Mandala Mambalasa

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS CRIMINAL APPLICATION NO. 152 OF 2008

IN THE MATTER OF SECTION 118 OF THE CRIMINAL PROCEDURE AND EVIDENCE CODE

AND

IN THE MATTER OF SECTION 42(2)(c) OF THE CONSTITUTION

BETWEEN:

CLIFFORD CHATHYOKA.....APPLICANT

AND

THE REPUBLIC .....RESPONDENT

CORAM: THE HON. JUSTICE S.A. KALEMBERA
Mr Msuku, of Counsel for the Applicant
Mrs Edith Malani, Official Interpreter

RULING

Kalembera, J

INTRODUCTION

This is an order on the applicant's application for bail. The application is brought under Section 118 of the Criminal Procedure and Evidence Code as read with Section 42(2)(e) of the Republic of Malawi Constitution. There is

an affidavit in support of the application sworn by Laton Mauya Msuku, counsel for the applicant who duly adopted it. There is also an affidavit from the State sworn by Fostino Maele, Senior State Advocate, opposing this application. However the State despite being duly served with a Notice of Adjournment did not attend the hearing of this application.

THE APPLICANTS CASE

It has been deponed in the affidavit in support of this application that the applicant is aged 18 and is married with a child aged 2 years old, and he hails from Captain Village, T/A Katunga, Chikwawa District. It has further been deponed that the applicant on or about 28th December, 2007 joined a group of people who were gathered at the premises of the sister-in-law of one George Misoya (deceased) and he joined the beer drinking. The deceased became unruly to the extent that he pulled down a urinal which was being used by the customers simply because it was constructed by him as the owner of the premises was his sister-in-law. It has further been deponed that the deceased later on went into the nearby toilet to urinate whereupon one Mr Mc Lean Captain asked him as to his wisdom in pulling down the urinal when he knew that he himself would need it at some point. Everyone at the place started making fun of the deceased and one Master Kalumbi pulled him out of the toilet. It is further deponed that the deceased picked one of the poles he had pulled down from the urinal and wanted to beat the said Master Kalumbi. The people at the place intervened and the deceased started beating anyone who came closer to him and the applicant was one of the victims. There ensued a free-for-all fight as the whole group descended on the deceased. Later the deceased left for his home and the people dispersed. Throughout the week following the incident, the applicant started receiving threats from the relations of the deceased that they would deal with him, whereupon the applicant left the village to stay with his other relations in N'gabu for his own safety. It has further been deponed that whilst at N'gabu the applicant heard that the deceased died on 10th January 2008, and he received word from his relations at Captain Village not to dare go back as the deceased's relations had vowed to take revenge on him and the said Mc Lean Captain. The police arrested Mc Lean Captain one of the people who was at the drinking place for the death of the deceased, and in or around February, 2008 he was granted bail by the High Court. It is further averred that the applicant was committed to the High Court by Chikwawa Magistrate Court and the applicant has constantly proclaimed his innocence over the death of the deceased. It is further deponed that this is a proper case for the court to grant bail to the accused on the following grounds:

i. That the applicant is only but a victim of circumstances as he is being held responsible for the deceased's death merely because of his presence at the place
ii. That the applicant is a responsible man with strong family ties and cannot abscond bail if so granted by the court
iii. The applicant cannot even speculate the possible state witnesses in the case for the State to fear interfering with the evidence
iv. The applicant is just a young man and should be protected from prison life unless on good reasons.
v. The applicant has no previous criminal record for the State to fear repetition of the same
vi. The applicant does not even know when he will be tried nor can the State give a guarantee on the same
vii. There is nothing in the interest of justice requiring continued detention of the applicant as his release cannot in any way jeoparolize his trial
viii. In any event, the applicant cannot jump bail as there is no guilty mind on him.

THE RESPONDENT CASE:

In the affidavit for the State sworn by Fostino Maele, Senior State Advocate of Private Bag 312, Blantyre it is deponed that the matters he has averred were obtained from Deputy Inspector Kasalika of Chikwawa Police. It is further deponed that the applicant was arrested in June, 2008 on allegation of causing the death of George Misoya (deceased). The deponent further states that on 28th December, 2007 the applicant and his friends were drinking beer at the deceased's sisters' place; that the deceased started demolishing a urinal that had been constructed at the drinking place to serve customers. It has further been deponed that the applicant and Mc Lean Captain tried to stop the deceased from destroying the urinal, and that the deceased took a pole and started assaulting the applicant and his friend in order to resist their intervention. It has further been deponed that it was either the applicant or Mc Lean Captain who snatched the pole and hit the deceased to death. That the applicant ran away to Lilongwe where he stayed from 28th day of December, 2007 to June, 2008 where he was arrested by the Community Police members after relatives of the deceased had seen him in Lilongwe and went to report to the police. It has further been deponed that the investigations are not over since the applicant was at large and has just been caught, and further that the applicant was at large for about six months

and chances of absconding bail are high. It is therefore deponed that the interests of justice lie in favour of keeping the applicant in police custody until the investigations are over and until his case is ready for trial. The State therefore prays that this application be dismissed.

