

**THE PEOPLE v KAMBARANGE KAUNDA AND RAFFICK MULLA AND IN THE
MATTER OF ART 29(3) OF THE CONSTITUTION (1990 - 1992) Z.R. 30 (H.C.)**

HIGH COURT
I. M. C. MAMBILIMA, J.
6TH SEPTEMBER, 1990
(REVIEW CASE NO. HPR/151 OF 1990)

Flynote

Criminal procedure - Institution of criminal proceedings - Criminal proceedings can be instituted by other person or authority if Director of Public Prosecutions decides not to prosecute - Nothing stopping Director from re-opening case.

Headnote

The Director of Public Prosecutions (the Director) had directed that criminal proceedings not be instituted against the applicants. Subsequently an inquest was held and the coroner ruled that the applicants should be arrested and charged with murder. The police complied with this ruling, prior to receiving any further directions from the Director. The applicants contended that their rights in terms of the Constitution of Zambia, in particular arts. 13 and 20, and that the decision of the coroner, acted upon by the police, amounted to an infringement of the Director's free and fair exercise of his powers in conducting prosecution.

Held:

- (i) That there was no provision in art. 20 to the effect that if the Director decided for some reason not to proceed with criminal proceedings, then no further criminal proceedings could be instituted against the suspect for the same offence. It was not the intention of the Legislature to give the Director the power to bar anyone from further criminal proceedings on the opinion of the Director. This was more so in view of art. 58 of the Constitution which allowed other persons or authorities to initiate and undertake criminal proceedings against anyone.
- (ii) Further, that there was nothing to stop the Director from re-opening a case which he had closed if fresh evidence, a new dimension developed or even re-open the case if he had second thoughts.
- (iii) Accordingly, that the applicants were not entitled to any constitutional relief except to wait for the Director to look through the record of the inquest and make his decision as to how he would proceed.

Legislation referred to:

1. Constitution of Zambia, Cap. 1, arts 13, 20, 29(3), 58.
2. Criminal Procedure Code, Cap 160, s. 277.
3. Inquests Act, Cap. 216, s. 4.

Other works referred to:

- (1) S.G.G. Edgar Craies on Statute Law 7th ed.
- (2) P.St. J. Langan Maxwell on Interpretation of Statutes.

For the applicants: A. Hamir of Solly Patel, Hamir and Lawrence and R Ngenda of
Richard Ngenda and Associates.

For the respondent: G.S. Phiri, Director of Public Prosecution.

Judgment

I.M.C. MAMBILIMA, J.:

This matter comes to this Court by way of review under art. 29(3) of the Constitution of Zambia. The applicants are alleging that art 13 of the Constitution of Zambia (hereinafter referred to as 'the Constitution') pertaining to their entitlement to fundamental rights of freedom and protection of the law, and art. 20 of the Constitution entitling them to a fair hearing have been, are being or likely to be contravened in relation to each of them for reasons which are enumerated in their questionnaire as follows:

- "1. Police officers investigating and attending to this matter had submitted the evidence obtained by them in the investigation of the alleged murder to the Director of Public Prosecutions pursuant to art. 58 of the Constitution of Zambia with a view to securing the Director of Public Prosecutions' instructions in instituting and undertaking criminal proceedings for murder or allied offences against the said accused persons before the Court.
2. The Director of Public Prosecutions gave consideration to the evidence before him and declared that he was satisfied that the accused persons herein had acted in self-defence and directed that no criminal proceedings should be instituted or undertaken against the accused persons.
3. That an inquest was held and the coroner was of the opinion at the conclusion thereof that the first and second accused persons be arrested and charged with the offence of murder.
4. That within a period of about seven days thereafter, the police arrested and charged the accused persons with the offence of murder as hereinafter set out.
5. That the institution of the criminal proceedings against the accused persons for the said offence of murder was made without consultation or approval of the Director of Public Prosecutions and in effect in violation of the instructions given by the Director of Public Prosecutions as hereinafter set out."

The questions which have been posed for my consideration are:

- "1. Whether the police have violated the accused persons' entitlement to liberty and the protection of the law guaranteed by art. 13 of the Constitution of Zambia in relation to the accused persons as they allege in view of the Director of Public Prosecutions' said instructions?
2. Whether the police have violated the accused persons' entitlement to a fair hearing guaranteed by art. 20 of the Constitution of Zambia in relation to the accused persons in arresting and charging them as they allege in view of the Director of Public Prosecutions' said instructions?
3. (a) Whether the police have violated the independence of the Director of Public Prosecutions guaranteed to him by art. 58 of the Constitution of Zambia to the prejudice of the accused persons?
(b) Whether the opinion of the coroner at the said inquest is an authority to the police to institute criminal proceedings in view of the provisions of article 48 of the Constitution of Zambia?
(c) Whether the police or any other authority comply with the Director of Public Prosecutions' directions not to institute or undertake criminal proceedings, take over and continue such proceedings or to discontinue at any stage before judgment such criminal proceedings?
4. What constitutional relief, if any, are the accused persons entitled to?"

Mr *Hamir* for the applicants submits that the applicants on arrest are being held in custody pending receipt of instructions from the Director of Public Prosecutions supposedly to determine if they should be committed

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to High Court for murder. Mr *Hamir* further submits that the applicants are asserting that their rights, in particular as enshrined in art. 13 of the Constitution which entitles them to the protection of the law and art. 20 which entitles them to a right to a fair hearing by an independent and impartial court and art. 58 which guarantees them a fair prosecution, have been violated.

He told the Court that art. 58 of the Constitution empowers the Director of Public Prosecutions to institute and undertake any criminal proceedings against any person before any court in respect of any offences allegedly committed by that person. The same article empowers the Director of Public Prosecutions to take over and continue any criminal proceedings and also to discontinue at any stage before judgment any such proceedings whether undertaken by him or another authority. According to Mr *Hamir* this article was framed with a deliberate aim or purpose to ensure that all persons accused of any criminal offence may be prosecuted for that offence without distinction of whatever nature. He further submits that in the exercise of his power under the said art. 58, the Director of Public Prosecutions should be free from extraneous influence from whatever source. He told the Court that this guarantee eliminates considerations of irrelevant matters and *mala fide* prosecutions so that when the Director of Public Prosecutions is exercising his power his mind is directed solely to the facts and law applicable to the case at hand. The Director of Public Prosecutions in this way is not expected to prosecute any individual for the sake of it or to please any person or sector of the public and there is no provision that any source or authority is empowered to interfere with the Director of Public Prosecutions.

In his continued submissions, Mr *Hamir* stated that the applicants in this case are not free having been arrested for the offence of murder and they are now kept in custody. According to Mr *Hamir*, by so doing, the applicants have been denied the protection of art. 58 in that the Director of Public Prosecutions had earlier considered the case against the applicants when the police earlier carried out investigations into the death of Miss Tabeth Mwanza. The Director of Public Prosecutions, upon considering the evidence he had, the facts and the law applicable before him, directed that no criminal proceedings should be instituted against the applicants because they acted in self-defence. According to Mr *Hamir*, in making this ruling the Director of Public Prosecutions acted within the confines of his constitutional authority. When an inquest was later held and the coroner ruled that the applicants should be arrested and charged with the offence of murder, the police went ahead to arrest the two applicants in contravention of the earlier directive of the Director of Public Prosecutions. He further submits that the actions of the police are in conflict with those of the Director of Public Prosecutions and that the police did not revert to the Director of Public Prosecutions before arresting the applicants since the Director of Public Prosecutions was out of the country. Mr *Hamir* also told the Court that the correct procedure which the police could have adopted would have been for them to refer the matter back to the Director of Public Prosecutions if fresh evidence was available than to counter the Director of Public Prosecutions' instructions by arresting .

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the applicants. He told the Court that the inquest after which the coroner recommended the arrest of the applicants does not function like a court of law in that the coroner is not bound by the rules of evidence applicable in criminal matters.

The Director of Public Prosecutions in reply told the Court that in this case prosecution had not yet been commenced. He further submitted that as incumbent Director of Public Prosecutions he had not as yet had the opportunity to study the record of the inquest proceedings and therefore he had not as yet exercised any powers vested in him by art. 58 of the Constitution. He was of the view that it would be wrong at this stage to indicate before the Court how he intended to dispose of the proceedings of the inquest by the coroner or advise whether the inquest revealed any new factors which were not available at the earlier stage. Explaining how the police operate, the Director of Public Prosecutions said that under the Criminal Procedure Code Cap. 160 and the Penal Code Cap. 145, the police are entitled to investigate crime, make an arrest of a suspect and prefer a charge of the offence which in their opinion is believed to have been committed by the suspect. In the exercise of that power, the police are not subject to any interference or control except to the extent that such suspects must be dealt with according to the law. The Director of Public Prosecutions also pointed out that in the discharge of their function of detecting crime, the police are solely responsible to the office of the Director of Public Prosecutions.

In reply to the Director of Public Prosecutions' submission, Mr *Hamir* told the Court that in as far as they are concerned, prosecution in this case had already started and, according to him, it will be unjust that while waiting for the future considerations of this case of the Director of Public Prosecutions the two applicants should be denied their constitutional rights to liberty. The issues raised by the applicants call for the interpretation of the articles of the Constitution invoked. The cardinal or primary rule of interpretation of statutes is that they must be construed according to the intention expressed therein. In the words of *Craies on Statute Law* [1]:

"If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense."

This is a literal construction. According to *Maxwell on Interpretation of Statutes* [2]:

"It is corollary to the general rule of construction that nothing is to be added to or taken from the statute unless there are adequate grounds to justify the inference that the legislation intended something which it omitted to express."

Coming to the articles of the Constitution on which the applicants are relying, art. 13 spells out the fundamental rights and freedoms to which every person in Zambia is entitled. These are:

- (a) The right to life, liberty, security of the person and protection of the law;
- (b) Freedom of conscience, expression, assembly and association; and

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- (c) Protection for the privacy of his home and other property and from deprivation of property without compensation.

These rights are enjoyed of course subject to art. 4 of the Constitution. Article 20 contains provisions to secure the protection of the law. It entitles every person charged with a criminal offence to a fair hearing within a reasonable time by an independent and impartial court established by law. The article then goes on to enunciate various principles to be observed and adhered to in case of criminal trials. As a bar to further criminal proceedings, the article contains two sub-articles. The first is sub-art. 5 which provides as follows:

"No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence which he could have been convicted at the trial for that offence, save upon the order of superior court in the course of appeal or review proceedings relating to the conviction or acquittal."

This is what is referred to as *autre fois* acquit and *autre fois* convict in legal circles. The second provision is sub-art. 6 which provides:

"No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence."

Under s. 277 of the Criminal Procedure Code it is open to an accused against whom an information has been filed to plead that:

- (a) He has been previously convicted or acquitted as the case may be of the same offence; or
- (b) That he has been granted a pardon for his offence.

If the plea is found to be true, then that accused shall not be tried of the offence.

Article 58 is the one which establishes the office of the Director of Public Prosecutions. Sub-article 2 provides that the Director of Public Prosecutions shall have power in any case in which he considers it desirable so as:

- (a) To constitute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person;
- (b) To take over and continue any such criminal proceedings as have been instituted or undertaken by any other person or authority; and
- (c) To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other authority.

The power to discontinue cases does not extend to appeals, any case stated or question of law reserved at the instance of the accused. Sub-article 4 of art. 58 provides that the powers conferred on the Director of Public Prosecutions by clauses 2(b) and 2(c) above, shall be vested in him to the exclusion of any other authority. As can be seen, clauses 2(b) and 2(c) give the Director of Public Prosecutions the power to take over and continue any criminal proceedings instituted by others and the power to

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discontinue any criminal proceedings instituted by him or others before judgment. One can safely argue and rightly so that the Director of Public Prosecutions does not enjoy a monopoly on the power to institute and undertake criminal proceedings under clause 2(a) of art. 58. A private person or another authority can institute and undertake criminal proceedings. Under the proviso to sub-art. 4, however, such a person or authority can only withdraw the proceedings with the leave of court.

Sub-article 6 provides that in the exercise of powers conferred on him by art. 58, the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority except in cases which involve considerations of public policy when the Director of Public Prosecutions is obliged to act in accordance with the directions of the Attorney-General. This

section requires the Director of Public Prosecutions to use his own independent criteria when exercising his powers under art. 58. This clause is necessary and, as Mr *Hamir* pointed out, it is intended to guarantee the Director of Public Prosecutions free and fair exercise of his powers in conducting prosecutions. His guide should be the law and the facts before him. He should not fall prey to emotions and extraneous considerations for, indeed, if he were to prosecute cases for the sake of it, he runs the risk of being sued in tort for malicious prosecution.

The inquest proceedings to which the applicants were subject were carried out under the Inquest Act Cap. 216. Section 4 of this Act makes it obligatory for a coroner to hold an inquest where a person dies, *inter alia*, violently or unnaturally. After ascertaining the circumstances of how a person died, it is competent for a coroner to say which person if any should be charged with murder or some other homicide offence. In this case, we have a position where the coroner has said that the applicants have since been arrested and charged with murder.

It appears to be disputed, from the questionnaire and the affidavit sworn by Mr *Hamir*, that the Director of Public Prosecutions did, before the holding of the inquest, direct that no criminal proceedings should be instituted against the applicants because, in his view, the applicants acted in self-defence. The question to be resolved is, can such a direction be a bar to further criminal proceedings against the applicants? Reading through art. 20 of the Constitution the only time that a person cannot be tried for a criminal offence is if he has been pardoned for that offence or if he can show that he has already been tried for that offence and has either been convicted or acquitted of the offence. There is no provision in art. 20 to the effect that if the Director of Public Prosecutions decides for some reason not to proceed with criminal proceedings, then no further criminal proceedings can be instituted against the suspect on the same offence. It could not have been the intention of the Legislature therefore to give the Director of Public Prosecutions this power to bar anyone from further criminal proceedings on the opinion of the Director of Public Prosecutions. This is more so in view of art. 58 which allows other persons or authorities to initiate and undertake criminal proceedings against anyone.

In the way art. 20 is worded, I am of the view that there is nothing to stop the Director of Public Prosecutions from re-opening a case which he had closed if fresh evidence or new dimension develops. In fact, strictly

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speaking, he could even re-open the case if he has had second thoughts. I am compelled to arrive at this understanding of art. 20, because even when the Director of Public Prosecutions exercised his power to enter a *nolle prosequi* at any stage before judgment, an accused person is merely discharged. There is always an option left to the Director to re-open the case if and when he so wishes.

I must mention, however, that I have not had the opportunity to look at the statement which the learned Director of Public Prosecutions earlier issued in this case. Mr *Ngenda* deposes that the said statement was produced to the coroner. But going by questionnaire, it is stated that the Director of Public Prosecutions 'directed that no criminal proceedings should be instituted or undertaken against the accused persons'. If I had looked at the statement, I would have seen in what context these words were used. I would like to believe that the Director of Public Prosecutions was speaking for himself and directed his statement to the police who had sought his instructions, because under art. 58, the Director of Public Prosecutions does not monopolise the power to institute and undertake criminal proceedings. As I earlier observed in my ruling, other persons can prosecute and unless, therefore, the Director of Public Prosecution, was speaking of himself, he cannot validly make a blanket direction that no criminal proceedings should be instituted or undertaken against anyone.

The Director of Public Prosecutions did not explain in this case that the police are entitled to investigate crime, charge and arrest a suspect if in their opinion a crime has been committed and, in the discharge of such a function, they are not subject to the control of anyone though they are responsible to his office. In this case, they arrested the applicants after the ruling of the coroner. There is no doubt that the inquest proceedings added a new dimension to the case. On one hand, there was an earlier instruction from the Director of Public Prosecutions not to prosecute and, on the other, the coroner is of the view, after his inquest, that the applicants should be charged with murder. It is now entirely up to the Director of Public Prosecutions to sit down to look at the record of the inquest and compare it with evidence earlier available to him and make his own independent decision whether he, as Director of Public Prosecutions, can proceed with the case and, in so doing, he is not subject to the control of any authority or person. But the Director of Public Prosecutions told the Court that, as at the date of this hearing, he had not even had an opportunity to look through the inquest proceedings and he rightly pointed out that he could not indicate to the Court how he intended to dispose of the inquest proceedings or whether the inquest reveals new factors which were not available earlier. This being the case, it cannot be said at this stage that the independence of the Director of Public Prosecutions has been interfered with because he has not yet exercised his powers under art. 58 of the Constitution. After he has considered the record of the inquest, the Director of Public Prosecutions is at liberty to apply to the High Court under s. 33 of the Inquest Act to quash the inquest.

On the whole, I find that in arresting the applicants the police did not violate arts 13 and 20 of the Constitution. I have already stated that the

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applicants cannot plead *autre fois acquit* or *autre fois convict* or that they have been pardoned of the offence, the only aspects which will render further criminal proceedings against them null and void. This answers the first and second questions.

As to the third question as to whether the police have violated the independence of the Director of Public Prosecutions as guaranteed by art. 58 of the Constitution to the prejudice of the accused, it should be pointed out that the police do not need the Director of Public Prosecutions' authority in order to arrest and charge a suspect and in a homicide case, like the one the applicants have been charged with, there is no way the police can proceed with the case after arrest without getting the instructions of the Director of Public Prosecutions. The Director of Public Prosecutions will still have to exercise his powers with the full independence as guaranteed to him by art. 58 of the Constitution. There will thus be no prejudice to the accused persons. In my view, the police have not violated the independence of the Director of Public Prosecutions as guaranteed by art 58.

As to whether the opinion of the coroner at the inquest is an authority to the police to institute criminal proceedings in view of art. 58 of the Constitution, it should be pointed out that the coroner is a quasi-judicial authority and if under s. 28 of the Inquest Act he ascertains that the named persons be charged with homicide offence, that is an authority for the police to arrest and charge that person with the said homicide offence and refer the matter to the Director of Public Prosecutions for his decision. The Director of Public Prosecutions is again expected under art. 58 of the Constitution to make up his own mind on how to deal with the case.

Finally, at the stage of their proceedings, I do not see that the applicants are entitled to any constitutional relief except to wait for the Director of Public Prosecutions to look through the record of the inquest and make his decision as to how he will proceed. As at now, I do not find any illegality or irregularity about the arrest of the applicants and their stay in custody pending instructions of the Director of Public Prosecutions.

Application dismissed.

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