IN THE HIGH COURT OF MALALWI

PRINCIPAL REGISTRY

MISCELLANEOUS CRIMINAL APPLICATION NO. 90 OF 1997

MAGGIE NATHEBE **APPLICANT**

AND

REPUBLIC **RESPONDENT**

CORAM: MWAUNGULU, J.

Kalembela, Legal Aid Advocate, for the Applicant

Manyunwa, Principal State Advocate, for the Respondent

Mangisoni, Official Interpreter

Mwaungulu, J.

ORDER

This is an application by Maggie Nathebe for this court to order bail pending appeal to this court. The application is made under section 355(1) of the Criminal Procedure and Evidence Code. The applicant was convicted by the First Grade Magistrate at Midima of the offence of theft by a person employed in the public service. This is an offence under section 283 of the Penal Code. The First Grade Magistrate sentenced the appellant to a total term of fourteen years' imprisonments with hard labour. The applicant has appealed against conviction and sentence to this Court against the order of the Court below. She now wants this Court to release her on bail pending that appeal.

In her appeal she raises three grounds. She contends that the trial magistrate misdirected himself on the burden of proof placed on the appellant in rebutting the charge of theft by public servant. Secondly, she urges that the trial court erred in law in admitting the evidence of prosecution No.4, detective constable Mwale, which was unreliable and inconsistent. Finally, she says that the trial magistrate wrongfully dismissed the evidence of the appellant which tended to prove

that she was not the only one who had access to her room in which the money missed. The appeal is not for consideration now. The grounds of appeal had to be introduced to deal with the matters that are taken into account on applications for bail pending appeal.

The applicant has filed an affidavit in which, apart from laying information and grounds on which the application should be granted, she has reproduced her grounds of appeal. In the affidavit she contends that the application should succeed because the appeal is likely to be allowed because the court below misdirected itself on the burden of proof. It is deponed that she has been in employment for some time. She comes from a known place in Mzimba. She also contends that she has a young family. She has a husband and a son. She therefore contends that this court on these facts should release her on bail.

It is idle to suppose that in this discourse I can improve on the statement of the principle on which bail pending appeals can be made. The good work has been done by fellow Common law judges in England. That principle has been accepted by this Court first by Chatsika, J., in**Pandirker v. Republic**, 1971-72 6 ALR (M) 204, although that was not a case of bail pending appeal. That was a case of stay of execution of an order of the Court below disqualifying the applicant from driving or holding a driving licence following the applicant's conviction for offences under the Road Traffic Act. This Court relied on principles applicable to bail pending appeal. The Court approved the English decisions of **R. v. Howeson**, (1936), 25 Cr.App.R. 167 and **R. v. Leinster**(Duke),(1923) 17 Cr. App.R. 147. The case was followed in this Court in a case involving bail pending appeal in **Goode v. Republic**, (1971-72) 6 ALR (M) 351. The principle has been approved by the Supreme Court of Appeal in **Chihana v. Republic**, MSCA Misc. Cr. Appl.

Where this Court or any court has to decide whether bail should be granted to the applicant who has been convicted and serving a prison sentence the real question is whether there are exceptional circumstances which would lead the Court to conclude that the justice of the case would be served by granting bail. That will be the case where prima facie there is likelihood that the appeal will succeed or where there is the risk that, by the time the appeal is heard, the applicant will have served the sentence. The latter aspect does not concern us here. The applicant is serving a sentence of fourteen years' imprisonments with hard labour. The grounds of appeal have been lodged. The record is ready. It is very likely that the appeal will be heard very soon. Neither is it significant to the application that the applicant has a family which includes their young child. Every sentence of imprisonment entails a loss of liberty that will deprive many of parenthood and consortium. If courts were to give attention to these matters all the time, they would be concerned with the plight of the offender and his relations and not the gravity of the offence and the policy behind the criminal law and process. I agree entirely with the remarks of Edwards, J., in **Goode v. Republic** that domestic matters and the good character of the applicant should not usually be the matter in this sort of application. The only matter to consider is whether prima facie there is likelihood that the appeal here will succeed.

I am assuming I am understanding the applicant's contention well, which I should, when she says

that there was a misdirection on the burden of proof. It is contended for her that on appeal the misdirection could result in the conviction being quashed. That, if correct, is enough to grant the application. The Court of Appeal in England did that in **Landy, White and Kaye v. R.**, [1981] 1 All. E.R. unreported on this aspect. In this case the factual premise on which the conviction is based is not complicated. The applicant, a civil servant received money by virtue of her employment. She traveled all the way from Lilongwe to Mulanje to pay out to other employees. She put up in a rest house. Her story is that the money was stolen in the rest house in the night. This story was rejected. The section creating the offence is section 283(1) of the Penal Code:

"Where it is proved to the satisfaction of the court that any person employed in the public service has by virtue of his employment received or has in his custody or under his control any money or other property, and such person has been unable to produce to his employer such money or other property or to make due account therefore, such person shall, unless he satisfies the court to the contrary, be presumed to have stolen such money or other property, and shall be convicted of the felony of theft."

That this section is a reverse onus provision is beyond question. There are decisions of this Court to that effect, **Thompson v.Republic**, (1971-72) 6 ALR (M) 264.The latest is**The Chief Public Prosecutor v. Chikuni**, (1991) MSCA Crim. App. No 23. In the Supreme Court of Appeal, Skinner, C.J., in **Hill v. Republic**, (1971-72) 6 ALR (M) 180, 183 said:

"It seems to us that in prosecutions of public servants for embezzlement of public monies or misappropriation of public property the intention of the legislature was to put the burden on the accused to prove his innocence. This was done in 1963 by an amendment to the Penal Code which resulted in section 283 in its present form becoming part of the law. The formula which was used was to provide that where the State should show that the accused was a public servant and money or property which was under his control or in his custody was missing and unaccounted for - comparatively simple matters to prove to the requisite standard - the accused has to prove that he did not fraudulently take or convert the money or other property."

