IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

MISCELLANEOUS CRIMINAL CASE NO 136 OF 2000

JOHN BANDA

VERSUS

THE REPUBLIC

Coram: L.P. Chikopa, J.

L. B.T. Ndovi of Counsel for the Applicant

J. Manyungwa Deputy Chief State Advocate for the Respondent

Bondo (Mr.) Clerk

RULING

On November 10, 2000 we heard an application by the applicant. It was supported by an affidavit sworn on his behalf by his legal counsel Mr. Ndovi. He requested for an order (and I quote) that:

"a. The applicant be granted bail and that he be set at liberty on the conditions as the court deems fit and (sic) alternatively be released without any conditions at all.

b. The applicant be brought before the court within 48 hours or as the court may deem fit to be charged or dealt with thereat."

Like I said hereinbefore the application was supported by an affidavit sworn by his

counsel. Many things were deponed therein. There might be the need to comment on some of them hereinafter. At this stage however let me reproduce the prayer contained therein.

"WHEREFORE your applicant prays to this Honourable Court to grant him bail pending trial if any and/or without bail conditions as set out by the court or to be released outright so he can restore his fundamental right to liberty, obtain adequate and effective treatment and may be continue his remand out of prison and the return of his K53000.00 in the police custody and be brought before court to be chargedif there is any offence committed against the Malawi state."

The application's heading says it is an application "**for bail under section 42(2)(e) of the constitution and/or outright release in terms of section 42(1)(c) and (f) of the constitution and section 118(5) of the Criminal Procedure and Evidence Code."**

Section 42(1)(c) and (f) provides:

"Every person who is detained, including every sentenced prisoner, shall have the right:

(c) to consult confidentially with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the state;

(f) to be released if such detention is unlawful.

Section 42(2)(e) provides:

Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which she or he has as a detained person, have the right;

(e) to be released from detention, with or without bail unless the interests of justice require otherwise."

Section 118(5) of the Criminal Procedure and Evidence Code provides:

"No application for a direction that any person in custody pending proceedings in a subordinate court be released on bail shall be entertained by the High Court unless such subordinate court has first refused to direct such release."

Mr. Manyungwa, Deputy Chief State Advocate, represented the State which opposes the application. He never swore an affidavit. He was content to inform the court that this was not a trial and that the absence of an affidavit in opposition is not fatal to the state's position herein. He cited **MISCELLANEOUS APPLICATION NUMBER 9 OF 1994 D YIANNAKIS VS REPUBLIC** decided by **Mwaungulu J**. He also gave an excuse for his failure to swear and file an affidavit with the court but perhaps that is not our problem. It does not, in my humble opinion, change the law relating to the need, in appropriate cases, to swear and file affidavits any one bit. He did however argue against this application mainly on matters relating to the law. It is thus the State that brought in the **Transfer of Offenders Act** which is Act number 25 of 1991 and the **Mutual Assistance in Criminal Matters Act** which is Act number 24 of 1991.

We were informed that the applicant is wanted in Tanzania because, it is alleged, he committed two violent crimes. There is one for theft of two motor vehicles. Then another for robbery. We were further informed that there is cooperation between the Malawi Police and the Tanzanian Police in matters touching on law enforcement. And it was because of such cooperation that Malawi Police received through **INTERPOL** a communication from their Tanzanian counterparts dated July 24, 2000 requesting for effectively the apprehension and eventual removal of the applicant herein to Tanzania to answer the charges alleged above. The applicant was accordingly arrested and has been in custody from July 13, 2000 to date pending such removal. All this was done and continues to be done under the aegis of the **Assistance in Criminal Matters Act** and **Transfer of Offenders Act** hereinabove mentioned.

At this stage perhaps it is time we looked at the issues raised by the parties herein. Starting with the applicant. What exactly is it that he wants from this court? And what really is the State saying?

