the State to file its response to the merits of the application. It raised a number of grounds for opposing the granting of bail to the applicant. I deal with these grounds hereunder.

The applicant's co-accused were denied bail on the same charge and circumstances

Ms. *Mupini's* averment was that the applicant actively took part in all the violence that happened. She averred that therefore the applicant should be denied bail since his co-accused's applications were rejected. In response Mr *Marange* argued that this is not a ground for denying an accused person bail as each accused ought to be treated differently. Whilst the accused persons may be facing the same charge, their personal circumstances may differ. He submitted that whilst the applicant's co-accused were arrested soon after the public violence in June 2022, the applicant was arrested 3 months after the offence was committed. He was abducted on 22

September 2022 by members of ZANU PF who only handed him over to the police on 29 September 2022. The applicant who is a builder was working in Westgate and would occasionally go to see his wife and children in Nyatsime where the public violence occurred. The applicant has a house in Nyatsime. I am in agreement with Mr *Marange* that an accused person is not denied bail on the ground that their co-accused was denied bail. The grounds for refusal of bail are listed in s 117 (2) of the CPEA. They are:

> "The likelihood that the accused will abscond; the likelihood that the accused will interfere with the evidence or witnesses; the likelihood that the accused will commit further crimes; the likelihood that the proper functioning of the criminal justice system will be undermined; and in exceptional circumstances, the likelihood that public order will be disturbed or public peace or security will be undermined if the accused is released on bail."

Section 117 (2) does not provide for the ground raised by Ms *Mupini.* It must be borne in mind that grounds of refusal of bail should be reasonably substantiated. As was correctly submitted by Mr *Marange,* circumstances of accused persons differ. Whilst there may be likelihood that accused A will not stand trial if granted bail, there might not be that likelihood in respect of accused B. The same applies to all the other grounds: the likelihood that the accused will interfere with the evidence or witnesses; the likelihood that the accused will commit further crimes; the likelihood that the proper functioning of the criminal justice system will be undermined; and the likelihood that public order will be disturbed or public peace or security will be undermined if the accused is released on bail. Section 117 (3) of the CPEA sets out the factors that the court should take into account in deciding whether the grounds in s 117(2) are present in respect of each accused person. For instance, a person who has no place of abode is more likely not to stand trial than a person who has a fixed place of abode. The two accused persons cannot therefore be treated in the same way. In *Mutambara & others* v *Minister of Home Affairs* 1989 (3) ZLR 96 (H) it was held that for accused persons who are jointly charged, there is still an obligation to consider each individual case separately as well as treating the person as part of a group. I subscribe to this assertion. What I understand by treating an accused as part of a group is that it is vital in the administration of justice that there does not appear to be any form of discrimination between accused persons that are jointly charged. However, the non- discrimination should not be taken to mean that when one accused person is denied bail, then his co-accused should equally be denied. Our law is such that an accused person is entitled to bail as a matter of right unless there are compelling reasons to deny them bail. The right is found in s 50 (1) (d) of the Constitution. The provision reads:

> "Any person who is arrested must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention."

Therefore, the granting of bail to an accused person is the general rule and the denial of bail is the exception. The right to bail is tied to the right of the accused to be presumed innocent until proven guilty that is provided for in s 70 (1) (a) of the Constitution of Zimbabwe and the right to personal liberty that is provided for in s 49 of the Constitution of Zimbabwe. As a result, generally, it is only after the accused has been convicted that he or she should be deprived of his or her liberty. Every accused person is thus entitled to the respect, protection, promotion, and fulfilment of these three constitutional rights before they are convicted. See s 44 of the Constitution of Zimbabwe. It is on that basis that accused persons who are jointly charged ought to be treated equally in respecting, protecting, promoting, and fulfilling their constitutional rights. The reverse is not applicable. Our law in s 56 of the Constitution does not provide for equal treatment of persons when the end result is to disrespect and not protect, promote, and fulfil their constitutional rights. Instead, s 56 (1) provides that all persons are equal before the law and have the right to equal protection and benefit of the law. This means that people are supposed to benefit from the law by having their rights respected, protected, promoted and fulfilled. Therefore, denying a person bail on the ground that his co-accused were denied bail flies in the face of his constitutional rights to bail, liberty, and the right to be presumed innocent until proven guilty in a court of law. Section 56 (1) therefore demands that when one accused is granted bail, the rest be granted bail as well, unless there are compelling reasons not to do so. Compelling reasons in such a case are those circumstances that are peculiar to each individual. For instance, if a person was on the run when others were arrested, he or she is likely to abscond trial. Such a person may be treated differently from the others by being denied bail.

