JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL

Criminal Appeal No 15 of 2016

(Being High Court Case No. 261of 2016)

BETWEEN

DOROTHY MBETA	**1st APPELLANT**
CHIPUZA GWADIRE	**2ND APPELLANT**
NINO COSTINO SAIMALA	**3RD APPELLANT**

AND

REPUBLIC	**RESPONDENT**

Criminal Procedure – Bail – application under section 118 of the Criminal Procedure and Evidence Code – practice and procedure based on the Bail (Guidelines) Act and Guidelines on Bail

Criminal Procedure – Bail – application – there must be evidence and information on all principles and factors necessary for a court to exercise judgment from the state and a person arrested or accused of a crime

Criminal Procedure – Bail – a court must consider each and every principle and factor in the Guidelines on Bail – failure is wrong exercise of discretion

Criminal Procedure – bail – practice and procedure – the application must succinctly state whether it is the constitutional right to bail or statutory right that is sought

Criminal Procedure – Bail – practice and procedure – burden and standard of proof – on the applicant to establish on balance of probabilities threshold facts showing that it is in the interests of justice to release – the prosecution in turn bears the evidential burden to show that it is not in the interests of justice to release a person arrested or accused of a crime

Criminal Procedure – custody time limits – right to release – with or without bail after expiration of the maximum custody limits or extension

Criminal Procedure – custody time limits – delay by court, accused person or court – the state gains no time

Criminal Procedure – bail – appeal – bail pending appeal from refus al to grant bail – application for bail pending appeal against refus al or granting of bail – application must be included or accompany the notice of appeal

Human rights – right to release from lawful detention – section 42 (2) (e) of the Constitution – the right to release unconditionally and right to release with or without bail

Human Rights – the right to release unconditionally – the right is subject to interests of justice – a person will not be released unconditionally if interests of justice require otherwise

Human Rights – the right to release without bail – the right is subject to interests of justice – a person will not be released without bail if the interests of justice is otherwise

Human rights the right to release on condition of bail – the right is subject to interests of justice – a court will not release on bail where the interests of justice require otherwise

Legislation Considered

Bail Guidelines Act, sections 1; 2; and 3

Bail Guidelines, Part 1, rule 1; Part 1, rule 2; Part 1, rule 3; Part 2, rule 1; Part 2, rule 2; Part 2, rule 3; Part2, rule 4 (a); Part 2, rule 4 (a) (i); Part 2, rule 4 (a) (ii); Part 2, rule 4 (a) (iii); Part 2, rule 4 (a) (iv); Part 2, rule 4 (a) (v); Part 2, rule 4 (a) (vi); Part 2, rule 4 (a) (vii); Part 2, rule 4 (a) viii); Part 2, rule 4 (a) (ix); Part 2, rule 4 (a) (x); Part 2, rule 4 (b); Part 2, rule 4 (b) (i); Part 2, rule 4 (b) (ii); Part 2, rule 4 (b) (iii); Part 2, rule 4 (b) (iv); Part 2, rule 4 (b) (v); Part 2, rule 4 (b) (vi); Part 2, rule 4 (b) (vii); Part 2, rule 4 (b) (viii); Part 2, rule 4 (b) (ix); Part 2, rule 4 (c); Part 2, rule 4 (c) (i); Part 2, rule 4 (c) (ii); Part 2, rule 4 (c) (iii); Part 2, rule 4 (c) (iv); Part 2, rule 4 (c) (v); Part 2, rule 5 (c); Part 2, rule 5 (c) (i); Part 2, rule 5 (c) (ii); Part 2, rule 5 (c) (iii); Part 2, rule 5 (c) (iv); Part2, rule 6 (a); Part2, rule 6 (b); Part2, rule 6 (c); Part2, rule 6 (d); Part2, rule 6 (e); Part2, rule 6 (f);

Constitution, 1966: section 2 (1) (iii)

Courts Act: section 11 (b)

Constitution: sections 18; 19 (6); 39 (1); 42 (1) (f); 42 (2) (e); 44 (1); 44 (2); 45

Criminal Procedure and Evidence Code: section 35 (1); 97; 118; 119; 161A; 161B; 161C; 161D; 161E; 161F; 161G; 161H; 161I; 161J; 355 (1)

Criminal Procedure Rules: rules 1.1; 1.2; 17.25 (4); Rule 41.7; 68.3 (2); 68.3 (2) (h) (iii); 68.6 (6) (f) (ii); 68.8

Supreme Court of Appeal Act: section 7; 8 (b); 11 (1); 24

Supreme Court of Appeal Rules: Order 1, rule 18; Order 2, rule 1; Order 4, rule 13;

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

Cases cited

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

Dzole v Republic (2016) Criminal Appeal No 14 (MSCA) (unreported);

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

Kamwangala v Republic (2013) Criminal Appeal No. 6 (MSCA) (unreported);

Kasambala v Republic (2013) Miscellaneous Criminal Appeal No 5 (MSCA) (unreported)

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

Letasi v Republic (2016) Criminal Appeal No 13 (MSCA) (unreported)

Mhave v Republic (2005) Criminal Appeal No. 25 (MSCA) (unreported)

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

Parekh v The People (SJ) (SC)

Patel v Gondwe (2015) Criminal Appeal No 31 (MSCA) (unreported)

S v Khumalo (1957/2012) [2012] ZAKZPHC 27 *S v Smith and Another*, (1969) (4) SA 175 (N)

S v Stanfield (1) SACR 221 (C)

*Salvado v The St*ate 2001 (2) BLR 411 (HC)

State v Registrar of Financial Services ex parte *Prime Insurance Ltd and another* (2016) Criminal Appeal No 41 (MSCA)

State v Electoral Commission ex parte *Muluzi and another* (2009) Constitutional Case No 2 (HC) (DC) (unreported)

State and 5 Others ex p Right Honourable Dr. Cassim Chilumpha, [2006] MLR 433

Zgambo v Republic (1998) Criminal Appeal Case No 11 (MSCA) (Unreported)

Words or phrases judicially considered

Bail

CORAM: JUSTICE D F MWAUNGULU, JA

Maele, Counsel for the appellant

Mtonga/Salamba, Counsel for the respondent

Minikwa, official court interpreter

Mwaungulu, J A

JUDGEMENT

Dorothy Mbeta, Chipuza Gwadire and Nino Gastino Saimala have appealed against the decision of the court below refusing to release them on bail. They could have applied for release from detention under section 42 (2) (e) of the Constitution. The court below would then have considered whether it was in the interests of justice to release them unconditionally or release

them on condition that they be released with or without bail. They, however, applied for bail under the statute, section 118 of the Criminal Procedure and Evidence Code.

