JAMESON TIMBA
and
PROFESSOR MPOFU
and
PAULINE GARUSA
and
TAMBUDZAI MAKOKORO
and
LYNETTE MARIA MAKOMVA
and
VONGAI RUGOTO
and
ANNA MUTENJE
and
FAITH MAPOSA
and
IYINESS ADIO
and
RESCA MANATSA SERVICE COM
and
VIOLET CHITSINDI
and
OLIVIA MBALAME
and
RUDO KARASAMUNGU
and
DORCAS NYAMAROPA
and
EDITH MUNDIYA
and
GRACIA CHARI
and
NICOLE CHABATA
and
EDNA FERO
and
JOSPHINE MUNDIYA
and
TOBIAS MANGWAYANA
and
KEVIN CHIROVA PAS
and
PATRICK MASIMBA SANDE
and
ESMERI CHAPFIRUKA
and
REDEEM MANDIZVIDZA
and
CHAMUNORWA ANDREW

and
NOMMATTER KANJ E
and
RICHARD CHITUHU
and
PANASHE MATSIKA
and ‘
WISDOM NYAMA
and
TINOTENDA JERA
and
PETER ZISENGWE
and
BRIAN MAZIVEI
and
VICTOR MASEDZE
and
GIVEMORE TENHEDZI
and
ZVIKOMBORERO DERECK MARI
and
TATENDA MUKWEMBI
and
ARTWELL KATANDA
and
AMOS MUDONDO
and
RONALD HONDONGWA
and
CHARLES LIWONDE
and
COLBERT MUGWENHI
and
SIMBARASHE NYAMUDEZA
and
MAXWELL SANDE
and
TAWANDA MUKUCHA
and
TAWANDA RANGANAI
and
TAVAKA KUCHENGA
and
PRINCE MAJENA
and
TARUVINGA TENSEN
and
ISHMAEL MUCHERO
and

LEOPALD MASHONGANYIKA
and
MILTON CHIHWANDE
and
SIMBARASHE FORE
and
MURONIBI SAMSON
and
MAFUKOME TENISEN
and
JASON KAUTSA
and
KUNDAI GUTU
and
TSITSI DZOVONERA
and
LUCIA KANDEMIRE
and
CATHERINE MUSHARA
and
MAUREEN DI-IAN A
and
NETSAI MARAITI
and
MEGGY NYASHA KONDANANI
and
JEFITA NJOVO
and
MORGAN GONI-II
and
FAITH MULANGALA
and
CAROLINE TASHAYAWEDU
and
CALEB MAKUYANA
and
RUVARASHE BILLIART
and
EDWARD NDLOVU
and
MOSES CHIRIMA
and
CLAYTON PIVANO
and
AMANDA VIRGINIA BILLIART
and
MELINDA EMILY BILLIARTY
and
LEYTON MWANAKA

and
INNOCENT VIRIMAYI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 17 July 2024

Appeal against refusal of bail

W. Jiti, *J Bamu* , *M. Mandevere*, and *L. Mbereko* for the appellants
C. Muchemwa and *K.H. Kunaka*, for the state

MUTEVEDZI J: This is an appeal against the decision of the Magistrates' Court sitting at Harare refusing all the seventy- four (74) appellants admission to bail. The decision was delivered on 27 June 2024. The demographics of the appellants is interesting. They were not a random assembly. Instead, they hail from different but clearly defined clusters predominantly the suburbs of Chitungwiza, Epworth and Hatcliffe which account for almost three quarters of the appellants. Equally noteworthy is the fact that fifty-seven of the appellants are not formally employed and that over sixty of them are aged below forty years. They are of the same political persuasion having all admitted their affiliation to a political outfit called the CCC. The appellants made a combined bail application in the court a quo. In their appeal in this court, which again was prosecuted as one, they raised several grounds of appeal to which I will advert later in the judgment.

[1] The appellants were all arrested on 16 June 2024. The allegations against them are stated in the request for remand form (form 242). The legal practitioners representing the appellants, presumably on the appellants' instructions, all agreed to the correctness of the accusations by the prosecution. All counsel intimated that they had no scruple with the allegations and chose to contest them at an unspecified future date.

