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Committee on the Human Rights of Parliamentarians

ZWE-46 – Job Sikhala

Report by Mr. Abdool Rahim Khan (Botswana)

1. At the request of the IPU, on 23 February 2023 I attended the Magistrates Court in Harare as an observer in the trial of member of parliament, Mr. Job Sikhala, who has been denied bail and incarcerated since June 2022.

2. I wish to thank the instructing attorneys, Messrs. Nkomo and Bamu, for all their assistance in procuring documents in the matter. Their research is reflected in the Application pursuant to Section 198 (3) of the Criminal Procedure and Evidence Act (Chapter 9:07).

Dated at Gaborone this 6th day of September 2023

REPORT

IN THE MAGISTRATES COURT FOR THE PROVINCE OF HARARE — CRB NO. ACC316/22

In the matter between:

THE STATE

Versus

JOB SIHKALA — Accused

JOB SIKHALA TRIAL

Mr. Job Sikhala is charged with the crime of:

Defeating or obstructing the course of justice in Section 184 (1) (e) of the Criminal Law (Codification and Reform) Act, Chapter 9:23

In that on a date unknown to the Prosecutor but during the period extending from 25 May 2022 to 16 June 2022, and in Chitungwiza and Nyatsime, Job Sikhala, knowing that a police officer was investigating the commission of a crime or realizing that there was a real risk or possibility that a police officer may be investigating the commission or suspected commission of a crime and who by an act caused such investigations to be defeated or obstructed, intending to defeat or obstruct the investigations or realizing that there was a real risk or possibility that the investigations may be defeated or obstructed; that is to say, Job Sikhala, knowing that a murder case involving deceased Ms. Moreblessing Ali, of No. 11727 Nyatsime Phase 5, Beatrice, was being investigated by the police and that the police were on a manhunt for the suspect, Mr. Pius Mukandi, alias Jamba, circulated a video clip on various social media platforms claiming that Moreblessing Ali was kidnapped and murdered by ZANU PF supporters, thereby intending to mislead police investigations.

1. Essentially, the charge sheet comprises the following:

(a) The accused must have known or been aware that the police were investigating the commission of a particular crime;
(b) The accused, by disseminating certain information, must have caused the Police to defeat or obstruct their investigations;
(c) The fact of the dissemination caused the police to be misled by this information; and
(d) He circulated the video which recorded him addressing the members of the public.

2. The State called three witnesses who were the main witnesses. Their evidence will be discussed in detail below. The Defence called the accused as well as an expert on the reliability or otherwise of video evidence and the circumstances under which such evidence could be accepted.

3. Let us commence with the State's case. It must be borne in mind that the background to this charge is a video recording of the accused addressing mourners or ostensibly supporters of his party on a date that has not been confirmed with any accuracy. Hence, the charge sheet refers to a period between 25 May and 16 June 2022. The accused is seen in the video addressing a rally held at the funeral of one Moreblessing Ali, whose body had been discovered on the 11 June 2022.

4. The first witness was Mr. Elliott Muchada, who is a police officer. From his examination in chief and cross-examination it emerges that he could neither confirm whether the accused was aware of the police investigations, nor that the video of the incident was addressed to mourners present at this funeral. A crucial aspect of his evidence is deficient in that the accused must have been aware of the police conducting their investigations into this incident. However, nowhere in his evidence does he traverse this issue. The issue as to who recorded the video or for whom it was meant is irrelevant. He is not charged with making the video but that he disseminated the video. It is simply that he made

these statements implicating a third party knowing full well that the police were investigating this crime and that the effect of his broadcasting this misinformation was that it misled the police. But, with respect, how is this possible if he was not even aware that the police were investigating this very crime? The police could not prove further that he circulated the video. There was simply no evidence to support this.

5. The second witness for the State was Mr. Kudakwashe Mandiranga, also an attested member of the Zimbabwe Police Force, who testified as follows:

6. That he downloaded the video from the internet (YouTube). He then later transferred it from the source to a DVD and then to a flash disk. His evidence was marked by a number of admissions that were damaging to the State. For example, he could not answer as to whether the video was edited or whether it was tampered with. There was no evidence that the accused uploaded the video, although this is not an element of the charge. It is that he circulated the video. Again, no evidence was tendered to support this contention.

7. He stated that the accused's words used could have been tampered with. He was unable to identify the speaker or his voice and he did not have sight of the original recording. He finally accepted that he had no expertise in video filming, editing or production.

8. The effect of his evidence reflects a poor understanding of the role of a witness in criminal proceedings, as it appears that the witness was badly prepared for the cross-examination. On material points his evidence was unhelpful and he made concessions that exonerated the accused. It is difficult to appreciate how a judicial officer can rely safely on the evidence of such a witness.

9. The third witness was Hardwick Maziti, who was the investigating officer. He was instructed to trace a video in which the accused had make certain utterances concerning the death of Moreblessing Ali. In terms of his instructions, it was alleged that the accused had laid the blame of the deceased's death on ZANU thugs who were responsible for her death. However, it did not appear that the accused was aware of the police investigations into her death. Even though he stated that the video diverted the police from their investigations, he did not interview the police who were physically conducting the investigations; therefore, it is difficult to understand the veracity of his statement that the video derailed the police in the investigations.

