JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL

Miscellaneous Criminal Appeal Nos 5A and 5B of 2017

BETWEEN

MCDONALD KUMWEMBE APPELLANT

AND

PIKA MANONDO APPELLANT

AND

REPUBLIC RESPONDENT

RAPHAEL KASAMBARA APPELLANT

AND

REPUBLIC RESPONDENT

Legislation

Constitution

Sections, 4, 10 (1), 10 (2), 42, 42 (1), 42 (1) (c), 42 (1) (e), 42 (1) (f), 42 (2) (1) (f), 42 (2) (e), 42 (2) (f), 42 (2) (f) (viii), 44 (1), 44 (2)

Criminal Procedure and Evidence Code

Section 2, 16, 118, 355 (1)

Criminal Procedure Rules (England and Wales)

Rule 1.2

General Interpretation Act

Section 53

Supreme Court of Appeal Act

Sections 7, 8 (b), 12, 24 (1)

Supreme Court of Appeal Rules

Order 1, rule 4; Order 1, rule 18; Order 4, rule 13(1), Order 4, rule (13) (6); Order 5, rule 1

Cases

(*Muluzi v Director of the Anti-Corruption Bureau* (2005) Civil Appeal No 17 (MSCA) (unreported)

Adeojo Nyamupfukudza v Regina (2013) EWCA 41

Adeojo Nyamupfukudza v Regina (2013) EWCA Crim 41 and

Alfred v Republic (1993) Miscellaneous Criminal Application No. 6 (MWHC) (Bt) (unreported)

Antonio Lejano v The Philippines G.R. No 176389 (Supreme Court of the Philippines

Bogere and another v Uganda (Criminal Appeal No 1 of 1997; [1998] UGHC 15 (6 July 1998) :

Bonzo v Republic (1996) Criminal Appeal Case No 89 (MWHC) (unreported)

Chihana v Republic (1992) Miscellaneous Criminal Appeal No 9 (MSCA) (unreported)
Director of Public Prosecutions v Varlack [2008] UKPC 56

Director of Public Prosecutions v. Varlack (British Virgin Islands) [2008] UKPC 56 (1 December 2008) Privy Council Appeal No 23 of 2007.

Dzole v Republic (2016) Criminal Appeal Case Non 16 (MSCA) (unreported)

Finance Bank of Malawi Ltd v Nicolaas Heyns and Nedbank Malawi Ltd (2010) Civil Appeal No 45 (MSCA) (unreported)

Gadabwali v Republic (2013) Miscellaneous Criminal Appeal No 2 (MSCA) (unreported)

Goode v Rep [1071 – 72] 6 ALR, Mal 351
Kamaliza and others v Republic [1993] 16 (1) M L R 196

Kamaliza and others v Republic [1993] 16 (1) M L R 196

Kaudzu and other v Republic (2016) Criminal Appeal No 16 (MSCA) (unreported)

Kaudzu and others v Republic (2016) Criminal Appeal Case Non 16 (MSCA) (unreported)

Kaudzu and others v Republic (2016) Criminal Appeal Case Non 16 (MSCA)

Kumuwa v Republic (2012) Bail Application No 107 (MWHC) (Bt) (unreported)

Kumwembe and others v Republic (2013) Criminal Case No 65 (MHC) (LR) *Nathebe v Republic* and *Kumuwa v Republic* (2012) Bail Application Case No 107 (MWHC) (unreported),

Kusowa v R Suleman v Republic [2004] M L R 398

Letasi v Republic (2016) Criminal Appeal Case Non 16 (MSCA) (unreported)

Mangulama v Speaker of the National Assembly, [2007] M L R 139

Mangulama v Speaker of the National Assembly, [2007] M L R 139.

Manyange v The State [2003] WHCC1:

Mbeta and others v Republic (2016) Criminal Case No 15 (MSCA) (unreported)

Mekiseni and another v Republic (2015) Criminal Appeal Cause No 14 (MSCA) (unreported)

Mekiseni and another v Republic (2015) Criminal Appeal Cause No 14 (MSCA) (unreported)

Muluzi v Director of the Anti-Corruption Bureau (2005) Civil Appeal No 17 (MSCA) (unreported)

Nathebe v Republic (1997) Miscellaneous Criminal Application No 90 (MHC) (PR)
Oluput v Uganda (Criminal Application No 160 of 2013; [2013] UGCA 22 (22 November, 2013:

Pandirker v Rep [1971 - 72] ALR Mal 204
Pandirker v Republic (1971-72) 6 ALR Mal 202
Patel v Gondwe (2015) Civil Appeal No 31 (MSCA) (unreported)

Patel v Uganda Criminal Application Case No 1 of 2003

R. v Howeson [1936] 25 Crim App R 147.
R. v. Anderson ((1991 Crim.L.R. (1991) Crim.L.R. 361;

R. v. Pearce (96 Cr.App.R. 264)

R. v. Wood (52 Cr.App.R. 74;

Rep v Mvula (2012) Criminal Appeal Number 7 (MSCA) (unreported).
Republic v Banda and others [1995] 2 M L R 767

Republic V Dr Cassim Chilumpha and Yusuf Matumula (2007) MLR 261

Republic v Mchotseni (2002) Confirmation Case No. 423 (MWHC) (Bt) (unreported)

Republic v Mvula (2012) Criminal Appeal No 7 (MSCA) (unreported)

Republic v Mzondi Mvula, Kondi Msungama, and Rashid Gaffar MSCA Criminal Appeal Number 07 of 2012

S v Smith and Another, (1969) (4) SA 175, 177 (N)

S v Smith and Another, (1969) (4) SA 175, 177 (N),
Sipolo v Republic (2016) Criminal Appeal No 36 (MHC) (PR) (unreported)

Smith v S (CA&R 150/09) [2009] ZAECGHC 52 (18 August 2009):

Suleman v Republic [2004] M L R 398

Taipi v Republic (2014) Criminal Appeal Case No 9 (MSCA) (unreported)

The Director of Public Prosecutions Banda and others (1995) Criminal Appeal No 21 (MSCA) (unreported)

The Police v Joseph Attard (Criminal Appeal No 98/2012 (Court of Criminal Appeal, (Malta) :

The Police v Joseph Attard Criminal Appeal Number 98/2012 (the Appeal Court of Malta)
The state and 5 others ex p Right Honourable Dr. Cassim Chilumpha, [2006] MLR 433

The state and 5 others ex p Right Honourable Dr. Cassim Chilumpha, [2006] MLR 433

Uche v Republic (2015) Crim *S v Smith and another*, (1969) (4) SA 175, 177 (N)

Uche v Republic (2015) Criminal Appeal No 110 (MHC) (LR) (unreported)

Watton v R (1979) 68 Cr App R 293

Yiannakis v Republic (1994) Miscellaneous Criminal Application No 9 (MWHC) (Bt) (unreported)

Text Books

DWORKIN R Taking Rights Seriously, Bloomsbury, 1997, London, New Delhi, New York, Sydney

Words and phrases

Bail

Deems fit

Interests of justice

CORAM: D F MWAUNGULU, JA

Chipeta, for the 1st and 2nd Appellants

Msisha, SC, Gondwe, Chipembere, for the 3rd Appellant

Kachale, the Director of Public Prosecutions, Chibwana, Public Prosecutor, Malunda, Senior Assistant Chief State Advocate and Chilkankheni, Senior State Advocate

Minikwa, official court officer

Mwaungulu, J A

JUDGMENT

Précis

In this application, there is an application of McDonald Kumwembe and Pika Manondo (Miscellaneous Criminal Application No 5A of 2017) and another by Raphael Kasambara (Miscellaneous Criminal Application No 5B of 2017. The two applications were joined and heard together. The application to this Court should not, as the Director of Public Prosecutions contends, have been by way of appeal. If the applicants had appealed, they could, under Order 1, rule 18 of the Supreme Court of Appeal Rules, under section 7 of the Supreme Court of Appeal Act applied, rather than appeal, to this Court and a single member would, subject to referral to the full court, would have determined the matter. This Court would then use its management powers under rule 1.2 of the Criminal Procedure Rules (England and Wales), applicable to this Court by section 8 (a) of the Supreme Court Act. Short of that, the court would have heard the application under Order 5, rule 1 of the Supreme Court of Appeal Rules or waived the application of Order 1, rule 18 of the

Supreme Court of Appeal Rules under Order 1, rule 4 of the Supreme Court of Appeal Rules *Finance Bank of Malawi Ltd v Nicolaas Heyns and Nedbank Malawi Ltd* (2010) Civil Appeal No 45 (MSCA) (unreported); *Patel v Gondwe* (2015) Civil Appeal No 31 (MSCA) (unreported) are *per incuriam* the decisions of (*Muluzi v Director of the Anti-Corruption Bureau* (2005) Civil Appeal No 17 (MSCA) (unreported); *The state and 5 Others ex p Right Honourable Dr. Cassim Chilumpha,* [2006] MLR 433; and *Mangulama v Speaker of the National Assembly,* [2007] M L R 139; (*Muluzi v Director of the Anti-Corruption Bureau* (2005) Civil Appeal No 17 (MSCA) (unreported); *The state and 5 Others ex p Right Honourable Dr. Cassim Chilumpha,* [2006] MLR 433; and *Mangulama v Speaker of the National Assembly,* [2007] M L R 139).