[2] I momentarily stop here to mention that it does not carry much wisdom for a legal practitioner to take the above course. It is ill-advised because in determining matters present, a court will never be guided by what a litigant will moot in future. In the case of *Loveridge Dzimwasha and Others v The State* HH 119/23, this this court stated that the

growing subterfuge where legal practitioners deliberately consent to the placement of their clients on remand but immediately seek to circumvent their admissions therein by challenging facts on which an accused would have been placed on remand during bail hearings is a red herring which will always be exposed for what it is. The irrefutable position of the law is that in a bail application, an applicant cannot possibly deny facts which he/she would have either expressly or by acquiescence admitted to at remand stage. For the umpteenth time, I restate the basic position that although they have a relationship, the remand processes and bail applications are completely separate stages in the prosecution of criminal offences. The remand procedure is provided for in s 32 of the Criminal Procedure and Evidence Act [Chapter 9:07] (the CPEA) under Part V thereof whilst bail applications are regulated under Part IX from s 115 onwards. Whilst some legal practitioners may therefore consider it wise to conflate the two, the attendant pitfalls are so glaring that anyone who chooses not to see them has only themselves to blame.

[3] In this case, the facts on which all the appellants were placed on remand with the agreement of their legal practitioners were described in the following manner. On 16 June 2024 around 1400 hours the police received intelligence that an unsanctioned gathering was taking place at house number 6 Downie Road, Strathaven, Avondale West in Harare. The purpose of the gathering was to organise engagement in unlawful demonstrations in Harare. Police officers proceeded to the place. Upon approaching the house, they heard loud noises emanating from the premises, which to them, was a clear indication that a large number of people was gathered therein. They immediately decided to call for reinforcements to enable them to properly account for the participants and to investigate whether indeed the objective of those gathered was to arrange illegal demonstrations.

[4] When the police arrived, so the allegations continued, the appellants became riotous. They armed themselves with stones which they hurled at the police officers. Some of the stones found their targets. Two police details were hurt in the melee. A police vehicle described in the papers as a Mahindra with registration numbers ZRP3501M was also damaged. The commotion only stopped after the police officers used tear smoke to quell the disturbances. They eventually managed to arrest the appellants. But even after their arrest, the appellants threatened that they would take their fight to the officers by making follow ups on all the details who were involved in their arrest. The officers who were injured were referred to hospital for medical examination. At the time of the bail hearing the degrees of their injuries were yet to be ascertained.

[5] A further telling admission made by all counsel was that almost all of the appellants admitted that they belonged to the same political organisation which is described in the papers as CCC. I am not sure whether it is an acronym or it is the full name of the political party concerned.

[6] With the facts upon which the appellants were arrested rendered uncontentious by their counsels' acquiescence to the allegations, the court aquo duly placed all of them on remand. The legal effect of that process was that it was agreed that there was reasonable suspicion that they had all committed or participated in the commission of the crimes preferred against them by prosecution. What remained to be determined was whether or not each of them was to be admitted to bail. Needless to state, the prosecutor advised the court that he was opposed to the admission of all the appellants, except accused number 56 called *Ndapuwa Shawn Timba* and accused number 21 who happened to be a juvenile. With the consent of the prosecutor the court aquo admitted the duo to bail on conditions which it imposed.

[7] It is the responsibility of prosecution in all applications for bail except those in which an accused is charged with an offence listed in the third schedule to the CPEA, to show the existence of compelling reasons why an accused must not be admitted to bail in all instances where the state objects to the admission of an accused to bail. In a bid to shore up its opposition in that regard, the state called the testimony of the investigating officer. It was on the strength of the prosecutor's submissions, the testimony of *Panganai Gwati* and the submissions by the various counsels who represented the appellants that the court a quo largely based its reasoning in dismissing the application for bail.

[8] Paraphrased, the court a quo denied the appellants bail on the basis that:

a. the appellants are all facing a serious offence which if convicted of, they are likely to be sentenced to imprisonment. As such, the fear of that severe penalty is likely to act as an inducement for them to abscond their trial.
b. the appellants are likely to interfere with investigations or witnesses because they had attacked police officers on duty and in uniform.
c. the appellants threatened to follow up all, police details involved in their arrest and deal with them.
d. The appellants are likely to commit further and similar offences given that at the time of their arrest, about twenty of their accomplices fled the scene and escaped

arrest. It is therefore likely that if released on bail, the appellants will team up with the fugitives and commit further offences.

e. The court a quo also justified the factor of likelihood that public order will be disturbed or that public peace or security will be undermined if the appellants were admitted to bail on the same reasoning that persons who attack and threaten police officers have no regard for the law.

