IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CRIMINAL APPLICATION NO. 33 OF 2003

YASINI DAITON LIGOMBA

VERSUS

THE REPUBLIC

ORDER

On the 27th of February 2003 the applicant, Yasini Daiton Ligomba, applied to this court for an order to release him on bail under section 42(2)(b) of the Constitution. On the 4th of March 2003, the date on which the summons was to be heard, there was an adjournment because, although the state was served, nobody appeared on behalf of the Attorney General. I heard the application on the 5th and 6th of March 2003. On the basis of the arguments from Mr Makhalira, legal practitioner for the applicant and Miss Chimwaza, Deputy Chief State Advocate, on behalf of the Attorney General, I thought I should have some time to consider the matters raised from their arguments. This was important because both Mr Makhallira and Miss Chimwaza cited before me decisions of the Supreme Court of Appeal, decisions binding on this court. On the other hand, both decisions issued from the Supreme Court before the Bail Guidelines Act of 2000. The matter hasn't been to the Supreme Court of Appeal after the Bail Guidelines Act of 2000. It was important therefore to consider whether the Bail Guidelines Act affected the previous Supreme Court of Appeal decisions and, if so, to what extent. More significantly I have to consider whether the Bail Guidelines Act, 2000 did make any serious inroads on the principles guiding this court after the 1994 constitution establishing the fundamental right the applicant now invokes.

The applicant and three others are in custody because of the murder of Mr Patrick Ingolo who died on the 23rd of February 2000. The circumstances in which Mr Ingolo died are not really in dispute. On the night before the assaults leading to death, Mr

Ingolo and his wife were arrested by the applicant's servants stealing maize from the applicants garden. The applicant fled. His wife was arrested immediately. Both the applicant's affidavit in support of the application and the Attorney General's affidavit in opposition to the application accept that on that night the applicant's wife was assaulted severely in the applicant's house. The next day the deceased surrendered himself to his arrestors to release his wife. The assailants beat the deceased severely using sticks. The deceased died later that afternoon.

The applicant requests bail on two grounds. Foremost the applicant depones that he is not guilty of the crime. He contends that he was not one of those who assaulted the deceased. The deceased was in his house. He buttresses this on the ground that the police released him and only rearrested him. The others remained in custody since. He cannot understand why one year later the police rearrested him and charged him of this crime. He contends his arrest could only be explained on a different ground, a political one. He depones that his arrest could be political because it is alleged he uttered certain words against the Presidents bid for third term. He contends that his arrest was in retaliation for the utterances. He contends these utterances, which he admits to have made, were taken out of context and misunderstood. Those behind his arrest could only have arrested on that misunderstanding. He contends therefore that he should be released on that account.

Miss Chimwaza the Deputy Chief State Advocate does not deny the applicants earlier arrest. The Deputy Chief State Advocate seems not to have addressed her mind to that factual aspect. She contends however that there was no political influence on any aspect of the subsequent arrest. She depones that at the applicants house it was the applicant, the applicant's wife, Magret Kawinga, Justin Edward, George Allan and Rashid Wilo who assaulted the deceased. She contends that there is evidence to connect the applicant with the crime. There is an affidavit in reply to the Deputy Chief State Advocate's affidavit. Mr Makhalira relies on a newspaper report in the 'Malawi News' the 1st to the 2nd of March 2003. The newspaper report mentions the applicant's arrest. Mr Makhalira however relies on a report by the police officer to the Malawi News that it was Wilo and another who committed the crime.

If the nature and quality of the evidence is important, as I suspect it is, to the question whether or not to grant bail, on the affidavit's before me there is sufficient basis to refuse the bail application. Starting with the applicant's contention that the subsequent arrest could only have been on political grounds, the affidavit evidence does not support such a contention. The deceased and his wife stole from the applicant's garden. The applicant's servant arrested the deceased wife. The deceased's wife was taken to the applicant's house. The applicant's servants allegedly beat the deceased's wife. In the applicant's affidavit there is no suggestion about whether or not the applicant participated in hitting the deceased as to explain the applicant's involvement or lack of it in this crime. The lacuna is covered by the Deputy Chief State Advocate who suggests that there is evidence, including evidence from the deceased's wife, that the applicant and others

committed the crime. Of course, the applicant contends otherwise. There is however material on which this court, when considering whether to grant bail, may regard.

