CRB B938/03

MORGAN TSVANGIRAI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE 11, 12, 13 and 19 June 2003

Bail Application

Adv. *G. Bizos SC,* with him Adv. *C. Andersen SC,*
and Adv. *E.T. Matinenga,* for the applicant
Mr *Nemadire,* with Mr *Musona,* for the respondent

MAVANGIRA J: The applicant was placed on remand at the Magistrates Court, Harare on 10 June 2003 on allegations of treason alternatively, incitement to public violence alternatively, contravening section 19(1)(b) of the Public Order and Security Act [*Chapter 11:17*]. On the same day the present application was filed with this court.

The parties had prior to the hearing advised the judge in chambers, that although initially issue was being taken with the placing of the applicant on remand, that position no longer pertained. The only outstanding matter in issue was that of whether or not the applicant was entitled to be admitted to bail.

At the outset of the hearing the applicant's counsel addressed the court on the headline of the Herald, a national daily newspaper, of that date. The headline read "Tsvangirai denied bail". A copy of the newspaper was produced as an exhibit, as well as a copy of the newspaper's placards for that date, which also read "Tsvangirai Denied Bail". The court's attention was also drawn to a cartoon at page 10 of the same newspaper, apparently showing, in the third segment of the cartoon, the applicant counting his days as a prisoner until July. It was submitted that this grossly violates the *sub judice* rule which prohibits comments upon *sub judice* proceedings. Further, that this constitutes contempt of court and was done with malice. Reference was made to the case of *Banana v The Attorney-General,* 1998 (1) ZLR 309 at 320C (6) where GUBBAY CJ, under the heading "The capacity of trial judges to disabuse their minds of extraneous and prejudicial matter" stated:

> "Unlike the situation where jurors are the sole arbiters of factual issues, in a criminal trial in the High Court the judge has a voice in the decision of any question of fact. It is necessary, therefore, to consider whether there is any realistic potential on his or her part for the existence of partiality following upon the pre-trial publicity to which the applicant was the victim.

Counsel for the applicant contended that the powerful impact of the media with the public perception of guilt and expectation of a conviction cannot ever be discounted on the part of our judges. Not only are they susceptible to it but also to the opinions of relatives, friends and colleagues who have been influenced. Reliance was placed on these words of Lord Widgery CJ in *A-G v Times Newspapers Ltd* [1972] 3 All ER 1136 (QBD) at 1142c-d:

> 'It is widely recognised that a professional judge is likely to be unaffected by temperate comment on the case before him, even though that comment is one sided, but we should not, in our judgment, too readily accept the proposition that a judge sitting alone is not open to prejudice of this kind. Unfortunately, the comments made on pending proceedings are not always temperate, and, indeed, they may in some instances be so strong as to amount to a threat to the judge that if he does not follow the arguments there put forward, he may be severely criticised, if not pilloried subsequently.'

These observations are pertinent and demand respect. I am inclined to think it is a fallacy to assume that trial judges cannot be affected by persistent outside information of a prejudicial nature. Judges are mortals with human frailties. Yet it is my firm conviction that only a remote possibility exists of a judge, imbued with basic impartiality, legal training and power of objective thought, being consciously or subconsciously influenced by extraneous matter."

Although not highlighted in the submission, the learned Chief Justice, continued thus:

"Even such a possibility has been refuted. In *R v Horsham Justices, ex p Farquharson and Anor* [1982] 2 All ER 269 (CA) Lord Denning MR at 287f stated emphatically that:

> 'at a trial judges are not influenced by what they may have read in the newspapers'.

The Canadian Courts are equally definite that the training and experience of judges equip them to dismiss from their minds any media publicity adverse and hostile to the accused they are trying. In *Regina v Hubbert* (1975) 11 OR (2d) 464 (Ontario Court of Appeal) at 477, the following *dictum* from an earlier decision was approved:

> 'I have not heard it suggested that a trial judge who had heard about a case is not competent to decide it, and I do not think that his capacity to reject what he had heard before is unique.'"

It was submitted by the applicant's counsel that it was however not being contended that this court is incapable of hearing the application. The complaint was, *inter alia,* that the Herald's headline, the placard, the cartoon and the editorial purport to give directions to the judiciary as to how to handle the applicant.

