

ATTORNEY-GENERAL v EDWARD JACK SHAMWANA, VALENTINE SHULA MUSAKANYA, MUNDIA SIKATANA, GOODWIN YORAM MUMBA, ANDERSON KAMBWALI MPOROKO SO, MACPHERSON MBULO, PATRICK MKANDAWIRE, MATINANGA LISWANISO, THOMAS MUPUNGA MULEWA, GODFREY MIYANDA, DEOGRATIAS SYMBA, ALBERT CHILAMBE CHIMBALILE AND ROGER KANYEMBU KABWITA (1981) Z.R. 12 (H.C.)

HIGH COURT

E.L.

6TH

(1981/HP/1103)

SAKALA,

SEPTEMBER,

1981

J.

#### Flynote

Civil procedure - Mandamus and prohibition - Powers of the High Court to grant against subordinate courts - Discretion.

Criminal law and procedure - Treason - Certificate of summary committal - Powers of the Director of Public Prosecutions.

Criminal law and procedure - Treason - Certificate of summary committal by Director of Public Prosecutions - Criminal Procedure Code, Cap. 160, s. 255 - Jurisdiction of subordinate court - Where subordinate court can query powers of Director of Public Prosecutions- Duty of subordinate court.

Criminal law and procedure - Indictment - Non-disclosure of offence - Pair play to be observed.

Criminal law and procedure - Rules of procedure - High Court rules - Practice where injustice would result.

Criminal law and procedure - Complaints by accused - Power of court to hear- Whether lies where court has no jurisdiction to try offence charged.

#### Headnote

The respondents appeared before the subordinate court of the first class at Lusaka jointly charged with the offence of treason while two others were in addition, separately charged with the offence of misprision. A certificate of summary committal to the High Court was issued by the Director of Public Prosecutions. The accused raised a preliminary objection on the basis that they had not seen fresh copies of the indictment. The subordinate court held that the accused persons be given opportunity to examine the indictment, and raise any preliminary issue, if any, before committal to the High Court for summary trial.

p13

The Attorney-General for Zambia filed an application by way of originating notice of motion seeking two orders, namely prohibition and mandamus. By the order of prohibition the applicant sought to have prohibited the Senior Resident Magistrate at Lusaka, from hearing arguments on the said objection front the accused persons and by the order of mandamus, the applicant asked the court to direct the said Senior Resident Magistrate to comply with the provisions of s. 255 of the Criminal Procedure Code, Cap. 160 of the Laws of Zambia by committing the respondents to the High Court for trial forthwith.

**Held:**

- (i) The High Court has power to grant orders of prohibition and mandamus to any Subordinate Court in Zambia. The powers are however discretionary.
- (ii) Although treason is not included in the schedule of offences triable by the High Court and not by any Subordinate Court in Zambia, there is no special authority written or otherwise given to Subordinate Courts to try treason and misprision. Whether the offence of treason can be tried summarily is a matter within the province of the Director of Public Prosecutions.
- (iii) Section 255 of the Criminal Procedure Code is mandatory. The certificate of committal issued by the Director of Public Prosecutions prohibits the holding of a preliminary inquiry by a Subordinate Court and compels that court to commit the accused for trial before the High Court forthwith. No subordinate court has any jurisdiction in the matter and by law no subordinate court can query the powers of the Director of Public Prosecutions to issue a certificate of summary committal under sections 254 and 255 of the Criminal Procedure Code.
- (iv) The indictment must disclose an offence. It is a principle of fair play that an accused should know on what charge he is being committed for trial.
- (v) An accused person charged with any offence not triable by the Subordinate Court is entitled to be heard on any complaint and the court to record whatever is said even in the face of the certificate of summary committal. To hear complaints is not to exceed jurisdiction nor is it holding of a preliminary inquiry. Subsequently the Subordinate Court is duty bound to commit the accused.
- (vi) Rules of procedure need not be strictly adhered to where injustice would result, particularly bearing in mind that the court has a wide discretion in matters of procedure.

**Cases referred to:**

- (1) Hancock v Somes 120 E.R. 1108.
- (2) Grace v Clinch 114 E.R. 1026.

p14

- (3) Muyangwa & Others v The People (1976) Z.R. 320.
- (4) Chipango & Ors v The People (1978) Z.R. 304.
- (5) Zola and another v Ralli Brothers Limited [1969] E.A. 691.
- (6) Foster v Harvey 46 E.R. 837.