10. He conceded that Pius Mukandi was apprehended in regard to the murder and that the video did not detract from their inquiries. He was unaware of the stage of investigations by the police, or whether they had made other arrests apart from Mukandi. So, in important respects this witness was unable to corroborate any of the previous witnesses, thus leaving glaring discrepancies in the State's case.

11. Taking the totality of the State's evidence, it came as no surprise that the Defence applied for the discharge at the close of the State's case.

12. The principles in this application are set out in Section 198 (3) of the Criminal Procedure and Evidence Act (Chapter 9:07), which provide as follows:

> "198 Conduct of trial
>
> (3) if at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty."

There are a number of cases in various jurisdictions that define the concept of an application for a discharge at the close of the prosecution case.

See the following Section 198 (3) in Zimbabwe: (I must express my appreciation for the Defence for forwarding their notes to me).

1. This Section is one of the fundamental pillars of our criminal justice system and it has been interpreted by the courts in this country.

2. The applicable principle or legal basis for granting a discharge of the accused at the close of the prosecution case was well laid out by Gubbay CJ in S v Kachipare 1998 (2) ZLR (S). The legal basis is where:

2.1 there is no evidence to prove the essential element of the offence; Attorney-General v Bvuma & Anor 1987 (2) ZLR 96 (S) at 102F-G; or

2.2 there is no evidence on which a reasonable court, acting carefully, might properly convict; Attorney-General v Mzizi 1991 (2) ZLR 321 (S) at 323B; or

2.3 the evidence adduced on behalf of the State is manifestly unreliable that no reasonable court could safely act on it; Attorney-General v Tarwirei 1997 (1) ZLR 575 (S) at 576G;

2.4 where the evidence of the Prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely act on it; Attorney-General v Bhuma & Another 1987 (2) ZLR 96 (S) at 102;

2.5 Critically, in Attorney-General v Bhuma & Anor 1987 (2) ZLR 96 (S) at 102F the court held that it is:

> "Not a judicious exercise of the court's discretion to put an accused on his defence in order to bolster the State case in a case which, standing alone, cannot be proved".

See the following in Botswana:

The State v Motlalekgosi B Busang – Case No. CTHLB-000038-09 before Judge Leburu – State v Busang All Bots 550 (HC)

See the following in South Africa:

Director of Public Prosecutions: Limpopo v Molope and Another – All South Africa Law Reports September 2020 (2020) 3 All SA 633 (SCA)

State v Kameli – Case No. CA & R 25/96 – All South African Law Reports (1997) 3 All SA

State v Ndlangamandla – CASE NO. 42/98 – All South African Law Reports (1999) 2 All SA

13. The principle remains quite clear. The State has to adduce enough evidence to place the accused on his defence. They have to prove a nexus between the elements of the charge that link the accused directly to the charge, which leaves the court with no option but to call upon the accused for an explanation for his/her conduct. The onus will then be on the State to prove that in respect of each and every element there is sufficient evidence that might, not shall or will, indicate that the accused played a role in the commission of the crime.

14. From an examination of the totality of the evidence, the following emerges:

(a) The police gave evidence and at no stage did they indicate that they were hampered in their investigation or misled by the accused's utterances;
(b) They also confirmed that the video and the words attributed to the accused had had no effect and had not hampered their investigations; nor were they obstructed or misled by the information given by the police. They continued in their investigations with no input from the accused; and
(c) No police officer gave evidence that as a result of the information supplied by the accused did they commence inquiries verifying his sources. Nor could they identify the speaker in the video and could certainly not proffer evidence that he had circulated the video.

15. On the contrary, it is manifestly clear that, even after receipt of the video, the police did not discontinue their leads and concentrate on the information supplied by the accused. It literally had no effect whatsoever on their investigations.

16. In respect of the video evidence, as there is no charge with regard to the production of the video, I will refrain from expressing any views on this aspect of the evidence. There is, however, an element of the charge that refers to the accused circulating the video on social media. Again, no evidence was tendered by the State to prove this element of the charge and this ought to have been considered by the presiding judicial officer.

17. It is important to note that no evidence was tendered proving that the accused created this video, that he uttered these alleged words and directed it at the police; it was not disseminated to members of the public at present, let alone advertised to the general public. It is noteworthy that no evidence was given about the stage of the investigations into the murder case against Mukandi by the police, so that this aspect of the matter was not fully canvassed. Even the mere fact that there were ongoing police searches for the perpetrator of the murder was not examined during the evidence. The State could not prove that he was particularly aware of the conduct of the investigation.

18. There was no evidence that the state witnesses had interviewed any of the police officers investigating this murder and none were called. Therefore, since there was no evidence that he was aware of the matter and that he did not directly address the police, he under no circumstances can be said to have been aware of what the police were investigating.

19. It is my considered opinion that, with the litany of unproven facts and the lack of evidence, it will be most prejudicial to convict the accused of this particular crime. These inconsistencies are so glaring that no right-thinking court could on the basis of these facts find the accused guilty. The magistrate ruled that the accused had a case to arrest.

20 With regard to bail, which has consistently been refused since his first appearance, the court has stated that, as Job Sikhala has violated a court order, on that basis he is not entitled to the grant of bail in the present matter.

21. Regrettably, from the records available to me, in the court there was little detailed discussion on the principles and on why it enunciated the grounds for denying the accused bail in the court. Bail is discussed in the annexure below.