There are, strictly speaking, no exceptional or unusual circumstances out there and, therefore, bail pending appeal, like bail pending trial, should, after considering all circumstances, be, and mark my words, granted or refused in the interests of justice. In so concluding, it is not that where there are special circumstances, the court would have to release a person on bail pending appeal. It is that where there are no special circumstances, it might, nevertheless, be in the interests of justice to release a person on bail pending appeal. It is also that, even if there were exceptional circumstances, the court could, nevertheless, refuse bail. The residual is where there cannot be special circumstances. The proposition that it is not in the interests of justice to release a person on bail because there are no special circumstances cannot, in principle, be correct.

First, it is because there cannot be agreement on what are and are not special circumstances. To this uncertainty, the logical conclusion is that all depends on the facts and circumstances of the case. The result of this is that certain innocuous circumstances could be special on one occasion and not on another. Conversely, very debilitating circumstances could be innocuous on one occasion and not special on another occasion. The net result is that they are not exceptional or unusual, after all.

Secondly, one can, however, envisage where, even if there are no special circumstances, it is in the interests of justice to release a person on bail. The most logical situation is where, with many circumstances, independent and not exceptional or unusual, put together, it would be in the interests of justice to release a person on bail pending appeal. It is possible to argue that in those circumstances, there is, cumulatively, special circumstances. This is a heuristic argument. The truth is that the circumstances – special or general – of the case are not the *sine qua nona* bail pending appeal would be granted. Special circumstances are not ends in themselves.

On a bail application pending appeal, the court is looking ultimately that, before the verdict is known, an order should be made in the interim – before there is a final order – that would not result in injustice or, to put it differently, that would maximize justice whatever the outcome. Expanding justice and reducing injustice when the verdict is later known is the function of bail pending appeal or, indeed, pending trial. The correct focus

for the court is that justice may be achieved and injustice avoided when a court finally determines the appeal.

Where there is a conviction and the appeal against it fails, releasing the accused person pending appeal, more especially, where the accused person has partly served sentence carries two risks. First, for the stint in prison, the prisoner, where the appeal is weak, may be motivated not to appear. The risk is alleviated – but not entirely – by stringent or taxing conditions for bail. Secondly, for section 355 (2) of the Criminal Procedure and Evidence Code, the sentence does not reduce for the time on bail pending appeal, there can be inherent injustice in delaying the sentence. This consideration, however, is inane where, by the accused person applying, it must be evident that the prisoner is willing to take the risk. Against this, however, are justice considerations where the appeal ultimately is successful and the appellant will have served the sentence or part of it, however transient.

An innocent person is entitled not to spend a day longer in prison. It is gross injustice for an innocent person to spend any time – however transient – in prison. The injustice far outweighs the injustice on a guilty person flirting away from prison for as long as it takes to determine the appeal. For an innocent person, it is onerous to prolong detention for lack of proof of special circumstances. The injustice is scarcely appeased by that an innocent person has a conviction or that the criminal process must take its course until the appeal is allowed. For this reason bail becomes a right and not a favour.

In a bail application pending appeal, just as pending trial, a court is balancing and choosing the better solution or the better evil. The court is, before a final order, balancing the interests of justice in determining whether to grant or refuse bail. That is the chief preoccupation whenever interim applications are made before a court disposes of the matter, not any less in this matter. To focus – at least, chiefly – on exceptional or unusual circumstances is losing eyes on the ball.

Facts and chronology of events for the application

In this case the applicants, appellants in the main case, appeared jointly in the Court below on two charges of attempted murder and conspiracy to commit a murder, offences under sections 223 and 227, respectively, of the Penal Code. When the prosecution case closed – this is significant aspect because, among other things, the Court focuses on it in considering releasing Raphael Kasambala on bail – the Court below acquitted Raphael Kasambala of attempted murder. The matter, therefore, proceeded against MacDonald Kumwembe and Pika Manondo on both counts as charged and for Raphael Kasambara on conspiracy to murder.

In judgment, the court makes two startling conclusions, almost gainsaying the acquittal. At page 35 of the judgment, the Court below says:

> On the charge of conspiracy to murder, the texting and calls between the tree accused persons also provide an inference of the 3rd accused giving instructions to the 2nd accused to execute the mission, the 2nd accused

> reporting to the 3rd accused periodically and getting further instructions, and the 2nd accused facilitating the commission of the crime by the 1st accused on 13 September 2013, driving him to Dedza and meeting him on 14 and 15 September 2013 to effect payment for the job done. In this regard, it can also be said that the 2nd accused was an aider and abetter in procuring and facilitating the shooting by the 1st accused and as such was a principal offender in terms of section 21 of the Penal Code.

On the same page, the Court below makes this statement convicting "all" three persons "as charged:"

> I accordingly convict all the accused persons as charged. Bail for the three accused persons is hereby revoked and they shall be remanded in custody pending sentence.

It does seem, therefore, as if Raphael Kasambala was convicted for the offence of attempted murder for which he was acquitted at the close of the prosecution case. Subsequently, before the Court below passed sentence, the applicants applied unsuccessfully to the Court below for bail pending appeal. The appellants neither appealed against the order nor applied to this Court under section 7 of the Supreme Court of Appeal Act.

At the wake of 2017, this Court passed three judgments on bail generally and bail pending appeal: *Kaudzu and others v Republic* (2016) Criminal Appeal Case Non 16 (MSCA) (unreported); *Dzole v Republic* (2016) Criminal Appeal Case No 16 (MSCA) (unreported); *Letasi v Republic* (2016) Criminal Appeal Case Non 16 (MSCA) (unreported); and *Kaudzu and others v Republic* (2016) Criminal Appeal Case Non 16 (MSC *Mbeta and others v Republic* (2016) Criminal Case No 15 (MSCA) (unreported) A); . *Letasi v Republic,* dealing with bail pending appeal, as the Director of Public Prosecutions observes, perhaps, triggered these applications. The Director of Public Prosecutions and the appellants, from the tenor of arguments think, rather curiously, that focusing on interests of justice relaxes the special circumstances rule.

The application

MacDonald Kumwembe and Pika Kumwembe on 22 March, 2017 applied for bail pending appeal. Raphael Kasambara applied separately on 24 March 2017. These applications merged on 3 April, 2017. For an elongated preliminary objection, this application was only heard in October, 2017. The preliminary application and its resolution lowered, as other matters piled, earlier enthusiasm.

The appellants' submissions

The fulcrum of the appellants' application is *Letasi v Republic*. On it, the appellants submit, for section 42 (2) (e) of the Constitution, that every person accused of a crime is entitled to be released on bail unless interests of justice require otherwise. They rely on this

statement in *Olupuf v Uganda* (Criminal Application No 160 of 2013; [2013] UGCA 22 (22 November, 2013, cited in *Letasi v Republic*:

> The question of an offender losing his right to the presumption of innocence upon conviction was settled in *Arvind Patel*'s case (supra) and this Court emphasized the same in *Mugisha*'s case (supra). To deny one bail pending appeal because one was convicted would in essence be to prematurely extinguish one's right before one's fate is finally determined by the final appellate court.

The appellants, from *Letasi v Republic*, cite this statement:

> On close reading of sections 42 (1) (f) and 42 (2) (e) of the constitution, the prisoner is an accused person entitled to bail under section 42 (2) (e) of the constitution and, therefore, subjected to the same test of interests of justice. One must, therefore, track the meaning of the words 'an accused person' and 'accused of commission of a crime' and prisoner in section 42) of the Constitution. Interpreted liberally and generally, a convicted prisoner, more especially, if the prisoner has appealed, remains an accused person for all purposes in the Constitution. Curiously, under section 42 (1) of the Constitution, a person detained includes a prisoner.
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> A prisoner is, according to section 42 (1) a person detained and, therefore, entitled to release if, under section 42 (1) (f) of the Constitution, the detention is unlawful. The words 'accused of....commission of a crime' and 'accused person occur in the body of section 42 (2) of the Constitution itself:"

The appellants submit further that section 24 (1) of the Supreme Court of Appeal Act, empowering the Supreme Court power to grant bail pending appeal, never suggests that bail pending appeal should be granted on proof of exceptional circumstances. The appellants cite this statement from *Letasi v Republic*:

> Where the application is made to the Court below based on section 24 (1) of the Supreme Court Act, the Court below will employ the test in section 24 of the Supreme Court of Appeal Act. The test is not whether there are exceptional circumstances. The test is 'if it deems fit.' ... Requiring special circumstances for grant of bail pending appeal, unless required by the statute, only restricts the otherwise wide power which section 24 of the Supreme Court of Appeal Act is. Section 24 of the Supreme Court of Appeal Act does not, where it could have, require proof of exceptional circumstances.

The appellants refer to two decisions of this Court – *Mekiseni and another v Republic* (2015) Criminal Appeal Cause No 14 (MSCA) (unreported) and *Chihana v Republic* (1992) Miscellaneous Criminal Appeal No 9 (MSCA) (unreported). In *Mekiseni and another v Republic* this Court said:

> Bail after conviction is the discretion of the court where it deems it fit.' Such admission to bail therefore is rare and only in exceptional and unusual circumstances.