SUBMISSTIONS

Unfortunately neither party has filed any written submissions nor skeletal arguments. It is very pertinent that the court should be assisted with well researched and enlightening submissions and skeletal arguments.

ISSUES FOR DETERMINATION

The main issue for determination is whether it is in the interest of justice that the applicant be released on bail as prayed for or that he be denied bail.

THE LAW:

The application is brought under section 42(2)(e) of the Constitution as read with section 118 of the Criminal Procedure and Evidence Code[1]. These are the main legal provisions governing the issue of bail. Section 42(2)(e) of the Constitution provides as follows:

> S.42(2)"Every person arrested for or accussed of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right–.....
>
> (e) to be released from detention, with or without bail unless interest of justice require otherwise."

Through section 118 of the Criminal Procedure and Evidence Code,[2] bail has always been available for an accused person. The current Republic of Malawi Constitution has through Section 42 (2) (e) given every person arrested, or accused of, the alleged commission of an offence the Constitutional right to bail unless the interests of justice require otherwise. Section 118 of the Criminal procedure and Evidence Code, thus provides in part as follows:

> S.118(1)"When any person, other than a person accused of an offence punishable with death, is arrested or detained without warrant by a police officer, or appears or is brought before a court, and is prepared at any time while in the custody of such police officer or at any stage of the

[1] **(Cap 8:01) of the Laws of Malawi**
[2] (Cap 8:01) of the Laws of Malawi

proceedings before such court to give bail, such person may be released on bail by such police officer or such court, as the case may be, on a bond, with or without sureties:

.....

(3) the High Court may, either of its own motion or upon application, direct that any person be released on bail or that the amount of, or any condition attached to, any bail required by a subordinate court or police officer be reduced or varied."

It is pertinent to note further the provisions of section 1 of Part 11 of the Bail Guidelines Act,[3] which provides as follows:

"Any person arrested for, or accused of the alleged commission of an offence is entitled to be released with or without bail, at any stage preceding his or her conviction in respect of the offence, unless the court finds that it is in the interest of justice that he or she be detained in custody."

It is well settled that according to section 42(2)(e) of the Constitution and more especially Section 118(3) of the Criminal Procedure and Evidence Code, the High Court has jurisdiction to grant bail to accused persons charged with any office. What is important is that the granting or refusal to grant bail must be in the interests of justice. I therefore have the requisite jurisdiction to make a determination on this application-In the case of ***Fadweck Mvahe –v- Republic***[4] their Lordships, Unyolo, CJ; Mtegha, JA; Kalaile, JA; Mtambo, JA and Tembo, JA stated as follows at page 7 of their judgement:

"Just to recapitulate, we have indicated that it is common ground that the High Court has power to release on bail a person accused of any offence including murder. We have indicated also that it is common case that the right to bail stipulated in Section 42(2)(e) of the Constitution is not an absolute right; it is subject to the interests of justice."

(See also: ***Mc William Lunguzi v.The Republic***[5] and ***Christos Demetrios Yiannakis vs. The Republic.***[6]).

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[3] Bail Guideline Act, 2000
[4] MSCA Criminal Appeal No. 25 of 2005
[5] MSCA 1995 IMLR 632
[6] 1995 2 MLR 505

It must be borne in mind that at common law the High Court has always had power to grant bail in Capital offences. In the case of ***Wilham –v- Dulton***[7], the court had this to say:

> "The court may bail for High Treason, but it is a special favour and not done without the comment of the Attorney General, and they likewise may bail for murder, but it is seldom done, and never without special reason."

In any bail determination the court has to take into considerations certain requirements in relation to the nature of the offence, circumstances of the offender etc. However the primary consideration which the court should always take into consideration is whether the accused person if released on bail will avail himself or herself for trial without fail. In the Canadian case of ***Rex –v- Hawken***[8] Chief Justice Faris, SC had this to say:

> "The question of bail is sometimes misunderstood. When a man is accused he is nevertheless still presumed to be innocent and the object of keeping him in custody prior to trial is not on the theory that he is guilty but on the necessity of having him available for trial. It is proper that bail should be granted when the judge is satisfied that bail will ensure the accused appearing for his trial."

And in the Malawian case of ***Amon Zgambo vs. Republic***[9] the Supreme Court buttressed the point thus:

> An accused is presumed by the law to be innocent until his or her guilt has been proved in a court of law and bail should ordinarily be withheld from him as a form of punishment. The court should therefore grant bail to an accused unless this is likely to prejudice the interests of justice."

In the matter at hand as has already been alluded to herein, the applicant and others were involved in a fight with the deceased, who died a few days later. The police at first arrested one McLean Captain, who was eventually granted bail by the High Court. Later, a few months down the line the applicant was also arrested, but in Lilongwe again for the alleged murder of the deceased. The respondents allege that he was at large because he was trying o avoid arrest. Is this therefore an appropriate matter where the court's discretion

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[7] (1689) Comb 111
[8] [1944] 2 DLR 116, 119-120
[9] MSCA Criminal Appeal No.11 of 1998 (unreported)

should be exercised in favour of the applicant and release him on bail? The State in its affidavit has deponed in paragraph 4(5) as follows:

> "That the circumstances of the case were as follows–
>
> .....
>
> It was either the Applicant or Mc Lean Captain who snatched the pole and hit the deceased to death."

