

**IN THE HIGH COURT FOR ZAMBIA
AT THE CRIMINAL REGISTRY
HOLDEN AT LUSAKA**
(Criminal Jurisdiction)

HPBA/27/2016

BETWEEN:

MICHAEL CHANDA

RABIE CHIRAMBO

MISHECK CHANDA



1ST APPLICANT

2ND APPLICANT

3RD APPLICANT

AND

THE PEOPLE

RESPONDENT

**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 10TH AUGUST, 2016 - IN CHAMBERS**

For the State : *Mr. Zimba – National Prosecutions Authority*

For the Defence : *Mr. Ngoma – Messrs Lungu Simwanza & Company*

RULING

CASES REFERRED TO:

1. *Chetankumar V Shantkal Parekh V The People* (1995) ZR SC.
2. *Oliver John Irwin V The People* (1993 -94) ZR 7

AUTHORITIES CITED:

1. *Section 123 of the Criminal Procedure Code*
2. *Article 13 (3) (a) and (b)*
3. *Section 6, 23 and 43 of the Narcotics and Psychotropic Substances Act*
4. *Section 47 of the Electoral Process Act No. 35 of 2016*

On the 4th August, 2016 the Applicants caused to be filed summons for an order to admit the accused persons to bail pending trial pursuant to *Section 123 (3) of the Criminal procedure Code Cap 88 of the Laws of Zambia and Articles 13(3) (a) (b) 134(a) of the Constitution of Zambia Amendment Act 2015 as read together with the Constitution of Zambia*. Filed also was a combined affidavit in support. Exhibited were copies of National Registration Cards and a passport together with voter's cards and the Applicant's Skeleton Arguments.

Counsel in his submissions informed the court that he relied on the principle laid down in the case of *Oliver John Irwin V The People* on the power of the court to admit to bail accused persons in all cases. Counsel further submitted that the Applicants were of fixed abode, were Zambian nationals who are registered voters in possession of National Registration Cards. Counsel informed the court that the Applicants wish to take part in the elections and referendum scheduled to take place on the 11th August, 2016. According to Counsel this was their Constitutional right. Counsel pointed out that if they were not granted bail and be allowed to vote their preferred candidate Mr. Edgar Chagwa Lungu would be disadvantaged. Counsel pointed out that the Applicants were not a flight risk and the offence is a bailable one.

Mrs. Mulenga for the state opposed the application for bail on the grounds that the offence with which the accused persons are charged is not bailable. Counsel referred the court to *Sections 6,*

23 and 43 of the Narcotic Drugs and Psychotropic Substances Act Cap 96 of the Laws of Zambia. Counsel submitted that there is nothing unconstitutional about a law that prohibits the grant of bail in matters that are not bailable. Further that in Article 13 relied upon by the Applicants, whilst it confers the right to personal liberty it also envisages situations where such liberty can be denied. Counsel stated that one of these circumstances is where the accused has been charged with an unbailable offence.

In reference to the *Oliver John Irwin V The People* case, Counsel informed the court that the decision of the Supreme Court has been overturned by legislation and that at the time the decision was rendered there was no prohibition of bail for murder cases. Counsel relied on the case of ***Chetankumar Shantkal Parekh V The People (1995) ZR SC.***

Counsel whilst stating that the court has jurisdiction to entertain bail applications in criminal matters further went on to state that, such jurisdiction do not extend to matters that are not bailable, the only exception to that principle is where the trial has been unreasonably delayed. Counsel informed the court that the law under which the Applicants have been charged, authorizes the deprivation of their liberty.

Accepting that personal liberty is a birth right and that except in cases permitted by the constitution and the general law personal

liberty is jealously guarded in a civilised and democratic society. In as far as the laws referred to; **Section 123 of the Criminal Procedure Code** provides as follows:

“ (1) When a person is arrested or detained, or appears before or is brought before a Subordinate Court, the High Court or supreme Court he may, at any time while he is in custody, or at any stage of the proceedings before such court, be admitted to bail upon providing a surety or sureties sufficient, in the opinion of the Police Officer concerned or court, to secure his appearance, or be released upon his own recognizance as such Officer or court thinks fit.

