MALAWI JUDICIARY

IN THE COURT OF THE CHIEF RESIDENT MAGISTRATE SITTING AT BLANTYRE

CRIMINAL CASE NO. 1143 OF 2023

BETWEEN

WILLIAM BILDERBURG----------APPLICANT

-AND-

THE STATE----------RESPONDENT

CORAM: **Msokera, CRM**

Tambulasi, Gondwe, Maele, Chipembere, Maliwa, of counsel for the Applicant

Chisanga, of Counsel for the Respondent

RPO Kaputa, for the Respondent

Sibande-Phiri, Court Clerk/ Official Interpreter.

RULING

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1. The applicant in this matter is so desirous to gain his liberty back such that this is his fourth time to knock on the doors of justice for us to swing them open so that he should be released from custody on bail. In the last three applications, the prosecution consistently objected to his applications on the ground that the applicant is man who should not be trusted with his liberty as he is likely to use it as an opportunity to evade trial by leaving the jurisdiction. Yet, now they do not only offer no objection to his application but also pray together with him that he should be released from custody on bail.

2. The basis of the reapplication is that the applicant claims that the state has received communication from Venezuela that he is not a wanted person. This to him is a change of circumstances which shows that he is not or is no longer a flight risk and therefore must be released from custody on bail.
3. The response of the prosecution is an admission that Venezuela has deleted the red notice it raised with INTERPOL. Here is what the Principal State Advocate has deponed in his affidavit:

> *'5. **THAT** I am reliably informed by Interpol through a memo, NCB CARACAS 7174 dated 30th November, 2023 discharging a red notice, and was addressed to NCB, Lilongwe and a letter from the Office of the Director of CID, confirming the discharge of a red notice. I attach the Memo from Interpol, marked as SC 1, and a letter from the office of the Director of CID, marked SC 2.*
>
> *6. **THAT** the development entails that the Applicant ceases to be a flight risk.*
>
> *7. **THAT** I agree with the defence that the circumstances of Applicant have indeed changed, necessitating his release on court bail.*'

4. We cannot help it but marvel at how both the applicant and the state have reasoned and arrived at the conclusion that the applicant has ceased to be a flight risk. Our reasons in our previous rulings were clear. We never at all denied the applicant his application on the basis that there was an existing red notice with INTERPOL. In fact, our finding was pointing to the past and not the present existence of a red notice. This is what we held in paragraph 26 of our first ruling:

> *'Without attempting to determine whether the applicant was as at the date of the application herein still on Interpol's wanted list, the court finds as a fact that the 1st applicant herein was listed on the Interpol's wanted list in 2017. This shows that at some point in his life, the 1st applicant was an internationally hunted person. This is why we do not think that it is in the interest of justice to hand back to such a person his freedom pending conclusion of investigations or trial when it has been demonstrated that he is capable of obtaining a Malawian citizenship identification and passport while at the same time having a South African passport. And it is our view that attaching conditions to prevent him from leaving the jurisdiction is likely to be a futile exercise.'*

5. Clearly, our previous determinations on bail had nothing to do with the current status of the red notice. We are, therefore, surprised that both the applicant and the prosecution are in agreement that there has been a change of circumstance necessitating the release of the applicant from custody on bail.
6. It is even more disturbing to see the applicant, who through counsel, vehemently denied of there being any INTERPOL's red notice against him, now submitting that the non-existing red notice has been deleted. We wonder, how can that which did not exist be deleted?
7. Some would think that because the prosecution does not object to the current reapplication for bail, then the court, as a neutral referee in an adversarial proceeding, cannot do otherwise but to grant the application. While we admit that the *sports referee* metaphor does help the unlearned to easily understand the role of the court, we find it an inadequate representation of the solemn business of judging. The trivialities of commercial sports are aimed at winning for the sake of winning and entertaining people. But court business, especially in criminal trials, is not aimed at finding the winner. We seek to convict the guilty and acquit the innocent.

8. We know that sometimes the factually guilty person does sneak through the nets of procedural and evidential rules and is pronounced to be legally innocent. That happens because the criminal justice system is yet to discover a way of absolutely ascertaining the past. But it is never the intention of our system that the guilty person should thus escape. That is why in our jurisdiction we adhere to '*the principle that substantial justice should be done without undue regard for technicality…*' (section 3 of the Criminal Procedure and Evidence Code).

9. In bail applications, the court's duty is to determine whether the right of the accused to be released from custody with or without bail does not collide with the interests of justice. The interest of justice is to see to it that the guilty are brought to book and that the innocent are not convicted. It is impossible to achieve this goal when an accused person evades trial. This is why an accused person who is proved to unlikely attend trial must seldomly be released from custody with or without bail. And in the present application, we fail to agree with the parties that the applicant is now a man who is likely to attend his trial. Our position remains the same as held in our three previous rulings. There is no change of circumstance, whatsoever, necessitating the release of the applicant from custody on bail.

10. Before we conclude, we must express our concern with the way this application has been handled by the bar. We do not think that the bar is incompetent. We think that the bar is deliberately putting the interests of the applicant ahead of the interests of justice. This is contrary to counsel's duty to the court. And it is more worrying when the prosecution decides to participate in such an approach to the administration of justice.

11. If counsel for the applicant were acting in earnest and in good faith as the officers of the court, they would have never brought this application. If the prosecution were objective and acting in the interest of the Republic, which it is their duty to serve, they would not have agreed with the applicant in the circumstances of the present application.

12. Even if we must use the inadequate metaphor of sports and referring, the comparable conduct of the bar seems to us akin to match fixing, an attempt to make the referee preside over a mere sham and cheat the spectators that what they are experiencing is real competition. We may forgive sportsmen for this but, except for plea bargaining, not so the gentlemen and ladies of the bar in a criminal trial.

13. We must emphasise that public confidence in the authority of the court is undermined where the court is made to rubberstamp illogical decisions which do not reconcile with the law and the facts. This is why we refuse to take part in such an exercise. We refuse to be a referee that is blind to the interests of justice. On the authority of section 9 of Part II to the Schedule of the Bail (Guidelines) Act, notwithstanding the fact that the prosecution does not oppose the granting of bail, this court, having weighed up the personal interests of the applicant against the interests of justice, deny the application.

14. For the sake of maintaining a sound perception of justice, we must confess that we find it conflicting for us to continue presiding over this trial. We do not believe that given our foregoing comments on the bar, a reasonable person would believe and maintain the view that we will remain impartial and not prejudiced against the applicant. Not that we will fail to be impartial as a matter of fact, but that the perception of partiality may likely be entertained. For that reason, we proceed to recuse ourselves from the trial of this matter. The Principal Resident Magistrate is hereby assigned to continue presiding over the trial.

15. Any party that is not satisfied with the determinations herein has a right to appeal before the High Court by filing a notice of appeal with that court within 10 days from the date of pronouncement.

DELIVERED at BLANTYRE in open Court on **15th** day of **December, 2023**

C.H. Msokera
CHIEF RESIDENT MAGISTRATE