22. These are dealt with briefly in the judgment where the court stipulated the various charges he was facing in different courts and in addition in a high court matter that was pending. In view of all these charges, he was denied bail. With respect, the crime ought to have been whether he was adhering to these other bail conditions, was he a serial offender or what?

23. The principles set out in Zimbabwe are generally accepted in most democracies and certainly consistent with Botswana law.

24. Accordingly, what is surprising is that the trial is almost complete, yet bail has been denied to the accused. The arguments that were initially valid cannot, with respect, be applied to a matter where the only outstanding item is the judgment to be delivered.

25. With regard to the issue of bail, see the following:

"A" (Swaziland law)

SWAZILAND (ESWATINI)

The right to personal liberty is entrenched in section 16 of the Constitution of Swaziland. However, in practice the full scope of the protection guaranteed under international standards is missing. Section 21(1) of the Constitution of Swaziland provides for the right to a fair public trial, except when exclusion of the public is necessary in certain limited situations. The principle of presumption of innocence is enshrined in section 21(2)(a), which

provides that a person who is charged with a criminal offence shall be presumed to be innocent until that person is proved or has pleaded guilty.

Suspects can request bail at their first appearance in court, except in the most serious cases such as murder and rape, where bail may be granted only by the High Court. The law pertaining to bail in Swaziland has undergone changes since 1991 when the legislature enacted various laws designed to restrict the availability of bail to accused persons.

The Criminal Procedure and Evidence Act is the principal statute in criminal matters. Sections 95 and 96 of the Act provides for bail, predicated on the principle of presumption of innocence. Because the right to personal liberty is specially entrenched in the Constitution of Swaziland through limited grounds permitting deprivation of liberty under section 16(1), an accused is entitled to be released on bail unless doing so would prejudice the interests of justice.

Section 95 provides as follows:

"(1) Notwithstanding any other law the High Court shall be the only Court of first instance to consider applications for bail where the accused is charged with any of the offences specified in the Fourth, the Fifth Schedules or under subsection 95 (6).

2. Notwithstanding any other law the High Court may, subject to this section and section 96 of this Act, at any stage of any proceedings taken in any court or before any magistrate in respect of any offence, admit the accused to bail.

3. Subject to the provisions of this Act, the High Court shall, where an accused person is charged with any of the offences listed in the Fourth Schedule, if it determines that the circumstances warrant that the accused may be admitted to bail, admit the accused to bail and fix the amount of bail in an amount not less than E 15,000.00 (Emalangeni fifteen thousand), in addition to any other conditions it deems fit.

4. Where the court is satisfied that substantial and compelling circumstances exist which justify that the amount of bail be fixed in an amount less than E15 000, it shall enter these circumstances on the record of proceedings and may thereupon fix the amount of bail at such lesser amount.

5. Where an accused person is charged with any of the offences listed in the Fourth Schedule and it appears to the Court, or the prosecution submits to the satisfaction of the Court, that aggravating circumstances exist, or where an accused person is charged with any of the offences listed in the Fifth Schedule, and the Court is of the opinion that the circumstances warrant that the accused may be admitted to bail, subject to the provisions of this Act, admit the accused to bail and fix the amount of bail in an amount not less than E50 000 (Emalangeni fifty thousand) in addition to any other conditions it deems fit.

6. Where an accused person is charged with any offence, other than the offences covered by the provisions of this section but not excluding an offence under the Theft of Motor Vehicles Act, 1991, the amount of bail to be fixed by the Court shall not be less than half the value of the property or thing upon which the charge relates or is based upon and where the value cannot be ascertained without any form of speculation the Court may, for purposes of this subsection, without or with the assistance of any person the Court deems could be of assistance to it, also fix an amount to be the value of the property or such thing.

7. Where the High Court refuses an application for bail, it may upon application give appropriate directives to expedite the procedure under section 88.

8. 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 grounds under the provisions of section 96(4) are established".

Section 96 provides as follows:

1. In any court—

(a) an accused person who is in custody in respect of an offence shall, subject to the provisions of section 95 and the Fourth and Fifth Schedules, be entitled to be released on bail at any stage preceding the accused's conviction in respect of such offence, unless the court finds that it is in the interests of justice that the accused be detained in custody;
(b) subject to section 95, an accused who desires to be released on bail may make a written application in the form of a petition, or in any other form if the court so directs, to the appropriate court;
(c) subject to the provisions of section 95, the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time and where the commitment is on a warrant issued by the High Court, it shall only be competent to apply for bail to the High Court;
(d) if the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether the accused wishes that question to be considered by the court.

2. In bail proceedings the court —
(a) may postpone any such proceedings;
(b) may, in respect of matters that are in dispute between the accused and the prosecutor, enquire in an informal manner the information that is needed for its decision or order regarding bail;
(c) may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced;
(d) shall, where the prosecutor does not oppose bail applications in the High Court in respect of matters referred to in subsections (12)(a) and (12)(b), require of the crown's counsel to place on record the reasons for not opposing the bail application.

3. If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.

4. 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 released on bail, may endanger the safety of the public or any particular person or may commit an offence listed in Part II of the First Schedule; or
(b) where there is a likelihood that the accused, if released on bail, may attempt to evade the trial;
(c) where there is a likelihood that the accused, if released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence;
(d) where there is a likelihood that the accused, if released on bail, may undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or
(e) where in exceptional circumstances there is a likelihood that the release of the accused may disturb the public order or undermine the public peace or security.

