

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISC. CRIMINAL APPLICATION NO. 191 OF 2001

BETWEEN:

PRECIOUS DENJA.....APPLICANT

-and-

THE REPUBLIC.....RESPONDENT

CORAM: THE HON. JUSTICE A.C. CHIPETA

Mrs Kanyongolo, of Counsel for the Applicant

Mr Mwenelupembe, Deputy Chief State Advocate for the Respondent

Mr Nthole, Official Interpreter

RULING

The Applicant is a convict under a ten year imprisonment sentence imposed on 28th June, 2000 by the Chief Resident Magistrate at Blantyre for Armed Robbery. He lodged an appeal against both his conviction and his sentence but the mother file of his case has apparently been mislaid between the Blantyre Magistrates Court and the High Court. The appeal has not been heard and due to the uncertainty as to when, if ever, the file will be traced, the date the appeal will be heard and/or determined also hangs in limbo. He swears to the effect that he has faith in the success of his appeal and in the circumstances disclosed above seeks bail pending the determination of his appeal.

Mrs Kanyongolo, of Counsel for the Applicant, put forward quite a spirited argument in favour of her client's application. With due emphasis she stressed the predicament her client now finds himself in with an unheard appeal whose record is so far nowhere to be seen and the consequent anxiety and uncertainty. These factors, it was her argument, amount to such exceptional circumstances as to qualify her client for bail while awaiting this appeal and she earnestly prayed for same. The State, via Mr Mwenelupembe, the Deputy Chief State Advocate, on its part was quite vocal in opposing this appeal. Worried

that if it will be enough to secure bail before appeal just to have a missing case record, the State just fell short of making a heavy accusation and generally just hinted that convicts will be solely tempted to cause files to miss in order to attain such bail.

I was quite attentive throughout the time the opposing arguments, were being advanced in this case and I have taken ample time to soberly reflect upon them. I have in so doing not lost sight of the governing authorities in situations where bail is sought post rather than pre conviction. The naked law on the subject is that such bail, as has been sought here, is only granted on display of exceptional circumstances. I will therefore only be in a position to consider bail for the Applicant herein if I am convinced that he has shown me such type of circumstances. The case of Pandirker -vs- Rep [1971-72]6 ALR Mal. 204, which the State cited in their argument, was so blunt as to point out that before a conviction has

been quashed by a superior court the convict (who in this case is the Applicant) is deemed to be guilty and “does not deserve the free exercise of his freedom” - p. 208.

So far I know of no case where it has been held that uncertainty of date of appeal due to the fact that the case record cannot readily be traced is an exceptional circumstance to warrant bail. I for my part, presented with such argument, think that it does not amount to an exceptional circumstance. I know however that generally where it appears to a court that chances of success of an Applicant’s appeal are high bail will normally be considered. In this case, in the absence of the record and accordingly in the absence of opportunity to vet the record for myself and assess those chances, I am in no position to share in the faith of the Applicant about the likelihood of the success of his appeal.

I certainly do not condone the administrative laxity in our courts that leads to uncertainties such as we have in this case on the whereabouts of the material record. In fact I condemn it. Be this as it may, at law I am bound to view the Applicant convict herein as a guilty man who is not entitled to the free exercise of his freedom per Pandirker (supra). At the same time due to absence of record I do not know what chances of success, if any, his appeal has and I cannot just assume these because the file is presently not traceable. Bearing in mind S 355 of the Criminal Procedure and Evidence Code and the case authorities that have emanated from its interpretation I see no qualification in this matter on the part of the Applicant for him to deserve bail in this case. In the result I dismiss the Applicant’s application but at the same time seriously urge the Registrar to ensure that the Applicant’s trial record is traced so that he is enabled to practically exercise his right of appeal.

Made in Chambers this 27th day of September, 2001 at Blantyre.

A.C. Chipeta

JUDGE