IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA Criminal Appeal No. 1 of 2018

(Being High Court of Malawi, Zomba District Registry, Miscellaneous Criminal Application No. 97 of 2016)

Sandras Frackson.....1st Appellant

Kuthakwaanthu Chakalamba.....2nd Appellant

Benjamin Jabes.....3rd Appellant

And

The Republic.....Respondent

Coram: Honourable Chief Justice A.K.C. Nyirenda SC
Honourable Justice E.B. Twea SC, JA
Honourable Justice A.C. Chipeta SC, JA
Honourable Justice L.P. Chikopa SC, JA
Honourable Justice F.E. Kapanda SC, JA
Honourable Justice D.F. Mwaungulu SC, JA
Honourable Justice A. D. Kamanga SC, JA
W. Sudi, of Counsel for the Appellants
Masanjala, Senior State Advocates of Counsel

for the Respondent
Kishindo, Senior Deputy Registrar
Msowoya, Chief Judicial Research Officer
Chintande (Mrs) and Masiyano(Ms), Court Clerks
Pindani (Mrs), Court Reporter

Chipeta SC, JA:

ORDER

This matter was before us last week, i.e on 24th May, 2018. We on that day heard the three appellant's appeal against the decision of the High Court of Malawi sitting at Zomba denying them bail in a murder trial that they are yet to face. Post the hearing, we adjourned the matter to a date to be advised for the pronouncement of our decision on the appeal. Pending that date, however, we have found ourselves in a situation where we believe that, in line with the dictates of justice we must, in the interim, make an order in the matter. It is for this reason that six days after the hearing we had, and before even preparing our decision in the appeal, we have called the appellants and the respondent back to the Court to pronounce to them the interim Order we have come up with.

As depicted by Section 18 of the Constitution, personal liberty is a high profile right under the constitutional dispensation that exists in this jurisdiction. Thus whenever it is revoked, even by the State for alleged crime, the inclination of the law is that the circumstances surrounding such revocation be looked into at the earliest opportunity with an eye towards the possible restoration of the said liberty. Accordingly, as early as within the first 48 hours of any person's arrest for alleged crime, or at the latest as early as by the expiry of that period of time from arrest, section 42(2)(b) of the Constitution sounds alarm bells for State institutions to see to it that the arrested person is brought before an independent and impartial court of law to there be charged or be informed of the reason for his further detention, *failing which he shall be released.* Further, where on such maiden appearance before the court the said arrestee has ended up being further detained by the court, under Section 42(2)(e) of the Constitution he has, and he retains, the right *to be released* from detention, with or without bail, *unless the interests of justice require otherwise.*

Beyond this stage, it will be seen that hereafter even in situations where, for instance, it has not been found to be in the interests of justice to have someone arrested for alleged crime released, whether with or without bail under the above-referred Section 42(2)(e) of the Constitution, the existing system of justice requires that as the affected arrestee thus continues to be held in custody, he be at least accorded a fair trial, and that the such trial should be conducted within a reasonable time [see: section 42(2)(f)(i)of the Constitution]. Further, it is a basic requirement of the law that at the trial in question, the person so accused of crime shall be presumed innocent until proved guilty [see: section 42(2)(f)(iii) of the Constitution]. In this regard, the Criminal Procedure and Evidence Code (Cap 8:01) of the Laws of Malawi readily walks in the footsteps of the above constitutional provisions by, *inter alia,* setting deadlines for the commencement of various categories of criminal proceedings before the different levels of Court that are available, and also by, through its Part IVA, specifying pre-trial custody time limits for the detained accused persons in respect of the categories of cases they are meant to face trial for.

As will clearly be evident upon checking, for the offence of murder, which falls within the category of the most serious crimes in our land, Section 161G of that part of the Code sets a maximum of 90 days as the longest lawful incarceration a person accused of that level of crime can undergo before the commencement of his trial. However, in terms of Section 161H of the same Code this is subject to Court-sanctioned extensions that must cumulatively not exceed an extra 30 days. Again here, in true reflection of the sanctity of personal liberty, Section 161 I of this Code comes in to empower Courts, even of their own motion, to consider releasing whoever is affected at the expiry of the lawful pre-trial custody time limits.

Vis-à-vis the matter at hand, we observe that the way our system of justice has this far treated the appellants does not, by any stretch of imagination, tally with the high sounding constitutional and legal provisions we have just referred to above. Indeed, as a Court, we have found it to be a matter of grave concern that, although it is now getting very close to two years since these three appellants were arrested on 21st July, 2016, to date they do not appear to have at all sufficiently benefited from the treatment their own Constitution and their own Laws guarantee to all human beings, including them, that are found within the boundaries of this country. We are even more disturbed by the fact that among the three is a child, i.e, the 2nd appellant Kuthakwaanthu Chakalamba, who was only aged 15 years on

arrest in July, 2016, and who has thus also had to endure life in custody for almost two years now, in all that time doing nothing more than just waiting for and hoping that his trial for murder will start.

Our worry about the child in particular, we must say, is heightened by the fact that as of now we do not even have any information on whether, after he had been so denied bail in the Court below, the State did, as ordered by the Honourable Judge in that Court, manage to move him from remand at Ntcheu Prison to remand at a reformatory centre suited to his age. In this regard, however, even if the state did so move him, we would be of the mind that such remedial move came a little too late, as by then he must have already been incarcerated at a wrong place (i.e a prison) for longer than half a year i.e, from arrest in July, 2016 to April, 2017 or thereabouts when, as we understand it, the December 2016 ruling on bail was shared out to the parties. We thus very much doubt whether moving a child from a prison setting to an appropriate reformatory centre for children after something like nine months of staying in prison could, by itself, erase whatever negative effects the juvenile might have suffered during that lengthy residence in prison. In any event, considering that the juvenile's lawful period of pre-trial incarceration was not supposed to exceed 90 days, if not lawfully extended, then his move from prison to a juvenile detention centre, after so many months had passed in excess of his first 90 days of incarceration, was not going to have the effect of henceforth legalizing his incarceration, which by then was already unlawful through and through.

Reverting to all three appellants, as already observed, we are deeply concerned that their pre-trial incarceration is very close to clocking a duration of two years now, and as we have already indicated, we are in no doubt that the three of them are presently in an illegal pre-trial detention. We sadly note, incidentally, that in all that length of time, save for the state having brought the trio before a Court of law within five days of their arrest, i.e, on 26th July, 2016, whereat they were each committed for trial for murder to the High Court of Malawi, it (the state) does not appear to have done much else in relation to these appellants that can be said to be in compliance, or in attempted compliance, with the requirements of the law. If anything, the only record we have of what the state has been able to do *vis-à-vis* the appellants in all the time that has so far gone by is: (i) that when the three applied for bail in the Court below, its reaction was to try to block the said application from being heard by the Court on technical grounds; and (ii) that when

the appellants brought an appeal to this Court against their being denied bail by the Court below, it has opposed their appeal.

Besides these two visible activities of the state, there is, for instance, no indication that after getting the appellants committed for trial in the High Court, there was any step taken by the state to show that it was concerned with the plight of the appellants as they continued to reside in custody, and yet under the law, the incarceration in question needed to be legally monitored and regulated. Further, and most unfortunately too, there is equally no sign that even as the appellants languished in detention, the state was doing anything to ensure that they would be accorded a fair trial within what could be considered a reasonable time. Indeed, detained as they were, for the offence of murder, there does not appear to have been designated any state official to oversee what should happen to the appellants upon the expiry of their lawful 90 days pre-trial custody time limit, i.e, whether they should be released or whether they should instead be further kept in custody upon legally securing an extension of their detention in terms of and to the extent of the limits permitted by the law. Thus, by the time the appellants were clocking, and then exceeding, their 90 days of legally tolerable pre-trial detention, no one took note and no one did anything about it. We observe, therefore, that as on 16th November, 2016 when the three appellants were lodging their application for bail at the High Court in Zomba, they were already almost one full month past the maximum period of 90 days they could lawfully have been in custody awaiting the commencement of their trial had the state been faithful to the letter of the law on this subject.

To be quite candid, it strikes us that in the matter at hand the appellants were arrested, and then brought to Court for committal purposes within five days of their arrests, only to be thereafter forgotten and abandoned in custody. The state, it appears to us, only woke up to the reality that the three were still in custody when it was served with their joint application for bail. Even then, however, instead of focusing on helping them realize their rights as persons that had been arrested for alleged crime for which they had that far already lost their personal liberty for four months, the state chose to first concentrate its efforts towards fending off the hearing of their application on technical grounds. We are now at the end of May, 2018, i.e, 22 months after the arrest of the appellants for alleged murder, but there is no indication that the state is either ready or is about ready to commence the trial of the appellants, a trial which if it was to take place while they were in custody

should legally have been commenced within the first 90 days of their arrests i.e, within the July-October, 2016 period of time. For us, it is these appalling circumstances i.e the almost endless pre-trial detention of the three of them, including the juvenile, as if the law governing such situations only applies to others and not them, that has compelled us to take immediate action by way of issuing, in the interim, an order in advance of our drawing up of the determination we are due to come up with in respect of the appeal we heard.

In our view, therefore, there is no doubt that the rights of the three appellants herein have been trampled upon by the very system of justice that was supposed to protect and safeguard those rights for them. Rural people as they are, they stand weak against the law and against the mighty institutions of the state, which, paradoxically, exist to serve them. They are, in a sense, a vulnerable people in that they might not be as knowledgeable as someone better enlightened about what rights the Constitution accords them, or as confident as someone better resourced about how vocally to assert and claim those rights, especially where the said rights have been wantonly violated. We believe, in the circumstances, that we cannot spot such plight and afford to look away until our decision in the appeal is ready for delivery. We take it to be incumbent upon us as the Supreme Court of Appeal of the land to stand up for the immediate correction of the harm the illegal pre-trial detention herein has so far done to these three appellants, which harm continues unabated to date. True, we accept, the trio stand accused of a heinous offence, but, like would be the case with anyone else standing in their shoes, we must acknowledge that they are at this stage to be presumed innocent until proven guilty. Accordingly, we now make an order that will curtail their continuing illegal pre-trial incarceration. We thus order the release of the three appellants herein on bail on the conditions we list hereunder:

(a) The first and the third Appellants (Sandras Frackson and Benjamin Jabes), who are adults, should, at the High Court of Malawi, Zomba District Registry, each enter into a non-cash bail bond in the sum of K50,000.00, the same being recoverable from them for forfeiture purposes only on breach of the said bail bond;

(b) The said first and third Appellants should in addition each furnish to the said High Court of Malawi, Zomba District Registry, two satisfactory sureties, each to be bound in the sum of K50,000.00 (not cash), the same being recoverable from the said sureties for forfeiture purposes only on breach of the bail bond;

(c) The second Appellant, i.e the juvenile Kuthakwaanthu Chakalamba, should through two of his parents and/or guardians at the High Court of Malawi, Zomba District Registry, execute a non-cash bond in the sum of K20,000.00 in respect of each such parent/guardian, the same being recoverable from such parent/guardian for forfeiture purposes only on breach of the bail bond;

(d) All three appellants should surrender to Mlangeni Police Station for safe-keeping their Passports or other Travel Documents, if they have any, until the conclusion of their yet to be commenced murder trial by the High Court of Malawi;

(e) All three appellants should be reporting in answer to their bail bonds to the said Mlangeni Police Station once every fortnight in a month during working hours before noon on Mondays starting with Monday 11th June, 2018; and

(f) All three appellants should not travel outside Ntcheu District without first informing the Officer-in-Charge of Mlangeni Police Station of both the destination and the duration of such intended visit out.

We further order that the examination of sureties for purposes of giving effect to this grant of bail to the appellants be done before the Assistant Registrar of the Zomba District Registry of the High Court of Malawi.

We so order.

Pronounced in open Court the 30th day of May, 2018 at Blantyre

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HONOURABLE CHIEF JUSTICE A.K.C. NYIRENDA SC

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HONOURABLE JUSTICE E.B. TWEA SC, JA

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HONOURABLE JUSTICE Dr J.M. ANSAH SC, JA

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HONOURABLE JUSTICE R.R. MZIKAMANDA SC, JA

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HONOURABLE JUSTICE A.C. CHIPETA SC, JA

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HONOURABLE JUSTICE L.P. CHIKOPA SC, JA

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HONOURABLE JUSTICE F.E. KAPANDA SC, JA

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HONOURABLE JUSTICE D.F. MWAUNGULU SC, JA

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HONOURABLE JUSTICE A.D. KAMANGA SC, JA