JUDICIAL SERVICE COMMISSION

COMMENTS BY THE HONOURABLE CHIEF JUSTICE FOLLOWING COMPLAINTS ON HANDLING OF PUBLIC VIOLENCE CASES

1. Introduction

The Chief Justice, as Head of the Judiciary and Chairperson of the Judicial Service Commission, does not ordinarily comment on concerns levelled against judicial officers' decisions, or conduct of judicial officers in the exercise of their duties. The route ordinarily taken is for Appellate Courts to comment through their judgments.

The extraordinary events outlined below have, however, obliged the Chief Justice to issue a statement in the public domain, given the topicality of a public interest concern.

1.1. Background

During the week beginning 14 January 2019 Zimbabwe experienced public demonstrations which later turned violent. The protests resulted in serious injury and death to some citizens. Property and goods of substantial value were either stolen or intentionally vandalised. The police arrested individuals suspected of involvement and participation in these offences and brought them to appear before various Magistrates Courts across the country.

The cases were heard in these courts; and decisions on various issues were and still are being made by magistrates in their respective jurisdictions. Some decisions from the Magistrates Courts have drawn notable criticism from certain sections of civic society, including but not limited to legal practitioners, the media and other social commentators. The criticism specifically related to the discharge of their duties.

Following these developments, the Chief Justice, the Deputy Chief Justice, the Acting Secretary for the Judicial Service Commission and the Acting Deputy Secretary for the Judicial Service Commission held a meeting with the President and the Executive Secretary of the Law Society of Zimbabwe on 22 January 2019. The meeting was at the request of the Law Society on behalf of its members. The Law Society indicated it wanted to bring to the attention of the Chief Justice concerns raised by its members on the manner trials of accused persons for public violence arising from the events during the week commencing 14 January 2019 were being handled by magistrates. The issues of concern related to the bail process for the accused persons, alleged mass trials, and dismissal of preliminary applications by magistrates.

In addition, the Chief Justice received a letter from the Secretary General of the International Commission of Jurists (ICJ), Mr Sam Zia Zarifi, reiterating some of the concerns that were already in the public domain.

In the meeting held with the Law Society on 22 January 2019 progressive engagements were undertaken. In the end, it was agreed that in order to address the concerns raised -

1. There must be a distinction between complaints of an administrative nature on the one hand and issues relating to the exercise of the judicial function arising from the public demonstrations on the other. Whilst the Judicial Service Commission is empowered to deal with all administrative complaints against judicial officers, those that relate to the judicial function remain out of bounds for it.

2. In that regard, neither the Chief Justice nor the Judicial Service Commission are empowered by the Constitution to interfere with the judicial decision-making process of judicial officers in courts, regardless of how distinctive the circumstances may be. Once a decision has been made, only a court of competent jurisdiction can set it aside. The Chief Justice maintains that position.

It was left to the Law Society to communicate the position to its membership.

On 29 January 2019 a section of legal practitioners held a public march to the Constitutional Court to deliver a petition for the attention of the Chief Justice. Based on the number of signatures appended to the petition, 119 legal practitioners participated in that march. Even though those signatories represent a minority of the Law Society's membership, this group's anxieties are nonetheless taken seriously.

The petition also raised a number of other issues relating to the deployment of the army, disproportionate use of force by the police, dragnet arrests, and abduction of suspects. These issues do not fall within the administrative purview of the Judiciary, as they do not relate to the functions of the Judiciary. In line with the principle of separation of powers, which is the pillar of constitutionalism, such concerns are best addressed to the appropriate authorities for comment or investigation. The Courts can and will only comment on them if and when they are brought under judicial review via the standard and appropriate channels, known to all capable legal practitioners, and supported by verifiable facts.

In summary, the concerns that related to the courts and appear to be the basis for the criticism levelled against judicial officers are as follows:

1. That magistrates are dismissing bail applications by the arrested suspects, creating an impression of extra-judicial influence on their decisions;
2. That the courts are sanctioning "fast-track" trials without affording the accused persons adequate time to prepare their defenses;
3. That magistrates are dismissing other pre-trial applications made by accused persons. The petitions include applications for some judicial officers to recuse themselves from handling the cases; and
4. That the courts are refusing legal practitioners the opportunity to take instructions from their clients.

