VALENTINE SHULA MUSAKANYA v THE ATTORNEY GENERAL (1981) Z.R. 188 (H.C.)

HIGH COURT
CHALA, J.
20TH JANUARY 1981
(1980/HP/1652)

Flynote

Constitutional law - Detention - Grounds for detention - Compliance with Art. 27 (1) of the Constitution- Vagueness of grounds- "Specifying grounds in detail" - What constitutes.

Constitutional law - Detention - Grounds for detention - Compliance with Art. 27 (1) of the Constitution - Grounds served after 13 days - Whether served "as soon as is reasonably practicable".

Constitutional law - Detention - Grounds for detention - Detention on similar grounds - Whether detaining authority acted mala fide and punitively.

Constitutional law - Detention- Art. 15 (1) of the Constitution - Whether applicable to persons detained under the Preservation of Public Security Regulations, reg. 33 (1).

Headnote

The applicant was first detained under a police detention order in October, 1980, pursuant to the Preservation of Public Security Regulations. He was a few days later detained under a Presidential Detention Order under reg. 33 (1) of the Preservation of Public Security Regulations.

His detention was declared unlawful by the High Court on the basis that the grounds for his detention were vague and roving. The applicant was on the same day arrested and charged with the offence of treason. He appeared in the Magistrate's court whereupon the State entered a *nolle prosequi* and the applicant was discharged. In December, the applicant was again detained under a Presidential Detention Order which is the subject of his application for a writ of *habeas corpus ad subjiciendum*. He alleged *mala fides* on the State in ordering his detention on similar grounds and that his detention was punitive in this respect. The applicant further alleged the State's failure to comply with Art. 27 (1) of the Constitution and that under Art. 15 the court should release him conditionally or unconditionally on the ground that he was not tried in proper time.

Held:

(i) Vagueness is a relative term. How much detail must be given and what constitutes vagueness will depend upon the circumstances of each case. The detainee or the applicant must be given grounds in such a form as to enable him to make an adequate representation against his detention on such grounds.

(ii) It is trite law that detaining authorities have fourteen days in which to serve grounds of detention.The words "as soon as is reasonably practicable" are intended to impart a sense of urgency but the true limit is the period of fourteen days.

(iii) The onus of proving *mala fides* is on the applicant. The proper approach is to determine whether the order was mala fide. What has got to be made out is not the want of bona fides on the part of the police, but want of bona fides as well as the non application of mind on the part of the detaining authority *viz.* the President.

(iv) The President is empowered by law to detain people for Preservation of Public Security. It cannot be argued that in detaining the applicant the President was being punitive. The court cannot question in any way the discretion of the detaining authority if it is exercised within the power conferred.

(v) Persons detained under reg. 33 (1) of the Preservation of Public Security Regulations do not come under the provisions of Art. 15 (3). If they did, the whole purpose of exercising control over the movement of such persons would be defeated.

Cases referred to:

(1) Kapwepwe & Kaenga In re v Attorney-General (1972) Z.R. 248.
(2) State of Bombay v Atma Ram Vaidya AIR (1951) S.C. 157.
(3) Naresh Chandra v State of West Bengal AIR (1959) S.C. 1335.
(4) Munalula & 6 Ors. v A-G. (1979) Z.R. 154.
(5) Re Buitendag (1974) Z.R. 156.
(6) Lawrence Joachim Joseph De Souza v State of Bombay AIR (1956) SC 382.
(7) Eleftheriadis v Attorney-General (1975) Z.R. 69.

Legislation referred to:

Preservation of Public Security Regulations, Cap. 106, reg. 33 (1).
Constitution of Zambia, Cap. 1, Arts, 15 (3), 27 (1).

For the applicant: J. M. Mwanakatwe of M.M.W. & Co.
For the respondent: A.- G. Kinariwala, Assistant Senior State Advocate.

Judgment

M.S. CHAILA, J.: This is an application by Mr Valentine Shula Musakanya (whom I shall continue to refer to as "the applicant") for the writ of *habeas corpus ad subjiciendum*. The facts supporting the application are contained in the affidavits sworn by the applicant by one Ngosa Hilda Kasote.

The applicant was detained pursuant to an order made under regulation 33 (1) of the Preservation of Public Security Regulations (hereinafter referred to as the Regulations) in December, 1980. Prior to that detention the applicant was under police custody on a charge of treason. He was arrested and charged with the offence of treason on 26th November, 1980. In his affidavit the applicant has deposed as follows:

(6) "That on the 24th day of October, 1980, I was detained pursuant to a Detention Order purportedly signed by Assistant

Superintendent Simasiku of the Force Headquarters of Zambia Police.

(7) That on the 31st day of October, 1980, the Detention Order referred to in the preceding paragraph was revoked but I was immediately served with another detention order purportedly signed by the President of the Republic of Zambia .

(8) That on the 13th day of November, 1980, I was furnished with grounds upon which I was detained. A true copy of the statement afore-mentioned is now produced and shown to me marked "VSM" as exhibit hereto.

(9) That on or about the 14th day of November, 1980, I applied to this Honourable Court at its Ndola Registry for leave to issue a writ of habeas corpus ad subjiciendum and the said application was successful.

(10) That on the 26th day of November, 1980, the Honourable Mr Justice Bweupe declared my detention unlawful, because *inter alia*, the Honourable Mr Justice Bweupe found the grounds of my detention "insufficient, vague and roving". A true copy of the report in the Times of Zambia of the Judgment of the Honourable Mr Justice Bweupe is now produced to me marked "VSM2".

(11) That notwithstanding the ruling in the preceding paragraph that my detention was unlawful, I continued to be in detention and the police officers purported to arrest me shortly after the said judgment. One police officer forced me out of the dock in court through the back door into a police car which action clearly demonstrated malice and hatred by the police against me.

(12) That I was charged at the Ndola police station with treason as a way of justifying my further detention and as an excuse for keeping me in detention on the same grounds on which I had been previously detained. A warrant of arrest was issued in Lusaka on the 26th of November, 1980, at 1715 hours in my absence.

(13) That I was brought back to Lusaka on the 26th day of November, 1980, by officers of the Zambia police.

(14) That I was not brought before a court of law to answer the charge of treason until Monday, the1st day of December, 1980.

(15) That on the 1st day of December, 1980, at about 0945 hours an Order was issued in pursuance of the Preservation of Public Security "Ordinance". A true copy of the said detention order is shown to me marked "VSM3", as exhibit hereto.

(16) That in view of the fact that my name appears on the said Presidential Detention Order in different ink from the rest of the contents save the date, I have grave doubts as to whether it was in fact "issued" by the President of the Republic of Zambia.