5. In considering whether the ground in subsection (4) (a) has been established, the court may, where applicable, take into account the following factors, namely-
(a) the degree of violence towards others implicit in the charge against the accused;
(b) any threat of violence which the accused may have made to any person;
(c) any resentment the accused is alleged to harbour against any person;
(d) any disposition to violence on the part of the accused, as is evident from past conduct;
(e) any disposition of the accused to commit offences referred to in Part II of the First Schedule as is evident from the accused's past conduct;
(f) the prevalence of a particular type of offence;
(g) any evidence that the accused previously committed an offence referred to in Part II of the First Schedule while released on bail; or

(h) any other factor which in the opinion of the court should be taken into account.

6. In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely-

(a) the emotional, family, community or occupational ties of the accused to the place at which the accused shall be tried;
(b) the assets held by the accused and where such assets are situated;
(c) the means, and travel documents held by the accused, which may enable the accused to leave the country;
(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
(e) the question whether the extradition of the accused could readily be effected should the accused flee across the borders of the Kingdom of Swaziland in an attempt to evade trial;
(f) the nature and the gravity of the charge on which the accused shall be tried;
(g) the strength of the case against the accused and the incentive that the accused may in consequence have to attempt to evade his or her trial;
(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
(j) any other factor which in the opinion of the court should be taken into account.

7. In considering whether the ground in subsection (4)(c) has been established, the court may, where applicable, take into account the following factors, namely-

(a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;
(b) whether the witnesses have already made statements and agreed to testify;
(c) whether the investigation against the accused has already been completed;
(d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;
(e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;
(f) whether the accused has access to evidentiary material which is to be presented at his or her trial;
(g) the ease with which evidentiary material could be concealed or destroyed; or
(h) any other factor which in the opinion of the court should be taken into account.

8. In considering whether the ground in subsection (4)(d) has been established, the court may, where applicable, take into account the following factors, namely-

(a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;
(b) whether the accused is in custody on another charge or whether the accused is on parole (where applicable);
(c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or
(d) any other factors which in the opinion of the court should be taken into account.

9. In considering whether the ground in subsection (4)(e) has been established, the court may, where applicable, take into account the following factors, namely —

(a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
(b) whether the shock or outrage of the community might lead to public disorder if the accused is released;
(c) whether the safety of the accused might be jeopardized by his or her release;
(d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;
(e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or

(f) any other factor which in the opinion of the court should be taken into account

10. In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice the accused is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely-
(a) the period for which the accused has already been in custody since his or her arrest;
(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
(d) any financial loss which the accused may suffer owing to his or her detention;
(e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
(f) the state of health of the accused; or
(g) the age of the accused, especially where the accused is under sixteen (16) years;
(h) where a woman has murdered her newly born child;
(i) any other factor which in the opinion of the court should be taken into account.

11. Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (10) to weigh up the personal interests of the accused against the interest of justice.

12. Notwithstanding any provision of this Act, where an accused is charged with an offence referred to —
(a) in the Fifth Schedule the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release;
(b) in the Fourth Schedule but not in the Fifth Schedule the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.

13. Notwithstanding any law to the contrary —
(a) if the Director of Public Prosecutions intends charging any person with an offence referred to in the Fourth Schedule or Fifth Schedule, the Director of Public Prosecutions may, irrespective of what charge is noted on the charge sheet, at any time before such person pleads to the charge, issue a written confirmation to the effect that the Director of Public Prosecutions intends to charge the accused with an offence referred to in the Fourth Schedule or Fifth Schedule;
(b) the written confirmation shall be handed in at the court in question by the prosecutor as soon as possible after the issuing thereof and forms part of the record of that court; and
(c) whenever the question arises in a bail application or during bail proceedings whether any person is charged or is to be charged with an offence referred to in the Fourth Schedule or Fifth Schedule, a written confirmation issued by the Director of Public Prosecutions under paragraph (a) shall, upon its mere production at such application or proceedings, be prima facie proof of the charge to be brought against that person.

14. Notwithstanding any law to the contrary —
(a) in bail proceedings the accused, or the legal representative, is compelled to inform the court whether
(i) the accused has previously been convicted of any offence; and
(ii) there are any charges pending against the accused and whether the accused has been released on bail in respect of those charges;

(b) where the legal representative of an accused on behalf of the accused submits the information contemplated in paragraph (a), whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not;

(c) the record of the bail proceedings, excluding the information in paragraph (a) shall form part of the record of the trial of the accused following upon such bail proceedings and where the accused elects to testify during the course of the bail proceedings the court shall inform the accused of the fact that anything the accused says, may be used against him or her at the trial and such evidence becomes admissible in any subsequent proceedings; and

(d) an accused who intentionally or wilfully-
(i) fails or refuses to comply with the provisions of paragraph (a); or
(ii) furnishes the court with false information required in terms of paragraph (a)
commits an offence and is liable on conviction to a fine not exceeding E5000 (Emalangeni five thousand) or to imprisonment for a period not exceeding two years, or to both the fine and imprisonment.

