

THE STATE

versus

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 MUIRINGIRI
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

HIGH COURT OF ZIMBABWE

BHUNU J

Harare, 13 February 2013 and 20 February 2013.

ASSESSORS:

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

Bail Court Application

Mr. E Nyazamba, for the State.

Ms. B Mtetwa, for the defence

BHUNU J: The accused persons are charged with murder of a policeman in the course of duty on 29 May 2011.

This has been a protracted trial fraught with applications and counter applications. The state has now applied for a two week postponement of the trial to facilitate the calling of an expert witness, a foreign doctor who conducted the post-mortem on the remains of the deceased. There are certain protocols and procedures that have to be fulfilled before the foreign doctor can testify before our local courts. The long and short of it all is that he can only testify with the permission of his mother country.

The state has however met some challenges in obtaining such permission from the foreign country although with better organisation and foresight things could have been expedited. Conscious of the need for the trial to move on without unnecessary prejudice to the accused the state has undertaken to seriously consider dispensing with the evidence of the foreign doctor should they fail to secure his clearance to testify in this Court from the relevant authorities by the end of the two week suspension.

Apparently frustrated by the proposed two week delay the defence has countered with an application for bail for those accused still in custody and relaxation of bail conditions for those out on bail. The defence's argument is that had the state been diligent enough it ought to have timeously made the necessary arrangements to facilitate the availability of all witnesses as and when required.

There is some force in this argument. It was remiss of the state to leave the necessary arrangements until late into the trial. Had the state acted conscientiously with some measure of due diligence this postponement and resultant prejudice to the accused could have been avoided.

Despite the above observation the overriding consideration is whether or not the granting of bail or relaxation of the bail conditions will compromise the ends of justice. In other words the Court is duty bound to balance the interests of the individual to freedom and the due administration of justice. See *S v Benatar 1985 (2) ZLR 205*. As pointed out by SANSOLE J in that case the balance is a delicate one.

The primary consideration is however, whether the accused will attend his trial. In *S v Ndlovu 2001 (2) ZLR 261 (H)* it was held that, the primary question to be considered in deciding whether the accused should be granted bail is whether he will stand trial or abscond. In denying the 5 accused persons who are still in custody in judgment number HH 456 – 12 at p 7 I had this to say:

“What emerges quite clearly from the evidence before me is that while there has been a weakening of the state case in respect of the rest of the accused persons it has strengthened against the first, second, ninth, tenth and sixteenth accused persons being:

1. Tung
amirai Madzokere.
2. Yvon
ne Musarurwa.
3. Rebe
cca Masvikeni.
4. Last
Maengehama and
5. Simo
n Mapanzure.

The above accused persons are not entitled to bail as they are a flight risk owing to the seriousness of the offence and their failure to establish the existence of special circumstances prescribed by law.”

That position remains the same it has not been altered by the proposed postponement of two weeks. The evidence against these 5 accused persons remains the same. It has not been diluted in anyway by the proposed postponement.

As previously stated there is direct evidence before me identifying and linking the 5 accused persons to the commission of the offence. What remains to be determined is the weight of the state evidence against the defence evidence. Thus the real prospect of conviction cannot be excluded at this stage thereby providing an incentive to abscond. There is no gainsaying the offence is a serious one as it is a capital crime.

For the foregoing reasons, the 5 accused persons still constitute a flight risk. That position has not change. The courts have said time without number that it is not in the interest of justice to grant bail where the charges are serious and there is overwhelming evidence

against the accused. See *Joice Nyambuya and 2 Ors v The state HH 56 – 03* and *SANDRAS J v The State SC – 81- 2000*.

As regards the relaxation of bail conditions that can only be done in the light of changed circumstances warranting such alteration of bail conditions. As I have already pointed out there has been no changed circumstances beyond those that prompted me to grant the remaining 24 accused persons bail. The offence still remains serious and there is need to keep track and an eye on the accused persons to ensure that they attend their trial.

The mere fact that the accused persons have religiously observed their bail conditions cannot without more be evidence of the fact that they will not abscond if such conditions are relaxed. Another way of looking at it is that the accused persons have not defaulted because the bail conditions are working as a restraint against default.

Turning to the application for postponement, although I have already noted that the prosecution's state of preparedness leaves a lot to be desired the ends of justice demand that all the relevant evidence be placed before this Court. The sanctity of human life requires that whenever human life is lost the matter whenever possible be determined on the merits rather than technicalities.

For the foregoing reasons it is accordingly ordered:

1. That the application for postponement be and is hereby granted.
2. That the application for bail be and is hereby dismissed
3. The application for the alteration of bail conditions 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.