VALENTINE SHULA MUSAKANYA v THE ATTORNEY-GENERAL (1981) Z.R. 214 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER, AG. D.C.J. AND CULLINAN, J.S.
10TH JULY AND 8TH OCTOBER, 1981
(S.C.Z. JUDGMENT NO. 18 OF 1981) 35

Flynote

Constitutional law - Detention - Detention under Preservation of Public Security Regulations - Legality under the Constitution.

Constitutional law - Detention - Purpose of detention - Whether detention governed by Art. 27 (1) (a) or Art. 15 (3) of the Constitution.

Constitutional law - Detention - Grounds for detention - When vague.

Evidence - Alibi - Defence of - Weight of evidence.

Constitutional law - Detention - Alibi - Defence of - Necessity to adduce credible evidence of alibi covering whole period alleged in grounds

1981 ZR p215

SILUNGWE CJ

Headnote

The appellant was detained under reg. 33 (1) of the Preservation of Public Security Regulations. His application for a writ of *habeas corpus ad subjiciendum* was unsuccessful in the High Court. The appealed to the Supreme Court, contending *inter alia* that the trial judge erred in law in holding that the provisions of Art. 15 (3) (b) of the Constitution do not apply to persons detained under reg. 33 (1) of the Preservation of Public Security Regulations; that the trial judge also erred in law in holding that the appellant's grounds for detention were not vague. The appellant further contended that the trial judge erred in law in refusing to accept the appellant's plea of *alibi*.

Held:

(i) A detention which is made for the purpose of preserving public security is a constitutional derogation from the provisions *inter alia*, of Art. 15 and cannot therefore be challenged on grounds that it is inconsistent with or in contravention of that Article.

(ii) The position of a person detained for the purpose of preserving public security is governed by the provisions of Art. 27 (1) and not the provisions of Art. 15 (3)(b) or of the Criminal Procedure Code unless person such is also charged with a criminal offence in which event all of these provisions would become relevant.

(iii) It is settled law that if a detainee is furnished with a ground containing sufficient information to enable him to make a meaningful representation, such ground conforms with the constitutional requirements of Article 27 of the Constitution and cannot therefore be said to be vague.

(iv) Unless a detainee is able to adduce credible evidence of *alibi* covering the whole of the period stated in the grounds, he cannot be said to have put forward an alibi.

Cases referred to:

(1) Shamwana v The People, (1981) Z.R. 261.
(2) Kapwepwe & Kaenga, In re (1972) Z.R. 248.
(3) Munalula & Ors. v The Attorney-General (1979) Z.R. 154.
(4) Attorney-General v Musakanya, S.C.Z. Appeal No. 4 of 1981.
(5) Chisata & Lombe v Attorney-General, (1981) Z.R. 35

Legislation referred to:

Constitution of Zambia, Cap. I, Arts. 27 (1) (a), 26.
Preservation of Public Security Regulations Cap. 106, reg. 33 (1).

For the appellant: J.M. Mwanakatwe, M.M.W. & Co.
For the respondent: A.G. Kinariwala, Senior State Advocate.
p216

Judgment

SILUNGWE, C.J.:

On December 1, 1980, the appellant was detained under reg. 33 (1) of the Preservation of Public Security Regulation and was shortly thereafter duly served with the following ground for detention:

"1. That on a date unknown but in or about the early part of April, 1980, you together with Messrs Jack Edward Shamwana and Goodwin Yoram Mumbas attended an unlawful meeting at the residence of Mr Pierce Annfield situated in Kabulonga area, Lusaka where Mr Pierce Annfield disclosed a plan to overthrow the lawfully constituted Government of the Republic of Zambia by force.
2. That subsequent to the aforesaid meeting and on a date unknown but between the 1st day of April and 31st day of May, 1980, you together with Messrs Goodwin Yoram Mumba, Edward Jack Shamwana, Anderson Mporokoso, Deogratias Syimba and other persons whose names are unknown attended an unlawful meeting chaired by Mr Pierce Annfield at the residence of Mr Edward Jack Shamwana situated in Kabulonga area, Lusaka where yourself and other persons mentioned herein agreed to overthrow the lawfully constituted Government of the Republic of Zambia by force.
3. That you failed to report the above meetings to the police or other lawful authorities."

The appellant then applied to the High Court for a writ of *habeas corpus ad subjiciendum* but the application was refused. It is in consequence of that refusal that this appeal is now before us.

Mr J. Mwanakatwe, learned counsel for the appellant, canvasses four grounds of appeal one of which being as to the order for costs made against the appellant in the court below.

In his submission, Mr Mwanakatwe argues that the learned trial judge erred in law in holding that the provisions of Art. 15 (3) (b) of the Constitution do not apply to persons detained under regulation 33 (1) of the Preservation of Public Security Regulations. He contends that Article 15 (3) (b) does not only apply to persons detained for the purpose of preserving public security but also to those detained on a reasonable suspicion of having committed, or being about to commit, a criminal

offence.

The learned trial judge held in his judgment that the provisions of Art. 15 (3) of the Constitution did not apply to the appellant on the ground that the appellant was being detained for the purpose of preserving public security. He was firmly of the view that persons detained under regulation 33 (1) of the Public Security Regulations do not come under Article 15 (3) for, if they did, the whole purpose of exercising control over the movement of such persons would be defeated.

Part III of the Constitution, which encompasses Articles 13-31, provides a machinery for the protection of fundamental rights and

p217

freedoms of the individual. Article 15 relates specifically to the protection of the right to personal liberty, clause 3 (b) of which reads:

> "15. (3) Any person who is arrested or detained :
> (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained as mentioned in paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

The Preservation of Public Security Regulations are rooted in the Preservation of Public Security Act, Cap. 106. Section 3 of the Act provides:

> "3. (1) The provisions of this section shall have effect during any period when a declaration made under paragraph (b) of subsection (1) of section 29 (now Article 30) of the Constitution has effect.
> (2) The President may, for the preservation of public security, by regulation -(c) make provision for the . . ., control . . . of movement of . . . persons, . . ."

By regulation 33 (1) of the Preservation of Public Security Regulations:

> "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 that such person be detained and thereupon such person shall be arrested, whether in or outside the prescribed area, and detained."

Recently, in *Shamwana v The People*, (1), this court held that there was deemed to be in force in this land a declaration made under paragraph (b) of Article 30 of the Constitution. That that is still the position today is not open to argument.

On a proper reading of Art 15 (3) (b) of the Constitution, on the one hand, and of reg. 33 (1) of the

Preservation of Public Security Regulations, on the other, it emerges that the provisions of Art. 15 (3) (b) are designed to ensure for the benefit of a person who is arrested and detained on a criminal charge, or a reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia by way of compelling his release with or without any conditions attached thereto or, alternatively, by bringing him to trial within a reasonable time. The clear purpose of these provisions is two fold: first to

p218

promote a speedy trial; and second, to induce the individual's release, free from any conditions, or, "upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial". In other words, the provisions envisage the bringing to court of a detained person in order to stand trial. Regulation 33 (1), however, stands in sharp contrast to Art. 15 (3) (b), for it empowers the President to exercise control over persons for the explicit "purpose of preserving public security" as an end in itself and without regard being had to the setting in motion of a criminal process. As Baron, D.C.J., said in

Re Kapwepwe and Kaenga (2), at page 260:

> "The machinery of detention or restriction without trial . . . 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 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."

It is interesting, moreover, to note that Article 26 makes provision for derogation from fundamental rights and freedoms in these terms:

> "26. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Articles 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."

This then illustrates that a detention which is made for the purpose of preserving public security is a constitutional derogation from the provision (inter alia) of Art. 15 and cannot, therefore, be

challenged on the grounds that it is inconsistent with, or in contravention of, that Article. The position of a person detained for the purpose of preserving public security is governed by the provisions of Art. 27 (1), not those of Art. 15 (3) (b) or

p219

of the Criminal Procedure Code unless such person is also charged with a criminal offence in which event all of these provisions would become relevant.

For the reasons given above, I am satisfied that the learned trial judge was on firm ground when he held that a detention under reg. 33 (1) of the Regulations is not caught by Art. 15 (3) (b) for, if it were otherwise, the object of exercising control over the movement of persons in the interests of preserving public security would thereby be rendered nugatory.

The appeal based on this ground is misconceived and I would have no hesitation in dismissing it.

The second ground of appeal is that the learned trial judge erred in law in holding that the grounds furnished to the appellant were vague. It is argued that the grounds were in fact vague because they did not provide a specific date and that in consequence the appellant was not in a position to make a meaningful representation to the detaining authority or the Detainees Tribunal. In *Re Kapwepwe and Kaenga*, (2), and *Munalula and six others v The Attorney-General*, (3), this court discussed at some length the question of vagueness in a ground for detention. It is now settled that if a detainee is furnished with a ground containing sufficient information to enable him to make a meaningful representation, such ground conforms with the constitutional requirements of Article 27 (1) (a) (which makes it mandatory for the detaining authority to furnish a detainee "with a statement in writing . . . specifying in detail the grounds upon which he is . . . detained . . .") and cannot, therefore, be said to be vague.

The question is whether the grounds for detention in the instant case were insufficiently detailed and so resulted in the appellant's inability to make a meaningful representation. In answering this question it is necessary to recall to mind the first and second grounds for detention.

In the first ground, it is stated that during the early part of April, 1980, (which must be taken to mean a period between April, 1-15), the appellant together with other named persons, attended an unlawful meeting at the residence of Mr Pierce Annfield which is located in the Kabulonga area Lusaka, at which Mr Annfield disclosed a plan to overthrow by force the lawfully constituted Government of the Republic of Zambia. In the second ground, it is stated that between April, 1 and May 31, 1980, the appellant, together with persons named and unnamed, attended an unlawful meeting, this time at the residence of Mr Edward Jack Shamwana which is also situated in the Kabulonga area, Lusaka, and which was chaired by Mr Pierce Annfield, and at which it was agreed to overthrow by force, the lawfully constituted Government of the Republic of Zambia. As can be seen, although the grounds do not speak of specific dates, they nonetheless give specific periods, venues of the meetings and at least some of the names of persons in attendance at those meetings the chairman of one, and a spokesman at another meeting and the purpose of the meetings, namely, to overthrow, by force, the lawfully constituted Government of the Republic of Zambia. With all this in view, is it arguable

p220

that adequate information was withhold from the appellant? I have already dealt with similar ground in another judgment delivered today in the case of *The Attorney-General v Valentine Shula Musakanya*, (4), and held that they were not vague. If anything the present grounds are more particularised than the former. I cannot see how it can be said that the present grounds are vague. I, therefore, have no difficulty whatsoever in arriving at the conclusion that the grounds furnished to the appellant contained sufficient information to enable him to know what was alleged against him so that he could, if he so wished, make a meaningful representation. I am fully satisfied that the learned trial judge was not here in error.

For the reasons given, I would dismiss the appeal based on this ground.

In regard to the third ground of appeal, Mr Mwanakatwe submits that the learned trial judge erred in law by his refusal to accept the appellant's plea of alibi. He argues that alibi should have succeeded in that an uncontroverted affidavit sworn by the appellant's witness supports his (the appellant's) averment that he was constantly in and out of Lusaka on various dates during the period of the alleged unlawful meetings. For this submission, Mr Mwanakatwe relies on the following passage from the judgment of Cullinan, J.S., in the case of *Chisata and Lombe v The Attorney-General*, (5), page 22, lines 18-23:

> "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 *Chisata and Lombe*, (5), is on all fours with the case now under consideration for the reason that the two cases are attended by dissimilar circumstances. In *Chisata and Lombe*, (5), the appellants had been given, in their respective grounds, specific dates on which they (together with other persons) were alleged to have held unlawful meetings at Mufulira for the furtherance of "political motives by unlawful means of committing murderous acts". Alibi was put forward by both appellants in their affidavits deposing that they were in Lusaka and Ndola respectively at the material times and that the Police were given a fairly detailed account of their movements in those towns. The State filed no affidavit in opposition with the result that the evidence of alibi given by the appellants stood uncontroverted. In the present case, however, only periods of time - as opposed to specific dates - appear in the appellant's grounds for detention, namely, ". . . a date unknown but between the 1st day of April, and 31st May 1980."

In circumstances such as these, unless a detainee is able to adduce credible evidence of alibi covering the whole of the period stated in the grounds, he cannot be said to have put forward an alibi. Such is the situation in which the appellant finds himself in this case. In other words the plea of alibi is unsuccessful. Accordingly, the appeal based on this ground cannot, in my view, succeed.

p221

Although in my judgment the appellant should lose this appeal, I would not condemn him in costs

because he has raised a constitutional point of public importance, concerning the interpretation of Art. 15 (3) (b) of the Constitution, which has not been decided by this Court before. In the circumstances, I would order that each party bears his own costs.

Judgment
GARDNER, AG.D.C.J.: I concur with the judgment of the learned Chief Justice.

Judgment
CULLINAN, J.S.: I also concur.

Appeal allowed