At the time of the judgment of the court below, they were in lawful custody within the maximum custody time limits under section 161 A to 16 1J of the Criminal Procedure and Evidence Code. They remained so until the hearing of the appeal on 25 November 2016. They were not, at the time I was to deliver the judgment, on 9 January 2017. The case was adjourned so that counsel addresses the court on this prospect. The state gained no time by this. There is no reason why the State could not proceed with the prosecution. The evidence, by the State's own admission, was strong and remained strong. The State seems to have resigned to that the High Court does not set down homicide cases. In this manner, the State overlooked that on the law, as is now, there is a limit on the period when citizens can be in lawful custody while the state is prosecuting the crime. Consequently, where those limits are exceeded, the State will prosecute citizens while they are free without or with bail.

The State, therefore, is not absolved from these obligations because there is delay in the courts caused by inertia from the court, the accused person or the court. Neither is the state absolved from this responsibility because there are various applications before it or an appeal from them. For each case, the State is supposed, under its duty under Rule 1.1 of the Criminal Procedure Rules to act justly and fairly to ensure that cases are set down speedily to ensure accused persons' or suspects' speedy and quick trial. There is, because of Rule 1.2 of the Criminal Procedure Rules a constant duty on the state, of course, even on the accused person or suspect, to inform the court, without delay, failure to comply, among other orders necessary before or during trial, with sections 161A-J of the Criminal Procedure and Evidence Code and the Criminal Procedure Rules, default rules of this court under section 8 (a) of the Supreme Court of Appeal Act, and any practice, procedure and law of this court.

A single member of this court cannot determine an appeal against an order of the court below refusing bail. The full court – not a single member of the court –must determine the appeal against the judgment of the lower court refusing bail. There is a substantive appeal – under section 11(1) of the Supreme Court, albeit on a pretrial order, which should be heard by a full court. Under section 7 of the Supreme Court of Appeal Act a single member of this Court cannot determine a substantive appeal. *Gadabwali v Republic* (2013) Miscellaneous Criminal Appeal No 2 (MSCA) (unreported) and *Kasambara v Republic* (2013) Miscellaneous Criminal Appeal No 5 (MSCA) (unreported), relied on by the appellants, never regarded section 7 of the Supreme Court of Appeal Act. In *Gadabwali v Republic* this court, thought, despite that there was an appeal, that this court was exercising its original jurisdiction.

This court, except in the context of an appeal, has no original jurisdiction to grant bail. Section 7 of the Supreme Court of Appeal Act does not make a distinction between final and interlocutory orders made in *Kasambala v The State* and that a single judge can determine such an appeal is not borne out. Under section 11 of the Supreme Court of Appeal Act, subject to the

other provisions of this section, any person aggrieved by a final judgment of the High Court in its original jurisdiction may appeal to the Court. Under section 2 of the Supreme Court of Appeal Act, "judgment" includes decree, order, sentence and decision. Refusal or granting of bail is a final order or decision appealed from as such. Even if it be interlocutory, it is an appeal which a single member of this court cannot determine. This is a jurisdiction question based on a statute and cannot, therefore be disregarded under Order 1, rule 4 and Order 5, rule 1 of the Supreme Court of Appeal Rules. This Court and the Chief Justice have power to allocate the case to an appropriate forum.

The appellants are in custody way past the maximum custody time limits. The intention of the legislature in sections 161 A-J of the Criminal Procedure and Evidence Code was that accused persons or suspects could only be in lawful custody pending trial for periods prescribed and extensions not exceeding 30 days failing which they may be released absolutely or on bail – released, they must be! The State gains no time from that there are pending applications in, in this case, the Supreme Court of Appeal. This court, therefore, will consider under section 24 of the Supreme Court of Appeal Act, consider whether the appellants should not be released on bail pending appeal. Generally, the court below acted on paucity of information and never considered critical considerations under the Bail (Guidelines) Act and the Guidelines on Bail. The likelihood of the appeal succeeding on both aspects is high. It would, with this prospect, be inane to let the appellants spend a moment longer in detention pending trial in circumstances where the prosecution has done little to ensure the appellants are prosecuted within the maximum time in which they can be detained pending trial.

The application for bail pending appeal should have been included in or accompanied the notice of appeal (*Letasi v Republic* (2016) Criminal Appeal No 13 (MSCA) (unreported); *Dzole v Republic* (2016) Criminal Appeal No 14 (MSCA) (unreported); and *Kaudzu and others v Republic* (2016) Criminal Appeal No 16 (MSCA) (unreported). Section 24 of the Supreme Court of Appeal Act is the basis for the power of this Court and the court below – courtesy Order 4, rule 13 of the Supreme Court of Appeal Rules – to grant bail pending appeal.

