John Zenus Ungapake Tembo and others v The Director of Public Prosecutions

Court:	Supreme Court Of Appeal
Bench:	The Honourable Justice J Kalaile SC JA , The Honourable Justice Villiera, JA, The Honourable Justice Unyolo SC, JA
Cause Number:	MSCA Criminal Appeal Number 16 of 1995
Date of Judgment:	September 11, 1995
Bar:	Stanbrook, Queen's Counsel, For the Appellants Counsel George Kaliwo, For the Appellants Counsel Gustav Kaliwo, For the Appellants, Counsel Munlo, SC, For the Appellants Counsel I N K Nyasulu, For the Respondent Counsel Mwenelupembe, For the Respondent

Head Notes

Criminal Procedure Bail – Constitutional Right to Bail – Malawi Constitution s 42(1)(e) – Onus of proof lies on the State to justify continued detention

Criminal Procedure Bail – Interests of Justice – Definition of interests of justice is upheld liberty will not be prejudiced

Criminal Procedure Bail – Changed Circumstances – Severance of indictment constitutes a new basis for bail application

Criminal Procedure Bail – Capital Offences – Bail is available in capital cases and discretion should not be unduly restrictive

Criminal Procedure Bail – Exceptional Circumstances – Proof of exceptional circumstances is merely caution when assessing all facts

Criminal Procedure Bail – Interests of Justice – Risk of absconding or tampering with witnesses justifies refusal of bail

Criminal Procedure Bail – Pre-Trial Detention – Nine-month detention for a prospectively long trial is prejudicial and favours bail

Summary

The Appellants appealed to the Malawi Supreme Court of Appeal against a High Court decision delivered on 31 May 1995 dismissing their application for bail. The three Appellants were arrested in January 1995 in connection with the 1983 deaths of three Cabinet Ministers and a Member of Parliament and were committed for trial on charges of murder and conspiracy to murder. Their initial application for bail was refused by the Chief Resident Magistrate for lack of jurisdiction. A subsequent application to the High Court was refused by Mwaungulu, Acting J., who nonetheless ordered that if the case was not ready for hearing by 24 April 1995, the Appellants should be released on bail.

As the case did not commence by the appointed date, a fresh application for bail was brought before Mkandawire, J., who dismissed it, arguing that the prosecution was not wholly to blame and that no "exceptional circumstances" had been shown. Following

an order for severance, the prosecution elected to proceed only on the lesser, non-capital charge of conspiracy to murder. The final application for bail was dismissed by Mkandawire, J., on the grounds that severance of the charges did not constitute a fresh matter that would permit him to revisit the earlier ruling. The Court allowed the appeal, finding unanimously that this was a proper case in which bail ought to have been granted to the Appellants. The decisive rationale was that section 42(1)(e) of the Malawi Constitution creates a right to bail for everyone, subject only to "the interests of justice." The Majority affirmed that the onus of proof is on the State to show why an accused should be deprived of this right, noting that the likelihood of the Appellants absconding was remote. The Court further held that the severance of the indictment to the non-capital charge of conspiracy to murder constituted a new situation and a proper basis for a fresh bail application under the Criminal Procedure and Evidence Code. The prolonged pre-trial detention of nine months for a case that was clearly going to be a long trial was also a crucial factor. The Court pronounced the decision orally in open Court, granting the Appellants bail on specific conditions involving a bond, sureties, and daily reporting. The Court made no order as to costs

Legislation Construed

- Malawi Constitution (s 42)
- Criminal Procedure and Evidence Code (s 118, s 293, s 310(2))

Judgment

This is an appeal against the decision of Mkandawire, J., given on 31st May 1995, in which the learned Judge dismissed the appellants' application for bail.

After hearing Counsel on both sides in argument and after considering the matter conscientiously, we unanimously found that this was a proper case in which bail ought to have been granted to the appellants. We accordingly allowed the appeal and granted the appellants bail on the terms indicated hereafter. We pronounced this decision orally in open Court and reserved our reasoned judgments, having agreed that each Judge would write his own judgment.

The history of the matter' is as follows. The three appellants were arrested by the Police on 4th January 1995 and taken into custody in connection with the deaths of three Cabinet Ministers and a Member of Parliament 'in Mwanza in-1983. Two days later, on 6th January, the appellants were brought before the Chief Resident Magistrate's Court at Zomba and committed for trial at the High Court on charges of murder and conspiracy to murder. The appellants applied for bail, but the learned Magistrate turned down the application, saying that he had no jurisdiction to grant bail. in a case of this nature.

The appellants then made another application for bail before the High Court. The matter came before Mwaungulu, Acting J. (as he then was) , and by his order dated 6th March 1995, the. learned Judge refused to grant the appellants bail, saying that the appellants had not proved any exceptional circumstances to enable him release them on bail. Having refused to grant bail, the learned Judge, however, proceeded to make an order that the Director of Public Prosecutions (DPP) should file formal charges and have the case ready for hearing on 24th April 1995. He then tied the said order to the application for bail and directed that if the case was not ready for hearing on the date indicated, 24th April 1995, the appellants should be released on bail.

Somehow, the case did not commence on the appointed date. indeed, by that date, even the statements which the prosecution were required to furnish to the appellants under the provisions of section 293 of the Criminal Procedure and Evidence Code had not been furnished. The appellants, Counsel then moved the Court to release the appellants on bail. At that point in time, the case had been assigned to Mkandawire, J. After hearing Counsel, the learned Judge dismissed the application, saying that the prosecution were not wholly to blame for the failure of the case to start and that at any rate, the appellants were still unable to show exceptional circumstances as to entitle them to bail.

Subsequently, another application was brought before the learned Judge. In that application, the defence requested, among other things, that the charges be severed 'in order to make the case less complex; other reasons were also proffered. The application was successful on this point and the learned Judge ordered that the murder offences be tried separately from the conspiracy to murder offences. Following on the order, the prosecution elected to proceed on the conspiracy to murder counts against the appellants. Observably, hearing of the case has since started on the said conspiracy to murder counts, leaving the murder counts held over.

There then followed another 'application for bail., again before Mkandawire, J. The prosecution again opposed the application. In his ruling of 31st May 1995, the learned Judge observed that the appellants were relying on the very matters they had raised previously when they sought bail before Mwaungulu, Acting J. The learned Judge said that he could notrevisit those matters, since he was not sitting as an appellate court. He said that he could only confine himself to fresh matters or circumstances. He was

of the view that no new matters had been raised, saying that the fact that the charges had been severed did not constitute a fresh matter and could not be the basis of a fresh application for bail. lie also observed that the case was making some progress. For these reasons, the learned Judge dismissed the application. It is against that decision that the appellants appealed to this Court.

Firstly, Counsel for the appellants attacked the decision on the ground that the learned Judge erred in failing to give effect to the constitutional right to bail contained in section 42 of the Malawi Constitution. It was also contended that the learned Judge erred in refusing bail despite the fact that the prosecution had failed to adduce facts that could justify the appellants being deprived of the said constitutional right. The thrust of the arguments on this aspect was that section 42 of the Constitution provides the right to bail for everyone and for any offence, subject only to "the interests of justice". Counsel submitted that rights are rights and that where the State wishes to deprive a citizen of such rights, it must prove why the citizen should be so deprived.