15. The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice.

16. The court releasing an accused on bail in terms of this section, may order that the accused —

(a) files a Government Revenue Office receipt with the clerk of the court or the registrar of the court, as the case may be, or with a Correctional Services Department official at the prison where the accused is in custody or with a police official at the place where the accused is in custody, reflecting that the sum of money determined by the court in question has been paid; or

(b) shall furnish a guarantee, with or without sureties, that he or she will pay and forfeit to the State the amount that has been set as bail, or that which has been increased or reduced in terms of subsection (19), in circumstances in which the amount would, had it been deposited, have been forfeited to the State.

17. Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the court otherwise directs and this subsection shall not be construed as denying an accused access to any information, record or document to which the accused may be entitled for purposes of the trial, at the time of the trial.

18. Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail —

(a) with regard to the reporting in person by the accused at any specified time and place to any specified person or authority;

(b) with regard to any place to which the accused is forbidden to go;

(c) with regard to the prohibition of or control over communication by the accused with witnesses for the prosecution;

(d) with regard to the place at which any document may be served on him under this Act;

(e) which, in the opinion of the court, will ensure that the proper administration of justice is not placed in jeopardy by the release of the accused;

(f) which provides that the accused shall be placed under the supervision of a probation officer or a correctional official.

19. Subject to the provisions of this Act —

(a) any court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, subject to the provisions of sections 95 (3) and 95 (4),increase or reduce the amount of bail so determined, or amend or supplement any condition imposed under subsection (15) or (18) whether

imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application;

(b) if the court referred to in paragraph (a) is a superior court, an application under that paragraph may be made to any judge of that court if the court is not sitting at the time of the application.

20. The court dealing with bail proceedings as contemplated herein or which imposes any further condition under subsection (18) or which, under subsection (19), amends the amount of bail or amends or supplements any condition or refuses to do so, shall record the relevant proceedings in full, including the conditions imposed and any amendment or supplementation thereof and where such court is a magistrate's court, any document purporting to be an extract from the record of proceedings of that court and purporting to be certified as correct by the clerk of the court, and which sets out the conditions of bail and any amendment or supplementation thereof, shall, on its mere production in any court in which the relevant charge is pending, be prima facie proof of such conditions or any amendment or supplementation thereof.

21. In this section, a refusal to admit an accused to bail after commitment to trial shall be without prejudice to the rights of the private party mentioned in sections 10 and the proviso to 1 section 108 is subject section 95 and this section. "'

Case Law:

1. Ntshangase and others v Prince Tfohlongwane and others [2007] SZSC 13
2. Thulani Rudolph Maseko and Bheki Makhubu v The Honourable Chief Justice and 3 Others (161/2014) [2014] SZHC 77 (6th April 2014).
3. Gumedze vs The King Jan Sithole NO & Others vs The Prime Minister of Swaziland & Others
4. Unreported Supreme Court of Appeal Case 35/2007
5. Mary Dlamini vs The King Unreported High Court Case 126/1991
6. Mbuyisa Dlamini vs The King Unreported High Court Review Case .../2008 Methula & Another vs The King Minister of Home Affairs & Others vs Mliba Fakudze & Others Mkhangezi Gule vs Mashikilisana Fakudze & Others Unreported High Court Case .../2010
7. Ray Gwebu & Lucky Nhlanhla Bhembe vs The King Unreported Court of Appeal Cases 19 & 20/2001

"B" (Botswana and South Africa law)

BOTSWANA

The Botswana Constitution guarantees a right to be presumed innocent. It forms part of the provisions which secure protection of the law.

Section 10 of the Constitution provides as follows:

“(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognized by law.

(2) Every person who is charged with a criminal offence—

(a) shall be presumed to be innocent until he is proved or has pleaded guilty;
(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;
(c) shall be given adequate time and facilities for the preparation of his defence,
(d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice;

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution... "

The above provision makes an important guarantee, namely, that a person who has been charged would be brought before court within a reasonable time. This provision is an important aspect of the right to be presumed innocent. The Botswana model provides for a limited list of circumstances which constitute the exceptions to the guarantee of personal liberty. Section 36 of the Criminal Procedure Act provides as follows:

"(36) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say—
(a) in execution of the sentence or order of a court, whether established for Botswana or some other country, in respect of a criminal offence of which he has been convicted;
(b) in execution of the order of a court of record punishing him for contempt of that or another court;
(c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;
(d) for the purpose of bringing him before a court in execution of the order of a court;
(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Botswana;
(f) under the order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of 18 years;
(g) for the purpose of preventing the spread of an infectious or contagious disease;
(h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;
(i) for the purpose of preventing the unlawful entry of that person into Botswana, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Botswana, or for the purpose of restricting that person while he is being conveyed through Botswana in the course of his extradition or removal as a convicted prisoner from one country to another;
(j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Botswana or such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Botswana in which, in consequence of any such order, his presence would otherwise be unlawful; or
(k) for the purpose of ensuring the safety of aircraft in flight. "

The Botswana Criminal Procedure Act provides for bailable offences. However, bail may be granted even where the offence is non-bailable. Section 104 of the Botswana CPA provides that: Every person committed for trial or sentence in respect of any offence except treason or murder may be admitted to bail in the discretion of the magistrate: Provided that- (i) the refusal by the magistrate who has committed any person for trial, to grant such person bail shall be without prejudice to such person's rights under section 113, and (ii) the magistrate may admit to bail a person under the age of 18 committed for trial on a charge of murder. This provision is not the only provision where bail may be granted for a nonbailable offence. The High Court of Botswana is empowered, in terms of section 114 of the Botswana CPA, to grant bail for all offences.

