IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CRIMINAL APPLICATION NO. 171 OF 2004

BETWEEN:

CLIVE MACHOLOWE **APPLICANT**

AND

THE REPUBLIC **RESPONDENT**

CORAM: **THE HON. JUSTICE J. KATSALA**

R. Matemba, Principal Legal Aid Advocate for the applicant

Miss T. Chimbe, Senior State Advocate for the Respondent

Mrs Mangisoni Court Clerk

RULING

This is an application for bail pending trial brought by Clive Macholowe under section 42(2)(e) of the Constitution as read with section 118 of the Criminal Procedure and Evidence Code. It is supported by an affidavit sworn on behalf of the applicant by Reyneck Matemba, Principal Legal Aid Advocate. The State is opposing the application and Thokozani Chimbe, Senior State Advocate has sworn an affidavit on behalf of the respondent.

The facts of the case, which appear not to be in dispute, are as follows. On 27th November 1997 the applicant in the company of colleagues and armed with dangerous weapons robbed the National Bank of Malawi Limited, one of the commercial banks in the Republic of Malawi, of some sums of money. This

was at the bank's branch at Thyolo. He was arrested, tried and convicted of the offence of armed robbery and was sentenced to 10 years imprisonment. But on 9th April 2004 after serving 5 years of his sentence, the applicant was released from prison having been granted pardon by the President of the Republic. However, it is alleged that on 25th November 1997, immediately before the Thyolo robbery aforesaid, the applicant and one Yusuf Sanudi, Abdul Majid Sanudi, Joseph Mpasu and others who are presently at large, armed with dangerous weapons, robbed the Blantyre District Education Office of some sums of money and unlawfully caused the death of a police officer. Now the applicant and his colleagues have just been formally charged in the High Court with the offences of armed robbery and murder. They appeared before the court on 13th and also on 19th August 2004 when the case was adjourned to some time in October 2004. However, on the aforesaid 19th August 2004 the applicant was arrested by police officers and taken into custody in respect of the two charges. He has been in custody since then and hence this application.

It is deposed in support of the application that the arrest and detention are unwarranted because the investigations into the charges were concluded many years ago as such it cannot be said that the applicant is interfering with investigations or even witnesses. The applicant fails to appreciate why the Director of Public Prosecutions did not object to his release on the presidential pardon in view of the charges he is now facing. Why let him be released only to arrest and take him back into custody four months later, he wonders. It is therefore believed that the applicant's arrest is tantamount to psychological torture. It is further deposed that the applicant was diagnosed to be HIV positive in June 2000 and that he is a tuberculosis patient. He has exhibited a medical report and a Tuberculosis treatment card to substantiate this. It is alleged that his continued detention will lead to a deterioration of his health. It is also deposed that the applicant was arranging to go to the Republic of South Africa to undergo a thorough medical check-up. A letter of introduction from Dr C. M. Nyirenda who is the Chief Consultant Physician at Queen Elizabeth Central Hospital in Blantyre to Dr Phillip Pincus of Milpack Hospital in Johannesburg has been exhibited. It is alleged that the applicant has since failed to fulfil this appointment because of his arrest and detention. Finally, it is deposed that the applicant may not live long enough to undergo his trial if he is kept in custody in view of what has been called his "life threatening health status".

As already said, the State opposes the application. It is deposed in the affidavit in opposition that the office of the Director of Public Prosecutions was never consulted on the applicant's pardon by the President and his release from prison. The applicant should not have been released after the pardon because of the pending charges in respect whereof his co-accused are still in custody awaiting trial. It is

also deposed that the applicant escaped from lawful custody while awaiting trial for the Thyolo robbery, and was re-arrested in the Republic of South Africa. Further it is deposed that the witnesses for the State fear for their safety and are unwilling to come forward while the applicant is free, and that the State is therefore in the course of applying to the court for an order that the identity of the witnesses be concealed until after the trial. It is also deposed that there is no evidence to prove that the applicant's health is deteriorating to the extent of threatening his life. It is deposed that the applicant is in good health and was about to perform at the launch of his music album entitled "Chigawenga" on 20th August 2004. A newspaper cutting showing details of the intended launch is exhibited. Finally, it is deposed that there are no special or exceptional circumstances to warrant the applicant's release on bail.