Regarding the bail application itself, the following was the effect of the applicant's counsel's submissions:

The main trial involving the applicant and others on a charge of treason started on 3 February 2003. The applicant is, in relation to that trial, on bail involving substantial amounts of money and other conditions. The trial has reached a stage where one substantial witness is under cross-examination and there are 3 or 4 other witnesses who will be giving short and not highly controversial evidence. The trial has thus reached a stage where they should now start preparing for the applicant's defence if the applicant is called to his defence. It is thus of absolute importance that he remains on bail during this period when he has to prepare his defence. Much of the preparation has to be done outside office hours and generally the facilities for consultation and arrangement of viewing of videos which play an important part in the trial, are not available in cells which are generally very small and badly lit. As there are three accused persons in the trial, two of whom will be at liberty and one presently in custody, this will result in duplication leading to difficulties and additional expenses in the conduct of the defence case.

The applicant's counsel submitted that the offence in the main trial is supposed to have taken place as a result of clandestine action and that the gravamen of the offence is that the President was going to be murdered. Bail was granted in that matter. A comparison should be made between that for which bail was granted and the present allegations which arise from editorialised allegations from newspaper cuttings of what are now alleged to be offences of treason and the two alternative charges. If the applicant could safely be admitted to bail on the charges in the main trial, there is no good reason why he should be kept in custody pending investigation of the current allegations.

The applicant's counsel proceeded to address the court in an endeavour to show the allegations against the applicant as being baseless. For reasons I will explain later in this judgment, I do not consider it necessary to dwell at length on the reasons advanced save to set them out as advanced by counsel.

It was submitted that in the State allegations against the applicant there is not a single statement in which the applicant's precise words are used. In this regard, reference was made to the papers used by the State in an application for variation of bail conditions made before the Judge President in the main trial, which application

was opposed and dismissed. It was submitted that the bits of newspaper reportage relied on by the State were not fact but a matter of editorial deduction that the applicant meant that there must be a revolt, violent conduct or breakdown of law and order. It was submitted that on the other hand, the best evidence of what the purpose of the stayaway was intended to be and how it was going to be conducted must be what the Movement for Democratic Change (MDC) itself publicly disseminated in its own name. The court's attention was drawn to Annexures "C" and "D" at pages 15 and 16 of the applicant's papers. These are statements or advertisements apparently emanating from, and disseminated by, the MDC. Attention was drawn to the fact that nowhere do these statements, which have been largely ignored by the State, advocate or encourage that there must be violence or a revolt or breakdown of law and order or any treasonous conduct of any description. On the contrary, participants are urged to be peaceful, disciplined, vigilant, courageous. Participants are told not to be provoked but to exercise maximum restraint.

Reference was also made to the affidavit of Kembo Mohadi, the Minister of Home Affairs, particularly at paragraph 6 where he deposed as follows:

"While the MDC purports to urge its supporters to be peaceful during the demonstrations, experience has shown that each time they take to the streets, ugly scenes of violence have always ensued. There are numerous documented reports of destruction of property, assault on innocent civilians and general intimidation of the public."

This was highlighted in contradistinction to paragraph 3(a) of the same affidavit, where, in laying the basis for the application for variation of bail conditions, the Minister stated:

> "Since January 2003, the MDC through its leadership has been advocating and urging the public to engage in mass action and "final push" to the State House to oust the President and his government through the following unlawful means:
>
> a) organising and addressing country-wide star rallies urging people to revolt against the Head of State and government through illegal mass-stayaways and demonstrations."

It was submitted that the use of the word "revolt" by the Minister was a thumbsuck as the word appears nowhere in the applicant's papers. The description of stay-aways as illegal had also been made by the Commissioner of Police when he applied for an interdict. However, the Director of Public Prosecutions had, in the proceedings before the Judge President, conceded that stay-aways

were not unlawful activity.

It was submitted that, armed with the information for which it has now placed the applicant on remand, the State's first action or reaction was to apply for an order meant to gag the applicant and his co-accuseds. The order that was sought in the failed application for variation of bail conditions reads:

"1. Each respondent is ordered not to incite the public to engage in unlawful activities and illegal demonstrations.

2. Each respondent is ordered not to make inflammatory statements likely to lead to public disorder."

It was submitted that, in the circumstances, the present charges are an afterthought. Further, that there was no allegation that the applicant had disobeyed or breached the bail conditions on which he was released in relation to the charge relating to the main trial. It was in the application for variation of bail conditions that the numerous newspaper reports referred to were attached in support of the allegations against the applicant. It was submitted that if any people are alleged to have committed crimes in response to calls for violence by the applicant, such calls are and were non-existent and there is thus no principle by which the applicant ought to be denied bail. In their respective affidavits, the Minister of Home Affairs, in the application for variation of bail conditions, and the Commissioner of Police, in the application for an interdict, do not seem to have the present treason charge in mind. The present charge seems to arise when attempts to silence the applicant, his co-accuseds and the MDC failed.

