IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CRIMINAL APPEAL NO, 11 OF 1998

(Being High Court Miscellaneous Criminal Application No. 128 of 1998)

BETWEEN:

AMON ZGAMBO ……..... ……..APPELLANT

and

THE REPUBLIC …… ……..RESPONDENT

BEFORE: **THE HONOURABLE THE CHIEF JUSTICE**
THE HONOURABLE MR JUSTICE UNYOLO, JA
THE HONOURABLE MR JUSTICE MTEGHA, JA
Limbe, of Counsel, for the Appellant
Kamwambe, Chief State Advocate, for the Respondent
Ngaiyaye (Mrs), Official Interpreter/Recorder

JUDGMENT

Banda,CJ

This is an appeal against the order of the lower Court which refused to grant bail to the appellant.

The .appellant satnds charged with murder, contrary to section 209 of the Penal Code. The facts, which are apparently not denied, are that the accused, who was working as a guard for ADMARC, shot dead a person who was allegedly suspected to be an armed robber. Initially, the shooting' wa's regarded as justifiable homicide, on the ground that the appellant was defending his employers' property, and 'consequently the appellant was granted bail by the police. On 12th January 1998, the State decided to charge the appellant with murder and his earlier bail was cancelled. The first formal application for bail-was made on 23rd January 1998, and it came before Kumitsonyo, J. The application was refused on the ground that there were no exceptional circumstances to entitle the appellant to bail. Mr Limbe,, Counsel for the appellant, submitted that the learned judge was influenced in refusing to grant bail by the undertaking which the State had given, namely, that the appellant's trial would be expedited. After four months, a second application for bail was made on 27th May 1998, and it came before Chimasula Phiri, J. Bail was again refused on the ground that no exceptional circumstances were present. The third application for bail was made on 25th September 1998, and it came before," Twea, J. Bail was also refused. It is against this last -refusal for bail,, that this appeal is made to this Court.

Five grounds of appeal were filed. In arguing the appeal, Mr Limbe argued grounds 2, 3 and 4 together. The main thrust of Mr. Limbe's submission is that the learned judge erred in 'not placing -due weight on the fact that the prosecution did not object to the bail and that the lower Court placed undue weight on the fact that the appellant had been committed for trial in the High Court. Mr Limbe contended that this reliance on committal proceedings greatly prejudiced the appellant's bail prospects. Mr Limbe further contended that the learned judge misdirected himself in failing to consider similar cases which were cited to him and in which bail was granted.

There has been a sharp rise in the number of applications for -bail in the recent past, both in the Magistrate's Courts and in the High Court. There does not, however, appear to be a consistent approach in- the manner in which these courts have dealt with such applications. We would, therefore, like to taKe the opportunity which this case has presented, to give some guidance on the principles which courts should bear in mind in dealing with bail applications. It is hoped that we should be able to achieve a consistent and uniform approach if courts follow those principles.

Bail is defined as sureties taken by a person for the appearance of an accused person 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 his trial,. The surety may seize the accused if he has reasonable belief that the accused is about to abscond and may take him before a court. The surety must be of sufficient ability to answer for the sum in which he is bound. A person who has been indemnified by an accused is not acceptable as his surety.

The right to bail is enshrined in the Malawi Constitution. Section 42(2)(e) of the Constitution provides that every person arrested for, or accused of, an offence shall, among other rights which he or she has as detained person, have the right to be released from detention with or without bail unless the interests of justice require otherwise. This Court observed in **MacWilliam Lunguzi v. The Republic, MSCA Criminal Appeal No. I of 1995**, that section 42 (2) (e) does not create a new right. The right to bail has always been available to. an accused person and that all that the. above-mentioned section really does is to give the right to bail. constitutional force. We would also like to repeat, with emphasis, what this Court said in the **Lunguzi** case, that section 42 (2) (e) does not create an absolute right to bail. The question whether or not bail should be granted is in the discretion of the court, and it will refuse to grant bail to an accused if it is satisfied that the interests of justice so require.

It is to, be observed that once a person has been charged with an offence, he is expected to be prosecuted for that offence, and the law requires that the accused shall be available to stand his or her trial until the case has been concluded.) accused is presumed by law to be innocent until his or her guilt has been proved in court and bail should not ordinarily be withheld from him as a form of punishment." The court should, therefore, grant bail to an accused, unless this is likely to prejudice the interests of justice.

The requirements of bail 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. The determination of this issue involves a consideration of other issues such as theseriousness of the offence, the severity of the punishment in the event of a conviction, and whether the accused has a permanent place within the jurisdiction where he or she can be located.