As already stated herein every arrested or accused person is presumed innocent unless proved otherwise. Reading paragraph 4(5) of the said affidavit for the State, it is clear that the State is unsure as to who, between Mc Lean Captain and the Applicant, snatched the pole and hit the the deceased to death. This affidavit was sworn on 3rd October, 2008 and this application was heard on 20th October, 2008. At the hearing of this application the State was not represented and there was no further affidavit from the State in addition to the one being referred to herein. In that affidavit the State further deponed that the investigations were not over and that the applicant be kept in custody until the investigations were over and until the case is ready for trial.

It has been held and it is settled law that the onus is on the State to prove that it would not be in the interests of justice for an accused person to be released on bail. I have also noted though, that in the instant case the incident leading to the death of the deceased occurred on 29th December, 2007, after the death of the deceased on 10th January, 2008 one McLean Captain was arrested by the police and around February, 2008 he was granted bail by the High Court, in June 2008 the applicant was arrested for the same offence hence this application. I would want to believe that the police commenced their investigations immediately after the deceased death and that even if the applicant had been at large the investigations were still going on and even when the applicant was arrested in June, 2008 the investigations should have continued to tie up any loose ends. I do agree with my brother Manyungwa, J in the case of ***Jahid Osman Ibrahim –v- The Republic***[10] where he quoted with approval the following views of Chipeta, J in Miscellaneous Criminal Application No. 201 of 2008.

> "There are offences of varying degrees and gravity in Criminal Law. For theft of a loaf of bread or for killing a neighbour chicken, I would not expect the State to toil for days on end with investigation. For the killing of a human being I would not be so insensitive as to treat it as

[10] **Miscellaneous Criminal Application No. 20 of 2008**

> an ordinary crime, that can be investigated as easily. I tend in being arrested for being found with a vehicle that was allegedly stolen in a scenario that resulted in the death of a person and asking for bail only ten days after the arrest, and after allowing the State only two days within which it could have reacted, to the application, the applicant is being naïve about the absence of evidence from the State..... The State is entitled to reasonable time to conduct investigations and in squeezing his application for bail within ten days of his being arrested for possessing a motor vehicle that is linked to a homicide, appears to me the applicant has tried to ensure that the respondent would have nothing to offer at the hearing so that only his story can carry the day.
>
> Contrary to the way the applicant argued his application bail remains in the discretion of the court. A court of law cannot grant bail to any applicant as a matter of cause."

However the instant case can be distinguished from the two cases referred to, in that in Miscellaneous Criminal Application No. 201 of 2008 the applicant was applying for bail only ten days after his arrest, whereas in the case of ***Jahid Osman Ibrahim –v- The Republic*** the application was made within a period of less than a month the applicant had spent in custody. In the present case the applicant has applied for bail almost five months after his arrest. And the State as already indicated herein is not sure as to who between the applicant and one Mc Lean Captain caused the death of the deceased. The State has had eleven months of investigations. The incident which led to the demise of the deceased was a brawl at the drinking place. That cannot entail complicated investigations. It is therefore unfortunate that the State has not produced convincing facts before this court to demonstrate that it would not be in the interest of justice to deny bail to the accused. Although at this stage the court is not necessarily concerned with the evidence it is very important for the State to atleast give the court a glimpse of the evidence or facts in the possession of the State in order to prove or establish that it would not be in the interest of justice to have the accused released on bail. As to what is meant by "*interests of justice*" this was answered in the case of ***Rex v. Monrovin***[11] when Lord Justice Mann said:

> "Interests of justice require that there be no doubt that the accused person shall be present to take his trial upon the charge in respect of which he has been committed."

[11] **(1911) Maun LR p. 582**

In the matter at hand the applicant was at large but I give him the benefit of the doubt that he was indeed at large because he had been threatened by the relative of the deceased and not otherwise. Moreover as has already been alluded to herein his colleagues Mc Lean Captain who was arrested earlier than him was already granted bail by my learned brother, Twea, J in Miscellaneous Criminal Application No 44 of 2008. It is therefore my considered opinion that the State has failed to discharge its burden to prove that it would not be in the interest of justice to grant bail to the applicant and I consequently grant the prayer by the applicant and release him on bail on the following conditions:

i. The applicant do bind himself in the sum of K10,000 not cash
ii. That the applicant to furnish two satisfactory sureties to be bound in the sum of K10,000 each not cash
iii. That the applicant should be reporting to his nearest police station once every fortnight on Fridays
iv. That the applicant should not leave his place of abode without permission of the Officer In-charge of his nearest police station.

The sureties to be examined by the Registrar.

PRONOUNCED IN CHAMBERS this 13th day of November, 2008 at Blantyre

S.A. Kalembera
JURGE