As I understand his application, even allowing for some imperfections of the English language, it is for an order that he be granted bail or set at liberty on such conditions as the court might deem fit. In the alternative he asks to be released unconditionally. The (b) part of relief sought is that he be brought before court within 48 hours or as the court may deem fit to be charged or be dealt with thereat. The prayer in the affidavit raises much the same issues. That is apart from giving, in my opinion, the reason why the applicant should be released (firstly so that he should attend a doctor and secondly so that he must have his right to liberty restored).

It also raises the small matter of K53000.00. He alleges it was taken from him by the police. He seeks a return thereof.

Let us consider the question of bail. Firstly I should say at the outset that I do not subscribe to the view that a detainee of whatever hue has under the constitution the right to bail. I am yet to come across a constitutional provision to that effect. What I consider to be the correct position is that a detainee has the right to liberty. Bail refers to the

condition(s) on which one regains his/her liberty. That is clear from section 42(2) (e). It says a detainee has the right **inter alia** to be released from detention with or without bail. One cannot in my opinion apply for bail. It is an anomaly. You apply for your liberty to be restored. In simple language to be released from detention. It will then be up to the court to release you with or without bail. Again in simple language with or without conditions.

One might argue that section 118 of the Criminal Procedure and Evidence Code does grant some right to bail. It does not. It only gives the courts and the police in appropriate cases the discretion to release detainees on bail. Again the operative word in my opinion is **'release'**. The section grants a discretionary power to release **on conditions.**

In the instant application, which could clearly have benefited from more careful drafting, it is the considered opinion of this court that it is less than correct to talk of an application for bail. Certainly not under section 42(2)(e) of the constitution. As I understand it the section only spells out what rights a detainee has. One of them is to be released from detention unless the interests of justice require otherwise. When the detainee comes to court he/she is only restating the right and asking the state to show cause on a balance of probabilities why his/her liberty should not be restored to him. It is then up to the court to set the applicant at liberty on such conditions as it deems fit. The correct thing to do herein, in the opinion of this court, was to use the very words that section 42 (2)(e) itself uses. The applicant should have sought to assert his right to liberty and invited the state to show cause why he should not be released from detention. It would then have been up to this court to restore such right with or without bail.

The applicant must also have misconstrued the purport of section 118(5) of the Criminal Procedure and Evidence Code. As I understand the section it allows for detainees whose applications for release have been turned down by subordinate courts to bring such applications before the High Court. Provided that (a) a prior application must have been refused by the subordinate court and (b) that the applicant must be in custody **'pending proceedings in a subordinate court'.** With the greatest respect I cannot say otherwise than that there are no proceedings pending against the applicant herein in a subordinate court. The applicant knows that he is in custody pending removal to Tanzania. In fact the whole reason these proceedings were taken out was to contest such removal. I fail to see how section 118(5) aforesaid can be of any use to the matter at hand much less to the applicant.

Part (b) of the order sought by the applicant was to the effect that the applicant be brought before court within 48 hours. That sounds to me to be a **habeas corpus** application. It does not appear in the application's heading. But more than that this court is aware that the applicant did appear before the First Grade Magistrate court at Mzuzu on September 8, 2000. That court denied him bail. He was remanded in custody. He then came here trying to overturn the court below's order. He cannot now come to this court and claim

an order of **habeas corpus**.

The applicant also sought to rely on section 42(1)(c) and (f) of the constitution. Initially I was at a loss as to exactly where to place that section in the scheme of things herein. It was not until I read the heading to the application that I came to the conclusion that the section was meant to be in support of the application for an unconditional release. And it was at that conclusion that I was surprised at what paragraph (c) was meant to achieve in this application. It deals with the detainee's right to legal counsel and the necessity in an appropriate case for the state to provide such counsel. Surely that right is not in issue in this matter.

Paragraph (f) on the other hand deals with detainee's right to be released from detention if such detention is unlawful. In this court's view the legality or otherwise of the applicant's detention is the only issue for determination herein. We proceed to examine how each party proceeded to argue their viewpoints.

The applicant alleges that his detention is unlawful because he has never committed any offence in Malawi. The Malawi police therefore had no business arresting him. They have no business having him in custody.

The state on the other hand, while admitting that the applicant has not committed any offence in Malawi, still insist that his arrest and continued detention is lawful. They say they have received a request from the Tanzanian police in terms of the **Transfer of Offenders Act** and **Mutual Assistance in Criminal Matters Act** for the arrest and removal of the applicant. They arrested the applicant. His continued detention is in order to facilitate his removal to Tanzania.

The applicant took the matter a step further. The gist thereof was that the Acts being relied upon by the state to justify the arrest and continued detention of the applicant are 1991 Acts whereas the constitution is a 1995 document. It was further argued that the constitution having guaranteed the applicant liberty the two Acts cannot take it away. To the extent that they purported to do so the two Acts must be taken to be unconstitutional and therefore null and void. It was also contended on behalf of the applicant that the removal of the applicant to Tanzania must be done following proper procedures and that the only procedure known to the law in Malawi is through extradition.

With the greatest respect I doubt if the applicant's counsel is correct. I am sure counsel appreciates that the right to liberty is capable of limitation or restriction. Section 44(2) is clear on that score. It actually lays down such restrictions or limitations. They are those that are prescribed by law, which are reasonable, recognised by international human rights standards and are necessary in an open and democratic society. Much the same is

provided for in section 12(v) of the same constitution. Where such limitation or restriction is in the form of legislation I doubt whether the mere fact that the legislation is earlier in time than the constitution means that its provisions are automatically null and void. There are many laws in Malawi which were passed before the 1995 constitution. They are not bad law simply because they are older than the constitution. They must actually be shown to be in conflict with the constitution for section 5 of the constitution to become operative. It is for that reason that I disagree with counsel Ndovi's position that we must disregard the **Transfer of Offenders Act** and the **Mutual Assistance in Criminal Matters Act** simply because they are 1991 Acts and we are talking about rights conferred by a 1995 constitution. For this court to accept counsel Ndovi's position he should have done more than make reference to the age of the two Acts in comparison to the constitution's.

In my view whether or not the applicant's detention is lawful depends on whether the state's infringement of the applicant's right to liberty is that which can be justified under section 44(2) aforesaid. And in doing so it is my further opinion that the matter of the legality or otherwise of such detention ought to be looked at in two stages. There is the detention **per se** which the applicant says is illegal because he has committed no offence against the Malawi state. Then there is his detention pending removal to Tanzania. The applicant says since he cannot be removed to Tanzania in the absence of an extradition treaty between the two countries his detention pending any such "extradition" must be illegal as well.

Like I said at the beginning the state never swore an affidavit. The State relied on the case of **YIANNAKIS VS REPUBLIC** in which the court said these applications are not a trial. Failure to swear an affidavit is not necessarily fatal to a party's case. I should imagine that was another way of saying that certain procedures can be dispensed with during the hearing of a miscellaneous application. Quite honestly I really have no problem with such a position. In an appropriate case that is. In the instant case the state told us that the applicant was arrested courtesy of a documented request by the Tanzanian police routed through **INTERPOL** Harare. During the hearing of this application the state said it had in court this document. It actually read from it. It was from this document that the state got the gist of the request and the fact that it went through **INTERPOL** Harare. It was from a reading of that document that the state said the document was dated July 27, 2000. Might not one ask why the State never saw the good sense to show this document to the court or the applicant? That document in so far we were told is **the** request by the Tanzanians. It is the very basis of the applicant's arrest and intended eventual removal to Tanzania. It was never shown to us. Without going so far as to suggest the unsavoury how does the court conclude that what the state read out is what the document said? Indeed conclude that such a document does exist? I remind myself at this stage of what the court said in the **YIANNAKIS** case about affidavits. But this a different case altogether. We are talking about the liberty of an individual not only in his home country but abroad as well. The Courts must be the first to guard it jealously. It is in my opinion dangerous to allow anybody to stand up and conduct themselves **vis a vis** the applicant in the manner in which the Malawi Police did without requiring that person

to make an attempt at showing proof of the request. That is a system that would be more than open to abuse. Rogue elements(and we can not pretend there are none) in our law enforcement agencies would seize on it to victimise innocents. The courts should be slow to encourage such a procedure.

Looked at from a different angle doubt can be cast as to whether the applicant was indeed arrested on the request of the Tanzanian police. The state said that the request was in a document dated July 27, 2000. We do not know when it was received by the Malawi police either in Lilongwe or in Mzuzu. We are told by the applicant that he was arrested on July 13, 2000. That was not disputed by the state. The question is 'if it is indeed true that the applicant was arrested on the request of the Tanzanian police contained in a document dated July 27, 2000 how come he was arrested on July 13, 2000 on the basis of the same request? Could it be that the police were being economical with the truth in their instructions to State Counsel?

Let us talk about the Acts themselves. Starting with the **Transfer of Offenders Act.** Much as I would agree that it does allow in certain circumstances the transfer of detainees between commonwealth countries I doubt whether one can apply it herein. Offender by definition cannot equal any detainee. Offender with reference to that Act is defined in section 2. It specifically refers to a person who has been convicted and sentenced which the applicant is not. Any doubts as to what offender means is cleared in spectacular fashion by the preamble to the Act. I quote it in full:

"An Act to provide for the transfer to prisons in their countries of origin of persons convicted within Malawi and to provide for a like transfer of persons convicted outside Malawi, and to provide for matters connected therewith or incidental thereto".

Clearly the Act cannot apply to the applicant. He is not convicted and sentenced. His country of origin is not in so far as the affidavit is concerned Tanzania.

We were also referred to the **Mutual Assistance in Criminal Matters Act.** Specifically to sections 22 and 23 thereof. The state said that under those sections one country in the commonwealth can request another commonwealth country to trace, arrest and remove a suspected felon to the requesting country. Copies of the Acts were made available to us by the state. We had occasion to look at those provisions. They do not in my opinion seem to cover the situation now before us. Section 22 covers the situation where the requesting country asks Malawi to facilitate the attendance of a person resident in Malawi in the requesting country for purposes of giving evidence in that other country. It is trite knowledge herein that the applicant is not wanted to give evidence but to stand trial.

Section 23 aforesaid refers to the transfer of prisoners between commonwealth states. Subsections 1 to 4 are largely procedural. I found subsection 5 to be quite interesting though. It defined 'prisoner' as;

"A person who is being held in custody pending trial for, or sentence for, or is under imprisonment for, an offence, or is subject to any limitation on his personal liberty pursuant to any law."

The all-important question in my view is whether the applicant is a prisoner in terms of subsection 5 above mentioned. Clearly the applicant is not being held in custody pending trial. Or pending sentence. Neither is he under imprisonment for an offence. He is being held in custody pending removal to Tanzania. One cannot deny however that he is under some limitation on his personal liberty. The next question therefore becomes 'is the limitation on his personal liberty pursuant to any law?' According to the state the limitation on the applicant's personal liberty is based on the **Transfer of Offenders Act** and the **Mutual Assistance in Criminal Matters Act.** I have already said that the **Transfer of Offenders Act** does not apply to the applicant herein. That Act therefore cannot be within 'any law' as envisaged in the said Act. Similarly I do not think that 'any law' as used section 23(5) was intended to include the **Mutual Assistance in Criminal Matters Act**. When the legislature talked of 'any law' it meant in my opinion any law other than the **Mutual Assistance in Criminal Matters Act** itself. In other words the person sought to be removed to the requesting state had to be already in custody on the basis of the operation of some other law at the time the request is made. Such was not the case herein. The applicant went into custody specifically so that the **Mutual Assistance in Criminal Matters Act** should be applied on him. The applicant cannot therefore in my opinion be called 'prisoner' as defined in the said Act. The Act cannot, does not apply to him. But there is an even better reason why I think the said Act should not apply to the applicant herein. I believe that the reason the section says the limitation on one's personal liberty should be pursuant to any law is to ensure that such limitation is lawful. A limitation cannot in my opinion be pursuant to any law if it is unlawful. In the instant case we know by now that the applicant was arrested on July 13, 2000, way before any request was made indeed received. We also know that the applicant has not by the state's own admission committed any offence against the Malawi state. The natural conclusion is that the initial arrest of the applicant could not have been because of the request from Tanzania. He had not committed any offence. It means that the applicant was arrested for no lawful reason. That, in turn, can only mean that the arrest was unlawful. Bringing that reasoning into section 23(5), it means the initial limitation on the applicant's personal liberty could not have been pursuant to any law. It was unlawful. He cannot in my view be a person "subject to any limitation on his personal liberty **pursuant to any law**." The section, indeed the Act, cannot apply to him.