In *Chihana v Republic* this Court said:

> In an application for bail pending an appeal it has to be borne in mind that, upon conviction, the applicant lost his freedom of movement. In essence, conviction is followed by punishment. The authorities have a duty to restrict, as one of the forms of the punishment, his freedom, on the basis of conviction.
>
> He no longer is a free man. Therefore, in order to grant freedom to such person whose fundamental freedom has been lost by conviction, there must exist some 'exceptional and unusual circumstances. in other words the case must be so exceptional and unusual that having regard to all the circumstances surrounding it, the court will be justified in overlooking the order for his imprisonment and make a counter order that he be released at least until his appeal has been determined."

The appellants, based on this statement in *Letasi v Republic,* submit that *Chihana v Republic* and *Mekiseni and another v Republic* were *per incuriam* section 29 of the Supreme Court of Appeal Act:

> Where, like here, a statute provides a basis for exercise of a power or discretion, the court must apply the test and not, except, perhaps, by interpretation, proffer a different test. The statute, having laid the test as "if it deems fit," the Supreme Court, in *Chihana v Director of Public Prosecutions*, could not introduce a different test, namely, "special or exceptional circumstances". In *Chihana v Director of Prosecutions,* the Supreme Court of Appeal was not defining the words "if it deems fit" as meaning "in special circumstances". Consequently, this Court could not, in my judgement, properly decide that this Court or the High Court could only grant bail pending appeal on poof of special circumstances. Introduction of the words "in special circumstances," therefore, could only be per incuriam section 24 (1) of the Supreme Court of Appeal Act and at best impermissible judicial legislation. It is introducing words in a statute. The words "in special circumstances" cannot be an interpretation of the words "if it deems fit". If they were, they would be restricting the wide and encompassing power and discretion in section 24 (1) of the Supreme Court of Appeal Act. Once a statue, like here, gives a broad power or discretion, the court cannot by interpretation or substitution through its decisions or rule of court restrict the statutory power or discretion.

The appellants quotes this further statement from *Letasi v Republic*:

> The principle that bail pending appeal should be granted only in special circumstance is constrictive and undermines the discretion and power in section 24 (1) of the Supreme Court of Appeal... Consequently, whether or not to grant bail, before, and after conviction, is in the interests of justice... A fortiori accumulation of circumstances, even if not exceptional, could in the interest of justice justify the granting of bail pending appeal. The circumstance or circumstances must be proved to exist and to, in the interest of justice, justify release of the convicted person on bail pending appeal.

The appellants also refer to this statement in *Smith v S* (CA&R 150/09) [2009] ZAECGHC 52 (18 August 2009), cited in *Letasi v Republic*:

> All bail applications are governed by the same principle, but there are differences in emphasis in cases of bail pending an appeal from cases of bail prior to conviction. For example, the presumption of innocence no longer plays a role, the prospects of success on appeal involve a different test, the risk of absconding assumes different importance, and issues of interference with witnesses or with investigations are ordinarily no longer relevant, the overriding consideration remains always the right of an accused persons in terms of section 25 (2) (d) of the Constitution to be released on bail unless the interests of justice require otherwise. Frequently, the interests of justice require otherwise.

The appellants also rely on this statement from the High Court of Zimbabwe in *Manyange v The State* [2003] WHCC1 cited in *Letasi v Republic*:

> It is trite that bail is a matter for the discretion of the court. In exercising its discretion the court considering for bail pending appeal must be satisfied that there are reasonable prospects of success on appeal and that the granting of bail will not endanger the interests of justice. This has been the approach of this and the South African Courts.

The appellants, based on this statement in *Letasi v Republic,* submit that some aspects of the Bail Guidelines Act are handy when considering whether to grant bail pending appeal:

> The expression 'interests of justice' implies that there are many and compounded and overlapping interests that conflate the pursuit of justice when considering the right to release where there should be an undertaking to give bail. Those interests are reflected in the many principles and factors now distilled in the Bail Guidelines Act. The principles are not to be overlooked; they are to be utilized. Consequently, failure to consider any of the principles or factors is error of judgment. Equally, it is error of judgment if any of these factors, in respect to a case, are exaggerated or undermined. Under the scheme of the Bail Guidelines Act the applicants and the respondent must bring

evidence and relevant information on one of them. This is to enable the court to exercise good judgment on the application.

Specifically, they submit on various aspects of section 4 of the Bail Guidelines Act. The 3rd Appellant submits that he is unlikely to abscond respond. He, as a Malawian citizen has assets, a family and a profession to protect. During trial, he submits, he attended all the proceedings and never remained outside in the three times he left. Moreover, the 3rd appellant submits, there will be no prejudice to the state if released on bail because he will attend the hearing. He will be available to serve sentence should the appeal be dismissed. He will, however, have served the prison sentence needlessly should he succeed. There is no remedy for imprisonment sanctioned by a court.

The appellants submit, additionally, that the appeal is likely to succeed. They concede that at this stage, this Court is not considering and should not consider the merits of the appeal. All that they are supposed to prove is a satisfactory likelihood of success. They quotes this statement in *Letasi v Republic*:

> In this case, while there is likelihood that the appeal would succeed, on a scale, the likelihood is satisfactory, if not less. In such a case, the court may exercise its discretion either way.

The appellant submit that there is no evidence to support the theories advanced by the prosecution on which the conviction was based. The appellants further submits that the Court below overtly assumed the role of prosecutor in the process adding flesh to the bare bones of the prosecution case.

On call logs, the appellants submit that the Court below overlooked this Court's decision in *Republic v Mvula* (2012) Criminal Appeal No 7 (MSCA) (unreported) which doubted use of call logs as implicating evidence without more pointing to the guilt of the accused. The appellants submit that the Court below misunderstood *Director of Public Prosecutions v Varlack [2008]* UKPC 56 for this decision by the United Kingdom Privy Council on an appeal from the Virgin Islands is to the same effect as one from this Court. The appellants submit that the Court below never considered whether there was evidence from the appellant to show or confirm, as was the case in *Adeojo Nyamupfukudza v Regina* (2013) EWCA 41. Conspiracy, they submit, on this statement in *Republic v Dr Cassim Chilumpha and Yusuf Matumula* (2007) MLR 261, bases on proof of conduct where inference of conspiracy is possible:

> The essence of conspiracy is agreement ... in other words the crime of conspiracy is complete when two or more agree to meet an unlawful act with intention of carrying it out. Nothing need to be done in pursuit of the agreement...

They submit that, apart from call logs, the state never proved any conduct or misconduct on which a conspiracy could be inferred. They further submitted, citing this

statement from *Republic v Mvula*, that in those conversations, as long as they are unknown, they could have discussed many and more things:

> PW4 was clear in his evidence that a call log is a log of calls. It does not disclose the contents of the calls ... The call log showed that PW1 and the respondent called each other almost every day from 14th February 2011 to 22nd February 2011. This tends to confirm what PW1 told the Court below that he and the third Respondent were business associates. It is clear that during those calls they could have discussed many more issues than what PW1 told the Court below.

Courts, the appellants submit, are reluctant to infer proof of facts from undisclosed telephone conversations. They relied on this statement in *The Police v Joseph Attard* (Criminal Appeal No 98/2012 (Court of Criminal Appeal in Malta) :

> It is inconceivable with respect to find that a person is guilty of the charges brought against that person solely on account of a co-accused having received a telephone call from the residence of that person. Not even in a Court of Civil Jurisdiction would the mere fact of a telephone call been made when the contents of that telephone call are absolutely unknown to cause a Judge to consider that such call is evidence enough to find for a plaintiff or a defendant.

The appellants contend that, the circumstantial evidence, with or without the call logs, cannot, based on *The Director of Public Prosecutions Banda and others* (1995) Criminal Appeal No 21 (MSCA) (unreported), lead to inference of guilt. The appellants also contest the decision on alibi evidence of the Court below. They, relying on this statement in *Bonzo v Republic* (1996) Criminal Appeal Case No 89 (MWHC) (unreported), submit that, the appellants having raised the premise for an alibi, it was to the state to disprove it:

> The defence of alibi in our law is just like any other defence that the defendant can raise to criminal charges. Once the premise has been laid by the defendant, the defence becomes part of the overall picture and the burden remains on the prosecution to prove the case against the defendant beyond reasonable doubt. The prosecution has to disprove the defence. This may entail calling evidence in rebuttal. Sometimes, however, all that the prosecution has to do is by cross-examination show that the defence although raised is untenable. It must never be thought that there is any burden on the accused to prove the alibi. Once the defendant raises it the prosecution must disprove it. (R. v. Wood (52 Cr.App.R. 74; R. v. Anderson ((1991 Crim.L.R. (1991) Crim.L.R. 361; R. v. Pearce (96 Cr.App.R. 264)
>
> Here the doubt must be resolved in the appellant's favour. It must be taken that the appellants had laid a sufficient premise for the alibi. It was not for the prosecution to rebut it as part of their overall burden to prove the case against

the appellants beyond reasonable doubt. The approach of the Court to the defence was erroneous.