In reply, the learned DPP agreed that section 42 of the Constitution does indeed create a right to bail. He, however, said that this is not a new right at all; it has always been there. The learned DPP also agreed that the onus is on the prosecution, in any case, whether involving a capital offence or not, to show why an accused should not be granted bail by the court. The learned DPP, however, said that it is important to note that the Constitution has not made the right absolute, but subject to the "'interests of justice". He said that once the State has shown, on a balance of probability, that the interests of Justice justify the continued detention of an accused, the burden then shifts to the accused to show that he/she is entitled to bail by showing "exceptional circumstances". He submitted that in the present case, the appellants failed to show

such exceptional circumstances before the lower Court and that they had failed to do so even at the time the appeal came up for hearing, so that their continued detention could not be impugned in thecircumstances.

Pausing here, I wish to state that I would agree that, generally, speaking, the right to bail existed in our laws even before the present Constitution came into force. Such a right existed by virtue of section 118 of the Criminal Procedure and Evidence Code. With regard to the High Court, subsection (3) thereof provides:

"The High Court may, either of its own motion or upon application, direct that any person be released on bail or that the amount of, or any condition attached to, any bail required by a subordinate court or police officer be refused or varied."

It is, however, to be observed that despite this provision, it appears that in the past everybody thought that bail was not available to accused persons charged with capital offences. Without question, accused persons answering charges for such offences were always locked up. As I understand it, it was only late last year when a judicial pronouncement was made to the effect that the High Court here has jurisdiction to grant bail even in cases involving capital offences: per Mwaungulu, Acting J., in Christos Demitrious Yiannakis -v- Rep., Misc. Criminal Application No. 9 of 1994 (unreported). observably, the accused in that case was charged with the offence of murder and Counsel for the State had argued vociferously that bail was not available for capital offences. The argument was, however, rejected and subsequently the accused person was granted-bail by Mbalame, J. While on this point, it is also to be noted that bail was again granted in yet another murder case involving a certain Mrs Davis in Balaka. The courts have clearly taken quite a new perception in matters of bail lately as a result of the provisions of section 42(i)(e) of the new Malawi

Constitution.

Happily, the Malawi Supreme Court of Appeal has confirmed that the High Court does indeed have power to Cant bail even in capital offences. The Supreme Court has also confirmed that the onus is on the State to show cause why bail should not be granted or, what is the same thing, why it would not be in "the interests of justice" not to release an accused person on bail: see Mc William Lunguzi -v- Rep., M.S.C.A Criminal Appeal No. 1 of 1995 (unreported).

“This raises an important question, namely, what is meant by the phrase "the interests of justice"? Actually, the way section 42(i)(e) of the Constitution puts it, is that every person who is detained has the right to be released from detention, with or without bail "unless the interests of justice require otherwise".

The case of S -v- Smith and Another, (1969) (4) SA 175 (N) a South African case, is useful. At page 177, E-F, Harcourt, J. said: "The general principles 'governing the grant of bail are that, in exercising the statutory discretion conferred upon it, the court must be governed by the foundational principle, which is to uphold the interests of justice; the court will always grant bail where possible, and will lean in favour of, and not against,. the liberty of the subject, provided that it is clear that the interests of justice will not be prejudiced thereby-"

And in a Canadian case, namely, Rex -v- Monvoisin (1911), Manitoba Reports, Vol. 20, at page 570, it was observed: "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-"

In S -v- Essack, (1965) (2) SAR. 161, another South African case, Miller, J. said at page 162: "It seems to me, speaking generally, that before it can be said that there is any likelihood of justice being frustrated through an accused person resorting to the known devices to evade his trial, there should be some evidence or some indication which touches the applicant or accused person in regard to such likelihood."

And earlier on the same page, the learned Judge had this to say:

"In dealing with an application of this nature (i.e. an application for bail), it is necessary to strike a balance as far as can be done between protecting the liberty of the individual and safeguarding and ensuring the proper administration of Justice...If there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the court will be fully justified in refusing to allow him bail."

What emerges from the foregoing cases, so it appears to me, is that where a person has been charged with an offence, the wheels of justice are set in motion and the accused person is expected to be prosecuted for the offence and the law requires that the accused shall be available to stand his/her trial until the case is completed.

To put it simply, what section 42(I) (e) of the Constitution is saying, is that every person who is detained has the right to be released from detention, with or without bail, unless such person, if so released, is likely to frustrate or prejudice the course of

justice by failing to stand his/her trial, e.g. by fleeing the country. From the various cases 'that I have been able to come across, this appears to be the paramount consideration, but the interests of justice would also be frustrated where there is a reasonable likelihood that if the accused person was released on bail, he/she would tamper with witnesses or interfere with police investigations: see S -v- Acheson(1991) (194) (2), SA 805 a Namibian case. There are several other considerations as well which I may have occasion to refer to later in this judgment. Perhaps I should point out here before I pass on that section 42(i)(e) is not just about bail as such, but that it encompasses the wider remedy available by habeus corpus at common law.

Referring to the present case, the prosecution seem to have relied heavily on the seriousness of the charge brought against the appellants. With respect, it is correct that the seriousness of the charge brought against an accused person is one of the factors to be considered by the court. Fear is a natural instinct in human beings, so that generally speaking, the more serious the offence, a capital offence for example, and the sentence it may call for upon 'conviction, the greater the likelihood that the Accused person would be disposed to abscond. All the same, the court has to consider all the circumstances of the particular case. And, as was observed in the **Essack** case above-mentioned, there should, in each case, be some evidence or some indication which touches the particular accused person that he/she is likely to abscond. On my part, I didn't think that it was so shown in the present case. Indeed, I would say that the matters raised by the appellants in their lengthy affidavits sworn to in support of the bail application show that the likelihood of them absconding, if released on bail, is quite remote.

Next, it was contended, on behalf of the appellants, that the learned Judge in the Court below erred in holding that severance of the indictment could not be the basis for a subsequent application for bail. Just to recapitulate, I have shown on this aspect that the appellants were originally indicted on murder counts and conspiracy to murder counts. I have then shown that following a preliminary objection, the Court below ordered that the charges should be severed and that the prosecution then elected to proceed on the conspiracy to murder charges, leaving out the murder charges. In the decision appealed against, the learned Judge held that such severance could not be the basis for a subsequent application for bail. It appears that what bothered the learned Judge, basically, was that it was the appellants themselves who had sought severance of the charges and that the appellants could not then turn around and complain that such severance would -result in delay in disposing of the case. With respect, I am unable to join in -the view taken by the learned Judge. Section 310 (2) of the Criminal Procedure and Evidence Code confers on the High Court additional power to grant bail, where the Court makes an order either for the postponement of a trial or for a separate trial or an order for severance. The section does show clearly that this particular power is in addition to, and not in derogation of, any other power of the Court for the same or similar purposes, It appears to me that the section was put in in recognition of the fact that severance of counts almost always does create a new situation than that which obtained hitherto. For example, in the present, case, I have shown that following the order for severance, the prosecution have proceeded to prosecute the appellants for the offence of conspirancy to murder, which is a lesser offence than the capital offence of murder previously preferred. Significantly, conspiracy to murder is a non-capital offence, punishable by a maximum sentence . of 14 years imprisonment. To my mind, the Court has to proceed with this case on the basis of the new situation herein; to deal with the case on the basis of the murder charges would be wrong, as those charges are no longer before the Court in the present case. Indeed, I think that it is a fair comment to say that the prosecution must

have good reasons for leaving out the murder charges. It is also to be noted that the offence of conspiracy to murder is bailable even by a subordinate court: see section 118(1) of the Criminal Procedure and Evidence Code. Actually, there is a well-known case in the Chief Resident Magistrate's Court at Zomba (a case which is now commonly referred to as the Bishops case") where that Court granted bail in a case involving a charge of conspiracy to murder, as in the present case. I mention all this just to highlight the point I am trying to make on this aspect; otherwise basically each case is to be decided on its own facts.

In short, I am unable to join with the learned Judge in the Court below in his finding that severance cannot be the basis of an application for bail; it can be.

The lower Court's decision was also attacked on the ground that the learned Judge failed to consider the issue of sufficiency of evidence. It was submitted that statements under section 293 of the Criminal Procedure and Evidence Code had been served by the time the application for bail was brought before the lower Court. It was said that although this was so, the lower Court did not look at the said statements, as the learned Judge erroneously thought that these had already been considered and dealt with in an earlier application before Mwaungulu, Acting J. which, however, was not the case. It was submitted that had the learned Judge looked at the said statements, he would have seen that they did not disclose a prima facie case, or any case, against the appellants.

Pausing here, I would agree that the strength or weakness of the evidence against an accused person is a factor to be considered in bail applications: see R v- John

Maginniss. While I would also agree that section 293 statements are intended to give the substance of the evidence of the witnesses to be called at the trial, it must be appreciated that such statements basically give only the summary of the intended evidence. From the Maginnis case and a number of other cases that I have read, it appears to me that the kind of evidence that is envisaged on this aspect is evidence in the legal sense; that is to say, evidence on oath such as viva voce evidence given at a preliminary inquiry or evidence by affidavit or depositions: see R -v- Barthelemy (1852) 1 E & BL 8, The Sate -vPurcell (1926) IR 207, and the Monoisin case I mentioned earlier in this judgment. As I have earlier indicated, statements furnished under the provisions of section 293 are merely a summary of what was recorded from a prospective witness in the case, not under oath, for example, at a police station. With respect, the Court should be slow to act on such material for purposes of determining bail applications. This, in my view, is sufficient to dispose of the appellants' contention on this aspect.

There were other matters that exercised my mind in the present case. I have discussed above some of the considerations to be taken into account by the Court as to whether bail should be granted or not. Another consideration which I didn't discuss is how prejudicial it might be for the accused person in a particular case to be kept in custody by being refused bail, regard being had to all the circumstances of the case. Some of the matters to be considered on this aspect include the duration that an accused person has already spent in custody if any, and the duration that he will have to continue to be in custody before his trial is completed: see the Acheson case.

Referring to the instant case, the Court, was told that originally the State intended to call some 153 witnesses. The Court also learnt that of these witnesses, less than a

third had testified, leaving over a hundred other witnesses still to testify. Further, the Court learnt that actually more witnesses than the number originally envisaged would be called. It was, therefore, clear that this was going to be a long trial. Observably, by the time we were hearing the present appeal, the appellants had already been in custody for about nine months. All in all, it was evident that if not released on bail, the appellants were going to be in custody for a long time.

For the foregoing reasons and after giving the matter much thought, I concurred with my brother Judges that this was a proper case in which bail ought to have been granted to the appellants, and as I have earlier indicated, this Court allowed the appeal and granted the appellants bail, on the following conditions:

1st Appellant

1. K500,000 bond, not cash;

2. To furnish two sureties each in the sum of K10,000, not cash, to be examined by the Registrar;

3. To surrender his passport to the Commissioner of Police, Southern Region;

4. To report daily at a police station, time and police officer, to be designated by the Inspector General of Police;

5. Not to leave for places other than office and home without the authority of the designated police officer.

2nd Appellant

1. K10,000 bond, not cash;

2. To furnish two sureties each in the sum of K2,000 to be examined by the Registrar;

3. other conditions as for the 1st Appellant.

3rd Appellant

1. K30,000 bond, not cash;

2. Other conditions as for the 2nd Appellant.

There is one Other matter which Counsel touched on in arguing this appeal and I think that it is only proper that I comment on it, albeit briefly. It relates to the guidelines that were laid down by this Court, per the Honourable the Chief Justice, in the Lunguzi case, above-mentioned as regards the principles which courts should always bear in mind in considering applications for bail. Counsel expressed some concern about the approach adopted by the court in that case.

The Court stated in the Lunguzi case that while it was true that the High Court could, in its discretion, grant bail in any case, the Court was of the view that the discretion should be exercised with extreme caution and care in the most serious offences. The Court went on to observe that murder, apart from treason, is the most heinous offence known to the law as is exemplified by the death penalty the offence attracts and that the law of this country has always been that it is rare, indeed unusual, that a person

charged with 4n offence of the highest magnitude, like murder, should be granted bail., Finally, the Court observed that the general practice in most Commonwealth countries is that the discretion to release -an accused person charged with a capital offence is exercised only on proof of "exceptional circumstances".

Counsel for the appellants submitted that the approach adopted by the Court on this aspect tantamounts to saying that in capital offences the right to bail as enshrined in the Constitution is abrogated because of the seriousness of the charge. Counsel said that this can't be right, as implicit in such a view is that a citizen should have doubts about his rights.

My own view is that in dealing with applications for bail, the court should not be unduly restrictive. The law gives the court a real discretion in the matter. While the seriousness of the charge is a factor to be considered by the court, all the facts of the particular case should be examined and it is only where the court is satisfied that -the interests of justice require otherwise that an accused person should be refused bail. In other words, it would be wrong for the court to refuse to grant bail simply because an accused is charged with murder, if there was no doubt that he would stand his trial and would not interfere with witnesses or police investigations or commit another offence and there was no risk to his safety if released on bail. It is also to be noted on this point that bail must not be withheld merely as a punishment to the accused person. Decided cases abound with statements to this effect.

With regard to the other statement that the law of this country has always been that it is rare and unusual that a person charged with murder should be admitted to bail, I

would say that this was simply what the courts perceived to be the law and then a practice developed whereby, as I have earlier indicated, persons charged with capital offences were indiscriminately locked up. I have shown that it was only recently, so far as I am aware, that a' 'Judicial pronouncement was made, quite correctly, declaring that bail was available even in capital offences.

It is also true, as stated in the Lunguzi case, that the courts in this country have required proof of "exceptional circumstances" in order to grant bail in serious offences (I am not referring to capital offences here). Observably, it was the accused person who was required to show such "exceptional circumstances". But these are not magic words. As was correctly observed by Mwaungulu, Ag. J. in the Yiannakis case, what is really meant by "proof of exceptional circumstances" is that in relation to serious offences such as capital offences, in exercising its discretion whether or not to grant bail, the court should weigh the total facts carefully and, to put it in the learned Judge's own words, "with the utmost of circumspection". I have already said that, generally speaking, the temptation to abscond is quite strong in the case of an accused person who is charged with a capital offence. But having said this, the fundamental question still is whether the accused person is likely to stand his trial. If the answer to the question is in the affirmative and there is no likelihood that he will commit another offence or interfere with witnesses and there is no risk to his own safety, then bail should be'. granted despite the gravity of the offence.

Before I pass on to the next point, let me emphasize that the expression "exceptional circumstances" is not a term of art and in this regard the fact that an accused is a sickly person or that heis a respectable member of his community or the fact that he has a possible strong defence to the charge laid against him could, in my view,

constitute "exceptional circumstances" within the meaning just discussed, so as to entitle the court to grant bail'; it all depends on the facts of the particular case.

The other concern expressed by Counsel for the appellants was that the guidelines in the Lunguzi case appeared to require that an applicant for bail should produce evidence which must be available for cross-examination. The Court went on to caution that the discrition to grant bail should not be exercised on affidavit evidence. With respect, I am unable to share fully in this view. As was observed by Counsel for the appellants, applications for bail are almost always granted upon affidavit evidence. This is also the case in our local jurisdiction; even in applications for orders of **habeas corpus** courts require the applicants to support their applications by affidavits. However, reading the judgement as a whole, it appears that what really bothered the Court on this aspect was the view which seemed to have come up in some High Court judgements, to the. effect that in order for the Court to properly decide on issue of bail, it was imperative for the prosecution to produce evidence either on affidavit or in the form of depositions to show the strength of their, case. The Court, rightly in my view, held that this requirement, 'if pushed too, far could assume the role of semi-trials and would impose an undue burden on the prosecution at that stage. it is to be noted that 'the Court, however, appreciated and acknowledged that generally where depositions were available which show a possible defence, the Court would be entitled to take the evidence from such depositions into a court in considering the application for bail alongside whatever other facts obtained in the particular case.

These are the few observations I wanted to make; otherwise I agree with the other things articulated in the said guidelines. As already indicated, the substantive appeal was successful and that the appellants were granted bail on a unanimous decision of the Court.

Finally, there was a prayer for costs. The principles governing the award of costs in criminal proceedings are not quite well-developed in criminal proceedings in this jurisdiction as they are in civil proceedings. In the absence of full argument by Counsel on the subject, I think that the proper thing to do is to make no order. Indeed, it must be appreciated that hearing of the main case is still continuing. I would, therefore, make no order as to costs of the appeal.

Kalaile, J.A.

My Lords, the three appellants have been in custody well over a period of nine months as they were arrested on 6th January 1995. They applied for bail before Mkandawire J. and on 31st May 1995 their application was unsuccessful. They thereafter applied before Villiera, J.A.. sitting as a single Judge of this Court and his Lordship granted leave to appeal to this Court against the Order made by Mkandawire J. The appellants' counsel filed seven grounds of appeal for and on behalf of the three appellants. Before I examine the grounds of appeal, I wish to deal with an issue raised by the learned Director of Public Prosecutions (herein-after referred to as the DPP) even if he did not file any cross appeal.

It was argued by the DPP that the Supreme Court of Appeal was not-competent to entertain an appeal where bail was denied by the High Court. This very point was exhaustively dealt with by Mwaungulu J. in Tembo & Others. v, Rep Criminal Application No.1 of 1995. This Court cannot express any views on this point since the learned DPP filed a separate appeal in DPR v, Te,mbo & Others, Misc. Criminal Appeal No.3 of 1995. That point shall be dealt with by the full Supreme Court when this particular appeal is before the said Supreme Court.

I now turn to the seven grounds of appeal which Mr Stanbrook later ended by compressing into three. The first and seventh grounds were argued together and these were that:

(1) in failing to give effect to the constitutional right to bail contained in Section 42 of the Constitution of Malawi; and (7) wrongly refused bail despite the fact that no grounds were tendered on the part of the DPP that could Justify Mr Tembo, or Mr Likaomba or Mr Kalemba being deprived of their constitutional right to bail respectively.

Starting with the first ground, Mr Stanbrook argued the point that the grant of bail under s.42 is qualified by the words "unless the interests of justice otherwise requires" and section 42 draws no distinct 'ion between capital and non capital offences. He surprised me by arguing that at common law, bail could be granted for capital offences. Yet in Rex -v- Hawken (1944) 2 DLR Farris C.J. S.C. granted bail in a murder trial and there are a number of other authorities where bail was so granted in common law jurisdictions. The correct approach is that bail is granted sparingly, where the charge is a capital offence since the accused is likely to jump his bail.

It was also argued by Mr Stanbrook that in Malawi under the present constitutional provisions, it is not for the accused person to establish before the court that he has exceptional circumstances. Mr Stanbrook dealt with the 'exceptional circumstances, syndrome later when addressing this Court on the issue of severance under grounds numbers 5 and 6 as well as the guidelines stated by the learned Chief Justice in Lunguzi v. Rep. M.S.C.A. Criminal Appeal No.1 of 1995. He argued that the choice by

the DPP to pursue the conspiracy charge after severance of the murder charges is an exceptional circumstance to warrant granting bail to the three accused persons. In one breath Mr Stanbrook states that the doctrine of exceptional circumstances has no place under the 1994 Constitution and in another he calls in aid the doctrine of exceptional circumstances in connection with the severance of charges under the fifth ground of appeal.

In dealing with the subject of exceptional circumstances, Mwaungulu J. put the position thus in Yiannakis V Rep. Crim. App. No.37,of 1994 "Let me just mention as I conclude that when I say that bail in capital offences should be granted in special circumstances I am not limiting the exercise of the discretion. Article 42(1) (e) clearly creates a right to bail ' subject to one qualification: as justice requires. Justice requires the examination and balancing of all the circumstances in a particular case. Essentially it is the balance between the inviolable right of a citizen to liberty as long as he has not been proven guilty and the necessity to preserve law and order by prosecuting those who offend. It follows, therefore, that by insisting for proof of exceptional circumstances the courts take the view that in relation to capital offences, given the gravity of the sentence, the discretion to grant bail should be exercised with the utmost circumspection. It is not intended to create a whole plethora of decisions of what circumstances constitute special or exceptional circumstances. In one case one circumstance may not be as dominant."

The expression "special" or "exceptional" circumstances was also considered by the Malawi Supreme Court of Appeal in the case of Devoy v Rep. (1971-72) ALR Mal. .223 at 236 in connection with convictions grounded on the uncorroborated evidence of an accomplice. Skinner C.J. in delivering the sole judgment of that court was of the

opinion that: - "It was said by the East African Court of Appeal in Canisio s/o Walwa -v- R. an appeal from the decision of the then High Court of Tanganyika that any reference by that court to "special" or "exceptional circumstances" which appeared in the judgment in that case should again be treated as indicative of no more than the rule of prudence to which he had earlier referred. In other words "exceptional circumstances" as used in Wanjerwa's case was no more than another mode of expressing the warning as to the dangers of convicting on the uncorroborated evidence of an accomplice."

Now, in the context of a bail application, "exceptional circumstances" in applications where the applicant is charged with a capital offence is another mode of stating that if the accused is likely to suffer serious penalties such as the death penalty or life imprisonment, the likelihood of such person jumping his bail is higher than if he was charged with a lesser offence such as conspiracy to murder.

To that extent, this is a rule of prudence in that justice requires the examination and balancing of all the circumstances in a particular case and in arriving at a conclusion which takes into account the pros and cons of the particular circumstances of a case.

On my part, I share the same viewpoint as that expressed by the learned DPP by holding that the provisions of 9.42 of the Constitution do not change the position at common law. In Lunguzi V. Rep Misc. Crim. App. No.1 of 1995, the Chief Justice put the position aptly in the following terms - "There are two points which must be made about the effect of s.42(2)(e) of the Constitution. In our view the-right to bail which s-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 the 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 s.42(2)(e), does not create a new right. The right to bail has always been known to our law and all that s.42 (2) (e) does is to give it constitutional force."

And the position at common law is clearly expressed by Ronson J. in Rex V. Monvoisin thus: "Archbold's Criminal Pleading and Evidence page 111, after stating that the proper test of whether bail should be granted or refused is whether it is probable that the party will appear to take his trial, says that the test should be applied by reference to the following considerations:

(1) The nature of the accusation.

(2) The nature of the evidence in support of the accusation.

(3) The severity of the punishment which the conviction will entail; and

(4) Whether the sureties are independent or indemnified by the accused."

In S, V. Acheson Mahomed J. listed ten instances against the four listed by Ronson J. as ancillary circumstances which should be considered so as to determine whether the accused will not jump his bail. What Ronson J. and Mahomed J. stated in common is not in any way inconsistent with the provisions of s.42 of the Constitution.

What then is the significance of the words "unless the interests of Justice require otherwise?" In the case of Rex v Monvoisin , Ronson J. states as follows in the last paragraph of his judgment: "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. There have been no delays on the part of the Crown and I cannot see any circumstance in this case to justify the exercise of discretion in favour of this application. It is therefore refused."

Under the provisions of s.42 of the Constitution I too would take a similar stand if the prosecution is not guilty of unwarranted delays, and, as Hanna J. put it in State V. Purcell: "According to the theory of the law an accused is committed into custody for trial in a serious case because there is a probability that he might not otherwise be available, and not because there is a presumption against him of guilt: In re Robinson."

This very principle was expressed thus by Farris C.J. S.C. in Rex V. Hawken at page 119: "This brings me to the next phase, as to whether or not a Judge should exercise his discretion and grant bail to a person accused of murder. The question of bail is sometimes misunderstood. When a man is accused he is nevertheless still presumed to be innocent, and the object of keeping him in custody prior to trial is not on the theory that he is guilty but on the necessity of having him available for trial. It is proper that bail should be granted when the Judge is satisfied that the bail will ensure the accused appearing for his trial."

That, to my mind, is the cardinal principle which a trial judge should bear in mind in an application for bail. In my opinion, this principle does not abrogate any provision of the Constitution. Indeed, this is what the expression "unless the interests of justice otherwise requires" is all about.

Instead of dealing with grounds 2, 3 and 4 specifically, Mr Stanbrook took us on a tour of the guidelines which the Chief Justice gave in the Lunguzi case. So far as these deal with murder cases, they are obiter dicta. But where the guidelines touch on the issue of sufficiency of evidence and the provisions of s.293 of the Criminal Procedure and Evidence Code, then they have a bearing on grounds 5 and 6 and I feel obliged to comment on Mr Stanbrook's submissions.

As far as I can see it, the Lunguzi case is authority on the proper burden and standard of proof in bail applications. That, really, is the ratio decidendi of that case. On the subject of sufficiency of evidence in bail applications, I take the stand that after the depositions were submitted before Mkandawire J., he should have considered the granting of bail on the basis of whatever evidence was before him and should have applied the principles enunciated by Ronson J. and Mohamed J. in the cases cited in this judgment earlier on.

In his ruling dated 24th April 1995, Mkandawire J. stated, inter alia, that - "Now that the 21 clear day requirement has not been complied with, what is the position? In his ruling of 6th March, 1995, Mwaungulu J. found that there were no exceptional circumstances to enable the court exercise its discretion in favour of granting the accused persons bail. The learned Judge said it quite clearly that the accused persons had failed to prove exceptional circumstances. Now, does the Director of Public Prosecution's failure to comply with section 293 of the Criminal Procedure and Evidence Code constitute an exceptional circumstance? I do not think so. Having found that there were no exceptional circumstances, had the Judge wanted he could have dismissed the bail application outright without going any further. But in order to

ensure that the case was brought to court without delay, the learned Judge went further and fixed a date. It is noted that the DPP has done everything that was there to be done except that there is a shortfall of 4 days. If the DPP had done nothing, I think that the accused would have been entitled to insist that they be released on bail."

The last two sentences of the citation were questioned by Mr Stanbrook. He does not agree that by 24th April 1994 the DPP had done everything that was there to be done in that Mwaungulu J. states at page 13 of his Order delivered on 6th March 1995 that - "It is contended by the DPP that the applicants could not contend that the evidence of the State is weak before the applicants were served with the statements under s.293 of the Criminal Procedure and Evidence Code. On an application for bail the State should furnish the Court with evidence on which the case is based. In not disclosing the strong evidence to the Court the DPP has left the Court with no matterial on which to properlyexercise the discretion. As I said before, the applicantsare not also very free from blame, in as much as they also have not disclosed their side of the case."

What Mr Stanbrook also disagreed with was the statement that "If the DPP had done nothing, I think that the accused would have been entitled to insist that they be released on bail."

Counsel asked the rhetoric question, how do you raise the exceptional circumstances in the absence of a prima facie case being established by the prosecution? Clearly it cannot be done.

Furthermore, argued Mr Stanbrook, after the severance of the capital offences from the charge sheet, the trial Judge was entitled to consider the bail application afresh in view of the presence of the s-293 statements coupled with the severance. These factors were never before Mwaungulu J. when he considered the subject matter of bail.

A word or two on the issue of s.293 statements and the sufficiency of evidence in bail applications. I believe the correct position to be as stated by Hanna J. in the State. Y. Purcell where it was observed that :-

"As to the third ground, viz:- the strength, on the depositions, of the case against the accused, - it is inadvisable to discuss the evidence in detail, or to do more than express my opinion that there is evidence of a prima facie case to go to the jury for consideration, and of such a character that, if they believe the witness, and the case for the State is not answered or displaced, it would warrant a conviction."

On this very point, I once more revert to the case of Rex -v- Nawken where Farris C.J. S.C. noted that :- In any case it is the view of this court that it is not only the right but the duty of the Judge before whom an application for bail is made for a person committed for murder to examine the evidence taken on the preliminary hearing, and if the evidence does not justify a committal, or the evidence is so weak that there is little chance of a conviction, and when the other circumstances are such (particularly under present day circumstances) that there will be no chance of the accused failing to appear at his trial if bail is granted, then bail should be granted."

The depositions which Hanna J. made reference to in the Purcel case are prescribed for by the provisions of s.265 of the Criminal Procedure and Evidence Code which reads -

“(1) When the accused charged with such an offence comes before a subordinate court, on summons or warrant or otherwise, the court shall, in his presence, take down in writing, or cause to be so taken down, the statement on oath of witnesses, who shall be swora or affirmed in accordance with the Oaths, Affirmations and Declarations Act.

(2) Statements of witnesses so taken down in writing are termed depositions.

(3) The accused may put questions to each witness produced against him and the answer of the witness thereto shall form part of such witness's depositions.

(4) If the accused does not employ counsel, the court shall, at the close of the examination of each witness for the prosecution, ask the accused whether he wishes to put any question to that witness.

(5) The deposition of each witness shall be read over to such witness and shall be signed by him and by the magistrate."

Now, in my considered opinion, this type of evidence would not result in establishing the guilt of an accused beyond reasonable doubt. It is the kind of testimony which attains proof on a balance of probabilities and would suffice to establish a mere prima facie case against the accused. This is what I believe to be the position of sufficiency of evidence in bail applications. Mr Stanbrook also argued, correctly in my view, that affidavit evidence has from time immemorial, been the traditional mode of furnishing evidence in bail applications and this is further provided for by Order 79 r.9 rr.1 Rules of the Supreme Court 1995 Edition which states at page 1350 that

"This rule provides for applications to the High Court for bail in criminal proceedings according to the circumstances, namely:

(a) where the defendant is in custody; or

(b) where the defendant has been admitted to bail by an inferior court, i.e. a magistrate's court or a coroner.

The application must be made to a Judge in Chambers and must be supported by an affidavit."

In Linguzi V. Rep. M.S. C.A. Crim. App. No. 1 of 1995, use of affidavit evidence in bail applications was firmly deplored. In my considered view, use of affidavit evidence per se is perfectly proper as long as the correct burden and standard of proof are applied.

Next Mr Stanbrook took up the subject of change of circumstances under grounds 2 and 4. These grounds read as follows -

"(2) in wrongly confining himself, in his consideration of bail, to circumstances which have occurrqd since the last application;

(4) in failing to deal with the application as a fresh application within the Court's powers under s.118 and S.310(2)(c) of the Criminal Procedure and Evidence Code.”

It was submitted by Mr Stanbrook that Mkandawire J. should have implemented the bail terms imposed by Mwaungulu J. since the service of process on Dr Banda was defective and resulted in a three week adjournment. And at this point In time, more than 50 "section 293 statements" were later served by the DPP on the defence. Lastly the defence had to resort to s-37 of the Constitution in order to elicit certain information from the prosecution. Part of Mr Stanbrook's submissions have already been covered in this judgment earlier on when I was examining the first ground of appeal in that part where I have cited judgments of both Mwaungulu and Mkandawire

JJ

Section 293 of the Criminal Procedure and Evidence Code provides that - "In every summary procedure case the prosecution shall, not less than twenty one clear days before the date fixed for the trial of the case, furnish to the accused or his counsel, if any, and to the Registrar of the High Court a list of the persons whom it is intended to call as witnesses for the prosecution at the trial and a statement of the substance of the evidence of each witness which it is intended to adduce at the trial."

It is perfectly clear that the contents of 11s.293 statements" (as Mr Stanbrook chose to term them) cannot be equated to the evidence of a witness given in examination-in-chief and later subjected to cross-examination by counsel.

Section 37 of the Constitution prescribes that - "Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of Government insofar as such information is required for the exercise of his right."

In dealing with the s.293 statements, the DPP submitted that, with regard to the conspiracy charge, the evidence proffered by the prosecution is mainly circumstantial evidence which must be examined as a whole and not in isolation. As a result of the severance, the Mwanza case would end up with three distinct trials and there was an appeal against the Order made by Mwaungulu J. Furthermore, there was a fresh bail application by the appellants on 24th May 1995 and during the same month of May, the appellants filed a host of preliminary objections so that the cumulative effect of

these applications added to the nine months delay in these proceedings.,

Mr Stanbrook raised the issues of autrefois acquit and autrefois convict regarding the murder charges which the DPP decided to put on hold until the conspiracy charges were disposed of. The DPP quite properly observed that this Court should not concern itself with the possibility of bringing up the murder charges as the Court is not expected to speculate on the outcome of the murder trial.

The first point which convinced me that this is a proper case in which to exercise my discretion in favour of the accused in granting bail is the rather inordinate delay in presenting the depositions to the court below. When Mwaungulu J. made his Order on 6th March 1995, he indicated that the DPP had left the court with no material on which to properly exercise it's discretion. Mr Stanbrook also argued that by July 1995 all of the requisite documents were not ready so that even if Mkandawire J. was minded to consider the issue of bail, he would not be in a position to do so. The blame for these delays falls squarely on the shoulders of the State. The bail applications and the preliminary objections raised by the defence played an insignificant role in further delaying the proceedings in the court below.

The second point which strongly exercised my mind in deciding to grant bail in these proceedings is that he accused are not charged with murder but with the offence of conspiracy to Murder which attracts a maximum prison term of 14 years imprisonment. Ms C.T. Kadzamira has been granted bail by the Chief Resident Magistrate and I believe that certain individuals have also been granted bail in the Zomba Magistrate Court on a similar charge of conspiracy to murder. Of course,

although the charges are identical, 'individual circumstances must be carefully and critically examined since the grant or refusal of bail is a judicial act and not an executive or ministerial act.

The conditions' upon which bail has been granted in the present case are fairly stringent so as to ensure that all of the accused attend their trials. Those conditions are not intended to be punitive in any way but as is stated in Archbold Criminal Pleading, Evidence and Practice, 36th Edition at para 202 on page 71

"Bail is not to be withheld merely as a punishment. The requirements as to bail are merely to secure the attendance of the defendant at the trial R, v. Rose 67 L.J. Q.B. 289."

Lastly, My Lords, on a different note, certain occurrences which happened in the course of this trial in the High Court call for comment so far as they affect the press. In Rex V. Hawken Farris C.J. S.C. observed that the freedom of the press is a sacred right under our form of democracy but that freedom does not extend to a licence to permit newspapers to publish articles which will result prejudicially to a fair trial, and in effect result in a trial by newspapers. It is a contempt of court to publish comment on pending proceedings which prejudges the merits of the, case or which imputes guilt to, or asserts the innocence of a particular accused. Indeed, when a trial has taken place and the case is over, the Judge is given over to criticism for the public and the press then have the undoubted right to criticize in a fair and candid spirit all the incidents of the trial and the judgment, and in the same spirit, to dissect the public conduct of all concerned in the trial, including the judges themselves. So that newspapers, in a case such as the present one, are confined solely to publishing a reasonable and fair report of the proceedings which are public property, but, they must do so without comment

on any interlocutory orders that may be made in the proceedings.

This principle was expressed in vivid terms in R. V. Clarks, Ex parte Crippen in the following fashion "We are determined to do nothing to substitute in this country trial by newspaper for trial by Jury; and those who attempt to introduce that system in this country, even in its first beginnings, must be prepared to suffer for it. Probably the proper punishment and it is one which this court may yet have to award prove insufficient will be imprisonment in cases of this kind. There is no question about that, because we cannot shut our eyes to the fact that newspapers are owned by wealthy people, and it may even happen that they will take the chances of the fine and pay it cheerfully and will not feel that they have then paid too much for the advertisement. Therefore it may well be that if this process is not stopped, if this is not a sufficient warning, the court may have to resort to a more peremptory method - that is imprisonment of the guilty person. We do not do so in this case. We have been told that the assistant editor, who is the person responsible for this act of contempt of court, sees how wrong he was, acknowledges his fault, and regrets it and apologises to the Court. When one does repent of a wrong we will not punish him as though he still persisted in his wrongdoing.... Notwithstanding that, this remains a very grave offence against the administration of justice. In the hope that what has been said in this Court will be the means of stopping it and enforcing our opinion, as we must do, the order of the Court is that the assistant editor, do pay to the Court the sum of E200, and also the costs of bringing this matter before the Court, and that he be imprisoned until that sum is paid."

I take it that this warning will be heeded by those to whom it may concern. In the case before us, I make no order as to costs.

Villiera, J.,A.

This is an appeal against the High Court refusal to grant bail The appellants' trial is in progress. They were originally committed for trial with others on numerous counts of murder, conspiracy to murder, being accessories to the fact Of murder and destroying evidence. In view of the multiplicity of charges and the number of accused persons involved, an application for severance of the indictment was made and the High Court duly ordered that the murder charges be tried separately from those involving conspiracy to murder. The Director of Public Prosecutions decided to proceed first with the charges relating to conspiracy to murder and the appellants are accordingly being tried on those charges.

Seven grounds of appeal were filed as under -

(1) that the learned Judge erred in failing to give effect to the constitutional right to bail contained in Article 42 of the Malawi Constitution.

(2) that the learned Judge wrongly confined himself, in his consideration of bail, to circumstances which had occurred since the last application.

(3) that the learned Judge erred in that he did not find that the Appellants who are being tried on offences of conspiracy to murder and conspiracy to defeat justice are entitled as a matter of right under section 118 of the Criminal Procedure and Evidence Code.

(4) that the learned Judge erred in failing to deal with the application as a fresh application within the court's power under sections 118 and 310(2)(c) of the Criminal

Procedure and Evidence Code.

(5) that the learned Judge erred in wrongly holding that severance of the indictment could not be a basis for a subsequent application for bail.

(6) that the learned judge erred in failing to consider the issue of sufficiency of evidence and in particular the fresh evidence arising out of the fact that section 293 statements had been served since the previous application and particularly since it did not disclose a prima facie or any case against Mr Tembo or Mr Likaomba or Mr Kalemba.

(7) that the learned Judge wrongly refused bail despite the fact that no grounds were tendered on the part of the DPP that could justify Mr Tembo or Mr Likaomba or Mr Kalemba being deprived of their constitutional right to bail respectively.

A quick perusal of the grounds of appeal indicates that they are interrelated. It is not possible to deal with one ground in isolation because inevitably, what one-has to say in one ground impinges on what has been complained of in another or more grounds. Neither Mr Stanbrook nor Mr George Kaliwo, for the appellants, was able to argue the grounds of appeal separately', but each was obliged to do so in an omnibus fashion. Mr Stanbrook led the appeal and was ably assisted by Mr George Kaliwo who, for the most part, adopted the submissions put forward by Mr Stanbrook. It was Mr Stanbrook's submission that section 42 (2) (e) of the Malawi Constitution confers a right to bail on all accused persons without any distinction as to the nature of the offence and that bail could only be refused if the interests of justice so required. Mr Stanbrook submitted further that as the appellants were being tried on charges of conspiracy to murder and conspiracy to defeat justice, which charges are far less serious than murder, the learned Judge should have treated the bail application as an entirely new and fresh application. This should have necessitated a fresh review of all

the circumstances including matters which were considered in the original application.

The learned Director of Public Prosecutions, if I understood him correctly, agreed that section 42 (2) (e) does confer a right to bail on accused persons irrespective of the nature of the offence. He contended, however, that the, right was not absolute and bail could be refused in appropriate cases if its granting would not be in the interests of justice. The DPP submitted that, courts should be slow in granting bail in all serious offences, including murder, rape and robbery, because in those cases accused persons on bail would be unlikely to surrender and take their trial. The DPP then considered the various grounds of appeal and finally submitted that there was no substance in any of them and that accordingly the entire appeal should be dismissed.

I am indebted to Counsel on both sides for their lucid presentations. Copies of judgments of the various authoritiescited, which were supplied to the Court were of immeasurable assistance In considering this appeal, it will be helpful I 'believe, if I start by quoting what **Mwaungulu, J**. said in the original bail application with regard to the effect of article 42(2)(e) of the Malawi Constitution. He said, and I quote: "At this stage it may be of some use to consider the effect of article 42 (2) (e) of the Constitution of 1994. The provision does not relate to bail as' such. It has a bearing on remanding of prisoners whether in custody or on bail. This provision was not part of the 1966 Constitution. It has, as I have just stated, tremendously affected the law on bail that it should attract special comment."

The learned Judge then quoted the article in full and continued: "Read together with article 42(2)(b) of the Constitution, an applicant is entitled as a matter of right to be released unless the interests, of justice require otherwise."

I would respectfully concur with those observations. The law on bail has indeed been affected by the new provisions in the Constitution. There was no general right to bail at common law. Judges granted or withheld bail based on their judicial discretion. An applicant could not demand to be released on bail as a matter of right. This common law position was adumbrated in the case of Witham vs Dutton (1698) , Comb 111, where the Court said, and I quote: "This Court may bail for high treason, but it is a special favour and not done without the consent of the Attorney General and they may likewise bail for murder but it is seldom done and never without a special reason."

It was restated in the Scottish case of M'Glinchey vs H M Advocate (1921), **58 SLR 470** where the then Lord Justice General was commenting on the effect of a statute on bail passed at the beginning of the eighteenth century. He said, and I quote again: "In one form or another, bail was, or at any rate from very remote antiquity, a part of our criminal law. Prior to the Statute of 1701 the-practice of exacting sureties from persons accused of even the gravest capital offences for their apperance to answer the charge was known and observed. But the advantages of' this practice were not available to accused persons as a matter of right. On the contrary, bail was allowed or refused according to the discretion of the Court."

The learned Lord Justice General then considered the effect of the Statute of 1701 and concluded in the following words, and I quote again: "It is perhaps 'right to make in conclusion the self evident observation that when an accused person asks for bail or appeals for bail, then bail he must get unless a sufficient ground is brought forward requiring the court to exercise its discretion by refusing it. A good deal was said about the presumption of-innocence. I prefer not to treat the matter as a question of

presumption. The accused person has a right to ask for bail; he has the right to have his application considered and unless the court has before it some good reason why bail should not be granted, bail ought to be allowed."

Section 118 of the Criminal Procedure and Evidence Code merely restates the common law position and gives the police and the courts power to grant bail at their discretion in certain cases. An accused had no general right to bail before the 1994 Constitution came into force. He now does have that right subject only to the interests of justice. There is no distinction between capital offences and others. All are bailable as a matter of right and all that is required is that the state or the prosecution should prove on a balance of probabilities why an accused should not be released on bail. It is no longer necessary, in my respectful view, that an accused should prove exceptional circumstances to be entitled to bail. This phrase "exceptional circumstances" has at any rate caused many problems. No one knows for sure what it means and yet we are stuck with it. Judges demand that exceptional circumstances be proved in capital offences before bail can be granted. No one has yet ventured to give an example of what exceptional circumstances may be. This is obviously difficult because each application must be treated on its own merit. What appears to be an exceptional circumstance in one case may not necessarily be so in another. Now that an accused has a right to bail, he needs do no more than claim his right. If an accused has exceptional circumstances which he voluntarily raises in support of his application, then that would be quite in order and the court would be entitled to consider them together with other material. It must be reiterated, however, that the overriding requirement in considering whether to grant or refuse bail is the interest of justice and not exceptional circumstances.

This now brings me to a consideration of the nature of the interest which a court must bear in mind in deciding whether to grant or refuse bail. It is, I believe, generally agreed that the burden is on the prosecution to prove on a balance of probabilities. that it will not be in the interest of justice for an applicant to be released on bail. It was always acknowledged even at common law that it would not be in the interest of justice to grant bail to an accused who would likely not answer to his bail or would likely flee the jurisdiction. It would likewise not be in the interest of justice to release on bail an accused who would likely commit further offences while on bail or would interfere with prosecution witnesses. These are the three main considerations, but there are others. However, the paramount consideration for a court in deciding whether to remand an accused or to release him on bail still remains that he should appear for trial. This was made quite clear by **Farriss, C.J., S. S**., in **Rex vs Hawken (1944) , 2 DLR**, at page 116, when he said, and I quote: "The question of bail is sometimes misunderstood. When a man is accused he is nevertheless still presumed to be innocent and the object of keeping him in custody prior to trial is not on the theory that he is guilty but on the necessity of having him available for trial. It is proper that bail should be granted when the Judge is satisfied that the bail will ensure the accused appearing at his trial."

The same sentiments were expressed by **Coleridge, J.** in the earlier case of **Re Robinson (1854) , 23 LJ .OB** at page 289. The United Kingdom Bail Act of 1976 which for the first time conferred the right to bail on citizens of the United Kingdom makes exceptions to this right on more or less the same considerations. These exceptions are obtained in Schedule 1 and Part I of the Act, and section 2 of the Schedule is headed "Exceptions to the right to bail". The section is worded as follows, and I quote: "2. The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail

(whether subject to conditions or not) would (a) fail to surrender to custody, or (b) commit an offence while on bail, or (c) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person."

It is clear, therefore, that the right to bail which has been conferred by the Constitution in Malawi and by statute in the United Kingdom is subject to the same restrictions which applied at common law.

Let me now consider how a court is to decide whether an applicant who applies for bail will appear to take his trial. This issue was exhaustively dealt with in the Re Robinson case mentioned earlier. Coleridge, J. said, and I quote: "The test, in my opinion, of whether a party ought to be bailed is whether it is probable the party will appear to take his trial. I know that I have been thought to go further than other members of the Court of Queen's Bench; but I do not think there is any real difference between them and myself for though I lay down that test I think that it ought to be limited by three following considerations. When you want to know whether a party is likely to take his trial, you cannot go into the question of his character or of his behaviour at a particular time, but must be governed by answers to three general questions. The first is what is the nature of the crime. Is it grave or trifling? Here the prisoner's crime which is that of concealing his effects, is of the heaviest character. The second question is, what is the probability of a conviction? What is the nature of the evidence to be offered by the prosecution? Here it is very strong. Though the circumstances admit of the observations made by counsel against their conclusiveness, yet the prisoner does not suggest them himself, nor does he deny his guilt. The third question is, is the man liable to severe punishment?

Now, our laws know hardly any secondary punishment so heavy as affixed to this offence."

These tests have been enlarged upon by various Judges over the years culminating in the South African case of State vs Acheson **(1991), 2 SA,** at page 805, in which, Mahomed, A.J. conducted another comprehensive review of the authorities and added a number of tests of his own. It is clear that the more the serious a case is, the more careful the courts should be in considering bail. This is not to suggest that bail should be refused in all serious cases, because 'again the paramount consideration should be whether an accused will surrender bail to stand his trial. A court will be assisted in its task by considering evidence where it is available. At this stage, a court does not consider the conclusiveness of the evidence against the accused to warrant a conviction. An approach such as that would attract the criticism voiced elsewhere of mini trials 'in applications for bail. The purpose of examining the evidence at this stage is merely to assist the court in properly considering the question of bail and no more. Judges have always been careful to distinguish the purpose of examining the evidence in the course of hearing applications for bail. In Rex vs **Barthelemy (1852) , 1 E & BL** at page 8, Lord Campbell, C.J. said, and I quote: "We have carefully looked over the depositions in this case and we are of opinion that we should not be justified in interfering. It appears that the prisoners are committed on an inquisition, good on the face of it, finding them guilty of wilful murder and on looking at the depositions, it appears that there was a murder committed in a duel and we think that there is evidence that the prisoners were parties to the murder. we give no opinion as to whether that evidence is conclusive but we think that the evidence is . Sufficient to authorise the sending of them to trial"

Again, in **Rex vs Monvoisin (1911) , 3 Man L. R.,** at page 68, **Robson, J.** said, and I quote: "It is unnecessary and would be improper now to enter into a detailed

discussion of the evidence. Perusal of depositions shows that a defence of the nature mentioned will not be inappropriate when the charge is before the proper tribunal."

And finally, in the case of **State vs Purcell (1926)** I. R., at page 207, **Hanna, J.** said, and I quote: "As to the third ground viz: - the strength of the case against the accused on the depositions, it is inadvisable to discuss the evidence in detail or do more than express my opinion that there is evidence of a **prima facie** case to go to the jury for consideration and of such a character that if they believe the witnesses and the case for the State is not answered or displaced, it would warrant a conviction."

The same is true of affidavit evidence. It should readily be **receivable in bail applications so long as its purpose is not** to prove the guilt of the accused but merely to assist the court decide the bail issue. I can see no deference between affidavit evidence in a bail application and that in preliminary matters in civil proceedings. It must be noted also that affidavit evidence is not in any way inferior to other types of evidence. It is a well known fact that these Courts have made important decisions relying on affidavit evidence.

I mentioned the United Kingdom Bail Act of 1976 earlier in this judgment. So far as I am aware, this piece of legislation is not applicable to Malawi. The case of **R vs Nottingham Justices ex-parte Davies (1980), 2 All E.R.**, at page 775 must be understood with this fact in mind. The case decided no more than that where bail has been refused, a subsequent application by the same accused should not be entertained unless there was new material which either was not available during the earlier application or was inadvertently not brought up. This is as it should be. A second or subsequent application for bail is not an appeal and a court should not be obliged to consider matters that have already been decided upon. on a second or

subsequent application for bail, a court should, however, not completely ignore the earlier decision, for how else will it satisfy itself whether matters, being argued before it are indeed new material? There is another aspect to this. New material may not in itself entitle an accused to bail. But is there nothing to be said about the cumulative effect of the old material and the new one? Surely, an accused should, in fairness, be allowed to take advantage of any cumulative effect in his favour in appropriate cases.

I shall now turn to the appeal at hand. The learned Judge in the High Court had before him a second application for bail. It was a fresh application and was to be considered in its entirety on its own merit. The learned Judge was expected to acknowledge the fact that the new Constitution had given the right of bail to the appellants and that he could only refuse it if the interests of justice so required. There was obviously new material before him and he was expected to consider whether in the new altered circumstances the interests of justice still demanded that the appellants continue to be remanded in custody. The second application was made after severance of the charges had been ordered. The appellants were no longer being tried of the more serious offence of murder. The prosecution had decided to start with the offence of conspiracy to murder, leaving the murder charges for later. It is true that the murder charges are on file, but it is observed that they will be tried, if at all, by a differently constituted court. The learned Judge did not have to worry about proof of exceptional circumstances, although of course he was bound to consider the interests of justice. On this basis alone, the learned Judge should seriously have considered the granting of bail. The need for special circumstances was gone. The appellants are being tried for offences which are bailable even by subordinate courts. Some of the accused persons in the case have been granted bail for similar offences by the subordinate courts or by the High Court. I have in mind the cases of Mr Mc William Lunguzi and Miss Kadzamira. At any rate, the learned Judge failed to consider the fact that the

appellants were entitled, to bail as a matter of right. What is more worrisome, however, is the fact that the learned Judge failed to give any reasons why the appellants should not be released on bail. It should have been obvious that severance would cause serious problems of delay. Charges would have to be tried one after another and already the conspiracy trial is proving to be lengthy. This is not altogether surprising, since there are numerous accused persons with several defence counsel and a list of even more numerous witnesses. Section 310 of our Criminal Procedure and Evidence Code makes provision for consideration by the High Court of bail to an accused person when separate trials have been ordered. It must have been obvious to the legislators that severance would cause delays and that it would be oppressive to an accused if he wereto be kept in custody during the various separate trials. The learned Judge should have made specific findings on the effects of the section in view of the severance of charges ordered. Instead, he declared that severance could not be the basis of abail application. It had to be in the circumstances of that application. Again, there was new material in the form of the section 293 statements when the second bail application was made. The value of these statements is not that they are evidence against the appellants, but merely the substance of what the prosecution claim their witnesses will say at the trial. Such statements do give an idea of what the prosecution's case is likely to be and should be of assistance in determining the question of bail. Here the learned Judge stated that most of the matters before him had already been dealt with at the previous bail hearing. It is difficult to see how this could have been the case, since **Mwaungulu, J.** did not have the advantage of perusing those statements.

For these reasons, I am satisfied that the learned Judge erred in not considering objectively the material that was before him. This is a case in which bail ought readily to have been granted, especially regard being had to the evidence in support of the

applications. 'Accordingly, I concurred with my colleagues in granting bail to the appellants on the conditions imposed.

DELIVERED in open Court this 11th day of September 1995, at Blantyre.