The court below, unlike this Court, is covered by section 355 (1) of the Criminal Procedure and Evidence Code. Section 355 (1) of the Criminal procedure and Evidence Code covers stays of execution of sentences – all sentences, including prison sentences. Under section 329 (2) of the Criminal Procedure and Evidence Code all prison sentences are effective on pronouncement. The prisoner could, however, apply for stay of execution of the prison sentence and granting upon which the court may order bail pending appeal. Outside section 355 (1) of the Criminal Procedure and Evidence Code and Order 4, rule 13 of the Supreme Court of Appeal, the court below – and lower courts – have no jurisdiction, as such, to grant bail pending appeal.

Section 8 (a) of the Supreme Court of Appeal Act provides that the practice and procedure of the Court shall be in accordance with the Act and any rules of court made thereunder; provided that if the Act or any rules of court under it do not provide for any

particular point of practice and procedure, the practice and procedure of the Court shall be in relation to criminal matters as nearly as may be in accordance with the law and practice for the time being observed in the Court of Criminal Appeal in England. On the particular point of bail pending appeal, the Supreme Court of Appeal Act and the Supreme Court of Appeal Rules are without specific provision. Under rules 41. 7 and 68.3 (2) of the Criminal Procedure Rules, the default rules because of section 8 (a) of the Supreme Court of Appeal Act effective, it is mandatory to include in the notice of appeal – even appeals against orders – for an application pending appeal to be included or to accompany a notice of appeal (*Letasi v Republic, Dzole v Republic* and *Kaudzu and others v Republic*). There was, because the practice and procedure was no thoroughly investigated, a non-compliance under Order 5, rule 1 of the Supreme Court of Appeal Rules. The court can, in the interests of justice, either waive the non-compliance or order compliance. Ordering compliance would be dilatory and, therefore, discordant with the principle of acting justly under the Criminal Procedure Rules.

Moreover, the compulsion in rules 41.7 and 68.3 (2) of the Criminal Procedure Rules that an application for bail pending appeal must be included in the notice of appeal denotes pro-action and progressiveness in asserting the right to bail pending appeal. The requirement enables a court on appeal to address the matter as early as possible so that where there is a prospect of success on appeal, a retrial or a substantial reduction in sentence, the prisoner's rights are preserved soonest. Consequently, despite failure by the State and the appellants, as participants, to include the application for bail pending appeal in the notice of appeal, the correct order, since the matter is already here, was to hear the application for bail pending appeal(*Patel v Gondwe* (2015) Criminal Appeal No 31 (MSCA) (unreported); *Muluzi v Director of the Anti-Corruption Bureau* (2005) Criminal Appeal No 17 (MSCA) (unreported); *The state and 5 Others ex p Right Honourable Dr. Cassim Chilumpha,* [2006] MLR 433; *Mangulama v Speaker of the National Assembly,* [2007] M L R 139);*Finance Bank of Malawi Ltd v Nicolaas Heyns and Nedbank Malawi Ltd* (2010) Criminal Appeal No 45 (MSCA) (unreported); G*adabwali v Republic*; *Patel v Gondwe* (2015) Criminal Appeal No 31 (MSCA) (unreported); *The State v Registrar of Financial Services* ex parte *Prime Insurance Ltd and another* (2016) Criminal Appeal No 41 (MSCA) (unreported). Essentially, this court is either, under Order 5, rule 1 of the Supreme Court of Appeal Rules waiving the requirement under rules 41.7 and 68.3 (2) of the Criminal Procedure Rules that such an application should have been made together with the notice of appeal or dispensing under Order 1, rule 4 of the Supreme Court of Appeal Rules of the rule that requires such a process. Moreover, failure by the appellants to include the application for bail pending appeal disabled the court from, under rule 1.1 and 1.2 of the Criminal Procedure Rules and was on the parties' part failure, under rule 1 of the Civil Procedure Rules, to assist the court.

The matter should not have been heard in Chambers. The general rule is that the Supreme Court of Appeal must hear an application of this nature in open court. The court in open court could adjourn the matter to Chambers. Moreover, without an order otherwise, the appellants should have attended these hearings as a matter of right.

"At the stage where we are the release of an accused person on bail pending appeal against refusal to grant bail – like in all circumstances of bail pending appeal – can only be, based on section 24 of the Supreme Court of Appeal Act, as the court sees fit. This is in the interests of justice (*Letasi v* Republic). This is not the case of bail pending an appeal against conviction – the principle remains the same. Where there is an appeal against an order refusing bail, one consideration in determining whether it is in the interests of justice to release the accused person is whether the appeal against bail – if it cannot be disposed of quickly – has a realistic chance of success. The consideration is not and it should not be whether the appeal will succeed. That is for the hearing of the appeal.

Application for release on bail pending appeal must be disposed of quickly and speedily because – where there is a right or necessity to release – an accused person should not be deprived of freedom for any moment longer where further detention, even if initially lawful, is unlawful or is not in the interests of justice. Where, therefore, there is a real prospect of success of an appeal against refusal to grant bail, it may be, among other things, in the interests of justice, to release the accused person on bail pending appeal and promptly.

The prospect of the appeal against bail succeeding in this matter are very high or are they not? At this stage, a court is only concerned with assessing the prospect or possibility that the appeal against a judgment pending appeal may succeed. Where the prospects are not there or are very low, the court will not release an accused person on bail pending appeal as a matter of course. Consequently, where the prospects are high, a court may, unless there are compelling reasons, release on bail almost invariably. The risk of erring against releasing on bail at this stage are ameliorated in part, if not in whole, by that the law leans in favour of rights – the right to freedom.

In making such a decision, the court is not perturbed or distracted by that it may effectively be determining the appeal on bail. The court is dominated only by the interests of justice. Where, therefore, after considering all the circumstances of the case, the interests of justice favour detention, it is a small matter that a court refuses bail pending appeal and effectively deciding the appeal. Conversely, where the interests of justice, after all considered, results in release of an accused person, it is peripheral to the matter that in doing so the court is effectively deciding the substantive matter. The court, sensitive to the appeal, is properly, for that matter, preoccupied to do what is in the interests of justice.

