IN THE HIGH COURT OF MALAWI

MISCELLANEOUS CRIMINAL APPLICATION 61 OF 2003

IN THE MATTER OF SECTION 42 (2) (e) OF THE CONSTITUTION OF THE REPUBLIC OF **MALAWI**

AND

IN THE MATTER OF SECTION 18 OF THE CRIMINAL PROCEDURE AND EVIDENCE CODE

AND

IN THE MATTER OF CHARLES KHASU AND IN THE MATTER OF LOUIS KHASU

CORAM: D F MWAUNGULU (JUDGE)

MwakhwawaChayekha, legal practitioner, for the applicant

Kamwambi, Chief State Advocate, for the State

Chisi, official interpreter

Mwaungulu, J.

ORDER

This is an application under section 42 (2) (e) of the Constitution. The state, violating section 42 (2) (b) of the Constitution, after forty-eight hours, neither, after arresting and detaining the applicant, charged the applicant nor brought him before a court of law to be told the reasons for his further detention. There is divergence between the state and the applicants about how the applicants were at the police. The State suggests the police arrested the applicant when the

applicants arrived at the [police to report that they killed somebody stealing maize in the applicant's maize. The applicants contend that they surrendered themselves to the police when they learnt that the police were looking for them in relation to the death of the deceased. The applicant's version of events is that, their guards, who they employed because people stole maize from the garden, shouted to them that there were eight people stealing from their garden. When they went there one of them was attacked. It appears one among their number attacked the deceased. They went to the police to report about the theft and attack. They subsequently took the deceased to the hospital. The prosecution story is that the applicants, belonging to a neighbourhood watch group, ambushed the deceased and assaulted him to death. Since, their arrest, on the 9th of April, 2003, they have not been taken to court to be charged or be told reasons for their further detention.

From the state's affidavit, the Attorney General has no answer or explanation the applicants' allegation that state machinery never brought the applicants to a court of law in the 48 hours section 42 (2) (e) of the Constitution prescribes. The applicants served the Attorney General with this application on 16th April, 2003affidavit. In between that then and now, the police have neither charged the applicants nor brought them before a court of law. Later of course I will consider whether bail should be granted in the circumstances of this case. For now I should hasten to say that on the Attorney General's failure to bring the applicants before a court of law within forty-eight hours, I should release the applicants precisely for the reasons explained at length in Re Leveleve Miscellaneous Civil Application No. 195 of 2002 (unreported).

The state has had the application since, I suppose, the 16th April 2003.. Everything, given the time the state has and the proximity, the court can take judicial notice of location and cites within its vicinity, of the Director of Public Prosecution's office to the regional prosecution's office, points to a laxity undesirable for this application and the right violated. The applicants depose that the state failed within forty-eight hours of arrest and fourteen days thereafter to bring them to a court and charge or give reasons for the applicants' further detention. That is the only evidence on record.

Section 42 (2) (b) of the Constitution reads:

"Every person arrested for, or accused of an alleged omission of an offence shall, in addition to the rights which he or she has a detained person, have the right … as soon as it is reasonably possible, but not later than 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she must be released."

The section creates an inseparable right between the time and the state organs duty it. Forty-eight hours is as integral to the right as the state organ's obligations under the sections. The right is for

the State to treat the citizen as the section requires in the time specified. A fortiori a state organ violates the citizen's right and fails its duty if it brings the citizen to a court of law and charges or informs the citizen reasons for the citizen's further detention after the forty-eight hours. Barring any limitation of the right by law, there can be no defense to violation of this right.

The law, as it is now, has not limited or abrogated the right. On the contrary, the Criminal Procedure and Evidence Code, in stressing the importance of the citizen's right and the state's duty under the Constitution, requires the state to discharge that duty in other respects within twenty-four hours of arrest. The Constitution obliges our legislature to pass laws that expand and better reflect Part IV provisions. The Criminal Procedure and Evidence Code provision must be understood that way. The constitutional requirement that limitation must be by law means that no institution can by any process or power other than by law limit or abrogate rights the Constitution creates under Part IV. A state organ carrying out executive functions cannot unilaterally and arbitrarily overrun Part IV Provisions. No judicial pronouncements in this Court or in the Supreme Court abridge this specific right at common or customary law.

Conceptually and practically, the easiest right for state organs to implement is obeyed, more often, in breach. The obligations for state organs are very practical and reasonable. In other jurisdictions, England and Wales, for example, state organs have ninety-six hours to charge the citizen failing which the state organ must release the citizen. Under our Constitution the State has, within forty-eight hours, two simple options. First the state organ could charge the citizen. The assumption in the section, very obvious indeed, is that it is lawful to detain a citizen charged with an offence further, the prospect for prosecution being the sine qua non the detention would be unlawful. In many cases coming to our courts, the decision to charge the citizen can be made at the earliest and in any case within the forty-eight hours because, as happened here, the state receives the matter fait accompli. The public has arrested the citizen and brought the citizen and witnesses to the police. Even in homicide cases, if the Director of Public Prosecution's fiat is necessary, it is possible, though at times difficult, to obtain the fiat and charge the citizen in these circumstances.

Secondly, the Constitution requires, if the state cannot charge the citizen within forty-eight hours, the state to bring the citizen to a court of law, within the forty-eight hours, to be told the reasons for the citizen's further detention. Unlike at English law, the state is not obliged to release the citizen if it cannot charge the citizen. The state, under the section, can and should justify further detention because the court should release the citizen unless the interest of justice require otherwise. The section does not use the expression "in the public interest." For it is indeed in the public interest that offenders should be brought to book. It is also in the public interest however that the innocent are not detained and, if detained, detained for unnecessarily long time, only to serve the public interest in prosecuting crime. There is a potential of conflict between the public interest and the citizen's rights to liberty. The Constitution, therefore, uses the more germane expression "the interest of justice." The court must balance the interests of justice. The court must balance the public interest viz-a-viz the rights of a citizen from what is just in the circumstances.