It was submitted that this new treason charge is not borne out by what the applicant, his co-accuseds or the MDC said: The State picked passages from a newspaper and preferred the charges without indicating what it is that was said by the applicant that constitutes treason.

It was submitted by the applicant's counsel that in opening the main trial, the Deputy Attorney-General described the offence as a political offence. The applicant's counsel referred the court to the case of *S v Budlender & Another,* 1973 (1) CPD 264 a case involving a contravention of the South African Riotous Assemblies Act, 17 of 1956, which was described as a political offence.

It was submitted that this court does not have to decide whether the applicant is guilty or not guilty of the offence on which he has presently been put on remand. The inquiry is on the facts, on the strength or lack of it, of the State case; whether he is likely to commit offences. The statement in the State's Request for Remand Form 242 that the applicant has a propensity for committing crimes when out of custody was said to be baseless and tending to show that the State seems to have lost sight of the presumption of innocence. He distinguished the applicant's circumstances from a

case in which, for example, a serial killer faces numerous counts and there is substantial proof against him even though final guilt has not been proven, thus justifying the allegation that the accused has a propensity to commit crimes.

The court's attention was drawn to the affidavit of the investigating officer at page 126 of the papers and to the fact that the investigating officer does not say that he fears that the applicant will not stand trial. The court's attention was also drawn to a lengthy schedule at page 72 of the papers which purports to set out what is supposed to have been done by the MDC and all its office bearers. In the preamble to the schedule, it is twice stated that the MDC has been urging or calling on the people to "revolt". It was submitted that the court could not place any reliance on the schedule as it was not identified by anyone, particularly regarding who compiled it and from what information. The word revolt is obviously an interpretation of that information, a conclusion come to by an unknown person who has not taken the court into his confidence as to why he came to that conclusion.

The court was painstakingly taken through many of the incidents and details reflected on the schedule in an endeavour to show that such did not support the allegation against the applicant. Some of the incidents related to the distribution of pamphlets regarding people joining a mass-stayaway. The schedule highlights, for example, the following words on the pamphlets in question: "Jesus is coming, the signs are here, Action for National Survival". Stayaways being not unlawful, this does not support the allegations against the applicant. Some of the columns give the names of "accused persons", apparently being perpetrators of various alleged criminal acts. However, there is no allegation as to how these named persons are linked to the applicant or to the MDC, it was submitted. Some of the columns describe the accused persons or perpetrators as, for example, "three unknown MDC youths", "a group of unknown MDC youths", "unknown group of MDC youths", "unknown", "group of 15 MDC supporters". The schedule is at pages 72 to 96. Page 97 is a schedule showing the reported number of disturbances in the various provinces of the country. It was submitted that no allegation is made that these were done on behalf of the MDC.

The court's attention was drawn to page 98 of the papers, a schedule showing dates, times and venues of meetings at which the applicant made various statements as reported on the schedule. It was submitted that not only was the document compiled without much care, in that the schedule documents events as from 25 January 2003 whereas the allegations he faces are based on events as from 3 May 2003, but also no one has verified that that was said or where the information comes from. No witness has been alluded to even though the statements are alleged to have been made at public meetings. It was submitted that what emerges from the

applicant's and his co-accuseds' papers is that there was straightforward ordinary political discourse, even though it may have been in strong language, but there was no incitement to violence.

It was submitted that the Commissioner of Police, in his application for an interdict, attached the schedules at pages 100, 101 and 102 of the papers, in none of which there is any allegation of violence. Significantly, the Commissioner of Police also attached a document by the MDC headed "Week of Action", which calls for peaceful demonstrations. This is at page 103 of the papers. The Commissioner also attached the document at page 104 which again calls for Zimbabweans to be "peaceful, disciplined, vigilant and courageous". This information, it was submitted, can hardly be said to support a charge of treason and the decision to oppose bail must have been made without a proper reading or understanding of the information that has been put before the court.