What then are the prospects of the appeal against bail succeeding? They are very high. First, the court below never – it should have – considered all principles and factors prescribed by the Guidelines on Bail made under the Bail (Guidelines) Act for applications for bail under section 118 of the Criminal Procedure and Evidence Code. The principles and factors considered were not treated with profundity and specificity required under the Acts and guidelines. The State, moreover, has not prosecuted the appellants within the custody time limits under section 161 A-J of the Criminal Procedure and Evidence Code.

In the court below, on hearing of the application, the court below received conflicting accounts on what actually happened with the appellants who all along deny involvement. The deceased and his brother were on 30 September 2016 assaulted to death following death of their sister. The brothers wanted to sell a plot of land belonging to their sister. The sister had been to the courts, the police and village headmen. Her account was believed everywhere and the court was about to adjudicate on it. Rumour had it that the brothers invited a wizard or witch in the village against their sister. She incidentally developed mental illness and died eventually. The deceased and his brother never attended the funeral a few houses from their sister. The deceased and his brother were, thereafter, assaulted by other furious funeral mourners, according to the appellants, or by the appellants, according to the prosecution. Whatever is true, the appellants are in custody for it. They applied for release to the court on 3 October, 2016.

The application based on a constitutional right under section 42 (2) (e) of the Constitution and the statutory right under section 118 of the Criminal Procedure and Evidence Code and the Bail (Guidelines) Act. Initially, the state was, at the hearing on 6 October, 2016, for the appellants' release on bail. The State changed its mind on the date the matter was adjourned to, 13 October, 2016.

The way the application is framed is important. It appears, however, that the court below understood the application differently. The confusion, however, stems from the application itself and how counsel argued the matter. It is important, therefore, to discuss the constitutional right to release in section 42 (2) (e) of the Constitution and the statutory right to bail under section 118 of the Criminal Procedure and Evidence Code.

The application in the court below is worded 'In the matter of section 42 (2) (e) of the Constitution of the Republic of Malawi and in the matter of section 1 part II of the Bail (Guidelines) Act." The wording suggests that the application is made under the Constitution and/or the Bail (Guidelines Act). This can be confusing.

The constitutional right is a right to be released. The release, however, can be with or without bail. 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 rights which he or she has a detained person, have the right to be released from detention, with or without bail unless the interest of justice require otherwise.

Conceptually, therefore, a citizen applying under the constitutional right need not apply for bail; a citizen must apply for release from detention. If the court refuses release, the bail question disappears. On the other hand, if the court allows release, the question becomes whether the release can be with or without bail. This court in *Republic v Kaudzu and others* defined the word bail. Where, therefore, the court orders release, it almost invariably will order release on bail – a suspects or an accused person's undertaking or agreement, on a sum, cash or without

cash, to appear at the time and place stated at the peril of forfeiting the bonded sum on failure to appear. Conceptually, to require a citizen to be released on such an undertaking is a clog on the right – rather than a right. The right to release is subject to a citizen's undertaking to appear. We can speak, grotesquely, of a right to be released on such an undertaking.

The title of the summons is equally misleading: "Summons for release on bail from pre-trial detention." The word 'release' is taken from the constitutional provision. The word "pretrial" is probably from section 161 A-J of the Criminal Procedure and Evidence Code. On an application for release, it is unnecessary to apply for bail. The expression 'release on bail" derives from the statutory right in section 118 of the Criminal Procedure and Evidence Code and section 42 (2) (e) of the Constitution. The prayer in the affidavit, however, locates this application under section 118 of the Criminal Procedure and Evidence Code: "the applicants pray that this … court exercise its discretion in granting bail to the applicants … " Substantially, therefore, the application was for bail under the statute. The court below, therefore, treated, properly, in my judgment, the application as being an application for bail under the statute: "This is a bail application by the three appellants … " In the judgment of the court below there is no reference to the right of release under section 42 (2) (e) of the Constitution.

The constitutional right was, however, extensively covered in the parties' submissions. The respondents, in the below made two principal points one based on this court's decision in *Mhave v Republic* (2005) Criminal Appeal No 25 (MSCA) (unreported) and the other based on this court's decision in *Kamwangala v Republic* (2013) Miscellaneous Criminal Appeal No 6 (MSCA) (unreported). The right in section 42 (e) is an absolute right despite it being exercised in the context of the interests of justice. It is not absolute because, under sections 44 (1) and 44 (2) of the Constitution it can be limited by law – statute, judicial decisions, customary law or international law.

Bail in section 42 (2) (e) of the Constitution is embedded to the right to release. In other words, once a suspect could be released, the court may order that, rather than released unconditionally, the accused person is released on an undertaking to appear for trial. The discretion, therefore, is, on release, whether not to attach bail to the release. The accused person would certainly prefer release without bail. Section 42 (2) (e) of the Constitution, therefore, leaves it to the court *suo motu* or at the application by the state, to consider releasing the suspect on bail. The understanding of the right in section 42 (2) (e) of the Constitution impacts on the burden of proof.

It is generally accepted, based on *Mhave v Republic,* that the burden is on the State to prove that it is not in the interests of justice not to grant bail. The assertion needs analysis. Obviously, it is not for the state, where a suspect applies, to assert the right in section 42 (2) (e) of the Constitution. Consequently, the burden cannot be on the state.

When asserting a right under section 42 (2) (e) of the Constitution, the suspect is the applicant. The principle is who asserts must prove. The burden of proof, therefore, cannot be on the respondent, the state. The applicant, at the least, must establish threshold facts to entitlement to release. The suggestion that the burden of proof is on the state emanates from not recognizing that the accused person, as the applicant must establish threshold facts before bail inures. That arises from not appreciating the right in section 42 (2) (e) of the Constitution the consequence of which is to peg the words 'unless the interests of justice require otherwise' to bail alone. The words pervade all the three aspects of the right.