In view of the foregoing, I will not deny the applicant bail on the ground that his co-accused were denied bail on the same charge and circumstances.

Likelihood of interference with witnesses

Ms. *Mupini* averred that there is a huge risk of interference with witnesses if the applicant is released on bail, considering that those witnesses positively identified him during

the commission of the offence. She further averred that the applicant and the witnesses reside in the same area. In respect of this ground, it was submitted on behalf of the applicant that he was arrested three months after the offence was committed. Therefore, he was not in detention all along. The State did not tender any evidence to show that he had during that period attempted to interfere with witnesses in the matter. In terms of s 117 (3) (c) of the CPEA, in considering whether or not the ground of the likelihood of interference with witnesses has been established, the court shall take into account:

> "Whether the accused is familiar with any witness or the evidence; whether any witness has made a statement; whether the investigation is completed; the accused's relationship with any witness and the extent to which the witness may be influenced by the accused; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; the ease with which any evidence can be concealed or destroyed; any any other factor which in its opinion should be taken into account."

In *casu* the State did not give the identity of the witnesses that will testify on its behalf. The investigating officer's affidavit does not mention who the witnesses are. Ms *Mupini* initially submitted that she did not know the witnesses and then changed tact by saying that for security reasons she was not at liberty to disclose their names. This simply means that the applicant does not know who the State witnesses are. I asked Ms *Mupini* how it will be possible for the applicant to interfere with witnesses whom he does not know. She was unable to respond to the question. Mr *Marange* submitted that no witness statements were shared with the applicant in this matter. In *S* v *Hussey* 1992 (2) ZLR 187 (S) the Supreme Court said that more is required than simply bald assertions by the State that the accused is likely to interfere with witnesses who may be called by the State. The assertion must be well grounded and the State is obliged to place cogent reasons before the court, supported by information to justify the assertion. In *casu* the State did not provide any information to show that for the three months that the applicant was out of custody before he was arrested, he made attempts to interfere with witnesses who may be called by the State. If, for three months, the applicant did not do anything to show that he intended to interfere with witnesses, there is therefore no reason to believe that he will seek to do so after he has been granted bail, more so when he does not even know who the witnesses are. In any case, a bail condition restraining him from interfering with witnesses can be imposed against him. Consequently, I have no reason to uphold this ground for refusal of bail.

The applicant may hamper police efforts to arrest his accomplices who are still at large

Ms. *Mupini* contended that the applicant's release on bail will hamper police efforts to track down his accomplices who are still at large. Mr. *Marange* submitted that it is not clear how the applicant will hamper police efforts to arrest the applicant's accomplices that are not even known to him. Ms. *Mupini* was not able to furnish any names of the outstanding accomplices. The investigating officer's affidavit does not say who these accomplices are. It also does not say how the applicant's release on bail will dampen the police efforts to arrest them. In the absence of information on how the applicant will hamper police efforts to arrest outstanding accomplices, it is an invalid reason for the court to refuse an accused person bail merely because his or her accomplices have not been arrested. In view of the foregoing, I have no reason to uphold this ground in favour of the State.

Likelihood of absconding trial

Ms. *Mupini* averred that the offence was allegedly committed on 14 June 2022, but the applicant was only arrested on 29 September 2022 because he was on the run in between. For this she submitted that she was referring to the investigating officer's affidavit. The applicant's bail statement does not deal with this issue of him having been on the run before his arrest. The applicant simply says that no evidence was tendered by the State to suggest that he may abscond if granted bail. Let me hasten to point out that in preparing his statement for bail, the applicant used the investigating officer's affidavit which was commissioned on the 1st of October 2022 which is the date the applicant first appeared in the Magistrates Court. This affidavit outlines why the investigating officer was opposed to the applicant being granted bail. That the applicant was on the run was not one of the reasons why bail was being opposed. In para5 the investigating officer said:

> "Accused is facing an offence which when convicted, calls for a lengthy custodial sentence. In view of this and coupled with the evidence the State has, may entice the accused to abscond trial."

The investigating officer did not say that the applicant had been on the run between the 14th of June 2022 when the offence was allegedly committed and the 29th of September 2022 when he was arrested. However, the investigating officer went on to prepare another affidavit after I had directed the State Counsel to file a response to the merits of the applicant's bail

application. The second affidavit was commissioned on the 12th of October 2022. It is similar to the first affidavit in all material respects except that it has a new paragraph 5 which reads:

> "During the commission of the offence the accused was positively identified by witnesses whom he stays with in Nyatsime area, Beatrice. Thereafter the accused went into hiding and was only arrested on 29 September 2022 by members of the public who are also witnesses in this case."