[9] It is the above decision which the appellants have appealed against to this court. They cited several grounds for their contestation. In summary they are that:

i. "By granting bail to accused number 56, the court aquo failed to treat the appellants uniformly
ii. By failing to admit Maxwell Sande (appellant 43) to bail, the court aquo misdirected itself given that he is a minor who should have been released into the custody of his parent(s) or guardian.
iii. The court aquo failed to consider each appellant's personal circumstances
iv. It further misdirected itself by relying on the seriousness of the offence and the likely penalty without considering the relative strength of the state's case and assurances given by the appellants that they would stand trial
v. That the court aquo erred by concluding that the appellants were likely to interfere with witnesses without giving regard to the considerations stated in s 117 (3) (c) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (The CPEA).
vi. That in concluding that the appellants were likely to team up with their fugitive accomplices, the court aquo erred because it did not apply the factors prescribed under s 117 (3)(a)(iv) of the CPEA
vii. That the court aquo also erred in finding that the release on bail, of the appellants would jeopardise the criminal justice system including the bail system when that had not been established by evidence on record
viii. That the court aquo failed to adopt a holistic approach to the question of bail in this case."

The law regarding bail appeals

[10] Appeals regarding bail are regulated by s 121(1)(b) of the CPEA. They do not necessarily fall into the bracket of other general appeals. If they did, the grounds stated in this appeal would inevitably, not have passed the test of conciseness. They would have also been non-compliant for failure to state several detail that is mandatory in in notices and grounds of other appeals. In the case of *Mary Mubaiwa-Chiwenga v The State and others* SC 4/21, at p. 6 of the cyclostyled judgment, the Supreme Court clarified the procedure which must be followed in the noting of an appeal in terms of s121 (1) (b) of the CPEA when it said:

> "Rule 67 prescribes the procedure by which an appeal provided for by s 121 (1) (b) of the Criminal Procedure and Evidence Act (which the appellant's intended appeal is) may be noted. The appeal is noted by filing with the registrar **a written statement** indicating the matters stated in paragraphs (a) to (c) of sub- rule (1). In addition to the said statement the appellant must, (the underlining is for emphasis) in accordance with sub- rule (2), simultaneously lodge with the registrar a record of the bail proceedings which are the subject of the appeal. After filing the appeal the appellant shall, (the underlining is for emphasis) in fulfilment of the requirements of r 5 (a), cause a copy of the statement and the record of the bail proceedings to be served on the Prosecutor-General and on the judge whose decision is the subject of the appeal."

[11] On the strength of the above dicta, this court also concluded in the case of *Grace Mandisodza v the State* HH 363/22 that an appeal against a decision of bail is not initiated by a notice of appeal but by filing a written statement with the registrar. It would therefore be erroneous for an appellant to just file a notice of appeal and omit to file the bail statement as required by R 91 of the High Court Rules, 2021 (the Rules). In this case, the appellants chose to file both the grounds of appeal like in ordinary appeals and the bail statement. Including both was superfluous but certainly not fatal in my view. It must also follow that it is difficult if not impossible for a court to refuse to hear a bail appeal for non-compliance with the format required of general notices of appeal.

[12] Once the above hurdle is surmounted, the factors which come into play in the actual determination of a bail appeal do not significantly differ from what must be considered in a general appeal. The only further difference is that in all other appeals a finding by the appeal court that the court aquo committed a misdirection inevitably leads to the appeal succeeding and the decision being vacated but with bail appeals the matter does not end there. The appeal court is mandated to still look beyond that and determine, regardless of the misdirection whether or not the appellant can be admitted to bail. See the case of *Belington Maronga and Others v The State* HH 393/21.

[13] Like with any other appeal, when hearing a bail appeal, the appellate court is not permitted to stray outside the record of proceedings. What it must determine is whether the court *a quo* misdirected itself in denying the appellant bail. The cases of *S v Maphosa and 2 Others* HMT 1/21; and *Pardon Chigwada and Others v The State* 221/14 are apposite.