(17) That on the 1st day of December, 1980 at about 1130 hours I appeared before a Lusaka Magistrate whose name I believe to be Mr Meebelo Kalima charged with treason. A true copy of the said

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charge sheet is shown to me marked "VSM4", as exhibit hereto.

(18) That at the said appearance referred to in the preceding paragraph the State Advocate entered a nolle prosequi on the Director of Public Prosecution's instruction and the Magistrate duly discharged me. There is now shown to me an exhibit marked **5** "VSM5" which is a true copy of the report in Zambia Daily Mail dated the 2nd day of December, 1980, on my discharge by the said magistrate.

(19) That I believe the officers in Zambia police who arrested me and charged me with treason

were motivated by malice against me and acted independently of the Director of Public Prosecutions. There is now shown to me marked "VSM6" a true copy of the article which appeared on the front page of the Times of Zambia published on the 27th day of November, 1980.

(20) That I was discharged at about 1240 hours when I was immediately taken back to Lusaka Central Prison.

(21) That the grounds of my detention are substantially the same as those furnished to me in a statement in writing on 13th day of November, 1980, save that the new grounds upon which I am now detained purport to allege that on a date unknown but in or about the early part of April, 1980, I attended an unlawful meeting with Messrs Jack Edward Shamwana and Goodwin Yoram Mumba at the residence of Mr Pierce Annfield in Kabulonga, Lusaka; and that subsequent to the aforesaid meeting and on a date unknown but between the 1st day of April and 31st day of May, 1980 I attended a meeting at residence of Mr Edward Jack Shamwana with Messrs Goodwin Yoram Mumba, Edward Jack Shamwana, Anderson Mporokoso, Deogratias Syimba and other persons whose names are unknown at which meeting it is alleged I and other persons mentioned herein agreed to overthrow the Government of the Republic of Zambia. A true copy of the statement of the ground upon which I am now detained is shown to me marked "VSM7", as exhibit hereto. It was furnished to me on 13th December, 1980.

(22) That during the period mentioned in the preceding paragraph and during the period from 1st day of March, 1980, to the 31st day of May, 1980, I occasionally travelled from Lusaka to Ndola and from Lusaka to Kitwe for the purpose of supervising the new business interests I had acquired at the beginning of 1980. There is now shown to me a true copy of the affidavit of Ngosa Hilde Kasote and produced as exhibit "NKK1" hereto.

(23) That I have been in continuous detention since the 24th day of October, 1980.

(24) That my detention appears to me to be punitive and certainly unlawful.

(25) I humbly submit to this Honourable Court that I am the said Valentine Shula Musakanya detained at Lusaka Central

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Prison, Lusaka, that I believe my detention to be unlawful, malicious and motivated by mala fide and I pray that this Honourable Court will grant me leave to issue a writ of *habeas corpus ad subjiciendum* directing the Attorney-General as Principal Legal Adviser to the Government of the Republic of Zambia and the Inspector - General of Police to show cause why I should not be released immediately."

In the second affidavit sworn by Ngosa Kasote a deponent has deposed as follows:

(6) "That I have been for the past one year the Personal Secretary/Stenographer of Mr W.K. Simukonda, the Group Company Secretary/Accountant at the Head Office of Kapumpe Investments Limited.

(7) That in the course of my duties as Personal Secretary/Steno grapher to the said Group Company Secretary I have always known the travel arrangements of the said applicant Valentine Shula Musakanya, the Chairman of the said Kapumpe Investments Limited.

(8) That during the period from the first day of March, 1980, to the 31st day of May, Valentine

Shula Musakanya occasionally travelled to Ndola from Lusaka and to Kitwe from Lusaka or Ndola for the purpose of supervising the operations of new business interest which he acquired after the beginning of 1980.

(9) That I verily believe that the contents of this my affidavit are to the best of my knowledge and belief true".

The respondent has filed an affidavit in opposition. The affidavit was filed and sworn on behalf of the respondent by Mr Mubuka Sinyinda Senior Assistant Commissioner of Police CID. In part the affidavit of the respondent reads as follows:

(6) "That with reference to paragraph 5 of the affidavit of Mr Mwanakatwe, I deny that the applicant was arrested on the 24th day of October, 1980 on unspecified charges. I say that the applicant was arrested and detained by the police on the 24th day of October, 1980, under the provisions of Regulation 33(6) of the Preservation of Public Security Regulations Cap. 106. It is admitted that the detention of the applicant under regulation 33(6) was revoked on the 31st day of October, 1980. It is however not admitted that a Presidential Detention Order was substituted for the police detention order on the 31st day of October, 1980. I say that after the police detention order was revoked on the 31st day of October, 1980, the applicant was on the same day served with a Presidential Detention Order under regulation 33(1) of the Preservation of Public Security Regulations Cap.106 and as such with effect from the said date the applicant was detained under regulation 33(1) of the Preservation of Public

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Security Regulations Cap. 106.

(7) That paragraph of the affidavit of Mr Mwanakatswe it is admitted.

(8) That with reference to paragraph 7 of the affidavit of Mr Mwanakatwe it is, admitted that the applicant's detention under the Presidential Detention Order dated the 31st day of October, 1980, was declared to be unlawful by the Honourable Mr Justice Bweupe in the High Court at Ndola With further reference to the said paragraph I deny that the grounds set out in the statement dated the 12th day of December, 1980, to justify the second detention of the applicant on the 1st day of December, 1980, are inadequate or improper to found lawfully the applicant's detention as alleged or at all.

(9) That with reference to paragraph 8 of the affidavit of Mr Mwanakatwe, I deny that the grounds of the applicant's detention contained in the statement dated the 12th day of December, 1980, are as vague or as insufficient or as exploratory as those contained in the statement dated the 12th day of November, 1980, which were declared illegal by the Honourable Mr Justice Bweupe as alleged or at all.

(10) That with reference to paragraph 9 of the affidavit of Mr Mwanakatwe I deny that the allegations contained in the second statement dated the 12th day of December, 1980, demonstrated mala fides or prejudice against the applicant as alleged or at all.

(11) That paragraph 1 to 5 of the applicant's affidavit are admitted.

(12) That paragraph 6 of the applicant's affidavit is admitted save that the Detention Order referred to therein was purportedly signed by Assistant Superintendent Simasiku. I say that the detention order referred to therein was as a matter of fact signed by Assistant

Superintendent Simasiku under the Preservation of Public Security Regulations Cap. 106.

(13) That paragraph 7 of the applicant's affidavit is admitted save that another detention order referred to therein was purportedly signed by the President of the Republic of Zambia. I say that another detention order referred to therein was as a matter of fact signed by the President of the Republic of Zambia.

