IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISC. CRIMINAL APPLICATION NO. 169 OF 2001

BETWEEN:

JOYCE ALICE GWAZANTINI.....APPLICANT

-and-

THE STATE.....RESPONDENT

CORAM: THE HON. MR JUSTICE F.E. KAPANDA

Mr Kauka, of Counsel for the Applicant

Mr Kamwambe, Chief State Advocate and Mr Msowoya of Counsel for the State

Mr Ngwata, Official Interpreter/Recording Officer

Kapanda, J

RULING

Introduction

The Applicant, Joyce Alice Gwazantini, is in custody on a charge of homicide. She was taken into custody on Friday the 17th of August 2001.

On the 22nd of August 2001 the Applicant took out a summons for bail. It is her prayer, inter alia, that she be released on bail pending her trial. The Registrar set down the hearing of the summons on the following day the 23rd of August 2001. I heard Counsel's viva voce arguments on the 23rd and 24th of August 2001. I am grateful to both Messrs Kamwambe, Msowoya and Kauka for their lucid and careful submissions.

I wish to observe that the application is supported by four affidavits viz two sworn by learned Counsel for the Applicant; one has been sworn by the husband of the Applicant and another affidavit has been sworn by the Applicant herself. The State is objecting to the application herein. To this end the State, through Counsel, has filed an affidavit in opposition to the applicant's prayer that she be released from custody on bail.

It must be observed that the affidavits of the Applicant and her husband, filed on 24th August 2001, are in reply to the affidavit in opposition filed by the State on 23rd August 2001. Further, one of Counsel's affidavit, the one that was sworn on the 24th of August 2001, is also an affidavit in reply to the State's said affidavit in opposition.

The Application

The Summons

In the summons, taken out on the said 22nd day of August 2001 the Applicant is applying for an order that she be charged and released on bail on such conditions as the court may deem fit. The application for an order that she be charged has since been overtaken by events for she has since been committed for trial in the High Court and it is my considered opinion that the time she was being committed she was informed of the charge she will be answering.

Depositions and arguments

As already indicated it is the Applicant's wish that she be released on bail pending her trial in the High Court. The applicantion, so far as is revealed by the affidavits in support, is essentially premised upon two grounds. It is the view of Applicant that the said two grounds demonstrate that there are exceptional circumstances that warrant her being released on bail.

Firstly, it is contended by learned Counsel for the Applicant, and it is deponed in his two affidavits, that there is insufficient evidence on which the Applicant could be convicted of any offence relating to wounding or leading to the death of the deceased. Moreover, it is the argument of learned Counsel for the Applicant, and it is also deponed by the said learned Counsel in his affidavits in support of this application, that he had the occasion to read the police docket in respect of the case against the Applicant and that he found the statements contained therein to constitute hearsay speculative and circumstantial evidence on which not even a prima facie case could be found. Furthermore, it has been deponed by learned Counsel for the Applicant that all statements given to the police, by the Applicant's maid and her other niece, indicate that the Applicant was nowhere near the scene of the incident that subsequently led to the death of the deceased, both in physical and temporal proximity.

It must be noted that the State is contending that actually the allegations in the police docket are so serious and damning. The learned Chief State Advocate has, in point of fact, made reference to a dying declaration by the deceased in support of the said contention that there is enough evidence to support the charge that has been preferred against the Applicant. As a matter of fact it is the argument of the State that there is sufficient evidence, including a dying declaration of the deceased, that makes the State's case against the Applicant very strong.

It would appear, from the affidavit and the arguments of learned Counsel Mr Kauka, that the applicant is contending that she has a good defence of an alibi to the allegation that has been made against her. Now the question that arises, and fall to be decided, is whether the fact that a suspect has a good defence that would entitle a suspect to be released on bail. I will reserve my opinion on this. I will give same later in this ruling.

Secondly, the Applicant would want to be released on bail on the ground that her health condition is such that to continue keeping her in custody would not be in the interest of justice. A medical report, to this end, has been exhibited to the affidavit of learned Counsel for the Applicant. The said medical report is dated 23rd August 2001. The relevant parts of the said medical certificate, exhibited to Mr Kauka's affidavit of 24th

August 2001, are as follows:-

"---

Mrs Alice Gwazantini

This is to certify that the above named has been my regular patient for many years. She has been having sinusitis and migraine headaches frequently.

