GEOFREY CHAKOTA, BENDA MAKONDO, JOHNSON MAKOTI AND MORRIS KAPEPA v ATTORNEY-GENERAL (1980) Z.R. 10 (H.C.)

HIGH COURT
KAKAD, COMMISSIONER
1ST FEBRUARY, 1980
1979/HP/D/1482

Flynote
Constitutional Law - Detention - Statement of grounds of detention - Article 27 (1) (a) of the Constitution. Meaning of a statement in writing in a language he understands - Objects of.
Constitutional Law - Detention - Illiterate detainee - Procedure for serving statement of grounds of detention.

Headnote
The four applicants were detained under reg. 33 (1) of the Preservation of the Public Security Regulations and the grounds of detention were duly served on each as required under Art. 27 (1) (a) of the Constitution of Zambia, Cap. 1. Subsequently the four applicants applied separately for issue of a writ of habeas corpus *ad subjiciendum*. The issue raised in each case was that the grounds of detention furnished to them were in a language which each of the applicants did not understand and consequently it did not comply with the provisions of Art. 27 (1) (a) of the Constitution of Zambia.

The issue before the court was to determine what the phrase "a statement in writing in a language he understands" meant and whether it had been complied with.
The first applicant claimed that he was totally illiterate but admitted that the grounds of detention had been explained to him in the language he understood. The court ruled that this was sufficient and it would not have made any difference in what language the statement was written as he was illiterate.

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The second applicant admitted that he knew a bit of English and that he was explained the grounds of detention by the officer in charge, in a language he understood. The court ruled that his detention was Constitutional.

The third applicant who was illiterate admitted that the grounds of detention were explained to him by a fellow detainee in a language he understood. Therefore his detention was constitutional too.

The fourth applicant was also illiterate but the grounds of detention were explained to him by a fellow prisoner, in a language he understood. His detention was also constitutional.

Held:
(i) The provisions of Art. 27 (1) (a) of the Constitution of Zambia, Cap. 1, are mandatory and have to be strictly complied with by the detaining authority.

(ii) The objects of serving on a detainee a written statement specifying grounds of his detention in a language that he understands as provided in Art. 27 (1) (a) are:

> (a) that the detainee should within the stipulated period be made aware of the reasons as to why he is detained; and
> (b) that the detainee could at the earliest opportunity make a meaningful representation to a Detaining Authority or to the Tribunal.
> (iii) Where a detained person is illiterate, the Detaining Authority should, at the time of serving a written statement of grounds under Art. 27 (1) (a) make certain that the grounds are fully explained and translated in a language that the detainee understands, and a certificate of such explanation stating the language in which it was explained should be attested by the officer who explained the grounds to the detainee.
> (iv) The interpretation and explanation of the grounds to a detainee illiterate in English, in a vernacular language that he understands, affords a constitutional protection and places him in a position to be able to make a representation as provided under Art. 27 (1) (a).

Cases referred to:
(1) Chipango v A.-G. (1970) Z.R. 31.
(2) A.-G. v Chipango (1971) Z.R. 1.
(3) Sharma v A.-G. (1978) Z.R. 163.
(4) H. Das v The Magistrate, Cuttack (1969) A.I.R. 43 S.C.
(5) Harikisan v The State of Maharashtra & Others (1962) S.C.R. Supple 2, p.918.

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Legislation referred to:
Preservation of Public Security Regulations Cap. 106 reg. 33 (1).
Constitution of Zambia, Cap. 1, Art. 27 (1) (a).

For the applicants: C. Musonda, Legal Aid Counsel.
For the respondent: Mrs M. Makhubalo, State Advocate.

Judgment
KAKAD, COMMISSIONER:

The four applicants, Geofrey Chakota, Benda Makondo, Johnson Makoti and Morris Kapepa (for easy reference I will hereinafter refer to them as first, second, third and fourth applicant) applied separately for issue of a writ of habeas corpus *ad subjiciendum.* This is therefore an application of the first, second, third and fourth applicant for the issue of a writ of habeas corpus *ad subjiciendum.*

Mr C. Musonda, Legal Aid Counsel, and Mrs M. Makhubalo, the State Advocate, represented the applicants and the respondent respectively.

Each of the applicants was detained under reg. 33 (1) of the Preservation of the Public Security Regulations and the grounds of detention were duly served on each as required under Art. 27 (1) (a) of the Constitution of Zambia, Cap. 1.

The first and the second applicants were detained on 23rd October, 1976, and the grounds of detention were served on each on 5th November, 1976.

The third and fourth applicants were detained on 23rd February, 1977, and it appears that both were duly served with the grounds of detention on 7th March, 1977.

At the hearing the applicants abandoned initial grounds in support of the applications and relied on the ground raised in the supplementary affidavit in each case.

The common issue raised in each case is that the grounds of detention furnished to the applicants were in a language which each of the applicants did not understand and consequently it did not comply with the provision of Art. 27 (1) (a) of the Constitution of Zambia, Cap. 1.

The legal issues raised in these applications are common and will be dealt with together. Material parts of the facts are also common. I therefore propose to deal with the common part of law and facts together.

At the conclusion of the case 1979/HP/1482, the learned counsels made their respective submissions; and at the conclusion of the remaining three cases, i.e. 1979/HP/1483, 1979/HP/1484 and 1979/HP/1485, the learned counsel urged this court to rely and adopt the submission made in 1979/HP/1482. In the circumstances I consider it proper to write a single judgment and this judgment for the purpose of "judgment in each case" will be the judgment in each of these four cases I have heard.

Article 27 (1) (a) reads as under:

> "(1) where a person's freedom of movement is restricted, or he is detained, under the authority of any such law as is referred to in

> Article 24 or 26, as the case may be, the following provisions shall apply:
>
> > (a) he shall, as soon as is reasonably practicable and in any case not more than fourteen days after the commencement of his detention or restriction, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is restricted or detained."

Article 27 (c) and (d) permits a detainee to make representation to a detaining authority and/or to the Tribunal.

All the applicants, it is apparent from their respective grounds of application, had made representations to the Tribunal and had appeared before the Tribunal. The first applicant appeared in June, 1978. The second applicant appeared in July, 1978. The third and fourth applicants appeared in August, 1978.

The first applicant in his evidence testified that prior to his detention he was a miner. He admitted that the grounds of detention were served on him after he was detained. He deposed that he spoke and understood Kachokwe language. According to him the grounds were written in English which he did not understand; and the said grounds were not explained to him in Kachokwe. He said that he could neither write nor read. In re-examination he admitted that later on the grounds were explained to him in the language he understood.

The second applicant in his evidence deposed that he knew a bit of English. He said that at the time the grounds of detention were served on him they were explained to him in Kaonde language which he understood. He agreed that the document containing the grounds though in English were explained to him, but he refused to sign the statement as he did not agree with the alleged allegations.

The third applicant testified that he was a carpenter before he was detained. He deposed that the document containing grounds of detention and which was served on him was in English. He said that he did not understand English and the grounds were not explained to him in Lunda, the language he spoke and understood. In cross-examination he admitted that he knew why he was detained. He deposed that he could neither write nor read. He admitted that the grounds were explained to him later by a detainee.

The fourth applicant in his evidence said that he was a labourer at a farm and spoke and understood Lunda. He deposed that the grounds of detention served on him were in English which he did not understand. According to him the grounds were explained to him by his fellow prisoners. He said he could neither read nor write.

It is therefore common cause that each of the applicants in these cases, was detained under reg. 33 (1) and each was duly served with written grounds of detention as required under Art. 27 (1) (a). All the statements containing the grounds undoubtedly were written in English.

It is not controverted that the first, third and fourth applicant were illiterate and could not understand, read or write English. The second applicant knew a bit of English but spoke and understood Kaonde. The first applicant spoke and understood Kachokwe. The third and fourth applicants spoke and understood Lunda.

Article 27 (1) (a) provides that a detainee within fourteen days of his detention should be furnished with a statement in writing in a language that he understands specifying the grounds upon which he is restricted or detained.

The learned counsel for the applicants submitted that the ground raised in the supplementary affidavit was based on the construction of Art. 27 (1) (a) of the Constitution of Zambia, Cap. 1. The common ground raised in the supplementary affidavit in each of the cases reads:

"That the grounds of detention furnished to the applicant were in a language which the applicant does not or did not understand and did not comply with Article 27 (1) (a) of the Constitution of Zambia Act, No. 27 of 1973."

The applicants' counsel went on to say that on decided cases in Zambia the provision of Art. 27 (1) (a) had to be strictly complied with otherwise the detention was unlawful. He referred to the case of *A-G. v Chipango* (2) and stated that in that case the Court of Appeal had held that the compliance of the provisions of Art. 26 (1) (a) which is now Art. 27 (1) (a), was mandatory and the detaining authority was bound to comply with the said provisions. He contended that the legislature in imposing mandatory provisions under Art. 27 (1) (a) provided a protection for an individual.

He submitted that the question in these cases was that the written grounds furnished to each of the applicants should have been in a language understood by each of the applicants. In short the learned counsel contends that the grounds of detention served on the firm applicant should have been in Kachokwe, on the second applicant should have been in Kaonde and on the third and fourth applicants should have been a Lunda.

The learned counsel argued that the fact that the grounds (written) furnished to the applicants were in English, denied the applicants their right to know why they were detained and that amounted to a fundamental breach of the constitutional provisions. He contended that the fact that the grounds were explained to the applicant by others did not amount to compliance with Art. 27 (1) (a). He submitted that it was irrelevant that English was the official language in Zambia, and contended that if that was the intention of the legislature it would have stated so in Art. 27 (1) (a) .

The learned State Advocate in reply submitted that it was clear from the evidence that each of the applicants was made aware of the grounds of detention. She did not agree that the rights of the applicants in Art. 27 (1) (a) were infringed. She contended that all the applicants

being illiterate, all that was required was to bring to the understanding of the applicants the grounds of detention. According to the State Advocate in these cases it would have made no difference in which language the grounds were written. She said that the applicants being not able to read and write would not have been in a position to read them and would have had to rely on what was explained. She contended that had the legislature intended that the statement had to be stated or written in the mother tongue of a detainee it would have stated so.According to her in these cases the use of English language was relevant as English was the official language of Zambia.

The applicants' counsel submitted that the provisions of Art. 27 (1) (a) of the Constitution of Zambia, Cap. 1, were mandatory and had to be strictly complied with by the detaining authority. I agree with this. This issue has been firmly established by our final courts in the following cases:

In the High Court case *Chipango v A-G*. (1) Magnus, J., delivering the judgment said:

"He describes these as 'constitutional conditions subsequent to arrest' and I prefer this

> description as applied to paragraphs (a) and (b) of Section 26 A (1) of our constitution rather than Mr Baron's bold description of them as 'condition subsequent'. As I held that these are constitutional conditions subsequent to arrest, they are all mandatory and fundamental rights of the individual, and if they are not followed, I can only conclude that such non-compliance must render further detention unconstitutional and unlawful."

On appeal of the above quoted case to the Court of Appeal, the High Court decision on the point in issue was upheld. The learned Chief Justice delivering the judgment of the Court of Appeal in *A-G. v Chipango* (2), in dealing with the question of Constitution of Zambia, at p. 64 said:

> "I consider that the condition is not a mere procedural step in the furtherance of consideration of a detainee's case, but it goes vitally to the fact of detention. In my opinion the provision must be adhered to strictly, and failure to do so causes further imprisonment under the detention order to be invalid. It is not strictly necessary for me to determine whether the same considerations apply to a failure to comply with paragraph (a). The argument is not so strong. The provision does however appear to be in some order of descending importance. A person is entitled to know within a short period why he is detained. I would be prepared to hold that failure to comply with this paragraph also has the same result."

In *Sharma v A.-G.* (3), the learned Deputy Chief Justice delivering the judgment in the Supreme Court at p. 167, pronounced:

> "I am satisfied therefore that when a person is detained pursuant to reg. 33 (6), the provisions of Art. 27 of the Constitution must be complied with."

Coming to the common law point raised in the applications before this Court, the learned counsel for the applicants contended that the detaining authority by serving a written statement in English language on each of the applicants who did not understand English and who only understood their mother tongue, had infringed the provisions of Art. 27 (1) (a), and therefore further detention of the applicants was unconstitutional and unlawful.

Article 27 (1) (a) reads: "He shall as soon . . . restriction, be furnished with *a statement in writing in a language that he understands* specifying in detail the grounds upon which he is restricted or detained."

The phrase "a statement in writing in a language he understands" on the face of it sounds and appears to be simple. I have gone through most of the authorities in our courts dealing with applications of this nature, and it appears to me, that this is the first time this point has been raised. In my view this is a relevant point and well taken.

The quiz in the phrase "a statement in writing in a language he understands", as I see it, appears in the wording "in a language that he understands". It is common knowledge that English is the

official language of the Republic of Zambia. Equally it is common knowledge that there are many other vernacular languages spoken and understood in Zambia. Though English is the official language in Zambia, it does not necessarily follow that every Zambian or a resident in Zambia, understands, reads or writes English. There are I believe a number of people in Zambia who are not literate in English. Amongst them are the applicants. According to the learned counsel for the applicants, where a detainee is an illiterate in English, it was, under Art. 27 (1) (a) mandatory for the detaining authority to serve on the detainee a statement in writing specifying the grounds of detention in the language that he understands and not in English, and it was in such a case irrelevant that English was the official language of Zambia. He argued that if the legislature had intended the statement to be in the official language it would have said so. The learned State Advocate on the other hand contended that the legislature did not intend that a statement under Art. 27 (1) (a) should be written in the mother tongue and if it had so intended it would have been so specified. Both these arguments in my view have some force in them.

On this point the observation of the learned Magnus, J., in *Chipango v A.-G.* (1) (*supra*) are, in my view, befitting. At p. 6 of the judgment he said:

> "It would, of course, be desirable in all cases, and more especially in cases where the liberty of the subject is concerned, if the legislature were more specific in what it intended to do. I suppose, however, that this would be a counsel of perfection which, although it would lighten the work of the courts, would be achieving some thing which no legislature appears to have achieved so far. It

> therefore falls upon the courts, as it so often does, to construe what Parliament in its wisdom intended should be the law.".

The objects of serving on a detainee a written statement specifying grounds of his detention in a language that he understands as provided under Art. 27 (1) (a), I believe, are (1) that the detainee should within the stipulated period be made aware of the reasons as to why he is detained; and (2) that the detainee could at the earliest opportunity make a meaningful representation to a detaining authority or to the Tribunal. In my view it is in this light that it is provided under Art. 27 (1) (a) that a detainee should strictly be served with a statement specifying the grounds of detention in a language that he understands. There certainly would be no problem where a detainee is literate in English.

On the common law point raised in the applications before this court, the counsel for the applicants quoted the Indian Supreme Court case - *H. Das v The Magistrate, Cuttack* (4). In that case it was found that the detained person did not have the grounds served upon him within five days as by law prescribed, and the grounds, which ran into fourteen, typed pages, and referred to his activities over a period of thirteen years, were given to him in a language he did not understand and without any attempt at explanation. The court in that case held that the failure to serve the grounds within the five days required made the order invalid. It should be noted that in that case the main reason to find the order invalid was on account of failure to serve the grounds within a stipulated period and

not because the grounds were in a language that the detainee did not understand. In another Indian case *Harikisan v The State of Maharashtra & Others* (5) at p. 918, the detainee was served with the order of detention and the grounds in English. He did not know English and asked for a translation of these in Hindi. This request was refused on the grounds that the order and the grounds had been orally translated to him at the time they were served upon him and that English still being the official language, communication of the order and grounds in English was in accordance with the law and constitution. The Supreme Court of India on appeal from High Court in that case held:

> "That the provisions of Art. 22 (5) of the Constitution were not complied with and the detention was illegal. Article 22 (5) required that the grounds should be communicated to the detainee as soon as may be and that he should be afforded the earliest opportunity of making representation against the order. Communication in this context meant bringing home to the detainee effective knowledge of the facts and grounds on which the order was based. To a person who was not conversant with English language, the detainee must be given grounds in a language which he can understand and in a script which he can read, if he is a literate person. Mere oral translation at the time of service was not enough."

In that case the learned Chief Justice delivering the judgment of the Indian Supreme Court, at p. 925, observed:

> "We do not agree with the High Court in its conclusion that in every case communication of the grounds of detention in English, so long as it continues to be official language of the State, is enough compliance with the requirements of the constitution.
>
> If the detained person is conversant with English language, he will naturally be in a position to understand this gravamen of the charge against him and the facts and circumstances on which the order of detention is based. But to a person who is not so conversant with the English language, in order to satisfy the requirements of the constitution, the detainee must be given the grounds in a language which he can understand, and in a script which he can read, if he is a literate person."

The provisions of our Constitution dealing with detention and the provisions of the Indian Preventive Detention Act, 1950, were closely examined and compared in the High Court case of *M.W. Chipango v The Attorney-General* (*supra*) and I find it not necessary to deal with them in these cases. However, under Art. 27 (1) (a) of the Constitution of Zambia it is provided that the written statement specifying grounds of detention must be in a language that a detainee understands whereas that provision is silent in the Indian Preventive Detention Act, 1950. Under the Indian Detention Act all that is required is that the grounds should be communicated within the prescribed period to a detainee.

The vernacular languages in Zambia and in India have their own script and dialect. The only minor distinction, I believe, is that each of the Indian vernacular languages has its own alphabet whereas

the vernacular languages in Zambia are written in most of the English alphabet. However, this distinction is immaterial in so far as the distinct nature of a vernacular language is concerned. Therefore, a person in Zambia could well be literate in a Zambian vernacular language though not necessarily literate in English language.

All the applications before this court are based on the ground that each off the applicants was an illiterate person, in that he could speak and understand a vernacular language but could not write or read any languages. In my considered view where a detained person is illiterate, the detaining authority should, at the time of serving a written statement of grounds under Art. 27 (1) (a), make certain that the grounds are fully explained and translated in a language that the detainee understands; and a certificate of such explanation stating the language in which it was explained should be attested by the officer who explained the grounds to the detainee. Where a detainee is illiterate in English, the detaining authority following the above procedure would in my view be considered as having strictly complied with the provision "a statement in writing in a language that he understands" under Act. 27 (1) (a). The interpretation and explanation of the grounds to a detainee illiterate in English, in a vernacular language that he understands, I consider, affords a

constitutional protection and places him in a position to be able to make representation as provided under Art. 27 (1) (*d*).

I have observed that in two written statements of grounds exhibited in the cases before this court, a certificate of explanation has been attested. However in those certificates the language in which the grounds were explained is not stated. I am not dealing with a case where a detainee is literate in a vernacular language but not in English. In my opinion the wording "in a statement in writing in a language that he understands" under Art. 27 (1) (a) being mandatory, may have significant implications where the detainee is literate in a vernacular language and who is served with grounds of detention in English. The decision in the Indian case of *Harikisan v The State of Maharashtra & Others* (5) (*supra*) though not binding on our courts is highly persuasive.

The first applicant claims to be totally illiterate. According to him he cannot read or write and could only understand and speak Kachokwe. He admitted that the grounds of detention were some time later explained to him in the language he understood. However, looking at the statement containing the grounds which was served on the applicant (attached to the supplementary affidavit), it is apparently clear that the serving officer had explained the grounds to him. There is a certificate to that effect on the statement. Secondly, looking at the grounds in the written statement and the grounds sworn by the applicant in this application, it clear that the applicant was fully aware of the grounds of his detention. Thirdly, the applicant had appeared before the Tribunal where his case appears to have been comprehensively renewed by the Tribunal. I am therefore satisfied that the grounds of detention were explained and communicated to the applicant in the language he understood. The applicant being unable to read and write, it would, I consider, have made no difference in what language the statement containing the grounds were written. I am therefore satisfied that in the circumstances of the case, the detaining authority had fully complied with Art. 27 (1) (a) of the Constitution of Zambia, Cap. 1. The detention of the applicant therefore was

neither unconstitutional nor unlawful. In the result the applicant's application is dismissed.

The second applicant in his evidence admitted that he knew a bit of English. According to him he spoke and understood Kaonde. In his evidence he said that he was explained the grounds by the officer, but he refused to sign the statement containing the grounds because he did not agree with the alleged grounds of detention. The applicant therefore was fully conversant with the grounds which I find were fully explained to him by the serving officer. On the facts and in the circumstances the detaining authority I find had complied with Art. 27 (1) (a) of the Constitution. The applicant's detention therefore was constitutional and lawful. The application is therefore dismissed.

In the case of the third applicant there is no doubt that he is illiterate and can only speak and understand Lunda. He admitted that the grounds of detention were explained to him by a fellow detainee. The applicant

had in fact appeared before a Tribunal and his application was heard by the Tribunal. This is evident from the grounds he submitted in his application. The grounds of detention in his application before this court are more or less what they are in the written statement that was served on him. In the circumstances of the case and on facts the applicant I find was fully made aware and was fully explained the grounds of detention in the language he understood and because of that he was able to make a representation to the Tribunal. He being illiterate it would have made no difference in which language the grounds were written. I therefore find that the detaining authority had not breached the provisions of Art. 27 (1) (a) of the Constitution. The applicant's detention I find was neither unconstitutional nor unlawful. The application is therefore dismissed.

The fourth applicant claimed to speak and understand Lunda. There is no dispute that he is illiterate, i.e. he cannot read or write. The written statement of the grounds written in English was duly served on him. He admits that the grounds in the statement were explained to him by a fellow prisoner in a language he understood before he made a representation to the Tribunal. The applicant therefore knew what the grounds were, otherwise he, I believe, would not have been in a position to make representation to the Tribunal. I am satisfied that in the circumstances it would have made no difference in which language the statement and the grounds were written. I consider that the detaining authority had not infringed Art. 27 (1) (a) of the Constitution, Cap. 1. The applicant's detention therefore was neither unlawful nor unconstitutional. The application, in the result, is dismissed.

As the applicants are represented by the Legal Aid Department, it would, I consider, be proper that in all these four cases, each party bears his own costs.

Application dismissed