Moreover, relying on the same case, submit, based on the following statement in *Antonio Lejano v The Philippines* G.R. No 176389, a decision of the Supreme Court of the Philippines, that the court should not have disallowed the alibi evidence because it did not believe the information in the passport:

> If one is cynical about the Philippines system, he could probably claim that Webb, with his father's connections, can arrange for the local immigration to put a March 9, 1991 departure arrival stamp on the same. But this is pure speculation since there had been no indication that such arrangement was made. Besides, how could Webb fix a foreign airlines passenger manifest, officially filed in the Philippines and at the airport in the U.S. that had his name on them? How could Webb fix with the U.S. Immigrations record system those two dates in its record of his travels as well as the dates when he supposedly departed in secret from the U.S to commit the crime in the Philippines and then return there? No one has come up with a logical and plausible answer to these questions."

The appellants charge that the Court below was not even handed in considering the evidence on the alibi. They rely on this statement in *Bogere and another v Uganda* (Criminal Appeal No 1 of 1997; [1998] UGHC 15 (6 July 1998) :

> "The passage cited earlier in this judgment shows that the learned trial judge held the defences of alibi to be unsustainable because, "through the evidence of the 4 eye witnesses the accused had been put at the scene of crime. "What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the scene of crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces, evidence showing that the accused person was at the scene of crime, and the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable. In the instance case, we have found it very difficult to avoid the conclusion that the learned trial judge considered and accepted the prosecution evidence alone, and then rejected the defence summarily simply because he had accepted the prosecution evidence. That was in our view a misdirection. Accordingly we hold, with due respect that the Court of Appeal erred in law

upholding the depth of the statement which had been arrived at pursuant to misdirection."

The appellants submit, based on *Republic v Mchotseni* (2002) Confirmation Case No. 423 (MWHC) (Bt) (unreported) that the Court below did not direct itself on the evidence of visual identification.

Overall, the appellants contend that, having established that there is likelihood that the appeal will succeed, it is in the interests of justice that they should be released on bail. They further submit that, if there is need for exceptional or unusual circumstances, they are established by their submissions and, therefore, they should be released on bail.

The submissions of the Director of Public Prosecutions

The Director of Public Prosecutions preliminarily submits that the application is misconceived. The appellants should have appealed against the refusal of bail by the Court below. Moreover, the Director of Public Prosecutions submits, the appellants, if there should have been an application, should, on Order 1, rule 18 of the Supreme Court of Appeal Rules, first have commenced these proceedings in the Court below. On the substantive application, the Director of Public Prosecution submits that, on the evidence and law, the Court below was not a foot wrong. The appeal, therefore, has no likelihood of success. Much of the Director of Public Prosecution's exertions, however, are on this Court's decision in *Letasi v Republic* that the overarching principle on bail pending appeal, like on bail pending trial, is the interests of justice.

The first point the Director of Public Prosecutions takes is that holding, as the Supreme Court of Appeal did in *Republic v Letasi,* that the right to bail in section 42 extends to those of convicted of a crime amounts to amending the Constitution. The Director of Public Prosecutions submits that section 42 specifies rights which a prisoner can have and those rights do not extend to bail – including bail pending appeal. The Director of Public Prosecution submits that section 24 of the Supreme Court of Appeal Act deals with bail pending appeal.

The Director of Public Prosecution submits that there are two (contradictory) views of this Court on section 24 of the Supreme Court of Appeal. She submits that *Letasi v Republic* is juxtaposed against *Kamaliza and others v Republic* [1993] 16 (1) M L R 196; *Suleman v Republic* [2004] M L R 398 and *Mekiseni and others v Republic* (2015) Criminal Appeal Case No 14 (MWSCA) (unreported). The Director of Public Prosecution submits that the earlier decisions should be preferred and that bail pending appeal should be only on proof of unusual and exceptional circumstances. The Director of Public Prosecution, therefore, submits that there were no unusual or exceptional circumstances in this case and this Court should not, therefore, grant bail pending appeal. Conversely, if bail is granted in the interests of justice, this was a case where the interests of justice are for refusing bail.

Reasoning

The correct spot to start, therefore, is exactly where the Director of Public Prosecution has left us, namely, that, supposedly, the decisions of this Court are contradictory. This, obviously, is a tenuous stand if one, has to understand what, for lack of a better term, I will call bail law, bail law is. From the vista of constitutional, statutory and common law, one sees a progression, not a contradiction. The decision of this Court in *Letasi v Republic* is the singular occasion where the Constitution, statutes and the common law on bail law were reviewed. It comes as no surprise, therefore, that the Director of Public Prosecution adheres to a particular position on this moving law. Admittedly, some problems are conceptual.

What is bail?

One, therefore, has to start from the definition of bail. Neither the Constitution nor legislation defines the word. Understanding the word or the concept 'bail' resolves a lot of misunderstanding about the right in the Constitution and orders that court make *suo motu* or on application. There must be a distinction between 'bail,' 'granting bail,' 'giving bail' and 'an order of bail.' Bail is an agreement or an undertaking between a suspect or prisoner and a court that, with or without conditions and with or without payment of money, that a suspect or prisoner will, at a court appointed time in the future, attend a court hearing – trial, sentence or appeal hearing. Invariably, it is the suspect or prisoner, not the court that gives bail. Section 118 (1) of the Criminal Procedure and Evidence Code captures this because it reads:

> When any person, other than a person accused of an offence punishable by death, is arrested or detained without warrant by a police officer, or appears or is brought before a subordinate court, and is prepared at any time while in the custody of such police officer or at any stage or the proceedings before such subordinate court to give bail by such police officer or such subordinate court, as the case may be, on a bond, with or without sureties.

The right to bail pending appeal from the Constitution

The agreement can be executed as a bond and whatever form it takes, it is an agreement by a person to appear. Section 42 of the Constitution, therefore, recognises this – the right to such an agreement – as a fundamental right where there is a risk of detention. So section 42 (2) (e) of the Constitution provides:

> Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the right he or she has as a detained person, have the right … to be released from detention, with or without bail unless the interests of justice require otherwise.

The right the person has in section 42 (2) (f) of the Constitution is in addition to the right he or she has as a detained person – this brings us to find who is a person detained. The answer is in section 42 (1) of the Constitution: "Every person who is detained, including every sentenced prisoner …" A sentenced prisoner, therefore, is a person

detained. The right under section 42 (2) (f), therefore, is in addition to rights that a sentenced prisoner has as a detained person. A sentenced prisoner, therefore, is also entitled to the right in section 42 (2) (f) of the Constitution to be released from detention, with or without bail, unless the interests of justice require otherwise. It is a restrictive rendition of section 42 (2) (f) of the Constitution to read it independent of section 42 (1) in the understanding of which a person detained includes a sentenced prisoner. The restriction is only plausible if, as the Director of Public Prosecution, the words 'charged' or 'arrested' of a crime in section 42 (2) relate only to a person actually arrested or charged and, therefore, relate to before conviction or sentence, a matter discussed profusely in *Letasi v Republic*.

This ordinary understanding comes from what we normally perceive of the concepts 'charged' and 'arrested.' The words must be read in context – the immediate text, which would be the section itself and wider text. In relation to the immediate text. It is significant that section 42 (1) (e) of the Constitution provides:

> Every person who is detained, including every sentenced person, shall have the right … to challenge the lawfulness of his or her detention … before a court of law.

Section 42 (2) (1) (f) of the Constitution provides:

> Every person who is detained, including every sentenced person, shall have the right … to be released from detention if such detention is unlawful.

The way, for a convicted person, to challenge the lawfulness of a detention is by way of appeal or review after conviction. It would not be a good understanding of section 42 (2) (f) of the Constitution that a sentenced prisoner, during that challenge, does not have or loses the right to be released with or without bail. The principle remains the same – in the interests of justice. Equally, it would be a misreading of section 42 (2) (f) that when a sentenced prisoner awaits the final prize – release from the unlawful detention – he has no right to be released, with or without bail. The principle remains the same – interests of justice.

Moreover, when section 42 (2) (e) of the Constitution is read with sections 42 (2) (f) (viii) and 42 (2) (f) (x) of the Constitution, the words 'accused of a crime' cannot connote pre-conviction status only. Section 42 (2) (f) (viii) of the Constitution reads:

> Every person arrested for, or **accused** of, the alleged commission of an offence shall, in addition to the right he or she has as a detained person, have the right … as an **accused person**, to a fair trial which shall include the right … to have recourse by way of **appeal or review** to a higher court than a court of first instance.

The appeal can only be post-conviction or post-sentence – the Constitution still refers to this person as a person accused or arrested for a crime. Equally, section 42 (2) (f) (x) of the Constitution provides:

> Every person arrested for, or **accused** of, the alleged commission of an offence shall, in addition to the right he or she has as a detained person, have the right … as an **accused person**, to a fair trial which shall include the right … to be sentenced within a reasonable time after conviction.

Section 42 of the Constitution, therefore, creates a broad right to release from detention that premises on being granted released with or without bail. The release can be without bail. The release can be with bail, all in the interests of justice. The Constitution does not restrict the right to post-conviction or ante-conviction. It creates a broad right.

