YONA MUTANDA v THE ATTORNEY-GENERAL (1980) Z.R. 165 (H.C.)

HIGH COURT
MOODLEY, J.
18TH SEPTEMBER,1980
1980/HN/351

Flynote

Constitutional law - Detention - Grounds of detention - Language - Whether mandatory to furnish detainee with grounds of detention In language he understands. Constitution of Zambia, Art. 27 (1) (a).

Headnote

The applicant was detained under the Preservation of Public Security Regulations, reg. 33 (1). In his application for a writ of habeas corpus *ad subjiciendum* he alleged that the provisions of Art. 27 (1) (a) of the Constitution had been breached in that the statement of the grounds of his detention were served on him in a language which he did not understand. The grounds were served in the English language.

Held:

(i) What is of paramount importance is that the detainee must be made aware of the reasons of his detention. While a written statement of the grounds of his detention is necessary it does not necessarily follow that it must in every case be couched in a language which the detainee understands. The detainee must be informed of the reasons for his detention and the provisions of Art 27 (1) (a) would be satisfied if a statement of the grounds for detention were furnished to him in a language which he understood provided he is literate, but where he is illiterate then the contents must be explained to him by the officer who serves the statement on him.

(ii) The requirement to serve the statement of the grounds of detention in a language understood by the detainee is only directory and failure to comply with that requirement does not amount to a breach of Art. 27 (1) (a) of the Constitution.

Cases cited:

(1) Eleftheriadis v Attorney-General (1975) Z.R. 69.
(2) Chipango v Attorney-General (1970) Z.R. 31.
(3) Million Juma v Attorney-General (1979) HN/944).
(4) Kapwepwe and Kaenga, In re (1972) Z.R. 248.
(5) Mhango v Attorney-General (1976) Z.R. 297.

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Legislation referred to:

Constitution of Zambia, Cap. 1, Art. 27 (1) (a).
Preservation of Public Security Regulations, Cap. 106, reg. 33 (1) and (6).

For the applicant: Mr Chali, Mwanawasa & Co., Ndola.
for the respondent: Mr R.G. Patel, State Advocate.

Judgment
MOODLEY, J.:

This is an application for the issue of a writ of habeas corpus *ad subjiciendum*. On the 16th of June, 1980, counsel for the applicant was given leave to issue the notice of motion for the writ and on the 22nd August, 1980, a return of the writ was duly made by the Assistant Superintendent of Kamfinsa Prison who thereupon produced the body of the applicant to the court. The applicant had filed a comprehensive affidavit in support of the originating motion for the writ and, for the purposes of this judgment, I propose to confine myself to two issues which emerge in the applicant's affidavit and upon which Mr Chali relies as grounds for his submission that the detention was unlawful and in breach of Constitutional provisions.

On the 30th December, 1976, an order was made by His Excellency the President of the Republic of Zambia to detain the applicant Yona Mutanda under the provisions of reg. 33 (1) of the Preservation of Public Security Regulations. It should be said that originally the applicant had been detained by a Police officer of the rank of Superintendent on the 18th December, 1976, under reg. 33 (6) of the Preservation of Public Security Regulations and this Police detention order was revoked on the 3rd January, 1977. The grounds for the detention were duly served on the applicant on 15th January, 1977, at Kamfinsa Prison, the said grounds having been drawn up on the 11th January, 1977, and signed by the Secretary to the Cabinet. Although by his affidavit the applicant had averred that the grounds for his detention were served on him more than fourteen days after the commencement of his detention, Mr Chali did not proceed with that particular argument because the documents exhibited to the affidavit shoved that the grounds had been served within a specified period.

The grounds for detention read as follows:

> "To Yona Mutanda.
> WHEREAS on 3rd January, 1977, you were detained by order of the President made on 30th December, 1976, under Regulation 33 (1) of the Preservation of Public Security Regulations.
> AND WHEREAS it is provided by Article 27 (1) (a) of the Constitution that every person detained shall,not more than fourteen days after the commencement of his detention, be furnished with a statement in writing specifying in detail the grounds upon which he is detained it.

> NOW THEREFORE you are hereby informed that the grounds upon which you are detained are: That on a date unknown but in October, 1976, in the forest in the Copperbelt area, you met ADAMSON MUSHALA but failed to report this meeting to the authorities or the Security Forces. This act is prejudicial to public security and for its preservation, it has been found necessary to detain you.

Given at Lusaka this 11th day of January, 1977.
(signed)
SECRETARY TO THE CABINET."

At the foot of these grounds is an endorsement by Detective Chief Inspector G. J. Banda certifying that he had served a true and correct copy of the grounds of detention upon the applicant at Kamfinsa on the 15th January, 1977.

