TUNGAMIRAI MADZOKERE

and

LAST MAENGEHAMA

and

LAZARUS MAENGEHAMA

and

STANFORD MAENGEHAMA

and

GABRIEL SHUMBA

and

PHINIEAS NHATARIKWA

and

STEFANI TAKAIDZWA

and

STANFORD MAGURO

and

YVONNE MUSARURWA

and

REBECCA MAFUKENI

and

SYNTHIA FUNGAI MANJORO

and

LINDA MUSIYAMHANJE

and

TAFADZWA BILLIAT

and

SIMON MUDIMU

and

DUBE ZWELIBANZE

and

SIMON MAPANZURE

and

EDWIN MUINGIRI

and

AUGUSTINE TENGANYIKA

and

FRANCIS VAMBAI

and

NYAMADZAWO GAPARE

and

KURINA GWESHE

and

MEMORY NCUBE

and

LOVEMORE TARUVINGA MAGAYA

and

ODDREY SYDNEY CHIROMBE

and

ABINA RUTSITO

and

TENDAI MAXWELL CHINYAMA

and

JEPHIAS MOYO

and

SOLOMON MADZORE

and

PAUL NGANEROPA RUKANDA

versus

THE STATE

HIGH COURT OF ZIMBABWE

BHUNU J

HARARE, 12 March 2012, 15 March 2012, 21 March 2011

and 22 March 2012 and 5 April 2012.

ASSESSORS:

Mr Msengezi.

Mr Mhandu

 *E Nyazamba* and *P Mpofu,* for the State

*C Kwaramba and S V* *Hwacha,* for the 1st to 26th accused

 *G Mtisi and T Zhuwarara,* for the 27th to 29th Accused

**Bail Application**

BHUNU J: On 29 May 2011 members of the Movement for Democratic Party (MDC) convened a gathering at Glenview One Shopping Centre. The gathering later matched to Glenview 4 Shopping Centre at around mid-day where the group was peacefully dispersed by the police. Despite having been dispersed by the police the group is alleged to have relocated to Glenview 3 Shopping Centre where the group of youths again gathered at Munyarari Night Club. They were allegedly ferried to that venue by Norman Marega Chikura using a Mazda B1800 motor vehicle.

Acting on information the police followed and confronted the group at the Night Club with the intention of dispersing the gathering that had not been sanctioned by the police. The now deceased police officer Petros Mutedza was part of the group of police officers who went to disperse the group of party youths.

Upon being confronted by the police the group of youths turned rowdy and violent. They attacked the hopelessly outnumbered police officers who fled in a bid to escape the ferocious attack on them. While the deceased’s colleagues were fortunate to escape with some bruises, he was not so fortunate as he was attacked and killed in the melee.

That the deceased was attacked and killed by a group of youths alleged to belong to the MDC is beyond question and a matter of common cause. The real crux of the matter is however, the identity of the murderers and trouble shooters. The accused persons do not seem to deny that they are members of the MDC. What needs to be determined is however, whether one or more of them actively participated or associated themselves with events that led to the public violence that killed the deceased.

The State’s case is that the twenty – nine accused persons were part and parcel of the group of persons who acted in concert and common purpose. They are alleged to have resorted to public violence during which they attacked and killed the deceased in the process of resisting the police order to disperse.

In the alternative the accused are charged with public violence as defined in s 36 of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*] arising from the same set of facts.

All the 29 accused persons have now been lodged in custody pending trial before this Court. The State is ready and prepared to kick start and commence the trial. The accused persons have all denied the allegations against them relying in the main on the defence commonly known as an *alibi* in legal parlance. That defence simply means that the accused were not at the scene of the crime at the time the offence was committed.

Whether or not the accused are guilty as charged is a matter of evidence which is yet to be led in this Court. The issue for determination at this juncture is however, whether or not the accused persons are good candidates for bail. Can they be trusted to stand trial right through to the end given the seriousness of the offence and possibility of the ultimate penalty of capital punishment?

That question can be best be answered in the light of the accused’s conduct and behaviour right from the commencement of the investigations, arrest and indictment for trial. In determining that issue it is incumbent upon the Court to balance the interests of the private individual against those of the State and the due administration of justice as articulated in the well known case of *S* v *Benata* 1995 (2) ZLR 205 at 209 C – D*.* In coming to a fair and just determination in this respect the guidelines were laid down in the case of *S* v *Ndlovu* HH 177– 01as follows:

1. Whether the accused will attend his trial or abscond.
2. Whether he is likely to interfere with witnesses.
3. Whether he is likely to commit further offences.

Of the three vital guidelines the cardinal issue for determination is whether the accused will attend his trial or abscond. This application comprises of two groups of accused persons whose circumstances are diametrically different although they are jointly charged with the same offence.

The first group consists of two applicants Solomon Madzore and Paul Nganeropa Rukanda who were denied bail pending trial by the bail Court on the basis that they could not be trusted to stand trial as they were a flight risk. They appealed to the appeal Court without success whereas their compatriots who had been denied bail together with them were successful on appeal.

Both of them are of fixed abode aged 35 and 33 years of age. They are both useful members of society. *Solomon Madzore* is a 4th year social studies student with the University of Zimbabwe. Paul *Nganeropa Rukanda*

The second group comprises of accused 1 to 27 who were granted bail either by the bail Court or on appeal. After being granted bail the applicants were indicted for trial in this Court on 1 March 2012. Despite being granted bail by the courts these accused are in custody pending trial by operation of law. Section 66(2) of the Criminal Procedure and Evidence Act requires that upon indictment to the High Court for trial an accused person be remanded in custody until granted bail by that Court. The section reads:

**“66 Summary committal for trial of accused person**

(I) ....

1. On receipt of a notice in terms of subs (1), the magistrate **shall** cause the person concerned to be brought before him or her and not withstanding any provision of this Act, **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 the warrant or **till admitted to bail or liberated in the course of law.** (Emphasis provided).

The starting point is that the law requires that an accused person committed for trial in

the High Court be lodged in prison for the duration of the trial unless they can show to the Court’s satisfaction that their release will not compromise the ends of justice. The reason appears to be that committal for trial in the High Court heralds a turn for the worse as the day of reckoning becomes inevitable for the accused. The real prospect of facing trial for a serious offence and the possible severe penalty might motivate the accused to abscond hence the need for incarceration until he can prove otherwise.

The accused in this case have brought their application under s 167 of the

Criminal Procedure and Evidence Act [*Cap 9:07*]. That section entitles an accused person to apply for bail whenever a trial is postponed or adjourned in terms of s 165 or 166 of the Act.

As I have already pointed out above, the State is ready and willing to proceed to trial.

The postponement and delay in proceeding to trial has been occasioned by the applicants. On 12 March when they appeared for trial before this Court they declined to plead to the charges arguing that they were not ready with their respective defences because they had not given their defence counsel full instructions. The state proposed that the matter be postponed to 19 March 2012 for trial, a proposal that was vigorously opposed by the defence. The defence preferred that the trial be held in abeyance indefinitely until they are ready to proceed to trial.

The matter was then postponed *sine die,* that is to say, indefinitely to next term to

enable the applicants to prepare for their defences. The net result was that the matter was postponed before any of the accused persons had pleaded. Consequently, no summary of the state case or defence outline could be filed.

The case of *Justine Sandras* v *S* SC 81–200 is authority for the proposition that it is

not in the interest of justice to grant bail where the offence is serious and there is overwhelming evidence against the accused. That proposition of law is buttressed by the dictum in The *Attorney General* v *Remember Moyo* SC 33–02 in which the Supreme Court reiterated that the strength of the State case is one of the most important factors by which a Court must be guided in deciding whether it is in the interest of justice.

The accused’s plea and defence outline measured against the summary of the State

case are important pointers to the strength or otherwise of the State case against the applicants. Their failure to plead hamstrung and deprived the Court of the means to assess the relative strength of the State case against the defence case. A trial court is therefore ill disposed to determine the question of bail without these important pointers to the eligibility of the applicants to bail

This explains why CHATUKUTA J sitting in bail court on 9 March 2012 declined to

determine the question of bail on the merits preferring that it be determined by the trial Court. In her brief and concise reasons for judgment this is what the learned judge had to say:

“I declined to deal with the merits of the bail application for the following reasons:

Section 169 of the Criminal Procedure and Evidence Act *[Cap 9:07]* provides for the termination of bail upon tendering of plea by an accused person. It therefore follows that that any bail application granted to an accused person is terminated by operation of law unless the trial court directs that bail continues.

It appeared to me that in view of that section it was not proper for me to determine the bail application on a Friday, when trial was to commence two days later on the Monday. **It was my view that the trial Court was better suited in my view of that section to determine the application.** The trial Court would still be required to determine the same submissions that I was expected to determine assuming that I had proceeded to determine the matter and granted bail.” (Emphasis provided)

By their failure to plead the applicants have at this juncture placed this Court in no better position than the bail Court. That being the case, like my learned sister CHATUKUTA J I am of the firm view that it will be inappropriate to determine the question of bail in the absence of the applicants’ pleas, defence outlines and summary of the State case.

In the result it is ordered: **that this application for bail be and is hereby held in abeyance until such time the applicants have pleaded to the charges against them and filed their respective defence outlines.**

*Zimbabwe Lawyers for Human Rights,* 1st to 27th applicants’ legal practitioners

*Musendekwa – Mutisi the 28th to 29th*,applicants’ legal practitioners

*The Attorney general’s office,* respondent’s legal practitioners.