The court's attention was drawn to the fact the State had produced two summaries of the allegations being laid against the applicant. One summary was attached to the Request for Remand form 242 on Saturday, 7 June 2003, when the applicant was first taken to the Magistrates Court. The second summary was placed before the magistrate when the applicant was finally placed on remand on 10 June 2003. The two summaries read differently in a number of respects, with some aspects altered in the second summary, to tally with the textbook definition on treason. It was submitted that this was a change of the factual allegations and the court should thus not accept the allegations of fact set out therein. The two summaries appear at pages 11 and 113 respectively. The question was posed as to why the information in these two summaries was not placed before the Minister, as that would be the explanation as to why he credited the MDC with his statement that it propagated peace.

The applicant's counsel produced as exhibits 3 and 4 excerpts from the newspapers, The Standard and The Daily News, headlined "Ignore Court Order: MDC" and "MDC Presses On". It was again submitted that the content of the articles do not support a charge of treason.

It was submitted that the court cannot rely on any of the documents and schedules before the court as none are supported by any evidence. It was also submitted that the State had no regard to the usual procedure of having the investigating officer tell the court what evidence he has in support of the serious charge and that he has decided to charge the accused and bring him before a magistrate. This must also be viewed together with the absurdity of the absence of an allegation that the applicant may not stand trial.

The court was referred to *S v Looij* 1975 (2) ZLR 27 (AD) especially at 41C-F where the judge stated:

> "No matter how scurrilous, defamatory or grossly offensive a written or verbal attack on a government may be, such an attack is not subversive unless it is an attack on the system of government as distinct from the government operating for the time being under the system. The right of members of the public to criticize, even in scathing terms, the action of a government elected for the time being under a democratic constitution is one of the cornerstones of democracy. Subversion is an extremely serious offence. So serious that it is only committed when the statements alleged to be subversive are established beyond reasonable doubt to be made with the intention of undermining not merely the government for the time being but the system or constitution under which that government was elected and operates. See *R v Malianga,* (4) SA 226 (FSC); *R v Mugabe,* (1) SA 514 (R., AD); *R v Ngwenya,* (1) SA 243 (R, AD); *S v Mutasa,* (4) SA 610 (R, AD)."

The court was also referred to the case of *S v Aitken* (2) 1992 (2) ZLR 463 in support of the proposition that the strength of the State case is a salient factor in deciding whether to admit an applicant to bail.

> Reference was made to the case of *In re Munhumeso and Ors,* (1) ZLR 49 (S) which sets out the importance of fundamental freedoms. It was submitted also that with regard to the State contention that stay-aways and demonstrations may lead to violence, the other side of the coin is that history shows that if the regime puts a lid on demonstrations and the like, this may lead to the use of violence. Putting a lid on demonstrations of any type may be completely counterproductive. These submissions were being made in a bail application because, it was submitted, the purpose of the applicant's arrest and the opposition to bail was to silence him. The fact that there is no fear of him not standing trial is sufficient proof of that. The State's fear is said to be that the applicant will commit similar offences.

It was also submitted that the State's opposition to bail is an attempt to introduce what the Herald in its editorial called "protective custody", when it probably meant preventive detention. The effect of denying the applicant bail would be that a person has only got to be charged with a political offence; he makes a speech over which there is dispute as to whether it was correctly reported; before he is convicted on that charge and at the whim of a police officer he could be charged with another offence and bail is opposed. It would start a downward trend of the court's power to grant bail and will be abused to keep political opponents of the government in prison.

It was submitted that the court ought to grant the applicant bail in this matter and that in so doing the court ought to avoid the imposition of conditions which will silence the applicant, as this would set a dangerous precedent, because political opponents who have an important role to play in any country will be silenced and thus deprived of the right of freedom to assemble and the right of freedom of expression and other such rights. In matters of this nature the courts must stay out of politics and apply the law on proven facts.

A video recording was shown to the court of a meeting on 24 May 2003 at which the applicant addressed a rally. This meeting is referred to on p 12 paragraph 5.9; page 114 paragraph 10 and page 99. At page 12 paragraph 5.9 it is reported thus:

"5.9 On 24 May 2003, Morgan Tsvangirai addressed his supporters urging them to be courageous in their fight to remove President Mugabe from power through violent demonstrations."

At page 114 paragraph 10 it is reported thus:

"On the 24th May 2003 the accused addressed his supporters at Chibuku Stadium, Chitungwiza and urged them to be courageous in their fight to remove the President and government from power through violent mass demonstrations."