I saw her at Chichiri prison today. Her sinusitis and migraine have flared up due to adverse condition and in addition she has vaginal infection due to poor sanitary conditions.

She is also known to have suffered from diabetes in the past. She needs to have blood test for sugar---"

It is the submission of learned Counsel for the Applicant that having purportedly demonstrated that there is scanty evidence against his client, and that having regard to the contents of the medical report, it is not in the interest of justice that the incarceration of the Applicant should continue.

The State has taken issue with the medical report. Actually, the State is doubting that the said medical report was obtained in good faith in view, it was argued, of the fact that at the commencement of the hearing of this application there was no medical report attached to the affidavit in support of the application and that it only came out after the State had contended, in its affidavit in opposition to the application, that there were no exceptional circumstances to warrant the release of the suspect on bail. In point of fact, in paragraph 6 of the said affidavit filed on 23rd August 2001, Mr Kamwambe had deponed that no evidence had been brought to support the fact that the applicant is asthmatic and that incarceration has worsened her health condition.

Issue for Determination

In my opinion, after going through the affidavits filed herein and upon reading the arguments offered for and against this application, there is only one issue that requires this court's adjudication. The only question that arises, and fall to be decided, is whether or not there are exceptional circumstances that would warrant the granting of bail to the Applicant.

Law and Findings

The burden and standard of proof

It is now settled law that it is for the State to show cause why it would be in the interest of justice not to release a suspect on bail. Further, it is trite law that the standard of proof, in proving that it is in the interest of justice for a suspect not to be released on bail, is on a balance or preponderance of probabilities. I will, therefore, bear these maxims in mind when I am deciding on the question for determination in this matter.

Let me also observe that it would appear that it is incumbent upon a suspect, who is charged with a capital offence, to prove that there are exceptional circumstances in his/her particular case that would require that he/she be released on bail - Lunguzi -vs-

Republic MSCA Criminal Appeal No. 1 of 1995.

Should bail be granted to the Applicant?

The law relating to bail in murder and/or capital offences has been clearly put in the case of Lunguzi -vs- The Republic MSCA Criminal Appeal No. 1 of 1995. The now famous dictum of the Honourable the Chief Justice R.A. Banda S.C., in Lunguzi's case, is very pertinent and I will quote the relevant parts of same. The following is what the Honourable the Chief Justice had to say, in Lunguzi's case, regarding the circumstances under which a suspect would be granted bail in capital offences:-

"Murder, apart from treason, is the most heinous offence known to the law. The punishment for murder, under our law, is death. The law of this country has always been that it is rare, indeed unusual that a person charged with an offence of the highest magnitude like murder should be admitted to bail--- The general practice in most Commonwealth countries is that the discretion to release a capital offender on bail is very unusual and is rarely exercised and when it is done, it is only in the rarest of cases and only on proof exceptional circumstances. In our view it must be rare when the interest of justice can require that a capital offender or persons accused of serious offences should be released on bail." (emphasis supplied by me)

It is an undisputed fact that the Applicant will be answering a charge of murder. The court was informed, and this has not been denied by learned Counsel for the Applicant, that the suspect herein has already been committed for trial in the High Court. It therefore follows, in my view, that the statement of the position at law in the Lunguzi case must apply to the instant case. The Applicant must demonstrate, and satisfy this court, that there are exceptional circumstances in this case that necessitates her being released on bail. I have reminded myself that it has been commented by the Malawi Supreme Court of Appeal, and the High Court, that the words exceptional circumstances must be understood within the context of a particular case. I will bear this in mind when determining the question of whether or not there are exceptional circumstance in this matter before me requiring that she be released from custody.

Has the applicant shown that there are

exceptional circumstances in this case?

Illness

As noted earlier, the Applicant is contending that the medical report produced shows that it will not be in the interest of justice that she continues to be custody pending her trial. It has further been urged by learned Counsel for the Applicant that the health condition of his client, as revealed in the medical report, shows that there are exceptional circumstances calling for the granting of bail to the suspect.