Neither is the applicant's contention the police released him earlier of real significance. It might very well be, as applicant contends, that the previous release points to his innocence. It could very well be that, at the earlier release the evidence the prosecution now has connecting the applicant with the crime was not available to the prosecution then. In those circumstances it will be difficult to suggest certainly that the earlier release only points to innocence. At the end of the day, if the nature of the evidence is fundamental to deciding whether or not to grant bail, the court is bound to consider the material before it, both from the applicant and the state, and decide whether on that material the court should or should not grant bail.

As I said earlier the Attorney General opposes application. The Chief State Advocate relies on the case of Zgambo v Republic MSCA Cr App No. 11 of 1998, unreported. This is a decision of the Supreme Court of Appeal, binding on this court. The Chief State Advocate argues before me that this application should fail because the applicant is charged with murder. She submits on the authority just cited, that, because this is a serious case and is in fact punishable with death, this court should grant bail only on proof of exceptional circumstances. She cites the statement of Banda CJ., at page 5 and 6 of the unreported judgment. In that case the Hon the Chief Justice relied on a previous Supreme Court of Appeal decision of Lunguzi v the Republic , MSCA Cr. App. No. 1 of 1995, unreported. In the Lunguzi case the Chief Justice said;

"Murder apart from treason, is the most heinous offence known to the law. The punishment for murder under our law is death. The law of this country has always been that it is rare, indeed unusual, that a person charged with an offence of the highest magnitude like murder should be admitted to bail. From our perusal of cases from other jurisdictions, it is clear that this is also the law in most common law jurisdictions. The general practice in most Commonwealth countries is that the discretion to release a capital offender on bail is very unusual and is rarely exercised, and when it is done, it is only in the rarest of cases and only on proof of exceptional circumstances."

Commenting on this passage the Chief Justice in Zgambo v Republic. Said:

"We would like to concur with these sentiments in this judgment and only wish to add that it should apply with equal force to other serious offences. In our view, it would not be normal practice to grant bail to persons charged with very serious offences. In our judgment, it would be highly inappropriate to turn loose on a community a person who has been accused of committing a serious offence. It would not be in the interest of justice so to do. Bail, in such cases, should only be granted where exceptional circumstances are present. This Court attempted to define what was not exceptional

circumstances in the Lunguzi case. The list there was not intended to be exhaustive. Each case must be considered on its own facts. A long period of detention before trial, per se, cannot be exceptional circumstances."

The Chief state Advocate contends that on the circumstances of this case the court should not grant bail because there are no exceptional circumstances to an offence whose punishment is capital.

Both Supreme Court of Appeal raise conceptual and practical problems. Of course granting bail for a capital offence has been much discussed in our courts since the case of Yiannakis v Republic Misc. Crim. Appl. No 9 of 1994, unreported. It had been suggested that bail could not be granted in capital offences. Once it was decided that bail could be granted on capital offences the problem had been to design a rule that fits all. In relation to capital offences it was suggested, following many common law jurisdiction decisions, reviewed in that case and subsequent cases, that it would only be in exceptional circumstances that a defendant, charged with a capital offence, would be released on bail. Indeed, immediately there was the very fear of inundation arising from courts having to decide at each point in time what were exceptional circumstances in which bail would be granted on capital offences. In the Supreme Court of Appeal, in Tembo v the Republic there was a divergence of opinion. Unyolo JA, as he then, was and Kalaile J.A., approved the lower courts approach premising grant of bail in capital offences on establishment of exceptional circumstances. That was not the only premise approved by the High Court. It is the other premise that was approved by Viliera J.A. Villiera J.A., thought that the test laid down in the constitution was not proof of exceptional circumstances rather the interest of justice. Subsequent Supreme Court of Appeal decisions have not approved Villiera J.A.,'s approach. Subsequent Supreme Court of Appeal decisions have approved the approach premising grant of bail on exceptional circumstances.

Of course section 42 (2)(b) of the Constitution provides that bail should be granted unless the interest of justice requires otherwise. There is however nothing in the judgments of the majority Justices of the Supreme Court of Appeal and the decisions of this Court to suggest that by the requirement as to special circumstances or the exceptional Justices ousted the test envisage by section 42 (2)(b) of the Constitution. On the contrary, what judges have been suggesting in the Supreme Court of Appeal and this Court is that, where the defendant is charge with a capital offence, the interest of justice are better served by requiring that bail should in the circumstances obtaining be granted on proof of exceptional circumstances. The courts have defined that as meaning no more than that, faced with a charge of a capital offence, bail should be granted after much circumspection. This means no more than that the court should consider all the pertinent facts given the nature of the offence and the possible sentence before granting bail. In the Zgambo case the Supreme Court of Appeal seems to suggest that that same level of circumspection attend an application for bail for any serious offence. As I have indicated, the two propositions raise conceptual, definitional and practical problems. In many ways

the propositions do not reflect scrutiny the courts invoke on the factors and circumstances around the alleged crime justifying a decision whether or not to grant bail.