(14) That paragraph 8 of the applicant's affidavit is admitted save that the said statement purported to describe the grounds upon which the applicant was detained. I say that the said statement as a matter of fact described the grounds upon which the applicant was detained.

(15) Save that on the 26th day of November, 1980, the Honourable Mr Justice Bweupe declared the applicant's detention unlawful, paragraph 10 of the applicant's affidavit is not admitted.

(16) That I am informed by the Assistant Senior State Advocate Mr A.G. Kinariwala and I verily believe it to be true that the Attorney-General being dissatisfied with the said judgment of

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the Honourable Mr Justice Bweupe is appealing against the said judgment to the Supreme Court and that a notice of appeal to that effect has already been filed but that the record of appeal has not yet been lodged because a certified true copy of the judgment and proceedings has not yet been furnished by the High Court at Ndola to the Attorney-General.

(17) That with reference to paragraph 11 of the applicant's affidavit, it is denied that after Mr Justice Bweupe declared the applicant's detention unlawful, the applicant continued to be in detention or that the police officers purported to arrest the applicant shortly after the judgment was delivered as alleged or at all. I am informed by Assistant Superintendent of Police, Mr Albert Simataa Simasiku and I verily believe it to be true that after the judgment was delivered and Mr Justice Bweupe left the court room he Mr Simasiku told the applicant to leave the court room from the back door as there was a large crowd at the front door of the court room as well as the front door of the High Court Building. I am further informed by the said Mr Simasiku and verily believe it to be true that when the applicant came out of the High Court Building he Mr Simasiku told the applicant that he Mr Simasiku intended to charge and arrest the applicant for the offence of treason and that for the purpose he Mr Simaiku wanted to take the applicant to the Ndola Police Station. I am further informed by the said Mr Simasiku and verily believe it to be true that he Mr Simasiku accordingly asked the applicant to sit in a police car which was waiting outside the High Court Building. I am informed by the said Mr Simasiku and verily believe it to be true that according to his directive the applicant sat in the police car and was taken to the Ndola Police Station. I emphatically deny that the mere fact Mr Simasiku asked the applicant to use the back door in getting out of the High Court Building and the further fact that he Mr Simasiku asked the applicant to get into a police car after explaining to him the reason for doing so in any way demonstrated malice or hatred by the Police against the applicant. I say that in doing so he Mr Simasiku was only carrying out duties as a police officer.

(18) That with reference to paragraphs 12, 13 and 14 of the said affidavit of the applicant I am informed by the said Mr Simasiku and verily believe that after taking the applicant to the Ndola, police Station he Mr Simasiku charged the applicant for the offence of treason contrary to section 43 (1) (a) of the Penal Code Cap.146 and arrested him. It is denied that the applicant was charged with the said offence as a way of justifying his further detention or as an excuse for keeping him in detention on the same grounds on which he had been

previously detained as alleged or at all. It is denied that a warrant of arrest was issued in Lusaka on the 26th day of November, 1980, at 1715 hours in the absence of the applicant as alleged or at all. I am informed by the said Mr Simasiku and verily believe it to be true that as the applicant was

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charged and arrested as aforesaid in Ndola, a warrant to remove the applicant from Ndola to Lusaka was obtained from the Subordinate Court, Ndola on the same day and the applicant was brought to Lusaka on the same day. I am informed by the said Mr Simasiku and verily believe it to be true that by the time he and other police officers who escorted the applicant from Ndola to Lusaka it was about 1715 hours and all the courts were closed. It was therefore not possible to take the applicant before a court of law. A warrant for the commitment of the applicant on remand was therefore obtained from the magistrate Mr Meebelo Kalima and the applicant was remanded in custody until the first day of December, 1980. On the 1st day of December, 1980, the applicant was taken before the court of law to answer the charge of treason.

(19) That with reference to paragraph of the said affidavit of the applicant I am informed by Mr Forbes Stambo, an Assistant 5 Superintendent in the Zambia Police and I verily believe it to be true that on the 1st day of December, 1980, he served on the applicant a true and correct copy of the Presidential Detention Order of the same date a copy of which is annexed to the applicant's affidavit and marked "VSM3" and not a purported Presidential Detention Order as alleged.

(20) That with reference to paragraph 16 of the applicant's said affidavit I say that the said Presidential Detention Order exhibit "VSM3" was in fact issued by the President of the Republic of Zambia.

(21) That paragraph 17 of the applicant's affidavit is admitted.

(22) That with reference to paragraph 18 of the Applicant's said affidavit, it is not admitted that annexure "VSM3" reflects a true version of what transpired on the 1st day of December, 1980 except that the State Advocate entered a nolle prosqui on the instructions of the Director of Public Prosecutions and that the magistrate duly discharged the applicant.

(23) That with reference to paragraph 19 of the applicant's said affidavit I deny that the officers in Zambia police who arrested and charged the applicant with treason were motivated by malice against the applicant as alleged or at all. I say that Mr Simasiku who arrested and charged the applicant with treason as hereinbefore stated acted in accordance with the powers vested in him by law. I am informed by the Director of Public Prosecutions Mr Joshua Simuziya and verily believe to be true that annexure "VSM6 " is an inaccurate and misleading report.

(24) That paragraph 20 of the applicant's affidavit is admitted.

(25) That with reference to paragraph 21 of the applicant's said affidavit, I deny that the grounds of the applicant's detention contained in exhibit "VSM7" are substantially the same as those contained in statement in writing dated the 13th day of November, 1980, as alleged.

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(26) That contents of paragraph 22 of the applicant's said affidavit as well as exhibit "NHK1" are

not admitted.

(27) That with reference to paragraph 24 of the applicant's said affidavit it is denied that the applicant's detention is punitive or unlawful as alleged.

(28) That with reference to paragraph 25 of the applicant's said affidavit I deny that the applicant's detention is unlawful or malicious or motivated by *mala fides*."

From the applicant's affidavit and the respondent's affidavit most of the issues are not in dispute. On the 26th of November, 1980, at Ndola High Court my brother Bweupe, J, declared the detention of Valentine Shula Musakanya who was the applicant in that case as unlawful. See case No. 1980HN728. According to the affidavit of the applicant the police officer forced him to go through the back door into the police car; because the front door was crowded with a lot of people outside and when the police officer who asked the applicant to go out was acting on instructions to arrest the applicant on criminal charge of treason. The State does not dispute the fact that they invited the applicant through the back door but they argued that they did that in good faith because there were a lot of people outside the court building through the front door. The applicant has argued that the police action in inviting him through the back door into the police car clearly demonstrated malice by the police against him. Mr John Mwanakatwe who was representing the applicant has drawn the court's attention to an article in the Times of Zambia on 27th November, 1980, to what a reporter wrote in column one which reads:

> "He had no sooner finished his 140 minute ruling and while well wishers congratulated Mr Musakanya's counsel, Mr Nkaka Puta, when the former Bank of Zambia governor was pushed from the dock downstairs to the cells by a police officer and whisked away in a police car before Mr Puta could speak to him."

