

EDWARD JACK SHAMWANA v THE ATTORNEY-GENERAL (1981) Z.R. 261
(S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER, AG. D.C.J. AND CULLINAN, J.S.
22ND AND 29TH DECEMBER, 1980
(S.C.Z. JUDGMENT NO. 35 OF 1980)

Flynote

Constitutional law - Detention - Whether failure to make afresh declaration under s. 29 (Art. 30) of the Constitution fatal to the respondent's case.

Constitutional law - Detention - Declaration under Preservation of Public Security Ordinance - Whether ultra vires the provisions of s. 29 (Art. 30) of the Constitution.

Constitutional law - Detention- Validity - Whether Presidential detention order prima facie valid.

Constitutional law - Detention - Whether failure to furnish grounds within stipulated period raises a presumption of non-existence of grounds ab initio.

Constitutional law- Detention- Lengthy police interrogation- Whether prima facie case relived in relation to non-existence of grounds.

p262

Headnote

The appellant was detained under the Preservation of Public Security Regulations. His appeal to the High Court to grant a writ of *habeas corpus ad subjiciendum* failed. The learned counsel for the appellant contended that for the Preservation of Public Security Regulation to come into play, it was necessary to invoke in full, not merely in part, the provisions of s. 29 of the Constitution, that s. 29 made it imperative for the President of the Republic of Zambia to issue a new proclamation declaring that a state of public emergency or threatened emergency existed; that the President made no such proclamation at all; and that in the result, detentions purportedly made since Independence, including that of the appellant, have been, and continue to be unlawful and unconstitutional. The learned counsel further contended that the fact that the appellant was subjected to lengthy police interrogation is evidence of the averment that the appellant's detention was without grounds.

Held:

- (i) Since there was in existence the Governor's declaration under s. 4 of the Preservation of Public Security Ordinance, there was then in force, as from the date of Independence, a Declaration under s. 29 of Art. 30 of the Constitution.
- (ii) A Presidential Detention order is, on the face of it a valid order and a detainee must establish a *prima facie* case as to its alleged invalidity.
- (iii) Failure to furnish grounds within the stipulated period raises a presumption of non-existence of grounds ab initio.
- (iv) Lengthy police interrogations does not, *per se*, raise a *prima facie* case, for an interrogation might be conducted for the purpose of trying to establish further grounds of detention or indeed the complicity of others in the existing grounds.

Legislation referred to:

Preservation of Public Security Ordinance Cap. 266 s. 4.

Constitution of Zambia App. 3 s. 29, Sch. 2.

Zambia Independence Order, 1964, ss. 4 (1) (3) (6).

Preservation of Public Security Regulations, Cap. 106, regs 31A; 33.

Zambia Independence Act, 1964, App. 3 ss. 2, 4 (1), and 7.

Constitution of Zambia Act Cap. 1 s. 15.

Constitution (Amendment) (No. 5) Act No. 33 of 1969, s. 8.

Cases referred to:

(1) R. v Norfolk County court 60 L.T.Q.B. 379.

(2) Green v Marsh [1892] 2 Q.B. 330.

(3) South British Fire and Marine Insurance Co of New Zealand v Da Costa [1906] 1 K.B. 456.

(4) Banda (J) v A-G. (1978) Z.R. 233.

p263

(5) R. v Governor of Brixton Prison, Ex parte Soblen [1963] 2 Q.B. 243.

For the appellant: A.B. Munyama; Nkwazi Chambers

For the respondent: A.G. Kinariwala, Assistant Senior State Advocate.

Judgment

SILUNGWE, C.J.: delivered the judgment of the court.

This is an appeal from the High Court's refusal to grant a writ of *habeas corpus ad subjiciendum*.

Mr Munyama, learned counsel for the appellant, relies on three grounds of appeal. The first ground is that the Governor's declaration of the existence of a grave situation, under s. 4 of the Preservation of Public Security Ordinance, made on July 28, 1964, lapsed on October 24, 1964, when Northern Rhodesia became the independent Republic of Zambia, and was, therefore, of no effect thereafter.