Provided that any person charged with-

- (i) Murder, treason or any other offence carrying a possible or mandatory capital penalty;***
- (ii) Misprision of treason or treason-felony; or***
- (iii) Aggravated robbery;***
- (iv) Theft of motor vehicle, if such person has previously been convicted of theft of motor vehicle.***

shall not be granted bail by either a subordinate court, the High Court or Supreme Court or be released by any Police Officer.

- (2) Subject to the provisions of section one hundred and twenty-six, before any person is admitted to bail or released on his own recognizance, a bond (hereinafter referred to as a bail bond), for such sum as the court or officer, as the case may be, thinks sufficient, shall be executed by such person and by the surety or sureties, or by such person alone, as the case may be, on condition that such person shall attend at the time and place mentioned in such bond and at every time and place to which during the course of the proceedings the hearing may from time to time be adjourned.***
- (3) The High Court may, at any time, on the application of an accused person, order him, whether or not he has been***

committed for trial, to be admitted to bail or released on his own recognizance, and the bail bond in any such case may, if the order so directs, be executed before any magistrate.

- (4) Notwithstanding anything in this section contained, no person charged with an offence under the State Security Act shall be admitted to bail, either pending trial or pending appeal, if the Director of Public Prosecutions certifies that it is likely that the safety or interests of the Republic would thereby be prejudiced.*
- (5) Notwithstanding anything to the contrary contained in this Code or in any written law, it is declared for the avoidance of doubt that upon a person being convicted or sentenced by a subordinate court and before the entering of an appeal by such person against the conviction or sentence or both, the subordinate court which convicted or sentenced such person or the High Court has and shall have no power to release that person on bail with or without securities.*

Article 13 (3) (a) and (b) the article that the Applicant relied on provides as follows:-

“A person shall not be deprived of his personal liberty except as may be authorised by law in any of the following cases:

- 1)*
- 2)*

The sub article relied on provides as follows:-

(3) Any person who is arrested or detained-

- a) For the purpose of bringing him before a court in execution of an order of a court; or*

(b) Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force Zambia; and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained under paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

Section 6 of the Narcotics and Psychotropic Substances Act provides as follows:

"Any person who traffics in a narcotic drug or psychotropic substance shall be guilty of an offence and shall be liable upon conviction to imprisonment for a term not exceeding twenty-five years."

Furthermore, Section 23 of the same Act provides that:

- "(1) Every drug trafficking and drug manufacturing offence shall be a cognisable offence for the purposes of the Criminal Procedure Code.*
- (2) Where a person arrested under this Act is serving a sentence of imprisonment, or is in lawful custody, he shall, upon an order in writing by a drug enforcement officer or police officer, be produced before that officer or before any other drug enforcement officer or police officer at such place as may be specified in the order for the purpose of investigations into the*

matter in respect of which he is liable to be arrested under this Act."

Section 43 of the same Act provides that:

"Whenever any person is arrested or detained upon reasonable suspicion of his having committed a cognisable offence under this Act, no bail shall be granted when he appears or is brought before any Court."

Thus the offence with which the Applicants herein are charged with is non-bailable.

The Constitution does not offer absolute protection of personal liberty. Article 13 of the Constitution of Zambia envisages that a situation can arise when a person may be deprived of his personal liberty hence the derogations specified therein. It can be seen that the law relating to bail (Section 123 of the Criminal Procedure Code) gives wide discretion to the court to admit an accused person to bail pending trial in all offences with some exceptions.

In the case of ***Oliver John Irwin V The People*** referred to by Counsel for the Applicant the facts were as follows:-

"The Appellant, who was charged with murder, was denied bail and committed to trial in the High Court before an inquest was held. The High Court's ruling arose from a referral by the Magistrate's court in response to the

Appellant's application for bail, for an order that a preliminary inquiry be held, and for an order that an inquest be held under the provisions of Section 7 of the Inquest Act while the ongoing proceedings were discontinued. The appeal raised some preliminary procedural issues as whether the matter was properly before the Supreme Court. Having so ruled, the court considered the substantive questions and held as follows:-

It was held that:

- i. ***"The High Court has power to admit to bail in all cases including those relating to persons accused of murder and treason, subject to the rule that such persons are rarely admitted to bail. Such application must be made to the High Court. The Subordinate Court has no power to grant bail in a murder case, and the Supreme Court enjoys only appellate jurisdiction.***
- ii. ***An inquest is subject to the mandatory provisions of Section 6 of the Inquest Act cannot be commenced and would have to be adjourned until the conclusion of criminal proceedings."***

The second case referred to of ***Chetankumar Shantkal Parekh V The People (1995) ZR SC*** the facts were as follows:-

"The Appellant appeared before the Subordinate Court on a charge of Unlawful Possession of Drugs, Contrary to Section 8 of the Narcotic Drugs and Psychotropic Substances Act, (No. 37 of 1993). The Learned trial Magistrate refused to grant bail and in terms of the Criminal Procedure Code and the

supervisory jurisdiction of the High Court under that law and under article 94(5) of the Constitution, the Appellant renewed his application for bail before a High Court Judge and raised a constitutional argument.”

It was held that:

- i. Where any trial is unreasonably delayed through no fault or stratagem of the accused, the arrested person must be released on what one might call “constitutional bail.” such bail is available and clearly overrides any prohibitions in the lesser laws so that article 13(3) would apply to any unreasonably delayed case, whatever the charge and whatever Section 43 of the Act or Section 123 of the Criminal procedure code or any other similar law may say*
- ii. There is nothing in the constitution which invalidates a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence, provided that he is brought to trial within a reasonable time after he has been arrested and detained*
- iii. Before the stage when a trial becomes unreasonably delayed, it is constitutionally permissible to authorized deprivation of liberty, if authorised by law, and without making any provision for bail under any circumstances.*

In this case for completeness the Supreme Court proposed to demonstrate that the constitution while conferring a right to personal liberty also envisages a perfectly constitutional loss of such liberty among nine other reasons, to facilitate the prosecution of offenders against the criminal law and went on to quote Article 13 (1) (2).

Referring to the *Oliver John Irwin V The People* case the Supreme Court pointed out that they were aware that in that case they agreed to treat as an appeal from a determination in a constitutional reference a matter which was ostensibly a bail application but which to all intents and purposes had been argued as a constitutional issue whether the High Court had power to grant bail to a person charged with murder. The Supreme Court went on to state that their decision in favour of bail has since been overruled by legislation but the point to note is that the Supreme Court agreed to treat the proceedings as irregular as they were as if they had been a constitutional reference. This, the Supreme Court stated was for the purpose of dealing on an issue of great public importance. The Supreme Court went further to state that these indulgences should not be regarded as available as a matter of course, they are not and we would not be surprised if in future they declined to extend this sort of enabling fiction to cases that are not properly constituted and in the correct form of proceedings.

I am aware that the decision to grant or refuse bail to any accused person must always balance these two conflicting policy goals of social interest in crime control and public safety on one hand and protecting individuals against state deprivation of their person liberty before trial on the other hand. To this the Applicants have added another dynamic of exercising their rights as eligible voters to participate in both the referendum and

general election polls scheduled for 11th August, 2016. The Applicants point out that if they are allowed to vote it may not lead to victory of their preferred Presidential Candidate Mr. Edgar Chagwa Lungu and further that their preferred candidate would be disadvantaged if they are not allowed to vote as he needs 50 + 1 percent votes cast to win the Presidential Election.

As much as the Applicants' application is meant to be for a good cause this is a matter in which the application for bail is denied. This application is not for constitutional bail as the Applicants have not shown that their trial is unreasonably delayed through no fault of their own.

I have been guided by the provision of **Section 123 of the Criminal Procedure Code** and the **Chetankumar Shantkal Parekh V The People (1995) ZR SC** case already referred to. The use of the word "**shall**" makes it mandatory for the court not to grant bail in the specified categories of offences.

Further **Section 47 of the Electoral Process Act No. 35 of 2016** provides that:

"A person shall not be entitled to vote at an election, if that person is in lawful custody or the person's freedom of movement is restricted under any written law."

This applies to the Applicants. Bail is denied, the accused persons are for now remanded in custody. You have the right to appeal to the Supreme Court.

DELIVERED AT LUSAKA THIS 10TH DAY OF AUGUST, 2016.



G.C.M CHAWATAMA
HIGH COURT JUDGE