IN RE LISO (1969) ZR 6 (CA)

A Petition by Liso in the matter of sections 65 and 69 of the Constitution 15 (1965 App. 3) as read with the Electoral Act, 1968 (No. 24 of 1968), section 29 for determination that his seat in the National Assembly is not vacant.

COURT OF APPEAL

DOYLE JA; EVANS AND MAGNUS JJ 20

14th JANUARY 1969

Flynote and Headnote

[1] Constitutional law - National Assembly - Automatic loss of seat - An overt act is not required to vacate seat.

A member of the National Assembly need not perform any overt act in order to vacate his seat under section 65 (2) of the Constitution; 25 on the occurrence of any of the events there set out, he automatically vacates his seat.

[2] Criminal procedure - Appeal against sentence - Criminal appeal rules do not apply to suspend the vacation of seat in the National Assembly by a Member.

30 Rule 11 (c) of the Criminal Appeal Rules, 1908, does not operate to suspend the vacation of a seat in the National Assembly by a Member pending an appeal.

[3] Constitutional law - National Assembly - Automatic loss of seat - Criminal appeal rules have no application.

35 See [2] above.

[4] Criminal procedure - Appeal against sentence - Sentence quashed on appeal - Meaning of "quashed".

Where a sentence of imprisonment is quashed by the Court of Appeal under section 14 (3) of the Court of Appeal for Zambia 40 Ordinance, the sentence is void ab initio.

[5] Criminal procedure - Sentence - Sentence quashed on appeal - Meaning of "quashed ".

See [4] above.

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[6] Constitutional law - National Assembly - Member receives prison sentence of more than six months - Sentence quashed on appeal - Effect of quashing.

Where a Member of the National Assembly receives a sentence of more than six months' imprisonment, and that sentence is quashed 5 on appeal, and another of six months or less is substituted, that member is deemed not to have vacated his seat under section 65 (2) (c) of the Constitution.

[7] Criminal procedure - Sentence - Sentence of more than six months' imprisonment received by Member of the National Assembly - Sentence 10 quashed on appeal - Effect on vacation of seat in National Assembly.

See [6] above.

Case cited:

(1) Hancock v Prison Commrs [1960] IKB 117.

[1959] 3 All ER 513. 15

Statutes construed:

(1) Constitution (1965 App. 3) s.65 (2)

(2) Court of Appeal for Zambia Ordinance (cap. 12, no. 52 of 1964), s.14 (3)

Pimm, for the appellant.

Skinner Attorney-General, for the respondent. 20

Judgment

Doyle JA: The appellant was elected a member of the National Assembly on the 16th January 1964. On 13th March, 1968, he was convicted in the court of the Senior Resident Magistrate at Choma of the offence of insulting the President contrary to section 58 E of the Penal Code and was sentenced to eighteen months' imprisonment with hard 25 labour. His appeal to the High Court was unsuccessful but his subsequent appeal to the Court of Appeal was successful to the extent that his sentence was quashed and a sentence of 6 months' imprisonment with hard labour substituted.

Appellant had however been informed by the Speaker that he was not 30 entitled to resume his seat in the National Assembly until it had been determined by judicial decision whether or not he had vacated his seat by reason of the provisions of section 65 of the Constitution. Accordingly appellant by petition to the High Court under the provisions of section 69 of the Constitution applied for a declaration that his seat in the National 35 Assembly had not become vacant and that he was entitled to resume his seat in the National Assembly. The petition was heard by the learned Chief Justice and was dismissed on 21 - 10 - 68. He now appeals to this Court.

The National Assembly was dissolved on 2nd November, 1968. 40

In consequence the petition now only relates to a prayer for a declaration that appellant's seat did not become vacant. If granted the declaration would determine the past status of appellant and his right to emoluments as a Member of the National Assembly.

