JOHN CHISATA AND FAUSTINOS LOMBE v ATTORNEY-GENERAL (1981) Z.R. 35 (S.C.)

SUPREME COURT
BRUCE-LYLE, CULLINAN, JJ.S. AND MUWO, AG. J.S.
10TH FEBRUARY AND 26TH MARCH, 1981
(S.C.Z. JUDGMENT NO. 6 OF 1981)

Flynote

Constitutional law - Detention - Detention tender Preservation of Public Security Regulations, reg. 33 (1) - Grounds for detention - Court's power to inquire into reasonableness.

Constitutional law - Detention - Allegation that detention unreasonable - Burden of proof - Constitution of Zambia, Art. 26

Headnote

The appellants were detained under reg. 33 (1) of the Preservation of Public Security Regulations. The State alleged that the first appellant convened meetings in which he preached the use of violence to achieve political motives and that violence was actually used when an explosive was thrown into the Chililabombwe Mine Social Club. The second appellant was alleged to be one of those who participated in the incident at Chililabombwe. The State gave specific dates on which meetings were held and when the incident took place. Applications for the issue of writs

of habeas corpus were rejected by the High Court. On appeal to the Supreme Court the applicants by affidavits put up pleas of alibi and gave detailed account of their movements on the alleged dates. The State did not file any affidavits in reply. During the hearing of the appeal the State argued that there was no onus upon the detaining authority to prove the grounds of detention.

Held:

(i) The court is not concerned with the truth or falsity of the grounds of detention but is merely concerned with whether or not there was reasonable cause to suspect the appellants.

(ii) Article 26 of the Constitution indicate that the measures taken must be "shown" to be unreasonable, seemingly it is the detainee who must undertake such burden.

Cases referred to:

(1) Re Kapwepwe & Kaenga (1972) Z.R. 248.
(2) Eleftheriadis v Attorney-General (1975) Z.R. 69.
(3) Gopalan v State of Madras (1950) AIR S.C. 27.
(4) Khudiram v State of West Bengal (1975) 2 S.C.R. 832.
(5) Narayan Debnath v West Bengal (1975) 2 S.C.R. 57.
(6) Daktar Mudi v State of West Bengal (1975) 2 S.C.R. 61.
(7) Liversidge v Anderson (1942) A.C. 206.
(8) Attorney-General of St Christopher v Reynolds [1979] 3 All E.R. 129,
(9) Secretary of State for Education and Science v Tameside Metropolitan Council [1977] A.C. 1014.
(10) Re Buitendag (1974) Z.R.156.
(11) R. v Board of Control and Ors. Ex parte Rutty [1956] 1 All E.R. 769.
(12) Wilmot's Opinions (1758) Wilm. 77; 97 E.R. 29.
(13) Regina v Governor of Brixton Prison, Ex parte Soblen [1963] 2 Q.B. 243.
(14) Shamwana v Attorney-General (1981) Z.R. 261.

Legislation referred to:
Preservation of Public Security Regulations, Cap. 106; regs. 33 (1), 33 (6), ss. 3 (3), (52).
Leeward Islands (Emergency Powers) Order in Council, 1959, s. 3 (1).
Emergency Powers Regulations, 1967, reg. 3 (1).
Zambia Independence Order, 1964, s. 4 (2).
Constitution of Zambia, 1964, ss. 14, 103 (1).
Constitution of Zambia, Cap. l, Art. 26.
Constitution of St Christopher, Nevis and Anguilla, s.14.
Habeas Corpus Act, 1816, ss. 3 and 4.

p37

For the appellants: L.P. Mwanawasa, Mwanawasar & Co.
For the respondent: A.G. Kinariwala, State Advocate.

Judgment

CULLINAN, J.S.: These are two appeals against the dismissal of the appellants' applications to the High Court for the issue of a writ of habeas corpus the grounds of detention in each case are interconnected and the appeals have been consolidated. I shall refer to Mr Chisata and Mr Lombe as the first appellant and second appellant respectively.

On 15th September and 20th September, 1978, the first and second appellants were respectively detained by a police officer, apparently under the provisions of regulations 33 (6) of the Preservation of Public Security Regulations (which latter regulation I shall refer to as "regulation 33"). On 4th October, they were both served with a Presidential order of detention, made on 3rd October, under regulation 33 (1). That regulation reads as follows:

> "33. (1) Whenever the President is satisfied that for the purpose of preserving public security it is necessary to exercise control over any person, the President may make an order against such person, directing than such person be detained and thereupon such person shall be arrested whether in or outside the prescribed area, and detained."

On 13th October, 1978, both appellants were served with a statement of the grounds of their detention. The grounds in respect of the first appellant read as follows:

> "That you on the 8th day of September, 1978, at Mufulira, Zambia, you convened an unlawful meeting at a Factory near the Abattoir which you attended as a Chairman and Elias Kayenga as a Secretary. Present at this meeting were Eric (Erick) Bwalya, Mumba known as a Lawyer, Watson (Whiteson) Mwenya, Fostino Lombe, Jackson Mutale, Marcel Kayenga, Henry Menso, Mbita Kabalika, Edward Mucheleka and other persons unknown. At this unlawful assembly, it was resolved among other things that violence be used to further your political motives as opposed to peaceful and constitutional means. You thereafter, actively took part in the following:
>
> (a) That you proceeded to other Copperbelt Towns where you convened other unlawful meetings aimed at furthering your political motives by unlawful means;
>
> (b) That you on the evening of 9th September, 1978, convened another unlawful meeting at the same Factory near the Abattoir in Mufulira, chaired by you, present at this unlawful meeting were: Elias Kayenga, Fostino Lombe, Marcel Kayenga, Mbita Kabalika, Eric (Erick) Bwalya, Edward Mucheleka, Damford (Bedford) Simutowe, Francis (Frances) Bowa, Watson (Whiteson) Mwenya, Jackson Mutale, Whiteson Kalembwe, Henry Menso, and other **45** persons unknown. You disclosed at this unlawful meeting that the General Conference at Mulungushi Rock had

p38

> accepted the amended Constitution and that what remained was the use of violence and strikes;
>
> (c) That you informed this unlawful meeting that, in order to carry out the use of

violence a committee was to be appointed, hence you appointed Damford (Bedford) Simutowe, Fostino Lombe, Eric (Erick) Bwalya, Jackson Mutale, and Marcel Kayenga to excute violence. Subsequently it was left to you (John Chisata), Elias Kayenga and Mbita Kabalika to decide what first course of action to be taken, which resulted in the dispatch of Damford (Bedford) Simutowe, Fostino Lombe, Eric (Erick) Bowa, at 2100 hours on 9th September, 1978, to Chililabombwe, where they executed your common purpose, by throwing a petrol explosive into Chililabombwe Mine Social Club where there was a social function, resulting the death of twelve persons.

These acts are prejudicial to public security and its preservation and for the Preservation of Public Security it has been decided to detain you."

The grounds of detention in respect of the second appellant read as follows:

"(a) That you on the 8th September, 1978, at Mufulira in Zambia, you together with Damford (Bedford) Simutowe, Eric (Erick) Bwalya, Mumba, Watson (Whiteson) Mwenya, Francis (Frances) Bowa, John Chisata, Elias Kayenga, Jackson Mutale, Marcel Kayenga, Henry Menso, Mbita Kabalika and Edward Mucheleka attended an unlawful assembly where it was resolved that violence was to be used to further your political motives and;

(b) That you on the evening of 9th September, 1978, whilst acting together with Damford (Bedford) Simutowe, Eric (Erick) Bwalya, Watson (Whiteson) Mwenya and Francis (Frances) Bowa travelled to Chililabombwe with a view to implementing your political motives by unlawful means of committing murderous acts, and that you together with your colleagues mentioned above surveyed the area of Chililabombwe Mine Social Club where there was a social function a tthe time and thereafter, carried out your murderous and subversive acts by throwing a petrol explosive into that hall which caused the death of twelve persons.

These acts are prejudicial to the public security and its preservation and for the preservation of Public Security it has been decided to detain you."

The learned counsel for the appellants, Mr Mwanawasa, has put forward a number of grounds of appeal. The first of those rests on the appellant's challenge in the High Court of the validity of their detention on the basis that the grounds were not true. This they did by filing affidavits containing evidence of alibi; a further affidavit was filed by a Mr Kaoma, on behalf of the second appellant, corroborating the latter's

p39

alibi. The learned State Advocate at the hearing in the High Court maintained that the court could not go behind the order of detention to ascertain whether the grounds of detention were true or false. He submitted that there was no obligation upon the State to prove the grounds to be true, and for that reason it seems the State did not file any affidavits in reply. In the event, the appellants' affidavits and that of Mr Kaoma were uncontroverted. The trial judge in a very thorough and learned judgment found himself in agreement with the State Advocate's submissions: in particular he found that there was no 'legal obligation' upon the respondent to rebut the affidavits filed. The first ground of appeal contests this finding.

The learned State Advocate Mr Kinariwala has adopted and repeated the submissions made by his learned colleague in the court below. I agree that there is no onus upon the detaining authority to prove the grounds of detention, nor are we necessarily concerned with the truth or falsity as such of the grounds. The grounds for a detention order, as Doyle, C. J., put in *Re Kapwepwe & Kaenga* (1) at p.255, "may be mainly precautionary and based on suspicion". Mr Kinariwala has referred us to the following oft-quoted dicta by Baron, J.P., (as he then was) in *Kapuwepwe & Kaenga* (1) at p.260:

"The machinery of detention or restriction without trial (I will hereafter use 'detention' and cognate expressions to include 'restriction' and cognate expressions) is, by definition, intended for circumstances where the ordinary criminal law or the ordinary criminal procedure is regarded by the detaining authority, as inadequate to meet the particular situation. There may be various reasons for the inadequacy; there may be insufficient evidence to secure a conviction; or it may not be possible to secure a conviction without disclosing sources of information which it would be contrary to the national interest to

disclose; or the information available may raise no more than a suspicion, but one which someone charged with the security of the nation dare not ignore; or the activity in which the person concerned is believed to have engaged may not be a criminal offence; or the detaining authority may simply believe that the person concerned, if not detained, is likely to engage in activities prejudicial to public security. And one must not lose sight of the fact that there is no onus on the detaining authority to prove any allegation beyond reasonable doubt, or indeed to any other standard, or to support any suspicion. The question is one purely for his subjective satisfaction."

I accept that the detaining authority is not prima facie obliged as such to "support any suspicion" his order is valid on the face of it. To that extent I agree that the detaining authority's satisfaction is not subject to review. I hesitate to think however that the learned Judge President by the use of the term "subjective satisfaction" meant to convey that the detaining authority's satisfaction was absolute and was not subject to the test of reasonableness where challenged on prima facie grounds. Nowhere else is that term used in the reported cases before

this court over the years-it was not used or expressly adopted by Doyle,C.J., or Gardner, J.A., (as he then was) in their judgments in *Kapwepwe Kaenga* (1). Indeed, as will be seen, the test of reasonableness was to some degree applied in that case. In the case of *Elefheriadis v Attorney-General* (2), in this court Doyle, C.J., had occasion to observe at p.71:

> "I wish to make it clear from the outset that I do not question in any way the discretion of the detaining authority. The court cannot query the discretion of the detaining authority if it is exercised within the power conferred. The question here is one of *vires*."

There the learned Chief Justice did not state what were the limits of the power conferred. He did not state that the discretion was not subject to the test of reasonableness. Bearing in mind other dicta of the learned Chief Justice in *Eleftheriadis* (2) and indeed *Kapwepwe & Kaenga* (1), which I will have occasion to consider, it seems to me that the above passage is an authority for no more than the proposition that provided a detaining authority's discretion is not shown to be unreasonable, the court cannot then replace the detaining authority's discretion with its own discretion in the matter. That proposition is widely accepted.

The term "subjective satisfaction" and terms related have been frequently used in a multitude of Indian Supreme Court authorities based on legislation largely similar to regulation 33 (1), dating e.g., from *Gopalan v State of Madras* (3) to *Khudiram v State of West Bengal* (4). On a close study of the Indian authorities however it seems to me with respect that the Supreme Court of India has come to regard the detaining authority's satisfaction as something less than 'subjective'. While declaring its lack of jurisdiction to enquire into the "adequacy" or "sufficiency" of the grounds of detention, the court has put beyond doubt its competency to enquire into the detaining authority's satisfaction as to the very necessity to resort to detention, that is, as to the reasonableness of such satisfaction. Further, the authorities illustrate an increased willingness even to physically examine the materials placed before a detaining authority, to ascertain e.g., whether or not extraneous material had affected his decision, even in the face of the latter's affidavit that it had not - see e.g., the cases of *Narayan Debnath v West Bengal* (5) and *Daktar Mudi v State of West Bengal* (6) and *Khudiram v State of West Bengal* (4). In *Khudiram* (4) the court (per Bhagwati, J.) observed (at p. 850) that "it is elementary that the human mind does not function in compartments" and then went on to say (at p. 850):

> "Therefore in a case where the material before the District Magistrate is of a character which would in all reasonable probability be likely to influence the decision of any reasonable human being, the Court would be most reluctant to accept the ipse dixit of the District Magistrate that he was not so influenced . ."

While the Supreme Court was not there directly concerned with the correctness of the grounds served upon the detainee, but rather with the

aspect of the non-communication of other grounds, the court nonetheless clearly subjected the detaining authority's very thought processes to an objective examination.

The earlier Indian dicta on preventive detention were based on the strictures of the decisions in the English cases of two World Wars, on which incidentally the learned trial judge in this case placed much reliance, prominent amongst them the House of Lords case of *Liversidge v Anderson* (7). The majority decision in that case has met with the critical comment if not disapproval of high authority, including that of the House itself, over the years, indeed of our courts also and has fairly recently met with what I respectfully regard as the tacit disapproval of the Privy Council in the case of *Attorney-General of St Christopher v Reynolds* (8), which was a case on appeal from the West Indies Associated States Court of Appeal. While the Privy Council considered that the decision in *Liversidge v Anderson* (7) was "not directly in point", due no doubt to the particular wording of regulation 18 (1) of the Defence (General) Regulations, 1939, their Lordships did consider (at p. 138) a passage in Lord Atkn's "celebrated dissenting speech" (at p. 237) which indicated that the words "The Secretary of State is satisfied . . etc.", conveyed a "complete discretion". Lord Salmon observed (at p. 138):

> "No doubt that passage supports the argument that the words 'The Secretary of State if satisfied, etc. May confer an absolute discretion on the Executive. Sometimes they do, but sometimes they do not."

Lord Salmon however did not refer to any authority in point, other than *Liversidge v Anderson* (7), where such a construction had been placed on similar words. Indeed the only reference made was to the case of S*ecretary of State for Education v Tameside Metropolitan Borough Council* (9) where the House of Lords held that the words "If the Secretary of Estate is satisfied . . ." did not confer an absolute discretion. The Privy Council recognized the differing facts and backgrounds of e.g. *Liversidge v Anderson* (7), the *Tameside* case (9) and the case under consideration and decided that case on the basis of emergency regulations and in particular constitutional provisions which are similar to the relevant Zambian provisions. The case was concerned with an action for damages for false imprisonment, but this did not affect the interpretation of the constitutional provisions involved.

Section 3 (1) of the Leeward Islands (Emergency Powers) Order in Council, 1959, empowered the Governor of the State of St Christopher, Nevis and Anguilla to make emergency legislation. Section 3 (1) reads as follows:

> "The Administrator of a Colony to which this Order applies may, during a period of emergency in that Colony, make such laws for the Colony as appear to him to be necessary or expedient for securing the public safety, the defence of the Colony or the maintenance of public order or for maintaining supplies and services essential to the life of the community."

The Constitution of St Christopher, Nevis and Anguilla, which took effect on 27th February, 1967, provided that the Order in Council would cease to have effect on 1st September, 1967. On 30th May, 1967, the Governor declared a state of emergency and on the same date made and published the Emergency Powers Regulations, 1967, regulation 3 (1) of which reads as follows:

> "Detention of Persons. If the Governor is satisfied that any person has recently been concerned in acts prejudicial to the public safety, or to public order or in the preparation or instigation of such acts, or in impeding the maintenance of supplies and services essential to the life of the community and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained."

The Privy Council interpreted the above provisions in the light of the Constitution, Section 14 of which reads:

> "Nothing contained in or done under the authority of a law enacted by the Legislature shall

> be held to be inconsistent with or in contravention of section 3 or section 13 of this Constitution to the extent that the law authorises the taking during any period of public emergency of measures that are reasonably justifiable for dealing with the situation that exists in (the State) during that period."

In their Lordships' view the provisions of section 3 (1) of the Order in Council and section 14 of the Constitution were at variance. Lord Salmon in delivering the judgment of the Board observed (at p.136 at d):

> "The deference between the two laws was that the first law gave an authority absolute discretion and indeed the power of a dictator, to arrest and detain anyone, whilst s. 14 of the Constitution allows a law to be enacted conferring power to arrest and detain only if it was reasonably justifiable to exercise such a power. It is this very real difference which makes the 1959 Order in Council out of tune with the Constitution."

And again (at p.136 f):

> "It is inconceivable that a law which gave absolute power to arrest and detain without reasonable justification would be tolerated by a Constitution such as the present, one of the principal purposes of which is to protect fundamental rights and freedoms."

Lord Salmon went on to say (at p.136 at g) that section 3 (1) of the Order in Council should be construed in the light of section 14 of the Constitution as follows:

> "The Governor of a State may, during a period of public emergency in that State, make such laws for securing the public safety or defence of the State or the maintenance of public order or for maintaining supplies and services essential to the life of the community, to the extent that those laws authorise the taking of measures that are reasonably justifiable for dealing with the

p43

> situation that exists in the State during any such period of public emergency."

That construction raises the question of the validity of the Emergency Powers Regulations, 1967, in respect of which Lord Salmon observed (at p.137 at c):

> "Their validity depends on the proper construction of the following crucial words in reg.3 (1): 'If the Governor is satisfied . . .' These words can and should be given a meaning which is consistent with ss. 3 and 14 of the Constitution (similar to sections 15 and 26 of the Constitution of Zambia at Independence) and with the construction which their Lordships have put on the Order in Council under which the regulation was made. Accordingly 'is satisfied', which might otherwise mean 'thinks' or 'believes', does mean. 'If the Governor is satisfied on reasonable grounds that any person has recently been concerned in acts prejudicial to the public safety, or to public order . . . and that by reason thereof it is reasonably justifiable and necessary to exercise control over him, he may make an order against that person directing that he be detained. Their Lordships consider that it is impossible that a regulation made on 30th May, 1967 under an Order in Council which, on its true construction, conformed with the Constitution on that date, could be properly construed as conferring dictatorial powers on the Governor; and that is what the regulation would purport to do if the words 'if the Governor is satisfied' mean 'if the Governor thinks, etc'. No doubt Hitler thought that the measures, even the most atrocious measures, which he took were necessary and justifiable, but no reasonable man could think any such thing."

That construction was also adopted in the light of section 103 (1) of the Constitution, which is materially similar to section 4 (2) of the Zambia Independence Order, 1964, which provided that "existing laws" (e.g., the 1959 Order in Council) were to be "construed with such modifications, adaptions, qualifications and exceptions as (might) be necessary to bring them into conformity

with . . . (the) Constitution". I do not see that the equivalent provisions in section 4 (2) of the Zambia Independence Order, 1964, need for present purposes concern us as, in any event, it is trite law that the provisions of all legislation must be construed in the light of the Constitution where relevant: and so section 3 (3) of the Preservation of Public Security Act, and of course regulation 33 made thereunder, must be construed inter alia in the light of Article 26 of the Constitution-see section 5 (2) of the Preservation of Public Security Act. In this respect it will be seen that the provisions of that Article, which upon Independence were largely similar to those of section 14 of the Constitution of St Christopher, Nevis and Anguilla, have undergone some change. Immediately before Independence section 14 (1) of the 1964 Constitution (introduced on 3rd January, 1964) read as follows:

> "14. (1) Nothing contained in or done under the authority of any regulation made under Emergency Powers Order in Council, 1939,

> as amended, shall be held to be inconsistent with or in contravention of section 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 shall be held to be inconsistent with or in 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."

Upon Independence Article 26 (1) of the Constitution introduced under the Zambian Independence Order read as follows:

> "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."

The above provisions were amended under Act No. 33 of 1969 and were later re-enacted under Article 26 of the 1973 Constitution which 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 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 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."

It seeing to me that one enact of the 1969 amendment upon section 3 (3) of the Preservation of Public Security Act and regulation 33 was that the reasonableness of the legislation itself could not be queried: the courts cannot consider, for example, whether or not detention without trial during a state of emergency, is reasonably justifiable. The requirement of the reasonableness of the need to detain a person in any particular case nonetheless remains, with the exception that the deletion of the words "reasonably justifiable" and the introduction of the word "shown" (i.e. to be unreasonable) seems to place a burden upon the detainee rather than upon the detaining authority. Apart from that aspect, I cannot see that

there is any difference in effect in the requirement that the measures to be taken, whether it be the

making of regulation 33 or an order of detention (which is a measure authorised by and done under that regulation and hence the parent Act), must be "reasonably justifiable", and the requirement that the measure taken in any particular case, e.g., an order of detention, must not be shown to exceed anything which "could reasonably have been thought to be required". With regard to the latter requirement Baron, J.P., had this to say in *Kapwepwe & Kaenga* (1) at p.263:

> "It is not open to the courts to debate whether it is reasonable for there to be in existence a declaration under section 29 (which I will call for convenience a state of emergency); a challenge of the detention on the ground that it exceeded anything which could 'reasonably have been thought to be required' to meet the situation amounts to the contention that, assuming the state of emergency and assuming the truth of the allegations against the detainee, it was unreasonable to resort to detention-in other words, that the situation could and should have been met by some lesser measure."

Whereas Baron, J. P., there said that it is not open to the courts to consider whether or not a declaration under section 29 (now Article 30) of the Constitution is reasonable, it is of note that he did not say that the courts could not consider whether or not there was reasonable suspicion of the allegations against a detainee: he merely said that, in any particular case, "assuming the truth of the allegations against a detainee", a court could enquire as to whether it was reasonable to resort to detention. That observation does not, in my view, preclude an enquiry as to whether or not it was reasonable to suspect the detainee of such allegations

Article 26 formed the basis of a ground of appeal in *Kapwepwe & Kaenga* (1) where it was submitted (see p. 258) that the appellant's detention "exceeded anything which . . . could reasonably have been thought to be required ...." Both Doyle, C.J., (at p. 254/255) and Baron, J.P., (at pp. 263/264) considered such ground of appeal and rejected it, on the merits. Again, in the case of *Kapwepwe & Kaenga* (1) Doyle, C.J., found that of three grounds of detention furnished to Mr Kaenga, at least two sub-grounds of the third ground were vague and hence the third ground was vague (at pp. 256/257 and 268): he observed (at p. 257):

> "The third ground given to Mr Kaenga is a substantial ground and must have weighed materially with the detaining authority. It is not therefore, necessary for me to consider what would be the result in circumstances where a minor ground is concerned."

The learned Chief Justice went on to observe that "had each of the judges of the Court of Appeal been the judge of first instance, two of them, myself and Gardner, J.A. would have been in favour of issuing the writ". We are not concerned here with the vagueness of the grounds. The above extracts are relevant however in that they reveal that Doyle, C.J., in considering whether or not a ground was "substantial" as opposed to "minor" and whether it weighed 'materially' with the detaining

authority, was, in my view, subjecting the detaining authority's satisfaction as to the necessity for detention to an objective examination.

In the case of *Eleftheriadis v Attorney-General* (2) the appellant had been detained on the basis of a solitary alleged offence committed a year previously. Neither the order nor ground of detention referred to any apprehension as to the appellant's conduct. In the particular circumstances of the case this court (per Doyle, C.J.) was not prepared to draw an inference of future apprehension. That surely indicates that in a proper case the court would draw such inference, and indeed in a number of subsequent cases the High Court in fact drew such inference. The very act of doing so however is merely another way of saying that the court is satisfied that the detaining authority must in the circumstances have reasonably entertained the necessary apprehension as to the detainee's future conduct. Even had this court been so satisfied in *Eleftheriadis* (2) it seems that the court was nonetheless prepared to consider (at p.721) "any question which might arise under Article 26 of the Constitution as to thereasonableness of the measure taken", that is, of the necessity to detain. That observation indicates to me that the court regarded the aspect of the detaining authority's future apprehension as forming part of his satisfaction as to the detainee's activities, rather than his satisfaction of the necessity to detain. If I am correct in this assumption then it seems the court subjected the former satisfaction to an objective assessment.

There can be no doubting the court's jurisdiction to inquire into the aspect of the detaining authority's satisfaction of the necessity to detain. In doing so in *Kapwepwe & Kaenga (*1) Doyle, C.J., took matters good deal further however when he observed:

> "It is commonplace for a person to be acquitted in circumstances which show that there is a very strong suspicion that he combined the crime but the reasonable doubt remains. It may well be, in a particular criminal case, that a man is shown so clearly to be innocent, that the use of a charge against him for the purpose of detention order would be held to be unreasonable."

It might be that in particular criminal case a person is shown clearly to be innocent where the state for some reason has not produced certain evidence, and by reason thereof that person is later detained on a ground identical to the criminal charge. No doubt of course in such a case, in any subsequent application by the detainee to the High Court challenging his detention, some reference to such evidence would be made by the State, so that the detainee might not succeed in his application. Nonetheless the dicta of Doyle,C.J., above have general application. These dicta in my view clearly expose the detaining authority's satisfaction as to the detainee's activities to the test of reasonableness. Were a detainee to seek the court's assistance on the basis that the ground for his detention was in every detail similar to a criminal charge of which he had been acquitted, the court would in my opinion be obliged to scrutinise evidence before the criminal court to assess the reasonableness of the remaining suspicion. That indeed was the task of the High Court in *Re Buiteng*

p47

(10) at p. 161 where the court held that very strong suspicion existed after the applicant's acquittal, and that his subsequent detention on an identical ground was valid.

Article 26 speaks of "any situation existing or arising"during a period of emergency and again of the aspect 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 underlining is mine.)

The use of the word "reasonably" above indicates that the general appraisal is an objective one. The appraisal of the "circumstances prevailing at the time" is plainly objective: so also surely must be the appraisal of the "situation in question". Nowhere is there any mention of the satisfaction of "any person" as to the existence of "any situation existing or arising" or "the situation in question". The Article in the latter half thereof speaks only of "the situation in question". In my view the plain meaning of the above provisions is that they involve an objective assessment of such "situation". It seems to me to make nonsense of the Article to suggest that there must be an objective assessment of the prevailing circumstances, and the very need to resort to detention in the face thereof, while completely ignoring the possibility that the alleged 'situation' might be non-existent.

While the provisions of Article 26 differ from those of section 14 of the Constitution considered in *Reynolds* (8), apart from the other aspects earlier mentioned, I see little difference, as I have earlier said, in the stipulation that measures taken in a particular case must be "reasonably justifiable" and the proviso that they must not be shown to exceed reasonable requirements. Thereafter the construction placed by the Privy Council on regulation 3 (1) of the Emergency Powers Regulations, 1967, is of importance. The phrase "If the Governor is satisfied . . . " was construed by their Lordships to mean "If the Governor is satisfied on reasonable grounds . . . ". It can be said that that construction can be distinguished on the basis that the particular emergency provision under consideration in *Reynolds* (8) recited, not alone the detaining authority's satisfaction as to the necessity to detain, but also his satisfaction as to the detainee's activities, whereas regulation 33 (1) recites only the former satisfaction: that regulation provides only for the formulation of the detaining authority's satisfaction "that for the purpose of preserving public security it is necessary" to detain a person, before a detention order can be made. To construe the regulation to read thy the detaining authority could detain a person "if satisfied (on reasonable grounds) that it is necessary"

so to do would clearly be in tune with the latter provisions of Article 26. Such necessity however is in reality based on two aspects: firstly the detaining authority's satisfaction as to the detainee's alleged activities, and secondly, his satisfaction that detention is the answer to the situation. I cannot see that these two 'satisfactions' are separable. It seems to me if it is competent for a court

to enquire as to the reasonableness of the detaining authority's decision to resort to detention in the face of his mere suspicion of the detainee's activities, then I cannot but see that the court is completely to enquire into the reasonableness of such suspicion.

In the case of *Reynolds* (8) the notice of the grounds of detention furnished to the detainee read as follows:

> "That you JOHN REYNOLDS during the year 1967, both within and outside of the State, encouraged civil disobedience throughout the State, thereby endangering the peace, public safety and public order of the State."

Lord Salmon observed that "it was indeed a mockery to put it (the notice) forward as specifying in detail the grounds on which Mr Reynolds was being detained" and went on to say (at pp.140/141 j to b):

> "Neither at the inquiry made early in July, 1967, (to which reference has already been made in this judgment) nor at the trial of the present action presided over by Glasgow, J., nor in the Court of Appeal was there any glimmer of a suggestion put forward by the Governor or by the Attorney-General of any reason, justification or ground on which any reasonable Governor could have been satisfied that Mr Reynolds had been concerned in acts prejudicial to the public safety or public order. Mr Reynolds gave evidence at the trial repeating what in effect he had said in evidence at the inquiry, namely that be had been warned that he was about to be arrested and advised to leave the State, that he had done nothing wrong and so he was not afraid and had decided to stay where he was. No evidence was called by Crown counsel at the inquiry and none by the Attorney-General during the trial of the action. Had there been any evidence which could have shown that Mr Reynold's detention was reasonably justifiable, surely it would have been called on both occasions."

In all the circumstances, including the very vagueness of the ground of detention, the Privy Council considered that there was "an irresistible presumption that no grounds ever existed" and held that the detention order was invalid, dismissing the appeal and confirming the award of damages awarded by the Court of Appeal.

In the present case the appellants seek to establish that it was not they who were involved in any unlawful meetings, and in particular, in the fire and tragic death of twelve persons at Chililabombwe. This court is not necessarily concerned with the truth or falsity of grounds of detention however: the court is merely concerned to establish whether or not there was reasonable cause to suspect the appellants. It is not for the court to pronounce their guilt or innocence, that is a matter for the detaining authority or indeed the criminal courts should they face criminal charges. Mr Mwanawasa submits that on an application for habeas corpus the court is empowered under sections 3 and 4 of the Habeas Corpus Act, 1816 to "proceed to examine into the truth of the facts". The scope of the enquiry in a habeas corpus proceeding is by

the very nature of such proceedings obviously limited. As Hilbery, J., said in the Queen's Bench Division case of *R. v Board of Control and Ors, Ex parte Rutty* (11) at p. 772 at f:

> "On an application for a writ of habeas corpus this court does not sit as a court of appeal. It will not re-hear the matters which were to be decided by the judicial authority. The court will, however, admit affidavit evidence in order to decide whether there was any evidence before the judicial authority such as would justify his finding that he had jurisdiction to deal

with the applicant and to make an order."

In the same case Lord Goddard, C.J., observed at p. 775 at d to g:

> "That this court has power to examine into the truth of the facts set forth in the return to a writ of habeas corpus and to examine them by means of affidavit evidence is clear from s. 3 and s. 4 of the Habeas Corpus Act, 1816. That Act effected a notable change in the law. Previously neither at common law nor by the Habeas Corpus Act, 1679, could the court do more than look at the return and decide whether on its face it showed a lawful cause or detention. The facts could only be controverted by an action for a false return. The reason for this is made clear by the opinion of Wilmot, J., delivered before the House of Lords in 1758, which will be found in the volume in which the opinions of that great and most learned judge are collected entitled Wilmot's Opinions (12). It was because questions of fact were involved and it was only a jury that could decide them. If on inquiry the court finds there was no evidence by which the order or conviction can be sustained they can release on habeas corpus or quash on certiorari. This is clear from the cases cited by Hilbery, J. But if there is evidence, whatever this court may think of it and no matter what conclusion the members of the court might have come to if they had been deciding the case which led to the conviction or order, they cannot disturb the finding, for so to do would be to act as a court of appeal in a matter in which no appeal is given."

With those dicta I respectfully agree save that where Lord Goddard, C.J., speaks in turn of "no evidence" and "evidence" I read those words to refer, as Hilbery, J., put it, to evidence which would justify the finding under review. Similarly in a civil trial for false imprisonment, the court would not be ultimately concerned with the truth of the allegation against the plaintiff, but whether in all the circumstances the defendant had reasonable cause to believe the allegation and to imprison thereon. It is thus our task to ascertain whether the detaining authority could have entertained reasonable suspicion as to the appellants' activities.

The question arises as to where the onus lies in the matter. The latter provisions of Article 26 of the Constitution indicate that the measures taken must be 'shown' to be unreasonable. Seemingly it is the detainee who must undertake such burden, at least for the purposes of that Article. In the habeas corpus case of Regina v Governor of Brixton

p50

Prison, Ex parte Soblen (13) the Court of Appeal dealt with the authority of the Home Secretary to detain and deport a person if he "deems it to be conducive to the public good". Lord Denning, M.R. had this to say (at p. 302):

> "If therefore the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America because they had asked for him, then it would be unlawful. But if the Home Secretary's purpose was to deport him to his own country because the Home Secretary considered his presence here to be not conducive to the public good, then the Home Secretary's action is lawful. It is open to these courts to inquire whether the purpose of the Home Secretary was a lawful or an unlawful purpose. Was there a misuse of the power or not? The courts can always go behind the face of the deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or not. That follows from *Reg. v Board of Control, Ex parte Rutty* (11).
>
> Then how does it rest in this case? The court cannot compel the Home Secretary to disclose the materials on which he acted, but if there is evidence on which it could reasonably be supposed that the Home Secretary was using the power of deportation for an ulterior purpose, then the court can call on the Home Secretary for an answer: and if he fails to give it, it can upset his order. But on the facts of this case I can find no such evidence. It seems to me that there was reasonable ground on which the Home Secretary could consider that the applicant's presence here was not conducive to the public good."

It is of interest to note incidentally that Lord Denning, M.R., in the last sentence above, applied the test of reasonableness to the discretion of the Home Secretary. Donovan, L.J., had this to say (at pp.307/308):

> "Mr Solomon (for the applicant) asserted that the order was invalid for a different reason, namely, because it was a sham. The Home Secretary had not genuinely formed the opinion that it was conducive to the public good to deport the applicant; he simply wanted to comply with a United States request to surrender the applicant to them notwithstanding that the offence occurred as far back as 1944 and 1945, and had resorted to the device of deportation order simply to give the look of legality to that compliance. The task of the subject who seeks to establish such an allegation as this is indeed heavy. On the face of it the order which he wishes the court to quash will look perfectly valid, and to get behind it and to demonstrate its alleged true character he will need to have revealed to him the communications, oral and written, which have passed between the home and the foreign authorities. But if the appropriate Minister here certifies, as he has done in this case, that such disclosure will be contrary to the public interest, then as general rule the subject will not obtain it. He will be left to do his best without such assistance,

> and in the nature of things, therefore, he will seldom be able to do more than raise a prima facie case, or alternatively to sow such substantial and disquieting doubts in the mind of the court about the bona fides of the order he is challenging that the court will consider that some answer is called for. If that answer is withheld, or, being furnished, is found unsatisfactory, then, in my view, the order challenged ought not to be upheld, for otherwise there would be no protection for the subject against some illegal order which had been clothed with the garments of legality simply for the sake of appearance and where discovery was resisted on the ground of privilege."

The case of Soblen (13) turned on the issue of mala fides but the dicta of Lord Denning, M.R. and Donovan, L.J., apply in my view to any case where, once the detaining authority has established the fulfilment of the constitutional and other legal requirements connected with detention, the detainee then challenges the validity of the detention on any other ground. Indeed, I would here observe that the dividing line between a claim of mala fides, which was recognised even in the case of *Liversidge v Anderson* (7) and other war-time authorities as exposing the detaining authority's discretion to judicial review, and a claim of the unreasonable exercise of such discretion, must at times be exceedingly faint. In any event, the above-quoted dicta were referred to with approval by Silungwe, C.J., in his judgment in this court in the case of *Shamwana v Attorney-General* (14) at p.10. There the learned Chief Justice held that the appellant was required to raise a prima facie case where he sought to challenge the validity of his detention on the basis that no grounds existed when first detained. In the present case the detention order on the face of it is a perfectly valid order. It is not sufficient for the applicants merely to deny the grounds of detention. They have done more than that however: They have adduced evidence on the point which stands uncontroverted.

The first appellant in his affidavit deposed that he had departed from Mufulira to Lusaka on 6th September, 1978, where he remained until 1600 hours on 9th September, 1978, when he set off in a borrowed car, arriving at his home near Mufulira at about 2300 hours. The first appellant gave a fairly detailed account of his temporary residence in Lusaka, his movements, and the persons he met during his stay, including an Assistant Secretary in the Ministry of Trade and Industry whom he approached in order to secure an import licence, a Bank of Zambia official and another person subsequently appointed as Provincial Political Secretary. The first appellant deposed that he had detailed his movements to the police and had supplied them with the names of the persons he met in Lusaka. The State has supplied no answer to this alibi.

Mr Kinariwala submits however that even on the basis of the first appellant's affidavit it was possible for him to have attended the alleged meeting at Mufulira on 9th September, some time before 2100 hours at which time the second appellant and others were allegedly despatched to Chililabombwe. As I see it, the first appellant's evidence on the point

is not incredible and there is no evidence to the contrary. It is his evidence that he was at the relevant time negotiating a journey in a borrowed car from Lusaka to his home in Mufulira and there is no evidence before us to show that he was not doing so. Further, the allegations form part of a continuing transaction on the 8th and 9th September. On the basis of the first appellant's affidavit

it has been clearly shown that it was impossible for him to have been involved in the first two allegations. That aspect in my view fortifies his evidence that he was not involved in the third and fourth allegations. Certainly I consider that he has succeeded in sowing, in the words of Donovan, L.J., "such substantial and disquieting doubts in the mind of the court" regarding those latter two allegations that some answer is called for. None is forthcoming. I do not see how it can then be said that reasonable suspicion attaches to the first appellant.

As to the second appellant, he deposed that he was in Mufulira, where he resides, on 8th September, but that he went to Ndola on 9th September, 1978. His affidavit gives a detailed account of his movements and the people he met in Ndola and Twapia on 9th September, 1978 from the morning up until 23:00 hours when he went to bed in the house of Mr Kaoma in Twapia, leaving by bus for Mufulira the next morning. His affidavit was supported, as I have earlier said, by that of Mr Kaoma. The second appellant deposed that he had supplied the police with the names of the persons whom he had met in Ndola and Twapia. Here again the State has supplied no answer to the alibi.

It will be seen that the second ground of detention in respect of the second appellant makes no mention of a second meeting at Mufulira on 9th September, much less of his attending such meeting, as does the third ground supplied to the first appellant. The grounds supplied to the second appellant in my view clearly suggest that the transaction of 9th September, "conducted with a view to implementing . . . political motives", arose out of the meeting of 8th September, as it was at that meeting that "it was resolved that violence was to be used to further (such) political motives". Even if that is not the case I am put on inquiry by the fact that it is alleged that the second appellant attended the meeting on 8th September and yet, on the evidence before us, his alleged associates in crime had apparently no objection to his proceeding to Ndola for the innocuous purpose of expediting the editing of a school magazine, while they set about their dastardly course of violence in Chililabombwe. The events of 8th and 9th September were a continuing transaction as I have said, and I cannot but see that the second appellant's alibi for the events of 9th September in turn casts grave doubts on his alleged involvement in the events of 8th September. Those doubts are sufficient in my mind to call for an answer, but as with the events of 9th September, none is forthcoming. I cannot then see that reasonable suspicion attaches to the second appellant.

Mr Kinariwala has in effect submitted throughout that the court in even considering the contents of the appellants' affidavits is making a finding of credibility thereon and is thus deciding upon the correctness

p53

of the grounds. Obviously the appellant's affidavits must ex facie be credible as otherwise they would be rejected by the court out of hand. Because they are credible and because no affidavits have been filed in opposition the court is then obliged to accept their contents. I wish to repeat and stress however that we are not determining the truth or falsity as such of the grounds of detention. Mr Kinariwala submits that if affidavits in opposition were to have been filed, the court would be forced to make a finding of credibility between both sets of affidavits and hence determine the correctness of the grounds. On the contrary, had affidavits in opposition been filed the true nature of the court's inquiry would have been self-evident: provided the affidavits in opposition controverted that of the appellants and laid the basis for reasonable suspicion as to the appellant's involvement in the grounds of detention, then the court would be bound to find no more than that there was, what I would term, a triable issue" in the matter, and that it had not been shown that the detaining authority could not have reasonably entertained suspicion as to the appellant's alleged activities. It would not be for this court to try the issue involved, as there can be no question of the court replacing the detaining authority's satisfaction on that issue with its own satisfaction. As I have earlier said, the State did not file any affidavits in reply apparently on the basis that it was not necessary to do so. It is possible that affidavits might have been filed had a contrary view been taken. I do not see that we can speculate however as to whether affidavits might have been filed, or as to what their contents might have been.

As it is, I am satisfied that both appellants have made out their case and have shown on the basis of uncontradicted evidence of alibi that it was not reasonable to suspect them of the alleged activities and hence that it was not reasonably necessary to detain them. I do not see that it is necessary to consider the other grounds of appeal. I hold that the appellants' detention is invalid and I would allow both appeals.

One final point, the learned trial judge in his judgment dismissed the applications for the writ. He had in fact earlier in the proceedings issued the writ in both cases and thereafter dealt with the matter by way of the procedure at the hearing of the writ outlined in Rule 8 of Order 54 of the Rules of the Supreme Court Practice 1979, Vol. I. Having in fact granted the applications to issue the writ, the proper order to have made on return was either to have discharged or remanded the prisoners - see e.g., *R. v Board of Control and Ors, Ex parte Rutty* (11) at p. 775 and Atkin's Court Forms, 2 Ed., Vol. 14 pp. 50/51 and 65/66.

I would order that both appellants be discharged.

Judgment
BRICE-LYLE .: I agree with the reasoning of my brother Cullinan that the appeals be allowed.

Judgment
MUWO, AG. J.S.: I do concur.

Judgment
CULLINAN, J.S.: The order of the court is that the appeals are allowed and further that the appellants are discharged.

Appeals allowed