Mr Mwanakatwe has argued that the reporter is a very experienced journalist who made her own independent report. The respondent's answer on that point is in paragraph 17 of the respondent's affidavit. **35** I must point out here that Mr Sinyinda said in paragraph 17 was a hearsay. On that point the court will place very little significance to his version as to what happened in Ndola High Court building. The Times of Zambia Reporter speaks of the applicant being pushed from the dock downstairs to the cells by a police officer. It is difficult for me to say whether those words were written by a reporter who was seated in court or whether it was an edited version. It is, however, interesting to note in his affidavit paragraph 11: the applicant says "one police officer forced me out of the dock in court through the back door into a police car." That version by the applicant is different from what is contained in the issue of the Times of Zambia dated 27th November in which the reporter is reported to have said that the former Bank of Zambia Governor was pushed from the dock downstairs to the cells. In my view if the applicant had

been pushed by the police officer downstairs into the cells he would have clearly stated so in his affidavit. I will therefore not attach much weight to what appears in the Times of Zambia issue of 27th November, 1980, as representing a true situation. One thing is clear that the applicant was told or ordered to leave the dock by the police officer through the back door and outside he was ordered to sit in a police car and was driven to Ndola Police Station where he was charged with criminal offence. The other issue which is not disputed is the question of grounds. The State does deny

detaining the applicant on the same grounds on which the applicant was first detained. Another issue which is disputed is mala fides. The applicant has alleged that the State has with bad faith or acted with *mala fides*. The State has denied that.

Mr John Mwanakatwe has argued the applicant's case mainly on four specific grounds. The first ground is that the detaining authority has failed to comply with the requirements of Article 27(1) (a) of the Constitution of Zambia, namely that the detaining authority has failed to specify the grounds of detention in detail. The second ground on which the applicant has based his application is failure by detaining authority to comply again with the requirements laid down in Article 27(1) of the Constitution; namely that grounds must be served as soon as reasonably practicable. The third ground that the detention of the applicant is virtually on similar grounds as those previously declared unlawful and that the detention is punitive and tainted with malice and prejudice against the applicant. The fourth ground is that under Article 15 of the Constitution the court should release the applicant conditionally since he has not been tried in good time. I will deal with these arguments in the order which they have been argued I would like to refer to the provisions of Article 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, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is restricted or detained;

The grounds of detention were served on the applicant pursuant to Article 27 (1) as quoted above on 13th December, 1980. The ground read as follows:

> "Whereas on the 1st day of December, 1980, you were detainedby the Order of the President made on the same day namely 1st December, 1980, under Regulation 33 (1) of the Preservation of Public Security Regulations Cap. 106 of the Laws of Zambia;
> And whereas it is provided by Article 27 (1) (a) of the Constitution that every person detained shall, not more than fourteen days

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> after the commencement of his detention be furnished with a statement in writing specifying in detail the grounds upon which he is detained;
>
> Now therefore, you are hereby informed that the grounds upon which you are detained are:
>
> > (1) That on a date unknown but in or about the early part of April, 1980, you together with Messrs Jack Edward Shamwana and Goodwin Yoram Mumba attended an unlawful meeting at the residence of Mr Pierce Annfield situated in Kabulonga Area, Lusaka where Mr Pierce Annfield disclosed a plan to overthrow the lawfully constituted Government of the Republic of Zambia by force.

(2) That subsequent to the aforesaid meeting and on a date unknown but between the 1st day of April, and 31st day of May, 1980, you together with Messrs Goodwin Yoram Mumba, Edward Jack Shamwana, Anderson Mporokoso, Deogratias Syimba and other persons whose names are unknown attended an unlawful meeting chaired by Mr Pierce Annfield at the residence of Mr Edward Jack Shamwana situated in Kabulonga Area, Lusaka where yourself and other persons mentioned herein agreed to overthrow the lawfully constituted Government of the Republic of Zambia by force.

(3) That you failed to report the above meeting to the police or other lawful authorities.

Your aforesaid activities are prejudicial to the public security and there is genuine apprehension that if left at large, you will continue to persist in the said unlawful activities, and therefore, for the preservation of public security, it has been found necessary to detain you."

Counsel of the applicant Mr John Mwanakatwe has on the grounds submitted that those are vague. The detaining authority has failed to supply to the applicant with the statement in written specifying the grounds in detail. He has argued that in ground one and ground two there are two specific allegations namely that the applicant attended meetings. The detaining authority failed to particularise the dates of the meeting. Since the applicant was not given grounds of detention in detail the applicant is unable to make meaningful representation to the detaining authority or tribunal. The applicant is unable to explain the alibi since he has not been given specific dates. The learned defence counsel referred the court to the case of *Simon Kapwepwe and Kaenga* particularly to the expressions of Baron, J. P. as he then was. He also referred the court to the case of V*incent Namushi Munalula & Others v The Attorney-General*. I shall refer to these cases later in my judgment. He submitted that the grounds which were served on the applicant are vague and that the applicant cannot make any meaningful representation.

The learned Assistant Senior State Advocate Mr A.G. Kinariwala on vagueness of the grounds has argued that the law on vagueness has

been settled in Zambia. He referred the court to the case of *Kapwepwe and Kaenga*. He has admitted that as far as the State was concerned the grounds were not vague. The grounds give the applicant all the necessary information which he requires. I would like at this stage to refer to the case of *Simon Kapwepwe and Kaenga v The Attorney-General* (1). The Court of Appeal in the case of *Kapwepwe and Kaenga* discussed fully the law on vagueness of the grounds. Doyle, C. J., said at page 251 to 253:

"The first question which arises is whether this document complies with the requirement of the section to give grounds 'in detail'. Mr Annfield for the applicant argued that the dictionary meaning of a term 'in detail' meant an itemised set of grounds. He relied on the obiter dictum of Magnus, J., in *Chipango v Attorney- General* of Zambia (1970) S.J.Z. 179, that the grounds must be as particularised as they would have to be in a pleading in an ordinary action. He also relied on a number of Indian cases decided in relation to the Indian Preventive Detention Act. Under that Act where a preventive detention order was made the detaining authority was obliged 'to communicate to the detainee as soon as may be but not

> later than five days from the date of detention the grounds of the detention and to afford him the earliest opportunity to make a representation.' Under the Indian legislation a tribunal was set up to consider representations and if its decision was adverse to the order, its recommendation led to the mandatory vacation of the order. The Indian legislation differs from the Zambian both in its wording and in its effectiveness. The Indian courts have held that the meaning of the words 'to communicate to the detainee the grounds of the detention and to afford him the earliest opportunity to make a representation' is that the detainee must be given grounds which are sufficient to enable him to make an adequate representation to the detaining authority and tribunal. Grounds which are so vague as not to enable such representation do not comply with the section. Both counsel for the applicant and the Attorney-General agreed that the grounds given to a detainee under the Zambia Constitution must be sufficiently detailed to enable such a representation to be made. Clearly a ground which was so vague as not to permit such representation would not comply with the constitutional requirement.