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[1] Subsections (1), (2) and (3) of section 65 of the Constitution read as follows:

"65. (1) Every elected member of the National Assembly shall vacate his seat in the Assembly upon a dissolution of Parliament. 5

(2) An elected member of the National Assembly shall vacate his seat in the Assembly -

(a) If he ceases to be a citizen of Zambia;

(b) if he assumes the Office of President; 10

(c) if he is sentenced by a court in Zambia to death or to imprisonment (by whatever name called) for a term exceeding six months;

(d) Subject to the provisions of subsection (3) of this section, if any circumstances arise that, if he were not an elected 15 member of the Assembly, would cause him to be disqualified for election as such under section 62 (1) (a), (b) or (d) of this Constitution or under any law made in pursuance of section 62 (3), 62 (4) or 62 (5) of this Constitution; or

(e) if he is required to do so under subsection (6) of this section. 20

(3) Parliament may, in order to permit any elected member of the National Assembly who has been sentenced to death or imprisonment, adjudged or declared to be of unsound mind, adjudged or declared bankrupt or convicted or reported guilty of any offence prescribed under section 62 (4) of this Constitution 25 to appeal against the decision in accordance with any law, provided that, subject to such conditions as may be prescribed by Parliament, the decision shall not have effect for the purposes of this section until such time as may be so prescribed."

Counsel for the appellant first took the point that the appellant 30 had to do some overt act in order to vacate his seat. I have no doubt that this is not so and that the effective happening of any of the events set out in section 65 (2) automatically causes the seat to be vacated. It is plain that upon dissolution every elected member vacates his seat without any further act on his part. The wording "shall vacate his seat" is the 35 same in both subsections (1) and (2) of section 65. Furthermore the nature of the events set out in subsection (2) are such as in my opinion to lead to the same conclusion. For example it can hardly be that a person who has been declared to be of unsound mind should be expected to carry out some formal act for the purpose of divesting himself of his seat. It 40 would also be absurd that a member, by declining to take any further step, should be able to continue himself in office.

[2] [3] Appellant's counsel also took the point that Parliament had taken action under subsection (3) of section 65 and had thus prevented the operation of subsection (2). This argument was based on section 8 45 of the Court of Appeal for Zambia Ordinance which inter aliaprovides that, if the Ordinance or rules of court do not make specific provision,

then the practice and procedure of the Court shall be exercised in accordance with the law and practice for the time being observed in the Court of Criminal Appeal in England. Counsel relied on rule 11 (c) of the Criminal Appeal Rules, 1908, which reads as follows:

"SUSPENSION OF DISQUALIFICATIONS CONSEQUENT 5 ON CONVICTION - Where upon conviction of any person of any offence any disqualification, forfeiture or disability attached to each person by reason of such conviction, such disqualification forfeiture or disability shall not attach for the period of ten days from the date of the verdict against such person nor in the event 10 of an appeal under the Act to the Court of Appeal until the determination thereof. This Rule shall not affect the provisions of section 8 of the Forfeiture Act, 1870 (33 & 34 Vict. c. 23)."

The learned Attorney-General on this point argued (1) that the subsection clearly required specific provisions to be made in relation to 15 the seat of a member of the National Assembly; (2) that rule 11 (c) has no such similar connotation in the United Kingdom where a member is removed from his seat by Parliament itself; (3) that as the provision only applied to the Court of Appeal a person convicted in a Magistrate's Court and successful on appeal to the High Court would obtain no benefit; 20 (4) that the Court of Appeal is now defunct in England; (5) that tenure of office is not a matter of practice and procedure.

I am fully satisfied that the learned Attorney-General is right on the first three of these points and it is therefore unnecessary to consider the others. I consider that no provision has yet been made by Parliament under 25 section 65 (3) and appellant must fail on this point.

[4] [5] [6] [7] Appellants real point in this appeal rested on the argument that the reference to a sentence of more than six months' imprisonment meant an effective sentence of six months and not a sentence which had been quashed on appeal. It is clear that the words "is sentenced 30 to more than six months' imprisonment" can have different meanings in different contexts. For example were a statute to say that a person sentenced to more than six months' imprisonment shall have a right of appeal, this could only refer to the fact of the sentencing as the validity, appropriateness or otherwise of the sentence would be the subject of the 35 appeal. On the other hand were an insurer to ask the question.