Case Law:
Attorney General v Patile 2011 2 BLR 209 CA
State v Tawenga [1981] BLR 264
State v James Seven [1971 0 1973] BLR 59

"C" (United Kingdom law)

UNITED KINGDOM

Bail in the United Kingdom is the practice of releasing individuals from remand subject to certain conditions which are designed to enable criminal justice outcomes, primarily trials and police investigations, to be completed efficiently and effectively. Bail in this context is distinct from the bail bonds system applied in the United States and the approaches of the two systems differ markedly.

The primary source of legislation governing bail decisions is the Bail Act, 1976 (BA 1976). Other legislation that impacts on bail includes the Bail (Amendment) Act 1993 (B(A)A 1993), the Police and Criminal Evidence Act 1984 (PACE 1984) and the Senior Courts Act 1981 (SCA 1981).

There are broadly three categories of bail:

1. Police bail before charge
   Bail may be imposed on a person arrested elsewhere than at a police station, if certain conditions are satisfied in accordance with PACE 1984, s 30A(1A). Where a person has been arrested elsewhere than at a police station (street bail), there is a presumption that they will be released without bail being imposed. When a person is made subject to street bail they will be under a duty to attend a police station but they cannot be made subject to conditions of recognizance, security, surety, or residence. Other conditions may be imposed.
   - the custody officer is satisfied that releasing the person on bail is necessary and proportionate in all the circumstances (having regard, in particular, to any conditions of bail which would be imposed), and
   - an officer of the rank of inspector or above authorizes the release on bail (having considered any representations made by the person or the person's legal representative)

A custody officer has power under PACE 1984 to vary any conditions imposed.

Upon first imposing bail, there is a duty on the custody officer to appoint a bail return date in accordance with the applicable bail period (ABP). This is the window during which the officer can set and vary the bail return date. There is no power to extend the ABP once it has expired. In standard cases, the ABP is 28 days (unless it is designated as being exceptionally complex) and can be extended (before it has expired) for a period of up to two months (to a maximum of three months).

2. Police bail after charge and before the first court appearance

3. Court bail

   Right to court bail and grounds for refusing bail
   BA 1976, s 4 gives a general right to bail to:

- any person appearing before a magistrates' court, youth court or Crown Court
- any person who has been convicted of an offence but only if the court is adjourning the case for the preparation of pre-sentence reports, and - any person appearing before the court for alleged breach of a community order requirement

Where a person appears before the magistrates' court or Crown Court and applies to the court for bail, there is a presumption in favour of granting bail under BA 1976.

The right does not apply to an accused who has been charged with (or convicted of) offences specified in the Criminal Justice and Public Order Act 1994. These offences include murder, attempted murder, manslaughter, rape or attempted rape. Bail can only be granted in these cases if there are exceptional circumstances that justify it, e.g. in cases where the prosecution evidence is very weak or contradictory. The presumption in favour of bail in other

cases can be overturned if any of the exceptions contained in BA 1976 are made out. The three main exceptions are where there is a risk of the defendant:

- failing to appear; committing further offences, or interfering with witnesses

Appealing the refusal to grant bail in the magistrates' court or Crown Court

A person who is refused bail by the magistrate's court or who wishes to vary or remove conditions imposed on bail may appeal to the Crown Court. The Crim PR, SI 2020/759 provides a comprehensive procedural code for making bail applications to the Crown Court. A defendant has a statutory right of appeal to the Crown Court against the imposition of certain bail conditions. This right of appeal can only be exercised if the defendant has previously made an application to the magistrate's court to vary conditions of bail or if the conditions were imposed or varied following an application by the prosecution under BA 1976. The prosecution can also appeal to the Crown Court against the grant of bail by the magistrate's court under B(A)A 1993. The prosecution right of appeal is limited to offences punishable by imprisonment and where, before bail was granted, the prosecution made representations that it should not be granted. It is generally only used in cases of grave concern.

- High Court bail applications

The High Court may grant bail to a defendant under the Criminal Justice Act 1967. Applications for bail to the High Court are made to a judge in chambers in the High Court. The procedure is set out in the Rules of the Supreme Court. Exceptionally, a refusal to grant bail may also be challenged by way of judicial review.

Statutes:

Bail Act (1976) https://www.legislation.gov.uk/ukpga/1976/63/section/1

"D" (United States of America law)

UNITED STATES OF AMERICA

Bail is the temporary release of a person awaiting trial for a crime. This simple decision — to detain or release a defendant — is made all over the United States in courtrooms every day. It is a decision that often takes less than five minutes, does not require evidence, and usually only involves one lawyer and a judge.

America is one of only two countries in the world that requires individuals to pay money to be released on bail awaiting trial. In most countries in the world, it is a constitutional right for most defendants to be released on bail awaiting trial. In a cash-bail system, the court permits an individual charged with a crime to go free pending their trial. In exchange, the court sets a cash amount, bail, that the person must pay to the court to ensure their appearance at trial. In this way, the cash bail operates as a kind of collateral: when the person appears, the court returns the money. If the person fails to appear, though, the court keeps it.

