IN THE MATTER OF NKAKA CHISANDA PUTA

AND

IN THE MATTER OF THE CONSTITUTION OF ZAMBIA ACT No. 27 OF 1973
AND
IN THE MATTER OF THE PRESERVATION OF PUBLIC SECURITY ACT CAP. 106 OF THE REVISED EDITION OF THE LAWS OF ZAMBIA (1982) Z.R. 80 (H.C.)

HIGH COURT
SAKALA, J.
4TH DECEMBER, 1981
(1981/HN/774)

Flynote

Civil procedure - Declaration - Jurisdiction - Whether court has powers to hear a petition for damages brought under Statutory Instrument No.156 of 1969 in accordance with Art. 29 of the Constitution.

Constitutional law - Detention - Damages - When awarded.

Constitutional law - Detention - Preservation of Public Security Relations - Whether lawfully constituted.

Constitutional law - Detention - When detainee to be weighed - When solitary confinement - Whether mandatory for a police detention order to be written - How detailed.

Constitutional law - Detention - Whether contravened Art. 15 (3) of the Constitution - When grounds to be served.

Headnote

The petitioner brought an action in accordance with Art. 29 of the Constitution for: a declaration that his detention was unlawful, an award of damages for inhuman treatment while under detention and compensation for wrongful arrest and unlawful detention. He was first detained on 2nd July, 1981, and taken from his home in Ndola to Kabwata Police Station. On 4th July, 1981, he was taken to Lilayi Police Camp for interrogation. Two days later he was moved to Lusaka Central Police Station where he remained until he was transferred to Kabwe Maximum Security Prison on 9th July, 1981, and served with the first detention order under regulation 33 (6) of the Preservation of Public Security Regulations. He was again taken back to Lilayi Camp where he was finally examined by a doctor and treated. Although he was served with the grounds of detention on 28th July, 1981, and had his detention gazetted on 7th August, 1981, he was not weighed until 20th August, 1981. The petitioner alleged that during his detention he was ill treated, subjected to solitary confinement and denied legal representation, and that his detention contravened Art. 15 (3) of the Constitution.

p81

Held:

(i) The High Court under Art. 29 (2) and (8) of the Constitution has original jurisdiction to hear an application by way of petition (other means are provided by the High Court regulations) and make such order, issue such writs and give such directions as considered appropriate for enforcing Arts. 13 to 27 of the Constitution.

(ii) Under Art. 29 (8) no court can award damages against the Republic in respect of anything done under or in execution of detention order signed by the President unless the award arises out of physical or mental ill treatment or mistake of identity of the detainee.

(iii) A detainee must be weighed immediately on being put into detention.

(iv) A police detention order need not be written as in the case of Presidential Order.

(v) Solitary confinement may be construed in the context of the facilities available in place

so that non-entitlement to mix with fellow detainees is not necessarily such confinement.
(vi) The petitioner's detention was deemed to be lawful since the Preservation of Public Security Regulations under which he was detained were:

(a) observed with regard to the rules on supplying grounds; and

(b) legally constituted by the Governor under powers as contained in the Preservation of Public Security Ordinance, number 5 of 1960, ss. 3 and 4.

(vii) Determination as to whether a detention is reasonably justifiable is a privilege of the detaining authority.

(viii) A detainee who is not charged with a criminal offence does not come under Art. 15 (3) (b) of the Constitution and the authorities are not bound to bring him before a court.

Cases cited:

(1) A.-G. v Valentine Shula Musakanya (1981) Z.R. 1.
(2) Chikuta v Chipata Rural Council (1974) Z.R. 241.
(3) Kapwepwe, Kaenga v A.-G. (1972) Z.R. 248.
(4) Mungabangaba v A.-G. 1981/HN/403.
(5) Munalula and Ors v A.-G. (1979) Z.R. 154.
(6) Re Thomas James Cain (1974) Z.R. 71.
(7) Shamwana v A.-G. S.C.Z. Judgment No. 35 of 1980.
(8) Sharma v A.-G. (1978) Z.R. 163.
(9) Valentine Sheila Musakanya v A.-G. S.C.Z. Judgment No. 18 of 1981.

Legislation referred to:

Constitution of Zambia, Cap. 1, Arts. 15 (3), 27 (1) (a), 29 (1), (2) (a), (8).
High Court Rules, Cap. 50, O. 6, rr. 1(1), 2.

p82

Interpretation and General Provisions Act, Cap. 2, s. 35 (a).
Preservation of Public Security Ordinance, No.5 of 1960, ss. 3 (1), (2), (3), 4 (1), (2), 6.
Preservation of Public Security Regulations, Cap. 106, regs. 33 (1) (6).
Preservation of Public Security (Detained Persons) Regulations, Cap. 106, regs. 20(1) (a),(b).
Protection of Fundamental Rights Rules, Statutory Instrument No. 156 of 1969.

For the petitioner: A. R. Lawrence, Solly Patel, Hamir and Lawrence and C.A. Stacey, Lloyd Jones and Collins.
For the respondent: A. G. Kinariwala, Senior State Advocate.

Judgment

SAKALA, J.:

This is an application by way of petition brought in terms of the Protection of Fundamental Rights Rules of 1969 made under Statutory Instrument No.156 in accordance with s.28 now art. 29 of the Constitutions of Zambia. The petitioner seeks the following prayers from this court.

"1. That his detention be declared unlawful and that he be released on the grounds that -

(i) the purported grounds of detention were not served upon him as soon as was reasonably practicable nor in compliance with art. 27 (1) (a) of the Constitution;

(ii) apart from being untrue the grounds of detention are not detailed enough to comply with the provisions of Art. 27 (1) (a) of the Constitution of Zambia;

(iii) the Provisions of Art. 15 (3) of the Constitution of Zambia are being contravened by his continued detention:

(iv) he is being unlawfully confined.

1. (a) That the detention was not reasonably justifiable, and both detention orders exceeded anything which could reasonably; have been sought to be required (as per amendment).
2. That he be awarded damages for the inhuman treatment complained of.
3. That he be compensated in damages for wrongful arrest and unlawful detention."

The petitioner is a Zambian citizen. He is an advocate of the High Court and a partner in the firm of Messrs Lloyd Jones and Collins, 1st Floor, Permanent House, President Avenue, Ndola. He ordinarily resides at Flat Number 3, Lufapa, Dolphin Court, Nkana Road, Ndola. On the 2nd July, 1981, at about 1100 hours he was approached by uniformed and plain-clothes policemen who produced to him a search warrant signed by a magistrate. The officers searched the petitioner's office and home. After the search he was taken to Ndola Central Police Station where he was informed that he would be taken to Lusaka to help the police with investigations and that he would be back in Ndola shortly. The petitioner

p83

voluntarily accompanied the authorities. They arrived in Lusaka at about 2030 hours. He was taken to Lilayi Police Training School and later to Kabwata Police Station where he stayed up to 1700 hours; on the 4th July, 1981, when he was taken to Lilayi. On the 6th July, at about 1600 hours he was taken to Lusaka Central Police Station where he remained until he was transferred to Kabwe Maximum Security Prison on the 9th July, 1981. On the 9th July, 1981, he was served with a detention order made under reg. 33 (6) of the Preservation of Public Security Regulations. On the 15th July, 1981, the detention order of 9th July, was revoked. The petitioner was removed from Kabwe Maximum Security Prison and taken back to Lilayi prison. On the 27th July, 1981, he was examined by an army doctor who prescribed some medicines. On the 28th July, he was served with grounds of detention relating to the detention order made under reg. 33 (1) of the Preservation of Public Security Regulations. On the 7th August, 1981, the petitioner's detention was gazetted in the Government gazette. The petitioner was not weighed until the 20th August, 1981.

In his petition the petitioner has alleged that while at Kabwata Police Station he slept in a cell with one other person without any bed. He has further alleged that while at Kabwata Police Station he was not allowed to send any messages out or make any phone calls. He was not provided with food until the following day at lunch time. He further alleges that it was very cold; he had to use a door mat made out of sisal as a blanket. Later in the night of the next day he alleges that he was joined by about a dozen people arrested for all sorts of offences. The petitioner also alleges that while at Lilayi he was interrogated and the interrogation was coupled with threats and actual torture which resulted in bruises and cuts as well as swollen glands. The interrogation, according to the petitioner proceeded intermittently for three days during which time he was informed that while there he had no rights to legal representations. The petitioner states that while at Lusaka Central Police Station he spent the nights of 6th and 7th July, 1981, in a crowded cell with urine on the floor. A relation provided him with two covers. He states that despite his several requests for a doctor from the time he was beaten at Lilayi it was not until the 11th July, that he was examined by doctor. The petitioner also states that when he was removed from Kabwe Maximum Security Prison on the 27th July, 1981, he was taken to Lilayi Prison where he was kept in solitary confinement although he had not committed any of the scheduled offences.

The petitioner adduced oral evidence and filed three affidavits. The petitioner's oral evidence is

substantially a repetition of the contents of his petition. This evidence is on record. Very briefly, he testified that during the search at his office, the police opened the filing cabinet and took out two files relating to the cases of Messrs Valentine Musakanya and Patrick Chisanga, his clients who had been detained. He stated that from the file of Mr Musakanya the police collected a statement from another of his client Mr Goodwin Mumba. During the search at his flat he stated that the police were particularly interested in a chapter from a manuscript from the book he was writing on Constitutional Law and

politics in Zambia. One chapter of that book related to the Presidential and General Elections of 1978. The officers took copies of a newsletter called Africa Confidential.. They also took some notes. He stated that while at the office the officers scrutinised his diary. He said one of the officers who went through the diary stopped at one page and was particularly interested in the entries made on the 22nd May, 1981. He explained that subsequently he was served with grounds of detention which cited the 22nd May, as the day on which he had a meeting with Mr Pretorius. He stated that he did not meet Mr Pretorius on the 22nd May, but on the 22nd May, he had a woman client known as Mrs Gay Pretorius for whom he acted in a divorce matter in which Johannes Lodewikud Pretorius was the respondent. He explained that there was no connection between the Pretorius of 22nd May, and the Pretorius mentioned in the grounds of detention apart from the names. The petitioner testified that he had no objection to accompany officers to Lusaka since they had told him that he was returning soon. On arrival in Lusaka he was driven to Lilayi where he was asked to remain in the car. Few minutes later he was taken to Kabwata Police Station at about 2130 hours. At Kabwata he was taken to a cell where an officer on duty informed him that he was not allowed to have a blanket. He slept on the floor without any cover. On the 3rd July, he went to the reception where he again requested for a blanket. He was again informed that he was not allowed to use a blanket. At that time he noticed an entry in the register against his name stating that he was not allowed to see anybody and that he was being detained for his own protection. On the second evening he used a door mat as a cover as it was chilly in Lusaka at that time. He testified that most of the time he was alone in the cells but about mid-night a bunch of people were brought in largely for loitering. On the following day at about 1600 hours he was taken to Lilayi. On the way to Lilayi he was informed that he was not directly involved in what the police were investigating but they thought he could be useful in giving them information relating to some people. He was also informed than it would be better if he co-operated with them because if he did not he would stay in detention for ever and they would instruct the judiciary not to release him. The petitioner further stated that the officer taking him to Lilayi told him that they control the judiciary. To prove this the officer cited the case of Kaenga saying that the reason Kaenga had been released was that they had informed the judiciary that Mr Kaenga had been co-operative. On arrival at Lilayi, he was placed in a hall with a mattress referred to as the interrogation room. The room is not part of the prison. At 2000 hours the interrogation commenced. He was asked to give his life history which he did. He was asked about Mr Hamaundu, a lawyer at one time his colleague on the Law Association Human Rights Sub - Committee. He was also asked about Mr Pretorius and how long he had known him. He told them that he had known him for about four to five years. This is the Pretorius not his client. He said the last he heard of him was that he had been detained at maximum prison in Kabwe. He was also asked about Kapotwe. After asking questions about Ms Pretorius, Hamaundu and Kapotwe they moved to ask him on Mr Musakanya, his client. They wanted to know what instructions Mr Musakanya, had given him in connection with the

p85

alleged coup attempt of October, 1980. He gave them two reasons why it was impossible for him to talk about Mr Musakanya's instructions relating to treason charges. The first reason was that what Mr Musakanya said was privileged and that he had no sufficient time to discuss charges with him as he concerned himself largely with the civil action in the habeas corpus and petition. The petitioner explained that at a later stage the team leader by name of Capt. Katambi joined and said "all that you had said is rubbish". The petitioner states that the team leader went on to say that all lawyers were going to be wiped out. He said an officer by the name of Mbulo asked him how his father died. He explained that his father died from a stroke. According to the petitioner this was followed by laughter around the table. The officer by the name of Mbulo reminded him that Kapwepwe too died from a stroke and he, the petitioner will die from a stroke unless he co-operated with them. The petitioner said Capt. Katambi stated that the next time Mr Mansoor, once a lawyer for Mr Shamwana, comes to Zambia they would cut off his balls. Capt. Katambi then asked him whether he had been out of Zambia. He told him that he had been to Swaziland and had stopped over in Salisbury to collect a parcel from the Milners. Mbulo suggested that the reason he had gone to Salisbury was to deliver a message from Musakanya to Milner outlining the plan for the coup. The petitioner stated that the interrogation was at night. There were about nine officers around the table initially, later they conducted the interrogation in teams of two or three. By midnight all the people there had left apart from Mbulo's team which consisted of two people. At that time Mbulo did all the questioning. He again asked about Musakanya and Milner and on one occasion about General Kabwe. According to the petitioner Mbulo expressed himself dissatisfied with his answers. He requested him to stand up and asked him to take off his clothes. He asked him to do twenty press-ups. He did them but he did not do the last properly; as a punishment he was ordered to do another ten. Thereafter the petitioner states that Mbulo made comment about his being physically fit. He was allowed to put on his clothes and the interrogations proceeded. He testified that on the first night of the interrogations he went to bed at about three or four hours. No prison warder was present during the interrogation; the following day the pattern followed the same as the previous day. The interrogation started at 1030 hours. About 0100 hours in the morning Mbulo's team arrived; Mr Mbulo's colleague who said nothing the previous night said he was going to take over the show; he told him to strip again. He took a large stick about half an inch thick. He worked himself up into a rage claiming that he had kept him all night when he wanted to be with his wife instead of interrogating him. The petitioner stated that this officer took a big stick and hit him twice or three times on the face. The petitioner stated that he suffered injuries on the back and face and the glands were swollen. He had heavy sores in the back and he was bleeding. Mr Mbulo complained that if he did not co-operate he would get him beaten and nobody would know. They recorded statements which he was asked to sign. He did not read all of them. He said he was not very clear of the events of that night as he was bleeding and he was a bit faint. He explained that at Lilayi he was fed and at Kabwata he was fed one meal. He said he had requested

p86

for legal representation in the very beginning, but Capt. Katambi told him not to be stupid and think as a lawyer as in that room he had no right. He said at that time the person who had driven him from Kabwata Police Station told him that it was that kind of behaviour that was going to make them exercise their authority to remove one of the eyes. He went to bed on that day at 0530 hours in the morning. He was not given any treatment, for his injuries. He said when he arrived at Lusaka Central Police Station on the 9th July, the first thing he did was to request for medical

aid but the duty officer told him that he would attend to it the following day: he reminded him the following day, he promised for another day. This went on until the 9th July, when he was taken to Kabwe Maximum Prison. He said on the 9th July, an officer came to him and asked if he had a detention order, he told him that, he did not have one and the officer went out and prepared one for transfer. He said he complained to his lawyer and the officer-in-charge at Maximum Prison in Kabwe and to few relatives who had visited him who actually saw the injuries. In the van transporting him to Kabwe Maximum Prison there were other two detainees who asked him about how he got the sores on the face. He stated that at Mukobeko he was put in a cell with two other detainees who saw his injuries. One of the detainees was Harry Mkandawire while the other was Maxwell Mukumbuta. He requested for medical treatment at Mukobeko. On the 11th July, he was examined by a doctor who stated that he was physically and mentally fit. He requested for a private medical practitioner but he was told that it was not allowed. The petitioner also told the court that while at Lilayi, he was put in the prisoner's section in a room on his own where he was told not to communicate with anybody, but he was allowed out for thirty minutes twice a day; this was increased to an hour. He regarded this to be solitary confinement. He told the court that as a lawyer he was aware that to be in solitary confinement one must have breached some regulations. The petitioner explained that he was served with the grounds of detention on the 28th July. On receipt of the grounds he felt it was impossible to make representations, firstly he stated that as regards 22nd May, he never met Mr Pretorius and as regards the month of April he went to London on the night of 16th and returned on the 4th May.

In cross-examination, the petitioner stated that Mr Musakanya is his relative. He is married to his mother's cousin but, Mr Chisanga is not his relation. Suffice to mention that much of the cross-examination which is also quite detailed was a repetition of the evidence in chief. The petitioner however explained in cross-examination that on arrival at Lusaka Central Police Station the officer who received him saw his injuries and asked the other police officers not to lock him up but to keep him outside the cell as he would suffocate inside the cell. The petitioner stated he stayed outside in the reception until it was time to go to bed. He said when he was brought back from Kabwe to Lusaka he was detained at Lilayi in the prisoner's section where he was kept in a room which was quite clean. There was a bed and mattress, a chest of drawers, a window, two blankets and two bed-sheets. He was allowed to read newspapers and he was allowed exercises for thirty minutes a day. He was also allowed two

p87

visitors every Wednesday. The petitioner further stated in cross-examination that he did not understand the grounds of detention. They did not make sense to him. Firstly because the alleged conversation between him and Hamaundu did not take place so it is impossible for him to understand the allegations. He stated that he was not in a habit to understand things that did not make sense.

PW2, testified that he was detained on the 23rd June, 1981. Prior to 9th July, he was at Lusaka Central Prison. On the 9th July, he was transferred to Kabwe Maximum Prison; on that day he met the petitioner in the van. There was also another detainee by the name of Mr Mukumbuta . He testified that he saw the petitioner bleeding with a deep cut right under the nose. The wound was looking fresh. He asked the petitioner what was wrong with him, the petitioner informed him that he had been beaten at Lilayi. At that time it was the only injury he saw but the petitioner told him that he had plenty more at the back. He saw the injuries at the back at Kabwe Maximum Prison when they were sleeping together in one cell.

In cross-examination this witness explained that he is detained because he is alleged to have arranged with a certain warrant officer by the name of Chawinga to procure arms from the defence force for use in the rescue operation.

PW3 testified that on the 22nd May, 1981, he was in London. In cross-examination he testified that he was away from the 22nd May, to the 7th June.

Gay Pretorius deposed in her affidavit that the petitioner acted as her advocate in a divorce cause No.1979/HN/D/40 in the High Court at Ndola. She confirmed that among other days she consulted the petitioner on Friday the 22nd May, 1981, at 1500 hours and that she is the Mrs Pretorius referred to in the diary of the petitioner. She states that she had never met Johannes Lodwikus Pretorius and that he is in no way connected with her.

Ronald Christopher Chansa, a mayor in the Army, presently detained at Lusaka Remand Prison deposed to the circumstances that led to his detention and the various interviews he had with the police and the treatment he received at the hands of the police. He further deposed that during one of the interviews he was asked whether he knew the petitioner and when he last saw him. He stated that he told the police that he knew the petitioner. He last met him at the end of 1980. He said that this was the only time that he was questioned about the petitioner.

The third affidavit on behalf of the petitioner was sworn by one George Kapotwe presently detained in Mumbwa. Paragraphs (4) and (5) of that affidavit read as follows:

"(4) That one of the grounds on which I am detained is that on or about the 25th day of May, 1981, at your office situated at Mazembe Tractor, Lusaka, you were approached by a whiteman who introduced himself to you as a Mr Willem Johannes Pretorius,

p88

and who told you had been sent by Nkaka Puta of Ndola and that you were later contacted by Nkaka Puta by telephone, who asked you to introduce the said Pretorius to Geoffrey Hamaundu. Subsequently, meeting between the said Pretorius, the said Hamaundu and yourself was arranged at Ridgeway Hotel, Lusaka where you introduced the said Pretorius to the said Hamaundu and at which meeting the exchange rate of 75,000.00 US Dollars to Zambia Kwacha was fixed at 1.00 U.S. to Zambia Kwacha 1.00. (5) That as will be seen from the said ground of detention Mr Puta the petitioner herein nor myself were aware of the reasons why Willem Johannes Pretorius and Geoffrey Hamaundu wanted to allegedly exchange US Dollars for Zambian Kwacha."

The respondent adduced evidence from six witnesses. DW1 testified that from early July to early October, 1981, he was stationed at Lilayi. He knew the petitioner who was detained at Lilayi from 22nd July, to 24th September, 1981. He stated that the accommodation at Lilayi consists of rooms intended for senior officers on training. Each room consists of a bed and mattress, built in wardrobe, wash basin and a tap and also a chest of drawers. Each detainee is given two bed-sheets and two blankets. He explained that the detainees were allowed two visitors once a week. They were allowed exercises in the morning for a period of thirty minutes to one hour and also in the afternoon. The detainee's visitors could bring them any necessity they required. They were allowed to write letters and receive letters. They were also allowed to see lawyers. He said the petitioner enjoyed all these privileges. He testified that the petitioner was in room to himself like all the other detainees. They had instruction that the detainees should not mix as investigations were still going on. He told the court that it was true that Mr Puta was weighed on the 20th

August, 1981. He explained that this is because Lilayi being a new prison did not have a scale.

In cross-examination he explained that from the 2nd July, to the 12th July, he was not at Lilayi and he was not present when the petitioner was brought. He told the court that the petitioner arrived at Lilayi from Kabwe on the 22nd July, 1981. He complained to him later that he was sick and a doctor was brought on the 27th July. The witness explained that the letters written by the detainee were censored. He denied that he censored one of the petitioner's letters because in it he had used the words solitary confinement. He stated that as far as he was concerned the petitioner was not in solitary confinement, but in a room to himself.

DW2, a Senior Superintendent stationed at Lusaka Division CID, testified that the petitioner was arrested on the 2nd July and was served with a detention order on the 9th July. He explained that the delay in serving the order was on account that he was under the impression that he had been served with police detention order by Ndola Police but on making inquiries he realised that the Ndola Police had not served the petitioner with the detention order as a result he made the police detention order himself on the 9th July. This witness also explained that the

p89

petitioner was arrested and detained under reg. 33 (6) of the Preservation of Public Security Regulations.

In cross-examination he testified that he was not the officer-in-charge of the interrogations but he was the one who gave the order for the arrest of the petitioner but he did not send the detention order. He said between the 2nd and 8th July, he saw the petitioner once when he was at Lusaka Central Police Station. At that time the petitioner's mother and sister had come to visit him. According to this witness the petitioner looked normal. He told the court that the interrogations were conducted by combined efforts involving army and Zambia Intelligence Service and the police. Inspector Phiri was present at all the investigations.

DW3 told the court that the petitioner was brought to Kabwata Police Station on the 2nd July, 1981, by Capt. Shambane at 1600 hours. He said the petitioner spent the nights of the 2nd, 3rd and 4th at Kabwata Police Station. He told the court that at Kabwata Police Station, the cells are divided into two. One is female section and the other male; on the day the petitioner was brought there was one female prisoner and the petitioner. In each cell there were two blankets. According to this witness the petitioner was provided food by Capt. Shambane.

In cross-examination the witness testified that the petitioner was brought to Kabwata Police Station after 1600 hours. This witness was recalled later. On being recalled he told the court that according to the occurrence book the petitioner was brought to the station at 2130 hours. He stated that the following day there were quite a few people in the cell and there were still two blankets. The daily occurrence book at Kabwata Police Station was produced in this court and marked exhibit "D1".

DW4, Capt. Katambi, an officer in the Zambia Army testified that it could not be true that he questioned the petitioner but it could be true that he attended the interview where the petitioner was questioned. He denied threatening the petitioner during the interview. He further stated that he was merely in attendance at the time the petitioner was being questioned. He did not himself ask any questions. He could not remember the day of the interview but explained that he was summoned by his immediate boss to report to Lilayi where he was told that the petitioner was being interviewed by the police. His instruction was to go and listen to the interviews with a

view to finding out as to whether the petitioner's involvement was similar to that of other detainees of trying to bring arms into the country. He said his role was only to go and find out whether the petitioner's involvement had to do with the procuring of arms. He said he was driven to Lilayi at about 1000 hours. He left around 1500 hours as he had to take his child to the hospital.

In cross-examination he stated that the only reason he went to Lilayi was to sit and listen. According to this witness in cross-examination the interrogation was done only by the police. He said he did not ask the petitioner any questions during the five hours he stayed at the interview because the petitioner did not talk about arms but had he talked about

p90

arms he was going to ask him some questions. He could not know the names of the officers who were questioning the petitioner. He denied refusing the petitioner legal representation. He denied telling the petitioner that he had told him rubbish. He also denied talking to the petitioner about how his father died. He also denied asking the petitioner how Kapwepwe died. He stated that he never opened his mouth in the interrogation room for the five hours he strayed there.

DW5 testified that on the 29th June, 1981, he was instructed to search the house of Mr Johannes Pretorius. He went to the house situated at Plot No.774 Chingola East. During the search he recovered a passport number P408779 in the name of Johannes Pretorius. He explained that according to the passport Mr Pretorius left Zambia on the 21st May and landed at Gatwick on the 22nd May, 1981. He also stated that the passport showed that he returned to Zambia on the 2nd June. The witness produced in this court the passport in question which was marked exhibit "D2".

DW6 testified that he is a psychologist. He knows the petitioner's family, but did not know the petitioner as Puta. He explained that he knows the Puta family because they come from Nkula Village in Chinsali. He further explained that he met the petitioner at Lilayi Training School sometime in July, on a date he could not remember. He was instructed to go and collect the petitioner's personal data. He said when he met him he greeted him and interviewed him. He was in a group of some Police officers. The Police officers were questioning him. He was interested in the report. He said they talked to the petitioner for about four to five hours from 1400 hours to 1800 hours with intervals. He denied threatening the petitioner during questioning. He said he was not aware that the petitioner was beaten. He denied asking the petitioner to do press-ups. He further denied torturing, the petitioner.

In cross-examination the witness testified that he did not know who was in charge of the team. He said he did not know whether Capt. Katambi was in charge of the interviewing team. He explained that he has a Masters Degree from Tennessee State University in the USA. He also told the court that there was no specific person who instructed him to collect the petitioner's data. He stated that he was not present when the petitioner was asked to do press-ups.

In addition to the oral evidence the respondent also filed an affidavit in opposition sworn by one Amos Phiri, a Detective Inspector in the Zambia Police, stationed at Divisional Headquarters, Lusaka. In his affidavit he deposed that he was one of the Officers who interrogated Ronald Christopher Chansa. The officer in his affidavit denied all the allegations contained in the affidavit sworn by Mr Chansa.

The foregoing was the evidence in this petition. At the end of the evidence both learned counsel made submissions.

Before the hearing of the petition commenced, Mr Kinariwala raised a preliminary issue. The preliminary issue raised was that this court has no jurisdiction to make a declaration that the petitioner's

p91

detention is unlawful based on the grounds set out in the prayers of the petition that-

"(i) The purported grounds of detention were not served upon him as soon as was reasonably practicable nor in compliance with Art. 27 (1) (a) of the Constitution;

(ii) Apart from being untrue the grounds of detention are not detailed enough to comply with the Provisions of Art. 27 (1) (a) of the Constitution of Zambia;

(iii) He is being unlawfully confined as stated in para. 14 hereof -

(2) That he be awarded damages for the inhuman treatment complained of.

(3) That he be compensated in damages for wrongful arrest, unlawful detention and given such other redress as this Honourable Court may consider fit for the deprivation of his constitutional rights."

I deferred my ruling on the preliminary issue as I considered it not to go to the root of the petition particularly, that even if the ruling was in for of the State the hearing of the petition would still have continued on the other prayers. Mr Kinariwala submitted that the relief being sought by the petitioner cannot be granted by way of a petition. He contended that the proper procedure which the petitioner should have followed was to commence the proceedings by way of a writ as per 0.6, r. 1 of the High Court Rules. In this way, he submitted, the petitioner would have properly claimed for damages. He further submitted that there is no provision in the Constitution whereby a person can claim damages for unlawful detention or for assault and inhuman treatment by adopting a procedure which is not permissible by law. He submitted that the court had no jurisdiction to grant the relief claimed because the proceedings were not properly before the court. In support of his submissions, he cited the case of *Chikuta v Chipata Rural Council* (1) in which the Supreme Court held that there is no case in the High Court where there is a choice between commencing an action by a writ of summons or by can originating summons and that the procedure by way of an originating summons only applies to those matters referred to in O. 6, r. 2 of the High Court Rules and to those matters which may be disposed of in chambers find that where any matter is brought to the High Court by means of an originating summons when it should have been commenced by writ, the court has no jurisdiction to make any declaration.

As pointed out earlier, this action is brought in terms of Statutory Instrument No.156 of 1969, which was itself made in accordance with the then s. 28 of the Constitution now Art. 29. Article 29 (1) of the Constitution reads a follows:

"29. (1) Subject to the provisions of clause (6), if any person alleges that any of the provisions of Arts. 13 to 27 (inclusive) has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same

p92

matter which is lawfully available, that person may apply to the High Court for redress."

The petitioner is presently in detention. He alleges in his petition that he is unlawfully detained contravention among other things of Arts. 15 and 17. He has thus applied to this court by way of a petition as provided for in the Constitution for redress. The 5th edition of the Concise English Dictionary defines the word redress among other things to mean remedy. Art. 29 (2) insofar as is

relevant reads as follows:

> "The High Court shall have original jurisdiction:
>
> (a) to hear and determine any application made by any person in pursuance of clause (1)."

I am satisfied that this court has original jurisdiction to hear an application by way of a petition and subject to clause 8 this court has powers to make such orders, issue such writs and give such directions which may be considered appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Arts. 13 to 27, I am fortified in this approach by the provisions of Art. 29 (8) which insofar as is relevant reads:

> "29 (8) No court of law shall make an order for damages or compensation against the Republic in respect of anything done under or in the execution of any restriction or detention order signed by the President:

Provided that nothing in this clause shall apply to a claim for damages or compensation arising from:

> (i) physical or mental ill-treatment;
> (ii) any error in the identity of the person restricted or detained."

Generally actions for damages are commenced by a writ of summons but this does not necessarily mean that there is no other way such actions can be commended. 0.6 r.1(1) Cap. 50 reads as follows:

> "l (1) Except as otherwise provided by any written law or these Rules, every action in the court shall be commenced by a writ of summons."

The Constitution is a written law providing for a method by which an individual who alleges contravention of certain articles in respect of him can bring an action, namely, by way of a petition. After a very careful consideration of the relevant articles of the Constitution, I have no doubt in my mind that this court has jurisdiction to deal with the prayers as contained in the petition. The case of *Chikuta* in my view has no application to the present proceedings because in that case the written law specifically provided for what actions to be commenced by a writ of summons and what actions must commence by originating summons. The Constitution in the present proceedings has prodded that any complaint

p93

of contravention of certain articles must commence by way of a petition. The High Court Rules themselves make allowance where a written law provides its own methods of commencing actions. In the circumstances I find no merit in the preliminary issue raised. The objection based on the preliminary issue is accordingly dismissed.

The petitioner's prayers can be summarised under three distinct heads, namely, a declaration that his detention is unlawful; an award for damages for inhuman treatment and compensation for wrongful arrest and unlawful detention. The claims for a declaration that the detention is unlawful and for compensation for wrongful arrest and unlawful detention are in my view related and are matters of argument and submissions on the law based generally on facts not dispute. On the other hand the claim for damages for inhuman treatment is a matter of evidence. In the circumstances, I propose to deal with the claim for damages for inhuman treatment first particularly that both counsel's submissions do not specifically touch on this claim. I am however mindful that in rolled up claims one repeating himself is inevitable.

Paragraphs 7, 8, 9 and 10 of the petition read as follows:

"7. Your petitioner spent the next day at Kabwata Police Station. He was not allowed to send any messages out or make any phone calls and no food was provided until lunch time. As on the previous night your petitioner spent the night of 3rd July, 1981, without any bedding. Because it was very cold he had to use a door mat made of sisal as a blanket. Later the in the night he was joined by about a dozen people arrested for all sorts of offences, mostly loitering.

8. On 4th July, 1981, at about 1700 hours your petitioner was taken back to Lilayi where after supper interrogation commenced. This was coupled with threats and actual torture which resulted in bruises and cuts as well as swollen glands. The interrogation proceeded intermittently for the next three days and your petitioner was asked to write statements on the basis of the answers he had given. He was also informed that while there he had no rights to legal representation.

9. On 6th July, 1981, at about 1600 hours your petitioner was taken back to Lusaka Central Police and remained there until he was transferred to Kabwe Maximum Security Prison (Mukobeko), on 9th July, 1981, when he was served with the first detention order under reg. 33 (6) of the Preservation of Public Security Regulations.

10. At Lusaka Central Police Station your petitioner spent the nights of 6th and 7th July, 1981, in a crowded cell with urine on the floor and was lucky to have two covers provided by a relation."

It is common ground that the petitioner spent two nights in the cells at Kabwata Police Station. The petitioner told the court that on the first night it was cold; he requested for a blanket from the officer on duty. But

p94

the officer on duty told him that he was not allowed to have blanket. According to the petitioner he slept on the floor without any covering. On the second day, he again requested for a blanket; he was again told that he was not allowed to have a blanket. According to the petitioner on the second evening he had to use a door mat to cover himself as it was really chilly. He stated that most of the time he was alone in the cell but at midnight of the second day a bunch of people were brought in. It is also not in dispute that on the 4th July, the petitioner was taken to Lilayi where he was interrogated. The petitioner testified that during the interrogation he was threatened and tortured by DWs 5 and 6 resulting in bruises and cuts as well as swollen glands. The petitioner also explained that he was told while at Lilayi that he had no rights to legal representations. It is further common ground that the petitioner spent the nights of the 6th and 7th July, 1981, in a cell at Lusaka Central Police Station. The petitioner testified that the cell was crowded. The floor was covered with urine. He was provided two covers by a relation.

PW2 also in detention testified that on the 9th July, he was transferred to Kabwe Maximum Prison. On the way to Kabwe he was in company of the petitioner. In Kabwe he stayed with the petitioner in the same cell. According to this witness, he noticed a deep cut right under the nose of the petitioner which looked fresh. While in Kabwe he saw the petitioner's wounds on the back also fresh. Both the petitioner and PW2 gave evidence that while at Kabwe they were attended to by a doctor.

DW3, constable stationed at Kabwata Police Station testified that he was on duty on the 2nd

July, when the petitioner was in the cells at Kabwata Police Station. According to this witness, there are two cells at Kabwata Police Station and in each cell there are two blankets. This witness said that he found the petitioner already at the Police Station when he reported for duty. He denied that the petitioner could have been brought to the police station after 2000 hours. According to this witness the blankets in the cells were two weeks old. The witness explained that it is written down in the regulations that there must be blankets in the cells and for this reason they had blankets in the cells.

DWs 5 and 6 attended the interview where the petitioner was interrogated at Lilayi. DW5 stayed at the interview from 1000 hours to 1500 hours. He was there as a listener. He never put any questions to the petitioner because according to him the petitioner never in the interview talked about arms which information he was assigned to obtain. DW6 attended the interrogation from 1400 hours to 1800 hours. His assignment was to collect the petitioner's personal data. He never questioned the petitioner himself but he admitted putting questions to the petitioner for clarification only. Both DWs 5 and 6 denied beating the petitioner. Both witnesses also denied seeing anybody at the time of interrogation beating the petitioner. The two witnesses did not know each other. They also did not know any of the other members in the interrogation team.

I have very seriously addressed my mind to the evidence relating to the alleged inhuman treatment of the petitioners it would appear to me

p95

that the issue is one of credibility. I am not sure whether DW3, a constable at Kabwata Police Station, knew what he was talking. According to him he found the petitioner in the cell shortly after 1600 hours. Yet the occurrence book shows that the petitioner arrived at Kabwata Police Station at 2130 hours. The occurrence book written by the Police supports the evidence of the evidence of the petitioner to DW3 they have two blankets, two weeks old at Kabwata Police cells because the regulations say so. I observed this officer in the witnesses box; apart from being sluggish he was certainly absent minded in the witness box and confused. As against his version of the situation at Kabwata Police cells, I have no hesitation in accepting the petitioner's evidence. Even if there were two blankets two weeks old in the cell, the evidence is that there were about thirteen people in the cell on the second night and the situation still remained same namely two blankets in one cell for thirteen people.

The evidence of DWs 5 and 6 was to say the least the most startling. The petitioner was in his evidence emphatic and categoric that the two witnesses attended the interrogation sessions at Lilayi. He said that the two apart from using abusive language threatened, assaulted him with a stick and tortured him. He further said DW5 is the officer who said he, the petitioner, had no right to legal representation at the interrogation. DW6 according to the petitioner questioned him about how his father and the late Kapwepwe died. Yet according to DW5 he received an instruction to go to Lilayi where the petitioner was being interviewed to listen whether the petitioner would talk about procurement of arms. He sat at the interview from about 1000 hours to 1500 hours just listening. According to him he never put a single question to the petitioner. At 1500 hours because the petitioner did not talk about procurement of arms he left not to go to the office but to take his child to the hospital. In case of DW he was given instructions to go to Lilayi to collect personal data of the petitioner. He stayed at the interview from 1400 hours to 1800 hours just to collect personal data. He put no question to the petitioner apart from a question of clarification. The personal data he wanted was where the petitioner went to school. I seriously observed both witnesses in the box; they impressed me to be witnesses of aggressive personality. DW6 was sweating and shaking in the witness box. He explained when asked that he was

sweating as a sign of being physically healthy. This is the witness who according to the petitioner asked him to do press-ups at the time of which he is alleged to have said the petitioner was physically fit. The two witnesses denied threatening and torturing the petitioner. I am not impressed with their evidence and it certainly did not represent the truth of what transpired at the interrogation sessions. In fact they stayed longer at the interrogation than they told the court. On the issue of credibility I have no difficulty in accepting the evidence of the petitioner on the question of inhuman treatment. I am satisfied that DWs 5 and 6 threatened and tortured the petitioner resulting in the injuries complained of.

The petitioner told the court that he spent the nights of 6th and 7th July in a crowded cell with urine on the floor at Lusaka Central Police

p96

Station. A relation provided him with two covers. There has been no evidence to contradict the petitioner on this. I thus accept it as undisputed.

The question that I must resolve on this point is whether having accepted the story of the petitioner this court can make an order awarding the petitioner damages. By Art. 29 (8) this court is precluded from making an order for damages or compensation against the Republic in respect of anything done under or in execution of a detention order signed by the President except where the claim is for damages or compensation arising from physical or mental ill-treatment or from an error in the identity of a person detained. My task in the present case is very simple. The petitioner claims damages in respect of inhuman treatment done before the Presidential detention order was made and signed. At any rate the claim is for damages arising from physical and mental ill-treatment. In the circumstances having accepted the petitioner's story. I hold that he is entitled to an award of damages for the inhuman treatment complained of in his petition. I leave the question of quantum of damages for further submissions.

Before dealing with the other two prayers, I would like to deal with three matters not specifically prayed for in the petition but strongly brought out in the petition and evidence. These matters are: that the petitioner was not weighed until 20th August, 1981 and that the petitioner when moved from Kabwe Maximum Security Prison to Lilayi on 22nd July, he was kept in solitary confinement although he committed no scheduled offences and that his detention between 2nd July, and 9th July, was unlawful as he was not served with a written police detention order.

DW1 told the court that the petitioner was admitted at Lilayi on 22nd July, and was not weighed until 20th August, 1981. He explained that this was so because as a new prison it did not have a scale. Reg. 12 of the Preservation of Public Security (Detained Persons) Regulations reads as follows:

"12. The officer-in-charge shall, if circumstances permit, cause every detained person to be medically examined by a medical officer and weighed immediately on his admission to place of detention and at convenient intervals thereafter."

The language of the regulation is clear. The weighing must be done *immediately* on admission. The petitioner was in the hands of the detaining authorities from 2nd July. He was weighed on the 20th August. This cannot by any imagination be described as immediate. In the circumstances , I hold that the petitioner was not weighed immediately upon admission as required by law. This was therefore in breach of reg.12 of the Preservation of Public Security (Detained Persons)

Regulations.

The next question is whether the petitioner was kept in solitary confinement at Lilayi.

p97

Regulation 20 (1) (a) (b) of the Preservation of Public Security (Detained Persons) Regulations reads:

"20 (1) An officer-in-charge may punish any detained person found after due inquiry to be guilty of a scheduled offence by ordering him to undergo one or more of the following punishments:

(a) separate confinement in a separate cell or other place set aside for such punishment for a period not exceeding sixteen days on the normal diet as set out in the Second Schedule;

(b) separate confinement in a separate cell or other place set aside for such punishment for a period not exceeding seven days upon a reduced diet as set out in the Second Schedule."

It is common ground that the petitioner was not found guilty of any scheduled offence. The evidence of DW1 is that the accommodation at Lilayi consists of rooms intended for senior police officers who go there for training. He explained that each room has a bed, mattress, built-in wardrobe, a wash basin, a tap and chest of drawers. Each detainee has two bedsheets and two blankets. He said at the material time there were only detainees at Lilayi. They were each allowed two visitors once a week and they were allowed to read newspapers and write letters. He further explained that each detainee had a room to himself; but that since investigations were still continuing the leader of the investigations team had instructed them not to mix the detainees.

I have carefully considered the relevant evidence relating to the issue of solitary confinement according to the regulations separate confinement's a form of punishment given to a person who has been found guilty of any of the scheduled offences under the regulations. This punishment is served in a separate cell or a place set aside for such punishment. There is no evidence before me that the rooms at Lilayi were set aside for purposes of the punishment of separate confinement. The evidence I have is that each detainee was in a separate room with all the facilities and entitled to two visitors a week. It would appear that the main complaint of the petitioner is that he did not mix with his fellow detainees. I had a very brief perusal of the regulations. I was not able to find any regulation entitling a detainee to mix with fellow detainees. If the petitioner's complaint is that he was not allowed to mix with fellow detainees but allowed two visitors week, what then would have been the complain if at the time he was the only detainee at Lilayi. The reason for detainees not mixing at that time was given. I cannot say in the circumstances of the situation that the explanation was unreasonable. In my opinion the words solitary confinement must not be understood by the dictionary meaning only but must be construed in the context of the facilities available in a place. On the evidence before me I am not satisfied that the petitioner was kept in solitary confinement at Lilayi. In the circumstances, I refuse to make a declaration on the issue of solitary confinement..

Another issue raised is whether the petitioner's detention from

p98

2nd July, to 9th July, was unlawful on account of not having been served with a written police detention order. The issue for determination is whether a written police detention order is necessary before anybody can be detained under the Preservation of Public Security Regulations.

There is no direct authority on the point and the regulation does not specifically say so. But in my view the issue centres on the interpretation to be placed on the relevant regulation. The practice has always been that when the police arrest and detain a person under reg. 33 (6) of the Preservation of Public Security Regulations they always serve that person with a written document generally phrased like in this case as follows:

THE PRESERVATION OF PUBLIC SECURITY ACT
(Laws, Volume II, Cap. 106)

THE PRESERVATION OF PUBLIC SECURITY REGULATIONS DETENTION ORDER IN EXERCISE of the powers conferred by Regulation 33 (6) of the Preservation of Public Security Regulations, I HEREBY ORDER that: KAKA PUTAin respect of who I have reason to believe that there are grounds which would justify his/her detention under this Regulation, be detained for a period not exceeding 28 days against him/her. Made at Lusaka this 9th day of July, 1981."

Is the service of this document necessary in Law? Regulation 33 (6) insofar as is relevant roads as follows:

"33 (6). Any Police officer of or above the rank of Assistant Inspector may, without warrant, arrest any person in respect of whom he has reason to believe that there are grounds which would justify his detention under this regulation, and may order that such person be detained for a period not exceeding twenty-eight days pending a decision whether a detention order should be made against him, . . ."

It must be observed that the arrest in the first place is without a warrant. The regulation further says that a Police officer of a certain rank "may order that such person be detained . . . " It does not say "may make an order". The wording of this regulation may be contrasted with the language of reg. 33 (1) which reads:

"33 (1) Whenever the President is satisfied that for the purpose of preserving public security it is necessary to exercise control over any person, the President may make an order against such person, directing that such person be detained and thereupon such person shall be arrested whether in or outside the prescribed area, and detained."

The relevant words for contrast read " . . . the President *may make an order* against such person, directing that such person be detained . . ."

p99

In my opinion an order by the President has to be made in writing and signed for one very simple reason and that is he does not himself come into contact with the person to be detained and furthermore under Art. 29 (8) already cited for a court not to award damages against the State it must be shown that the thing done was done in execution of a detention order signed by the President. It would thus appear to me that while there are clear provisions that a Presidential Order ought to be in writing the situation is not clear with regard to police detention order. In my opinion I do not think that a Police detention order under reg. 33 (6) need be in writing. In the case of *Sharma v The Attorney-General* (2) at pp. 167/168 Baron, D.C.J., dealing with a Police revocation order said:

"It is convenient to deal at this point with the document revoking the police detention order. The point is perhaps academic, but I venture to doubt whether there is any necessity for a written order directing the detention of the person concerned, and I have even greater doubts

whether there is any power to revoke any such order, whether written or verbal."

It may be argued that the position of a revocation order is different but in my view, I am satisfied that under reg. 33 (6) there is no requirement of a written police detention order. The evidence of DW2 is that he ordered the arrest of the petitioner under reg. 33 (6) of the Preservation of Public Security Regulations. In my opinion a verbal order was adequate to comply with the regulation. The service of a written Police document subsequently is only necessary as it would appear for purposes of lodging the detainee in the prison; otherwise it does not alter the position of detention. In the circumstances I cannot say failure to serve the petitioner with a written Police detention order on 2nd July, rendered the detention of 2nd to 9th July, unlawful.

I now turn to the main prayer in the petition, namely a declaration that the petitioner's detention is unlawful. The claim for compensation for wrongful arrest and unlawful detention will depend on whether this court can grant the declaration being sought. Mr Stacey, on behalf of the petitioner advanced five arguments in his submissions in this prayer, namely, (1) that the petitioner's detention is a nullity in that the petitioner is detained in a fashion not authorised by law; (2) that the petitioner's detention cannot reasonably be justifiable; (3) that the petitioner's grounds of detention were not served on him as soon as reasonably practicable nor in compliance with Art. 27 (1) (a) of the Constitution; (4) that the grounds of detention apart from being untrue are not detailed enough to comply with the provision of Art. 27 (1) (a) of the Constitution; (5) that the petitioner's continued detention is in contravention to the provision of Art. 15 (3) of the Constitution.

The gist of Mr Stacey's submissions on the first argument is that the petitioner is now detained under a law purported to have existed before independence to and purported to have been inherited into post independence law when such law did not exist before independence and

p100

could thus have not been inherited. He submitted that no powers of detention were ever inherited under the Preservation of Public Security Regulations 1964. Mr Stacey outlined the history of the Preservation of Public Security Regulations starting with the Preservation of Public Security Ordinance No. 5 of 1960. To appreciate the force of Mr .Stacey's submissions on the first argument a brief outline of the history of the present reg. 33 of the Preservation of Public Security Regulations is necessary. Under two ss, namely, 3 and 4 the Preservation of Public Security Ordinance No. 5 of 1960 (hereinafter referred to as the Ordinance) the Governor was empowered to make regulations after having taken certain steps to deal with certain situations. The point that must be made absolutely clear at the outset is that regulations under s.3 were intended to deal with a situation so declared under that section by notice in the Gazette. On the other hand regulations made under s.4 were intended to deal with a situation so grave that the powers conferred by s. 3 were inadequate. Under s.4 the declaration was by Proclamation. Another point to take note of is that *only* regulations made under s.4 of the Ordinance empowered the Governor to make orders of detention. Section 3 (1) (2) and (3) of the Ordinance read as follows:

"3 (1) If at any time the Governor is satisfied that it is necessary for the preservation of public security so to do, he may, by notice in the Gazette, declare that the provisions of sub-sections (2) and (3) 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 further notice in the Gazette, directs that they shall cease to have effect, where upon they shall

cease to have effect except as respects things previously done or omitted to be done.

(2) Subject to the provisions of sub-section (3) of this section the Governor may for the preservation of public security by regulation-

(a) make provision for the prohibition of the publication and dissemination of matter prejudicial to public security and, to the extent necessary for that purpose, for the regulation and control of the production, publishing, sale, supply, distribution and possession of publications;

(b) make provision for the prohibition, restriction and control of assemblies;

(c) make provision for the prohibition, restriction and control of residence, movement and transport of persons, the possession, acquisition, use and transport of movable property and the entry to, egress from, occupation and use of immovable property;

(d) make provision for the regulation, control and maintenance of supplies and services;

(e) make provision for, and authorise the doing of, such other things as appear to him to be strictly required by the exigencies of the situation in the Territory.

p101

(3) Regulations made under this section shall make provision for any of the matters set out in sub-section (2) of section four of this Ordinance.

And ss.4(1) and (2) reads an 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, whereupon they shall cease to have effect except as respects 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 situation in the Territory, for:

(a) the detention of persons;

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

On the 11th May 1960, by Government Notice No. 121 (Proclamation No. 2 of 1960) the Governor invoked sub-ss. (2) and (3) of s. 3. This appears to have been incorrect because by law it should have been by notice. But in the same Proclamation he invoked s. 4 which by law could only be invoked by Proclamation. On the same date 11th May 1960, by Government Notice No. 122 the Preservation of Public Security Regulations 1960 were brought into effect empowering the Governor *inter alia* to make orders of detention.

On 27th July 1964, by Government Notice No. 374 notwithstanding Proclamation No.2 of 1960, the Governor (correctly this time) invoked sub-ss. (2) and (3). of s. 3. On the same date 27th July 1964, by Government Notice No.375 of 1964, in exercise of powers conferred upon the Governor by ss. 3, 4 and 6 only of the Ordinance (and NOT s.4) the Governor made the Preservation of Public Security Regulations 1964. These Regulations having been made under ss. 3, 5 and 6 did not provide powers of detention as such powers could only be provided by regulations made under s.4. These regulations revoked Preservation of Public Security Regulations 1961 published by Government Notice No.234 and made in terms of ss. 3, 4, and 6 of the Ordinance and which had provided for powers of detention. This meant that by 27th July

1964, the only Preservation of Public Security Regulations existing were those made under ss.3, and 6 and which did not provide for powers of detention. But the next day on 28th July 1964, by Government Notice No.376 of 1964 (Proclamation No.5 of 1964), rightly so, the Governor invoked sub-ss. (2) of s.4 of the Ordinance and revoked Proclamation No.2 which was published in Government Notice No.121 of 1960. On the same date

p102

28th July, by Government Notice No.377 of 1964, the Governor made the Preservation of Public Security (Amendment) Regulations in exercise of the powers conferred upon him by ss. 4,5 and 6 of the Ordinance amending by introducing powers of detention into Regulations made under reg.3. These Amendment Regulations introduced s. 31A (Powers of Detention) which is now reg. 33.

The submission of Mr Stacey is that the Governor had no power to make amendment Regulations under s.4 amending Principal Regulations made under s.3 unless the Principal Regulations had been made under s.4. Mr Stacey contends that since there were no Principal Regulations made under s.4 the Governor could not have introduced reg.31A by amending Principal Regulations which did not exist. He submitted that reg.31A being the ancestor of reg.33 of the present Regulations and if 31A did not exist and was a nullity it could not be imported into post independence law. Mr Stacey further submits that this being the position there are no laws of detention in Zambia today and thus the petitioner's deletion is not authorised by any law in Zambia.

At the outset I wish to observe that the point has been well taken and has great force in it. I agree that these were not the arguments which were advanced the case of *Shamwana v Attorney-General* (3); these are new arguments. In the case of *Shamwana* (3) the issue raised was whether a declaration still existed to justify the detening of person. The Supreme Court held that the declaration is by law deemed to exist. It is unfortunate that the issue was not raised in the petition itself to have enabled the court to have had the benefit of arguments from the State as well. Nevertheless I have carefully addressed my mind to the arguments and submissions of Mr Stacey on the point. In my view the crux of the matter is not whether the Governor had power to make the Preservation of Public Security (Amendment) Regulations under s.4 amending regulations made under s.3. The issue as I see it is this - had the Governor powers to make regulations wider s.4? The answer to the question from s.4 (2) already cited is in the affirmative. It follows that if one were to drop out the word "amendment" from the Preservation of Public Security (amendment) Regulations the regulations can and should still stand in their own right since the Governor was empowered to make the same under s.4 and there was a Proclamation in force. Looking at the issue differently; the Governor had powers to make regulations under both sections. He once did so by Government Notice No. 234 of 1961. Since the Regulations of 27th July were not revoked it can be implied that by the Amendment Regulations the Regulations now in existence are those made by the Governor under s.3 and later ss. 4,5 and 6. For my part I am satisfied that these two sets of regulations can be read together. They were made under one Ordinance and deal with one matter, namely, preservation of public security. At worst one would say the purported amendment has no effect but the Regulations as made under s.4 are valid. Whichever way one looks at the issue I am for my part satisfied that the law of detention and the powers of detention exist in Zambia. In other words the Preservation of Public Security Regulations brought into effect by Government Notice No.376

p103

of 1964 and the Preservation of Public Security (Amendment) Regulations by Government Notice No.377 of 1964 were in my view validly made because the Governor had under both ss.3 and 4 of the Ordinance powers to make the same. Reg.31A, the ancestor of the present 33 was therefore validly made and therefore lawfully inherited into the post independence law of detention. The petitioner's detention therefore was made under an existing valid law of detention lawfully inherited into post independence law. Accordingly I hold that on this point though well taken, this

petition cannot succeed.

The second argument advanced on behalf of the petitioner is that the detention is not reasonably justifiable. Counsel argued that the petitioner is faced with the most invidious of tasks that, he has to establish his innocence without being able to give evidence as to the substance of the allegations against him. He pointed out that the personality of the President and the fact of the order are deemed to be unquestionable and the petitioner is deemed to be guilty until found innocent. Counsel contended that if there really was justification for detention why was he not served at least with a police detention order on 2nd July? He said the dates in the grounds of detention were long passed. He submitted that it is obvious that the inquisitors hoped to obtain from a professional source information relating to Mr Musakanya who is represented by the petitioner and to whom he was also related.

In reply, Mr Kinariwala urged the court to take judicial notice that the situation that obtained at the time of the petitioner's detention was that there was a coup plot where some people had been detained and the petitioner was alleged to have involved himself in a plot to rescue the people detained in connection with the coup plot. He submitted that in those circumstances it cannot be argued that the petitioner's detention was not reasonably justifiable.

The petitioner was detained by the President pursuant to reg. 33 (1) of the Preservation of Public Security Regulations already cited above. In the case of *Kapwepwe, Kaenga v Attorney-General* (4) Baron, J.P. (as he then was) at p. 260 in a slightly different context from the argument advanced in this court said:

"And one must not lose sight of the fact that there is no onus on the detaining authority to prove any allegation beyond reasonable doubt, or indeed to any other standard, or to support any suspicion. The question is one purely for his subjective satisfaction."

It is thus not for the court to determine whether the detention was reasonably justifiable because the test is one of subjective satisfaction of the President only. A lot has been said about laws of detention. Baron, J.P., observed in the case of *Kapwepwe, Kaenga* (4) that the powers of detention are far-reaching but what has to be stressed is that the President has been given powers by Parliament to detain persons who are not even thought to have committed any offence or to have engaged in activities prejudicial to security or public order but perhaps because of their known associates or for some other reason the President believes

p104

it would be dangerous to detain. By their nature the laws of detention are intended for circumstances where ordinary criminal law or the ordinary criminal procedure is regarded by the detaining authority as inadequate to meet a particular situation.

Whether a detention is reasonably justifiable is a matter for the detaining authority. Certainly this imposes an invidious task on the detainee. But this is what the law says. I have already in my judgment considered the issue of the police detention order. But even if I were to declare that the petitioner was unlawfully detained between the 2nd and 9th July, when police written detention order was served on him this in itself would not have meant that his present detention is not reasonably justifiable. On this argument also I hold that this petition cannot succeed.

The third argument advanced on behalf of the petitioner is that the grounds of detention were not served on the petitioner as soon as was reasonably practicable. It was contended that if the grounds existed they must have been within the contemplation of the arresting authorities on the

2nd July and should have been served immediately the Presidential detention order was served. It was further submitted that service failed to comply with art. 27(1)(a) of the Constitution in that the Presidential order was made on the 14th July, and the service of the grounds was made on the 28th July. It was also contended that the petitioner was in fact already detained and the police order was only revoked after the Presidential order had already been made. It was submitted that for this purpose fourteen days period commenced one second after midnight on 14th July and expired at midnight on the 27th July.

It is now established law in Zambia that a police detention order made under reg. 33 (6) of the Preservation of Public Security Regulations is distinct from a Presidential Detention Order made under reg. 33 (1) (*see Sharma* (3) case) It is common ground that the Presidential Detention Order made on the 14th July 1981, was served on the petitioner on the 15th July, 1981, at 1720 hours. The grounds of detention were served on the 28th July at 1720 hours. Although the order was made on the 14th July it could in my view not be effective until service. Section 35 (a) of the Interpretation and General Provisions Act Cap. 2 reads:

> "In computing time for the purpose of any written law :
>
> > (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done..."

Moodley, J. in *Mungabangaba v Attorney-General* (5) considered this Action and said:

> "Accordingly, I hold that for purposes of Art. 27 (1) (a) of the Constitution, the computation of time for furnishing the statement of the grounds for detention should be exclusive of the day of which the actual detention order was signed and that the period of fourteen days should be calculated thereafter".

p105

Putting it at the highest in the present case the grounds were served exactly within fourteen days excluding the date on which the Presidential Order was signed. It certainly would be most desirable from a detainee point of view that grounds which must be presumed to be in existence at the time of arrest must be served at the time of the order. But this is not the law. Article 27 (1) (a) of the Constitution in part reads as follows:

> "27 (1) 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, he furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is restricted or detained."

In a recent, Supreme Court decision in *Attorney-General v Valentine Shula Musakanya* (6) after citing the above article of the Constitution Silungwe, C.J., had this to say:

> "Taking the above quotation as a whole, it is clear that the fundamental object intended to be secured by paragraph (a) of clause (1) is to provide a machinery for enabling a detained or restricted person to know as soon as possible, but not later than fourteen days, the reasons for his detention or restriction.

> I would regard the expression "as soon as is reasonably practicable and in any case not more than fourteen days . . " as falling into two parts, namely (a) "as soon as is reasonably practicable", and (b) "in any case not more than fourteen days."

As to (a), my understanding of it is that it does not constitute a mandatory period; it serves as an injunction to urgency. In the High Court case of Re Thomas James Cain (7) Doyle, C.J., considered, at page 77, the meaning of the words, "as soon as is reasonably practicable" and came to the conclusion that those words "are intended to impart a sense of urgency but that the true limit is the period of fourteen days. With that conclusion I am in full agreement.

> With regard to (b) it clearly represents the maximum, that is, the mandatory, period within which a detainee or restricted must be furnished with grounds for his detention or restriction, as the case may be."

I am bound by the decision of the Supreme Court in the instant case. In the circumstances, I hold that, on the facts not in dispute, the detaining authority complied with the Constitutional requirements of Art. 27(1)(a).

p106

The fourth argument advanced on behalf of the petitioner was that the grounds of detention apart from being spacious lack the detail to afford the petitioner an opportunity to make meaningful representations. It was argued that it was not possible to understand something and make intelligent representation thereto unless the presentation contained an inherent logic. This argument in any view amounts to saying that the grounds are vague. The law on the question of vagueness of grounds has been considered in very many cases in Zambia. The latest of the cases is the case of *Attorney-General v Valentine Shula Musakanya* (6) which reviewed some of the previous cases. The petitioner's grounds of detention are as follows:

"(1) That on a date unknown, but during the month of April 1981, while at GEOFREY HAAMAUNDU's office, situated at Chuundu House, Lusaka, you were informed by him namely, GEOFREY HAAMAUNDU that there were ex-residents of Zambia abroad who were willing to give financial help to Messrs EDWARD SHAMWANA and VALENTINE MUSAKANYA but that they were unable to transfer their money to Zambia. Subsequently, you were informed by GEOFREY HAAMAUNDU that he (GEOFREY HAAMAUNDU) was looking for somebody in Zambia who had lot of Kwacha and who would be willing to exchange it with the U.S.A dollars abroad. MR GEOFREY HAAMAUNDU further informed you that the money was intended for use to rescue Messrs EDWARD SHAMWANA and VALENTINE MUSAKANYA who were involved in the abortive coup attempt of October, 1981;

(2) That subsequently on or about the 22nd May 1981, you informed WILLEM JOHANNES PRETORIUS of Chingola about the aforesaid proposal namely, exchange of U.S.A dollars with Kwacha, as you were aware that WILLEM JOHANNES PRETORIUS was looking for foreign currency, and that soon after informing him, you instructed him namely WILLEM JOHANNES PRETORIUS to travel to Lusaka to meet GEOFREY HAAMAUNDU through a third man namely GEORGE KAPOTWE with a view that GEOFREY HAAMAUNDU and WILLEM JOHANNES PRETORIUS may discuss the exchange rate of the U.S.A dollars and the Zambian Kwacha. You further informed the said PRETORIUS that the money was intended for use to rescue the detainees involved in the abortive coup attempt of October, 1981;

(3) That you failed to report the above activities to the police or any other Government Security Forces."

The contention is that to state that " on a date unknown but during the month of April" is vague. In relation to the second ground it was argued that the authorities should have fixed a date and that the date of the intended rescue should have been mentioned. In the case of *Attorney-General v Musakanya* (6) the appeal hinged on the question of whether the grounds for detention can be said to be vague merely

p107

because of a failure to state in it a specific date on which the detainee allegedly participated in activities prejudicial to public security. It was argued in that case on behalf of the appellant that although failure to specify a date in a ground may in some cases have the effect of depriving a detainee of the opportunity to put forward an alibi it does not in itself constitute vagueness in ground. At pp.3 and 4 Silungwe, C.J., in the *Musakanya* case (6) stated;

"In *Re Kapwepwe and Kaenga* (4) followed by *Munalula and Six Others v The Attorney-General* (8) this court laid down the test to be applied whenever an allegation of vagueness in a ground for detention is made. The test is whether a detainee has been furnished with sufficient information to enable him to know what is alleged against him so that he can bring his mind to bear upon it and so enable him to make a meaningful representation to the detaining authority or the Detainees' Tribunal. An illustration which is entirely in point here was given by Baron , D.C.J., as he then was, *Kapwepwe and Kaenga* (4) concerning the application of the foregoing test. He said at p.262 lines 29-44, that

' . . . if the grounds were;

". . . that during the months of January and February 1972 you addressed meetings in Lusaka at which you advocated the use of violence against persons of different political or tribal affiliations . . ." '

> This would enable the detainee to make presentations on the basis of alibi or mistaken identity and also on the merits. For instance, he could say 'I have never addressed meetings in the place' or 'During the months in question I was engaged in a course of study in Dar-es - Salaam'... Or the detainee might say 'it is true that I addressed meetings in Lusaka during the months in question, but I deny that I advocated violence of any kind.' This representation is no more than a denial, but the information given cannot be held to be inadequate only for that reason."

Another way of looking at the illustration without in any way altering its meaning is this:

". . . that on dates unknown but between 1st January and 29th February 1972, you addressed meetings in Lusaka at which you advocated the use of violence against . . . " This formulation is similar to the first ground for detention in the present case. One thing that immediately strikes one's eye is that only a period of time, as opposed to a specific date (or dates) is given in the illustration. And yet it is apparent that the information contained therein would, in the word of Barren, D.C.J., "enable the detainee to make representations on the basis of alibi or mistaken identity and also on the merits." That is to say, the information supplied would be adequate to enable a detainee to make a meaningful representation. In regard to alibi, however, it is evident that a detainee would encounter obvious difficulties

108

unless the alibi is capable of covering the entire period reflected in the ground. In other

words, the aspect of alibi is relative: that is, relative not to the length of period stated in the grounds, but to the detainee's movements during the period stated.

In one case, a detainee might well be able to put forward an alibi on respect of a period of one year, and in another, a detainee might be unable to provide an alibi in respect of one day."

In the instant case the first ground does not mention specific dates but the month is mentioned, a place where the petitioner is alleged to have met a named person is mentioned; the purpose of the meeting is mentioned, the purpose of the subject matter of discussion is mentioned. The people to be rescued were mentioned. I cannot say that simply because a specific date was not mentioned the grounds lack detail.

Turning to the second ground date is mentioned, person to whom the information was passed is mentioned and the purpose of the money is mentioned. I am satisfied that the ground contained enough information. In the third ground the allegation is that the petitioner did not report the activities alleged in (1) and (2) to the authorities. I find nothing vague in that. Without being derogatory I must observe that the petitioner is an Advocate of the High Court. I am in no doubt in my mind that he understands the grounds to enable him to make a meaningful representation. In my opinion the grounds contain sufficient information. As has been said many times it is not for the court to determine the truth or falsity of grounds of detention.

The fifth argument advanced on behalf of the petitioner is that the provisions of art. 15 (3) of the Constitution of Zambia are being contravened by the continued detention of the petitioner. Art. 15 (3) of the Constitution reads as follows:

"15 (3) Any person who is arrested or detained-

(a) for the purpose of bringing him before a court in execution of the order of a court; to

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia:

and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained as mentioned in para. (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

This article was the subject of consideration again in the case of *Valentine Shula Musakanya v The Attorney-General* (9). In that case the court held that person detained for the purpose of preserving public security is governed by the provisions of Art. 27 (1) of the Constitution and

p109

not by those in Art. 15 (3) (b) of the Constitution unless such person is also charged with a criminal offence in which event all the provisions would become irrelevant. In the instant case the petitioner has not been charged with any criminal offence. It thus follows that the detaining authorities are not bound to take the petitioner before a court. The continued detention of the petitioner cannot be said to be in contravention of Art. 15 (3) of the Constitution.

For the foregoing reasons I hold that while the petitioner is entitled to damages for inhuman treatment complained of in his petition, his detention is lawful and accordingly, I dismiss the

petition to that extent.

Costs normally follow the event. But where each party has been successful on certain issues raised, as is the case here, I consider a fair order to be that each party should bear his own costs and I so order.

Petition allowed in part
