

REPORTABLE (ZLR) 7

(1) TUNGAMIRAI MADZOKERE (2) LAZARUS MAENGAHAMA
(3) STANFORD MAENGAHAMA (4) PHINEOUS NHATARIKWA
(5) STANFORD MANGWIRO (6) YVONNE MUSARURWA
(7) REBECCA MAFUKENI v THE STATE

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 7 & 13, 2012

C Kwaramba, for the appellants

E Nyazamba, for the respondent

Before: MALABA DCJ, in Chambers.

This is an appeal against the entire judgment of the High Court given on 1 July 2011, refusing bail in respect of the seven appellants, in case number B632/11 – 656/11. The appellants pray that the judgment of the court *a quo* be set aside and substituted with an order that they be admitted to bail with appropriate conditions.

The facts of the case are these. The appellants are facing a charge of contravening s 47 of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*] (“the Act”), it being alleged that, on 29 May 2011, they killed Petros Mutedza, who was an inspector in the Zimbabwe Republic Police.

Inspector Mutedza was called to disperse an unlawful gathering of members of the youth league of the Movement for Democratic Change (MDC-T) party at Glen View 3 shopping centre. The same group of about 50 youths had earlier on been dispersed by other police officers from Glen View 4 shopping centre.

The deceased and his team of police officers in uniform arrived at Glen View 3 shopping centre where the youths were participating in an “MDC (T) T-shirt visibility day” campaign strategy. They all wore MDC (T) red and white T-shirts, and chanted slogans and sang party songs. The youths were also braaing meat and drinking beer at Munyarari Night Club. The deceased and five other police officers entered the night club to tell the leaders that the gathering had to disperse, because it had not been authorized by the police.

It is alleged that the group of youths then shouted “matatya ngaurawe” which when literally translated means: “kill the frogs”. The police were then attacked with various missiles including stones, bricks and bar stools. They were forced to run out of the night club. The deceased mistook a Nissan Hardbody motor vehicle allegedly being driven by the fourth appellant for the police vehicle. He ran to it for cover. When the deceased tried to open the door of the car to seek refuge, the fourth appellant is alleged to have driven away from the deceased for about 4 metres. That is when the deceased was struck on the head with a half brick. He fell to the ground. The mob of youths set upon him kicking and trampling his body until he lost consciousness and died.

It is alleged that some of the youths jumped into the Nissan Hardbody and the fourth appellant drove them away from the scene at high speed. Cynthia Manjoro is also alleged to have driven away her vehicle from the scene with some of the youths who had attacked the deceased. It is alleged that MDC (T) youths who remained behind removed their party T-shirts to avoid detection and left the scene. Another police officer was seriously injured.

All the appellants were arrested at different times and places within 48 hours of the death of Inspector Mutedza. Together with thirteen co-accused persons the appellants appeared before the High Court. They applied for bail. After reading documents filed of record and hearing argument for and against the application the court *a quo* granted bail on conditions to twelve accused persons. Bail was refused in respect of eight accused persons including the appellants. Cynthia Manjoro was later granted bail. In the determination of the application the court *a quo* applied s 117 of the Criminal Procedure and Evidence Act [Cap. 9:07] (“the CPE Act”) which provides:

“117. **Entitlement to bail**

- (1) Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody.
- (2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established –
 - (a) where there is a likelihood that the accused, if he or she were released on bail will –
 - (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or

- (ii) not stand his or her trial or appear to receive sentence; or
 - (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
 - (iv) undermine or jeopardize the objectives or proper functioning of the criminal justice system, including the bail system; or
- (b) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.”

The court *a quo*, interpreted the provisions of s 117 of the CPE Act. It said:

“The section makes it clear that an accused person is entitled to be released on bail, unless the court finds that it is in the interests of justice that he or she be detained in custody. The detention of the accused person in custody can only be in the interests of justice if one or more of the factors mentioned in section 117(2) is or are established against him. The release of an accused person on bail is aimed at enabling him to attend trial while out of custody. It does not mean that he or she has no case to answer. On the other hand the detention of an accused person in custody is meant to secure his or her attendance to stand trial, if there are genuine grounds for believing that the factors set out in section 117 (2) have been established against him. That is why the seriousness of the charge that the accused is facing is not on its own enough to deny an accused person bail.”

The court *a quo* continued:

“The court must therefore endeavour to strike a balance between the interests of justice, and the accused’s liberty. Section 117 (1) leans in favour of the liberty of the accused person, hence the use of the words” ... shall be entitled to be released on bail, at any time after he or she has appeared in court on a charge, and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody.” The intention of the legislature is obviously to make section 117 consistent with the presumption of innocence until proven guilty. The proof or lack of it can only be established at the accused’s trial.”

The learned Judge said:

“I am satisfied that with stringent bail, applicants who have not shown a propensity to abscond can be granted bail. I am however also satisfied that those who have shown a propensity to abscond should not be granted bail as they are flight risks. This calls for an assessment of each applicant’s circumstances as per the state and applicants’ evidence and submissions. I appreciate the need to treat jointly charged accused persons equally, but where a distinction can be shown between bail applicants their individual cases can be treated differently.”

The court *a quo* found that each of the seven appellants had shown a propensity to abscond. They were found to be flight risks and not suitable candidates for admission to bail. The appellants who were not admitted to bail can be divided into three categories for the purpose of examination of the facts on which the court *a quo* found that there was a likelihood that the accused if he or she were released on bail will not stand his or her trial. The categories are:

- (a) Those who were found to have been hiding at a lodge and at the workplace in order to evade arrest;
- (b) Those who were found to have contacts outside Zimbabwe;
- (c) Those who fled the scene of crime in motor vehicles to evade law enforcement agents and allegedly aided and abetted other alleged perpetrators of the offence, to evade justice.

The first category consists of first, sixth and seventh appellants. The following are the facts found by the court *a quo* in respect of each of them:

Tungamirai Madzokere – First Appellant

He was arrested while allegedly hiding from the police at Palm Lodge along Selous Avenue in Harare. The court *a quo* found that:

“He did not explain what he was doing at the lodge leaving the police’s allegations that he was hiding to avoid arrest unchallenged. Mr *Kwaramba* for the applicants alleged that Ollyn Madzokere and Mavis Madzokere were arrested by the police as bait for first applicant who they were looking for, and were only released when applicant was arrested. Though not a proper way of pursuing the arrest of an accused person, as it interferes with the rights of innocent third parties, however, proves that the first applicant was avoiding arrest. This coupled with the fact that he had left home and was staying at a lodge several kilometers from his house in Glen View is proof that he is a flight risk. He also made indications at the scene, which were captured on video. This further strengthens the respondent’s case against him and may cause him to abscond.”

Yvonne Musarurwa – Sixth Appellant

She was arrested at Palm Lodge, and this is not disputed, although counsel for the applicant contended that this does not mean that she was hiding from the police. The court *a quo* found that:

“This is clearly not of any help to the applicant’s case. A serious allegation was made that she abandoned her residence to avoid the police, yet all that could be said is that, that information is colourless. It certainly colours the applicant a flight risk. While there could be nothing wrong with booking oneself into a lodge under normal circumstances, there is certainly something wrong if one does it for purposes of avoiding arrest. That indicates an intention to avoid having to answer charges. It makes her a flight risk.”

Rebecca Mafukeni – Seventh appellant

She, like the first and sixth appellants, was arrested at Palm Lodge, and the court’s findings are exactly identical to those of the sixth appellant, above. In addition to the first, sixth and seventh appellants who were arrested at Palm Lodge and found to have been hiding to evade arrest, making them flight risks, another appellant was arrested at his work place.

Stanford Mangwiro – Fifth appellant

The court *a quo* found that:

“He is a flight risk. The investigating officer, in his affidavit of 10 June 2011, said he had deserted his residential address and was staying at his work place where he told some workmates that his hands were painful because of the assault he did on some police officers.”

The second category of appellants consists of those who were found to have a propensity to abscond, and to be flight risks, for the reason that they had relatives outside Zimbabwe, in Botswana.

Lazarus Maengahama – Second appellant

The court *a quo* found that:

“The fact that the applicant works in Botswana tilts the scales in favour of the interests of justice. Granting the applicant bail on the promise that he will abandon his employment in Botswana, and surrender his travel documents, is taking a serious risk as the applicant is most likely to abscond as no explanation has been given as to how he will survive without a job. He is experienced at living outside the country and is going to be constantly thinking about the case, which I have already said is fairly strong. He might while waiting for his trial succumb to the temptation to flee back to Botswana or any other country as he has obvious contacts outside the country.”

Stanford Maengahama – Third Appellant

Counsel for the respondent, in his heads of argument, conceded that the court *a quo* erred, and misdirected itself, in its finding in regard to this appellant. The court *a quo* said:

“He is not employed, and he stays at his brother’s house. He is single. He therefore has no attachments to Zimbabwe which would persuade him to wait the trial of this case. He lied in his application that he has no connections outside Zimbabwe. This is a lie as his brother the 3rd applicant is working in Botswana. He is a strong, reliable contact person,

who will have an obvious interest in helping him once he leaves the country. The fact that he lied to the court makes it difficult for the court to believe him when he says he is prepared to stand trial.”

The third category of appellants is that of those who were found to have a propensity to abscond, and to be flight risks, on the basis of allegations that they evaded arrest by fleeing from the scene of the crime, and aided and abetted other perpetrators of the offence to evade justice.

Phineous Nhatarikwa – Fourth appellant

The court *a quo* said:

“Mr *Kwaramba* submitted that the state’s allegation that he drove off when the deceased tried to get into his vehicle proves he was not involved in the attack against the deceased. He further submitted that the fact that he parked a few metres away does not get him involved in the crime charged. Mr *Nyazamba* for the respondent submitted that the fact that people who had attacked the deceased got into his car and he drove away with them at high speed means he was aiding and abetting those who attacked and killed the deceased.”

“I agree with Mr *Nyazamba*’s reason. In fact, that he was driving those who attacked the deceased from the scene is an indication that he is likely to abscond. It is known that the car he was driving was traced to him through CVR. He now knows he is facing a serious offence. His instincts towards fleeing from brushes with the law may have been reactivated. He is not a good candidate for bail.”

All seven appellants were not admitted to bail. They now appeal to this Court against the refusal to admit them to bail. Leave to appeal in terms of s 121 of the CPE Act as read with s 44(5) of the High Court Act [*Cap. 7:06*], was granted by the High Court on 5 December 2011.

The grounds of appeal are as follows:

1. The court *a quo* erred by finding that appellants were flight risks, there being insufficient evidence showing any inclination to abscond.
2. The court *a quo* grossly misdirected itself by making findings which were not supported by the facts and evidence placed before the court.
3. The distinctions drawn by the court for granting bail to other jointly charged applicants and denying others are improper distinctions. Where there is an improper distinction there is no distinction at all. The court ought to have treated like-accused-alike.
4. The first, sixth and seventh appellants were denied bail for the reason that they were hiding at lodges to avoid arrest, and as such were flight risks. This finding was not supported by the facts and evidence placed on record. The court *a quo* mistook the facts.
5. The court *a quo* erred in coming to the conclusion that the second appellant's assurances to give up his employment in Botswana was not sufficient if he could not explain how he would survive without a job. In doing so the court allowed an extraneous matter to guide or affect it.
6. The court *a quo* erred in coming to the conclusion that because of second appellant's experience travelling outside the country and his contacts outside Zimbabwe he could be tempted to avoid trial. In doing so the court failed to treat the second appellant like other applicants who were granted bail but had travel documents and had travelling experience outside the country.
7. The court *a quo* erred in accepting the allegations of the State as fact. In doing so it allowed extraneous matters to guide or affect it.
8. The court *a quo* erred in finding that the video evidence strengthened the respondent's case and would induce the first appellant to abscond. In that regard the court *a quo* erred

in taking all the allegations of the State to be factual truths, even where there was insufficient evidence to support them.

9. The court *a quo* misdirected itself as to the evidence. The finding that the State case is “fairly strong” was not supported by the evidence placed on record.
10. The court *a quo* erred in coming to the conclusion that the third appellant lied that he had no connection outside the country when he had a brother in Botswana. It failed to consider that the brother was no contact at all as he was also in custody together with him. In doing so the court failed to take into account a relevant consideration.
11. The court *a quo* erred in failing to treat like accused alike. The third appellant and his brother Last Maengahama had both stated in their bail application that they had no connection outside the country when they both had a brother who worked in Botswana. Yet the court granted bail to Last Maengahama and refused to grant bail to the third appellant.
12. The court *a quo* was wrong in denying the fourth appellant bail. The court could not have taken it as a proven fact that fourth appellant was at the scene and that he drove off at high speed. Such allegations were not proved and as such they could not be a basis for denying bail. Therefore the court mistook the facts.
13. The court *a quo* erred by failing to come to the conclusion that by going to the police station to give food to those who had been arrested, the fourth appellant had not exhibited any evasive tendencies.
14. The court *a quo* denied the fifth appellant bail on the basis of an allegation by a police officer that the fifth appellant had deserted his home to stay at his work place and that he had bragged to his workmates about beating police officers. This finding was not based

on any evidence. The court seriously misdirected itself on the facts which amounts to a misdirection in law.

15. The court *a quo* failed to consider that whatever the State's fears were in regard to the seven appellants, they could be taken care of by the imposition of appropriate bail conditions. In fact all those denied bail were not shown to possess any special means which would enable them to breach stringent bail conditions.

In his submission before the Court, in support of the grounds of appeal, Mr *Kwaramba* for the appellants argued as follows:

The respondent had conceded that the third appellant Stanford Maengahama is a suitable candidate for admission to bail, and that he ought to have been admitted to bail by the court *a quo*. In effect, the concession was to the effect that the court *a quo* erred and misdirected itself when it refused to admit the third appellant to bail.

Counsel for the appellants submitted that it was common cause or accepted by both parties in their heads of argument that the lower court declined to admit all seven appellants to bail, on the basis that: "there was a real likelihood of appellants not standing trial if released on bail." Mr *Kwaramba* urged the court to consider the circumstances of Tungamirai Madzokere (first appellant), Yvonne Musarurwa (six appellant) and Rebecca Mafukeni (seventh appellant) as the same because all three were denied bail on the basis that they were flight risks after having been arrested while they were hiding from the police at a lodge in Harare.

It was argued that the Investigating Officer's conclusion that these three appellants were hiding in order to evade arrest, was accepted by the court *a quo*. The court *a quo* took it a step further and found that the appellants ought to have explained their presence at the lodge when they were arrested. Mr *Kwaramba* said that another judge of the High Court held in a subsequent bail application that the explanation offered that the appellants were at the lodge on frolics of their own, could not be accepted because it should have been given at the initial bail hearing.

Mr *Kwaramba*'s view was that the crux of the matter is whether the nature of the evidence placed before the court *a quo* was of sufficient cogency as to prove that the three appellants were hiding from arrest. He relied on the case of *S v Hussey* 1991 (2) ZLR 187 (S) as authority for the proposition that a certain level of cogency of evidence must be reached capable of justifying a decision not to release an accused person on bail. He argued that the evidence placed before the court *a quo* through the affidavit by the investigating officer was not cogent enough for the purpose of a finding that the appellants were at the lodge to avoid arrest

It was submitted that the affidavit does not state how long each of the three appellants had stayed at the lodge bearing in mind that they were arrested within 48 hours of the commission of the offence that they were subsequently charged with. The affidavit did not state whether the appellants were booked at the lodge under their own names, or whether they had packed any clothing to indicate an intention to stay at the lodge for a long period. Lastly, counsel for the appellants submitted that the affidavit does not state that the appellants knew, at the time of their arrest that the police were looking for them in connection with the alleged

murder. He said had such evidence been in the affidavit it would have satisfied the test of “cogency” to justify a finding by the court *a quo*, that the three appellants intended to evade justice and were hiding at the lodge for that purpose.

Mr *Kwaramba* submitted that there was no reason why the court *a quo* disbelieved the appellants’ explanation that they were at the lodge to conduct romantic liaisons. He said six and seventh appellants, are single and at liberty to do as they please. He argued that the burden was on the State to place sufficient evidence before the court to show that the three appellants were hiding to evade arrest. According to him the State failed to discharge the onus.

Counsel for the appellants pointed out that the allegation that first appellant made indications at the scene of the crime which were captured on video is subject to being proved at the trial. He said the court *a quo* erred and misdirected itself in taking the allegation into consideration when it refused to admit the first appellant to bail. It was submitted that the first appellant would tell the trial court that the video was inadmissible because it was obtained by torture. He said he was denied access to legal representation.

In short, the admissibility of the video would be put in issue before the trial court. The evidence contained therein which the court *a quo* relied on without viewing the video was not proven. It was submitted that the court *a quo* misdirected itself in relying on the allegation that the evidence in the video made the state case against the first appellant stronger. It was argued that the first appellant has strong ties to his community, and that, as a local councilor, he

was anxious to go to trial in order to clear his name. The failure by the court *a quo* to take this fact into consideration amounted to a failure to take into account a relevant consideration.

According to Mr *Kwaramba* the allegation that the first appellant was evading arrest as shown by a text message on his wife's cellphone was insufficient to prove that the first appellant was hiding to evade arrest. By relying on the allegation the court *a quo* allowed an extraneous or an irrelevant fact to guide it. That is a misdirection.

The court was urged to compare the circumstances of the first appellant with those of *Zwelibanzi Dube* and *Simon Mudimu*, the fourteenth and fifteenth applicants in the lower court. Both were admitted to bail, despite the fact that *Dube* was arrested after a night raid at his home. The court *a quo* found that there was no explanation as to why repeated police efforts to arrest him during the day had failed. It held that the lack of explanation should be resolved in *Dube's* favour. With the first appellant the court *a quo* held that failure to explain his presence at *Palm Lodge* did not leave room for an innocent explanation. The court held that *Dube* should be given the benefit of the doubt for the lack of clarity in the Investigating Officer's affidavit.

Similarly, it was argued that *Simon Mudimu*, the fifteenth applicant in the court *a quo* was arrested during a night raid after police efforts to arrest him during the day had failed. Yet the court *a quo* found that failure to show that *Mudimu* was aware that the police were looking for him was in his favour. Mr *Kwaramba* argued that there is clear failure by the court *a*

quo to treat like accused alike. That is a misdirection. It was argued that the court *a quo* failed to treat the first, sixth and seventh appellants the same as Dube and Mudimu.

On the application of the principle of “propensity to abscond”, Mr *Kwaramba* submitted that there was no evidence before the court *a quo* justifying a finding that the appellants were guilty of such propensity. He defined propensity as:

“an inclination to repeat behaviour the third time; to repeat a similar act. Likelihood to behave in a certain way”, and submitted that propensity is a strong word and is best described as “evidence of inclination towards repetition of behaviour.”

The court was asked to consider whether being found in a lodge within 48 hours after allegedly participating in the commission of a criminal offence supported a finding of propensity to evade justice. It was submitted that no evidence of intention to hide and evade arrest or of propensity to abscond was placed before the court *a quo*.

The fifth appellant was arrested at work. Mr *Kwaramba* submitted that there was no evidence placed before the court *a quo*, to show that he was aware that police were looking for him, and that, he was hiding from them at his work place. There was no evidence as to how long he had been allegedly hiding, no clothes, blankets or other items were recovered to show that he was living there. Such evidence would have been sufficient to justify an inference that he was hiding from the police.

It was argued that Gabriel Shumba, the fifth applicant in the court *a quo* was admitted to bail yet he was arrested in a night raid at his home where he was found hiding in a wardrobe in a bid to evade arrest. The Investigating Officer did not aver that Shumba had a propensity to abscond. To the contrary, the fifth appellant was alleged to have a propensity to abscond. The circumstances of the arrest are similar. In *Shumba's* case it is a fact that he was hiding in a wardrobe to avoid arrest. It was submitted that in the fifth appellant's case the allegation that he was hiding from the police at his work place is subject to proof. Counsel for the appellant submitted that is evidence of the failure by the court *a quo*, to treat like accused alike. That he said was misdirection on the part of the lower court.

The second appellant worked in Botswana. He was found to have a propensity to abscond. It was submitted by Mr *Kwaramba*, that this was a serious misdirection on the part of the court *a quo*. He said most of the applicants who were admitted to bail have passports and are frequent travellers outside the country. They had contacts outside the country. Last Tamai Maengahama, is a brother to the second appellant. He is one of three brothers who were arrested in similar circumstances and is facing similar charges. He is the most affluent of the three brothers and better travelled to other countries yet he was admitted to bail and ordered to surrender his passport. The court *a quo* did not find that he was likely to abscond because he had contacts outside the country. There was a failure to treat like accused alike.

It was submitted that the court *a quo* appreciated the elements of the principle of propensity. It however misapplied the principle and confused itself by the phrase "propensity to abscond". The court *a quo* said:

“What would establish a strong propensity is evidence that the applicants have previous convictions for public violence and are facing several similar cases ... it should be carefully considered to ascertain whether that likelihood is present.”

Mr *Kwaramba* argued that the fourth appellant was treated by the court *a quo* as if the allegation by the Investigating Officer that he fled from the scene of the crime had been proved. It was submitted that this was a misdirection because the fourth appellant disputed the averment. No witnesses were called to testify that he indeed fled from the scene, despite the fact that the Investigating Officer alludes to the fact that the fourth appellant was observed by undercover agents. It was argued that, even if it were accepted that the fourth appellant fled from the scene of the crime with the intention of evading arrest, it would not establish a “propensity to abscond.”

Mr *Kwaramba* submitted that, for a finding of a propensity to abscond to be justified, there has to be evidence of repeated or habitual acts of evading the arm of the law. He said the court *a quo* misdirected itself because there was no evidence of such behaviour by the fourth appellant. On the contrary, it was argued that the fact that the fourth appellant took food to some of his colleagues who were at a police station should have been treated as evidence of lack of intention to evade the police.

The court was asked to compare the circumstances of the fourth appellant with those of Cynthia Manjoro, the eleventh applicant in the court *a quo*. She was alleged to have sped off from the scene of the crime, in a motor vehicle with some of the deceased’s assailants. The Investigating Officer alleged that this showed an intention to evade arrest on her part. The

court *a quo* initially found her to be a flight risk, but later admitted her to bail on the basis of changed circumstances. Mr *Kwaramba* submitted that the fourth appellant should have been treated in the same manner as Manjoro. He said the court *a quo* misdirected itself in failing to do so.

Mr *Nyazamba* indicated to the Court that, after a careful consideration of the submissions by Mr *Kwaramba*, taking into account the principles of law applicable in an appeal of this nature, and the findings of the court *a quo* the State was prepared to make the following concession. It conceded that:

1. The court *a quo* may have misdirected itself by failing to apply the principle of treating like accused alike, or of equal treatment of accused persons facing similar charges, in an application for bail pending trial.
2. The misdirection was of such a serious nature as to justify the Court's interference with the exercise of discretion by the lower court, and substituting its own discretion, in respect of the second, third, fourth, fifth, sixth and seventh appellants.
3. Gabriel Shumba was hiding in a wardrobe when he was arrested and he was admitted to bail. His circumstances are similar to those of the first, sixth and seventh appellants who were arrested while allegedly hiding at Palm Lodge. The court *a quo* erred in granting Shumba bail and denying it to the appellants in similar circumstances.
4. The court *a quo* was correct not to take the seriousness of the offence alone, as a factor in denying the appellants admission to bail.

Mr *Nyazamba* submitted that respondent was not making the same concession in respect of the first appellant. He said apart from being arrested at a lodge and found to have been hiding to evade the police the first appellant made indications at the scene of the crime. He said the first appellant made a statement in which he allegedly gave details of his participation in the commission of the offence. Counsel for the respondent argued that the evidence that the first appellant was hiding at the lodge is different from what the Investigating Officer said about the sixth and the seventh appellants. First appellant allegedly sent a text message to his wife telling her not to open the door to anyone and not to tell anyone where he was. Mr *Nyazamba* said the communication showed that he was aware that the police were looking for him and his presence at the lodge was an attempt to evade arrest.

Mr *Nyazamba* submitted that the court *a quo* was correct in finding that the first appellant was a flight risk, because of the strength of the State case against him. It was conceded that while Gabriel Shumba's circumstances were similar to that of the first, sixth and the seventh appellants in that they were all arrested while hiding from the police, they differed materially in respect of the first appellant. He said there was the additional circumstance of the first appellant having made indications which were captured on video. The indications distinguished his case from that of Shumba and the other appellants.

Mr *Nyazamba* argued that the meaning of the phrase "propensity to abscond" was that the accused person "had an inclination to repeat what he has done before." He submitted that the evidence before the court *a quo* showed that the first appellant had an inclination to repeat what he had done before which he said was that:

1. He fled from the scene of the crime and evaded arrest by police officers. He even aided and abetted other assailants of the deceased to flee from the police.
2. He stayed away from home and warned his wife not to open the door or tell anyone where he was.
3. He harboured the sixth and seventh appellants at Palm Lodge and assisted them to evade arrest.
4. The court *a quo* refused to accept his explanation that he was at Palm Lodge for purposes of a romantic liaison.

Mr *Kwaramba* argued that, consideration of the definition of propensity set out by the court *a quo*, will show that the first appellant cannot be found to have a propensity to abscond. The reason is that the nature of the evidence placed before the lower court consisted of bald assertions by the Investigating Officer. The admissibility of the video evidence was going to be challenged at the trial. He said there was no suggestion that the first appellant has been convicted of similar offences or that he faced similar charges before and evaded arrest, justifying a finding that he has a “propensity to abscond.” Mr *Kwaramba* said that if the Court applies the principle of treating like accused alike, the first appellant should be treated in the same manner as the applicants who are alleged to have made indications at the scene of the crime. They were admitted to bail. Mr *Kwaramba* argued that as the first appellant is not the only one who is alleged to have made indications there is no reason for not treating him in the same manner as those other accused persons who are facing similar allegations and yet have already been granted bail.

The granting of bail involves an exercise of discretion by the court of first instance. It is trite that an appellate court will not interfere with the exercise of discretion by a

lower court or tribunal unless there is a misdirection. It is not enough that the appellate court thinks that it would have taken a different course from the trial court. It must appear from the record of proceedings that there has been an error made in the exercise of discretion such as that the trial court acted on a wrong principle; allowed extraneous or irrelevant consideration to affect its decision or made mistakes of fact or failed to take into consideration relevant matters in the determination of the question before it. See *Barrows & Another v Chimponda* 1991 (1) ZLR 58 (S); *Aitken & Another v Attorney General* 1992 (1) ZLR 249 (S).

The purpose of the exercise of the discretionary power vested in the court under s 117 of the CPE Act is to secure the interest of the public in the administration of justice by ensuring that a person charged with a criminal offence upon a reasonable suspicion of having committed it will appear on the appointed day to stand trial. It is for that purpose that s 117 of the CPE Act provides in effect that upon sufficient evidence being available to justify it, a finding that an accused person is likely not to stand trial when released on bail is a relevant and sufficient ground for ordering continued detention of him or her pending trial.

Section 117 of the CPE Act is also based on the principle that, regard being had to the presumption of innocence which is a fundamental right guaranteed under the Constitution to an accused person awaiting trial, he or she must be released on bail on appropriate conditions if the same object of ensuring his or her appearance at the trial can be achieved.

The question for determination is whether on the facts available and regard being had to the presumption of innocence to which the appellants are entitled, was the court *a quo*

justified in finding that there was a likelihood that they would not stand trial if released on bail even with stringent measures to ensure close monitoring by the police. Only if the finding is justified by the available evidence can it be said that the likelihood of the appellants not standing trial if released on bail is a relevant and sufficient ground for depriving the appellants of their liberty pending trial in terms of s 117 of the CPE Act.

In *Aitken & Anor supra* it was held that in deciding whether an accused person would abscond if released on bail the following factors constituted a useful guide:

- the nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction.
- The apparent strength or weakness of the state case.
- The accused's ability to reach another country and the absence of extradition facilities from that country.
- The accused's previous behaviour when previously released on bail; and
- The credibility of the accused's own assurance of his intention and motivation to remain and stand trial. See also *S v Jongwe* 2002 (2) ZLR 209 (S).

The Court turns to apply these principles to the facts of the case. Although Mr *Kwaramba* argued strongly that the finding by the court *a quo* that the first, sixth and seventh appellants were hiding at Palm Lodge to avoid arrest the evidence supports that finding. This is particularly the case when regard is had to the text message the first appellant admitted sending to his wife by cellphone to tell anyone, including the police, who came home looking for him that he was in Malbereign. He and his wife knew that he was not in Malbereign but at Palm

Lodge. It is clear from the admitted evidence that the first appellant was hiding his whereabouts. The fact that he did not specifically tell his wife in the text message that it was the police he was hiding from does not affect the correctness of the finding by the court *a quo* that he was hiding from the police.

The first appellant was found at the lodge in the company of the sixth and seventh appellants. It is said he was housing them. They were acting in pursuit of a common purpose to avoid arrest by the police. When regard is had to the fact that the sixth appellant made indications at the scene of the crime after her arrest the finding that she was absconding from arrest by the police is justified.

The same conclusion cannot be arrived at in respect of the finding by the court *a quo* that the fifth appellant was avoiding arrest when he was found by the police at his work place. A place of work is where an employee is compelled by the contract of employment to be. There was no allegation that the fifth appellant was at his work place at a time when he was not expected to be there. The fact of avoiding arrest was not the only one that could reasonably be inferred from the presence of the fifth appellant at his place of work.

There was nothing to support the allegation contained in the affidavit by the investigating officer that he was “staying” at his work place. The fifth appellant denied the allegation. In any case he was arrested within forty-eight hours of the offence being committed. The state needed to produce concrete evidence to show that he resided at his work place during that short period between the time of the commission of the offence and his arrest. A concession

has been made by state counsel that the evidence before the court *a quo* was not sufficient to support the finding that the fifth appellant was avoiding arrest. As that was the only basis on which the court *a quo* found that there was a likelihood that he would not stand trial if released on bail and it is correctly conceded that the finding is a misdirection, the fifth appellant is entitled to be released on bail.

The court *a quo* relied on the fact that the first, sixth and seventh appellants hid from the police to avoid arrest as evidence of the finding that they had a propensity to abscond. Mr *Kwaramba* argued that propensity was an inclination on the part of the accused person to repeat conduct he or she had done at least more than three times before. Mr *Nyazamba* on the other hand argued that the word referred to an inclination to repeat what a person has done before. According to the meaning contended for by Mr *Nyazamba* the fact that the appellants had avoided arrest was enough support for the finding that they had a propensity to abscond and were unlikely to stand trial if released on bail. It is however clear that the appellants had not absconded when on bail previously in any other criminal case.

It is clear from the manner the court *a quo* went on to take into account the fact of avoiding arrest and indications made at the scene of crime by the first and sixth appellants together that it considered that the probative value of the evidence of avoiding arrest was not on its own sufficient to justify the finding that there was a likelihood of them not standing trial if released on bail. There was nothing said on the indications allegedly made by the first and sixth appellants other than the statement that they were made. What was indicated was not disclosed. What the first and sixth appellants indicated as what they had done had to be known by the court

a quo before it could make a finding to the effect that their involvement in the commission of the crime strengthened the state case.

The first appellant said he intended challenging the admissibility of the indications at the trial on the ground that they were not made freely and voluntarily. Not only does this reveal a willingness to attend trial and use legal procedures to weaken the state case, it also shows that indications are not sufficient evidence for holding that an accused person is likely to abscond if released on bail. It is the principle of law on bail application that the seriousness of the crime the accused is charged with and the strength of the state case are on their own not enough to justify a refusal to grant bail. See *S v Hussey* 1991 (2) ZLR 187 (S).

A concession has been made by the state counsel in respect of the sixth and seventh appellants on the ground that the court *a quo* erred in finding from the single incident of avoiding arrest that they had a propensity to abscond. The same concession which the court finds was properly made was not extended to the first appellant.

