CHETANKUMAR SHANTKAL PAREKH vTHE PEOPLE (1995) S.J. (S.C.)

SUPREME COURT
NGULUBE, C.J., SAKALA AND CHAILA, JJ.S.
16TH MAY AND 10TH JULY, 1995.
S.C.Z. JUDGMENT NO. 11 OF 1995

Flynote
Bail - Cognisable offence - s.23(1) of Criminal Procedure Code - Article 94(5) of the Constitution - Constitutional bail

Headnote

The appellant appeared before the subordinate court on a charge of unlawful possession of drugs, contrary to Section 8 of the Narcotic Drugs and Psychotropic Substances Act, (no. 37 of 1993). the learned trial magistrate refused to grant bail and, in terms of the Criminal Procedure Code and the supervisoory jurisdiction of the High Court under that law and under Article 94(5) of the Constitution, the appellant renewed his application for bail before a High Court judge and raised a constitutional argument

Held:

(i) Where any trial is unreasonably delayed through no fault or strategem of the accused, the arrested person must be released on what one might call "constitutional bail". Such bail is available and clearly overrides any prohibitions in the lesser laws so that Article 13(3) would apply to any unreasonably delayed case, whatever the charge and whatever s.43 of the Act., or s.123 of the C.P.C. or any other similar law may say

(ii) There is nothing in the Constitution which invalidates a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence, provided that he is brought to trial within a reasonable time after he has been arrested and detained

(iii) Before the stage when a trial becomes unreasonably delayed, it is constitutionally permissible to authorise deprivation of liberty, if authorised by law, and without making any provision for bail under any circumstances

Cases Referred to to:

1. Oliver John Irwin v The People S.C.Z. Judgment No. 4 of 1993
2. Chilufya v The People S.C.Z. Judgment No. 8 of 1986
3. Sekele v The People S.C.Z. Judgment No. 4 of 1990
4. Kaunda v The People S.C.Z. Judgment No. 12 of 1991
5. Ngui v Republic of Kenya (1986) L.R.C. (Const.)308
6. Bull v Minister of Home Affairs (1987) L.R.C. (Const.)547
7. Attorney General of the Gambia v Momodou Jobe (1984)A.C. 689

For the Appellant: Mr L.P. Mwanawasa, SC. Mwanawasa and Company
For the Respondent: Mr M Mukelabai, Senior State Advocate

Judgment

NGULUBE, C.J.: delivered the judgment of the court.

The appellant appeared before the subordinate court on a charge of unlawful possession of drugs, contrary to Section 8 of the Narcotic Drugs and Psychotropic Substances Act, (no. 37 of 1993). the learned trial magistrate refused to grant bail and, in terms of the Criminal Procedure Code and the supervisory jurisdiction of the High Court under that law and under Article 94(5) of the Constitution, the appellant renewed his application for bail before a High

Court judge and raised a constitutional argument to which we shall be referring. To appreciate fully the issued and arguments in this case, we should refer to the statutory provisions involved. Section 43 of Act No. 37 of 1993 (the Act) reads.

> "S.43. Whenever any person is arrested or detained upon reasonable suspicion of his having committed a cognisable offence under this Act, no bail shall be granted when he appears or is brought before any Court."
>
> To learn what is intended by the reference to "cognisable offence" we have to turn to s.23(1) of the Act which reads:
>
> S.23(1)Every drug trafficking and drug manufacturing offence shall be a cognisable offence for the purposes of the Criminal Procedure Code."

By section 2 of the Act, trafficking is defined to mean:

> "(a) being involved directly or indirectly in the unlawful buying or selling of narcotic drugs or psychotropic substances and includes the commission of an offence under this Act in circumstances suggesting that the offence was being committeed in connection with buying or selling or
>
> (b) being found in possession of narcotic drugs or psychotropic substances in such amounts or quantities as the President may, by statutory instrument, declare to be trafficking for the purposes of this Act."

The learned judge agreed with a submission that in the absence of a declaration by the President as to the amounts or quantities to be taken as amounting to trafficking, an offence of simply illegally possessing drugs is bailable. However, he refused to grant bail on the merits and traditional considerations of the case, which he was perfectly entitled to do. We do not have too much difficulty with the approach of the learned judge except to caution that there are two limbs to the definition of "trafficking" and an offence of unlawful possession could conceivably still be caught by paragraph (a) which we have set out above if the circumstances suggest, to the trial court, that the offence was being committed in connection with buying or selling. This suggests to us that a trial magistrate is not precluded from applying a common sense approach where the amounts or quantities of drugs alleged in the case appear to the court to exceed what may reasonably be supposed to be for personal consumption.

Aggrieved by the failure to obtain bail in the High Court and, above all, the provision which prohibits the grant of bail at all, Mr Mwanawasa lodged an appeal on behalf of his client. Meanwhile, the trial proceeded and the accused was acquitted. We heard submissions whether the appeal had become academic and took the view that the appeal would still serve the very useful purpose of enabling us to pronounce upon the constitutionality or otherwise of a provision prohibiting the grant of bail and so clarify an area of law which was posing difficulties in the courts below. It would also serve as a further opportunity for this court to pronounce upon the competence or otherwise of this kind of appeal where important constitutional issues are litigated under what appeared to be a common bail application, when the applicant could so easily have taken up a straight forward constitutional reference.

As to the latter aspect, we are aware that in *Oliver John Irwin v the People* we agreed to treat as an appeal from a determination in a constitutional reference a matter which was ostensibly a bail application but which, to all intents and purposes, had been argued as a constitutional reference to decided a constitutional issue whether the High Court had power to grant bail to a person charged with murder. Our decision in favour of bail has since been over turned by legislation but the point to note is that we agreed to treat the proceedings, as irregular as they were, as if they had been a constitutional reference. This was for the purpose of doing on an issue of great public importance. These indulgences should not be regarded as available as a matter of course. they are not and we would not be surprised if in future we decline to extend this sort of enabling fiction to cases that are not properly constituted and in the correct form of proceedings. the position of this court, as far as bail applications are concerned when the accused is still being tried below and is not properly an appellant to this court, has been stated and restated in a number of cases starting with *Chilufya v The People* (2); followed in *Sekele v The People* (3) and *Kaunda v The People* (4) as well as the *Irwin* case. We do not entertain such bail applications and they can not be disguised as appeals. the only reason for entertaining this appeal therefore, was to reaffirm this position and to deal with the more important matter as if it were a constitutional reference under Article 28 from the subordinate court to the High Court, and thence on appeal to this court.

There was a subsidiary ground of appeal which mercifully Mr Mwanawasa did not attempt to press with any vigour. He sought to make the startling proposition that it is unconstitutional to deny bail in a bailable case, even on the merits and having regard to the usual considerations. The argument was that since Article 18(2)(a) presumes innocence until an accused person has pleaded guilty or has been convicted after trial, it is to presume an accused guilty and it is therefore unconstitutional for a court to deny bail in a *bailable* case. Mr Mwanawasa chose to say very little on this ground and there is no need for us to adopt a different stance except to summarily reject the proposition. As will shortly appear, there is no constitutional right to bail for an accused person except where the trial is unreasonably delayed, no doubt through no fault of the accused.

The major ground of appeal was to the effect that it is unconstitutional for any Act of Parliament subordinate to the constitution to prohibit or restrict the granting of bail pending trial. Although the burden of the appeal was an attack on the constitutionality of s.43 of Act No. 37 of 1993, Mr Mwanawasa also submitted that any other provision of like effect, such as the prohibition of bail for certain offences under the terms of s.123(1) of the Criminal Procedure Code, should be similarly pronounced against as being unconstitutional. Mr Mwanawasa sibmitted that for a provision to refuse bail pending trial in the fashion of s.43 is unconstitutional since under our law everyone has the right to be considered for bail on the merit by the court. He drew attention to Article 13(3) of the constitution which is in the following terms:

> "article 13(3) Any person who is arrested or detained
> (a) for the purpose of bringing him before a court in execution of an order of a court; or
> (b) Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;
>
> and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained under paragraph (b) is not tried within a reasonable time, the, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

For completeness, since we propose to demonstrate that the constitution, while conferring a right to personal liberty also envisages a perfectly constitutional loss of such liberty, among nine other reasons, to facilitate the prosectution of offenders against the criminal law, we quote Article 13(1)(e)

> "article 13(1) No person shall be deprived of his personal liberty except as may be authorised by law in any of the following cases:
>
> (e) unpon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;

We should also mention that Article 18, apart from confirming the presumption of innocence, also requires a fair and expeditious hearing within a reasonable time. An accused is clearly entitled to be tried and to have a decision rendered in his trial within a reasonable time.

Mr Mwanawasa's arguments were that Article 13(3) entitles any arrested person to a trial within a reasonable time and where any trial is unreasonably delayed, such person must be released - shall be released - on bail as clearly stipulated by Article 13(3). Up to this point in time, we have no problem with the submission and agree entirely that where any trial is unreasonably delayed through no fault or strategem of the accused, the arrested person must be released on what one might call "constitutional bail". Such bails is available and clearly overrides any prohibitions in the lesser laws so that Article 13(3) would apply to any unreasonably delayed case, whatever the charge and whatever s.43 of the Act., or s.123 of the CPC or any other similar law may say. We begin to disagree with Mr Mwanawasa when he argued that s.43 is inconsistent with Article 13(3) because it does not contain any qualification or acknowledgement of the constitutional provision so that bail would be unavailable even where the trial was unreasonably delayed. The supremacy of the constitution is commanded in the constitution itself - see Article 1(12) - and it is not necessary that s.43 of the Act and similar provisions should be expresses to be subject to the constitution, as Mr Mwanawasa proposed. This argument, together with one criticizing the legislature's attempt to

circumscribe judicial power by simply barring bail and predetermining by enactment who shall not be entitled to bail, has not found much favour in the senior courts or the commonwealth. We are aware of Mr Mwanawasa's arguments succeeding only in the Kenyan case *Ngui v Republic of Kenya* (5) which was considered and very respectfully, but properly in our view, rejected by the court in the Zimbabwean case of *Bull v Minister of Home Affairs* (6) especially the appellate decision from page 555. Bull followed the decision of the Privy Council in *Attorney General of the Gambia v Momodouf Jobe* (7) We propose to dwell on these cases in a short while but the clear position we have come to is that we agree with the Privy Council and the Appellate Division in Zimbabwe and will dispose of this appeal as they did their and we will reject the Kenyan approach, which coincided with Mr Mwanawasa's. Our conclusion based on these cases which are of very high persuasive value and which dealt with provisions very similar, if not identical, to ours is that there is nothing unconstitutional in a provision which prohibit or restricts the grant of bail pending trial. Such provisions do not conflict with Article conferring "constitutional bail" where there has been an unreasonably delayed trial. It follows also that Mr Mukelabai was on firm ground when he argued that the constitution itself envisages that a person being tried can be in custody and that the accused can not be said to be entitled to bail as a matter of right. He was also on firm ground when he argued that drug trafficking, murder, and similar cases where bail is prohibited are to be viewed against the provisions of Article 13(3) which apply when there is unreasonable delay.

We turn to look at the three cases mentioned. In the Gambian case of *Jobe* it was contended that a law S.7 of the Special Criminal Court Act 1970-- that prohibited the granting of bail, in the absence of special circumstances; to a person charge with an offence involving misappropriation and theft of public funds and property, was invalid as being in conflict with Section 15 of the Constitution of the Gambia. As pages 696 to 697, Lord Diplock said:

> "Section 7 which deals with bail need to be set out verbatim:
> '(1) any person who is brought to trial before the court shall not be granted bail unless the magistrate is satisfied that there are special circumstances warranting the grant of bail.
>
> (2) Before bails is granted under this Act the accused shall be ordered (a) to pay into court an amount equal to one third of the total amount of moneys alleged to be the subject matter of the charge or pledge properties of equivalent amount as guarantee; and (b) to find at least two sureties who shall pay into court an amount equal to one third of the total amount alleged to be the subject matter of the charge or pledge properties of equivalent amount as guarantee.
>
> (3) Any money or property paid into court or pledge under this Act shall be forfeited to the state the event of the accused jumping bail.'

The relevant provisions of the Constitution relating to remand in custody and release on bail are to be found in section 15 of the Constitution and they are:

> (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that it to say:...(e)upon reasonable suspicion on his having committed, or being about to commit, a criminal offence under the law of The Gambia;..(3) any person who is arrested or detained... (b) upon reasonable suspicion of having committed, or being about to commit, a criminal offence under the law of The Gambia; and who is not released, shall be brought without undue delay before a court. (4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order or a court.
>
> (5) If any person arrested or detained as mentioned in subsection 3(b) of this section is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial'.

There is thus nothing in the Constitution which invalidates a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence, provided that he is brought to trial within a reasonable time after he has been arrested and detained. Section 7(1) of the Act which prohibits release on bail, not totally but subject to an exception if the magistrate is satisfied that there are special circumstances warranting the

grant of bail, cannot in their Lordships' view be said to be in conflict with any provision of the constitution.

Again at page 698, Lord Diplock went on to observe:

> "Section 15(5) of the constitution does not come into operation unless the person who has been arrested upon reasonable suspicion is not tried within a reasonable time. There is nothing in the Act which authorises unreasonable delay in bringing a suspected person to trial."

The Gambian case is in point and we do not see any reason for coming to a different conclusion in this case, concerned as it is with similar issues. As we have pointed out, this case was followed by the appellate division in Zimbabwe in the *Bull* case where the case concerned a law under which defendant could certify that the grant of bail would be prejudicial to public security, whereupon no bail could be granted. The question was whether such law was not unconstitutional. We do have similar provisions and the court was called upon to pronounce upon the constitutionality of that law in the light of section 13 and section 18 of the constitution of Zimbabwe. These two sections and our own Articles 13 and 18 could have been drafted - and numbered - by the same person. the Zimbabwean case is, therefore, also very much in point. We therefore agree with them on the general approach to the interpretation of the constitution, which is to follow the language used and to give effect to the clear intention of the constitution. They reviewed a lot of authorities but we will be content to adopt the conclusions they reached which we find to be irresistible and most ligival. thus, like them, we too find that the constitutional provision for releasing on bail person who are not tried within a reasonable time is , in the words of Beck, J.A. at p 562:

> ''Fatal to the contention that a remanded suspected offender has a constitutional right by reason of section 13(1), prior to the stage when it can be said that he has not been tried within a reasonable time, to be released on bail; or even to have an impartial and independent court decide whether or not he should be release on bail."

We agree, that before the stage when a trial becomes unreasonably delayed, it is constitutionally permissible to authorise deprivation of liberty, if authorised by law, and without making any provision for bail under any circumstances and this accords with the plain meaning of the language used in Article 13(3) which Mr Mwanawasa relied upon. s.43 of the Act under debate and similar section depriving accused persons of bail are not unconstitutional.

Finally, there was the Kenyan case of *Ngui*, with which we respectfully disagree. As to the reasons for so disagreeing, we respectfully adopt the reasoning of Beck,J.A in the BULL case when he said, at pages 565 and 566:

> "It remains only to say that subsequent to the announcement of our conclusion my attention was drawn to a decision of the Kenyan High Court which was not referred to in argument, and of which my Colleagues and I were unaware. It is the case of *Ngui v Republic of Kenya,* Section 60(1) of the Constitution of Kenya confers on the High Court of Kenya unlimited original jurisdiction in civil and criminal matters. Section 72(5) of the Constitution of Kenya provides:
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> 'If a person arrested or detained as mentione in subsection (3)(b) is not tried within reasonable time, then without prejudice to any further proceedings that may be brought gainst him, he shall be released either unconditionally or upon reasonable conditions...'.''

Subsection (3)(b) applies to:

> ''a person who is arrested or detained... unpon reasonable suspicion of his having committed or being about to commit a criminal offence.''

It was successfully contended before a Bench composed of Simpson CJ and Cockar and Mbaya JJ that section 123(3) of the Criminal Procedure Code, as amended, was inconsistent with sections 72(5) and 60(1) of the Constitution.

Section 123(3) of the Criminal Procedures Code originally contained re restriction on the powers of the High Court to grant bail. In consequence of amendments made in 1978 and in

1984, however, the section came to read as follows:

> ''the High Court may, save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence, direct that a person be admitted to bail or that bail required by a subordinate court or police officer be reduced.''

The decision that the words which the amendments added to the section, namely 'save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence"- all offences which carry in Kenya a mandatory death penalty - conflict with section 60(1) of the Constitution of Kenya, has not relevance to the appeal that is before us, and I make no comment upon that part of the judgment.

The decision that those words had to be struck out of section 123(3) of the Code as being in conflict with section 72(5) of the Constitution is, however, very much in point. It was no part of the facts of that case that the appellant, who was an unwell woman of 54 charged with robbery with violence, had not been brought to trial within a reasonable time. The reasoning for the decision was simply that, as appears from p.311a-b.

> ''Whereas section 72(5) of the Constitution makes release on bail mandatory only in certain prescribed circumstances, it is applicable to all offences. The amendments the section 123(3) have the effect of prohibiting the High Court from granting bail in cases of murder, treason, robbery with violence and attempted robbery with violence in any circumstances. Thus where, for example, a person is accused of robbery with violence bail may not be granted even if he is not tried within a reasonable time.''

It appears from the report that no case authority was cited to the Court Certainly the decision of the Privy Council in Attorney General of the Gambia v Momodou Jobe (supra) was not brough to the Cour't attention if it had, the Court would not have been able to distinguish the matter before it from *JOBE's* case in so far as the effect of section 72(5) of the Constitution of Kenya was concerned. the fact that section 123(3) of the Code could admittedly not be taken as authorising a denial of the High Court's jurisdiction to release on bail a suspected murderer, traitor or violent robber who is not brought to trial within a reasonable time, because of section 72(5) of the Constitution, does not, in my respectiful view, lead to the conclusion that such a jurisdiction could not constitutionally have been denied the High Court (disregarding the question of section 60(1) of the Constitution) in relation to a suspected murderer, traitor or violent robber while he is being held in custody for a reasonable time pending trial. Such a suspected offender has no conditional right under section 72(5) to leberty before a reasonable time for being brought to trial has elapsed. I must therefore say of NGUI's case supra that I respectifully disagree with the reasoning that I have quoted above which appears at p.311a-b of the report.

For the reasons we have given, the appeal is dismissed.
Appeal dismissed