At page 99 it is reported thus:

"Date/time: 24/05/2003

Venue: Chibuku Stadium, Chitungwiza
Statement: He said that this is the final year for pushing the Government out and the time is drawing nearer, and nearer."

A transcript of the English translation was later produced as well as an affidavit by one Gift Chimanikire, the Deputy Secretary General of the MDC who video filmed the applicant's speech at the said rally. It was pointed out that at no stage did the applicant advocate violence but on the contrary he urged people to shun violence and be peaceful.

The court was referred to the case of *R v Farid Adams and Others,* judgement of the Special Criminal Court, Pretoria "as read out to court by the Presiding Judge, Mr Justice F.L.H. Rumpf on Wednesday, 29 March, 1961", in response to the State's contention that violence was not a necessary element for the crime of treason to be committed.

In the main these were the applicant's submissions.

For the State Mr *Nemadire* the following.

While it is true that at the commencement of the main trial on 3 February 2003 the Acting Attorney-General remarked that treason is a political offence, he went further to say that any citizen of Zimbabwe can aspire to occupy the highest political office in the land. It is the means which are used in endeavouring to get to that post that are at issue because if the means are unlawful the offence is committed.

It was submitted that, for the offence of treason to be committed, it is not necessary that it be violent or revolutionary. It could be peaceful and yet still be treason as the essential elements are an overt act which is unlawfully committed by a person who owes allegiance to the State which possesses *majestas*and that overt act is done with hostile intent. Reference was made in this regard to Hunt's *South African Criminal Law and Procedure,* ed, vol 2 at pages 14-29.

In response to the applicant's counsel's submissions that nowhere in the newspaper articles did the applicant advocate violence, it was submitted that he might not have said that but nonetheless he committed treason as it is not necessary that the act *per se* hostile intent. Neither does one need to physically participate, mere incitement being sufficient. Furthermore, even contemplating an unlawful change of government constitutes treason, hence there is no crime of attempted treason.

State counsel then proceeded to explain that, as a party to these proceedings, the Attorney-General's Office endeavours to persuade or convince the court to perceive the matter in the manner in which the Attorney-General perceives it just as the applicant's counsel is seeking to do the same. The decision does not lie with the Attorney-General's Office. Any suggestion therefore that the Attorney-General's Office labours under the impression that it determines bail is unfortunate. The Attorney-General's Office presents its case and, if aggrieved, it appeals against the decision concerned in the same way that the applicant would. This was in response to Mr *Bizos'* that there are people in the Attorney-General's Office who believe it is their prerogative to determine whether someone gets bail or not.

With regard to the newspaper articles that the court was referred, to Mr *Nemadire* that the Attorney-General's Office has no working relationship with the Herald. Neither does it control what goes on at the Herald or any other media house. Further, as to the applicant's fears that this court could be influenced by the articles,

it was submitted that the Attorney-General's Office had no such fear as that would be too simplistic an approach to adopt in the circumstances.

In an expose with regard to arrests and remands, the court was referred to s 13(1) and (2) of the Constitution, dealing with the protection of the right to personal liberty, particularly at sub-paragraph (2)(e).

It provides:

"(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the cases specified in subsection (2).

(2) The cases referred to in subsection (1) are where a person is deprived of his personal liberty as may be authorised by law -

....

(e) upon reasonable suspicion of his having committed, being about to commit, a criminal offence."

Reference was also made to the Criminal Procedure and Evidence Act [*Chapter 9:07*] with particular emphasis on Part V which deals with arrests. An arrest is provided for by the Criminal Code. It is not an unregulated act that the police may invoke willy nilly. The next stage is the remand stage, at which an accused person has the right to challenge the remand, which did not happen in this case. It was submitted that there seemed to be confusion in this regard as the applicant appeared to want to challenge his remand before this court, that is in a bail application.

It was conceded that there is a presumption of innocence in favour of the applicant as is the case with any other person.

Reference was made to section 116(7) of the Criminal Code which deals with bail. It provides:

"Subject to subsection (4) of section 13 of the Constitution, in any case in which the judge or magistrate has power to admit the accused person to bail, he may refuse to admit such person to bail if he considers it likely that if such person were admitted to bail he would –

(a) not stand his trial or appear to undergo the preparatory examination or to receive sentence; or

(b) interfere with the evidence against him; or

(c) commit an offence;

but nothing in this subsection shall be construed as limiting in any way the power of the judge or magistrate to refuse to admit an accused person to bail for any other reason which to him seems good and sufficient."