**Legislation referred to:**

Penal Code, Cap. 146, ss. 43 (1) (a), 44 (b).

Criminal Procedure Code, Cap. 160, ss. 11 (2), 200, 214, 219, 90, 254, 255.

High Court Rules O. 5, r. 12.

For the applicant: R. Balachandran Esq., Acting Assistant Senior State Advocate

For E.J. Shamwana: A.B. Munyama Esq., Nkwazi Chambers.

For V.S. Musakanya: G. Chaane Esq., Chaane and Company.

For Messrs Mulewa, Symba,

Chimbalile and Kabwita: R. Mandona Esq., Permanent Chambers, Kitwe.

For all the other respondents: In person

---

## Judgment

**E.L. SAKALA, J.:** This is an application by the Attorney-General for Zambia by way of an originating notice of motion seeking two orders, namely, prohibition and mandamus. By the order of prohibition the applicant is requesting this court to prohibit N. N. Kabamba Esq., Senior Resident Magistrate of the Subordinate Court of the First Class at Lusaka from hearing arguments on an objection raised by Mr. Edward Jack Shamwana and twelve others who are jointly charged with the offence of treason contrary to s. 43 (1) (a) of the Penal Code, Cap. 146 of the Laws of Zambia and in which the other two are in addition separately charged with the offence of misprision of treason contrary to s. 44 (b) of the Penal Code, Cap. 146 of the Laws of Zambia. By the order of mandamus the applicant is asking this court to direct the said N. N. Kabamba Esq., to comply with the provisions of s. 255 of the Criminal Procedure Code. Cap. 160 of the Laws of Zambia by committing the respondents in the said criminal case to the High Court for trial forthwith.

The circumstances leading to this application are that on the 17th August, 1981, the respondents appeared before the Subordinate Court of the First Class at Lusaka jointly charged with the offence of treason while the other two were in addition separately charged with the offence of misprision. According to the case record in the court below the second accused was represented by Mr Chaane while the rest appeared in person. Mr Balachandran who appeared for the State in those proceedings informed the court that he had with him a certificate of summary committal signed by the Director of Public Prosecutions. He also among other things explained to the court the reasons leading to the fresh charges. On behalf of the second respondent, Mr Chaane explained in those proceedings that he had not taken full instructions from Mr Musakanya. Mr Balachandran, however, promised that the statements in the case would be ready within a week. It is clear from the record that at the

p15

time the accused appeared before the Subordinate Court they had not seen the fresh copies of the indictment. The other accused made various representations to the court below. The relevant representations which prompted the present proceedings were those made by Mr Shamwana. They appear at pages (13) and (14). These read as follows: (word for word from the record in the court below)

**"Mr Shamwana:** I have not had the opportunity of looking at the charge and particulars. It is complicated charged in a serious matter. I should like to consider whether there are preliminary points of law to make. In particular whether treason is a most serious charge, which can be preferred against anybody as a suitable charge which can be tried summarily. I have not had the time to look at these things. I also would like to consider whether the power of the Director of Public Prosecutions cannot be questioned. I also wish to consider whether the court should be stated to the High Court whether a charge of this nature could be tried summarily. There are matters which I can only exercise if I look at the charge. It is pertinent that I draw the court's attention that on 7-8-81 the accused filed in the High Court a petition under the protection of fundamental rights. However, rights in that petition, the petitioners raised points that although the committal at the next sessions of the High Court in May, that was in plan three sessions have passed, that the accused considered the delay unconstitutional. Another issue raised (read out) to give the D.P.P. time by substitution. One accused has been removed after entering a nolle and another put in."

In reply Mr Balachandran at page (14) is recorded to have said:

**"Mr Balachandran:** First of all there can be no preliminary inquiry in the charge sheet. My submission with the greatest respect is according to section 255 of the Criminal Procedure Code once a Director of Public Prosecutions has issued (reads) the court must forthwith commit the accused."