The second ground is that s. 29 of the Constitution of Zambia, as set out in Sch. 2 of the Zambia Independence Order 1964, refers to a "declaration" and not to one that "shall be deemed to be in force", and so a declaration that "shall be deemed to be in force" under the provisions of s. 7 of the Zambia Independence Order is not a declaration in terms of s. 29 of that Constitution.

The third ground is that when the appellant was detained under a Presidential deletion order dated October 31st, 1980, the detaining authority had no grounds on which to detain him.

The kernel of Mr Munyama's contention in regard to the first ground is that the last colonial Governor of Northern Rhodesia had made a declaration of a grave situation under s. 4 of the Preservation of Public Security Ordinance which enabled the making of reg. 31A (now reg. 33) of the Preservation of Public Security Regulations and that that declaration had the force of law up to October 24, 1964, when Northern Rhodesia was transformed into the sovereign Republic of

Zambia. At Independence the contention goes on, the Preservation of Public Security Regulations - in particular, reg. 31A - could only be invoked by complying with the entire provisions of s. 29 of the Constitution of Zambia (hereinafter referred to as the Constitution), but that s. 29 of the Constitution has since not been complied with and consequently all detentions since independence, including the detention of the appellant, have been unlawful and unconstitutional. Mr Munyama argues that the purported extension by the National Assembly of the declaration under s. 4 of the Preservation of Public Security Ordinance was futile in that the National Assembly cannot extend that which in law is non-existent.

In answer to all this, Mr Kinariwala, the learned Assistant Senior State Advocate, submits on behalf of the respondent that s. 2 of the Zambia Independence Act, 1964, and ss. 4 (1) and 7 of the Zambia Independence Order, 1964, contain the necessary saving provisions which kept alive, *inter alia*, the Governor's declaration under s. 4 of the Ordinance, and that it was not necessary for the President of the Republic

p264

of Zambia to make a fresh declaration for the reason that under s. 7 of the Zambia Independence Order, the Governor's declaration had the effect of a declaration under s. 29 (1) (b) of the Constitution.

To facilitate a better understanding of the law of detention in Zambia, I consider it opportune to trace its history, going as far back as 1960.

By Ordinance No. 5 of 1960, the Legislative Council of Northern Rhodesia enacted the Preservation of Public Security Ordinance, s. 4 of which reads as follows.

"4 (1) If at any time the Governor is satisfied that the situation in the Territory is so grave that the exercise of the powers conferred by section *three* of this Ordinance is inadequate to ensure the preservation of public security, he may by Proclamation declare that the provisions of sub-section (2) of this section shall come into operation, and thereupon those provisions shall come into operation accordingly; and they shall continue in operation until the Governor by a further Proclamation directs that they shall cease to have effect except as respect things previously done or omitted to be done.

(2) The Governor may, for the preservation of public security, make regulations to provide, so far as appears to him to be strictly required by the exigencies of the situations in the Territory, for

(a) the detention of persons;

(b) requiring persons to do work and render services."

On July 28, 1964, the Governor, by Government Notice No. 376, issued Proclamation No. 5 under which he declared and proclaimed the coming into force on that date of the provisions of s. 4 (2) of the Preservation of Public Security Ordinance. On the same date the Governor, by Government Notice No. 377, amended the Preservation of Public Security Regulations by the introduction, among other things, of reg. 31A in these terms:

"31A (1) Whenever the Governor is satisfied that for the purpose of preserving public security it is necessary to exercise control over any person, the Governor may make an order against such a person, directing that such person be detained and thereupon such persons shall be arrested and detained."

It is a notorious fact that the immediate purpose of the measures taken then was to deal with the disturbances brought about in parts of the Northern and the Eastern Provinces by members of the Lumpa Church.