In *State of Bombay v Atma Ram Vaidya* (2) Kania, C.J., delivering the majority judgment of this court had this to say:

> "What is meant by vague? Vague can be considered as the antonym of 'definite'. If the ground which is supplied is incapable of being understood or defined with sufficient certainty it can be called vague. It is not possible to state

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> affirmatively more on the question of what is vague. It must vary according to the circumstances of each case. It is however improper to contend that a ground is necessarily vague if the only answer of the detained person can be to deny it. That is a matter of detail which has to be examined in the light of the circumstance of each case. If on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention it cannot be called vague."

In Naresh Chandra v State of West Bengal referred to by Scott, J., in the court below the Supreme Court of India said at page 1335:

> " the grounds for making an order for detention . . are conclusions of facts and are not a complete recital of all the relevant facts."

and at page 1341:

> " Vagueness is a relative term. Its meaning must vary with the facts and circumstances of each case. What may be said to be vague in one case may not be so in another and it could not be 261 asserted as a general rule that a ground is necessarily vague if the only answer of the detained person can be to deny it. If the statement of facts is capable of being clearly understood and is sufficiently definite to enable the detained person to make his representation, it cannot be said that it is vague."

The West Indian case of *Herbert v Phillips and Sealey* (1967), 10 W.L.R. 435, is a case decided by the Court of Appeal of West Indies Associated States.

Section 15 (1) (a) of the St Christopher, Nevis and Anguilla Constitution Order, 1967, reads as follows:

> "15. (1) When a person is detained by virtue of any such law as is referred to in section 14 of this Constitution the following provisions shall apply, that is to say:
>
> (a) he shall, as soon as reasonably practicable and in any case not more than seven days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained;".

It can be seen that except for a variation in time the section is on all fours with the Zambian section 26A (1) (a).
A detention order had been made and the grounds of detention were given as follows:

> " That you Dr William v Herbert, on several occasions during the year 1967, both within and outside of the state, encouraged

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> certain residents in the stale and other persons to use unlawful, felonious and murderous means to overthrow the lawful government of Her Majesty in the state, and that you were concerned in armed rebellion against the said lawful government, thereby endangering the peace, public safety and public order of the state."

The case was decided on other grounds but A.M. Lewis, C. J., dealt with the point that these grounds were not in detail in the following terms:

> " At the hearing of this appeal learned counsel for the Crown readily conceded that the first ground, which alleges the encouraging of the residents and other persons to overthrow the state, is too vague to comply with the requirements of the section. He contended, however, that the allegation in the second ground that the detainee was concerned in armed rebellion against the lawful government of the state was sufficient. The fact of armed rebellion, he stated, was notorious."
>
> "The object of requiring a detainee to be furnished with a statement specifying in detail the grounds upon which he is detained is to enable him to make adequate representations to the independent and impartial tribunal which the same section of the Constitution requires to contain the evidence which has come to the knowledge of the Governor and which it may be against the public interest to disclose. But it must, in detailing the grounds for detention, furnish sufficient information to enable the detainee to know what is being alleged against him and to bring his mind to bear upon it. A ground which is vague, roving or exploratory is insufficient to enable a detainee to bring his own mind to bear upon any acts or words of his which may possibly have attracted the attention of the authorities and from which the Government has drawn conclusions adverse to him which satisfy the Governor that it is necessary to exercise control over him. Without such a ground an

innocent person would not know where to begin with the representation of his case to the tribunal."

In the same case Baron, J. P., at page 260 said:

"Section 26A stands in this context. The whole of subsection (1) is directed to providing machinery to enable a detainee to make representations to the detaining authority and to the tribunal established by regulation 33 (1) for the purpose of obtaining relief; it is to this end that 'grounds in detail' must be furnished. Such grounds must enable the detainee to make representations not only on the basis of mistaken identity, alibi, and the like but also on the merits; the detainee must be put in a position where he can dispute the truth of the allegations against him.This is not, however, to say that the allegations must be particularsed in the same way as criminal charges; the procedure of preventive detention is, a fortiori , different from criminal procedure, and

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there is no warrant for the proposition that the allegations must be made in similar manner. Grounds are not charges; they are the reasons for the detention."

In the case of *Vincent Namushi Munalula & Others v The Attorney General* S.C.Z. Judgment No. 2 of 1979 Silungwe,C. J., said at page 3:

"The question of vagueness has been discussed in several cases including Kapwepwe and Kaenga v The Attorney-General. There both Doyle, C. J, and Baron, D. C. J, cited the passage from the majority judgment delivered by Kania, C. J., in *State of Bombay v Atma Ram Vaidya*."

Clearly, how much detail must be given and what constitutes vagueness will depend upon the circumstances of each case. The Supreme Court of India aptly put it in this way in *Naresh Chandra v State of Rest Bengal* at page 1341:

"Vagueness is a relative term. Its meaning must vary with the facts and circumstances of each case. What may be said to be vague in one case may not be so in another and it could not be asserted as a general rule that a ground is necessarily vague if the only answer of the detained person can be to deny it. If the statement of facts is capable of being clearly understood and is sufficiently definite to enable the detained person to make his representation, it cannot be said that it is vague."