"Have you ever been sentenced to more than six months 'imprisonment? "

I do not think that any court would hold that "no" was an incorrect answer where the insured had had such a sentence quashed on appeal. 40

The learned Attorney-General has argued that it is the mere fact of sentencing which operates paragraph (c) of subsection (2) of section 65 of the Constitution. He conceded that if the sentence was a nullity, e.g. if outside the jurisdiction of the court, it would not operate. Provided however that the court had jurisdiction, the passing of the sentence, no 45 matter how unreasonable in the circumstances, caused the vacation of

the seat. This would have occurred even if the conviction itself was quashed on appeal. He relied on Hancock v Prison Commissioners [1] which decided that a sentence substituted on appeal did not annul the original sentence ab initio. The only escape lay in action taken by Parliament 5 under subsection (3) of section 65. It is plain that if this argument is correct, the result in many cases may be a gross injustice. An inexperienced Magistrate may for some comparatively minor offence impose a sentence, in excess of six months' imprisonment. That sentence, possibly even the conviction, may be quashed on review next day by a 10 vigilant Judge of the High Court. Yet the member has lost his seat. This was recognised by the learned Attorney-General but he argued that the remedy and the only remedy, lay in the hands of Parliament by action under subsection (3) of section 65 of the Constitution. Parliament had made no provision under section 65 and therefore, however unfortunate 15 he might be, the appellant in this case had lost his seat.

What was the reason for the inclusion in the Constitution of paragraph (c) of subsection (2) of section 65? It seems to me that there can only be two possible reasons:

(1) that it is considered that a person who commits an offence in 20 circumstances of sufficient gravity as to warrant a sentence of more than six months' imprisonment is not a fit person to be a member of Parliament; or

(2) that it is considered that the absence of the member from Parliament for more than six months is a disfranchisement 25 of his electors.

Where the sentence is quashed on appeal neither of these conditions apply. In Hancock's case [1], Winn, J said this:

"Counsel for the plaintiff has submitted to me cogently (and one recognises that it is an argument which calls for careful consideration 30 and has considerable weight) that the word "quash" in that order means that the ten - year sentence was thereby rendered null and void and wholly set aside as though it had never been. There would be persuasive force in that argument, and I would be disposed to accept it, had I not found in the very wording of section 35 4 (3) of the Criminal Appeal Act, 1907, the provision that, wherever the Court of Criminal Appeal finds itself of the opinion that a sentence passed has been too severe, it shall quash that sentence and pass such sentence as the court thinks ought to have been passed in substitution therefor. It seems to me that, when one 40 finds those words in the section and considers the context in which they are used and the subject - matter to which they must be applied,

one is inevitably driven to the conclusion that the word "quash" is not there used in the sense in which the Shorter Oxford English Dictionary tells me that it is often used, 'to annul, make null or 45 void'; but instead that it is used in the less drastic meaning that the former sentence is by the order of the court rendered null and void at the moment when the Court of Criminal Appeal decides to

substitute for it a different sentence, so as to make that earlier sentence null and void and of no effect from that point of time onwards, but not so as to render it null and void ab initio, i.e., as from the date when it was passed. I feel that that must be the right way of construing the section, because otherwise, at least 5 as a matter of theory, the successful appellant against the length of sentence would have been unlawfully imprisoned as from the date of his conviction and removal to gaol until the time when the Court of Criminal Appeal so pronounced, and all measures of restraint exercised on him (not merely by retaining him in gaol 10 but in other ways) in that interim period would be, at least in theory, tortious wrongs committed against him. That will not be so if, as I think, the true intent of such an order and the true meaning of the words in section 4 (3) of the Criminal Appeal Act, 1907, which enables the order to be made, is that the Court of 15 Appeal quashes the original sentence for the future and substitutes a new sentence which the Court of Criminal Appeal considers that proper sentence, albeit that the sentence itself takes its extent from the original date of the first sentence, i.e. it is a term of so many years calculated from the starting date of the sentence 20 which has been quashed in the sence in which I have indicated."

With respect to the learned Judge I doubt the validity of this reasoning. It is not uncommon for convictions and sentences to be quashed on appeal. While in these circumstances the person who has been serving a sentence is unlucky, I do not consider that it can possibly be argued, 25 even in theory, that he is unlawfully imprisoned. Morally speaking perhaps he is, but in legal theory and practice he is imprisoned under a valid warrant. On the reasoning of the learned judge, it appears that a prisoner would at the same time be serving two sentences for the same offence, the original sentence until the date of quashing and the substituted 30 sentence from the date of passing of the original sentence. I would be prepared to hold that the word "quashed" in section 14 of the Court of Appeal for Zambia Ordinance has the ordinary English meaning of being annulled or made void and that where a court quashes and substitutes a sentence, that has effect ab initio. 35