Then the court said as follows:

**"Court:** That is the point which the accused wished to examine and see if he could argue."

At page (15) the court ruled as follows:

**"Court:** I will rule that the accused persons be given opportunity to examine the indictment and raise any preliminary issue if any before I can commit them to the High Court for summary trial or make any other appropriate ruling for this purpose. I will adjourn the matter to 30/8/81 for committal. Remanded in custody. They should also be given chance to consult their lawyers."

On the 18th August, 1981, the Attorney-General applied to this court for leave to apply for orders of prohibition and mandamus. The application

p16

was supported by a statement and an affidavit. The applicant also requested in that application that if leave was granted the proceedings in the case before the Subordinate Court be stayed. The court granted leave to the applicant and ordered that all the proceedings involving the respondents before the Senior Resident Magistrate be stayed until further orders. The application for leave was made ex-parte. The foregoing are the circumstances that lead to the present proceedings.

The application now before this court is supported by an affidavit sworn by Mr Balachandran and a statement drawn by him as well. Suffice it to mention at this stage that the affidavit in support of the application was the subject of strong attack by the respondents as being defective. I will revert to this issue later in my judgment. The grounds upon which the two orders are being sought are set out in paragraph three of the statement as follows:

- "(a) that despite a certificate issued by the Director of Public Prosecutions under s. 254 of the Criminal Procedure Code, Cap. 160 of the Laws of Zambia and the said certificate having been produced to the Subordinate Court by the Prosecutor, the learned Senior Resident Magistrate failed to commit the respondents to the High Court for trial forthwith.
- (b) that the learned Senior Resident Magistrate in ordering the adjournment of the said criminal case with a view to hear the arguments on the said objection raised by the First Respondent exercised jurisdiction not vested in him by law."

Paragraphs (4), (5), (6), (7), (8), (9), (10) and (11) of Mr Balachandran's affidavit read as follows:

- "(4) That I have the conduct of the matter herein and am authorised by the applicant to make this affidavit on his behalf.
- (5) That on the 17th day of August, 1981 the respondents above-named were taken to the Subordinate Court of the First Class at Lusaka where they appeared before N.N. Kabamba Esquire, Senior Resident Magistrate and were jointly charged with the offence of treason contrary to s. 43 (1) (a) of the Penal Code, Cap. 146 of the Laws of Zambia. Respondents number five and eight were also charged with the offence of misprision of treason contrary to s. 44 (b) of the Penal Code, Cap. 146 of the Laws of Zambia.
- (6) That at the aforesaid appearance all the respondents appeared by themselves except respondent number two. The second respondent was represented by his counsel Mr George Chaane. I appeared on behalf of the State.
- (7) That after the charges were read out to the respondents by the learned Senior Resident Magistrate I produced to the learned Senior Resident Magistrate a certificate of summary committal issued by the Director of Public Prosecutions under s. 254 of the Criminal Procedure Code, Cap. 160. Copies of the said charge sheet

p17

- and certificate of summary committal are annexed hereto and marked "RB1" and "RB2" respectively.
- (8) That soon thereafter the first respondent raised an objection to the effect that the said case should not go before the High Court by way of summary committal procedure and applied for time to put before the court his arguments to that effect.
- (9) That replying to the first respondent's said objection I submitted to the court that the provisions of s. 255 of the Criminal Procedure Code, Cap. 160 were mandatory and that in view of the fact that a certificate for summary committal had already been produced to the court, the court had no discretion but to commit the respondents to the High Court for trial forthwith.
- (10) That despite my aforesaid submissions, the learned Senior Resident Magistrate declined to commit the respondents to the High Court for trial forthwith and adjourned the case to 30th August, 1981 for hearing of first respondent's arguments on the said objection.
- (11) That in the premises I am praying this Honourable Court to grant leave to the applicant to apply for an order of prohibition and mandamus on the grounds stated in the statement and as supported by this my affidavit."

Paragraphs (4), (5), (6), (7), (8) and (9) of the affidavit in opposition sworn by Mr Shamwana read as follows:

- "(4) That I am the first respondent referred to in a document purporting to be an affidavit of Rajaratnam Balachandran dated 18th August, 1981.
- (5) That paragraphs 8 and 10 of the said document are not correct. What I did ask the court to do was to make an order so that I would have a copy of the charge to enable me to consider whether or not there was a preliminary matter to be raised on a point of law, and similarly the court did not order as alleged but adjourned the case to 30th August, 1981 to enable me to consider whether there was a basis for raising any preliminary point of law as aforesaid.