There are three aspects to the right in section 42 (2) (e) of the Constitution: a) the right to release, the dominant right; b) the right to be released without bail and c) the right, if it be a right, to be released on bail. The words 'unless the interests of justice require otherwise' are not and should not be restricted to 'with … bail.'

The release, if standing alone, must be in the interests of justice. There would be no release, if that is all that is asked for, where 'the interests of justice require otherwise.' The clearest cases where an accused person, a court or the State may apply for release without bail is where the sentence prescribed by law does not require immediate imprisonment. The slightly complex situation is where an immediate prison sentence would not be imposed and non-custodial sentences – absolute or conditional discharge, probation or community service – would be appropriate. There could be more discretionary instances. In such circumstances, the accused person has not to apply for bail – an application for release is the best option. The court could, because of it, not in spite of it, still suo motu or an application consider releasing on bail.

Equally, there cannot be release without bail where 'the interests of justice require otherwise,' namely, where the release should be with bail. The nearest example here is where, on balance, the accused person should be released on bail but there is a risk to quick and speedy trial or a trial ever taking place because, among other things, the accused, previously released without bail, never appeared for trial. In such circumstances, with or without application, the court may release on condition that the accused person gives bail

Moreover, there should be no release with bail where 'the interests of justice require otherwise,' namely, where, in the circumstances, it is unconscionable or unjust to require the accused to be released in return for bail. This, for example, is where, the accused, released on bail previously, never showed up for trial.

Where, therefore, an accused person applies for release under section 42 (2) (e) of the Constitution, the onus is upon the applicant to establish the right to release where, as often should be the case, there is lawful detention. The onus is on the suspect, as applicant, to prove entitlement to release. Any other view entails strict liability or duty on the state, as long as there is lawful detention for a crime. The threshold on such an application is for the applicant to show that it is in the interests of justice to be released. The state, once the threshold is reached, as the

respondent, dispels the threshold by showing that it is not in the interests of justice to release the suspect. In other words, the state must just demonstrate, the onus being only evidential, that the interests of justice require otherwise. The onus, however, remains on the suspect, as applicant, to show that the interests justice justify release from custody. The suspect has only to establish entitlement on a balance of probabilities.

Where the court refuses release from custody, based on section 42 (2) (e) of the Constitution, the bail question does not arise. The bail question in section 42 (2) (e) of the Constitution arises in the other two situations and, therefore, only in the context that the court decides for release. First, under section 42 (2) (e) of the Constitution, once the court opts for release, the suspect has a right to be released without bail – without an undertaking or agreement on a sum, cash or no cash, to appear at the hearing. The court could act *suo motu,* but it must hear the parties. The question of burden of proof does not arise, the burden on both parties will be basically evidential. The suspect could, however, demand that he be released without such an undertaking. The onus, as an applicant, would be on the suspect to demonstrate that it is in the interests of justice to be released without bail. The state would just bear an evidential burden to show that the interests of justice require otherwise.

Once the court inclines to releasing the suspect, normally, the State could demand that the release be with bail and not without bail. This request, however, does not comport, as the respondents contended, that the burden of proving that it would not be in the interests of justice not to grant bail is on the State. It is the State, upon the prospect of release, which demands release on bail. The state, therefore, has the onus of proving that it is in not in the interests of justice to release the suspect on bail with the prospect that, if it is not in the interests of justice to release the suspect on bail, the court will release the suspect without bail.

Finally, it could be the state, rather than the accused, who applies for bail. In cases where the police, on behalf of the State, cannot grant bail, the police, inclined to release a prisoner, may apply for bail. Moreover, it need not, based on section 15 of the Constitution, be the accused person or the state – those directly involved in the proceedings – another with a sufficient interest in enforcement of a right to bail can apply. All said in the last few paragraphs would apply *mutatis mutandis*.

The burden of proof, therefore, is, under section 42 (2) (e) of the Constitution, variegated. This court's statement in *Kamwangala v Republic* (2013) Criminal Appeal No. 6 (MSCA) (unreported) must be understood from this perspective:

> It should now be trite that where one is detained on account of being suspected of committing an offence [an accused in common parlance] they will be released from custody as of right unless the interest of justice require that such person not be released. Further it shall be up to the court seized of the matter to decide whether to

> release with or without conditions. It is for the State [prosecution] to convince the court on a balance of probabilities that it is in the interest of justice that the accused not be released from detention with or without conditions.

It is from these considerations that section 42 (2) (e) of the Constitution must be understood to have introduced something new. Counsel for the respondents contended differently based on the decision of this court in *Zgambo v Republic* (1998) Criminal Appeal No 11 (MSCA) (unreported) citing this statement from this court in *Tembo and others v Director of Public Prosecutions,* (1995) Criminal Appeal No 16 (MSCA) (unreported), this court said:

> In reply, the learned DPP agreed that section 42 of the Constitution does indeed create a right to bail. He, however, said that this is not a new right at all; it has always been there … Pausing here, I wish to state that I would agree that, generally, speaking, the right to bail existed in our laws even before the present Constitution came into force.

Those laws, however, had no constitutional backing until the 1994 Constitution. The 1966 Constitution in section 2 (1) (iii) introduced the United Nations Declaration of Human Rights. There is no provision like section 42 (2) (e) of the Constitution in the declaration. There were treaties that we ascribed to that have the equivalent right; all these, however, were subservient laws. The 1994 Constitution, as primary law, overarches them and they are, like, for example, section 118 they of the Criminal Procedure and Evidence Code and the common law right to bail, laws made under the Constitution. Section 118 of the Criminal Procedure and Evidence Code, however, like sections 161A-J, 261 and 302A of the Criminal Procedure and Evidence Code, create adjunct statutory rights. It is not without reason, I suspect, that Zambian jurisprudence refers to constitutional bail as in the same breath as bail under statute and the common law (*Parekh v The People* (SJ) (SC). Section 118 of the Criminal Procedure Rules, therefore, creates a statutory right to bail *sui generis* the right to release under section 42 (2) (e) of the Constitution. The right under the Constitutional is much broader than the right under section 118 of the Criminal Procedure and Evidence Code.