I now come back to the applicant's affidavit. Paragraph 11 of the said affidavit reads as follows:

> "That I am Kaonde by tribe and the only other language which I can understand is Bemba. I am advised and I verily believe that the statement of the grounds of my detention is in English a language which I cannot understand, speak or read. The officer who served me with this statement merely told me that the document contained the grounds of my detention and that as he was allegedly busy, I should ask somebody who could read and interpret it for me in a language that I understand."

Paragraph 12 reads:

> "That I admit that the said statement of the grounds of my detention has been read and interpreted to me in Bemba by a number of fellow detainees and prisoners but I am advised by my advocates and I verily believe that my detention is unlawful because the said statement was not made in writing in a language that I understand as the provisions of the Constitution require."

Paragraph 13 reads:

> "That while denying the allegations made against me, I am advised by my advocates and I verily believe that even if those allegations were true, my detention is punitive in that a failure to report my having met Mushala does not constitute me a security risk and that in any event such an omission is a past event on which I should not be detained unless it can be shown that there is an apprehension of a future continuation of such conduct which is not the case here."

Mr Chali contends that, on the facts, the President was not entitled to detain the applicant in respect of activities alleged to have been committed in the past and especially where there was no evidence that such activities would likely occur in the future. There was no mention in the grounds of an "apprehension" in the mind of the detaining authority that

such activities would occur in the future. Mr Chali relies on the case of *Eleftheriadis v The Attorney-General* (1) where it was held that reg. 33 (1) of the Preservation of Public Security Regulations, Cap. 106, is directed to the preservation of public security and that it should not be used solely as a punitive measure. Further, it was held that past activities could furnish good

grounds for detention under the regulation provided that these activities had induced an apprehension in the mind of the detaining authority of future activities prejudicial to the public security.

With regard to the second ground of argument against the detention, Mr Chali submits that the provisions of Art. 27 (1) (a) of the Constitution was mandatory and non-compliance with those provisions would render the detention unlawful since it would be a breach of a Constitutional protection afforded to the applicant. In support of this proposition he cites the case of *Chipango v The Attorney-General* (2). Mr Chali contends that it was mandatory on the part of the detaining authority to furnish grounds for the detention in writing in a language that the detainee understands. The detainee was totally ignorant of the English language and he was unable to comprehend the grounds for his detention as presented to him. He admits that the contents of statement of the grounds for detention were explained to him in Bemba by fellow detainees but Mr Chali contends that this does not detract from a need to comply with the mandatory provisions. It was incumbent upon the authority to ensure that the grounds for detention were in writing and in a language that the detainee understood since the purpose of the grounds was to inform the applicant of the reasons for detention so as to make meaningful representations to a competent tribunal.

Mr Chali relies on the case of *Million Juma v The Attorney-General* (3), as yet or reported. This case concerns an application for a writ of habeas corpus which came before my learned brother Mr Commissioner Sivanandan, and this very argument was put forward before the learned commissioner. He came to the conclusion that the provisions of Art 27 (1) (a) were mandator and a failure to furnish the grounds for de tension in writing in a language that the detainee understood was fatal. He was of the view that the words of Art. 27 (1) (a) should be followed to the letter and in spirit. Accordingly, he found that since the mandatory provision of Art. 27 (1) (a) of the Constitution had not been observed, in that the applicant was not furnished written grounds for his detention in a language that he understood, he came to the conclusion that the order for detention was not valid and that the continued detention of the applicant was unlawful.

Mr Patel for the State concedes that the grounds furnished to the applicant were not in any great detail but, nevertheless, they provided sufficient material to enable the applicant to make meaningful representations to a competent tribunal. He says that there was nothing unlawful about the detention of the applicant and that the grounds for detention were a compliance with Art. 27 (1) (a) of the Constitution. From the material provided it would be proper for an inference to be drawn of a future apprehension a the mind of the detaining authority

namely, that the applicant might arrange to have future with Adamson Mushala and that it was the possibility of such meetings that caused the detention of the applicant. With regard to the second ground for detention, Mr Patel submits that the applicant has not been prejudiced in any way by the fact that the grounds for his detention had been furnished In writing in the English language which the applicant allegedly did not understand. However, the substance of the grounds for detention were in fact explained to the applicant and this was clearly shown in the endorsement by the Police officer which appeared at the foot of the grounds for detention. The official language in the

Republic of Zambia is English. By para. 12 of his affidavit the applicant admits that the contents of the statement of the grounds for his detention were explained to him by his fellow detainees. Thus, it is clear that the applicant was never in ignorance about the grounds for his detention and, accordingly, he was equipped wit sufficient information to make meaningful representations to a competent tribunal. So or as the case of *Million Juma v The Attorney-General* (3) (supra) was concerned, Mr Patel submits that the decision of the learned commissioner was the subject of an appeal which is pending before the Supreme Court and this court should in no way be bound by that decision.

