IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CRIMINAL APPLICATION NO. 38 OF 2003

BETWEEN:

JOSEPH MPASU
APPLICANT

AND

THE REPUBLIC
RESPONDENT

CORAM: THE HON. JUSTICE J. KATSALA
T S Chirwa of Counsel for the Applicant
C Phiri (Mrs) of Counsel for the Respondent
Nthole Official Interpreter/Recording Officer

RULING

This is an application for bail pending trial brought by Joseph Mpasu under section 42(2)(e) of the Republic of Malawi Constitution. It is supported by an affidavit sworn by Timothy Sandys Chirwa of counsel on behalf of the applicant. The application is opposed and Chifundo Phiri of counsel has sworn an affidavit in opposition on behalf of the Respondent.

Let me mention at the outset that this application is a follow up to a similar application made on 27th May 2003 where I refused to grant bail to the applicant. It is therefore necessary at this juncture that I narrate the circumstances of the first application in order to give a clear perspective of the present application.

In an affidavit sworn by the applicant's counsel in support of the first application, it was deposed that the applicant was arrested on 4th August 2000 on charges of murder and armed robbery and

that he has been in custody ever since, that he has been denied bail on two occasions on the ground that no special circumstances were revealed to warrant release on bail. That the applicant is suffering from peptic ulcers which are threatening his life because of lack of proper food and medication. Two 'medical reports' were exhibited to the affidavit. The first was written by a Doctor Mwanza and reads;

> "the bearer Mr J Mpasu has been our patient here at Queen Elizabeth Central Hospital and diagnosed to Peptic Ulceration Disease.
> The problem has dwindling impact on the patient's health. Due to the on going problem of the patient the Hospital has decided to recommend the patient be on soft diet."

The second was from the prison dispensary and the relevant parts (as far as I can read since it is a faint photocopy) read as follows;

> "Present History:
> Peptic Ulcers
> - loss of appetite
> - loss of wt
>
> Physical Examination:
> - ill looking
>
> The patient is not okey because he developed ulcers due to poor diet and there is no diet food, the life is in danger. He can't stay here for a long time. Now you release him on bail bond because of his disease."(sic)

It was further deposed that the fact that the illness is threatening the applicant's health constituted special circumstances to warrant his release on bail so that he could find the special food and treatment required for his health, that although the state concluded its investigations over two years ago and that the applicant has already been committed to the High Court for trial, no steps have been taken to prosecute him despite assurances from the Director of Public Prosecutions for a speedy trial, and that a prolonged stay in prison in his current condition would lead to the applicant's death.

The Chief State Advocate who appeared for the State filed an affidavit in which he deposed that the applicant had confessed in his caution statement to have taken part in the armed robbery at the District Education Office in Blantyre where a policeman was killed, but denied directly causing the death or pulling the trigger, that information obtained from Chichiri Prison (where the applicant is remanded) indicated that the applicant was in very poor health condition and that he was deteriorating fast. The State therefore did not object to the granting of bail.

Despite the State's stance I refused to release the applicant on bail because I was of the view that in the light of his confession to have participated in the commission of the offences of armed robbery and murder, it was not in the interest of justice to do so bearing in mind the seriousness of the offences he is charged with, and the severity of the sentence(s) that would be imposed in the event of his conviction. I thought that the likelihood of the applicant appearing for his trial if released on bail was very remote. However I ordered that the State should ensure that the applicant is taken to a hospital for proper medical treatment, that he be brought before court for trial within three months failing which he should be at liberty to make a fresh application for bail.

In the affidavit supporting the present application counsel has deposed to the fact that to date the applicant has neither been tried nor taken to a hospital for medical treatment as ordered by the court, that the applicant is still suffering from peptic ulcers and that he has been in custody since 1998 and that his continued detention is a violation of his constitutional rights.

On the other hand counsel for the State in her affidavit in opposition deposed that the applicant has neither been tried nor taken to a hospital for medical care as ordered by the court because the Registrar of the High Court did not set his case down for trial and the State was not served with "the formal typed order which this Court made", respectively. It is further deposed that the applicant has been in custody since 4th August 2000 upon being arrested by INTERPOL in the Republic of South Africa and not since 1998 as deposed to in the affidavit in support of the application, and that the applicant was committed to the High Court for trial on 25th September 2000.

In their arguments counsel were very brief as they basically adopted the aforesaid affidavits. No authorities were cited in support of the arguments.

