IN THE HIGH COURT OF MALAWI

MISCELLANEOUS CRIMINAL APPLICATION 195 OF 2002

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

AND

IN THE MATTER OF SECTION 16 (6) (a) (i) OF THE STATUTE LAW (MISCELLANEOUS PROVISIONS) ACT

THE REPUBLIC

VERSUS

THOMAS LEVELEVE

CORAM: D F MWAUNGULU (JUDGE)

Chayekha, legal advocate, for the applicant

Kamwambi, Chief State Advocate, for the State

Nthole, official interpreter

Mwaungulu, J.

ORDER

This is an application under section 16 (6) (a) (i) of the Statute Law (Miscellaneous Provisions) Act for violation of Part IV provision 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. The public on 27th October, 2001, arrested the defendant and brought him to Mikolongwe police station. The applicant, soon after arrest, made a statement to the police denying the murder the police arrested him for. It is now ten months since the arrest. The state has neither charged him of the offence he was arrested for or any other offence nor brought him to a court of law for the court deal with him under the constitutional provision.

The state has had the application since, I suppose, the 26th of July 2002. Mr. Kamwambi, the Chief State Advocate, informs the court that he failed to contact the regional prosecution office and police station to verify the information around the applicant's arrest to enable him to argue the matter fully. He was the first to admit, however, that seeking such information would necessitate adjournment of the application. He thought, correctly in my judgment, that such adjournment was unnecessary. He submitted, however, that since this was just a habeas corpus application, it was in the public interest that this Court should give the state reasonable time to comply with section 42 (2) (b) of the Constitution. He further submitted that such a course is the proper one because, in the event that the information from the regional prosecution office is that the applicant was in fact brought before a court of law, the order of the court would be inane.

The state's request for further time to comply with section 42 (2) (b) of the Constitution must be based on not appreciating the nature and the purpose of the right that the 1994 Constitution creates, the consequences of its violation and the mechanism for limiting or abrogating the right. Of course, the state probably has no information on which to argue the application. 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 applicant deposes that the state failed within forty-eight hours of arrest and ten months thereafter to bring him to a court of law to be charged or be informed reasons for his further detention. That is the only evidence we have on the record. For the time the state has had since the application, the request here, on the face of it sincere and innocuous, must seem, to all fair-minded citizens, unusual.

Section 42 (2) (b) of the Constitution is worded as follows:

"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 duty it creates for state organs. The forty-eight hours is as integral to the right as the obligations the section creates for the state organs. The right is for the citizen to have the treatment the section requires within the time

specified. The duty is for the state organ to treat the citizen in the manner prescribed within the time stipulated. A fortiori a state organ violates the citizen's right under the section and fails its duty under the section 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 defence 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 from that perspective. 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, this is the easiest right for state organs to implement. The easiest right 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 ten months 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 ten months. In those ten months, the very simple things the Constitution requires, things which the state now wants time allowed for, 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. The applicant should be released on bail on his own bond for K5,000 and three other sureties on bonds of the like sum. He should appear at the police station near his place of residence fortnightly.

Made in Chambers this 9th Day of August 2000.

D F Mwaungulu

JUDGE