I have considered the submissions by both a Chali for the applicant and Mr Patel for the respondent. Dealing with the first ground argued on behalf of the applicant, I find that while the grounds for his detention are not particularised in great detail, they nevertheless provide a reason for the applicant's detention. The question is whether the reason provided is sufficient to justify the detention of this applicant. Mr Chali contends that the applicant is being punished for some past conduct namely, for having met Adamson Mushala on a date not known in a bored in the Copperbelt in October, 1976. There was nothing unlawful about this meeting and it was not shown whether there was any onus on the part of the applicant to report such a meeting, even if it was in fact true. In any event, it was contended that the detention of the applicant could be justified only if such conduct raised some future apprehension in the mind of the detaining authority and there was nothing in the grounds that indicated hat there was any apprehension in the mind of the detaining authority that such conduct on the part of the applicant would be repeated. The grounds did not specifically state any apprehension of future misconduct. Accordingly, was it possible to draw an inference of future apprehension from the grounds ? Looking at the grounds provided to justify the applicants' detention, it would appear that the misconduct alleged is that the applicant had met Adamson Mushala in the forest and had failed to report the meeting to security forces. Was this meeting, if true, an act of misconduct on the part of the applicant since no information was provided about Adamson Mushala himself. In the absence of such information, the court, however, can consider certain facts which might appear in the grounds for detention as being notorious and about which the court can take judicial notice.

It is an established fact that Zambia is in a state of emergency and has been so for several years. It is also a notorious fact that Adamson

Mushala together with a number of supporters have been carrying out terrorist activities, mainly in the North - Western Province of the Republic of Zambia and by their unlawful activities they have been challenging and attempting to subvert the lawfully constituted authority of the Government of the Republic of Zambia. It is also a notorious fact that Adamson Mushala has been able to evade apprehension because of the support he may have been receiving from some members of the public either willingly or by coercion and that the Government and its forces were doing everything possible to apprehend this individual and his gang of armed supporters. It has been cited by Doyle, C.J., in *re. Kapwepwe and Kaenga* (4) at p. 254 that:

> "Where facts are notorious or the detainee himself must know them, it should not be said

that a failure to refer in the grounds of these facts causes the grounds to fail to be in detail".

In the case of *Mhango v The Attorney-General* (5) Cullinan, J., stated as follows:

> "If in supplying grounds for detention a detaining authority relies on notorious facts or facts which are known to the detainee, the grounds themselves must contain sufficient information to direct the detainee's mind thereto; if not, the grounds cannot then be said to furnish sufficient information to enable the detainee to know what is being alleged against him and to bring his mind to bear on it."

In my view it is obvious that the grounds for detention, as set out provide facts which were within the knowledge of the applicant and upon which he could bring his mind to bear in order to make meaningful representations. As set out in the grounds, it was alleged that the misconduct on his part was prejudicial to public security and for its preservation it was found necessary to detain him. In my view the Acts stated in the grounds were sufficient to draw an inference of future apprehension in the mind of the detaining authority to the effect that if the detainee was allowed to be at liberty, then public security would be threatened by future acts of misconduct on the part of the detainee. In view of the fact that such an inference could be drawn from the grounds of detention, it was not necessary for a future apprehension to be stand either in the order or in the grounds. In my view the detention of the applicant in terms of reg.33(1) of the Preservation of Public Security Regulations was not being used as a punitive measure. I am also satisfied that the past activity, namely the applicant's meeting with Mushala in the forest and his failure to report the meeting, was a proper ground for detention under the said Regulations since it had induced an apprehension in the mind of the detaining authority about possible future acts prejudicial to public security. In those circumstances Mr Chali's first ground of argument against the detention order fails.

I now come to the second ground of argument, namely, that the mandatory provisions of Art. 27 (1) (a) have been breached in that the applicant had not been furnished with a statement in writing of the grounds

for his, detention in a language that he understood. I have had the opportunity of reading the judge of my learned brother Mr Commissioner Sivanandan in the case of *Million Juma v The Attorney-General* (3) (supra) and it is with respect that I must express my disagreement with the conclusions arrived at by my learned brother on the question of construction of Art. 27 (1) (a). I accept that Art. 27 (1) (a) provides a constitutional safeguard for a detainee. The question is whether on a proper construction this particular Article of the Constitution was a mandatory provision and that failure to comply with the provision renders the detention unlawful. Article 27 (1) of the Constitution, *inter alia*, states as follows:

> "Where a person's freedom of movement is restricted, or he is detained, under the authority of any such law as is referred to in Article 24 or 26, as the case may be, the following provisions shall apply:

(a) He shall as soon as is reasonably practicable and in any case not more than fourteen days after the commencement of his detention or restriction, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is restricted or detained . . ."