In their arguments counsel were very brief as they basically adopted their affidavits. But by way of emphasis counsel for the applicant submitted that the State has not produced any evidence to support the allegation that its witnesses felt intimidated by the release of the applicant. It was said that this is fear of the unknown.

No authorities were cited in support of the arguments.

It seems it is generally believed that the law on bail in these cases is now settled. This belief stems from 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) and the enactment of the Bail (Guidelines) Act (Act No. 8 of 2000).

In deciding this application the starting point should be the much-quoted statement by the Malawi Supreme Court of Appeal in the *Lunguzi* case 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."

This statement is very clear. It needs no expounding at all. It says, with a rare degree of clarity, the practice at common law, i.e. that the release on bail of a person accused of a capital offence is in the court's discretion. That discretion is rarely exercised. And it is exercised only where the applicant has proved exceptional circumstances warranting his release on bail.

The courts have religiously followed this common law practice over the years to such an extent that it seems to be beyond challenge. One would be tempted to say that it has stood the test of time. But I would dare to say that looking at our law as it is today, with the Constitution in place, I have serious doubts that this is indeed the correct practice.

Under the Constitution an accused person, regardless of the magnitude of the offence he is alleged to have committed, has the right to be released from detention 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 as a detained person, have the right to be released from detention, with or without bail unless the interests of justice require otherwise."

In the *Lunguzi* case the justices of appeal considered the effect of this section and gave what they called guidance on the principles which courts should always bear in mind when dealing with applications for bail. This is what they said;

> "There are two points which must be made about the effect of section 42 (2)(e) of the Constitution. In our view the right to bail which section 42 (2)(e) now enshrines does not create an absolute right to bail. The section still reserves the discretion to the courts and it makes the position absolutely clear that courts can refuse bail if they are satisfied that the interest of justice so requires. The second point we would like to make is that section 42 (2)(e) does not create a new right. The right to bail has always been known to our law and all that section 42 (2)(e) does

is to give it constitutional force. We would like to emphasise that section 42 (2)(e) does not give an absolute right to bail. The courts will continue to exercise their discretion depending on circumstances obtaining in each particular case."

This right is also recognised and repeated by section 1 of Part 2 of the Schedule to the Bail (Guidelines) Act. It 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 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."

Now, if an accused person has the right to be released from detention then why should he be required to prove exceptional circumstances in order to be released on bail? In other words, why should he be required to prove exceptional circumstances before he can enjoy his constitutional right? Indeed why should his release be in the discretion of the court when it is his constitutional right to be so released? Why should the onus of proving the exceptional circumstances be on him when he has the constitutional right to be presumed innocent? There are many questions to ask but the issue really is that the practice we have followed in our courts in bail applications in cases of this nature, in my opinion, is erroneous. We have tended to treat bail pending trial the same way we treat bail pending appeal, which is in the discretion of the court and the applicant has to satisfy the court that there are sufficient grounds to warrant his release. We have proceeded as if the State has the constitutional right to detain a person accused of committing a capital offence. Surely it is time we revisited this practice.

In my judgment the practice should rather be to require the State to prove to the satisfaction of the court that in the circumstances of the case, the interests of justice require that the accused be deprived of his right to release from detention. The burden should be on the State and not on the accused. He who alleges must prove. This is what we have always upheld in our courts. If the State wants the accused to be detained pending his trial then it is up to the State to prove why the court should make such an order. It is ridiculous, in my opinion, to require the accused to prove why he should be released from detention. Let me acknowledge the view expressed by the justices of appeal in the *Lunguzi* case to the same effect. However, it is very surprising that despite expressing such a view they turned around and went on to emphatically prescribe the common law practice which requires the accused to prove exceptional circumstances to be released on bail.

Let me also mention that it would appear that there is a general belief mostly amongst prosecutors that when a person is arrested it lies upon him to apply to court for his release. This belief is totally misconceived and erroneous. Yes, under section 42(1)(e) of the Constitution a detainee has the right to challenge the lawfulness of his detention before a court of law. But under section 42 (2)(b) of the Constitution every person arrested for or accused of the alleged commission of an offence, in addition to his aforesaid right as a detained person, has the right to be brought before an independent and impartial court of law not later than 48 hours after his arrest to be charged or to be informed of the reason for his further detention failing which he should be released. This section places the burden on the State to take the arrested person before the court. It is at the court that the state must prove to the satisfaction of the court that the accused, though entitled to release, should not be released because the interests of justice require that he be detained further. This must be done within 48 hours after his arrest. The section does not place the burden on the accused to apply to be brought before court or to apply to be released.

If these provisions are understood correctly one can see that there is no room for the common law practice under our law. In as much as it is correct that the right to bail is not new to our law and that it is not absolute, with the greatest respect, I do not agree that the right under section 42 (2)(e) is in the discretion of the court. I fail to see how something, which can only be enjoyed at the discretion of someone, can be a right. For example, under a contract of employment, if the payment of a bonus were in the discretion of the employer, it would be incorrect to say that the employee is entitled to a bonus. If we were to accept their lordships reasoning then it would be incorrect to say that an accused person has a right to be released from detention under section 42(2)(e). However, I entirely agree that the court will continue to exercise discretion under the section but strongly disagree that such discretion will be in respect of whether to release an accused person on bail or not.

Coming to the present application it is presented in line with the common law practice. The main ground advanced by the applicant is ill health. The applicant says that in the year 2000 whilst in prison he was diagnosed to be HIV Positive. That is, he has the virus that causes AIDS. He was also diagnosed to be suffering from Tuberculosis. The treatment card he has exhibited shows that he received full treatment for the tuberculosis and was cured. All the same the applicant says that if he is kept in custody awaiting his trial his health is bound to deteriorate because of the poor conditions prevailing in prison. He even fears that he may die before his trial.

The Bail (Guidelines) Act outlines the principles the court should take into account in deciding whether or

not bail should be granted. Section 6 of Part 2 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 19th August 2004. It is deposed on behalf of the State that on the said 19th August the State was ready to commence its case but failed to do so because the applicant sought an adjournment. The case has since been rescheduled for hearing sometime in October this year. It cannot therefore be said that there is a likelihood of delay in the disposal or conclusion of the trial. Further, the State has alleged that the applicant once escaped from lawful custody when he was on remand awaiting trial for the Thyolo robbery and that he fled the jurisdiction. He was re-arrested in the Republic of South Africa and extradited to Malawi. There is therefore a likelihood that he may attempt to abscond his trial once again this time around.

Let me reiterate what I have already said 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 that the applicant should be presumed innocent. It should also be remembered, as I have already shown above, that under our law the applicant has the right to be released from detention with or without bail unless the interests of justice require otherwise.

The question then is, do the interests of justice in this case require that the applicant be remanded in detention pending his trial?

Having carefully considered the circumstances of this matter I come to the conclusion that the interests of justice require that the applicant be kept in detention pending his trial. I do so because I am fully aware 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,* MSCA Criminal Appeal no. 16 of 1995 (unreported). 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. It has been deposed on behalf of the applicant that there is no basis to doubt that the applicant will attend his trial if released on bail because before his arrest, he did attend court on two occasions to answer the present charges even when he was not summoned by the court but only came to know about the dates through the media. But in the course of arguing this application it became apparent

that before his arrest the applicant was under the belief that the grant of pardon extended to the present charges as well. It is therefore not surprising that he was so willing to attend court. Now that he knows that he was pardoned only for the Thyolo robbery whose sentence he was serving and not the rest of the offences he may have committed, I am sure he may revisit his willingness to attend court for his trial.

As already stated the applicant escaped from lawful custody and also fled the jurisdiction soon after the alleged offences were committed and was re-arrested in the Republic of South Africa. 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, 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. I am not satisfied that bail will ensure the applicant appearing for his trial. The interests of justice in this matter, in my judgment, require that the applicant be kept in detention pending his trial. The application is therefore refused.

Made in chambers this 3rd day of September 2004

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J KATSALA

JUDGE