If the public interest is predominant, the court may not have to release the prisoner. This may be the case where, to the court, the evidence is overwhelming and a trial, if expedited, the court may convict the citizen and pass a sentence resulting in longer loss of freedom. Conversely, the citizen's rights may be predominant like where to the court the evidence appears to raise just a possibility of a conviction. There, unless the court may assure an expedited or speedy trial, the balance of justice may require the court to release the citizen. In balancing the interests of justice, the court must consider many things including the public interest and the citizen's rights.

In many cases the prosecution must charge at the earliest. Where this is not possible, that further enquiries are in the process, that the defendant may interfere with witnesses, that the evidence shows a sure conviction and likelihood of a longer sentence involving loss of freedom, the nature of the offence or the circumstances in which the offence was committed, the applicant's previous conduct when released on bail, the likelihood that the defendant would commit further crimes, the likelihood that the trial may occur soon, the pace of the investigation, the applicant's cooperation in the investigation, the likelihood that the applicant shall appear for trial, the public interest in bringing offenders to justice and a citizen's right to a quick and speedy trial, are matters, not exhaustive though, courts regard in balancing the interest of justice, deciding whether to release the citizen unconditionally or on bail or deciding whether to attach conditions to a release on bail.

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.

The right under section 42 (2) (b) of the Constitution should be seen as more than a right. Like most rights, it is an ideal. In my judgment it is also a standard, a measure of the efficiency of our criminal justice system. For separation of powers and removal of arbitrariness in the criminal process, the forty-eight hour right ensures prompt judicial control and check on executive actions affecting citizen's rights. To the citizen, the forty-eight hour right affords the citizen a prompt

opportunity to assert and sample rights the Constitution creates for the citizen and test the reasonableness of the state's deprival of those rights. The framers set forty-eight hours as the efficiency standard for our criminal justice system to bring the citizen under judicial surveillance. In my judgment there are no operational problems.

If there are operational problems, they point to the inefficiency of the criminal justice system and a compromise of the standard and efficiency level the section creates. I see no difficulties in state organs implementing the forty-eight hour right. This Court will take judicial notice that no police station in the Republic is forty-eight hours away from a court of law. Even if arrested on the furthest part in the north, Chitipa, formerly Fort Hill, in forty-eight hours, the state would bring the prisoner to the southern end, Nsanje, formerly Port Herald. It matters less that the matter is one that only the High Court can try. There are four branches of the High Court, one in each judicial region. More importantly, section 42 (2) (b) of the Constitution requires the state organs bring the citizen to an impartial and independent court of law. Magistrate courts are such courts. Under the Criminal Procedure and Evidence Code, they have jurisdiction over preliminary inquiries in matters that should be tried in the High Court unless the Director of Public Prosecution issues a certificate under the Code that the matter is a proper and fit one to be tried in the High Court. Compliance with the forty-eight hour rule can be done at the minimum of cost to the state system.

State organs cannot, however, avoid constitutional duties and responsibilities under the section because of administrative or financial difficulties. The weight a democratic constitution attaches to the citizen's rights should, in my judgment, be matched with prioritising and desire to attain efficiency levels that uphold and promote rights. Any other approach results in violation of rights. Our Constitution prescribes onerous remedies for violation of rights under section 46.

In this matter, the state violated the citizen's right to be brought to a court of law within forty-eight hours. It is now fourteen days since the state violated the citizen's right. In my judgment this right cannot be atoned by bringing the citizen any time later. After the forty-eight hours there is a continuous breach of the right. The way the right is framed, a law, statutory or otherwise, cannot provide for extension without obliterating the right itself. The state, has had this notice for over seven days. On proper habeas corpus procedure, the state, under rule 54.7 of the Civil Procedure Rules, was under a duty to make an appropriate return to this court to justify the citizen's loss of freedom. The court's power on such return, as demonstrated by R v. Board of Control, ex p Rutty, [1956] 1 All E.R. 769, are ample and a court can release on an order certiorari where the grounds are suspect. The state, on the applicant's deposition, has violated the citizen's right for fourteen days. In those fourteen days, the very simple things the Constitution requires would have been done. Apart from that, there was sufficient time for the state in the seven days, more than the forty-eight hours prescribed in the Constitution, to terminate this continuous violation. Even in the time before the hearing of the summons, the state would have taken the applicant to a court of law and charged him or explain the applicant's further detention. For just the neglect to bring the applicants to a court of law in forty-eight hours, the effective remedy, in my judgment cannot be further detention, but release of the

prisoner on bail.

On whether the applicants should be released on bail in a capital offence both legal practitioners, Mr. Mwakhwawa and Mr Kamwambi, agree, correctly, in my judgment that the evidence is crucial, a view expressed recently in Re Ligomba Miscellaneous Criminal Application No. 33 of 2003 (unreported) and Re Pherani Miscellaneous Criminal Application No. 50 of 2003 and buttressed in section 4 (a) (ii) of the Bail Guidelines Act, 2000. In Re Ligomba this Court said:

"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."

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 case there is evidence to go to the jury that makes a conviction possible. There is also evidence to go to the jury on self defense or defense to property. I think this is a matter where, notwithstanding the offence is capital, I should exercise my discretion to release the applicants on bail.

Made in Chambers this 24th Day of April 2003.

D F Mwaungulu

JUDGE