If one considers the provisions of this particular Article of the Constitution, one finds that it is incumbent upon the detaining authority, as soon as was reasonably practicable and, in any case not more than fourteen days after the commencement of the detention or restriction, to furnish the detainee with a statement of the grounds for his detention in writing in a language understood by the detainee. Reading the judgment in *Million Juma v The Attorney-General* (3) (supra), the learned commissioner in construing this Article lays emphasis on the fact that it was mandatory on the part of the detaining authority to furnish to the detainee a written statement of the grounds for his detention in a language which the detainee understood. This is where, regrettably, I part company from my learned brother.

It is my considered view that the inherent objectives of Art. 27 (1) (a) of the Constitution are that the detainee should be made aware of the reasons for his detention as soon as was reasonably practicable and in any event not more than fourteen days after the commencement of his detention. There are two limbs to Art. 27 (1) (a). The first limb deals with the title within which the reasons for detention should be communicated. The second limb deals with the manner in which the communication should be effected. As I have said, the learned commissioner in his judgment stressed the second limb namely, that in terms oil Art. 27 (1) (a) it was mandatory on the part of the detaining authority to furnish the written statement in a language which was understood by the detainee. On a proper reading of this Article it would appear that the Constitution is laying emphasis on the time factor, namely, that the written statement of the grounds for detention should be furnished as soon as was reasonably practicable and, in any event, not more than fourteen days from the

commencement of the detention. Quite clearly therefore, if the statement of the grounds for detention were served, say on the fifteenth day the commencement of the detention or any period thereafter, then there would be a breach of Art. 27 (1) (a). No deviation is permissible from the time factor provided for in this Article in relation to the furnishing of the statement of the grounds for detention. As I have stated, the purpose of the second limb to this Article is to ensure that the detainee is made aware of the reasons for his detention. In this connection Art. 27 (1) (a) should not be strictly construed, since such a course may operate against the best interests of the detainee.

One must take judicial notice of the fact that the English language is the official language of the Republic of Zambia. One must also accept the fact that large numbers of the population are not conversant with the English language and therefore rely on the vernacular languages for the purposes of communication. One cannot also ignore the fact that large numbers of people are illiterate, whether it be the English language or in the vernacular. Thus the objectives of Art. 27 (1) (a) would be achieved if the statement was furnished to the detainee in English or in the vernacular which he understood, provided he was literate or, in the case where he was an illiterate, the contents of the statement were fully explained to him. Assuming the detainee only spoke Bemba but he was

illiterate in that language, would the objectives of Art. 27 (1) (a) have been achieved by merely furnishing hint with a statement of the grounds of his detention in Bemba, even though the detainee could not read or write Bemba? Thus, if the second limb was to be construed strictly by regarding it as a mandatory provision, then the furnishing of such a statement in writing in the vernacular language of a detainee who was illiterate would be permissible. That was certainly not the intention behind Art. 27 (1) (a). This Article required the detainee to be informed of the reasons for his detention within a specified time.For the benefit and protection of the detainee, a certain degree of flexibility must be allowed for in the interpretation of it. 27 (1) (a). Thus, what is of paramount importance is that the detainee must be made aware of the reasons for his detention. While a written statement of the grounds for his detention is necessary, it does not necessarily follow that the statement must in every case be couched in a language which was understood by the detainee. The detainee must be informed of the reasons for his detention and the provisions of Art. 27 (1) (a) would have been satisfied; if a statement of the ground for detention were furnished to the detainee in a language which he understood provided of course that he was literate or, where he was an illiterate, then the contents of the statement of the grounds for his detention must be explained to him by the officer who served the statement on him.

The facts in this application show that the statement of the grounds for the detention were in the English language and the endorsement on the statement by the Police officer who served the detention order indicates that the grounds for the detention were explained to the detainee who had in fact affixed his thumb print on the statement. Further, the applicant by his affidavit, had admitted that the statement of the grounds for detention were explained to him by fellow detainees in the Bemba

language which he understood although his own vernacular was Kaonde.
It is not disputed that the statement of the grounds for detention were served within the specified time as provided for by Art. 27 (1) (a) of the Constitution and the applicant had acknowledged that he was fully conversant with the grounds for his detention. He was in no way prejudiced by the fact that the written statement of the grounds for his detention was in the English language. Thus, upon a proper construction of Art. 27 (1) (a) of the Constitution, I would hold that while it was mandatory upon the detaining authority to furnish a detainee with a written statement of the grounds for his detention as soon as was reasonably practicable and, in any case, not more than fourteen days after the commencement of the detention or restriction, the requirement that the statement of the grounds of detention should be in a language that the detainee understands was directory and that a failure on the part of the detaining authority to comply strictly with this requirement did not, in this case, result in a breach of Art. 27 (1) (a) of the Constitution. Accordingly, the application for a writ of habeas corpus *ad subjiciendum* is refused.
Application rejected