MARIO SATUMBU MALYO v THE ATTORNEY-GENERAL (1988 - 1989) Z.R. 36 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, J.S., AND BWEUPE, AG. J.S.
15TH JUNE AND12TH AUGUST, 1988
(S.C.Z. JUDGMENT NO. 8 OF 1988)

Flynote

Constitutional law - Habeas corpus - Detention under preservation of Public Security Act - Failure to report plot against goverment - Whether valid ground of detention.
Constitutional law - Habeas corpus - Preservation of public security - Criminal law defences not relevant to detention.
Constitutional law - Preservation of Public Security Act - Possible conflict with provisions of Constitution.

Headnote

The applicant was detained under regulation 33(1) of the Preservation of Public Security Regulations on the ground, *inter alia,* that whilst he was approached by members of groups bent on overthrowing the government he did not report the activities of those persons to the security forces. In his application for *habeas corpus* the applicant raised criminal law defences which were rejected by the Judge. The applicant appealed against what he said was the finding by the Court that he was guilty of misprision of treason.

The applicant also argued that section 3(3) of the Preservation of Public Security Act which allows the President to detain in certain circumstances was in conflict with Article 26 of the Constitution in that the President did not have absolute discretion to detain and the Court could inquire into the reasonableness of the detention in the circumstances prevailing. A further argument advanced by the applicant was that failing to report threats of treason which he believed could not succeed could not be a threat to public security. Merely by talking to plotters without being privy to the plot could not give rise to further apprehension that he was a threat to public security.

Held:

(i) Past activity can provoke future apprehension in the mind of the detaining authority. Why the 35 applicant failed to report, coupled with his association, is a question which the detaining authority would necessarily regard as raising suspicions about the applicant's own sympathies and position in relation to the cause of those who felt free to approach him.

(ii) *Habeas corpus* proceedings are designed to test the legality or constitutionality of the detention. The Court is competent to inquire into the validity of a detention order on a variety of challenges including the question of reasonableness (where the reasonableness aspect is raised by uncontroverted evidence showing that it was impossible to have done the things alleged). The Court does not inquire into the truth of the grounds nor is it the proper authority to receive meaningful representations.

(iii) Statutes cannot be construed to find a conflict with the Constitution except where this is

clearly demonstrated. The declaration of a general situation of emergency is a constitutional matter. The apprehension of a grave situation necessitating a declaration under Article 30 relates to a different set of circumstances and considerations from the prevailing circumstances referred to under Article 26 which relate to the circumstances of the particular detention order or other specific measures taken.

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Cases referred to:

(1) Chisata and Lombe v The Attorney-General (1981) Z.R. 35
(2) Nkaka Chisanga Puta v The Attorney-General (1983) Z.R. 114
(3) Shamwana v The Attorney-General (1981) Z.R. 261
(4) Munalula & others v The Attorney-General (1979) Z.R. 154
(5) Re Kapwepwe and Kaenga (1972) Z.R. 248

Legislation referred to:

Preservation of Public Security Act, Cap. 106, s. 3 (3)
Constitution of Zambia, Cap.1, Art. 26
Northern Rhodesia Order in Council, 1924
Northern Rhodesia (Constitution) Order in Council 1962, and 1963
Zambia Independence Order, 1964
Statutory Instrument 85 of 1964

For the appellant: S. M. C. Malama, Jaques and Partners.
For the respondent: L. S. Mwaba, Principal State Advocate..

Judgment

NGULUBE, D.C.J.: delivered the judgment of the Court.

This is an appeal against the dismissal by a High Court Judge of the appellant's application for a writ of *habeas corpus ad subjiciendum*. The appellant was detained under a Presidential detention order made pursuant to regulation 33(1) of the Preservation of Public Security Regulations and the grounds furnished pursuant to Article 27 of the Constitution read:

"(1) That on a date unknown but between 1st September and 30th September 1986, you were approached by JOHN SAKULANDA in your office at Zambia Broadcasting Services (Northern Region) at Kitwe's Parklands area of the Copperbelt Province of the Republic of Zambia, who requested you to assist in establishing contact with UNITA (United Movement for Total Liberation of Angola) in Angola with former members of United Progressive Party (UPP).

(2) That you were further informed by the said JOHN SAKULANDA that UNITA would help in the military training of ex-UPP cadres whose aim was to later come in and overthrow the legally constituted government of the Republic of Zambia.

(3) That on a date unknown but between 15th September 1986 and 15th October 1986, you were approached by ALFRED MUSONDA CHAMBESHI at JOHN SAKULANDA's house which is situated at House No. 4007 Chimweme Compound, Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, and informed by the said ALFRED

MUSONDA CHAMBESHI that the latter was the heir to the said United Progressive Party (UPP) throne after the death of the late SIMON MWANSA KAPWEPWE and that he was re-organising ex-UPP members for a guerilla war and wanted you, MARIO SATUMBU MALYO, to assist and act as link between UPP and UNITA.

(4) That you did not report the activities of the said JOHN SAKULANDA and ALFRED MUSONDA CHAMBESHI to the security forces.

Your aforesaid activities are prejudicial to public security and there is apprehension that if left at large, you will continue to persist in these unlawful activities and therefore, for the purpose of preserving public security it has been found necessary to detain you."

There was no dispute that the appellant had been approached by the

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persons named and his support solicited. In his evidence, the appellant explained his role and his response to the approaches; his opinion that the scheme was a non-starter; his failure to report based on fear for his own safety and his belief that there was no duty on his part, as a citizen, to report such matters to the authorities. He also contended that it was wrong to detain him because he was not an accomplice and never agreed to participate in the scheme; that he was an innocent party who had advanced a reasonable excuse for not reporting those other persons; that detention was a harsh measure; and that there was no indication that he would, in future, fail to report should he be satisfied of the gravity of the plans and intentions of such other persons. Counsel for the appellant prosecuted the application before the learned trial Judge and made submissions concerning a citizen's duty (or the absence of it) to report when he has dissociated himself from the criminal intentions of others. He also made a submission to which we shall return later regarding the status of s. 3(3) of the Preservation of Public Security Act Cap. 106, in light of Article 26 of the Constitution and argued for the striking down of s. 3(3). He also made a submission concerning the reasonableness of the measure of detention in the circumstances of this case. In reply, the State Advocate who appeared in the Court below made submissions which, among other things, discussed the law relating to misprision of treason; the unavailability of any defence based on fear, and the status of UNITA.

The learned trial Judge in his judgment responded at great length to the submissions which introduced elements of the criminal law. He discussed the citizen's duty to report a crime; found that, by virtue of s. 7 of the Penal Code, ignorance of the law was no defence; that failure to report in this case amounted to misprision of treason; that the appellant's fear for his life did not amount to a defence of duress or compulsion under s. 16 of the Penal Code and could not avail the appellant; and that by failure to report activities of persons who belonged to banned organisations and wished to contact an Angolan organisation officially regarded as a terrorist organisation, he had offended the state. There were at least three grounds of - appeal if not - four, which criticised the calling in aid of, and the resolution of the *habeas corpus* application on the basis of the criminal law. The whole of the criminal discussion we regard as having been completely irrelevant and immaterial and we have no difficulty in upholding the grounds of appeal in this respect. This finding however, can not affect the legality or otherwise of the detention, which was what the application was designed to establish. Though the learned trial Judge may have been justified, by the reference

thereto in the grounds of detention, in making a comment about the status of UNITA and UPP, there was no occasion in effect to find that the appellant had committed the offence of misprision of treason and that he had not advanced any viable defences thereto.

Having said this, we must also observe, in fairness to the learned trial Judge, that it was the submissions by the parties which misled him into embarking upon a quasi-criminal inquiry. *Habeas corpus* proceedings, by their very nature, are designed to test the legality or constitutionality of the detention; yet, counsel for the State in the Court below expressly raised a criminal argument while the appellant in effect sought to put

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his meaningful representations and explanations on the merits to the Court, decidedly the wrong forum to receive a detainee's meaningful representations. In arguing this appeal, Mr *Malama* appeared to suggest that a detainee is free to make his meaningful representations against the order of detention either to the Court or to 5the detaining authority and, in criticizing the learned trial Judge's quasi-criminal approach, stated that the Court below was wrong in effect to find the appellant guilty of misprision of treason instead of accepting his reasonable explanation. We wish to affirm that while the Court is without a doubt competent to inquire into the validity of a detention order on a variety of challenges which can be raised by a detainee, including the question of reasonableness (see eg *Chisata and Lombe v Attorney-General* (1) where the reasonableness aspect was raised by uncontroverted evidence showing that it was impossible for the detainees there to have done the things alleged), the Court does not inquire into the truth of the grounds, nor is it the proper authority to receive the detainee's meaningful representations. Thus, the Courts have entertained applications based on, *inter alia*, failure by the authorities to comply strictly with the mandatory provisions of the Constitution in matters such as late service of, or complete failure to serve, grounds; failure to specify the grounds in adequate detail and other failures to comply with the Constitution. They have also entertained challenges on the merits on such grounds as questions of *vires, mala fides*, the detention being punitive and not based on future apprehension; the detention not being reasonably necessary such as where an unchallenged alibi or other impossibility is established; mistaken identity and so on. In discussing, for example, the necessity to specify the grounds in sufficient detail, the Courts have always stated that the object of the law was to enable the detainee to understand and to know what was alleged so that he could bring his mind to bear upon it and so be in a position to make a meaningful representation to the detaining authority or to the detainee tribunal. It is apparent that the Courts have not once suggested that such meaningful representations should be made to them and it is obvious that, once a detention is found to be valid in law, the Court can not trespass into those aspects of the matter which are properly the preserve of those who detained him in the first place and who alone can then give any relief. Ultimately, therefore, the learned trial Judge could not entertain the very persuasive meaningful representations actually made to him in this case and which should have been made elsewhere. Accordingly, it is otiose to discuss further the manner in which the learned trial Judge disposed of this aspect of the case.

What was ground No.5 of the appeal raised the contention, which was unsuccessful in the Court *a quo*, that there is a conflict between Article 26 of the Constitution and section 3(3) of the Preservation of Public Security Act and that, accordingly, s. 3(3) should have been held to be void.

Art 26 of the Constitution reads:

> " 26. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Article 15, 18, 19, 21, 22, 23, 24 or 25 to the extent that it is shown that the law in question authorises the taking, during any period when the Republic is at war or when a declaration under Article 30 is in force, of measures for the purpose of dealing with any

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> situation existing or arising during that period; and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions unless it is shown that the measures taken exceed anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question."

s. 3(3) of Cap.106 reads:

> " (3) If the President is satisfied that the situation in Zambia is so grave that it is necessary so to do, he may by Statutory Instrument, make regulations to provide for: 10
>
> (a) the detention of persons;
> (b) requiring persons to do work and render services."

Mr *Malama* seeks a declaration that s 3.(3) of Cap. 106 is in conflict with, and therefore *ultra vires*, the Constitution. In arguing this ground, we were invited to consider the history of the detention laws and the Constitutional provisions relevant thereto, with particular regard to the amendments from time to time and the effect thereof. We were then urged to find that, as the Constitution is a basic and superior law to Cap.106 and since that Act came into being at a time when there was no similar basic law, its provisions in the subsection quoted which suggest an absolute discretion in the Head of State should be struck down on the ground that Article 26 of the Constitution is opposed to the concept of absolute discretion and enjoins the Court to inquire into the reasonableness of the measure in the circumstances prevailing. It was argued that the presidential satisfaction that the situation is grave must be subjected to investigation by the Court. The question is whether there is the conflict alleged or if in fact, as argued by Mr *Mwaba* for the State, the circumstances to be inquired into by the Court under Article 26 relate to the specific detention called in issue and not to the factors leading the President, in his sole judgment, to apprehend a grave situation.

Though most of the history concerning some of this legislation has been considered in *Nkata Chisanga Puta v Attorney-General* (2) and also earlier on in *Shamwana v Attorney-General* (3), it would be useful to summarise the history with particular reference to the point at issue. It should be noted, in the first place, that it is not correct to argue that there was no basic law prior to independence. Northern Rhodesia was governed by imperial Britain under constitutional arrangements contained in a number of Orders in Council, the principal one being the Northern Rhodesia Order Council, 1924. Under those Orders (which were eventually repealed by the Northern Rhodesia (Constitution) Order in Council, 1962) the Governor and the legislature ran the country and enacted laws, including the Ordinance of 1960 which survives as Cap. 106. The 1962

Order in s.5, preserved the existing laws which were to be construed with such modifications, adaptations and so on as would be necessary to bring them into conformity with the Order which introduced a constitution. As discussed in the cases previously mentioned, there was then already a proclamation of a state of emergency in force and made by the Governor under the absolute powers so much criticised by Mr *Malama*. With certain exceptions not relevant here, the 1962 Constitution and

other orders then in existence were revoked by the Northern Rhodesia (Constitution) Order in Council, 1963, which, in Chapter 1, introduced a Bill of Rights. The forerunner to the present Article 26 was section 14(1). This section of the 1963 Constitution read:

> "s 14(1) Nothing contained in or done under the authority of any regulation made under the Emergency Powers Order in Council, 1939 (a), as amended, shall be held to be inconsistent with or in contravention of sections 3, 4(2), 7, 9, 10, 11, 12, or 13 of this Constitution, and nothing contained in or done under the authority of any regulation made under the Preservation of Public Security Ordinance (b) shall be held to be inconsistent with or in 10 contravention of section 3 or 13 of this Constitution, to the extent that the regulation in question makes in relation to any period of public emergency provision, or authorises the doing during any such period of anything that is reasonably justifiable in the circumstances of any situation arising or existing during that period for the purpose of dealing with that situation."

((a) and (b) indicated footnotes which identified the Statutory Instrument and Cap number respectively).

As can be seen, the statute complained of in these proceedings was then specially mentioned as a legitimate derogation from the fundamental rights set out in that Constitution. We went into our independence under the Zambia Independence Order, 1964, which ushered in what we may call the 'Independence Constitution'. It was s. 7 of the Zambia Independence Order which transferred the Governor's Proclamation of Emergency under the Preservation of Public Security Ordinance and deemed it to be a declaration under the Independence Constitution, section 29(1)(b) read:

> "s. 7 If, immediately before the commencement of this order, a proclamation by the Governor of Northern Rhodesia under section 4 of the Preservation of Public Security Ordinance (a) is in force, then, there shall be deemed to be 30 in force, from the commencement of this Order, a declaration under section 29 (1) (b) of the Constitution that has been approved by the National Assembly at the commencement of this Order, and that declaration shall, unless it is sooner revoked or unless it is extended by the National Assembly in accordance with secion 29 of the Constitution, continue in force until 24th April 1965."

((a) was a footnote identifying the Cap number).

Thus, there has never actually been a separate declaration under the Constitution, as far as we have

been able to ascertain, but the Order of 1964 effected this transfer to the Constitution from the ordinance by stipulation of law. Section 26(1) of the Independence Constitution reads:

> "26. (1) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of section 15 or 25 of this Constitution to the extent that the Act authorises the taking, during any period when the Republic is at war or any period when a declaration under section 29 of this Constitution is in force, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period."

Meanwhile, by Statutory Instrument 85 of 1964, under extraordinary powers conferred by the Zambia Independence Order, the President amended the Preservation of Public Ordinance (then Cap 265), in two

significant respects. Firstly, the old subsection 1 of section 3 was deleted and replaced with the subsection as we know it today and which now reads:

> "(1) The provision of this section shall have effect during any period when a declaration made under paragraph (b) of subsection (1) of section 29 of the Constitution has effect."

The same Statutory Instrument also ushered in the same present subsection (3) under complaint and which we have already set out. The fact that the President was, in that Statutory Instrument, endeavouring to bring the ordinance into conformity with the Constitution cannot be denied. Emergencies had now to be declared under the Constitution and not under an ordinance; and the whole of the detention law had to operate under cover of the Constitution, as it still does to date. Instead of the ordinance being specified by name, as was the case under the 1963 Constitution, it now became, under s. 26(1) of the Independence Constitution, one of those Acts of Parliament (under Savings as to existing laws) under which nothing done shall be held to be inconsistent with the relevant sections of the Constitution to the extent that the Act authorised the taking of certain measures during any period of emergency. Act 33 of 1969 repealed and replaced s. 26 of the Independence Constitution and brought in the following:

> "26. Nothing contained in or done under the authority of any law shall be inconsistent with or in contravention of sections 15, 18, 19, 21, 22, 23, 24 or 25 of this Constitution to the extent that the law in question authorises the taking, during any period when the Republic is at war or when a declaration under section 29 of this Constitution is in force, of measures for the purpose of dealing with any situation existing or arising during that period; and nothing done by any person under the authority of any such law shall be in contravention of any of the said provisions unless it is shown that the measures taken exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question."

The section has survived in this form to date, under the 1973 Constitution.

Mr *Malama* argued that, because the language has been changed and there have been additions to Article 26 since its earlier days, the qualification then introduced - enabling the Court to inquire into the reasonablenes of the measure taken in light of the circumstances prevailing at the time - meant that the satisfaction as to a grave situation under s. 3(3) of Cap .106 could no longer be absolute and must be *ultra vires* for purporting to so provide, in the teeth of Article 26. In our considered opinion, statutes cannot be construed to find a collision except where this is clearly demonstrated. In light of the brief history of the legislation as outlined, it is apparent that declarations of a general situation of emergency are now a constitutional matter and no longer fall under the Act. It is also obvious, having regard to the relevant constitutional provisions which it is here unnecessary to spell out, that the competent authority to subject the declaration of emergency to an objective investigation, is the National Assembly which alone (apart from the President himself) can bring the

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state of emergency to an end and so curtail the operations of the Preservation of Public Security Act and its Regulations. As we stated in *Nkaka Chisanga Puta v Attorney-General* (2) , the Courts cannot question the justification or otherwise for the continuation of the state of emergency. We find that the apprehension of a grave situation necessitating a declaration now under Article 30 of the Constitution relates to a different set of circumstances and considerations from the circumstances referred to under Article 26 which relate to the circumstances of the particular detention order. The complaint relates to the application of Article 30 of the Constitution and since Article 26 deals with a different set of circumstances (although it also qualifies the absolute character of the presidential subjective satisfaction) we come to the conclusion that there is not in existence the conflict contended for. The ground of appeal in this respect is rejected.

The final ground of appeal was to the effect that failing to report threats of treason which the appellant believed would not succeed cannot be a threat to public security. The argument was that, unless the appellant was himself privy to the plot as an accomplice, there could be no future apprehension as to his future activity which related to quiet activity without any overt act. It was submitted that no security risk arose simply by talking to plotters and keeping quiet in future and that the appellant should not be detained for inactivity by failing to report the plotters, contact with whom had ceased three months prior to his detention. In reply, Mr *Mwaba* argued that the learned trial Judge had adequately analysed the circumstances of the existing situation in regard to this detention and that, in line with *Munalula & others v Attorney-General* (4) and re: *Kapwepwe and Kaenga* (5), future apprehension stemmed not only from the appellant's inaction but from his association with plotters or suspected dissidents. We have considered the submissions on this point. It is now settled that past activity can provoke future apprehension in the mind of the detaining authority. The essence of the allegation against the appellant, on a reading of the grounds as a whole, is not simply that he failed to report but that he also associated with the suspects. As Baron J.P stated in his oft-quoted passage from Kapwepwe and Kaenga (5), at page 260 in outlining the extent and object of the machinery for preventive detention:

> " In particular, it must be stressed that the President has been given power by Parliament to detain persons who are not even thought to have committed any offence or to have engaged in activities prejudicial to security or public order, but who, perhaps because of their known

associates or for some other reason, the President believes it would be dangerous not to detain."

Why the appellant failed to report, coupled with his association, is a question which the detaining authority would necessarily regard as raising suspicions about the appellant's own sympathies and position in relation to the cause of those who felt free to approach him, not once, but a couple of times. We consider that the detention based on previous activity which the authorities stated had induced a future apprehension has been successfully challenged and we affirm the learned trial Judge's end result in this case. This ground also fails.

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The appeal has failed but it also raised an important legal point not argued before. The appeal is dismissed but each party will bear his own costs both here and below.

Appeal dismissed.