When Northern Rhodesia became the Republic of Zambia on October 24, 1964, s. 2 (1) of the Zambia Independence Act of that year provided:

"2 (1) Subject to the following provisions of this Act, on and after the appointed day (i.e. October 24, 1964) all law which, whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, is in force on that day or has been passed or made before that day and comes

p265

into force thereafter, shall, unless and until provision to the contrary is made by Parliament or some other authority having power in that behalf, have the same operation in relation to Zambia, and persons and things belonging to or connected with Zambia, as it would have apart from this subsection if on the appointed day Northern Rhodesia had been renamed Zambia but there had been no change in its status."

Sub-s. (6) of s. 4 of the Zambia Independence Order, 1964, is to the same effect. The sub-sections read as follows:

"4 (1) Subject to the provisions of this section, the existing laws shall, notwithstanding the revocation of the existing Orders or the establishment of a Republic in Zambia, continue in force after the commencement of this Order as if they had been made in pursuance of this Order.

(6) For the purposes of this section, the expression 'the existing laws' means all Ordinances, laws or statutory instruments having effect as part of the law of Northern Rhodesia . . ."

From, and by virtue of, the foregoing provisions, it is plain that all existing laws, including statutory instruments, survived the transformation of Northern Rhodesia into the Republic of Zambia and thus continued in force unless and until provision to the contrary was made by Parliament or some other authority having power in that behalf.

That said, the task of determining what is the status of the Governor's declaration becomes simple. It is incontrovertible that the declaration (under Proclamation No. 5 of 1964) falls within the category of statutory instruments and is, therefore, caught by the provisions aforesaid. In other words, the declaration continued in force right through, and beyond, the birth of Zambia as an independent Republic.

This now brings me to the second ground of appeal. On the attainment of Independence, the Constitution of Zambia made important provisions with regard to declarations relating to emergencies and threatened emergencies. By section 29 of the Constitution (now Article 30) - "29 (1) The President may, at any time, by Proclamation published in the *Gazette*, declare that -

- (a) a state of public emergency exists; or
 - (b) a situation exists which, if it is allowed to continue, may lead to a state of public emergency.
- (2) A declaration under subsection (1) of this section, if not sooner revoked, shall cease to have effect-

(a) in the case of a declaration made when Parliament is sitting or has been summoned to meet within five days, at the expiration of the period of five days beginning with the date of publication of the declaration;

p266

(b) in any other case, at the expiration of a period of twenty-one days beginning with the date of publication of the declaration; unless, before the expiration of that period, it is approved by a resolution passed by the National Assembly.

- (3) Subject to the provisions of subsection (4) of this section, a declaration approved by resolution of the National Assembly under subsection (2) of this section shall continue in force until the expiration of a period of six months beginning with the date of its being so approved or until such earlier date as may be specified in the resolution:
Provided that the National Assembly may, by resolution, extend its approval of the declaration for periods of not more than six months at a time.
- (4) The National Assembly may by resolution at any time revoke declaration approved by the National Assembly under this section."

It is Mr Munyama's submission that for the Preservation of Public Security Regulations to come into play, it was necessary to invoke in full, not merely in part, the provisions of s. 29 of the Constitution; that s. 29 made it imperative for the President of the Republic of Zambia to issue a new Proclamation declaring that a state of public emergency or threatened emergency existed; that he made no such Proclamation at all; and that in the result, detentions purportedly made since independence, including that of his client, have been, and continue to be, unlawful and unconstitutional. Mr Munyama contends that s. 7 of the Zambia Independence Order speaks of a declaration deemed to be in force, which, in his submission, cannot be a declaration under s. 29 of the Constitution.

Section 7 of the Zambia Independence Order reads:

"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 is in force, then, there shall be deemed to be 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, unless it is sooner revoked or unless it is extended by the National

Assembly in accordance with section 29 of the Constitution, continue in force until 24th April, 1965."