It is accepted, by this court, that in deciding whether or not bail should be granted to a suspect a court of law is called upon to weigh and/or consider, inter alia, the state of health of a suspect (see guideline 7(f) of part II of the Criminal Procedure and Evidence Code (amendment)Act, 1999 popularly known as Bail Guidelines). Notwithstanding this guideline it must be pointed out that the Malawi Supreme Court, in the case of Brave Nyirenda -vs- The Republic MSCA Criminal Appeal No. 15 of 2001, has said, inter alia, that the fact that a suspect is sickly is not an exceptional circumstance and that if such a construction were to be allowed then

same could result "in a watered down meaning, and a clear derogation of the concept, of exceptional circumstances" (see also the case of Joseph Mpasu -vs- The Republic MISC Criminal Application No. 108 of 2001).

Illness per se is not an exceptional circumstance. But there might arise a situation where the health condition of a suspect might amount to an exceptional circumstance. I would tend to think that an illness that is terminal, or where a suspect is terminally ill, would qualify as an exceptional circumstance warranting a release of a suspect on bail. I am afraid to say that in the instant case such is not the case. As a matter of fact the medical report, by Dr. Gombwa, does not say that the Applicant is terminally ill. The said medical report does not even say that she can not be treated at the prison where she is being held or that the prison authorities and/or the State are refusing that the suspect should be treated, at prison, of her ailments. Indeed, it is not the contention of the Applicant that she is being refused access to medication nor has it been argued that the suspect can only be treated when she is on bail. Moreover, it is common cause that the medical report does not show that the suspect ought to be released on bail in order for her to be treated. If it were the case that the prison authorities and/or the State are refusing to let the suspect be treated of her ailment I will not have hesitated to order that she be allowed to be so treated and/or be visited by the doctor of her choice in terms of Section 42(1)(d) of the Constitution of the Republic of Malawi.

Put simply the medical report, and its contents, has not swayed this court into coming to the conclusion that there are exceptional circumstances to necessitate the granting of bail to the Applicant. Before leaving this issue of illness I wish to quote the following statement of my learned brother judge, The Honourable Mr Justice Mwaungulu, in the case of John Zenus Ungapake Tembo and Two Others -vs- The Rep (High Court) (unreported) at page 16 which I found instructive:-

"---the position, as I understand it, is that the health of the applicant is a consideration in two circumstances. First, where it is proved that the applicant's health is a direct result of the confinement. Secondly, it will be considered where the applicant is in real danger of his life---" (emphasis supplied by me)

I have noted from the medical report that the health condition of the applicant, in particular the sinutisis; migrane and diabetes; is not a direct result of the applicant's incarceration. These conditions, it would appear from the medical report, were there before the suspect was put in detention. As regards the vaginal infection that the applicant has allegedly contracted it is difficult, if not impossible, to determine whether indeed the infection is a result of the alleged unsanitory conditions at the prison. I am saying this

because there is no record to indicate that at the time of incarceration the applicant had no such infection. It is possible this condition, the infection, would have been there before incarceration. Moreover, the said sinutisis, migrane, diabetes and vaginal infection have not been described as life threatening and/or terminal.

I will now proceed to consider the other ground on which the Applicant is basing her applicantion for release from custody.

Insufficient evidence and/or a possible good

defence of an alibi

It has been observed, both in viva voce arguments and the affidavits in support of the application for bail, that learned Counsel for the applicant is contending that there is insufficient evidence to implicate his client. Moreover, it is the contention of the said learned Counsel for the Applicant that there is a good defence to the allegations made by the State against the suspect herein. As already observed, it is apparent that the Applicant is of the view that she has an alibi. Following from the foregoing contentions it has been argued that the fact that there is insufficient evidence in support of the allegation against the Applicant, and that she has an alibi which the suspect will raise at her trial, that constitutes exceptional circumstances requiring that the Applicant should be released on bail.

Unfortunately, the position at law does not favour the contention by the Applicant. At law the fact that a suspect has a possible good defence does not necessarily mean that that amounts to exceptional circumstance, (see the case of Brave Nyirenda -vs- The Republic Supra). Thus the fact that the Applicant has a possible good defence of an alibi does not entail that she should be granted bail or, that, that in itself means that she has demonstrated that there are exceptional circumstances requiring that she be granted bail.