Section 118 (1) of the Criminal Procedure and Evidence Code is more confined than the rights in section 42 (2) (f) of the Constitution:

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

police officer or such subordinate court, as the case may be, on a bond, with or without sureties.

First, in relation to the police, it applies only where the police arrested or detained an accused person without a warrant. Where the accused person is arrested or detained under a warrant, section 118 (1) gives no right to an accused person to give bail in lieu of detention and, therefore, a police officer cannot release an accused person, even in circumstances where a police officer can, where the arrest was with a warrant and the warrant – in accordance with 97 of the Criminal Procedure and Evidence Code, never provided for release on bail. This is because under section 97 of the Criminal Procedure and Evidence Code a warrant of arrest could prescribe bail and, in any event, a warrant of arrest requires the suspect to be brought to court upon arrest. The police officer cannot release on bail a person arrested for an offence where the accused person is liable to a death penalty (section 118 (1) of the Criminal Procedure and Evidence Code; Part 1, rule 3 of the Guidelines on Bail).

Secondly, there is a further restriction on the police. Part I, rule 1 of the Guidelines on Bail provides that where a person is arrested, whether with or without warrant, but the most Senior Police Officer at the police station where he or she is detained is not satisfied that there is sufficient evidence to charge him or her, then the most senior police officer should release him or her either unconditionally or on bail. Where, therefore, there is sufficient evidence, a police officer – up to charging the accused person cannot, subject section 42 (2) (b) of the Constitution, release the accused person. The police officer may only be released if the police, after arrest, actually charges the arrested person. Part I, rule 2 of the Guidelines on Bail provides: where a person has been arrested and is then charged at the police station, the most Senior Police Officer must decide whether to keep him or her in custody till he or she can be brought before the court or to release him or her on bail.

Thirdly, even for a subordinate court, the power to act only arises when an accused person has been brought before it. Under section 42 (2) (b) of the Constitution, the right to be brought to court only arises when within 48 hours the accused person has not been charged with a crime. Moreover, section 118 (1) of the Criminal procedure creates a right where a suspect "is prepared …to give bail" to "be released on bail …on a bond, with or without sureties." A subordinate court, therefore, can only act where the accused person is prepared – not otherwise – willing give bail. Even then the accused person may be released on bail –with or without sureties. There is, therefore, a possibility that after the charge, the accused person would remain in custody.

Of course, the High Court under section 118 (3) has got power to, either of its own motion or upon application, direct that any person be released on bail:

The high court may, either of its own motion or upon application, direct that any person be released on bail or that the amount of, or

> any condition attached to, any bail required by a subordinate court or police officer be reduced or varied.

The High Court cannot act *suo motu* where it has no information about accused persons who are arrested or who, having be arrested, are in custody because the police has not charged them or having charged them are not brought before it. It is to ensure that the High Court can act suo motu in these circumstances that in practice a duty – now widely in disuse – emerged for the police to inform the magistrate, for transmission to a judge, any person in custody. Such a practice should be reinforced so that the High Court can exercise powers under section 42 (2) (f) of the Constitution and section 118 (2) of the Criminal Procedure and Evidence Code.

Section 118 (2) does not, therefore, provide for the High Court to release somebody without bail. Neither can it be said, because of section 11 (b) of the Courts Act, that the High Court should have this jurisdiction. The power in section 118 (1) of the Criminal Procedure and Evidence Code gives power to a magistrate court to release an accused person where the offence does not attract a death penalty. Section of the Courts Act must mean that the High Court can exercise the power a magistrate has in section 118 (2). It cannot confer the power to release an accused person who has been charged with burglary, murder, robbery, treason or rape.

The Guidelines on Bail supposedly salvage the position. Part II, rule 1 of the Guidelines on Bail provides: a person arrested for, or accused of, the alleged commission of an offence is entitled to be released, with or without bail, at any stage of the proceedings before his or her conviction in respect of the offence, unless the court finds that it is the interest of justice that he or she be detained in custody.

This statutory right is distinct and in addition to the right under section 42 (2) (e) of the Constitution. It, is not, therefore, amenable to section 44 (1) and 44 (2) of the Constitution vis-à-vis section 42 (2) (e) of the Constitution. The statutory right – though understood from common law principles – is now circumscribed by statute – the Bail (Guidelines Act) and the Guidelines on Bail.

Bail proceedings under section 118 of the Criminal Procedure and Evidence Code are now essentially statutory. Section 2 of the Bail (Guidelines) Act applies the Act to all criminal cases where the granting of bail is considered by the police and courts under section 118 of the Criminal Procedure and Evidence Code. Under section 3 of the Bail (Guidelines) Act courts must apply the Guidelines on Bail:

> In considering whether to grant or refuse bail …a court …shall be guided by the principles, factors and other matters, constituting Guidelines on Bail, specified in the Schedule.

Part 2, rule 4 of the Guidelines on Bail postulates that the principles which the court should take into account in deciding whether or not bail should be granted including those specified in Part 2, rule 4 of the Guidelines on Bail. A court, therefore, faced with an application for bail must deliberately and deliberatively consider all the principles and factors based on the information or evidence or lack of information or evidence on the matter. The Bail Guidelines presuppose that parties will provide all the necessary evidence and information before the court. Part 2, rules 1 and 2 of the Guidelines on Bail, where that information is not available, provide that the court could order its production and adjourn the hearing for that purpose. The Court should not, therefore, resolve the application on paucity of information. The parties, therefore, are under a duty to disclose all material information, irrespective of the burden of proof.