The right to bail pending appeal under legislation

The Constitution, as foundational law, creates a broad right which legislation limits or adumbrates. In Malawi, the right to bail, at least in criminal proceedings, under the Constitution is addressed by many pieces of legislation: Section 24 of the Supreme Court of Appeal Act, sections 16, 118, 161I, 161J, 355 (1) and 359 of the Criminal Procedure Code and the Bail Guidelines Act. Section 118 of the Criminal Procedure and Evidence Code and the Bail Guidelines Act cover ante-conviction. After much hesitation, for ante-conviction bail, the governing principle for all offences, including capital punishment offences, is interests of justice.

Sections 16, 355 (1) and 359 of the Criminal Procedure and Evidence Code and section 24 of the Supreme Court of Appeal Act cover post-conviction bail. Section 16 covers bail for when a magistrate court, after conviction, remits the case for sentencing to the High Court. Sections 161I and 161J of the Criminal Procedure and Evidence Code (discussed in this Court in *Taipi v Republic* (2014) Criminal Appeal Case No 9 (MSCA) (unreported); *Gadabwali v Republic* (2013) Miscellaneous Criminal Appeal No 2 (MSCA) (unreported); *Kaudzu and other v Republic* (2016) Criminal Appeal No 16 (MSCA) (unreported); *Mbeta and others v Republic* (2016) Criminal Case No 15 (MSCA) (unreported). Section 161I of the Criminal Procedure and Evidence Code provides:

> At the expiry of a custody time limit or any extension there of , the Court may of its own motion or on application by or behalf of the accused person or on information by the prosecution, grant bail to an accused person.

Section 161J of the Criminal Procedure and Evidence Code provides:

> Nothing in this Part shall preclude an accused person in lawful custody from otherwise applying for bail under any other law during the subsistence of a custody time limit.

Section 355 (1) of the Criminal Procedure and Evidence Code provides:

> Subject to this Code, neither a notice of intention to appeal given under section 349 nor a petition of appeal under section 350 shall operate as a stay of execution of any sentence or order, but the subordinate court which passed the sentence or made the order, or the High Court, may order that any such sentence or order be stayed pending the hearing of an appeal and, if the appellant is in custody, that he may be released on bail, with or without sureties, pending such hearing.

Kumuwa v Republic (2012) Bail Application No 107 (MWHC) (Bt) (unreported) discusses at length section 355(1) of the Criminal Procedure and Evidence Code.

For our purposes, it is noteworthy that the right to bail pending appeal in section 355 (1) of the Criminal Procedure and Evidence Code is not a standalone right. It is part of the broader right to stay of execution of a sentence. Under section 355 (1) of the Criminal Procedure and Evidence the principal question is whether the sentence – imprisonment or any other sentence should be stayed. The principles for staying execution of a sentence are yet to be developed – because applications have been for bail pending appeal. Section 359 of the Criminal Procedure and Evidence Code. Section 359 of the Criminal Procedure and Evidence Code provides:

> The High Court may in its discretion in any case in which an appeal to the Supreme Court of Appeal has been filed grant bail pending the hearing of an appeal.

Apart from section 355 (1) of the Criminal Procedure and Evidence Code, the Criminal Procedure and Evidence Code creates and grants no – courts, because of the definition of court in section 2 of the Criminal Procedure and Evidence Code, the Code applies to – power to grant bail pending appeal. Subordinate Court powers to grant bail, including bail pending appeal, can only be statutory – not inherent. The High Court has, in addition to section 359 of the Criminal Procedure and Evidence Code, inherent power to grant bail – including bail pending appeal in civil and criminal proceedings (*Yiannakis v Republic* (1994) Miscellaneous Criminal Application No 9 (MWHC). Under section 355 (1) of the Criminal Procedure and Evidence Code, both a subordinate court and the High Court can stay execution of a sentence and, after doing so, release the prisoner on bail.

The statutory principle for granting bail pending appeal

The High Court, however, has concurrent jurisdiction with the Supreme Court of Appeal to grant bail pending appeal. Section 24 (1) of the Supreme Court of Appeal Act provides:

> The Court may, if it deems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.

The words "the court" refer to the Supreme Court of Appeal, not the High Court. Order 4, rule 13 of the Supreme Court Rules presupposes such power to the High Court:

> Where the Court or the Court below admits an appellant to bail pending the determination of his appeal on an application by him duly made …

Section 24 of the Supreme Court of Appeal Act itself prescribes the test: this Court may grant bail pending appeal where "if it deems fit". Section 359 of the Criminal Procedure and Evidence Code gives the High Court a broad discretion – 'in its discretion.' Neither section 359 of the Criminal Procedure and Evidence Code nor section 24 of the Supreme Court of Appeal Act, therefore, have the words in "special or unusual circumstances." "Special or unusual circumstances" are judicial creation – of long pedigree – only that in its introduction into Malawi common law the notion of justice in its original formulation was emasculated or overlooked.

Bail pending appeal in judicial pronouncements

In the Court below it surfaces in *Pandirker v Republic* (1971-72) 6 ALR Mal 202. In this Court, may be worded radically different, it is in *Chihana v Republic* (1992) Miscellaneous Criminal Appeal No 9 (MSCA) (unreported). This Court in *Chihana v Republic* cited *Pandirker v Republic.* The history of the rule is covered by *Nathebe v Republic* (1997) Miscellaneous Criminal Application No 90 (MHC) (PR) (unreported):

> It is idle to suppose that in this discourse I can improve on the statement of principle on which bail pending appeals can be made. The good work has been done by fellow common law judges in England. That principle has been accepted by this Court first by Chatsika, J. in *Pandirker v Rep* [1971 - 72] ALR Mal 204, although that was not a case of bail pending appeal….The court relied on principles applicable to bail pending appeal. The court approved the English decision in *R. v Howeson* [1936] 25 Crim App R 147. The case was followed in this Court in a case involving bail pending appeal in *Goode v Rep* [1071 – 72] 6 ALR, Mal 351. The principle has been approved by the Supreme Court in *Chihana v Rep* MSCA Crim App No. 9 of 1992 where this Court or any court has to decide whether bail should be granted to the applicant who has been convicted and serving a prison sentence the real question is whether there are

'exceptional circumstances' which would lead the court to conclude that **the justice of the case** would be served by granting bail.

R. v Howeson cited in *Pandirker v Republic* was decided in 1936 and limited bail pending appeal to exceptional circumstances. In 1979 *Watton v R* (1979) 68 Cr App R 293 was decided. This passage underscores the interests of justice, 296:

> Mr Blom-cooper drew our attention, very properly, to appendix F and a portion of paragraph 5 thereof, which runs as follows: 'In appeals from the Crown Court, however, bail can be granted only by the Court of Appeal and this is rarely done. We would wish to see some relaxation of the principles laid down by the Court of Appeal relating to the granting of bail only where it appears prima facie that the appeal is likely to be successful or where there is a risk that the sentence will have been fully served by the time the appeal is heard.' ... We think that is a correct formulation of the law ... and the true question is, are there exceptional circumstances, which would drive the court to the conclusion that justice can only be done by the granting of bail? The law has not altered." The law has not altered. The law is as it was. Exceptional circumstances are the test and the decision of the single judge is only one of the many matters which the Court must take into account when reaching its conclusion on that difficult matter.)

The Court below in *Pandirker v Republic* and *Republic v Goode* could not account for the interests of justice principle in *Watton v R* – decided much later. The Court below, in subsequent decisions (*Alfred v Republic* (1993) Miscellaneous Criminal Application No. 6 (MWHC) (Bt) (unreported) *Kamaliza and others v Republic* [1993] 16 (1) M L R 196; *Sipolo v Republic* (2016) Criminal Appeal No 36 (MHC) (PR) (unreported); *Uche v Republic* (2015) Criminal Appeal No 110 (MHC) (LR) (unreported) and *Kumwembe and others v Republic* (2013) Criminal Case No 65 (MHC) (LR), despite *Nathebe v Republic* and *Kumuwa v Republic* (2012) Bail Application Case No 107 (MWHC) (unreported), never accounted for the interests of justice principle in *Watton v R* . This is despite that the principle of interests of justice in *Watton v R* was accepted by the Supreme Court of Appeal in 2004 when *Suleman v Republic* was decided. *Chihana v Republic* cites *Watton v Republic* on a different matter and not on the interests of justice principle. Most certainly, this Court in *Chihana v Republic* should, in resorting to the common law of England, have accounted for the latter expression of the rule in *Watton v R*. That this Court did in later decisions: *R Suleman v Republic* [2004] M L R 398; *Kusowa v Republic* (2015) Criminal Appeal No 9 (MSCA) (unreported). The Court below in decisions earlier mentioned overlooked the synergy between exceptional circumstances and justice.

It is for failure to account for the principles in *Watton v R* that the expression of the rule in *Chihana v Republic* is rather problematic:

> The case must be so exceptional and unusual that having regard to all the circumstances surrounding it, the court will be justified in overlooking the order for his imprisonment and make a counter order that he be released at least until his appeal has been determined.