If this is a reverse onus provision, it has now to be considered in the light of section 42(2)(f)(iii)of the Constitution:

"Every person arrested for, or accused 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 ..... as an accused person, to a fair trial, which shall include the right ..... to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial."

There is a whole constitutional issue here as we shall see shortly. The Court below was aware of the decisions of this Court and Supreme Court on the matter. These were put to it. Although not cited, they are acknowledged in the judgment of that court. The Court below stated that the state had to prove the premise on which the presumption arises beyond reasonable doubt. In dismissing the applicant's story, the court said the applicant had not discharged her duty to rebut the presumption on a balance of probabilities. The court was therefore aware that this was a reverse onus provision and treated it as such. There could be difficulties with the application of the principles. This si for the appellant to show when the matter is being argued on the merits. Accepting that once the presumption arises the onus shifts to the defendant to show on the balance of probabilities that he did not stale the money, the burden shifts to the defendant. This provision would be a violation of presumption of innocence, a right entrenched in our Constitution.

Until our Constitution of 1994 the presumption of innocence was based on the often quoted statement of Viscount Sankey in **Woolmington v. Director of Public Prosecution**, [1935] A.C. 462, 481-482:

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defense of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

The Viscount, holding tenaciously to the sanctitity of the presumption of innocence at common law, only envisaged a statutory in-road. That statutes could override the presumption of innocence, as ably pointed out by the Deputy Chief Justice in the Supreme Court of Canada in **Rv. Oakes**, [1986] 19 CRR 308, was only justified on the supremacy of Parliament:

"With this in mind, one cannot but question the apprpriateness of reading into the phrase "according to law" in section 11(d) of the Charter the statutory exceptions acknowledged in**Woolmington** and **Appleby.** The **Woolmington** case was decided in the context of a legal system with no constitutionally entrenched human rights document. In Canada, we have temper4d parliamentary supremacy by entrnching important rights and freedoms in the Constitution."

Our legal system, much like the Canadian, is towards constitutional supremacy that is premised on judicial supremacy. This itself is based on the power of the Courts to declare acts and decisions of Government and laws as violating the Constitution. More importantly, it is the duty

of this court to ensure that the laws of the land accord with the august position now given to fundamental human rights in our Constitution. The presumption of innocence is a fundamental right under the Constitution. Laws that whittle it are now subject to scrutiny by Courts and, characteristically, will only be upheld if they are reasonable, recognised by human rights standards and are necessary in an open democratic society(**Jasi v. Republic** (1997) Cr. App. No. 64).

The questions whether the section 283(1) of the Penal Code offends the presumption of innocence and, if it does, whether the section is reasonable can only be upon evidence and argument by the State. If it is decided that the section offends, there was in this matter a misdirection on the burden of proof. I can only repeat the principles which would be applicable to this case. They are at page 332 of the case of **R. V. Oakes**:

"In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

"The fact that the standard is only the civil one does not render a reverse onus clause constitutional. As Sir Rupert Cross commented in the Rede Lectures, "The Golden Thread on the English Criminal Law: the Burden of Proof", delivered in 1976 at the University of Toronto, at pp. 11-13:

'It is sometimes said that exceptions to the Woolmington rule are acceptable because, whenever the burden of proof on any issue in a criminal case is borne by the accused, he only has to satisfy the jury on the balance of probabilities, whereas on issues on which the Crown bears the burden of proof the jury must be satisfied beyond a reasonable doubt. ... The fact that the standard is lower when the accused bears the burden of proof than it is when the burden of proof is borne by the prosecution is no answer to my objection to the existence of exceptions to the Woolmington rule as it does not alter the fact that a jury or bench of magistrates may have to convict the accused although they are far from sure of his guilt.'

Obviously the burden of proving that the limitations to the rights under the Constitution are reasonable is on the state because it wants to uphold the limitations or restrictions. The general principles of an enquiry under section 44(2) of the Constitution were considered by Dickson, C.J.C., in **R. v. Oakes** at pages 336 and 337. The Chief Justice emphasysed the importance of the

state leading evidence for the enquiry. To show that a restriction, derogation or limitation is reasonable, recognised by human rights standards and justifiable in an open and democratic society, the purpose of the limitation must be of such paramount importance to justify the restriction. Moreover, even if a purpose is identified, the means chosen must equally be justified. This involves a proportionality test, as was pointed out by Dickson, C.J.C.. There are three aspects to the proportionality test. First, the measure adopted must have a reasonable relationship with the objective of the limitation. Secondly the measure adopted must impair as little as possible the right in question. Finally there must be a proportionality between the effects of the limitation and the objective which the limitation intends to achieve.

The applicant's explanation has to be looked in terms of the burden of proof as generally understood should the State fail to satisfy the court that the limitation is reasonable.

As I mentioned at the beginning, the record is ready and it is with this Court. The grounds of appeal are also with the Court. The appeal will be heard not far from now. In fact I am setting the case to be heard before me on 30th April,1998. This is a matter on which there should be an address by the Attorney General and probably amicus curie from the Human Rights sector. I therefore refuse bail

Made in open Court this 31st Day of March, 1998.

D. F. Mwaungulu

JUDGE