Most jurisdictions set a standard bail amount for any particular alleged crime. But judges often have wide discretion to vary that amount (or even waive bail entirely). In setting bail for a defendant, a judge might also look at the person's prior criminal history, the likelihood that the person will not appear at trial (the flight risk), and the danger that person might pose to the community if they were released. In theory, more serious crimes, lengthier criminal histories, and greater flight and danger risks would result in higher bail. The higher bail, in turn, would create a greater incentive for the highest-risk individuals to actually return for their trials in recoup their money.

In the wake of the 1964 National Conference on Bail and Criminal Justice and the 1966 Federal Bail Reform Act, various organizations began issuing standards designed to address relevant pretrial release and detention issues at a national level. The American Bar Association (ABA) was first in 1968, followed by the National Advisory Committee on

Criminal Justice, the National District Attorneys Association, and finally the National Association of Pretrial Services Agencies (NAPSA).

Support for pre-trial detention can be found in the 1979 Supreme Court decision of Bell v. Wolfish where pre-trial detention was found to not violate the defendant's constitutional right to the presumption of innocence (Laudan, 2005). The Supreme Court justices found that presumption of innocence has, " no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun" and that presumption of innocence is unique to the jurors at the trial (Laudan, 2005).

After arrest, a defendant is subject to a bail hearing by a judicial officer. Bail hearings decide whether to grant bail, determine the appropriate amount, and set conditions of release.

In 1982, the federal government passed the Pre-Trial Services Act with the goal of reducing unnecessary detention.

Case Law:
Fields v. Henry County, 701 F.3d 180 (2012)
U.S. v. Salerno, 481 U.s. 739, 742 (1987)
Schilb v. Kuebel, 404 U.s. 357 (1971)
Bell v. Wolfish, 441 U.s. 520, 533 (1979).
Stack v. Boyle, 342 U.s. 1 (1951)
Carlson v. Landon, 342 U.s. 524, 545-46 (1952)
Coffin v. United States, 156 U.s. 432, 453 (1895)

26. These principles are applied uniformly throughout the common law countries.

27. In the present case, the court appeared to deviate from these principles.

28. On 3 May 2023, a report appeared on Nehanda Radio that the accused, Job Sikhala, had received a six-month suspended sentence and a USD 600 fine or, in default, a term of imprisonment of six months.

29. The report could not be finalized until receipt of the verdict in the present case, which was provided in August 2023.

30. With regard to the judgment delivered on 3 May 2023, please see the following:

31. In the famous case of Woolmington v DPP [1935] AC 462 stating the judgment for a unanimous court, Viscount Sankey stated the following:

> *“Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to … any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner … the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained”.*

32. This statement has been applied in almost all common law jurisdictions where the court has to evaluate all the evidence against the testimony given by the accused and decide on the basis of proof beyond reasonable doubt whether the accused is guilty or not. If there is a shadow of a doubt, then the court, despite any reservations, has to acquit the accused.

33. The function of the case law and paragraphs quoted below is to support the conclusion that, contrary to the accusation levelled against Mr. Job Sikhala, a reading of the record indicates that there is insufficient evidence that he was aware of the state of the investigations into Ms. Moreblessing Ali’s death. The evidence provided by the State fails to meet the threshold laid out by the case law below.

34. In the State v Kizito Mutsure HH 458-18 CRB 51/18 (A decision of the court in Zimbabwe), the court stated on Page 11:

"*To begin with, it is expected that where there is no evidence that the accused committed the offence charged, the Prosecutor General should in line with the exercise of professionalism just concede and withdraw the indictment if there is no probable chance that the accused may have committed any other offence which he might be convicted thereon".*

35. On page 16:
"It is common cause that there no was no independent witness to testify as to how the deceased ended up with the burns. The case falls to be determined on the basis of circumstantial evidence. In this regard the principles set out in the case of R v Blom … remain authoritative and continue to be followed in this jurisdiction. In Zacharian Amons Simango v S SC 42/14 and Abraham Mbovora v S SC 75/14 the Supreme [Court] held the principles in the R v Blom case to still hold good. GOWORA JA in Simango case … there are two cardinal rules which govern the use of circumstantial evidence in criminal trial, being:
i. The inference sought to be drawn must be consistent with all the proven facts-
ii. The proved facts should be such that they exclude every possible inference from them save the one to be drawn".

36. On page 18:
"When a court assesses evidence, it does not treat each individual piece of evidence as an isolated component. Pieces of evidence constitute a mosaic of proof. Doubts in relation to one piece of evidence naturally arises if one picks and chooses to focus on individual evidential pieces. Doubts may be removed when all pieces of evidence are considered together taking into account probabilities. Whilst the court critically interrogates and subjects each piece of evidence to examination, it is in the final analysis necessary to then consider the mosaic as a collective body of evidence. If evidence is not considered altogether, the court runs the risk of failing to pick the wood from the trees".
It is clear that this principle is well recognized in the courts of Zimbabwe.
Regarding improbability of evidence the following was provided by the Supreme Court of Appeal in Shusha v S [2011] ZASCA 1712 (Another Zimbabwe Case):
"When assessing evidence, it is trite that … [it] should not be rejected for merely being improbable. It will be rejected only if it is so inherently improbable that it could not reasonably be said to be true".

