IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Miscellaneous Criminal Application Number 62 of 2003

IN THE MATTER OF AUSTIN NANKWENYA
AND
IN THE MATTER OF SECTION 42 (2) OF THE CONSTITUTION OF MALAWI

AND

IN THE MATTER OF HABEAS CORPUS

CORAM: DF MWAUNGULU (JUDGE)
Chirwa, Legal Practitioner, for the applicant
Nayeja, Senior State Advocate, for the respondent
Nthole, official court interpreter

Mwaungulu, J.

ORDER

Austin Nankwenya, who as we speak is in detention for the murders of Winesi Musika and Stanford Mponde on the night of the 17th and 18th March 2000, applies for habeas corpus. Although Austin Nankwenya applies under section 42 (2) of the Constitution, under the Statute Law (Miscellaneous Provisions) Act, this Court can, on a habeas corpus application, release the detainee on bail. In Jasi v Republic, Cr.App. Cas. No. 64 of 1994, unreported, this Court thought that the procedure for enforcing rights under the Constitution, the Constitution itself providing no specific procedure, is supplied by the general law of the land. The Statute Law (Miscellaneous Provisions) Act empowers this Court to handle writs of habeas corpus and provides, in Rules made under it, the procedure. Consequently, the applicant wants this Court to release him immediately or be brought before a court to be dealt in accordance with the law.

The applicant bases his habeas corpus claim on that the State, as it should, has not brought him before a court of law within the forty-eight hours the Constitution prescribes. The applicant thinks that in that case, the State having violated his right, he should be released immediately or on bail. He contends he should be released on bail because he suffers a disease, which though not terminal, cannot be attended to properly when he is ion custody. The state opposes the application because of the nature of the allegation against the applicant.

The applicant's detention arises in the following way. Around the date of the crime there were many thefts at Mini Mini Tea Estates in Mulanje. Security officials at the tea estate rounded up a few suspects, including the two deceased persons. The suspects, it appears, were severely assaulted. The two died of the injuries sustained. All security personnel involved in the assaults are arrested for the homicide. This includes the applicant. The applicant deposes he was absent during the assault. The Attorney General, who, as we have seen, opposes the application, deposes that the applicant, and there are many witnesses to that effect, was one among them that assaulted the suspects who survived the onslaught and the deceased persons who died from it.

This Court would avoid the difficulties it faces in cases like the present, cases where by just commitment to adherence to the right and the process the Constitution establishes injustice would be avoided, if the Attorney General carefully considered this Court's decisions in Re Leveleve Misc.Cr.Appl. 195 of 2002, unreported, and Re Ligomba Misc. Cr.Appl. 33 of 2003, unreported. One would expect that after these decisions, there would be no repeat of what happened here. The situation leaves the Court in the insidious position of balancing rights against the public interest and the interests of justice. That balancing becomes obviously precarious and unpleasant where state organs undermine rights they, under the Constitution, are obligated to uphold and promote. The levity state organs show about their obligations under the Constitution must be met by, as this Court said in Republic v Palitu, Cr.App. Cas. No 30 of 2001, unreported, 'taking rights seriously.'

In Re Leveleve this Court emphasized that the forty-eight hour rule is more than a right or ideal. It is a measure of the efficiency of efficiency of the Attorney General's office and the Ministries of Home Affairs and Justice.

"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."

The section initially creates a duty on state organs to within forty-eight hours, not an ungenerous time, to investigate the crime and charge him if there is a case and release him if the investigations prove innocence. The section, where the investigations cannot establish guilt or innocence, requires the state organ to within the time nonetheless to bring the citizen to a court of law so that the citizen can be told reasons for his further detention. In Re Leveleve this Court said:

"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."

In Re Leveleve this Court explained the scope of the right under the forty-eight hour rule obligating state organs to within the time bring the citizen to a court of law to be charged or told reasons for his further detention. This Court lamented that the simplest right under the Constitution to uphold and implement is, more often, obeyed in breach. This Court said:

"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. . . 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."

This Court in Re Leveleve also suggests that further detention without charging the citizen and failing within forty-eight hours to bring the citizen before a court of law to be told reasons for further detention is an inexcusable violation of a right protected under the Constitution:

"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."

Habeas corpus is a prerogative process for securing a subject's liberty by presenting an effective way of immediate release from unlawful or unjustifiable detention in prison or private custody. "The provisions made by the law for the liberty of the subjects,'' said Lord Denman, C.J., in R v Earl Ferrers (1758) 1 Burr 631, "have been found for ages effectual to an extent never known in any other country through the summary right to the writ of habeas corpus." The jurisdiction of habeas corpus is the illegal detention, whether criminal or civil, of a subject. Under the constitutional provision being considered detention after forty-eight hours without charging or telling the subject reasons for further detention is illegal and enforceable by habeas corpus.

The police arrested the applicant for this offence in March 2000. The state organ has not brought the applicant to a court of law to be charged or told reasons for further detention for over there years now. This is oppressive and a flagrant disregard of a subject's right under the Constitution. Of course the state accuses the defendant of a serious crime, murder. The seriousness of the offence is the more reason the state organ should be more circumspect. The seriousness of the offence is no justification for overriding the subject's rights protected by our Constitution. The detention, as we have seen, is illegal. The detention is, however, for a crime. Where the detention is illegal but for a crime the release of the subject on a habeas corpus application is not a matter of course. The court has to consider releasing the applicant on bail. The authors of Halsbury

Laws of England: Crown Proceedings and Crown Practice, 4th ed., Vol. 11 para. 1463 say:

"If it is doubtful whether the act is a crime or not or . . . if appears to be a crime but a bailable one, the court may bail him."

The applicant produced to this Court a medical report on his health. The applicant suffers from Tuberculosis and Pneumonia. The medical assistant advises that for this disease the applicant need not be in prison because the diet is poor. The state distinguishes this matter from Re Gwazantini Misc.Cr.App. 11 of 2002, unreported, because the applicant was terminally ill. The decisions of this Court and the Supreme Court are to the effect that sickness per se is not a sufficient reason for granting bail. I agree with Miss Nayeja, Senior State Advocate, that the sickness is not terminal and, for an offence of the seriousness attributed to the offence under consideration, as this Court stressed in Re Ligomba, the court has to regard other considerations. The evidence, on the test laid in Re Ligomba, raises the possibility of a conviction. The public interest for a subject's trial has to compete with the subject's right to liberty and a right to a speedy trial also guaranteed by the Constitution. In this matter the proper course is to refuse bail and assure a speedy trial. I order that the matter be heard on the 15th December 2003.

Made in Chambers this 19th Day of September 2003.

D F Mwaungulu

JUDGE