By way of conclusion this court is of the opinion that whichever way you want to look at it the applicant cannot be in lawful custody. His arrest was unlawful. He had not committed any offence. The request had not yet been had from Tanzania. His removal to

Tanzania cannot be lawful either. The two Acts relied upon by the state much as they are lawful do not apply in the instant case. To remove the applicant to Tanzania using those Acts would be unlawful. To remove in any other way other than by extradition would be equally unlawful. His continued detention cannot in those circumstances be lawful. You cannot, in this court's considered opinion, keep the applicant in custody pending the doing of an illegal act(namely the removal to Tanzania). The applicant's continued detention therefore, in so far as it is for the purpose of facilitating the removal of the applicant to Tanzania is unlawful.

Let us now come to matter of the K53000.00. The applicant says it should be returned to him. The state disputes that allegation saying that the matter was investigated internally and found to be untrue i.e. the arresting officer never took the K53000.00. The merits or demerits of the allegation aside I am a bit disturbed with the manner the applicant went about the matter of the money. To begin with the issue is not raised in the application itself. It does not even appear on the heading. Neither is mention made of it in the applicant's specification of the nature of the order he sought from this court. It is only mentioned in the prayer in the affidavit sworn by his counsel. Purely on a question of principle I doubt whether that is correct. It is as if the applicant is commencing proceedings in the matter of the K53000.00 through the agency of the affidavit only. That cannot be correct.

But more than that the matter of the money is clearly not a small one. It is, to the obvious knowledge of the applicant, a hotly contested matter. This court does not want to believe that counsel for the applicant thought that this matter could be resolved just by him filing an affidavit in which he alleges that police officer Divala took the applicant's money. It should have been obvious to him that this was a matter in which there would be the need to specifically prove certain facts. Where **viva voce** evidence would be called for. This is different from a situation where the state accepts to have the money but allege some basis, factual or legal, to back their initial and continued detention of the money. The better thing to do is for the applicant to institute separate proceedings in respect thereof.

At the end of a rather tedious day it is obvious that the applicant is in unlawful custody. The state has failed to show lawful cause why the applicant was put into custody in the first place and why he should continue being there. He should be released unconditionally unless there is any other lawful reason why he should not.

The applicant's request for the return of the K53000.00 is not granted.

In passing but no less importantly let it be said that even if the state had lawful authority to remove the applicant it is clear to this court that the state can not then arrest the applicant fold their hands and keep the applicant in custody for time on end. The state must act in such a way that once the decision is made to arrest a person pending removal to the requesting country there should be the minimum of delay in effecting such removal. If we allowed the state to arrest and hold on to the detainees at leisure on the

pretext that they are waiting for their counterparts to do the needful we would in effect be reintroducing detention without trial through the back door. That would be unwelcome.

This court should also emphasise that whereas it recognises the fact that it is the prerogative of counsel to make forceful argument before it in advancing their client's causes such prerogative must never be taken as a cheap and thin disguise under which counsel should conduct themselves in court in a manner not befitting their status as officers of the court. Like was said during the arguments herein, this court specifically, will not tolerate any such kind of behaviour and will not hesitate, in appropriate circumstances, to take measures, including citation of counsel for contempt, to ensure that the sanctity, integrity and decorum of the courtroom is maintained.

Made in chambers this 17th day of November 2000 at Mzuzu.

L P CHIKOPA

JUDGE