37. Let us evaluate the evidence tendered by the State.

38. The first witness, Chief Superintendent Mr. Elliott Muchada, testified that the accused knew that the police were conducting investigations into the murder of Moreblessing Ali, as he (the accused) told the mourners not to bury the deceased. I find it difficult to deduce how mentioning that they must not bury an accused automatically implies that the police were actively investigating the murder. The accused never used the words investigation by the Zimbabwe police and nowhere can it be deduced that he was particularly aware of the ongoing investigations.

39. Secondly, while this was at a rally to mourn the death of an individual, the accused used this opportunity to convert it into a political rally, which is what politicians are accustomed to doing. He made categorical references to ZANU and the murders they have committed. Anyone who operates in the political sphere that is Zimbabwe is painfully aware that murders with a motive are being perpetrated almost daily. Therefore, his statement is not surprising. The cardinal question is whether he was aware of the investigation. From a reading of the record there is nothing to indicate that the accused knew of the present status of investigations, and he did not allude to it in his speech. Emotions were running high and he never made accusations against the police.

40. Insofar as the recording is concerned, the second state witness, Mr. Kudakwashe Mandiranga, related as to how he downloaded the video from the internet.

41. Expert witness:

The Constitutional Court of South Africa stated the function of an expert witness in Glenister v President of the Republic of South Africa and Others (CCT 28/13) (2013) ZACC 20**;** 2013 (11) BLCR 1246 (CC) (14 June 2013), as follows: *"In essence, the function of an expert is to assist the court to reach a*

conclusion on a matter on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training or experience, the reasons for the opinions he expresses are acceptable. Any expert opinion which is expressed on an issue which the court can decide without receiving an expert opinion is in principle inadmissible because of its irrelevance".

The expert opinion was dismissed by the Harare High Court due to lack of substantiating basis in S v Motsi (CRB R 477-79/12) [2015] ZWHHC 185 (24 February 2015).

42. The High Court cited Routestone Ltd v Minories Finance Ltd and Another (1997) BCC 180, where Jacob J observed that "*what really matters in most cases is the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it … A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion"*.

43. On the expert's opinion in Motsi, the court held:

"The fact of the matter in the present case is that the expert witness … did not compile his report in a manner which would permit a court to understand and follow the reasoning behind his conclusions. He sought to excuse the scanty nature of his report by stating that although it was desirable to include the detail which would allow the court to follow his reasoning, this was not a legal requirement for the sufficiency of his report. In maintaining this stance, he failed to play his role as an expert".

44. With regard to the ballistics expert's opinion:

"*Clearly there is nothing besides [the expert's] say so to enable the court a quo to have arrived at the conclusion that the bullet which was fired at the complainant … was discharged by the pistol recovered from the Appellant. As such one cannot state with certainty that this was indeed the case, as the prosecution argued. Without this detail, the trial court was not entitled to find … that the expert's evidence was admissible"*.

45. The third state witness was the investigating officer. He had possession of the video.

46. He insisted that the accused knew that the police were investigating the death of Ali without stating the basis for this conclusion. Secondly, he at no stage implicated the accused in the making and distribution of this video clip. The video was made by a number of people unrelated to the accused. The learned magistrate simply accepted the evidence of this witness without establishing his credentials. Thirdly, there is no evidence that the accused uploaded the video or that he was responsible for it being uploaded. In fact, it was shown that there was tampering with the video by the watermark being superimposed. This was the export evidence. What are the legal principles?

47. The magistrate correctly summarized the onus on the State:

(a) The police were investigating a murder;

(b) The accused knew they were investigating;

(c) The accused could have foreseen that they were investigating;

(d) He by his conduct obstructed or defeated the investigation; and

(e) There was the possibility that these investigations were obstructed.

48. The first point is that the State failed to conclusively prove that the accused knew of the investigations. There is no evidence that he knew, either having spoken to the police or having been advised by someone reliable, that the `police were conducting active investigations into the murder. At no stage does the State prove that in their discussions with the accused he expressly notified them that he knew of the investigations. The first witness categorically affirms this without any evidence whatsoever. It is merely his say so that convinces the court.

49. If one applied the criteria expressed by the magistrate against the evidence, then the following emerges:

(a) There is no evidence that the accused knew the police were investigating;

(b) There is no evidence that reasonably foresaw that the police would investigate;

(c) That his statements would mislead the police; and

(d) There is no evidence that he was responsible for uploading the video nor for distributing such evidence. This is crucial for the lack of motive that he had.

50. It is important to note that the accused never identified the specific culprits who had caused the death of the deceased and referred to them generally as ZANU thugs.

51. The mere fact that these perpetrators are not identified immediately casts doubt on the veracity of the evidence by the State. Who do they interrogate in connection with this crime? The accused never at any stage identified any particular individuals.

52. It appears to me so improbable that the police would be sidetracked by such a wide generalization that I find it highly improbable.

53. In conclusion, this appeal ought to succeed in the High Court as it would be a violation of his constitutional rights to be convicted on the basis of such evidence.

54. In this instance, it cannot reasonably be concluded that the prosecution made out a case which was wholly untainted by reasonable doubt. In fact, the opposite is the case and the lack of substantive evidence on the part of the State and State's expert witnesses has created sufficient reasonable doubt that the accused is guilty of the charges levelled against him. Viscount Sankey's golden thread quotation is cited with approval in Zimbabwean jurisprudence, thus this principle is directly applicable to the matter at hand.

Gaborone, 6th day of September 2023