It was submitted that ours is a society with a legal system where people must comply with the law in the interests of peace, law and order. Further, that it is not possible to have rights without corresponding duties. For example, if one has a right to demonstrate, one must comply with the law regarding demonstrations.

It was submitted that in opposing the applicant's application for bail the State is relying on the provision in section 116(7) of the Criminal Code that it is feared that the applicant might commit an offence while on bail. Mr *Nemadire* categorically stated that it was not part of the State's case that the State feared that the applicant would not stand trial or that he would interfere with evidence.

The court was referred to the case of *A.G. v Phiri,* 1987 (2) ZLR 33, as to the principles governing bail, with particular emphasis on 35D where REYNOLDS J said:

"The fundamental principle governing the court's approach for bail is that of upholding the interest of justice. This requires the court, as expeditiously as possible, to fulfil its function of safeguarding the liberty of the individual, while at the same time protecting the administration of justice and the reasonable requirements of the State. As it was expressed by INNES CJ more than eighty years ago in *R v McCarthy* 1906 TS 657 at 659:

> "The Court is always desirous that an accused should be allowed bail if it is clear that the interest of justice will not be prejudiced thereby …"

Although not highlighted by State counsel, REYNOLDS J proceeded further at 35E:

> "The principle was further expounded by DIEMONT J in *S v Mhlawli and Ors* 1963 (3) SA 795 (C) at 796B as follows:
>
> '… the Court must strike a balance between protecting the liberty of the individual and the administration of justice.'"

The case of *S v Chiadzwa* 1988 (2) ZLR 19 was also referred to. It discusses the importance of personal liberty as against the administration of justice. Also referred to was the case of *Aitken and Anor v AG* 1992 (1) ZLR 249 (S) where the Supreme Court upheld the High Court's decision in dismissing an appeal against the refusal of bail by the magistrate on the grounds that, given the seriousness of the alleged offences and the severity of the punishment that they would receive if convicted, there was a reasonable possibility that the appellants would abscond or interfere

with the investigation of the case against them.

It was submitted that these cases indicate that the onus shifts to the applicant to show that he satisfies the court that his admission to bail will not prejudice the interests of justice. It was further submitted that although the offence was serious, it had to be conceded that seriousness itself is not a determinant factor. It had to be looked at together with other factors. It was submitted that in this matter, a treason trial has already commenced involving the applicant and the current offences are offences he is alleged to have committed while on bail. The State is thus restricted to the one ground of fearing that he will commit other offences.

State counsel submitted that, like Mr *Bizos,* he also found quite laughable that on the schedules referred to by Mr *Bizos,* which schedules were alleged to have been part of the State papers in the application for variation of bail conditions, there are recorded details like, for example "3 unknown MDC youths", and other such descriptions. He submitted that it must not be ignored that there are also instances where the names of perpetrators of crimes are stated. Further, when the State sought to produce the very same schedule in the application for variation of bail conditions, it was vehemently opposed and was rejected. It was therefore baffling how the applicant's counsel was now relying on it.

It was submitted that the State's allegation against the applicant is that he engaged in unlawful demonstrations intended to remove the head of State or the current government. It was conceded that stay-aways are not illegal. However, section 24 of the Public Order and Security Act, [*Chapter 11:17*] was not complied with regarding the demonstrations. The section provides:

"24. **Organiser to notify regulating authority of intention to hold public gathering**

(1) Subject to subsection (3), the organiser of a public gathering shall give at least four clear days' written notice of the holding of the gathering to the regulating authority for the area in which the gathering is to be held:

Provided that the regulating authority may, in his discretion, permit shorter notice to be given.

(2) For the avoidance of doubt, it is declared that the purpose of the notice required by subsection (1) is -

(a) to afford the regulating authority a reasonable opportunity of anticipating or preventing any public disorder or a breach of the peace; and

(b) to facilitate co-operation between the Police Force and the organiser of the gathering concerned; and

(c) to ensure that the gathering concerned does not unduly interfere with the rights of others or lead to an obstruction of traffic, a breach of the peace or public disorder.

…

(6) Any organiser of a public gathering who fails to notify the regulating authority for the area of the gathering in accordance with subsection (1) shall be guilty of an offence and liable to a fine not exceeding ten thousand dollars or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment."

The crux of the matter, it was submitted, is that notice was not given in terms of the Public Order and Security Act, not that demonstrations are unlawful.

Regarding the discrepancies highlighted in the two State summaries, it was submitted that one was prepared by the police and the other was prepared by State counsel who normally prepare their own summaries. He submitted that it was largely a question of punctuation, grammar, phraseology and diction but does not change the essence and that it is within the Attorney-General's right to do so. Neither is it catastrophic that the discrepancies are there. The intention to unlawfully remove the government of the day remains.

It was also submitted that the pending election petition filed by the applicant in these courts is a lawfully allowed process. But to want to change the Government by any other means outside what is legally provided is against the law and that is where the applicant's problem is.

It was submitted that the question before the court was whether, if granted bail, the applicant would reoffend. If it is so likely, then the court ought to refuse to admit the applicant to bail.

It was also submitted that the court need not place any weight on the video cassette and affidavit of Chimanikire as it does not affect the matter before the court. Further, that would be delving into the merits of the case. There are issues that have to be addressed including such as who video-recorded the meeting and why, is it the original, was it not interfered with, is it authentic and a host of other issues, all of which is unnecessary at bail stage. Even though the applicant was not heard, on the video-tape, to encourage violence, it could have been said at some stage and then edited out.

In response to the court's question as to the State's response in relation to the applicant's counsel's submissions regarding conditions should bail be granted, Mr *Nemadire,* submitted that the Attorney-General's Office had not meticulously considered the issue of bail conditions. He however submitted that in *S v Aitken* 1992 (1) ZLR 249 (S), where there is a good discussion on bail conditions, it is stated that even with the strictest conditions, an applicant could still abscond, interfere with evidence or reoffend.

These were the State's submissions in the main.

It is important that the whole issue and purpose and law relating to bail be set out and understood.

Landsdown and Campbell in *South African Criminal Law and*

Procedure, vol V state at p 311:

> "the entering into a contract for the setting at liberty of an accused person who is in custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, for his appearance at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned."

Section 116, 118 and 126 of the Criminal Code deal, *inter alia,* with the powers of the court to admit an applicant to bail, including the grounds on which bail may be refused and the imposition of appropriate conditions where necessary. These sections are generally underlined by the existence of the court's discretion which must, of course, be exercised judiciously.

Generally, case authorities indicate that the courts tend to lean in favour of the liberty of the subject. See for example Burchell and Hunt's *South African Criminal Law and Procedure* vol 1 at p 317 where the learned authors state:

> "… In its endeavour to protect the administration of justice the court should not lose sight of its duty to safeguard the liberty of the subject, and a balance should be struck between these two interests. While most reluctant to consider the merits of, or to say anything which might savour of prejudging the case, the court will consider all the circumstances with a view to deciding whether the grant of release is likely to prejudice the ends of justice."

This is a matter which, because of its nature and circumstances, has attracted and received a lot of media publicity, both nationally and internationally. Diverse and various comments and commentaries have been made. However, the court's function is to consider the facts before it, examine the applicable law and apply the law to the facts before it in arriving at a decision. In my view, that is trite.

As will be apparent from an examination of the applicant's counsel's submissions, great efforts were made and a lot of time was spent in making submissions to the effect that the State did not have any reasonable basis justifying the raising of the charges in question against the applicant. "Where is the treason in this statement?" or "where is the call for violence in this statement?" or words to such effect were a common refrain, as the court was taken through the various documents that the State was said to have relied on in the application for variation of bail conditions and in the application by the Commissioner of Police for an interdict.

In this regard, it is, in my view, of absolute significance that the remand of the applicant by the magistrate was not challenged. It was accepted. That, in my view, amounts to a concession that the applicant should be placed on remand. The correctness or otherwise of the applicant's being placed on remand is not an issue before this court. Consequently, it is not necessary for this court to make any findings or assessments regarding the merits of the charges the applicant is facing.

In my view, the question for determination is rather, whether, having been placed on remand, which remand was not challenged, the applicant should now be placed on bail.