From this statement, it is quite clear that *Chihana v Republic* is not, as the Director of Public Prosecution contends, authority for the proposition that on bail pending appeal there must be proof of exceptional circumstances. The statement quoted focuses on the case and stresses that it is the case that must be exceptional or unusual. Judicial pronouncements of a principle are not to be interpreted as statutes.

Most certainly by focusing on that an order for bail would be countering an earlier order of sentence, this Court was undermining the essence of section 24 (1) of the Supreme Court which allows bail pending appeal precisely because there is a conviction or a sentence. The approach to an earlier order of a sentence should not have been what it was, namely, that bail should base on that there is such an order. The correct approach is at the end of the statement from *Watton v R* quoted earlier, namely, in granting bail, the judgment is one among – not the sole or important – considerations.

A further examination of the judicial statement in *Watton v R* followed in subsequent decisions of this Court demonstrates five aspects. First, it is true that there must be exceptional circumstances. Secondly, special circumstances are not an end in themselves. Thirdly, it does not follow that if there are exceptional circumstances, it is the end of the story. Fourthly, exceptional circumstances which conflate to it being just to release the prisoner on bail that are critical, urgent and exigent. It can be said, therefore, without any fear of contradiction, that, ultimately, in granting bail, because of the preponderances and uncertainties of a hearing or appeal, courts do what they usually do – determine interim measures that serve justice.

The exigence of justice, which is central to the common law formulation of the law on bail pending appeal, is lost in judicial pronouncements that isolate exceptional circumstances from justice which they serve. The pristine formulation of the law correctly expressed the paramountcy of justice and properly located special circumstances. If there is any problem with the principle – that bail pending appeal bases on proof of exceptional circumstances – it is that, wittingly or unwittingly, the centrality of justice is emasculated. The focus, therefore, has been trying to define or list exceptional circumstances – to the exclusion of the justice that they serve. The exercise has actually been problematic – ignoring the foundational principle, we come to it shortly.

At *nius prius* and now on appeal, either there has never been established any exceptional circumstance or all circumstances have been exceptional. The reported and unreported cases are littered with rejection of whatever has been thought to be exceptional.

Consequently, it has been 'rare' that bail pending appeal has been granted. It is this rarity that, as we have seen, caused relaxation from the exceptional circumstances test of yore and countenance it to (interests) of justice. On the other hand, other decisions seem to suggest that the exceptional circumstances are that the case has a prospect of success and likelihood that the accused will appear for the appeal. Consequently, either there are no exceptional circumstances or there has to be a redefinition of what they are. This Court recognised the problem in *Tembo and Others v Director of Public Prosecution*:

> Observably, it was the accused person who was required to show such "exceptional circumstances". But these are not magic words. As was correctly observed by Mwaungulu, Ag. J., in the *Yiannakis* case, what is really meant by "proof of exceptional circumstances" is that in relation to serious offences such as capital offences, in exercising its discretion whether or not to grant bail, the court should weigh the total facts carefully and, to put it in the learned Judge's own words, "with the utmost of circumspection". ... Before I pass on to the next point, let me emphasize that the expression "exceptional circumstances" is not a term of art and in this regard the fact that an accused is a sickly person or that he is a respectable member of his community or the fact that he has a possible strong defence to the charge laid against him could, in my view, constitute "exceptional circumstances" within the meaning just discussed, so as to entitle the court to grant bail'; it all depends on the facts of the particular case.

The Supreme Court seems to resign to that most factors would exceptional circumstances that we are prepared to admit.

From judicial statements, the interests of justice is a foundational principle

This Court in the same case introduced the notion of a foundational principle for all cases where, like here, a court is exercising a power, albeit on appeal, based on statute. It in *Tembo and others v Director of Public Prosecutions* approved this statement in *S v Smith and Another*, (1969) (4) SA 175, 177 (N), a South African case:

> The general principles 'governing the grant of bail are that, in exercising the statutory discretion conferred upon it, the court must be governed by the foundational principle, which is to uphold the interests of justice; the court will always grant bail where possible, and will lean in favour of, and not against, the liberty of the subject, provided that it is clear that the interests of justice will not be prejudiced thereby.

It is a constitutional foundational principle

It should be added that this is a constitutional and statutory foundational principle. Constitutional because the Constitution actually in section 42 creates an overarching fundamental right to release – for any person detained, including a sentenced prisoner – with a complementary and contiguous right to be released with or without bail. Section 42 pegs both aspects of the right to interests of justice. This right – with its stress on interests of justice – is to inform any legislation or judicial pronouncement vide sections 4, 10 (1) and 10 (2) of the Constitution.

It is also a statutory foundational principle

In *Letasi v Republic* this Court referred to Order 4, rule 13 of the Supreme Court of Appeal Rules to confirm that the Court below, like this Court, has jurisdiction to grant bail pending appeal – on the deems fit principle. What was not said is in Order 4, rule 13 (6) of the Supreme Court of Appeal Rules:

> At any time after an appellant has been released on bail, the Court, or where the appellant was released on bail by the Court below, that Court, may, if satisfied that it is in the interests of justice so to do, revoke the order admitting to bail …

Of course, this is subsidiary legislation and dealing with after bail has been granted. It, however, underscores what the words 'as deems fit' in section 24 (1) of the Supreme Court Act comports – it is not in the interests of justice when revoking the bail pending appeal, it is interests of justice through and through. The judges have sensed it after *Chihana v Republic* which, in following *Pandirker v Republic* – based on *Howeson v R* that limited the consideration to exceptional circumstances – overlooked the interests of justice principle.

It is a judicially foundational principle

Letasi v Republic should not be understood as disavowing earlier decisions. It should be understood as systematically extracting a principle that emerges from the common law of Malawi along the common law of other jurisdictions. *Letasi v Republic* draws from certain decisions of the Court below and this Court which, unlike *Chihana v Republic,* draw attention to the centrality of the interests of justice. In this respect *Letasi v Republic* and other decisions of this Court conform to internationally decided cases which, as we have seen, should inform interpretation of section 42 of the Constitution by this Court which, as we have also seen, must invoke the Constitution when interpreting laws made under the Constitution – such as section 24 of the Supreme Court of Appeal Act. It is important to note that *Chihana v Republic* was decided by this Court before the 1994 Constitution. As we have seen, however, the interests of justice consideration was part of

the common law of England – where we drew the exceptional circumstances principle. The jurisprudence there evolved. Subsequent decisions of this Court embraced the interests of justice principle from the wider common law – but this principle is statutorily and constitutionally founded and foundational.

Legislation and judicial pronouncements are subject to section 42 of the Constitution

Consequently, legislation and judicial pronouncements are subject to section 42 of the Constitution. As to legislation, all legislation on bail law must as, under section 8 of the Constitution – be laws where "values expressed or implied in this Constitution are furthered by the laws enacted." The notion of interests of justice is an expressed value for bail law and, if not, implied for all bail law. Under section 10 (2) of the Constitution, the common law cannot develop without incorporating the interests of justice in any bail law. The legislature in the Bail Guidelines Act has, in relation to bail pending trial, incorporated the constitutionally founded principle. Consequently, section 118 of the Criminal Procedure and Evidence Code is affected by the Bail Guidelines Act. Under section 355 (1) bail is contingent on stay of execution of a sentence. The interests of justice question does not arise. Equally, the power in section 16 is purposive – but subject to interests of justice. Under section 161I and 161J of the Criminal Procedure and Evidence Code bail is granted automatically at expiry of the prescribes time and extension of time. Section 24 (1) of the Supreme Court of Appeal Act, on the face of it, does not seem to embrace the principle of interests of justice.

If does not embrace the interests of justice principle, section 24 (1) of the Supreme Court of Appeal Act is a limitation – by law – on the right to bail under section 42 of the Constitution. Section. As a limitation, it has to pass the constitutional muster in sections 44 (1) and 44 (2) of the Constitution. Section 24 (1) of the Supreme Court of Appeal Act was passed on I January, 1964. It precedes the Constitution of 1994. It is, nevertheless, because of the Constitution, made under the 1994 Constitution.

Curiously, all Supreme Court of Appeal judgments, prior to *Letasi v Republic'* except, *Mekiseni and another v Republic*, never refer to section 24 (1) of the Supreme Court of Appeal Act. They go everywhere in the common law of Malawi and without but our legislation and Constitution. There are, however, conceptual problems in the decision of this Court where section 24 (1) of the Supreme Court of Appeal Act was considered.

This Court in *Mekiseni and another v Republic* said four things that need analysis. First, this Court said that, after conviction, a prisoner has no right to bail. That is a broad and bold statement. First, the right is constitutional. The Constitution in section 42 (1) (c) and (d) gives a right to a person detained, including a sentenced prisoner, to challenge the lawfulness of his or her detention and a right to be released when the detention is unlawful. One way of challenging the lawfulness of the detention where there is a conviction and sentence is by appeal or review. Section 42 (2) b (f) of the Constitution confer such a right

on a convicted person and section 42 (2) gives such a person a right to bail. Secondly, section 355 (1) of the Criminal Procedure and Evidence Code and section 24 (1) of the Supreme Court of Appeal Act are illustration of the statutory right. The right, therefore, if not constitutional, is statutory. Thirdly, of course, the rights is in the discretion of the court. That, however, does not negate the right. Sixthly, this Court tried to get something of both worlds.