In my most considered opinion the rule of thumb cannot be, where the defendant is charged with a capital offence, that the court should only grant bail on proof of exceptional circumstances. Such a rule would suggest, in my judgment, that the court, on the mere charging of the defendant of a capital offence would not investigate other matters which courts usually investigate on an application for bail. Such a rule is objectionable rule purely on the reason that, even if the defendant is charged with a capital offence, the court may, on the material before it, still release the defendant on bail if the evidence points to innocence notwithstanding that the charge is a capital offence. In deciding whether or not to grant bail, whether the offence is capital or not, courts have looked at three cardinal aspects the nature of the offence, the evidence in support of the charge and the likely sentence the court may impose on conviction. None of these considerations however are conclusive one way or the other. Each depends distinctively or conjunctively on the other. There might rise a situation where indeed, as in capital offences, the nature of the offence is of such a serious nature as merits a heavier sentence but the court actually grant bail because the evidence and the material before it during a bail application would not justify refusal of bail. The general rule in my judgment must be, at least in relation to capital offences, that a court would not grant bail unless there are exceptional circumstances where the evidence before the court is such that renders the conviction of the offender likely. For obviously if there is a conviction the punishment being capital and compulsory, the nature of the offence and the possible sentence are reasons why it would not be in the interest of justice to release the defendant on bail unless there are exceptional circumstances. The rule so stated allows the court considering bail in a capital offence to be influenced not only by the nature of the offence and the possible sentence but the quality of evidence before the court. It avoids refusal of bail on the mere suggestion in the charge that the offence and the sentence are capital.

This formulation of the rule also avoids definitional problems of a serious offence. From the standpoint of sentences the legislature prescribed where the sentence is mandatory, the offence is regarded as serious from that perspective. Where the sentence is not mandatory, the seriousness of the offence need not be based on the prescription of the crime from the legislative prescription of the sentence. The actual sentence for a serious or less serious offence, from the legislative standpoint, will depend on many factors around the crime, the offender, the victim and the public interest in the criminal process. A very serious offence, from the legislature standpoint, may be attended by laudable mitigating factors justifying a lower sentence. In my judgment, the prospect of a lower sentence may be a significant factor in granting bail even for a serious offence from the legislature standpoint, particularly if coupled with such factors as the period the defendant has been in custody, ill health, age, antecedents etc. Conversely, a less serious offence from the legislative standpoint may be attended with aggravation justifying a heavier sentence. In such a case the court would be doing the right thing in refusing bail if among other things, for purpose of conversation, the defendants period of detention is short or the prospects of a trial are good.

The principles of granting bail are, in my judgment, the same. While some circumspection is required for serious offences where the evidence points to a possibility of a conviction and a heavier sentence, this is an aspect of the general rule now given constitutional force that bail should be granted to a defendant unless the interest of justice require otherwise. When courts state that for capital offences, bail should be granted on proof of exceptional circumstances, they are only suggesting that in such offences, the risks to the interest of justice are higher when releasing a defendant on bail when the evidence shows a possibility of conviction. In requiring the defendant to be in custody till trial, courts are not undermining the defendants right to be presumed innocent till conviction. It is in the public interest that there should be a trial to determine the very question of innocence or otherwise of the defendant and justice be done if the defendant is not proved innocent. The chance or risk, not possibility, of escaping and avoiding trial where the defendant knows his guilt and the prospect of a heavy and mandatory sentence involving loss of life or liberty to the defendant, is higher. When granting bail the court must consider the prospect of the trial being abortive. The risks of an abortive trial are higher in the circumstances mentioned that is why courts, at least in relation to capital offences, where on the evidence and on balance a conviction is a possibility, require proof of exceptional circumstances. In Tembo v Director of Public Prosecutions, MSCA 1 of 1995, unreported the Supreme Court approved the following proposition from this court.

"Let me just mention as I conclude that when I say that bail in capital offences should be granted in special circumstances I am not limiting the exercise of the discretion. Article 42(2)(e) clearly creates a right to bail subject to one qualification: as justice requires. Justice requires the examination and balancing of all the circumstances in a particular case. Essentially it is the balance between the inviolable right of a citizen to liberty as long as he has not been proven guilty and the necessity to preserve law and order by prosecuting those who offend. It follows, therefore, that by insisting for proof of exceptional circumstances the courts take the view that in relation to capital offences, given the gravity of the sentence, the discretion to grant bail should be exercised with the utmost circumspection. It is not intended to create a whole plethora of decisions of what circumstances constitute special or exceptional circumstances. In one case one circumstance may not be as dominant."

This approach does not mean that courts are substituting a test of exceptional circumstances for the interest of justice, a suggestion Villiera JA, countenanced in Tembo v Director of Public Prosecutions. Even if they were, courts would be limiting, by law, an otherwise derogable right. The effect of this limitation would not, in my judgment, be an extinction of the right. The rule would not violate international human right standards. In my judgment, it is a law necessary in an open and democratic society which Malawi now is. The approach meets the interest of justice, the real consideration when deciding whether or not to grant bail.

All these decisions, however, arrived before the Bail Act 2000. The Supreme Court has yet to consider the matter after the Bail Act. One Misc. Crim. Appl. No. 195 of 2002 major decision on bail applications after the Act is the decision of this court in Leveleve v Republic. That case emphasizes the balancing a court has to undergo when granting bail.

This case turns out on the evidence against the applicant. Murder from the standpoint of the sentence Parliament prescribed is a capital offence. The sentence is mandatory on conviction. The question is whether the evidence raised before me shows a possibility of a conviction. The court once it concludes the evidence raises a possibility of conviction for the capital offence has to decide whether in the interest of justice the applicant should not be released on bail. On this latter question, the offence being capital, the court has to consider whether special circumstances, in the sense that the court has looked at the matter circumspectively, justify release of the defendant on bail.

To the first question the evidence raises a possibility of a conviction. At this stage the court is not looking at the evidence in terms of whether it is sufficient to warrant a conviction. That should properly be left to trial. The evidence is examined only to answer the question whether a conviction is possible. In this matter the deceased stole from the applicant's garden. The applicant's servants arrested the applicant's wife and detained her in the applicant's house. The servants assaulted the applicant's wife in the applicant's house. The deceased, to rescue his wife, came to the applicant's house. The applicant's servants were involved. The applicant's contention is that he was not involved. The prosecution have evidence that they will bring to the court to show that not only was the applicant involved but that he had the opportunity to commit the crime. There is evidence against this. Without evidence against it, on the face of it, a convictions is possible that is what is important now.

Once the evidence points to a possible conviction, on a capital offence, avoiding a trial is more than just a possibility. Granting bail in such circumstances should be after intense circumspection. Mr Makhalira submits that the applicant is a very respectable member in society. He should, therefore, be released on bail because he is very likely to appear for trial. This has to be considered in the light of the fact that the evidence before me there is a possibility of a conviction. In such a case, and I say this generally and not as a matter of principle, even the sage and the saint would ponder avoiding a trial if it is possible. In Leveleve v Republic Misc. App. No. 195 of 2002, unreported, this Court said;

"The power of the court to remand the prisoner and the right of the citizen to be released under section 42(2)(b) of the Constitution are not contradictory. They serve one purpose. Both facilitate the public right or interest to trial of the citizen for the crime the state suggests was committed and committed by the defendant. The appropriate choice to facilitate the trial, in my judgment, depends on deciding which of the two best serves the interest of justice subject of course to the overriding rights of the citizen to liberty and

presumption of innocence. There will be cases where the choice, bearing what was said in the preceding paragraph, is easy to make. On the one hand, remanding the prisoner will be just to the citizen and the public interest right to have the citizen tried. There will be cases, however, where that choice is, on balance, not easy to make. In those circumstances, in my judgment, the court should take the citizen's rights seriously. Where the prospect of trial are as good as or better when the citizen is released on bail than when he is remanded in custody, justice and good public policy demand that the option upholding the citizen's right to liberty and presumption of innocence should be preferred. To insist that a person be remanded to facilitate trial where the trial is possible when the citizen is at liberty would, in my judgment, be inhuman and degrading treatment under our law and a disregard of a citizen's right to liberty and to be presumed innocent unless proven guilty."

In years past, courts released murder suspects on bail bearing in mind the time spent in custody, usually very long, and the prospect of trial, normally in the distant and uncertain future. We are now reaching, it we have not reached already, where we can say with a bit of certainty when, normally a short time, a murder trial will be heard. On all these considerations, I refuse bail.

D F Mwaungulu

JUDGE