However it is not the meaning of section 14 (3) of the Court of Appeal for Zambia Ordinance (which is the equivalent of section 4 (3) of the English Criminal Appeal Act, 1907) which is in question. If one examines subsection (3) of section 65 of the Constitution one finds that action taken by Parliament does not remove the disqualifying decision. It merely 40 suspends its effect for a specified period. When that period expires, the decision comes into force. It is clear that the Constitution intends that a successful appeal shall prevent the vacation of a seat. It must therefore be accepted that the decision of the appellate court will remove the disqualifying decision. If that is so, I see no reason why the decision does 45 not do so even where there has been no suspension by Parliament. The learned Attorney-General has

however argued that if this is so subsection (3) of section 65 is meaningless. I do not think it is. When a member has

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been sentenced to more than six months' imprisonment, the Speaker must act as if that apparent decision is an effective one. He must therefore exclude the member from his rights and privileges as a member. The member may well be on bail pending appeal and therefore he is in a position 5 to exercise his right to sit and vote and receive emoluments. It does not seem to me unreasonable that the Constitution should enable provision to be made to allow the member his full rights until it has been finally determined whether or not he has been effectively sentenced to the disqualifying period. 10

I am not unmindful of the fact that under paragraph (c) section 69 (2) of the Constitution, Parliament may confer powers on the High Court in relation to applications such as this one. I do not however consider that these powers relate to the fundamental power of removing the disqualifying factor. That seems to me to be already implicit in section 65. 15

Furthermore no powers may be conferred upon the Court of Appeal under that paragraph.

There is one other point to which I may refer. It may be argued in support of the learned Attorney-General's contention, that it was the intention of the Constitution to achieve certainty that a by - election 20 might not be upset by subsequent action by the courts. Uncertainty would, however, still remain in the case where the original sentence was a nullity. That detracts from the validity of the argument.

I see no reason in the interests of certainty in by - elections to strain the words of the Constitution in such a manner as to cause members 25 unjustly to lose their seats. No doubt certainty is desirable but to achieve it requires clearer words.

In my opinion where a sentence of more than six months' imprisonment is quashed or reduced below six months on appeal, that sentence is not one which causes a member to vacate his seat. I would therefore 30 allow this appeal and grant a declaration that the appellant did not vacate his seat in the circumstances of this case.

Judgment

Evans J: I also would allow this appeal and for the reasons given by my brother Doyle.

Judgment

Magnus J: I have not had the advantage so far of seeing the 35 judgments of my learned Brethren, but wish to express my own views on this case.

[1] Firstly, I would observe that, in my opinion, the words in section 65 of the Constitution which provide that a member of the National Assembly "shall vacate his seat" mean no more, and no less, than "a 40 member's seat shall be vacated". I cannot accept the rather casuistic suggestion of Mr Pimm that a member must do some overt act before

his seat can be declared vacant..The operative word here is "shall". I therefore agree with the learned Chief Justice that if one of the events specified in section 65 (2) occurs, that member's seat is automatically vacated.

[4] [5] [6] [7] However, on the operation of section 65 (2) (c), I 5 feel the learned Chief Justice misdirected himself in holding that a sentence by a court of more than six months' imprisonment automatically operates to vacate a member's seat even though it is subsequently quashed on appeal. In coming to this conclusion, the learned Chief Justice seems to have relied in the main on the judgment of Winn, J, in Hancock v Prison 10 Commissioners [1] in which the learned Judge rejected the Oxford Dictionary definition of the word "quash" (i.e. to annul, make null or void) in favour of a definition of his own for which I can see no authority whatsoever. To my mind, if a sentence is quashed, it is treated as though it had never been pronounced, and cannot be cited among the previous 15 convictions of the accused nor can it be regarded as a conviction for any other purpose. In other words, as the Oxford Dictionary puts it, it is made null or void, i.e., ab initio. In the present case, therefore, when the Court of Appeal reduced the Petitioner's sentence to one of six months and, at the same time, quashed the sentence of the court below, they 20 substituted that sentence of six months for all purposes, including those of section 65 of the Constitution.

To hold otherwise would, as the learned Chief Justice observed, lead to injustice, and, in my view, to absurdity, and, as Mr Pimm pointed out in the Court below, one of the canons of construction of statutes is 25 avoid absurdity.

I would allow the appeal.

Appeal allowed