As is apparent from the list, the issues relate to procedural and substantive decisions made by judicial officers in the course of court proceedings.

2. Response to specific concerns

As already pointed out, the Chief Justice notes with concern the criticism levelled against the Judiciary generally, and the magistracy in particular. Following the meeting with the Law Society, and the subsequent petition by a section of its membership, the Chief Justice requested for a report on all matters relating to the public demonstrations that were brought before the courts. The Acting Chief Magistrate furnished the Chief Justice with the statistics indicated below as at 30 January 2019.

National	No. of cases received	No. of persons	Granted Bail	Convicted	Acquitted	Denied Bail
Grand Total	371	1055	48	80	66	995

Paraphrased:

a) A total of **371** cases were brought before the courts between 14 January 2019 and 29 January 2019.

b) **48** adult suspects were granted bail.

c) **12** juveniles were released into the custody of either their parents/guardians or social welfare officers on their appearance in court.

d) **995** suspects were denied bail.

e) **146** persons have gone for trial. Out of those, **80** persons were convicted and **66** persons were found not guilty and were acquitted.

From these statistics, the Chief Justice acknowledges with concern that a high number of cases remain pending trial. That concern is highlighted by the fact that some of the accused persons are remanded in custody. They must therefore be afforded fair and speedy trials in accordance with the Constitution. From an administrative perspective, the Judicial Service Commission will intervene and avail more magistrates to preside over the cases. The Chief Justice calls upon prosecutors to present all State papers to the accused and legal practitioners timeously to enable

prosecutions to proceed without further delays. Legal practitioners must also stand ready to provide *pro bono* services to smoothen the processes.

2.1. Accusations of predetermination or instructive dispensation of justice

The accusation that magistrates countrywide were acting under some form of directive or instruction to influence their decisions is extremely consequential. The Judiciary cannot take it lightly. All courts in the country, and all judicial agents within those courts, must never be interfered with in the dispensation of justice. The Constitution demands it. There are always two sides to any case. It is natural that each party would wish a case to be ruled in their favour, but consideration of the special interests of a party must never be a cause for interference with due process. Such a directive would be tantamount to interference with that court's decision-making process and judicial independence enshrined in section 164 of the Constitution of Zimbabwe, which provides that the Courts are independent subject only to the Constitution and the law which they must apply impartially, expeditiously and without fear or favour.

In the meeting held on 22 January 2019, the Chief Justice gave the Law Society his assurance that no directive or instruction was given by himself or the Judicial Service Commission to magistrates to dispose of cases before them in a particular manner. He maintains this position. The allegations that the Judiciary is acting under capture of an external force remain unfounded, baseless and unsubstantiated.

In the case at hand, there are suspects who were granted bail and others who were denied bail for reasons *ex facie* the court records. Sections 115C to 135 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provide for this. The analysis of those court records must inform the decisions taken, especially in light of the seriousness of those allegations. All juveniles who appeared in court were released into the custody of either their parents/guardians or the care of social welfare officers. In some instances, magistrates refused to place the accused persons on remand on the basis of over-detention and ordered their release. **66** suspects have been acquitted after trial. Such freedom of determination is an imperious principle in the administration of justice. Judicial discretion must be preserved. The statistics negate the unfounded narrative of an orchestrated initiative to detain accused persons. The fact that, through this exercise of judicial discretion, a majority of persons were denied bail becomes a secondary issue.