The Court will take into account the 'issue of whether there are reasonable grounds for believing that the accused, if released on bail,,. will tamper with witnesses or interfere with the relevant evidence or otherwise obstruct the course of justice. The determination of this issue will involve a consideration

of other related issues such as whether the accused is aware of the identity of. the witnesses and the nature of their evidence, whether the witnesses have already made their statements to the police or whether the case is still under investigation, whether the accused is related. to the witnesses and whether it is probable that they may be influenced or intimidated by him or her. The Court will also consider whether there is a reasonable likelihood that if released on bail, the accused will commit further offences.

The Court should consider the interests of both the accused and the prosecution. .. The court should consider whether the accused will be greatly prejudiced if he continues to be remanded in custody. This will again involve the consideration of issues such as the period the accused has already spent on remand, the period he is likely to spend on remand before the trial is concluded; the cause for the delay in completing the trial and whether or not the accused is partly or wholly to blame for the delay; the difficulties the accused might encounter in seeking legal assistance or in effectively preparing for his or her defence if he or she is to be kept in custody. The health of the accused is also a relevant issue to be taken into account. The court should decline to grant bail where it is satisfied that the accused's safety will be in jeopardy if granted bail These are only some of the factors. The **Lunguzi** case, supra, the case of **Tembo and Others v. The Director of Public Prosecutions, MSCA Criminal Appeal No. 16 of 1996** and the Namibian case of **S v. Acheson 1991 (2) SA 805** are instructive on this aspect, and as **Mohamed, AJ,** stated in the Acheson case, some of these factors and considerations will be more weighty than others, depending on the circumstances of a particular case.

This brings us to another point. This Court stated in the **Lunguzi** case that the discretion to grant bail in cases involving more serious offences must be exercised with extreme care and caution. The Court went on to say that with regard to capital offences, *it is on v in, rare cases and on v on proof of exceptional circumstances* that the Court will grant bail. The Court put it this way:

> *"Murder, apart from treason, is the most heinous offence known to the law. The punishment for murder under our law is death. The law of this country has always been that it is rare, indeed unusual, that a person charged with an offence of the highest magnitude like murder should be admitted to bail. From our perusal of cases from other jurisdictions, it is clear that this is also the law in most common law jurisdictions. The general practice in most Commonwealth countries is that the discretion to release a capital, offender on bail is very unusual and is rarely exercised, and when it is done, it is only in the rarest, of cases and only on proof of exceptional circumstances."*

We would like to concur with these sentiments in this judgment and only wish to add that it should apply with equal force to other serious offences. In our view, it would not be normal practice to grant bail to persons charged with very serious offences. In our judgment, it would-be highly inappropriate to turn loose on a community a person who has been accused of committing a serious offence. It would not be in the interest of justice so to do. Bail, in such cases, should only be granted where exceptional circumstances are present. This Court attempted to define what was not exceptional circumstances in the Lunguzi case. The list there was not -intended to be exhaustive. Each case must be considered on its own facts. A long period of detention before trial, per se, cannot be exceptional circumstances.

The other matter we would like to touch on relates to the procedure to be followed in the case of a subsequent application, or subsequent applications, for bail. A Court is not bound to ' entertain an application for bail where it has been previously refused unless it is satisfied that there had been a material change of circumstances. But where there has been a change of circumstances from an earlier

unsuccessful application for bail, the correct procedure is to bring a fresh application before the same court, or another magistrate or judge of the same court. And, where the circumstances have not changed, the correct approach is to proceed by way of appeal, setting out the grounds upon which the lower court is alleged to have erred.

After laying down what we consider to be the' principles which should guide courts in bail applications, we must now apply these principles to the case before us. Bail, as we have already observed, is discretionary, and it is up to the court after hearing parties, to consider, after applying the test, whether bail should be granted or refused. The fact that the prosecution has no objection to bail does not take away the discretion which must always remain with the court. The court will of course take into account the views of the prosecution but they are not decisive. Indeed, as we have already pointed out, section 42 (2) (e) of the Constitution has not given an absolute right to bail. The section still reserves the right to the court which must refuse bail if it is satisfied that the interests of justice" otherwise require.

In our view, the learned Judge in the lower Court was perfectly entitled to consider, as one of the factors, the fact that the applicant had been committed to the High Court for trial. That consideration, in our judgment, did- not prejudice the accused s application for bail nor did it offend against the presumption of innocence of the appellant. We have carefully considered the submission which Mr Limbe has made to the Court, and in view of the principles which we have outlined in this judgment, we are satisfied that the learned Judge in the lower Court'. was right to refuse bail. There were two previous applications of bail before two different judges and all had refused bail. There had clearly not been any material change in the circumstances from what they were before the other two judges. The period of one year which the appellant has spent in custody while waiting for his trial cannot constitute exceptional circumstances.

We would, therefore, dismiss this appeal in its entirety.

DELIVERED in open Court this 25th day of February 1999, at Blantyre.

Sgd ....
R A BANDA, CJ

Sgd ....
L E UNYOLO, JA

Sgd ....
H M MTEGHA, JA