On December 21, 1964, the President, by Statutory Instrument No. 85 of that year, and in exercise of the powers conferred upon him by s. 4 (3) of the Zambia Independence Order, amended the Preservation of Public Security Ordinance. By reg. 3 of the amending Statutory Instrument-

"3. Anything lawfully made, done or commenced under the existing law amended by this Order which, immediately before the date of commencement of this Order, was of, or was capable of 45 acquiring force or effect shall, subject to the provisions of the existing law, continue to have or to acquire force or effect, as the

p267

case may be, and shall, on and after that date, be deemed to have been made, done or commenced, as the case may be, under the existing law as amended by this Order."

Section 3 of the Ordinance was amended by the deletion of sub-section (1) and the substitution therefore of the following:

"(1) The provisions of this section shall have effect during any period when a declaration made under paragraph (b) of subsection (1) of s. *twenty-nine* of the Constitution has effect."

And by s. (3) as amended -

"(3) If the President is satisfied that the situation in Zambia is so grave that it is necessary so to do, he may make regulations to provide for -

- (a) the detention of persons;
- (b) requiring persons to do work and render services."

The President repealed s. 4 of the Preservation of Public Security Ordinance.

The Ordinance, as amended, provided for two pre-requisites for the continued existence of reg. 31A, in particular: firstly, a declaration under s. 29 (1) (b) of the Constitution and secondly, Presidential satisfaction that the situation in Zambia was so grave that it was necessary to make regulations providing for the detention of persons.

As I see it, subject to what I shall say hereafter with regard to the second ground of appeal, the provisions of s. 7 of the Zambia Independence Order made provision for the first pre-requisite, as from October 24, 1964.

Again the provisions of regulation 3 of Statutory Instrument No. 85 of 1964 trade provision for the second pre-requisite, namely, that it was then deemed (subject to what I have to say later on) that the President was satisfied that the situation in Zambia was so grave that it was necessary to make, and that he had so made, regulations for the detention of persons.

The question must now be asked: was failure to make a fresh declaration under s. 29 of the Constitution fatal to the respondent's cases? To answer this question it is necessary to consider whether or not declaration which is deepened to be in force under s. 7 of the Zambia Independence Order is a declaration for the purposes of section 29 of the Constitution.

In *R. v Norfolk County Court* (1), at p. 380, Cave, J., observed that when a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences, but it is not that something else. See also *Green v Marsh* (2); and *South British Fire and Marine Insurance Co. of New Zealand v Da Costa* (3), per Bigham, J., at pp 460, 461 the case is relevant although it turned on the construction of the term "deemed" in a clause under a re-insurance policy.

p268

In my opinion, the expression "shall be deemed" means "shall be regarded as"; "shall be considered as"; "shall be treated as"; or "shall have the effect of". In the present case, I have no difficulty in arriving at the conclusion than in the context in which the expression "shall be deemed to be in force . . ." is used, the meaning to be attributed to it is: "shall have the effect of being in force ...". This construction ties in with the relevant portion of s. 7 of the Zambia Independence Order which reads as follows:

"7.... then, there shall be regarded as being in force, from the commencement of this Order, a declaration under section 29 (1) (b) of the Constitution"

In other words, because there was in existence the Governor's declaration under section 4 of the Preservation of Public Security Ordinance, there was then in force, as from the date of independence, a declaration under section 29 of the Constitution. I am thus satisfied that a declaration which is deemed to be in force under s. 7 of the Order has the effect of a declaration for the purposes of s. 29 (1) (b) of the Constitution. And so, it was unnecessary for the President to make a fresh declaration under the Constitution.