Mr Kinariwala has drawn the attention of the court to the grounds in the Kapwepwe and Kaenga's case. He has also drawn the court's attention to the grounds furnished in the case of V*incent Namushi Mulula and Others v The Attorney-General.* The grounds in *Kapwepwe's* case read as follows:

"That during the months of December, 1971, January and February, 1972, you and other members of the United Progressive Party conspired to engage in activities to endanger the

safety of persons and property in consequence of which inter alia resulted in M. Pachiliso, 26-12-71; Sinkala, 9-1-72; P.S. Chishimba, 11-1-72; S. Bwalya, 14-1-72; P. Chishima, 14-1-72; M. Mulimba, 14-1-72; L. Nkula, 18-1-72; A. Chikwanda, 20-1-72; V. Mulenga, 23-1-72; G. Mulongwa, 23-1-72; F. Bwalya, 23-1-72; L.Chishima, 23-1-72; E. Lubla, 30-1-72; P. Manyimba, 28-1-72; F. Mubanga, 1-2-72; A. Chifundwa, 31-1-72; G. Nyoni, 3-2-72 and F. Chisenga, 1-2-72; being assaulted and threatened with death; and the properties of J. Banda, 3-1-72; P. Mulenga, 4-1-72; J. Ngenda, 4-1-72; 40 C. Mwamba, 5-1-72; P. Banda, 4-1-72; B. Chunda, 4-1-72, J. Namukoko, 4-1-72; L. Mwamba, 13-1-72; C. Chipolabantu, 14-1-72; C. Chipasha, 14-1-72; J. Chibungo, 14-1-72; K. Mwamba, 15-1-72; G. Mukuba, 15-1-72; A. Welwina, 16-1-72; V. Chilekwa, 18-1-72; W. Zimba, 7-1-72; A. Ngosa, 19-1-72; being damaged or destroyed, which activities are prejudicial to the security of the Republic.

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2. That during the months of December, 1971, January and February, 1972, you and other members of the United Progressive Party conspired to be defiant of and disobedient to the law and lawful authority and to publish by word of mouth and by way of circulars, statements defamatory and contemptuous of the Head of State and the Government, conduct likely to prejudice the security of the Republic."

In *Munalula's* case the grounds were as follows:

"That between November, 1972, and January, 1973, you and several other persons did undergo military training by Portuguese and South African soldiers in Angola and South West Africa respectively, with the intention that after such training you would return to Zambia to engage in acts of sabotage and to overthrow by unlawful means the Government lawfully established."

Mr Kinariwala has argued that in respect of *Kaenga's* case a period of three months was stated. The two grounds in Kaenga's case read as follows:

"1. That between August, 1970, and 19th September, 1971, you and other persons conspired to publish circulars which were highly prejudicial to the security of the Republic in that the subversive circulars among other things claimed that duly elected members of the Government, including His Excellency the President were not Zambian nationals.

2. That between the aforementioned period you were actively engaged in organising the United Progressive Party in a manner designed to create tribal conflict in the country when you well knew that such activity was prejudicial to the security of the Republic."

In *Kapwepwe's* case, he has argued that the period was between December, 1971, and February, 1972, and Supreme Court did not find that period to be vague and in *Munalula's* case there was a period of three months and the Supreme Court did not find that period to be vague. From the decisions of the Supreme Court each case depends upon the circumstances of each particular case. Vagueness is a relative term. Its meaning must vary with the facts of the circumstances of each case.

As Silungwe, J., said in the *Munalula's* case:

> "Clearly how much detail must be given and what constitutes vagueness will depend upon the circumstances of each case."

Coming to whether the grounds which have been given to the applicant in this case are vague or not, the court must look at the facts of this case and its circumstances. From the decisions of the Supreme Court in the cases referred to above the detainee or the applicant must be given grounds in such a form as to enable him to make an adequate representation against his detention on such grounds. In the instant case, the applicant has been given three grounds. The first ground reads as follows:

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> "That on a date unknown, but in or about the early part of April, 1980, you together with Messrs Jack Edward Shamwana and Goodwin Yoram Mumba attended an unlawful meeting at the residence of Mr Pierce Annfield situated in Kabulonga Area, Lusaka, where Mr Pierce Annfield disclosed the plans to overthrow the lawfully constituted Government of the Republic of Zambia by force."

Mr Mwanakatwe has argued than the State should have given the applicant a specific date. He has argued it is not sufficient to mention "about the early part of April, 1980." In this ground the applicant has been told that in the early part of April, he attended a meeting with the people mentioned in that ground at Mr Annfield's residence in Kabulonga at which meeting Mr Annfield disclosed the plans of overthrowing the legally constituted Government of the Republic of Zambia by force. The applicant has been told the month in which this meeting is alleged to have taken place. The applicant has been told the people with whom he attended the meeting and where he attended the meeting and what was discussed or mentioned at the meeting. Can it be argued that the state had not supplied the applicant with sufficient information to enable him to know what was alleged against him so as to bring his mind to bear on it, there by placing him in a position to make a meaningful representation to the detaining authorities or to the tribunal. In my opinion the applicant has been given in that ground sufficient information to enable him to make meaningful representation. He has been given the month and the part of the month in which the meeting took place. He has been given the names of the people who attended the meeting with him. He has been given the place where the meeting took place and he has been told what was discussed at the meeting. What more information would he then require? I hold therefore that the detaining authorities as regards to the first ground have complied with the requirements of Article 27 (1) (a) of the Constitution. The second ground provides:

> "That subsequent to the aforesaid meeting on the date unknown but between the 1st day of April, and 31st of May, 1980, you together with Messrs Goodwin Yoram Mumba, Edward Shamwana, Anderson Mporokoso, Deogratias Syimba and other persons whose names are unknown attended an unlawful meeting chaired by Mr Pierce Annfield at the residence of Mr Edward Jack Shamwana situated in Kabulonga Area, Lusaka, where you yourself and other persons mentioned herein agreed to overthrow the lawfully constituted Government of the Republic of Zambia by force."

Mr Mwanakatwe has again argued that the information is not sufficient in the sense that the applicant has not been given the definite date when he attended the alleged meeting and as a result of not having that information, the applicant is unable to make any meaningful representation to the detaining authorities or to the tribunal. Mr Mwanakatwe has also argued that the applicant is a business man and that during that period in question he used to travel frequently to the Copperbelt on business ventures. In this ground the applicant has been told that between first of April and

31st May, 1980, together with the people mentioned in the ground, attended a meeting at Mr Shamwana's residence in Kabulonga. That meeting was chaired by Mr Annfield and they agreed to overthrow the Government of the Republic of Zambia by force. Could this be regarded as not supplying enough information to the applicant? He has been given the period when the meeting is alleged to have taken place i.e. the 1st of April and 31st of May. He has been given the names of the people who attended this meeting. He has been given the name of the person who chaired the meeting and the place where the meeting took place and what was agreed at the meeting. Is that not sufficient information to enable him to make meaningful representation to the detaining authorities or to the tribunal? In my view the information given in that ground is sufficient to enable him to make a meaningful representation to the detaining authorities or to the tribunal. I am therefore satisfied that the respondent did comply as regards that ground with the requirements of Article 27 (1) (a) of the Constitution.

The third ground provides:

> "That you failed to report the above meetings to the police or other lawful authorities."