At the hearing Mr *Marange* submitted that the applicant was never on the run. He said that this is why the Form 242 and the initial investigating officer's affidavit of 1 October 2022 are silent on this issue. He submitted that it was clear that the second affidavit by the investigating officer had been prepared to defeat the applicant's present application for bail. He argued that if the applicant had been on the run, there is no way the investigating officer would have omitted this crucial ground of opposing bail both in the Form 242 and in his initial affidavit. Mr *Marange* submitted that the applicant's arrest was politically motivated as he was not arrested by members of the public but by members of ZANU PF who are bent on getting rid of him as he has been campaigning in the area to become a Councillor for a political party called CCC. It was averred that there is no way the police could have looked for him for three months without visiting his house and leaving word with his family. It was submitted that the applicant was working in Westgate doing construction work, but would occasionally go to Nyatsime to see his family. It was disputed that he was ever in hiding.

Ms *Mupini s*ubmitted that many people were involved in the public violence of 14 June and these people were unknown to the police. Soon after the commission of the offence, the applicant disappeared from the area only to resurface in September. Ms *Mupini* submitted that since the accused was not known to the police, the police had not been looking for him. It was members of the public who arrested him and took him to the police when he resurfaced. Ms *Mupini* submitted that members of the public knew him as number 9. It was only at the police station that the applicant's names became known. I asked Ms *Mupini* why then she was submitting that the applicant had been on the run when the police had never looked for him since they knew nothing about him until after members of the public had apprehended him and brought him to them. Ms *Mupini* then sought to change her submission by saying that the police had also been looking for him. She was now contradicting herself. Although she was saying that she got this information from the investigating officer, the investigating officer had not said it in the Form 242 and in both his affidavits. Other than saying that the applicant went into

hiding in his second affidavit, the investigating officer never said that the police ever looked for the applicant.

It appears that the State Counsel's and the investigating officer's averments that the applicant had been on the run is a ruse. Both were apparently clumsy in the way they dealt with the issue. If the applicant had been on the run for three months, that fact would have been the State's most critical ground for opposing bail. Without a doubt, that ground would have been stated in the Form 242 in Section C which provides for the investigating officer's grounds for opposing bail. It would have been stated in the investigating officer's initial affidavit. The fact that these two documents are silent on the issue means that the accused was never on the run. The police never looked for him. They did not know about him and his participation in the public violence. This means that nobody had implicated him or reported him to the police.

In terms of s 117 (3) (b) of the CPEA, in considering whether the likelihood to abscond ground has been established, the court shall take into account:

> "The ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefor; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; and any other factor which in its opinion should be taken into account."

Ms *Mupini* did not make any submissions about the nature and gravity of the offence or the nature and gravity of the likely penalty therefor; the strength of the case for the prosecution and the corresponding incentive of the accused to flee although case law shows that these are the most critical factors in deciding whether there is a risk of the accused absconding. See *S* v *Makamba* 2004 (3) ZLR 376 (S); *S* v *Jongwe* 2002 (20 ZLR 209 (S); *S* v *Ndhlovu* 2001 (2) ZLR 261 (H). Despite the investigating officer raising these factors in his affidavits, Ms *Mupini* did not raise them. I would not know if the omission was deliberate or not. Be that as it may, it was averred in the applicant's bail statement that he is a family man with minor children to look after. He is the sole breadwinner of the family. He has a house without title deeds in Nyatsime. He has no passport and does not have the financial capacity to relocate to a foreign country. All this was not disputed by the State. Further, it was averred that the State case against the applicant is not strong because the applicant has an *alibi*. On the day of the alleged violence he was not in Nyatsime but at work in Westgate. In the result, I find no merit in the ground that there is likelihood that the applicant will abscond trial if granted bail.

The proper functioning of the Criminal Justice System will be undermined

While Ms *Mupini* averred in her response to the bail application that the release of the applicant on bail will undermine the proper functioning of the criminal justice system, she did not explain how the applicant's release will undermine the proper functioning of the criminal justice system. On the other hand, the applicant did not respond to this ground. Even at the hearing none of the two counsels made submissions on this issue. I also overlooked asking the two counsels to address me on the issue. However, it is an issue I can deal with taking into account what is written on the Form 242 and the submissions that were made by both counsels when they were making submissions in respect of the other grounds above. In terms of s 117 (3) (d) of the CPEA in considering whether or not this ground has been established, the court shall take into account:

> "Whether the accused supplied false information at arrest or during bail proceedings; whether the accused is in custody on another charge or is released on licence in terms of the Prisons Act [*Chapter 7:11*]; any previous failure by the accused to comply with bail conditions; and any other factor which in its opinion should be taken into account."