It was, therefore, in anticipation of the relevance of s. 7 of the Order in regard to s. 24 of the Constitution, that there was stipulated (under s. 7 of the Order) a period of six months, that is to say, from October 24, 1964 to April 24, 1965, when the declaration would cease to have effect "unless it is sooner revoked or unless it is extended by the National Assembly in accordance with s. 29 of the Constitution". It is thus not fortuitous or a mere coincidence that sub-s. (3) of s. 29 of the Constitution provides that -

"(3) . . . a declaration approved by resolution of the National Assembly . . . shall continue in force until the expiration of period of six months"

By a resolution passed on April 21, 1965, the National Assembly extended the life of the declaration for a further period of six months (see Vol. III of National Assembly Debates April - May, 1965, at p. 9). This extension was followed by six monthly renewals of the declaration until s. 8 of the Constitution (Amendment) (No. 5) Act No. 33 of 1969, made the six monthly renewals unnecessary. As a result of the amendment, the declaration continues in force for an indefinite period unless and until it is revoked by either the President or the National Assembly. As there has

been no revocation, the declaration is to-date still in force under the provisions of section 15 of the Constitution of Zambia Act No. 27 of 1973.

My conclusions on the two issues raised leave no room for the first and second grounds of appeal to succeed.

As respects the third and final ground of appeal, Mr Munyama argues that, as the appellant clearly avers in his affidavit that the respondent has no grounds to detain him, which averment is nowhere

p269

denied in the affidavit in opposition filed on behalf of the respondent, this court is urged to hold that the appellant's detention is without grounds. Mr Munyama further argues that the fact that his client was subjected to police interrogation for a total period of twenty-two hours is evidence in aid of the averment, since the police would not have interrogated the appellant for that length of time were there in existence grounds for his detention.

In reply, Mr Kinariwala contends that, although there is no specific denial of the appellant's averment, this is not fatal to the respondent's case on the premise that the very wording of regulation 31 (1) of the Preservation of Public Security Regulations implies that grounds exist for the detention of a person under the regulation. He submits that, prima facie, there are grounds for detention under the regulations.

As this Court said in *Banda (J.) v The Attorney-General* (4) at p.239, grounds must be in existence at the commencement of detention. I would accept the proposition that in an ordinary civil case, failure to abide by a rule of pleading may result in the case being decided against the defaulting party.

In this case, however, there is statutory provision under reg. 33 (1) 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 that such person be detained . . ."

This means that, *prima facie*; the detaining authority exercises his power of detention under the regulation when he is satisfied that grounds exist for the detention of a person for purposes of preserving public security. A Presidential detention order is, therefore on the face of it, a valid order and a detainee must establish a prima facie case as to its alleged invalidity; see *R. v Governor of Brixton Prison, Ex parte Soblen* (5), per Lord Denning, M.R. at p. 302; and per Lord Donovan, L.J. at pp. 307-308. It is thus incumbent upon a detained person to adduce prima facie evidence in support of the assertion that no grounds exist for his detention. It is not enough for him simply to allege that grounds for his detention are non-existent.

In this case, it is common ground that habeas corpus proceedings were set in motion prior to the expiration of the statutory maximum period of fourteen days within which grounds for detention were to be furnished to the detained person in terms of Art. 27 (1) (b) of the Constitution. Failure to

furnish grounds within the stipulated period raises a presumption of the non-existence of grounds *ab initio*. However, the stipulated period had not expired in this case. The fact that the appellant was subjected to a lengthy police interrogation does not, per se, raise a *prima facie* case, for an interrogation might be conducted for the purpose of trying to establish further grounds of detention or indeed the complicity of others in the existing grounds.

p270

As I see it, therefore, the appellant has not adduced a *prima facie* case sufficient to challenge the validity of the Presidential order before us. I do not then see that failure by a police officer to specifically deny the allegation that no grounds were in existence, is fatal to the respondent's case. The third ground of appeal cannot then, in my view, succeed and I would accordingly dismiss the appeal.

In view of the fact that the case has raised Constitutional issues of public importance which have not been decided upon before, there shall be no order as to costs.

Judgment

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

Judgment

CULLINAN, J.S.: I also concur.

Appeal dismissed