[14] Where the appellate court determines that the court aquo properly considered the parties' contestations and applied the legal principles which regulate bail appeals correctly it cannot interfere with the decision simply because it could have decided the

application for bail differently. Interference is only permitted where a finding that for one reason or another the lower court misdirected itself. If that conclusion is arrived at, then the appeal court has the freedom to pry into the court *a quo*'s decision. This reasoning is squarely premised on the understanding that the decision to grant or to refuse to grant bail to a person accused of crime, is a judgement of the court seized with the application for bail. In beseeching an appellate court to disturb the decision of the lower court in bail appeals, an appellant therefore has the burden to prove the existence of a misdirection in that decision. It is not enough to simply state that there was such misdirection. If the malfeasance is not palpable it must be demonstrated by the appellant. He/she must clearly show that the lower court exercised its discretion so unreasonably that its decision cannot be allowed to stand. That requirement is not satisfied by unsubstantiated allegations or merely because the court aquo did not arrive at a decision which the applicant expected.

[15] Regarding the exercise of discretion, in the fabled case of *Barros & Anor* v *Chimpondah* 1999 (1) ZLR 58 (S), the Supreme Court also held that:

> "The exercise of …discretion may only be interfered with on limited grounds. It is not enough that the appellate court thinks that it would have taken a different course from the trial court. It must appear that some error had been made in exercising the discretion, such as acting on a wrong principle, allowing extraneous or irrelevant considerations to affect its decision, making mistakes of facts or not taking into account relevant considerations."

[16] I must add that in instances where an appellant seeks to challenge a lower court's findings of fact, the test is even more onerous. It was laid by the Supreme Court in the case of *Metalon Gold v Golden Million (Pvt) Ltd* SC 12/2015 whereat p. 7 of the cyclostyled decision ZIYAMBI JA quoting with approval from celebrated authors Herbstein and Van Winsen: *The Civil Practice of The Superior Courts* at page 738-9; remarked that:

> "It is settled that an appellate court will not interfere with factual findings made by a trial court unless those findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it."

[17] To put it mildly, the language used to set the threshold required to overturn a trial court's findings of fact is strong. The phrases used to describe a find of fact that it is susceptible to interference include 'grossly unreasonable; a court having taken leave of its senses; and outrageous in its defiance of logic.' In *Georgias Katsimebris v Muchuchuti-Guwiriro* HH

187/24, I had occasion to deal with the meaning of the same principles and remarked as follows:

> "The term grossly unreasonable means manifestly unreasonable. It means the decision is so outrageous in its defiance of logic that no court acting reasonably could have arrived at such a decision. It connotes unreasoniblity or unacceptability to a very great extent, degree or intensity.[1] The difference between gross unreasonableness and unreasonableness can be equated to that between gross negligence and ordinary negligence. The former is a higher standard or version of the latter. The same goes for gross irrationality. A grossly irrational decision is one that approximates it having been made in the absence of any intellect. It must have been made pursuant to the application of an arbitrary method of deciding cases akin to the throwing of lots. Where a court employs some semblance of reasoning based on acceptable thought processes the fact that the decision is ultimately wrong does not slap it with the ignominy which comes with gross unreasonableness…"

In addition to the above, to say a court had taken leave of its senses is simply euphemism that the judicial officer had lost his/her mind when he/she arrived at the decision complained of. A decision that defies logic is one which is equally senseless; is preposterous; is irrational or implausible. It is on the basis of such strong categorisation that I conclude that findings of fact by a trial court cannot be lightly overturned.

Application of the law to the facts

[18] Having stated the law, I now turn to relate it to the facts of this case and the grounds of appeal raised by the appellants.