The burden of proof depends on who, under section 118 (1) or 118 (3) of the Criminal Procedure and Evidence Code, applies for bail. The usual, of course, is that the suspect applies for bail. There is nothing in section 118 (1) and 118 (3) to suggest that the accused person, at least, in relation to a court, should apply. Under section 118 (1) of the Criminal Procedure and Evidence Code, the suspect or accused person must just be prepared to give bail and the court may release the accused person or suspect on bail. Consequently, the court – conscious of the accused person's rights – may have, where there is no application by the accused person or prosecutor, to act of its own motion or inform the accused person of the right under section 118 (1) or 118 (2) of the Criminal Procedure and Evidence Code.

In Kaudzu and others v Republic this court concluded that sections 161A-J the Criminal Procedure and Evidence Code were not part of our law until 2010. They adumbrate or enhance, rather than limit, the right to be released from detention with or without bail. They are an attempt by the legislature, in terms of section 8 of the Constitution, to enact laws where "values expressed or implied in this Constitution are furthered by the laws enacted." These are an instance where, under section 10 (2) of the Constitution, in the formulation of an Act of Parliament, the legislature, a relevant organ of State, gave "due regard to the principles and provisions of this Constitution." … They are not, therefore, subjected to section 44(1) and 44 (2) of the Constitution for whether they are reasonable, recognized by international human rights standards and necessary in an open and democratic society or negation of a right. Court has no power to extend the custody time limits and must release the suspect or accused person after 120 days, if there was an extension.

Coming to this case, the chances of the appellants succeeding on their appeal are very high. The only considerations and the only premises for the court below to refusal granting bail is in this excerpt:

> I have looked at all the facts given by both sides and I have considered the seriousness of this case. White who was attacked is still alive and if he did not see the three people, he could not have mentioned them in his statement to be his attackers. There was

> electricity light outside during the fracas. He recognized them. In my view considering the fact that the stronger the evidence against an applicant, the more likely he is to jump bail, and looking at the seriousness of the offence, I don't feel inclined to grant them bail, so bail is denied. However, I set the 16th January 2017 at 9.00am as the date for trial.

The court, therefore, only considered the seriousness of the offence and the nature of evidence against the appellants. The appellants' affidavit in support of the application showed that the appellants had a permanent place of abode; there were sureties who were available and willing to stand in; and that the evidence against the appellants was nebulous. The court below, therefore, never considered that the appellants had permanent place of abode and that there were sureties – matters actually and directly raised by the appellants. The court below actually never considered most principles and factors it had to consider under the Guidelines on Bail.

Section 2 of the Bail (Guidelines) Act, the application section, provides as follows:

> This Act shall apply to all criminal cases where the granting of bail is considered by the police and courts under section 118 of the Criminal Procedure and Evidence Code.

Part 2, rule 1 of the Guidelines on Bail, however, follows the spirit of the right in section 42 (2) (e) of the Constitution:

> A person arrested for, or accused of, the alleged commission of an offence is entitled to be released, with or without bail, at any stage preceding his or her conviction in respect of the offence, unless the court finds that it is in the interests of justice that he or she be detained in custody.

Under section 3 of the Bail (Guidelines) Act, the court granting bail must consider all these factors all the time and every times:

> In considering whether to grant or refuse bail, a police officer or a court, as the case may be, shall be guided by the principles, factors and other matters, constituting Guidelines on Bail, specified in the Schedule.

Equally, Guideline 4 (2) of the Guidelines on Bail, in relation to all principles and factors, requires that the court "should" consider them all:

> The principles which the court should take into account in deciding whether or not bail should be granted include the following …

In *Salvado v The St*ate 2001 (2) BLR 411 (HC), Nganunu CJ, said

> Apart from the use of the word "very" in describing the exceptional circumstances required to grant bail in these cases, I respectfully agree with the learned judge. I should also agree with respect with the obvious fact that the grant of bail is an exercise of a judicial discretion. As in the exercise of all judicial discretions the court must take into account all relevant factors …

In *S v Khumalo* (1957/2012) [2012] ZAKZPHC 27 (4 May 2012) In the Kwazulu-Natal High Court Murugasen,J:

> Mr Ntila has submitted that it is in the interests of justice that the appellant be granted bail. However there has been no address in this respect which is also fatal to the application and appeal. In exercising its judicial discretion, a court must consider the totality of the circumstances. *S v Stanfield* (1) SACR 221 (C) at 226 c – d

Part 2, rule 2 of the Guidelines on Bail provides:

> In bail proceedings the court shall deal with such proceedings expeditiously but may postpone the proceedings to allow the accused or the prosecutor to adduce evidence or further information.

Part 2, rule 3 of the Guidelines on Bail provides:

> If reliable or sufficient information is not before the court, the court may order its production.

Rule 1.1 (2) (f) of the Criminal Procedure Rules, for this court, provides:

> Dealing with a criminal case justly includes … ensuring that appropriate information is available to the court when bail and sentence are considered.

There is a duty on a party and the state is to provide full information on all the principles and factors covered in Part 2, rule 4 of the Guidelines on Bail. Equally, the court must consider all principles and factors in Part 2, rule 4 and Part 2, rule 6 of the Guidelines on Bail.

In this case, the court below acted without evidence or information on most principles and factors it considered and, with or without information, completely overlooked other principles and factors raised by the appellants and those that under the Guidelines on Bail should have been considered. Under Part 2, rule 4 (a) (i) of the Guidelines on Bail a court should consider the likelihood that the accused will evade trial. The court refused bail because the offence was serious. This was a legitimate consideration. It, however, could not, even if there was overwhelming evidence – as the court thought – stand alone. The appellants had a permanent place of abode. Moreover, there were sureties. The court below never excluded or considered these aspects.