What is vague about that? In my view it gave the applicant enough information to know what was being alleged against him as to enable the applicant to make a meaningful representation to the detaining authorities or to the tribunal. I will now turn to the second ground which was argued bar Mr Mwanakatwe on behalf of the applicant. Mr Mwanakatwe argued that the authorities failed to comply with the requirements of Article 27 (1) (a) in that they failed to serve the grounds of the detention on the applicant as soon as is reasonably practicable. It is not disputed that the applicant was detained on 1st December, 1980. The grounds of detention were served on him on 13th December, 1980. It is trite law that detaining authorities have got 14 days in which to serve the grounds of detention. On this matter the law is well settled see *Sharma v the Attorney-General* (1978) ZR p. 163. Although the detaining authority has complied with requirements of Article 27 (1) (a) of the Constitution I would like to urge the authorities not to make it a habit of waiting for eleventh hour in which to serve the grounds of detention. As Doyle,C.J., said in *Re James Cain* (1974) Z.R. at page 77:

> "If, therefore, the words under consideration mean that the mandatory period is "as soon as is reasonably practicable", section 27 (1) (a) has not been complied with. If they are to be so read, then the period of fourteen days is a limitation of the period of practicability. In other words, the phrase must read "as soon as is reasonably practicable and in any case not more than fourteen days after the commencement of the detention even if it is then still not practicable." I cannot conceive that this was the intention of the legislature and I agree with

learned counsel for the respondent that the words "as soon as is reasonably practicable" are intended to impart a sense of urgency but that the true time limit is the period of fourteen days

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It is indeed a pity that this injunction to urgency is so often disregarded. If it were adhered to many applications for writs of *habeas corpus* and other civil actions would not have come before courts."

In this particular case the applicant was first detained under police detention on 24th October, 1980. A few days later the applicant was detained under the Presidential Detention Order. The applicant challenged that detention. That detention was declared unlawful on the 26th November, 1980. The applicant was on the same day arrested and charged with the offence of treason. The applicant appeared in court on 1st December, 1980, and a nolle prosequi was entered by the State Advocate who appeared for the State. The applicant was discharged by the magistrates' Court. On 1st December, 1980, the day he appeared in court the applicant was detained under the Presidential Order which is the subject of this application. He was furnished with grounds of detention on 13th December, 1980. It is clear that the authorities did not adhere to the urgency. The applicant might have properly made representations to the detaining authorities before fourteen days elapsed as soon as he got the grounds for detention. As I have already stated above the period in which to serve grounds is fixed at fourteen days and when the grounds were served on the 13th December 1980, the detaining authorities were still within their fourteen days limit and therefore they complied with requirements of Article 27 (1) (a).

I would now turn to the question of *mala fides*. The learned defence counsel Mr J. Mwanakatwe has submitted that the present detention of the applicant is virtually on similar grounds with those which were served in respect of the first detention and which were declared vague by Bweupe, J. He has submitted that at the time the applicant was arrested and charged with treason mala fides and prejudice existed against the applicant. He based his submission on the case of *Eleftheriadis v The Attorney-General* (1975) Z.R. p. 69. Mr Mwanakatwe has further argued that the authorities have resorted to punitive measures.

Mr Kinariwala on behalf of the respondent has argued that Assistant Superintendent Simasiku asked the applicant to leave the court room through the back door and later informed him that the police officer was going to charge the applicant with an offence of treason, the Assistant Superintendent was merely doing what he as a police officer is empowered to do under the law. Mr Kinariwala argued that male fides should be directed against the detaining authority i.e., the President in order to render the detention unlawful. Mr Kinariwala has further argued that even if the court found that the police acted male fide it does not affect the detention in this case. On the proven facts the police could not be regarded to have been acting male fide. Mr Kinariwala has further submitted that after the applicant was arrested and charged with treason a warrant to remove the applicant from Ndola to Lusaka was obtained the same day from the Subordinate Court in Ndola. In Lusaka a warrant of commitment was obtined from the Subordinate Court. The applicant was then kept in remand until 1st December, 1980, when the applicant appeared before a Subordinate Court. A *nolle prosequi* was entered by the State Advocate on the directions of the Director of Public Prosecutions. Mr

Kinariwala has

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strongly argued that those actions by the police cannot be regarded mala fide. Mr Kinariwala has further argued that the allegations of male fides are alleged against the police and not against the President, the detaining authority. He has argued that the detaining authority in this case is the President and not the police. The applicant is detained under the Presidential Order issued under regulation 33 (1) of the Regulations. He has relied on the case of *Lawrence Joachim Joseph De Souza v State of Bombay*. (6).

As I have already stated above and it is accepted by the respondent that the police asked the applicant after Bweupe, J. had declared the applicant's detention unlawful to go outside through the back door. The applicant obliged. Outside the court room, the applicant was told that he was going to be arrested and to be charged with the offence of treason. I must point out here that it has not been argued on behalf of the applicant that the applicant's arrest for the offence of treason is being challenged as being unlawful. The complaint of the applicant is that at the time of the arrest outside the court building the police were acting mala fide. The applicant was taken to the Ndola Central police station where he was charged with treason. A warrant of removal was obtained on the same date, i.e. 26th November, 1980, and the applicant was brought to Lusaka. In Lusaka a warrant of commitment was again obtained from the subordinate court in Lusaka. The applicant was brought before the subordinate court and the charge was withdrawn by the State Advocate on instructions of the Director of Public Prosecutions. The applicant was then discharged. The applicant was then served with a detention order which is subject of this application. After the applicant got arrested and charged with treason, three distinct authorities got involved. The police arrested the applicant and charged him with treason. They applied for his removal from Ndola to Lusaka. In Lusaka the police applied for a warrant of commitment. The applicant was, brought before a subordinate court in Lusaka. The Director of Public Prosecutions dispatched his State Advocate and gave him instructions to withdraw the case. No reason was given by the State Advocate for withdrawal since the Director of Public Prosecution is not obliged to give any reasons for discontinuing proceedings against anybody. After the case had been withdrawn by the State, the applicant got detained under the Presidential Order. The Director of Public Prosecutions is empowered by the Constitution to discontinue any criminal proceedings whether there is sufficient evidence or not. The Director of Public Prosecution's exercise of his constitutional power should not imply that the police did not have sufficient evidence or that the police acted in bad faith. In the case of *Re Buitendag* (5), the question of *mala fides* was considered by Cullinan, J., as he then was. At page 161 Cullinan, J., said:

> "As Basu points out "the proper approach is to consider the facts of each case to determine whether the order was *mala fide*". Indeed the learned Chief Justice has observed that his dictum in the matter cannot be a general rule, though I find none the less that I place heavy reliance thereon. I have read the record of the applicant's trial. The onus of proving mala fides is upon the applicant. I am satisfied that it cannot be said that the applicant was shown so

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clearly to be innocent that his subsequent detention on the same grounds is reasonable. Indeed it seems to me that the following dictum of the learned Chief Justice could well be applied to this case, namely:

'It is common place for a person to be acquitted in circumstances which show that there is very strong suspicion that be committed the crime but the reasonable doubt remains."