2.2. A high proportion of suspects denied bail

Applications for bail are denied or granted on a case by case basis. That outcome is dependent on several factors, and the circumstances of the case must provide sufficient merit to ratify the decision by the court. The powers of judicial officers, rights of accused persons, and applicable judicial considerations relating to the granting or refusal of bail are outlined in sections 115C to 135 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

It bears reminding that crimes of public violence, theft and destruction of private property are not minor infractions of the law. They have the effect of dismantling the fabric of any society. Those arrested and charged for perpetrating such acts, regardless of the circumstances, must be processed through the criminal justice system. Where the charges have no basis at law and no basis in fact, the accused persons should be acquitted. Correspondingly, where the charges are founded and proven to the satisfaction of the court, the persons must be convicted and sentenced in accordance with the law. Magistrates must be free to discharge their duties in determining between these two potentialities. That determination must be within the confines of the law and without external influence by any person, public opinion, or pressure from any group of people. The regional and provincial magistrates handling these matters are experienced and competent officers. They are expected to be alive to the requirements of the Constitution in the discharge of their duties and exercise of discretion as dictated by the law.

Where that decision is queried or felt to be unjustly arrived at, the law protects the party who believes that the decision is incorrect either in substance or procedure. The Chief Justice has articulated in his previous addresses that the rule of law demands that the decision of the court be respected. He has gone further to state as follows:

> "*Our legal system has in-built self-correcting mechanisms which allow anyone who is aggrieved with the decision of a court to appeal against that decision to a higher court. The higher court may confirm the decision of the court or set it aside. Court decisions will not be set aside by insulting judicial officers who make the decisions and denigrating their offices. The decisions will not be set aside on the basis of unfounded accusations against the judicial officer. Court decisions may only be challenged by following proper legal processes such as appeal or review. This is the bedrock of the concept of the rule of law."*

For those (both State and accused persons alike) who feel the reasons for granting or denying of bail are not in accordance with the merits of the case and principles prescribed in the Criminal Procedure and Evidence Act and judicial precedent, there are avenues open to them. Central to our legal system is the review and appeals process, as provided for in the Criminal Procedure and Evidence Act. The Superior Courts are there to act as a check and balance against any erroneous decisions by the lower courts. The remedies available are protected and should be utilised to correct any injustice that any accused person believes has been occasioned against him or her. That is the very basis of the rule of law.

As highlighted by the statistics availed to the Chief Justice, there are 323 cases involving 995 suspects in which applications for bail were dismissed. The Chief Justice should not and will not comment on the correctness or otherwise of those decisions by the magistrates. The cases are not before him. The facts and circumstances of each individual case cannot be reviewed or considered by the Chief Justice.

However, in light of the high number of bail applications being denied, the Chief Justice requested possible reasons for this trend. A report from the Acting Chief Magistrate highlighted that the common thread running through the magistrates' decisions included, among other reasons, the following issues -

- the gravity of the offences charged;
- the interconnectedness of relationships amongst complainants and accused persons in the cases;
- the fact that complainants and accused persons live in the same communities presented danger of reprisals; and
- the general threat of further instances of violence and societal instability.

These reasons are general and do not relate to any specific case. What, however, is of unambiguous concern is the derisory number, as shown below, of cases that have been taken to the High Court on either appeal or review.

HIGH COURT APPEALS AGAINST BAIL REFUSAL IN PUBLIC VIOLENCE CASES

As at close of day 30 January 2019

STATION	TOTAL FILED	TOTAL COMPLETED	PENDING
HARARE	12	3	9
BULAWAYO	6	0	6
MASVINGO	1	1	0
MUTARE	0	0	0
TOTAL	**19**	**4**	**15**

HIGH COURT REVIEWS IN PUBLIC VIOLENCE CASES

As at close of day 30 January 2019

STATION	TOTAL FILED	TOTAL COMPLETED	PENDING
HARARE	4	0	4
BULAWAYO	0	0	0
MASVINGO	0	0	0
MUTARE	0	0	0
TOTAL	**4**	**0**	**4**

Paraphrased:

1. Only **19** cases have been taken on appeal to the High Court. There has been little effort in the legal framework at least to challenge the impugned decisions of the magistrates in the other **304** cases.

2. Only **4** cases have been taken on review.

2.3. Discharge of Justice by the Magistrates

In the Zimbabwean legal system, the fact that a person appears in court without legal representation does not in any way mean his or her rights are negated. Magistrates must in the discharge of their duties handle trials of unrepresented accused persons, with the necessary sensitivity to the protection of their rights to fair trial. Magistrates must dispose of matters before them. Whilst judicial officers have received extensive training on how to guide the unrepresented accused persons through legal procedures, they cannot prosecute the accused's case or descend into the arena.

52% of the public violence cases that have appeared before the courts during the period in question have had unrepresented accused persons. About **37%** of the cases were taken up by lawyers from Zimbabwe Lawyers for Human Rights (ZLHR). The organisation must be commended for taking up these cases. It worked tirelessly and did its best in these extraordinary circumstances. The Chief Justice noted from the Acting Chief Magistrate's report that the Zimbabwe Lawyers for Human Rights appears to be overstretched in dealing with these matters. A classic example is what happened in Bulawayo, where one legal practitioner has taken up **20** different cases. All these **20** matters were remanded to the same date, 31 January 2019, for trial. Obviously, the legal practitioner will not be able to appear in **20** different courts to offer legal representation. On the other hand, to give different dates to all these cases to accommodate one legal practitioner may end up frustrating the ends of justice. It is unacceptable for a legal practitioner to hold the entire criminal justice system to ransom in the guise of the right to a fair trial.

In that vein, the greater legal profession is encouraged to complement the good efforts of the Zimbabwe Lawyers for Human Rights by providing *pro bono* legal assistance to the accused persons. In that way, they would be coming together with the same positive enthusiasm they have already exhibited in organising and presenting the petition, and directing that fervor back into the formal legal system in assisting those unrepresented accused persons in the prosecution of their trials and in the effective stewardship of the appeals and review process as provided at law. Whilst overstretched in such circumstances, the professional contribution of legal practitioners (currently assisting accused persons) to oiling the wheels of effective justice cannot be understated.

2.3. Fast-track courts

Matters in all courts must be dealt with expeditiously. Fair and expeditious trials are a requirement of the law. This will depend on the circumstances of the matter and must still be within the parameters of the law. The Chief Justice reminds all and sundry once again that all judicial officers are required by section 164(1) of the Constitution to dispense justice expeditiously. In doing so, all due process must always be followed and rights of accused persons respected. Indeed, this was the theme of his address at the opening of the 2019 Legal Year on 14 January 2019. We are constantly reminded of the old adage that "justice delayed is justice denied". The Chief Justice maintains his position that where suspects are arrested and brought to court, they are entitled to speedy trials.

The Zimbabwean courts are not, by undertaking expeditious trials, reinventing the wheel. Such trials are a common phenomenon across the world in cases involving public violence. For instance, in England after the 2011 riots more than 3000 people were arrested, with 1500 being arraigned before the courts. Their trials were fast-tracked. Courts were in session 24 hours every day until the cases were completed. Even juveniles caught up in the riots underwent trial. There is therefore nothing unusual about fast-track trials, as long as they are conducted in conformity with the law. The Chief Justice therefore maintains his position that where suspects are arrested and brought to court, they are entitled to speedy trials.

Fast-track trials must in fact be the norm, and not a curious exception. The decision to undertake expedited trials in these cases has resulted in **66** innocent people who could have remained in custody or hamstrung whilst on remand being cleared of any criminal conduct and being freed. However, other than a reminder that expeditious justice delivery should not infringe on any other constitutionally enshrined rights, the Chief Justice is unable to comment on the procedure adopted in any particular case or the circumstances under which the cases complained of have been determined. Where an accused person or the State is aggrieved by the procedure undertaken in any trial court, this can only be challenged on review or appeal and determined by a court of competent jurisdiction, taking into account the applicable legal principles and the facts of each particular case.