This attempt created a fit problem. This Court was trying to marry unsuccessfully the statute and the principles by this Court that were created without regarding the 'as deems fit' principle of section 24 (1) of the Supreme Court Act and 'in its discretion ' in section 359 of the Criminal Procedure and Evidence Code. Section 24 (1) of the Supreme Court Act provides that bail pending appeal will be granted as a court deems fit. Supreme Court of Appeal decisions, based on the common law, said bail pending appeal, avoiding the interests of justice concept inherent in the common law formulation of the principle, will be granted on proof of exceptional circumstances. *Letasi v Republic* demonstrates that marrying the two principles has a fit problem. Bail pending appeal should, therefore, base on the wider discretion in section 24 (1) of the Supreme Court Act and section 359 of the Criminal Procedure and Evidence Code. Requiring usual and exceptional circumstances obfuscates the discretion and the right – that is impermissible. Under this principle, the overarching and constitutionally foundational principle that bail should be refused or granted in the interests of justice is part of the principle or influences it.

In coming to this conclusion, I am not a modernist as the appellants perceive me. The invitation to regard me as a DENNINGITE is luring. Lord Denning (1899 -1999) said:

> What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both.

Neither am I a non-conformist as the Director of Public Prosecution understands me. I am not as non-conformist as Lewis J, quoted in *Patel v Uganda* (Criminal Application Case No 1 of 2003):

> In that case Sheridan J (as he was) did not agree with what Lewis J said in an earlier case, in which Lewis J had ordered …the old rule as to "special circumstances" was from a harsher age and I am for a more humane approach.

As we have seen, the Court in *Watton v R* was like-minded. It meant to relax the harsh rule of usual and exceptional circumstances. The interests of justice predates my assertions. I cannot even suggested that I discovered it – I probably perfected it. Three previous judgments prior to *Republic v Letasi* accepted the Watton approach – interests of justice approach.

My conclusion bases on a systematic examination of judicial decisions since 1938 to 2018 viz-a-viz the Constitution and legislation in the prism of internationally decided cases that should inform our understanding of the right of release and bail in section 42 of the Constitution. One gem principle pervades this discourse: bail pending appeal will be refused or given in the interests of justice. There will be occasions where it is not in the interests of justice to release a prisoner on bail; there will be occasions where it is in the interests of justice to refuse release. Then there are situations in between. In the last scenario, courts will lean towards the liberty of a subject – taking rights seriously. It is the policy of the law and a broad constitutional principle that justice should protect liberty.

Is there a matter to go to appeal?

How this foundational principle works practically is a critical question. It is here where just looking for exceptional circumstances could result in injustice. The reason why earlier decisions pegged exceptional circumstances to justice was precisely to avoid a situation where, exceptional circumstances, present, there could be injustice either way. The principle, therefore, operates in an external rule and internal rule.

The first question, the external or exclusionary rule, therefore, is: is there a matter to go to appeal? This rule is intended to exclude those whose appeals on conviction or sentence or both would not succeed. The matters to consider are in section 12 of the Supreme Court of Appeal Act:

> The Court shall allow tan appeal under section 11 if it thinks that the judgment appealed against should be set aside –
>
> (a) On the ground that it cannot be supported having regard to the evidence;
> (b) On the ground of a wrong decision of any question of law; or
> (c) An any ground that there was a miscarriage of justice'
>
> and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that fact that it is of the opinion raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

If, on balance, the appeal may not succeed, there is no injustice to the prisoner in refusing bail. It is in the public interest and in the interest of justice that offenders are brought to book and, where necessary, immediately. Immediate imprisonment fulfils the deterrent and confinement goals of sentencing.

If on balance, therefore, the case may succeed, it is obvious what the injustice will be. For the innocent, even a day in confinement, is unnecessary, undignified and unjust. It is better, they say, to acquit the guilty than convict the innocent. There is a choice between two evils. Where, therefore, there is prospect of innocence, bail should, almost invariably be given.

In considering this question, a court should be wary that an application for bail pending appeal is not any way closer to an appeal hearing. The decision proceeds on the

judgment (on the facts and law), grounds of appeal and such affidavit evidence proffered. The court cannot have to look at the whole record. In some cases, probably the majority, this is impossible. Where it is possible, the record should be perused. The court is only considering the prospect of success of the appeal for determining whether it is in the interests of justice to refuse or grant bail.

Is the appeal more likely to succeed?

Once a court concludes that there is a matter to go to appeal it must evaluate its likelihood for success. Not all appealable grounds will succeed: they could be so peripheral to the issue as to be of no consequence. The court could, even if a ground is appealable, decide that there is no miscarriage of justice. The higher the likelihood of the success the higher the likelihood of being released on bail.

Is it in the interests of justice that bail should be allowed or refused?

Once a court concludes that there is likelihood that the appeal will succeed, it must consider, where there is an application for bail, whether it is in the interests of justice to allow or refuse to release the prisoner on bail. This is an internal rule, after the exclusionary rule. Consideration of interests of just are evenhanded. They comport justice to the prisoner and justice to the State – and to the victim. It is, however, the interests of justice viz-a-viz the prisoner and viz-a-viz the State.

The need for information

The jurisdiction to grant bail is discretionary only to the extent that it involves judgment on the circumstances and facts of the case. It behooves the State and the applicant that sufficient and full information is brought to the court for it to exercise judgment. The information must be pertinent to the question whether it is in the interests of justice to release or confine a prisoner before the appeal.

Special or exceptional circumstances

Bail in the interests of justice is granted after considering all the circumstances disclosed. Consequently, if there are specific or exceptional circumstances for refusing or allowing bail these must be brought to the court. Bail, however, will not be granted on proof or lack of proof of special or exceptional circumstances. Special or exceptional circumstances reduce or enhance the prospect of refusing or allowing bail. In *Kamaliza v Republic* [1993] 16 (1) MLR 198 it was backlog of cases.

Will interests of justice be achieved by confinement?

The first consideration, therefore, on interests of justice, is whether the interests of justice would be served by the confinement of the prisoner. The onus is on the State to demonstrate that the interests of justice will be served by confinement. In principle, courts, compelled by law and principle, lean towards the liberty of an individual, more so where the court concludes that there is prospect of the appeal succeeding. The State must consider the immediate and prospective outcomes of confinement or release. The immediate outcome must, of course, be that the prisoner will attend and continue to attend the appeal hearing where ultimately the conviction and sentence will be determined. The state might

consider the seriousness of the offence, the sentence actually imposed, the prisoner's previous conduct while on bail or in confinement. If, while in custody, the prisoner, planned an escape, the prospect of appearing are there but very much reduced. Equally, if the prisoner never complied with bail conditions, the likelihood of playing truant with the court are higher. Ultimately, the State might demonstrate that the prospect of the prisoner showing up to serve the sentence are remote. The criminal law is publicly enforced for purposes of punishing and preventing crime while offering opportunity for reform and rehabilitation in the prison sentences passed. Where, therefore, the prospects are that this will not happen, it is in the interests of justice, even where there is a prospect of success, to refuse bail. These immediate and prospective concerns might demonstrate that it is in the interests of justice not to release the prisoner on bail.

Will the interests of justice be served by releasing the prisoner on bail?

The second consideration, therefore, is whether it is in the interests of justice to release the prisoner on bail now that there is a prospect that the appeal will succeed. The onus of proof to demonstrate that it is in the interests of justice to be released on bail is on the prisoner whether the court is considering the matter *suo motu* or the prisoner is the applicant's. When the prisoner is the applicant, the burden follows the normal. The applicant must prove the claim. The prisoner discharges the burden not even necessarily on a balance of probabilities. It suffices if the prisoner shows that it is in the interests of justice to be released on bail. Once that is done, the State must demonstrate on balance of probabilities that it is not in the interests of justice to release the prisoner on bail or, which is the same thing, that it is in the interests of justice that the prisoner be detained or further detained.

Where it is unclear whether the interests of justice will be served by confinement or release on bail.

Where it is unclear whether the interests of justice will be served by confinement or release on bail, a court should uphold liberty – the right to liberty. The prisoner must be released on bail. Our constitutional order bases on fundamental rights which, unless limited by laws that are of general application, reasonable, proportionate and accepted in an open democratic society – which Malawi is – must be upheld. Equally, therefore, will it be the case where the matter is on balance.

Where the matters are on balance on interests of justice.

Where interests of justice can be served equally by confinement or by release on bail, the appellant should be released on bail. This is precisely because interests of justice are just interests – they cannot torpedo rights. Where rights and interests conflict at point of no resolution, rights must be taken seriously – Ronald Dworkin, Taking Rights Seriously, Bloomsbury, 1997, London, New Delhi, New York, Sydney.

The discretion

I am the most reluctant to suggests that bail pending appeal is a matter of discretion where that means that a court can refuse bail where it should be given and allow bail where it should not be given. The discretion that a court has under statutes, given that the right to release with or without bail is a fundamental right under the Constitution, is that the outcome depends on considering all the circumstances of the case and on principles. It is important, therefore, that a lot more information covering all aspects of the discretion is available to a judge for a better exercise of the discretion. Consequently, a court considering an application for bail pending appeal, must consider all the circumstances of the matter, exceptional or not, and determine whether it is in the interests of justice to refuse or allow the prisoner on bail awaiting an appeal hearing. Exceptional circumstances better the prospect of granting bail. They are not *sine qua nona* bail must be refused or allowed. Bail must be refused or allowed in the interests of justice – of the State and the prisoner – having regard to all pertinent factors and circumstances. Discretion is improperly exercised where a court fails disregards a material consideration, overstresses a minor factor or undermines a major factor.

In applications for bail pending appeal, the prospect of injustice, more especially for the innocent, trumps the usual concern that there is no need for reconsideration because there is an existing conviction. The innocent should not be in confinement for a day longer. It is because of the prospect of injustice that under the Criminal Procedure Rules, England and Wales, applicable to Malawi because of section 8 (a) of the Supreme Court of Appeal Act, the law now, to afford early consideration, require that an application for bail pending appeal must accompany the Notice of Appeal. It is very problematic, therefore, where the application is left to very late.

Disposal

Coming to this case, the first question is whether there is a matter for appeal? Much in every way! The appellants were jointly charged for attempted murder and conspiracy to murder. The evidence on the attempted murder comprised, at least for the first appellant, visual identification based on recognition. The second appellant's conviction bases on circumstantial evidence which essentially comprises of call logs. It is the call logs that found the conspiracy conviction of all the three appellants. The third appellant was acquitted of the murder charge. The first and second appellant were convicted of murder.

The call logs evidence, from the judgment, is part of the evidence for the second appellant's conviction of murder and all appellants' conviction for conspiracy to murder. There is a decision of this Court on evidence on call logs. It is the case of *Rep v Mvula* (2012) Criminal Appeal Number 7 (MSCA) (unreported). From many excerpts of the judgment, this Court suggests that call logs are a doubtful basis to find a conviction, let alone a conspiracy:

> PW4 was clear in his evidence that a call log is a log of calls. It does not disclose the contents of the calls … The call log showed that PW1 and the respondent called each other almost every day from 14th February 2011 to 22nd

February 2011. This tends to confirm what PW1 told the Court below that he and the third respondent were business associates. It is clear that during those calls they could have discussed many more issues than what PW1 told the court.

This Court continued:

> "...It is our view therefore that notwithstanding that the respondents had been in contact with each other, at different points in time, **on the totality of the evidence**, it cannot be said that they acted in concert of an unlawful purpose; R vs Bailey and Underwood 9 Cr App. R. 94. On the basis of the evidence before use we, therefore, would not have found that a conspiracy had been established" (my emphasis)

The Court below is unclear why this decision, binding on it, was not followed. It preferred, instead persuasive authority, *Adeojo Nyamupfukudza v Regina* (2013) EWCA Crim 41 and *Director of Public Prosecutions v. Varlack* (British Virgin Islands) [2008] UKPC 56 (1 December 2008) Privy Council Appeal No 23 of 2007. Certainly, in giving the facts for the judgment, in *Director of Public Prosecutions v. Varlack* call logs are mentioned. There is no statement or decision on them. The case turned on the hearsay rule. Equally, *Adeojo Nyamupfukudza v Regina* was not a case about call logs, a telephone conversation was actually recorded.

Concerning the first and second appellant, there is other evidence on both counts. The call logs can be used to locate the location of a suspect. In this respect, the call logs located the first and second appellant. There is other evidence, properly admissible, well-articulated by the Court below. Certainly, the third appellant's conviction bases on call logs. With use of this evidence in doubt in this Court, the question will have to be determined. There are, therefore, in relation to the three appellants an appealable issue

The next consideration, therefore, is whether it is in the interests of justice to release the three appellants. The first consideration here is the fact that there is a conviction for which there is an immediate imprisonment. It is in the interests of justice that those convicted of a crime serve their sentences and immediately where a trial court has determined that an immediate custodial sentence is appropriate. Section 42 (f) (x) creates a right to be sentenced without delay upon conviction. The court must regard the sentences passed and prospect of their reduction. Section 53 of the General Interpretation Act provides:

> Where an act or omission constitutes an offence under two or more written laws, the offender shall , unless a contrary intention appears, be liable to be prosecuted and punished under any of such laws, but shall not be liable to be punished twice for the same offence.

The conspiracy and the attempted murder constitute on the same evidence and facts. The offences were not charged separately or alternatively. The sentences passed here are close

to the maximum and, in context, are passed against first offenders. The sentence generally passed for murder on first offenders are lower. The sentences passed for an attempt or conspiracy, *ceteris paribus*, must compare. The sentences are likely to be reduced. They are likely to be much lower, but not, on preliminary assessment very low.

The question, therefore, is whether they are to be reduced to the level where they will be served before the appeal hearing. I am inclined to think not. The doubt, however, comports that this consideration does not resolve the matter. The court must then consider the likelihood that the appeal will succeed.

Where the appeal is likely to succeed, there is a real risk that the innocent would stay in prison for another day. It is in the interests of justice that the innocent are not confined a day longer. The plight of the innocent is more foreboding than those of the guilty. On balance it is a better evil to release the innocent even if, in the same process, you release, albeit temporarily, the guilty. In assessing this Courts are not prejudging or determining the appeal. The hearing, with more profound scrutiny and counsel (advice), will determine the appeal. The court at this juncture is only assessing, 1 to 5, what the prospects are that the appeal will succeed.

In making this assessment, courts are involved, and properly so, with making interim orders that may further justice or ameliorate injustice when finally a court determines the appeal. There is less injustice where bail is refused where the appeal may not succeed than when the appeal will succeed. Where the prospect of the appeal succeeding is higher, a court, may, almost invariably, have to release the prisoner on bail pending appeal.

The prospects of a reduction in sentence are higher; the prospect of the appeal against conviction succeeding are higher only in relation to the third appellant. For the first and second appellant, besides the call logs, there is other evidence. Obviously, the call logs can be and were used, properly, for that matter to locate the position of the appellants relative to the scene and time of the crime. What is doubtful is whether call logs, which do not account for the actual conversation, can be used for more and more so in criminal proceedings where proof must not be on preponderance of probabilities but beyond reasonable doubt. The third appellant's conviction on the conspiracy to murder hinges on call logs. There is, as seen, a decision of this Court on the matter. In *The Police v Joseph Attard* Criminal Appeal Number 98/2012, the Court of Criminal Appeal in Malta said:

> It is inconceivable with respect to find that a person is guilty of the charges brought against that person solely on account of a co-accused having received telephone call from the residence of that person. Not even in a Court of Civil Jurisdiction would the mere fact of a telephone call made when the contents of that telephone call are absolutely unknown to cause a judge to consider that such call is evidence enough to find for a plaintiff or a defendant.

Moreover, the matter complicates by that the Court below acquitted him of attempted murder. Moreover, despite section 53, charging conspiracy charges with substantive

matters is deprecated for fairness reasons (*Republic v Banda and others* [1995] 2 M L R 767; *Mekiseni and another*). This consideration probably affected the third appellant more.

There seems to be an apparent contradiction on finding the third appellant not guilty of the attempted murder and finding the appellant guilty of the conspiracy to murder. The prosecution case, on the same evidence, against the appellant's attempted murder charge based on that the third appellant agreed to commit the crime – the third appellant, as procurer or conspirator, was a principal offender. In effect, the third appellant was acquitted as principal because he never conspired or procured the crime. A finding later that there was a conspiracy cannot be explained on the general principle that a conspiracy is treated differently from the substantive crime – or its failed attempt. The prospect of success on the conviction and the sentence itself for the third appellant are higher. The prospect of the appeal of the first and second appellant against sentence succeeding are high but not to the extent of the sentence being reduced to a sentence to one that would expire before determining the appeal.

One concern that might arise on bail pending appeal is that in granting the order the appellant might achieve that which is the substratum of the appeal. Obviously, where the appeal is dismissed and the accused, released on bail pending appeal, escapes, there is immediately a risk that the appellant will not be brought to book. The arm of the law is law and a warrant of arrest hangs on the appellant to be brought to book once arrested in future. Against this, however, are two scenarios which are in the interest of justice. If the appellant is released early and the sentence passed is reduced considerable to one where the imprisonment would have lasted before the hearing or judgment, immediately imprisonment would result in injustice. Moreover, where the appeal on conviction succeeds, an early on immediate release would have served the interest of justice. As long as the appellant could be or is innocent, it in the interest of justice that a prisoner should not spend any minute longer in prison.

In this case, therefore, I order that the 1st and 2nd appellants will remain in prison until the disposal of the appeal. The 3rd appellant should be released on bail immediately on the same conditions of bail as ordered by the Court below before trial.

On an application for bail pending appeal, the court must, as a matter of course, consider, whether injustice may not ameliorate or justice attained by a speedy hearing of the appeal. It is possible, now with all Supreme Court of Appeal Judges sitting, to set this case down for hearing in the next session of the Supreme Court of Appeal. I so order.

Made in open Court this 14th Day of March, 2018

D F Mwaungulu

JUSTICE OF APPEAL