Regarding the insufficiency of evidence, as constituting exceptional circumstances, I wish to observe that, in as much as sufficiency of evidence is a factor to be considered on deciding whether or not a suspect should be granted bail, the sufficiency, or otherwise, of the evidence in support of the allegation against the suspect herein can not be weighted at this point in time. In point of fact I do not think, with due respect, that there is much that has been deponed in the affidavits to demonstrate that there is insufficient evidence. If anything the affidavits contain bare statements to the effect that learned Counsel had the occasion to read statements in the police docket and same purportedly show that the statements contain hearsay, speculative and circumstantial evidence which can not even support a finding of a prima facie case against the Applicant. I must add that neither the said statements, nor the substance of the said statements, have been disclosed in the affidavit(s) in support of this application. Further, it should not be forgotten that it is not always the case that proof comes by way of direct evidence. Indeed, circumstantial evidence may equally be used to prove allegations made against a suspect.

In any event I am mindful of the pronouncement of the Honourable the Chief Justice,

R.A. Banda S.C. in the case of Lunguzi -vs- The Republic, Supra at pages 5-6 which suggests that it is wrong to determine the issue of whether or not a suspect should be granted bail basing on the strength or weakness of the evidence in support of an allegation against a prisoner. The court will accordingly be guided by the observations of the Malawi Supreme Court of Appeal in Lunguzi's case. The said dictum is very illuminating and I will cite the relevant parts which are as follows:-

"In some recent judgments in the High Court there have been suggestions that in order to enable the court to properly decide the issue of bail it is imperative on the prosecution to produce evidence either on affidavit or in the form of depositions. This requirement, if it is pushed too far, can have serious repercussions on trials. The statements in some of the judgments suggest that it is necessary for the court to have this evidence to enable it to determine how strong or weak the prosecution case is or to enable the court to find out whether there is a defence available to the accused in order to decide whether or not to release the prisoner on bail. In our view such a requirement would be wholly wrong and highly prejudicial because any finding that the evidence was strong or weak would in effect amount to determining the very issue which must be reserved to the trial court. Applications for bail must never assume the role of semi trials. Courts must continue to confine themselves strictly to the issue of bail which can be resolved without the need of looking at the evidence. Indeed where a trial will be with a jury the issue of sufficiency or insufficiency of the evidence, is a matter, if there is evidence, which will be left to the jury to decide. It must be remembered that in many cases bail applications will be made very early, and in most cases, it will be soon after the arrest of an accused person when the prosecution will have not even started to take statements from witnesses. It would impose an intolerable burden on the prosecution to expect them produce evidence at that stage. It is a burden which would be difficult to discharge. The decision to find whether there is sufficient or insufficient evidence or whether there is a defence available to the accused can only be made after the evidence called has been tested through cross examination by both parties and this will not be available at bail applications except on those rare occasions when committals have been made after a preliminary inquiry. In our view the discretion to grant bail should not be exercised on affidavit evidence which has not been tested in cross examination." (emphasis supplied by me)

In the light of the foregoing observations I find that the alleged insufficience of evidence, and the possibility that the suspect might raise a good defence, does not, per se, amount to an exceptional circumstance. Indeed, the statement of the Chief Justice should, and must, apply to the instant case. It is to be observed that the evidence that the State intends to offer was not, and has not been, tested in cross examination since the committal of the suspect has been by way of summary committal proceedings.

Finally, although not strongly argued by learned Counsel for the Applicant, it is noted that in the first affidavit in support of this application, sworn and filed by Counsel on 22nd August, there is mention of the fact since the suspect has no property outside the country; has no intention of settling outside the country; that she has three young children who need motherly care; and that she has family ties, it therefore means that she likely to report for bail if she is released from custody.

Whilst it is admitted that the court is supposed to take into consideration the foregoing factors, before deciding on whether or not a suspect should be granted bail, I do not think that what learned Counsel has argued, and deponed in his said affidavit of 22nd August 2001, is anywhere near proving exceptional circumstances. The said factors would have made a lot of difference if the suspect had been charged with another offence other than a capital offence. This is the case because

in capital offences the measure is whether there are exceptional circumstances to warrant the grant of bail.

The short of it is that the Applicant has failed to show the required exceptional circumstances so that she be granted bail pending her trial. The application is hereby dismissed and the interests of justice require that the Applicant should continue to be remanded in custody.

Made in Chambers this 30th day of August 2001 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE