1. TUNGAMIRAI MADZOKERE

and

1. LAST MAENGEHAMA

and

1. LAZARUS MAENGEHAMA

and

1. STANFORD MAENGEHAMA

and

1. GABRIEL SHUMBA

and

1. PHINIEAS NHATARIKWA

and

1. STEFANI TAKAIDZWA

and

1. STANFORD MAGURO

and

1. YVONNE MUSARURWA

and

1. REBECCA MAFUKENI

and

1. SYNTHIA FUNGAI MANJORO

and

1. LINDA MUSIYAMHANJE

and

1. TAFADZWA BILLIAT

and

1. SIMON MUDIMU

and

1. DUBE ZWELIBANZE

and

1. SIMON MAPANZURE

and

1. EDWIN MUINGIRI

and

1. AUGUSTINE TENGANYIKA

and

1. FRANCIS VAMBAI

and

1. NYAMADZAWO GAPARE

and

1. KURINA GWESHE

and

1. MEMORY NCUBE

and

1. LOVEMORE TARUVINGA MAGAYA

and

1. ODDREY SYDNEY CHIROMBE

and

1. ABINA RUTSITO

and

1. TENDAI MAXWELL CHINYAMA

and

1. JEPHIAS MOYO

and

1. SOLOMON MADZORE

and

1. PAUL NGANEROPA RUKANDA

versus

THE STATE

HIGH COURT OF ZIMBABWE

BHUNU J

HARARE, 5 June 2012 and 19 June 2012 and 4 July 2012

ASSESSORS: 1. Mr Msengezi.

2. Mr Mhandu

**Bail Application – Leave to appeal.**

 *E. Nyazamba and P. Mpofu,* for the State

*C. Kwaramba and S. Hwacha* for the 1st to 26th accused

*D. Mutisi and T. Zhuwarara* for the 27th to 29th accused

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BHUNU J: This is an application for leave to appeal against my judgment of 19 June 2012 denying the 29 accused persons bail on account that they had failed to discharge the onus of proving on a balance of probabilities that they are entitled to bail in terms of s 117 (6) of the Criminal Procedure and Evidence Act [*Cap. 9:23*]. That section requires that an accused person alleged to have killed a law enforcement officer in the course of duty be detained in custody until he or she has been dealt with in accordance with the law unless the accused having been given a reasonable opportunity to do so, adduces evidence which satisfies the judge that exceptional circumstances exist which in the interest of justice permit his or her release.

The section is couched in peremptory terms admitting no exception save to comply with its mandatory provisions. It reads:

“(6) **Notwithstanding any provision of this Act**, where an accused is charged with an offence referred to in—

1. **Part I of the Third Schedule,** the judge or (subject to proviso (iii) to s 116) the magistrate hearing the matter **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 judge or magistrate that exceptional circumstances exist which in the interests of justice permit his or her release;”**

The 29 accused persons are in custody on allegations of murdering a law enforcement officer in the course of duty as defined in s 47 of the Criminal Law (Codification and Reform) Act *[Cap 9:23*] alternatively public violence as defined in s 36 of the Act. They are alleged to have killed a police officer on duty in the course of politically motivated violence. That being, the case, they fall under the purview of s 117 (6) of the Act. Their trial is currently under way.

 Although most of the accused persons were previously granted bail, they are in custody by operation of law in terms of s 66 of the Criminal Procedure and Evidence Act [*Cap. 9:07*] which requires that an accused person be remanded in custody upon indictment to the High Court for trial. Because of the mandatory provisions of s 117 (6) they can only be released on bail upon adducing evidence to my satisfaction as the presiding judge that exceptional circumstances exist which in the interest of justice permit their release on bail. Unfortunately for the accused persons no such evidence has been adduced to date. All what the accused persons have done is to state their defence outlines. In my judgment which is the subject of this intended appeal I gave good and sufficient reasons as to why in my opinion a mere defence outline without more falls far too short of meeting the mandatory provisions of s 117 (6) of the Act. There is no point in repeating what I said in that judgment save to highlight that a defence outline simply denotes a summary of the basis of an accused’s defence it does not constitute evidence of the facts stated therein.

 A defence outline is therefore, a mere assertion of what an accused person is going to say in his defence. On the other hand, evidence is that which is used to determine or demonstrate the truth or otherwise of that assertion. In other words, evidence is the mode of proving or disproving an assertion. It is the currency of fulfilling the burden of proof. The applicants having failed to adduce the required evidence establishing the necessary exceptional circumstances on a balance of probabilities consequently failed to discharge the onus reposed upon them to qualify for admission to bail.

It is instructive to bear in mind that s 117 (6) overrides any other section or provision in the Act in so far as it is predicated by the phrase**, “Notwithstanding any provision of this Act ...”.** This renders the attempt by the defence to incorporate the ordinary standard of proof applicable in s 117A or any other provision of the Act nugatory, inappropriate and futile in the circumstances of this case.

The term, **“Exceptional circumstances”** connotes a desire on the part of the law maker to set the standard of proof higher than in ordinary cases falling under s 117A or any other provision of the Act to the contrary. Thus the term takes the standard of proof outside common human experience, convention and practice.

Having said that, I am unable to see how the Supreme Court can come up with a different interpretation of the law in this regard.

The defence also sought leave to appeal to the Supreme Court on the ground that they intend to challenge the constitutionality of s 117 (6) of the Act. Although this submission is high sounding to those not schooled in law, it is rather legally sterile, absurd and ridiculous to say the least. The defence never raised the issue with this Court and the Court did not make any determination concerning the constitutionality or otherwise of the section in question. It is therefore amazing and an exercise in futility for the defence to seek leave to appeal on the basis of a ground of appeal which they never raised and was never determined by this Court.

In any case, every lawyer worth his salt knows that he does not need leave of this court to mount a constitutional challenge of any statutory provision when the rights and liberties of his clients are at stake. The applicants have been in custody for close to a year now if counsel genuinely believed that the section was unconstitutional as they would now want us to believe, they should have taken the appropriate action in terms of s 24 of the Constitution. That section provides for direct free access to the Supreme Court as a Court of first instance for the redress of constitutional infringements without first seeking any permission from this Court.

They could also have raised the issue with this Court or sought referral of the same issue to the Supreme Court during the course of the trial way back when the accused were initially denied bail. This they did not do, preferring to seek leave to appeal from this Court so as to shift blame when such leave is denied on sound legal grounds.

It is patently clear to me that apart from idle threats to mount a constitutional challenge, the defence never plucked up the courage to do so because they know pretty well that there is nothing remotely unlawful or unconstitutional about the law prescribing a higher standard of proof for entitlement to bail for someone alleged to have committed a very serious cardinal offence. Of course, the legislator prescribed that exceptional standard of proof because the offence is exceptionally serious and it calls for extraordinary measures to keep it in check. The section is not reserved for any class of persons it is meant for anyone who is alleged to have committed the offence including the accused’s rivals.

In my view, this extraordinary measure is necessary for the preservation of constitutional government and society at large because an attack on a law enforcement officer in the course of duty constitutes an attack on the government’s centre of power and to that extent an extremely destabilising conduct if not a declaration of war against the state and its coercive machinery. This therefore cannot be equated to an ordinary murder case.

If Parliament can take extraordinary measures to protect wild animals under s 97 of the Parks and Wild Life Act [*Cap 20:14*], I can perceive nothing unlawful or unconstitutional about a law that provides for extraordinary measures for the preservation of law enforcement officers or any other vulnerable class of persons. That section effectively shifts the onus of proof onto the accused person through a series of presumptions.

Despite my strong views about the correctness of my judgment I have been moved to entertain some doubt in respect of the group of accused persons who were initially granted bail by consent. It appears this group of applicants were granted bail by consent through an oversight of the law as the Court’s attention was never drawn to the mandatory provisions of s 117(6). Had the Court’s attention been drawn to the peremptory legal requirements laid therein it could have come to a different conclusion seeing that the applicants are averse to adduce evidence as required by the Act.

This is however, now water under the bridge which does not preclude me from determining the matter according to the prevailing law. Notwithstanding that observation it however remains doubtful whether or not the State’s initial consent to bail can amount to an exceptional circumstances. For that reason I am of the view that a different Court might come to a different conclusion in respect of this group of applicants.

In conclusion I am constrained to remark that the application is essentially chasing a moving target as the trial is in progress. The complexion of the case keeps on changing. For instance when the Court made its determination it had not gone for an inspection in loco which it has now done. It is envisaged that by the time the matter may come up for determination in the Supreme Court the case might have adopted a completely different complexion from what obtains at the present moment. This real eventuality might make it difficult if not inappropriate for the Supreme Court to determine the matter without reference to the trial court that will be seized with all the facts and evidence as at the time the Supreme Court comes to determine the matter. The application therefore tome seems like a person chasing his own shadow or a dog chasing its own tail.

Despite that parting shot the applicants are however, entitled to their day in the Supreme Court particularly the group that was initially granted bail by consent. It is accordingly ordered that the application for leave to appeal to the Supreme Court be and is hereby granted.

*Zimbabwe Lawyers for Human Rights,* 1st to 27th applicants’ legal practitioners

*Musendekwa – Mutisi,* the 28th to 29th applicant’s legal practitioners

*The Attorney general’s office,* respondent’s legal practitioners.