I think I can say without fear of contradiction that the law on bail in cases of this nature is settled. I say this because of the provisions of the Bail (Guidelines) Act (Act No. 8 of 2000) and the decisions of the Malawi Supreme Court of Appeal in *M Lunguzi v Republic*, MSCA Criminal Appeal number 1of 1995 (unreported), *A Zgambo v Republic*, MSCA Criminal Appeal No. 11 of 1998 (unreported), and *B Nyirenda v Republic*, MSCA Criminal Appeal No. 15 of 2000 (unreported).

I would not therefore wish to attempt to re-write the law on bail. That is a task in which I would fail miserably. All I will do therefore is to apply the law to the facts of this application.

The starting point in my view should be the statement by the Malawi Supreme Court of Appeal in the *Lunguzi* case (supra) where it said:

> "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. From our perusal of cases from other jurisdictions it is clear that this is also the law in most common law countries. 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 of 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."

My understanding of this statement is that the applicant must prove that there are exceptional circumstances warranting his release on bail otherwise he will not be so released.

This is the fourth time that the applicant has applied for bail to this court following his arrest. The ground advanced in all the applications is the same, that is, illness. In the first two applications the

applicant said he was suffering from tuberculosis. As already mentioned the applicant states that he is now suffering from peptic ulcers. He has produced two 'medical reports' to that effect. He says that there is no suitable diet or treatment at the prison. He argues that this coupled with the delay in prosecuting him constitute exceptional circumstances warranting his release on bail.

On 27th May 2003 I ordered that the applicant must be tried within three months and that he must be taken to hospital for treatment. Neither of these has been done. The reasons given by the State for the failure are, with greatest respect, ridiculous and only manifest neglect of duty. I find it surprising that counsel had the audacity to advance such reasons.

Now the question is, should the applicant be released on bail?

The Bail (Guidelines) Act outlines the principles the court should take into account in deciding whether or not bail should be granted. The Act in my view, merely restates the principles which the courts have applied over the years, long before the passing of the Act. They are not therefore new to the courts. And they do not in any way fetter the exercise of the court's discretion in matters of bail. Section 6 of the Schedule to the Act compels the court, when applying the principles, to weigh the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody.

The applicant has been in custody since 4th August 2000. He was committed to the High Court for trial on 25th September 2000, but up to now he has not been tried. No valid reasons for the delay have been advanced by the State. He is suffering from peptic ulcers. His condition is deteriorating. And the State has failed to take him to a hospital.

On the other hand, the applicant fled the jurisdiction soon after the alleged offences were committed. He was arrested by INTERPOL in the Republic of South Africa. He has confessed under caution to having participated in the commission of the offences he is charged with.

Should the applicant then be released on bail?

Before I answer this question let me say that I am aware that under our law an accused person is presumed innocent until his or her guilt is proved in a court of law. Therefore it is important at this stage to bear in mind that the applicant, though he has confessed to having participated in the commission of the alleged offences, should be presumed innocent. I am also aware that the applicant has under section 42(2)(e) of our Constitution the right to be released from detention with or without bail unless the interests of justice require otherwise. I have read the decision of the Malawi Supreme Court of Appeal in *J Z U Tembo and others v The DPP,* MSCA Criminal Appeal no. 16 of 1995 (unreported) where the Court considered the section and the significance of the words 'unless the interests of justice require otherwise'.

Having carefully considered the circumstances of this matter I now ask myself if it would be in the interests of justice to release the applicant on bail. I do so because I recognize that "the interests of justice require that there be no doubt that the accused shall be present to take his trial upon the charge in respect of which he has been committed", per Ronson J. in *Rex v Monvoisin* cited with approval in *J Z U Tembo and others v The DPP,* (supra). Can it be said with certainty

that the applicant, if released on bail, will present himself for trial? With respect, I do not think so. As already stated the applicant fled the jurisdiction soon after the alleged offences were committed and was arrested in the Republic of South Africa by INTERPOL. It is therefore my considered view that bearing this fact in mind and also the nature and/or seriousness of the offences he is charged with, his confession to having participated in their commission and the severity of the sentences likely to be imposed if he is convicted, there is a probability that the applicant might attempt to abscond trial. In short I am not satisfied that bail will ensure the applicant appearing for his trial. The interests of justice in this matter, in my view, require that the applicant be kept in detention pending his trial. The application is therefore refused.

Finally, in order to avert further delay in the trial of the applicant, I order that the Registrar of the High Court should set down the applicant's case for hearing as soon as funds for homicide cases are available.

Made in chambers this 4th day of December 2003.

John Katsala
JUDGE