Grounds 1-3

In grounds 1-3, the appellants are hum and haw. They are irresolute. They accused the lower court, particularly in ground three, of having failed to treat the appellants uniformly. In the same breath, the appellants refuse to accept that the circumstances of those accused who were granted bail may have been different from the rest of the others. For example, I read from the record of proceedings and it was emphasised at the hearing that accused number 56 named *Ndapuwa Shawn Timba* had just visited appellant one who is his father to drop a gift he had bought for him at the time that the police swooped on house number 6 Downie Road. On that basis, prosecution did not oppose his admission to bail. Counsel for appellant one then sought to argue that because both him and *Ndapuwa* were a few houses away from the premises where the gathering was taking place, there was no reason to differentiate him from accused 56. But that argument is fallacious in my analysis. It is not denied that appellant number one is the owner of house number 6 Downie Road. If the gathering was taking place on his premises and in his house,

[1] See https://www.collinsdictionary.com/dictionary/english/grossly-unfair

it is not unreasonable to draw the conclusion that it was with his authority and under his sanction that the participants in the gathering had converged there. If it is admitted that *Ndapuwa* was only a visitor, then the appellants were required to show that his admission to bail at the exclusion of all the others was so outrageous in its defiance of logic that no court acting reasonably could have arrived at that decision. Mr. *Bhamu* for the appellants motivated the court to hold so principally because the court did not give reasons for isolating *Ndapuwa* from the rest of the group. I refuse to be so persuaded. Courts do not usually give reasons for orders that are obtained by consent. As such the omission by the court aquo to give reasons why it granted *Ndapuwa* bail is generally the norm. The same applied to accused 21. That he is a juvenile was brought to the attention of the court. Prosecution once again consented to his admission to bail. Without going to town about it, it was obvious to everyone involved that it was his status as a minor which entitled him to be distinguished from the rest of his accomplices. I fail to make sense why a whole ground of appeal had to be based on that. It is futile to argue that the unreasonableness of the court aquo's decision is illustrated by its refusal to grant appellant 43 Maxwell Sunday bail because a perusal of the record of proceedings shows that if indeed appellant 43 is a minor, then either the court aquo was misled or it wasn't given enough information to that effect. On the papers that appellant's age is depicted as eighteen (18) years. The culpability of counsel is equally depicted in the present appeal. The draft for the order sought for Maxwell Sunday paints him as an adult. He is required to pay the same amount of bail and abide by the same conditions that his adult accomplices may be subjected to. There is nothing beneficial which can be obtained from alleging misdirection on the part of a court when it is apparent that an accused and his legal practitioner did not play their role. Counsel had an image of Maxwell's birth certificate in his phone. He only showed it to the state's representative at the hearing of this appeal. The court had every right to treat Maxwell as a major because the papers said he was. There is therefore no basis for alleging misdirection by the lower court. That Maxwell was not admitted to bail was an inadvertence not attributable to the court alone but also to counsel for not properly bringing the issue of Maxwell Sunday's minority to the attention of the court.

[19] There is no law, at least none was brought to the attention of the trial magistrate which requires a special treatment of an applicant with disability in an application for bail. The offence with which the appellants were charged is not one that required the exertion of physical toil such that it could be held to have been physically impossible for the appellant with the stated disabilities.

[20] That one of the appellants was just a tenant at number 6 Downie Road is akin to saying that there is no reasonable suspicion that she committed the offence or participated in its commission. It amounts to contesting the facts alleged at remand stage. I have already said they were not controverted at all. If that is the case the court aquo was right not to differentiate her from the rest of the appellants.

[21] In addition, besides stating the personal circumstances of the appellants such as their ages, sex, residential addresses and employment statuses I did not see any particularisation of their circumstances in relation to the commission of the offence. The bail application was made as a block. It related to all of them. The court aquo took it as such. Where in the charge prosecution alleges connivance or acting in common purpose as co-principal perpetrators in terms of s 196 A of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (The Code), an adverse averment by the prosecutor against one accused necessarily affects the other. In my view, grounds of appeal 1-3 are therefore clearly meritless.

[22] **<u>Ground 4- seriousness of the crime and the severity of the penalty</u>**

The attack on the court *a quo's* finding is that it relied on this aspect without relating it to the relative strength of the state's case. I however find that pillory insupportable. In her ruling at p. 128 of the appeal record the magistrate remarked that:

> "The D.A. I's evidence in opposing … was that the accused are facing a serious offence. It should be noted that it is a factor to be considered in conjunction with other factors. In *S v Madzokere and Ors* 2011(2) ZLR, the court said that seriousness of an offence is not on its own enough to deny accused person bail. In *S v Biti* (supra) the court also highlighted that seriousness of the offence charged and the likelihood of a severe sentence being imposed upon conviction are factors that the court must take into account as an inducement for abscondment. In *casu,* the court will consider this factor **together** with others discussed in this ruling to reach its determination…" (bolding is for emphasis)

To me, the above remarks clearly illustrate that the learned magistrate warned herself of the need not to take the seriousness of the offence in isolation. She singled out the considerations which must be conjoined to the gravity of the crime charged. Once she did so, she proceeded on the correct legal principle. Later in her ruling at p. 131 of the appeal record, she stated that in her view the law allowed the admission of evidence on oath including hearsay evidence in bail applications. She then concluded that the accused persons had been positively identified and arrested at the crime scene committing the offence. She further stated that there were several witnesses who had been lined up to testify. To baldly allege like the appellants did, that she did not consider the strength of the state's case is therefore inaccurate. The appellants appear to have

fallen into the error of assuming that the burden of showing the misdirection is discharged by a bare allegation. The magistrate's conclusions were supported by the facts and allegations stated in the form 242 which the appellants chose to agree with at remand stage. Once I again, sight must not be lost that where appellants are tied to the commission of the offence through the doctrine of common purpose, it is not necessary to particularise what each and every one of them did. Their association in the common enterprise suffices.

[23] <u>Ground v- that the court concluded that the appellants will interfere with witnesses/investigations without regard to factors stated in s 117 (3) (c)</u>

It is equally difficult to comprehend the basis of the appellants' contention in this regard. At the hearing Mr *Jiti* for the appellants argued that none of them had capacity to interfere with witnesses or investigations. He also argued that in any case, the witnesses were not known to any of the applicants. Further he said that the court aquo should have known that where it is alleged that an accused committed an offence with an accomplice, that accomplice must be mentioned by name. I am tempted once more to refer to the magistrate's ruling. Regarding this ground she specifically stated as follows:

> "In considering whether this ground has been established the court must take into account whether the accused are familiar with state witnesses and whether the investigation is completed. the court should also consider whether any state witnesses' statements have been made. The argument that there is likelihood of interference with witnesses and evidence will obviously be strong if the state can show that there have already been attempts to do so."

The magistrate's reasoning as shown above is not difficult to follow. It is logical. She then linked the above considerations to the facts before her. She concluded that the investigating officer had shown in his evidence that the appellants acting together had attacked the police officers who had attended the scene. The same police officers were the witnesses who would testify at the appellants' trial. To allege that the witnesses are not known to the appellants when they all physically met at the premises in question is what defies logic. To compound the problem, the appellants further intimidated the witnesses by threatening to follow them up and deal with them by among other things, exposing them to ridicule on social media platforms. Mr *Jiti* sought to downplay the social media aspect at the hearing. He suggested that the trial magistrate need not have given it consideration. But nothing could be further from reality. Social media is a tool which can be used for all kinds of intimidation. It is a weapon which can be abused to propagate hate and hate speech. Threats of exposure of a witness on social media cannot be taken for granted as a factor reading interference with witnesses/investigations. What that threat meant was that the appellants intended to smear the police officers and paint them as

rogue in the eyes of members of the public. In my considered view, it is idle to then accuse the court of having neglected to examine the allegation of interference with witnesses/investigations against the factors listed in s 117 (3)(c) when it clearly did. If the evidence of the investigating officer is taken as credible it supports once again the facts accepted by all the appellants as stated in the form 242. They were subdued and arrested after attacking police officers by pelting them with stones and generally being riotous. Ground of appeal (v) therefore also has no merit. It cannot succeed.

[24] **Ground vi. (likelihood to commit further crimes); ground vii (jeopardization of the criminal justice system including the bail system); disturbance of public order/public peace and security**

The appellants' contention that the trial court misdirected itself in relation to this point are tied to the one above. They attacked the learned magistrate's apprehension that the appellants were likely to commit further and similar offences because about twenty of their accomplices had evaded arrest. The magistrate said it was likely that the appellants could team up with their colleagues to commit further offences. The appellants' counsels argued that the accomplices were not mentioned. I have already alluded to S 196 A of the Code which prescribes the liability of co-perpetrators. In subsection (2) it decrees that the fact that two or more people were associated in any conduct regarded as preparatory to the conduct which resulted in the crime with which they are charged or that they engaged in criminal behaviour as a group or a team prior to the conduct which resulted in the crime with which they are charged shall be regarded as indicative of those people having acted with a common design. There is no law that requires the police to mention the presence of accomplices only in instances where they know the identity of such accomplices. The mention of the accomplices in this case was intended to show that the appellants are part of a larger group which the police allege were involved in the nefarious activities at Number 6 Downie Road. I do not therefore accept the contention that taking such a consideration into account must necessarily vitiate the court aquo's findings.

[25] The trial court's findings above were not even made in abstract. The record of proceedings bears testimony that even in the midst of the bail application there was a 'demonstration' that took place at the same courthouse where the application was being heard. It was linked to the appellants. If the demonstrators thought they were acting in solidarity with the appellants, then they were mistaken because what their behaviour acted to buttress the prosecution's fears that if the appellants are released on bail, they are likely to commit further offences.

[26] It is important also that the above factor is linked to the concern that the release of the appellants could disturb public order, public peace or public security. The law directs the court to take into account the degree of violence towards others implicit in the charge, any threats of violence which the accused may have made to any person and the amount of resentment that the accused is alleged to harbour against any person. The trial court concluded that the allegations against the appellants were replete with insinuations of violence. In fact, on one hand, violence is at the core of the charge of public violence. On the other hand, bigotry, concerns itself with a stubborn and complete intolerance of any creed, belief or opinion that differs from one's own. As indicated in the introductory paragraphs of this judgment, in his evidence during the bail hearing, the investigating officer's testimony was that the violence appeared to be choreographed. The appellants were not randomly assembled. Instead, they were selected from different but clearly defined clusters fronted by the suburbs of Chitungwiza, Epworth and Hatcliffe which accounted for more than three quarters of the appellants. I also highlighted the interesting factor of the large number of the appellants who are not formally employed. It isn't to say that it is the unemployed who commit offences. Instead, it is intended to show that it may not be unconscionable to infer that there is a real possibility of someone taking advantage of unemployed young men and women mainly from the suburbs of Chitungwiza, Epworth and Hatcliffe and initiating them into orgies of violence. That possibility looms large in this case. Given those issues, I do not see any misdirection in the magistrate's finding that the appellants are likely to commit further offences; that they exhibited a complete disregard for the law and that their release on bail is likely to put in danger the criminal justice system and threaten public peace and security.

[27] From how I see it, I am constrained to find, as I hereby do, that equally grounds of appeal (vi), (vii) and (viii) have no merit and must fail.

Disposition

[28] In the end, all having been said and done, my conclusion is that there was no misdirection in the court aquo's overall assessment of the issues and its finding that the appellants were not proper candidates for admission to bail. As stated earlier the only appellant for whom the appeal can succeed is Maxwell Sunday because of his age. That I may have determined the matter differently is a non-issue. What is material is that I didn't find any misdirection in the decision of the magistrate's' court. The discretion of

the trial magistrate, which as demonstrated, she exercised quite judiciously must stand. It disbars me from interfering with her judgment. In the circumstances I order as follows:

a. The appeal against the refusal to admit appellant **MAXWELL SANDE** to bail by the magistrates' Court sitting at Harare on 27 June 2024 be and is hereby allowed. The decision of the Magistrates Court is accordingly set aside and substituted with the following:

i. The appellant Maxwell Sande is released into the custody of his father Cecil Sande National Identity No. 49-057521 R 49 who shall ensure that at all materials times the appellant shall abide by the conditions of his attendance at court or any other that may from time to time be set by the court.

b. The appeal against the refusal to admit appellants **one (1)- forty-two (42)** and **forty-four (44) to seventy-five (75)** to bail by the Magistrates' Court sitting at Harare on 27 June 2024 be and is hereby dismissed in its entirety.

MUTEVEDZI J: .....

Jiti Law Chambers, *Tsunga Law International*, *Kadzere Hungwe & Mandevere & Takundwa-Mbereko Attorneys*, appellants' legal practitioners
National Prosecuting Authority, state's legal practitioners