The court below never, on this head, considered the nature and the severity of the punishment which is likely to be imposed should the accused be convicted of the offence against him or her (Part 2, rule 4 (a) (iv) of the Guidelines on Bail; the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried (Part 2, rule 4 (a) (v) of the Guidelines on Bail); (vi) the assets held by the accused and where such assets are situated (Part 2, rule 4 (a) (vi) of the Guidelines on Bail); the means and travel documents held by the accused which may enable him or her to leave the country (Part 2, rule 4 (a) (vii) of the Guidelines on Bail); the extent, if any, to which the accused can afford to forfeit the amount of bail which may be fixed, thereby inducing him or her to jump bail (Part 2, rule 4 (a) (viii) of the Guidelines on Bail); whether the extradition of the accused could readily be affected should he or she flee across the borders of the Republic in an attempt to evade his or her trial (Part 2, rule 4 (a) (ix) of the Guidelines on Bail); or other factors, concerning the principle, which in the opinion of the court should have been taken into account.

The court below, equally never considered that the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence. The court below, therefore, never considered the fact that the accused was familiar with the identity of witnesses and with the evidence which they may bring against him or her (Part 2, rule 4 (b)(i) of the Guidelines on Bail); whether the witnesses had already made statements and agreed to testify (Part 2, rule 4 (b)(ii) of the Guidelines on Bail); the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated (Part 2, rule 4 (b)(iii) of the Guidelines on Bail); whether the investigation against the accused had already been completed (Part 2, rule 4 (b)(iv) of the Guidelines on Bail); how effective and enforceable bail conditions prohibiting communication between the accused and witnesses were likely to be (Part 2, rule 4 (b)(v) of the Guidelines on Bail); whether the accused had access to evidentiary material which is to be presented at his or her trial (Part 2, rule 4 (b)(vi) of the Guidelines on Bail); the ease with which evidentiary material could have been concealed of destroyed (Part 2, rule 4 (b)(vii) of the Guidelines on Bail); the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings (Part 2, rule 4 (b)(viii) of the Guidelines on Bail); or any other factor on this principle which in the opinion of the court should be taken into account.

The court below never considered the principle that the accused, if released on bail, would endanger the safety of the community or any particular person or will commit an offence (Part 2, rule 4 (c) of the Guidelines on Bail). The court in considering this principle may, where applicable, consider the degree of violence towards other implicit in the charge against the accused (Part 2, rule 4 (c) (i) of the Guidelines on Bail). The court below, however, never took into account if the accused had made any threat of violence to any person (Part 2, rule 4 (c)(ii) of the Guidelines on Bail); if the accused persons had any resentment against any person (Part 2, rule 4 (c) (iii) of the Bail Guidelines); the accused persons had any disposition to violence in the past (Part 2, rule 4 (c)(iv) of the Guidelines on Bail); or any other factor which under this principle in the opinion of the court should have been taken into account.

The court below never considered Part 2, rule 4 (b) of the Guidelines on Bail that in special circumstances, the likelihood that the release of the accused will disturb the public order or undermine the public peace or security. In considering this principle the court may consider whether the nature of the offence or the circumstances under which the offence was committed was such that the release of the accused was likely to induce a sense of shock or outrage in the community where the offence was committed, and whether the shock or outrage in the community where the offence was committed, and whether the shock or outrage of the community could, were the accused persons to be released (Part 2, rule 4 (d)(i) of the Guidelines on Bail). The court, however, never considered whether the safety of the accused persons was by their release (part 2, rule 4 (c) (ii) of the Guidelines on Bail) undermined. There is reference, because of Part 2, rule 4 (c) (iii) of the Bail Guidelines, to whether the sense of peace and security among members of the public would be undermined or jeopardize by the release of the accused. The court below, however, overlooked considering whether there were special circumstances for the application of the principle as envisaged in Part 2, rule 4 (d) (iii) of the Guidelines on Bail.

The court below was oblivious to that, as a matter of principle, it was supposed to do a balancing act, weighing the interests of justice against the right of the appellants personal freedom and, specifically, the prejudice the appellants were likely to suffer if they were to be detained in custody (part 2, rule 6 of the Guidelines on Bail). The court below, was to consider (a) the period for which the appellants were already in custody since arrest (Part 2, rule 6 (a) of the Guidelines on Bail); the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail (Part 2, rule 6 (b) of the Guidelines on Bail); the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay (Part 2, rule 6 (c) of the Guidelines on Bail); any impediment to the preparation of the accused person's defense or any delay in obtaining legal representation which may be brought about by the detention of the accused (Part 2, rule 6 (d) of the Guidelines on Bail); and the state of health of the accused, as certified by a medical practitioner (Part 2, rule 6 (e) of the Guidelines on Bail).

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Failure by the court below to consider all principles and factors which, under the Guidelines on Bail, should be considered is an error of judgment or improper exercise of discretion. The Supreme Court of Appeal, sitting as a full court, would either allow the appeal based on this failure or, if the custody time limit had not expired, remit the case for to the court below to have more and better information to exercise the power properly. The custody time limits are to be obeyed by prosecutors and the courts. It is just unfortunate that the Registrar of the High Court failed to set the trials for the cases. I cannot even phantom an explanation for this. This neglect cannot justify the detention of accused persons beyond the custody time limits. Where custody time limits are exceeded the court has no discretion in the matter where that discretion is to further detain the accused person. The only discretion is to release the accused person and the further discretion whether the accused should be released absolutely or on the accused person giving bail. It is not mandatory to release the accused on bail -- in the sense that the accuse person must be released on an undertaking to appear with or without sureties.

The appeal against the refusal by the court below to grant bail is likely to succeed on the two aspects discussed at length. I would, therefore, grant the appellants bail pending appeal. Bail is granted on condition that there are four sureties. I remit the case to the judge in the court below to consider with counsel imposing such conditions as are envisaged in section 119 of the Criminal Procedure and Evidence Code.

Made this 9th day of January 2017`

Mwaungulu JA

JUSTICE OF APPEAL