- (6) That upon receipt of the originating notice of motion and other papers relative thereto I requested and obtained a copy of the case record from the Subordinate Court relative thereto. The said record is produced to me marked "Exhibit EJS".
- (7) That the Subordinate Court did not decline to make an order to commit the respondent as alleged but merely gave an opportunity to unrepresented respondents to consider the charge brought against them.
- (8) That the first respondent pointed out to the court that the charges all the respondents were facing were the most serious charges under our penal system; that since the respondents

p18

had had no legal advice on the matter and their legal advisers were not in the court and the State had not taken any steps to inform them notwithstanding the fact that the Director of Public Prosecutions knew or ought to have known who acted for each or some of the respondents. The adjournment was to enable these matters to be looked into.

- (9) That only the second respondent was legally represented but even then he had no prior knowledge of the charges".

On behalf of the applicant, Mr Balachandran argued that by not committing the respondents 'forthwith' the Senior Resident Magistrate declined to exercise his jurisdiction. He referred the court to the definition of jurisdiction as defined in Halsbury's Laws of England, volume 10, fourth edition at paragraph 715. Mr Balachandran pointed out that in terms of section 11 (2) of the Criminal Procedure Code treason is an offence triable only by the High Court and thus when the Director of Public Prosecutions has issued and produced a copy of a certificate of summary committal in terms of section 255 of the Criminal Procedure Code before any Subordinate Court in which a person charged with treason appears, that court must commit that accused to the High Court for trial forthwith. He referred the court to the Oxford English Dictionary, 1933 edition as to the meaning of 'forthwith' to mean 'immediately', 'at once' and 'without delay.' He submitted that the powers of the Director of Public Prosecutions are absolute. Once the certificate for summary committal is issued and produced the Subordinate Court has no discretion in the case but to commit forthwith. In support of the interpretation of the word 'forthwith' Mr Balachandran cited the case of *Hancock v Simes* (1) and the case of *Grace v Clinch* (2) Mr. Balachandran contended that in a case triable by the High Court if an accused has any representations they must be made before the High Court. He pointed out that sections 341 and 321A of the Criminal Procedure Code providing for a case stated and an appeal by the Director of Public Prosecutions respectively are not an alternative to the remedies now being sought by the applicant because the learned trial magistrate has not determined the matter. He submitted that the existence of an alternative remedy is in any case not a bar to an application for prohibition and mandamus. It was also Mr Balachandran's contention that in committal proceedings, there is no provision for providing a charge sheet to an accused person.

On the question of the defect in the affidavit Mr. Balachandran submitted that the objection should have been taken as a preliminary issue. He argued that the affidavit was sworn before a Commissioner of Oaths who is only a personnel officer in the Ministry of Legal Affairs and not an interested party in the proceedings.

On behalf of Mr Shamwana, Mr Munyama pointed out that from the case record, it was clear that at the stage of the proceedings the accused were not represented and that there was no determination. He further pointed out that the first accused merely made a remark on which the Senior Resident Magistrate did not make any ruling. Counsel also pointed out that the form on which the charge was drawn makes reference to s. 200

p19

and 214 and 219 of the Criminal Procedure Code. He submitted that if the accused had been taken to the Subordinate Court in terms of s. 90 of the Criminal Procedure Code, they were entitled to copies of the charge sheet to know what was alleged against them. He further submitted that within ss. 200-214 a court of law has power to adjourn a case and that is not a determination. He contended that ss. 254 and 255 of the Criminal Procedure Code were not intended to muzzle a Subordinate Court. He further submitted that the court below did not fail to exercise its jurisdiction by adjourning the case and did not refuse to comply with s. 255 of the Criminal Procedure Code. It was also counsel's contention that to adjourn a case is not to decline to exercise jurisdiction in a matter. Mr Munyama finally attacked the affidavit in support of the application for not disclosing the description of the Commissioner of Oaths.

On behalf of Mr Musakanya, Mr Chaane submitted that it sounds strange to argue that an accused person is not entitled to a charge sheet in a lower court. He pointed out that the first accused did not object to the committal. He argued that a magistrate is not precluded from looking at a charge sheet simply because there is a certificate of summary committal. Mr Chaane pointed out that a proper certificate of summary committal must indicate that "the case is a proper case for trial by the High Court as a summary procedure case" which was not in the certificate produced in the court below. He submitted that even a case where a correct certificate of summary committal has been issued a lower court is still entitled to ensure that before committal the indictment has been properly drawn and that the certificate complies with the law. He further submitted that only when the provisions of the law have been complied with, that is when there can be committal 'forthwith'. Mr Chaane pointed out that the remedies being sought are a matter for the discretion of the court. He submitted that on the facts, the submissions and the evidence before this court, there is no basis on which this court should exercise its discretion in favour of the applicant. He urged the court to dismiss the application and order that costs be on the basis of solicitor and client on account that the application should never have been made in the first place.

On behalf of Messrs Mulewa, Symba, Chimbale and Kabwita, Mr Mandona adopting the submissions of Mr Munyama and Mr Chaane submitted that the application is based on a void affidavit because the personnel officer in the Ministry of Legal Affairs before whom the affidavit was sworn is an interested party to the proceedings. In support of his arguments, Mr Mandona referred the court to the Commissioner of Oaths Act and to order 41 of the 1976 edition of the White Book. He pointed out that the effect of an affidavit being void is that it should be removed from the record thereby rendering the application misconceived. He also pointed out that his client Mr Symba had all along stated that he did not understand English and needed a French interpreter. Counsel contended that in those circumstances it is possible that his client did not understand the proceedings thus the Senior Resident Magistrate acted properly in adjourning the proceedings.

Mr Sikatana appearing in person also attacked the affidavit in support of the application. He invited the court to consider whether the affidavit in support of the application reflects a true picture of what is alleged to have been said by the first respondent in the lower court. He submitted that the first respondent was not arguing for a preliminary inquiry. He prayed that the application be dismissed with costs or be stayed.

Mr Miyanda also appearing in person attacked the format of the affidavit and argued that treason is an offence triable by the Subordinate Court.

Suffice is to mention that the rest of the respondents apart from some who made observations about the manner the application was brought made no submissions.

In reply, Mr Balachandran pointed out that the reason why treason and murder are not included in the schedule of offences tried by the High Court is that they are specifically provided for by s. 11 (2) of the Criminal Procedure Code. He further stated that in the court below the charge sheet was read out and nobody complained.

The gist of the applicant's case is that in a case triable by the High Court upon the issue and production of a certificate of summary committal in terms of ss. 254 and 255 of the Criminal Procedure Code, Cap. 160, a subordinate court has no discretion in the matter but to commit the case to the High Court for trial forthwith. The contention on behalf of the applicant is that the certificate having been issued and produced as before the Senior Resident Magistrate by adjourning the case in order to hear arguments on an objection raised by the first accused the learned Senior Resident Magistrate exercised jurisdiction not vested in him and declined to exercise his jurisdiction by failing to commit the accused forthwith.

On behalf of the respondents, the contention is that there was no determination in the proceedings before the Senior Resident Magistrate on which it could be said that he declined or failed to exercise his jurisdiction. It is further the case for the respondents that the affidavit having been sworn before a Commissioner of Oaths who is an interested party the court must rule that it is inadmissible and if this was to be the case there is no evidence in support of the application.

I have fully addressed my mind to the arguments and the submissions in this application. In my ruling on a preliminary issue, I held that the High Court has powers to grant orders of prohibition and mandamus to any Subordinate Court in Zambia. I did indicate however that the powers are discretionary. Before tackling the real issues raised by this application it is necessary at this stage for purposes of record to put the facts straight.

In the first place I have no doubt in any mind that although treason is not included in the schedule of offences triable by the High Court, it is nonetheless an offence triable by the High Court and not by any



p21

Subordinate Court in Zambia (see s. 11 (2) of the Criminal Procedure Code, Cap. 160). It is however, correct that s. 11 (2) of the Criminal Procedure Code, provides that a subordinate court can try the offences of murder and treason under special authority given by the High Court. But I know no special authority written or otherwise given to subordinate courts Zambia to try the two offences. The cases of *Muyangwa and Others v The People (3)* and *Chicago & Others v The People (4)* are but few recent cases of treason which ended up in the Supreme Court having originally been tried by the High Court after summary committal. The jurisdiction of the High Court having tried these cases was never in issue. In *Muyangwa (3)* case one of the appellants lost his appeal while in *Chipango (4)* case the appeal succeeded not on the basis of lack of jurisdiction by the High Court.

Section 254 of the Criminal Procedure Code reads as follows:

"254. Notwithstanding anything contained in Part VII, in any case where a person is charged with an offence not triable by a subordinate court, the Director of Public Prosecutions may issue a certificate in writing that the case is a proper one for trial by the High Court as a summary procedure case and such case shall, upon production to a subordinate court of such certificate, be dealt with by the subordinate court in accordance with the provisions of this Part."

The section gives the Director of Public Prosecutions absolute discretion to issue a certificate in writing in any case where a person is charged with an offence not triable by a subordinate court. The cases triable by the High Court are set out in the subsidiary to the Criminal Procedure Code and s. 11 (2). Section 255 of the Criminal Procedure Code sets out what has to be done by a subordinate court once such a certificate has been produced before it. The section reads:

"255. No such preliminary inquiry as is referred to in Part VII shall be held in respect of any case in which the Director of Public Prosecutions has issued and the prosecutor has produced to a subordinate court a certificate issued under the provisions of section two hundred and fifty-four, but the subordinate court before whom the accused person is brought shall, upon production of such certificate, and whether or not a preliminary inquiry has already been commenced, forthwith commit the accused person for trial before the High Court upon such charge or charges as may be designated in the certificate."

This section is mandatory. The production in a Subordinate Court of a certificate issued by the Director of Public Prosecutions prohibits the holding of a preliminary inquiry by that court and compels that court to commit the accused for trial before the High Court forthwith. No subordinate court has any jurisdiction in the matter and by law no subordinate court can query the powers of the Director of Public Prosecutions to issue a certificate of summary committal under ss. 254 and 255 of the Criminal Procedure Code.

p22

In my opinion the two sections are in no way intended to muzzle Subordinate courts. The committal

presupposes a number of things. The accused person must be before the subordinate court. The accused person named in the indictment must also be the accused named in the certificate of committal. The indictment must disclose an offence. I agree that there are no clear provisions entitling an accused to a copy of an indictment under ss. 254 and 255 of the Criminal Procedure Code. But I think it is a principle of fair play that art accused should know on what charge he is being constituted for trial. The two sections do not in my opinion, prohibit a subordinate court from hearing any complaint by an accused person. As a matter of good practice a subordinate court must record all complaints made by accused persons charged with offences triable by the High Court. There are many good reasons for this. One of them being to enable the accused to show his consistency at his trial. I am not prepared to accept any suggestions that once a certificate of summary committal is produced then a Subordinate Court has to close its ears from hearing complaints from accused. Often in trials before the High Court accused persons have made various allegations against the police. Among the allegations have been those of torture and assault. The cross-examination on behalf of the prosecution has often been - why did you not complain in the lower court where you appeared first? When the reply is that he made a complaint; he has often been referred to the record below which often is silent. In my opinion I would venture to say that an accused person charged with any offence not triable by the 25 Subordinate Court is entitled to be heard on anything and the court to record whatever is said even in the face of the certificate of summary committal. In the end however the court is duty bound to commit the accused. To hear complaints is not to exceed jurisdiction nor is it holding of a preliminary inquiry.

Again before dealing with the merits of the application it is convenient at this stage also that I must determine the status of the affidavit in support of the application. O.53/12 of the 1976 edition of the White Book sets out the procedure in an application for orders of mandamus and prohibition. Among the requirements is that the application must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought. It must also be accompanied by an affidavit verifying the facts relied on. In the instant proceedings there is an affidavit sworn by Mr Balachandran. The affidavit shows that it was sworn before a Commissioner of Oaths in the Ministry of Legal Affairs. Mr Balachandran informed this court in his submissions that the affidavit was sworn before the Commissioner of Oaths who is a personnel officer in the Ministry of Legal Affairs.

The attack on this affidavit is based on the fact that it was sworn before a person employed within the chambers of the Attorney-General who is the applicant in these proceedings and on whose behalf the same is being offered. The submissions on behalf of the respondents were that the affidavit is defective and void. Consequently the court must hold that it is admissible and be removed from the record. It must be observed that

p23

the defect in the affidavit was not raised as a preliminary issue but as part of the arguments in the main issue. I note, however, that observations on the defect of the affidavit were made immediately after the ruling on the preliminary issue on the 20th August, 1981. But it must be observed further that on that day the hearing was adjourned to the 28th August, to enable the first respondent to file an affidavit in opposition to one which was said to be defective. But, although not necessary, the affidavit in opposition does not raise the defect in the applicant's affidavit. Be that as it may, I must

now resolve the matter. 0.5/12 of the High Court rules reads:

"12. An affidavit shall not be admitted which is proved to have been sworn before a person on whose behalf the same is offered, or before his solicitor, or before a partner or clerk of his solicitor."

According to Mr Balachandran the affidavit was sworn before a personnel officer of the Ministry of Legal Affairs. In my opinion a personnel officer in the Attorney-General's Chambers is a clerk of the Attorney-General in the broader context of the High Court rules quoted above. But High Court Rules are rules of procedure for the smooth administration of justice. This is a court of justice. In my opinion therefore rules of procedure need not be strictly adhered to where injustice would result, particularly bearing in mind that the court has a wide discretion in matters of procedure. In *Zola and Another v Ralli Brothers Ltd* (5) the contention was that an affidavit in support of summons for summary judgment was a nullity in that the plaintiff did not disclose his means of knowledge of facts, nor the grounds for belief on matters stated-on information and belief. Sir Charles Newbold, the President of the East African Court of Appeal stated as follows at page 693:

"I agree that if the affidavit is a nullity then the trial judge could not act on it and the motion should have been dismissed. As I have said in other cases the courts should hesitate to treat an incorrect or irregular act as a nullity, particularly where the act relates to matters of procedure."

In my research I found no decided Zambian cases in which an objection to an affidavit was raised based on 0.5/12. But I must emphasise that this court cannot and will not accept an affidavit sworn before a solicitor in the cause nor his partner or clerk, although he may be a Commissioner of Oaths. Apart from being a matter of good ethics there are other good reasons for this rule: one of the reasons is that a court requires the security of an independent commissioner. But to reject such an affidavit as inadmissible much depends on the circumstances and the facts of each particular case. In the case of *Foster v Hartley* (6) a similar objection to an affidavit as in the present case was raised. The facts of that case were these: the plaintiff was a partner in the firm of Foster, Burrow & Co., Solicitors at Norwich. His solicitors upon the record were the town agents of that firm, appearing, however, as independent solicitors, and not as agents. The plaintiff made an affidavit in the cause which was sworn before one of his own clerks. For the sake of clarity on the point I propose

p24

to set out in full the ruling of the Lord Justice Turner. He said at page 838:

"The preliminary question which we have to decide in this case is, whether an affidavit made by the plaintiff and sworn before a person in his service can be received as evidence. It is not disputed that an affidavit cannot be sworn before the solicitor upon the record or before any one of his clerks; but I apprehend that the principle upon which that rule was established is, that the solicitor and the clerk must be presumed to have an intimate knowledge as to the evidence which would prove material or immaterial to the success of

the cause. That principle does not, as it appears to me, apply to the case of a person who happens merely to be in the employment of one of the parties to the cause, for there is no ground for assuming that such a person is acquainted with the circumstances connected with the cause in consequence of that relationship. If such a position were to be maintained it would be impossible to say to what extent it might not be carried. In my judgment, the rule in question should be confined to the case of solicitors on the record and their clerks. I think, therefore, that the plaintiffs affidavit is admissible in evidence in this case."

One of the members of that court dissented but nonetheless the objection failed. I am in total agreement with The Lord Justice Turner's observations.

In the instant case considering the circumstances of the application and the it in issue, I cannot say the personnel officer before whom the affidavit was sworn has intimate knowledge as to the evidence which would prove material or immaterial to the success of the cause. In the circumstances I rule that on the particular facts of the application before me the affidavit sworn by Mr Balachandran in support of the application is not defective and not void. Accordingly, I hold that it is admissible. But this is not to say that the position will be the same in all cases.

I now proceed to determine the application on its merits. The order of prohibition which the applicant is seeking from this court is an order to issue out of this court and to be directed to the Senior Resident Magistrate's court forbidding that court from continuing with the criminal case in which the respondents are the accused as such continuation with it would be in excess of that court's jurisdiction or in contravention of the laws of the land (see definition of Prohibition in Halsbury's Laws of England 3rd edition, volume 11 paragraph 211). By an order of man damus the applicant is requesting this court to command and direct the court of the Senior Resident Magistrate to commit the case before him to the High Court for trial forthwith (Halsbury's Laws of England, 3rd edition, paragraph 159). The questions for determination therefore are these:

- (a) Did N. N. Kabamba Esq., the Senior Resident Magistrate of the Subordinate Court of the First Class at Lusaka fail to commit the respondents to the High Court for trial forthwith; after a

p25

- certificate issued by the Director of Public Prosecutions under Section 254 of the Criminal Procedure Code, cap.160 had been produced to him by the Prosecutor?
- (b) Did N . N. Kabamba Esq., Senior Resident Magistrate of the First Class at Lusaka exercise jurisdiction not vested in him by law by ordering an adjournment of the criminal case before him with a view to hearing arguments on an objection raised by the first respondent?

The answers to these questions depend entirely on the interpretation to be placed on the relevant portions of the proceedings that took place before the Senior Resident Magistrate on the 17th August, 1981. I have already set out earlier in my judgment the relevant parts of the proceedings. I have also already discussed sections 254 and 255 of the Criminal Procedure Code. In any view, given the circumstances in which the first accused made his representations, the interpretation to be placed on them must be most liberal. The law as already discussed is very clear. Whether the

offence of treason can be tried summarily is a matter within the province of the Director of Public Prosecutions. If he so decided nobody can question that decision. My understanding of the first accused's remarks as recorded by the court below is not that he was asking for a preliminary inquiry or refusing to be committed. He was requesting the court to give him time to make certain observations on a serious charge which he had had no opportunity to look at. I find nothing unlawful for Subordinate Court to hear and record representations and complaints from an accused person who is before him in a case triable only by the High Court.

At the end of his ruling the Senior Resident Magistrate said "I will adjourn the matter to 30/8/81 for committal." This to me clearly indicates that the Senior Resident Magistrate was more than ready to commit the accused persons after hearing whatever they had to say. I do not disagree with the definition of the word "forthwith" but I find no magic formula in it. I am not prepared to accept that the use of the word "forthwith" in section 255 of the Criminal Procedure Code excludes any intervention by any adjournment. As I understand the practice, every court in Zambia has inherent jurisdiction to make orders of adjournments regardless of the nature of the case before it.

In the instant application it seems to me that the application would have had a good cause if the learned Senior Resident Magistrate had been given an opportunity to deal with matters on the 30th August, 1981 the date to which the case was adjourned. In my opinion the proceedings **40** that took place before the Senior Resident Magistrate on the 17th August, 1981 are subject of many reasonable interpretations and inferences. It would be wrong to suggest that the only interpretations and inference of those proceedings was that he failed to commit the accused and that by adjourning the case he exceeded his jurisdiction.

Orders of prohibition and mandamus are matters for the discretion of the court. In the instant application, I find that the situation does not warrant the exercise of my discretion in favour of the applicant. In the

p26

net result my answers to the two questions posed earlier for determination are in the negative. Accordingly, in the exercise of my discretion after having fully addressed my mind to the circumstances and the facts in support of the application, I refuse to grant the relief sought. The application is therefore dismissed. The effect of this is that the order of this court staying the criminal proceedings before the Senior Resident Magistrate at Lusaka is discharged and the case must be relisted as soon as possible for the necessary action by the Senior Resident Magistrate. I have no doubt that in dealing with that case the Senior Resident Magistrate will not overlook the observations of this court both on the law and on procedure.

The question of costs has greatly exercised my mind. But considering the nature of the issues resolved in this application and that they have been before the High Court in Zambia for the first time I think the fairest order should be that each party should bear its own costs. Accordingly I order that each party bears its own costs.

Application refused

---