When considering the case of the first appellant it is necessary to state that the substantive grounds on which the misdirection by the court *a quo* was conceded in respect of the sixth and seventh appellants apply to him. The principle of equality of treatment which requires that those who are in like circumstances must be treated alike would apply. This is particularly so when regard is had to the case of Gabriel Shumba. He was arrested by the police at night whilst hiding in a wardrobe at his home. The court *a quo* granted Gabriel Shumba bail. Hiding in a wardrobe to avoid arrest is not different from hiding in a lodge to avoid arrest. Both places

serve the same purpose in as far as their occupants are concerned. The Court finds no reasonable basis for differentiating the first appellant from the sixth, seventh appellants and Gabriel Shumba.

The second and third appellants are brothers. There is a concession in respect of both that they be granted bail. The Court finds that the concession is properly made. The court *a quo* had refused the second appellant bail on the ground that he would be induced by the desire to go back to his work in Botswana to abscond if released on bail.

The court *a quo* was also of the view that the seriousness of the offence would induce the second appellant to abscond. The important factor which was overlooked by the court *a quo* is that the second appellant had always travelled to Botswana lawfully. He has a passport which has been taken into the custody of the police.

There was no evidence to suggest that a person who had always sought to abide by the laws of going out and coming into the country would be induced by the desire to go back to work in a foreign country to abscond from judicial process. Going to a foreign country without travelling documents has its own serious hazards. There is an extradition arrangement between Zimbabwe and Botswana. It was not shown that the second appellant was prepared to risk the hazards attendant upon unlawful exit to a foreign country. The appellant had been in custody for a month at the time he appeared before the court *a quo* on an application for bail. The court *a quo* did not address its mind to the question whether the job he had in Botswana would still be available to him.

In respect of the third appellant the court *a quo* had refused him bail on an erroneous view of the facts. The second appellant was in custody together with the third appellant. The court *a quo* however placed the second appellant in Botswana and said he was available to assist the third appellant if he absconded to that country. Needless to say that was a clear misdirection on the facts entitling the third appellant to an order granting him bail.

There is a concession in respect of the fourth appellant. The court finds that the concession is properly made. The principle of equality of treatment applies in favour of this appellant. One Cynthia Manjoro was arrested for the same crime as the fourth appellant. The allegation against her was that after the deceased had been killed she allowed the assailants to get into her car and drove from the scene with them at high speed.

The same allegation was made against the fourth appellant. Both cars did not belong to the drivers. They were traced through the Central Vehicle Registry (CVR) to the political party of which they were members. Cynthia Manjoro was granted bail whilst the fourth appellant was refused bail. In light of the concession and the fact that there are no substantial grounds on which the case of Cynthia Manjoro and that of the fourth appellant can be treated differently he is entitled to be released on bail.

It is important to note that all the appellants are nationals with residence in the country. They have roots here. In the exception of the third, sixth and seventh appellants who are single, the rest have families in the country. They have strong property links with the country. They are unlikely, in the circumstances, to be under considerable temptation to evade

trial notwithstanding the seriousness of the crime with which they are charged. They all gave assurances of their commitment to attend trial if released on bail. They also undertook to submit themselves to stringent measures as part of the conditions of their release to ensure effective monitoring by the police.

The fact that the life of a police officer was lost in the course of execution of his duty of enforcing the law is an important factor to be considered in striking the balance between the interest of the individual in personal liberty pending trial and the interests of society in having those accused of crime on reasonable suspicion tried and punished if convicted. The interests of fairness and justice require that the matter be approached dispassionately in accordance with the law.

The appeal succeeds with no order as to costs. The judgment of the court *a quo* refusing the appellants bail is set aside and substituted with the following:

All the appellants are granted bail in the following terms and conditions:

- (1) The first appellant is to deposit a sum of \$1 000 with the Registrar of the High Court, Harare.
- (2) The second, third, fourth, fifth, sixth and seventh appellants shall deposit a sum of \$500 each with the Registrar of the High Court, Harare.
- (3) The first, second, fourth and seventh appellants are to surrender their travel documents to the Registrar of the High Court, Harare.
- (4) The third and sixth appellants are hereby prohibited from procuring travel documents until the case is finalized without first applying and obtaining permission to do so from a judge of the High Court, Harare.

- (5) Each appellant shall reside at the address he or she gave to the police at the time the charge was laid against him or her and report three times a week at Harare Central Police Station on Monday, Wednesday and Friday between the hours of 6am and 6pm.

Mbidzo, Muchadehama & Makoni, appellants' legal practitioners

Attorney-General's Office, respondent's legal practitioners