2.4. Mass Trials

It is noted that there is concern regarding several accused persons being tried together. Without benefit of the specific cases or circumstances in which this concern has been noted, the Chief Justice is aware that where accused persons are charged with the same facts, arising from the same circumstances, and with the same evidence, the law in sections 158 and 159 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] allows such accused persons to be tried together. Where this is deemed inappropriate for any reason, an application for separation of trials can be made. These, however, cannot be granted as a matter of course and must be adjudicated upon in line with the provisions of the Criminal Procedure and Evidence Act and judicial precedent. Equally, they should not be systematically refused without basis. Again, the Chief Justice reiterates that where any person believes that a decision on such a point has been wrongly reached, the remedy of appeal or review, as the case may be, remains open and available.

2.5. Refusal of Magistrates to hear legal practitioners

The meeting held with the Law Society on 22 January 2019 revealed only one incident of a legal practitioner who had been denied access in Goromonzi because he did not have a valid 2019 practicing certificate. The Law Society eventually intervened in that matter, giving an undertaking in writing that the legal practitioner was duly registered and entitled to be heard. The matter proceeded with the legal practitioner being granted audience.

The Chief Justice is currently unaware of any other incident where a magistrate has refused to hear any application or any legal practitioner, as no such incidents have been reported. The Chief Justice would like to call on all members of the public, within the legal realm and beyond, to bring any such reports through proper channels, so that appropriate interventions can be sought.

3. In Conclusion

Lawyers are reminded that avenues are available for substantiated complaints against the conduct of any judicial officer whose actions are extra-judicial. Where there is a suspicion that the magistrate has acted on an extra-judicial instruction or has been swayed or influenced unbecomingly that is an ethical issue, which should be reported to the Judicial Service Commission.

To date, the Judicial Service Commission has not received any complaints of such a nature.

The decisions to refuse or grant bail by magistrates and dismissal of pre-trial applications by magistrates cannot be reversed via petition. Only in the courts of law can matters of this nature be ventilated. The process of setting aside or confirming decisions of lower courts will only happen in Superior Courts. The Chief Justice urges all those with concerns to follow the legal route. The processes are clear and extensively provided for in the law. Only this avenue is consistent with the legal sequence of justice. Everyone who believes in the rule of law must use it as a measuring rod to test its effectiveness and efficacy.

An extra-judicial path unfortunately will not help the cause of suspects who require legal representation. Petitioning the Chief Justice or the Judicial Service Commission to intervene in decisions made by judicial officers in the course and within the scope of their work amounts to interference with the discretion and

independence of those judicial officers. That independence is sacrosanct, regardless of how the outcome is interpreted by any party.

The Chief Justice, having noted the issues and concerns of the stakeholders, has no power to order any form of review other than as prescribed in the law. To intervene in this matter in a manner which undermines the dictates of law would be tantamount to the Chief Justice creating a law to suit a specific and unique circumstance, and would not only be illegal, but centrally detrimental to the rule of law.

The position, from which the Judiciary will not relent, remains that issues which are the subject of these complaints must be dealt with in terms of the law. The Chief Justice calls upon all stakeholders in the justice delivery system to exercise their independent functions impartially and without influence, fear, prejudice or favour. The Judicial Service Commission remains committed to the rule of law and all its officers are bound to respect it.

The Chief Justice has taken full consideration of the issues raised, not only against the Judiciary but also other stakeholders in the criminal justice system. It is noted that, whilst the Chief Justice may be legally constrained from intervening in the judicial decision-making process, justice must always not only be done but be seen to be done.

The Chief Justice takes note of the high number of suspects facing allegations of public violence and the need for the cases to be expedited and finalised within the shortest possible time. It is necessary to bring together players in the administration of justice so that they collaborate to ensure effective management of the matters. To that end, he has instructed the Acting Secretary of the Judicial Service Commission to constitute a tactical committee of members from the following stakeholders - the Acting Chief Magistrate and his deputy, representatives from the Law Society, the National Prosecuting Authority, the Zimbabwe Republic Police and the Zimbabwe Prisons and Correctional Services.

The purpose of the Committee will be to address all issues and take all administrative measures to ensure speedy trials, with due respect to the rights of accused persons to expedient and efficient justice. The Committee will, through its Chairperson, report to the Chief Justice until all the issues have been addressed to the satisfaction of all the relevant stakeholders.