It is also, in my view, of great significance, that State counsel categorically stated that it is not the State's contention that, if granted bail, the applicant will not stand trial or that he will interfere with evidence or investigations into his case. The State's apprehension is that, if granted bail, the applicant is likely to commit or influence his supporters to commit similar crimes; that the applicant has a propensity to commit such crimes when out of custody. This concession by the State is, in my view, of great significance in view of the fact that failure to stand trial is one major factor that the courts consider in deciding whether or not to grant bail, and particularly so in matters involving political offences. See for example *S v Budlender and Anor, supra* at 268G where VAN ZIJL AJP stated:

"…. There is a greater incentive for political offenders to avoid standing their trials than there is in cases in which there is general moral opprobrium attached to the offence …"

In view of the State's concession stated above, are the State's concerns which concerns are in my view not unreasonable, only capable of being catered for by the deprivation of the applicant's liberty? Do the interests of the administration of justice outweigh the interests of the liberty of the applicant? In this regard, it is in my view significant to note that section 118(3) of the Criminal Code empowers the court that has granted an application for bail to add to the recognizance any of the conditions provided for therein, including any other matter relating to the accused's conduct. Thus the court is empowered to seek to control future criminal conduct through the imposition of appropriate conditions. It is of some, though maybe limited, relevance to note that in this matter there is no allegation that the applicant breached or disobeyed any of the conditions on which he was granted bail for the offences in the ongoing trial.

It is also of importance, in my view, to note that the applicant is undergoing trial. There is no verdict yet in that matter. In the eyes of the law he is still an innocent or law-abiding citizen. The same presumption of innocence also operates in his favour even in relation to these new charges. I am aware of no authority, nor has any been brought to the court's attention, that where an applicant for bail faces other charges previously preferred against him and for which he has not been convicted, that by itself is a reason for denying him bail. It cannot however be said that the State's concerns are totally unfounded. The applicant is on remand for advocating the unlawful removal of a constitutionally and democratically elected President and Government of the day. Armed with the information giving rise to these allegations, the State, on 2 June 2003 about 9 or so days before this hearing, applied to have his bail conditions in the other matter varied by the imposition of conditions requiring the applicant and his co-accused "not to incite the public to engage in unlawful activities and illegal demonstrations" and "not to make inflammatory statements likely to lead to public disorder". The application was unsuccessful, mainly for the reasons that the applicant and his co-accused were not alleged to have breached any of their bail conditions and that the application was predicated on activities that had taken place during the course of the year but in respect of which no charge had been preferred by the State. Significantly, the stated conditions would, if granted, have catered for or met the State's concerns. In this regard it is, in my view, also significant to note that the allegations against the applicant relate to events of the period stretching from March 2002 to June 2003. The allegations are not confined to the period from 31 May to 6 June 2003, the date of his arrest. This is confirmed by the investigating officer in his affidavit, that is, Annexure D to the State papers. It is noted that on 31 May 2003 the Commissioner of Police obtained a provisional order interdicting the applicant and MDC from proceeding with their planned mass demonstrations and stayaway scheduled for 2-6 June 2003. However, no submission was made to this court by the State counsel regarding the breach or otherwise of the interdict. Of further significance is the fact that State counsel did not specifically respond to the applicant's counsel's submission that the present allegations were only an afterthought conceived after the State had failed in its application for variation of bail conditions and that if such variation had been granted the present allegations would impliedly not have arisen.

In my view, the circumstances of this case are such that the court can strike a balance between the interests of the liberty of the subject and the interests of the administration of justice by admitting the applicant to bail with appropriate conditions. The court has unfortunately not been favoured with any submissions by State counsel regarding possible conditions. The court is therefore

at liberty to impose such conditions as it sees fit. The court is, however, not satisfied that the submissions made by the applicant's counsel in relation to such, adequately cater for the interests of the administration of justice.

In the circumstances it is my view that the applicant should be admitted to bail, in terms of which he is to deposit with the Registrar of this Court a cash deposit of $10 000 000. In view of the inflationary conditions in the country, I do not consider that this would be an excessive sum in the circumstances of this case. The applicant's counsel proposed that this court may impose conditions which would prohibit the applicant from making any statement which advocates the removal by violence or other unlawful means of the State President. As such conditions are consistent with the law, I have no reason not to accede to the applicant's counsel's submissions in that regard. A further condition will be that the applicant be ordered to provide substantial surety.

In the result I order as follows:

The applicant is admitted to bail on the following conditions:

1. The applicant deposits with the Registrar of the High Court a cash deposit of $10 000 000.

2. The applicant provides as surety, immovable property or properties with a total minimum value of $100 000 000 by surrendering the Title Deeds of such property or properties to the Registrar of the High Court.

3. The applicant does not make any statement, which -

(a) advocates the removal of the State President or the Government from office by violence or other unlawful means or;

(b) encourages or incites his supporters or other members of the public to try to remove the State President or the Government from office by violence or other unlawful means.

Atherstone & Cook, for the applicant.
Attorney-General, for the respondent.