Ms *Mupini* did not make any submissions to the effect that the applicant supplied false information at the time of his arrest. Even Section C of the Form 242 and the two affidavits of the investigating officer are silent on this issue. Nothing also shows that the applicant supplied false information during bail proceedings. Ms *Mupini* did not submit that the applicant has pending cases and previous convictions. Even the Form 242 and the investigating officer's affidavits are silent on these issues. There was no submission that was made which shows that there was a previous failure by the applicant to comply with bail conditions. It is clear that the State has no information to support this particular ground. As I have already stated elsewhere above, it is insufficient for the State merely to make bald assertions that the particular ground applies. The assertion must be well-grounded and reasonably substantiated by proper information. *S* v *Hussey* 1991 (2) ZLR 187 (S) and *S* v *Malumjwa* HB-34-03. There is therefore no basis for the court to uphold this ground for opposing bail by the State.

Conclusion

When an accused person applies for bail pending trial, he or she has not yet been tried and convicted. It is on this basis that he or she is legally presumed innocent. In terms of s 50(1) (d) of the Constitution it is now a fundamental human right that an accused person be

tried whilst he or she is out of custody. That he or she may remain incarcerated until tried is rather the exception. There ought to be some compelling reasons justifying continued incarceration pending trial. Therefore, a court should lean more in favour of the liberty of the accused if that can be done without jeopardising the due administration of justice which requires that the accused stands trial. See *Shamu* v *The State* HMA 18-21. This approach is consistent with the approach at international and regional level. The International Covenant on Civil and Political Rights (ICCPR), 1966 which Zimbabwe ratified on 13 May 1991, provides in Art 14 (2) for the presumption of innocence of persons accused of committing crimes. It further provides for the right to liberty and security of person in Art 9 (1). The Covenant expressly provides for the right to bail pending trial in Art 9 (3) which reads:

> "……It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."

The provision makes it clear that bail is a right that accused persons awaiting trial are entitled to. Detention pending trial is the exception. In the landmark case of *Hill* v *Spain* Communication No. 526/93, the ICCPR Human Rights Committee, a body that interprets disputed provisions of the ICCPR held that pre-trial detention should be the exception. It further held that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee.

Zimbabwe also ratified the African Charter on Human and Peoples' Rights (ACHPR), also known as the Banjul Charter, 1981 on 30 May 1986. The ACHPR is a legal instrument for the protection of human rights in the African region. It does not specifically provide for the right to bail. However, just like the ICCPR, it provides for the right of an accused person to be presumed innocent until proven guilty by a competent court in Art 7. In Art 6 it also provides for the right to liberty which reads:

> "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular no one may be arbitrarily arrested or detained. "

In *African Commission (Saif al-Islam Gaddafi)* v *Libya* Application 002/2013 @ para 80 this was interpreted to mean that deprivation of liberty is permitted only when it

is in conformity with procedures established by domestic legislation which itself should be consistent with international human rights standards.

By ratifying the ICCPR and the ACHPR Zimbabwe committed to be bound by the Conventions. Therefore, when Zimbabwean courts and tribunals are interpreting the right to bail, the right to be presumed innocent until proved guilty and the right to liberty as provided for in the Declaration of Rights, they must take into account the interpretations that have been given to these rights under these Conventions. Basically, the Conventions provide that the granting of bail to an accused person is the general rule and the denial of bail is the exception. In *casu* the State failed to show that there are compelling reasons to deny the applicant bail. Other than making bald assertions, it failed to show that there is likelihood that the applicant will not stand trial; interfere with witnesses; and hamper police efforts to arrest his accomplices who are still at large if granted bail. The State further failed to show that there is likelihood that the proper functioning of the criminal justice system will be undermined if the applicant is released on bail. It is therefore appropriate in the circumstances of this case to apply the general rule by granting bail to the applicant as there is no likelihood that the interests of justice will be jeopardised by his release from custody pending his trial.

In the result, the application for bail pending trial is granted.

It is ordered that:

1. The applicant deposits with the Clerk of Court at Harare Magistrates Court the sum of $20 000.00.
2. The applicant shall reside at House number 707, 29 St Kuwadzana1, Harare until the matter is finalised.
3. The applicant shall not interfere with investigations and witnesses that may at any future date be identified by the State as being witnesses against him.
4. The applicant shall report to CID Law and Order once every week on Fridays between 6am and 6pm.

Zimbabwe Human Rights NGO Forum, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners