



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL APPEAL NO. 177 OF 2008
(Being Criminal Case No. 151 of 2008 at the Chief Resident Magistrate
Court)**

BETWEEN:

**PAUL JAMES.....1ST APPELLANT
JOHN LIMBANI.....2ND APPELLANT
SHAIBU ABUDU.....3RD APPELLANT**

- AND -

THE REPUBLIC.....RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA
Mr Tembenu, of Counsel, for the appellants
Miss Phillipo, Senior State Advocate, for the State
Mrs P. Mangisoni – Official Interpreter

ORDER

Manyungwa, J

INTRODUCTION:

This is an appeal by the three appellants herein namely Paul James, John Limbani Banda and Shaibu Abudu against the order of the Senior Resident Magistrate sitting at Blantyre in refusing to grant bail to the three appellants. The 1st appellant who hails from Saiwa Village, T/A Makwangala, Ntcheu District, the 2nd appellant who hails from Mkumbe village, Traditional Authority Kadewere in Chiradzulu District and the 3rd appellant who hails

from Juma Village, Traditional Authority Maganga in Salima District were all charged in the lower court with the offence of being found in possession of Indian Hemp without permit or licence contrary to Regulation 19(1) as read with Section 4(a) of the Dangerous Drugs Act. It was alleged that the three on the 22nd July, 2008 at Namiwawa in the City of Blantyre were found in possession with Indian Hemp weighing 864.40 kgs without licence or permit.

Trial commenced at the Blantyre Magistrate Court on the 24th of July 2008 where all the three appellants pleaded not guilty to the charge. The three then, through Counsel Mr Kamkwase, applied for bail whose ruling was then reserved for the 25th July, 2008. When the court reconvened on the said 25th July, 2008, the Senior Resident Magistrate Court refused to grant bail to the three appellants on the grounds that the amount of the hemp was huge and also that the maximum punishment is life imprisonment. The magistrate therefore ruled that it was therefore likely that the appellants, if granted bail, would abscond their trial. It is against this holding that the three appellant have lodged the current appeal.

THE LAW:

Section 42(2)(e) of the Constitution provides for the release of an arrested or accused person from detention with or without bail. The said section provides:-

S42(2) “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 to;
(e) to be released from detention with or without bail subject to the interest of justice”.

Bail has been defined in the case of

Amon Zgambo V Republic¹ as sureties taken by a person for the appearance of an accused at a certain time and place to answer a criminal charge. The conditions of the recognisance as respects the surety are performed by the appearance of the accused at the trial. Thus, the paramount consideration by a court of law before deciding to grant bail to an accused or not is whether it is likely that the accused if granted bail, would appear at his trial to answer the charge. If the answer is in the negative, then of course bail would be withheld. If on the other hand it appears that it is likely that an

¹ **Amon Zgambo V Republic** MSCA Criminal Appeal Number 11 of 1998

accused shall avail himself or herself for trial, then bail should not be withheld as a form of punishment. The requirements of bail therefore are merely to secure the attendance of the accused at his trial and the test is whether it is probable that the accused will appear to take his or her trial.

As I said the lower court in the instant case refused to grant bail to the appellants citing the amount of the Indian hemp involved and the fact that the offence attracts a heavy punishment. It must be appreciated however that the onus of showing why it would not be in the interest of justice to release an accused on bail rests with the state. In the case of *Fadweck Mvahe V Rep*² the Malawi Supreme Court has clearly stated the law that it is for the State to show why it would not be in the interest of justice to release an accused on bail. This is what their Lordships, Unyolo, CJ, Mtegha LJ, Kalaile LJ, Mtambo LJ and Tembo LJ said in their judgement at page 2.

“Coincidentally, it will be seen from both the *Lunguzi and Zgambo* cases that the issues the courts, in those two cases said constitute exceptional circumstances and which the accused person is required to prove, are the very issues this court, in agreement with the holding in the *Tembo Case*, is saying the State must prove in, support of its objection to bail being granted. With respect, this latter approach in our view makes good sense. It is trite that he who asserts the existence of something must prove the same. If the State asserts that it would not be in the interests of justice that the accused person be granted bail, then it follows, on the principle just stated that the State must give reasons in support of the assertion”.

In my considered opinion no such reasons were given by the state in the court below to support the assertion that it would not have been in the interest of justice to release the three appellants on bail, as the onus was on the State. Further, the court did not seem to have considered and answered the question as to whether the state had discharged this burden placed on it according to the *Fadweck Mvahe*³

Consequently, I allow the appeal by the three appellants and I grant them bail on the following conditions:

CONDITIONS

² *Fadweck Mvahe V Republic* MSCA Criminal Appeal Number 25 of 2005

³ *Fadweck Mvahe V Republic* (supra)

1. Each of the three appellants to surrender their travel documents, if any, to the Officer In – Charge, Blantyre Police
2. Each of the three appellants to be bound in the sum of MK20,000.00 cash
3. Each of the three appellants to be reporting to the Officer In – Charge Blantyre Police Station on Mondays and Fridays before 4 pm until the matter is concluded at the Blantyre Magistrate Court
4. Each of the three appellants to produce two reliable sureties each of whom shall be bound in the sum of MK40,000.00 not cash
5. Each of the three appellants not to leave Blantyre District without first informing the Officer In – Charge Blantyre Police Station as to their intended destination and the likely duration of their stay.

The sureties are to be examined by the Registrar.

Pronounced in Chambers at Principal Registry this 28th day of August, 2008.

Joselph S. Manyungwa
JUDGE