I consider that such suspicion existed after the applicant's acquittal indeed suspicion, to use the words of the learned Judge President which someone charged with the security of the nation dare not ignore."

The decision in this case is not binding on this court, but it has a very strong persuasive value. According to Cullinan, J.'s view, the onus of proving mala fides is on the applicant. I entirely agree with Cullinan J.'s decision. I hold that the onus of proving *mala fides* is on the applicant. It has not been argued by the applicant that the police had no powers to arrest him after the applicant's detention had been declared unlawful. The police, in my view, were not precluded from arresting the applicant and charging him with treason after being released on orders of the Ndola High Court. In inviting the applicant to the police station and in arresting the applicant for treason the police were doing what is conferred upon them by law. The applicant was not brought before the subordinate court until Monday, 1st December, 1980. The applicant's detention was declared unlawful on Wednesday, 26th November, 1980. The applicant got arrested for treason on the same day in Ndola. The police got a removal warrant on the came date and was brought to Lusaka the same evening. A warrant of commitment was obtained and the applicant was remanded until Monday, the 1st of December, 1980. I agree there was some delay in bringing the applicant before a court of law. The law normally requires that a person must appear before a court of law within forty-eight hours. In this particular case, the applicant was arrested in Ndola, on 26th November, 1980. A warrant of removal was obtained. This was so presumably because the offence with which he was charged was committed outside Ndola District. The applicant had to be brought to the Subordinate Court which had jurisdiction. That was Lusaka. In Lusaka the police arrived after 1700 hours. The courts were no longer open. They got a commitment warrant from the Magistrate. The applicant was then remanded until Monday. Although there was some delay, that delay was not unreasonable and in any case the police did everything within their power to comply with the provisions of the Criminal Procedure Code in obtaining removal warrant and commitment warrant, I find therefore that the applicant has not proved that there was *mala fides* on the part of the police in arresting him with treason. The police were only carrying out their duties in good faith.

Mr J. Mwanakatwe has argued that the detaining authorities acted mala fide in detaining the applicant on virtually the same grounds as those in the first detention which was declared unlawful.

Bweupe, J.

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declared the first detention unlawful on the ground that the grounds were exploratory or roving and could not give the detainee an opportunity of making meaningful representation - see *Valentine Shula Musakanya v The Attorney-General* 1980/HN/728. The grounds in which the applied is being detained have been spelt out above. In the first detention which was, declared unlawful the grounds

are as follows:

> "Whereas on the 31st day of October, 1980 you were detained by the Order of the President made on the same day namely 31st October, 1980, under regulation 33(1) of the Preservation of Public Security Regulations;
> And whereas it is provided by Article 27(1) of the Constitution that every person detained shall, not more than fourteen days after the commencement of his detention be furnished with a statement in writing specifying in detail the grounds upon which he is detained.
> Now therefore, you are hereby informed that the grounds upon which you are detained are:

(1). That on a date unknown 1st day of March, 1980, and 6th day of October, 1980, you together with Messrs Goodwin Mumba, Edward Jack Shamwana, Anderson Mporokoso, Deogratias Syimba and other persons unknown, attended an unlawful meeting at the residence of Mr Edward Jack Shamwana situated in Kabulonga area, Lusaka where it was resolved to overthrow the lawfully constituted Government of the Republic of Zambia by force.

(2). That you failed to report the above meeting to the police or other security forces.
Your aforesaid activities are prejudicial to public security and there is a genuine apprehension that if left at large, you will continue to persist in these unlawful activities, and therefore, for the Preservation of Public Security, it has been found necessary to detain you.".

Ground one in the present detention speaks of the applicant attending a meeting in the early part of April, 1980, with Jack Edward Shamwana and Goodwin Mumba at the residence of Pierce Annifield where Mr Annifield disclosed a plan to overthrow the Government by force.

Ground 2 in this detention speaks of the applicant after the first meeting referred to in ground one again attended a meeting together with Messrs Mumba, Mporokoso, and Syimba and other persons, chaired by Mr Annifield at Mr Shamwana's home in Kabulonga where they agreed to overthrow the Government by force. The third ground is failure to report such meetings to the police. Ground one of the grounds under the first detention speaks of the applicant attending a meets held between 1st March and 6th October, 1980, at Shamwana's place. The meeting was also attended by Messrs Mumba, Shamwana, Mporokoso

and Syimba. In this ground there is a mention of Annifield. It can be seen that the first ground in the present grounds of detention talks of the meeting at Mr Annifield's place where Mr Annifield disclosed the plan to overthrow the Government. At that meeting Mr Deogratias Syimba was not present. It can be seen that this ground is very different from the ground in the first detention.

The second ground in this detention speaks of a meeting at Mr Shamwana's place which Syimba attended and was also attended by Mr Pierce Annifield. Pierce Annifield does not appear in the ground under the first detention. The meeting under second ground which Mr Annifield chaired may be different from the meeting referred to in the first ground under the first detention. It can

therefore be seen that the grounds the present detention are not the same as those in the first detention. As I have already said above, the onus of proving mala fides on the part of the President is on the applicant. In the case of *Lawrence Joachim Joseph De Souza v State of Bombay* (6), the question of mala fides was considered. The Court said at p. 386:

> "The appellant's counsel strongly urged that the bona fides of the detaining authority is to be judged with reference to the above background of events and that viewed in that light the vagueness of the grounds and the related claim of privilege under article 22(6) of the Constitution strengthen his contention. He also relied on what are urged as being certain discrepancies in the affidavits of the Under - Secretary and the Chief Secretary filed in the High Court in these proceedings. It is strongly urged that the order of detention was made without any real application of mind by the detaining authority, the authority acted merely at the instance of the police who were in league with the Goan Acting Committee, and that the police procured the detention order for the purpose of suppressing the freedom of the appellant, to ventilate his point of view on the Goan politics and to take up professionally the cause of persons in the positions of Carlos. We have been taken through all the material relating to the above allegations and have given our consideration to the same. It is enough to say that we are unable to see any reason for disagreeing with the conclusion of the High Court to the effect that the material is not enough to make out that the detaining authority was acting otherwise than bona fide. We also agree with the view of the High Court that, what has got to be made out is not the want of *bona fides* on the part of the police, but want of bona fides, as well as the *non-application* of mind, on the part of the detaining authority, *viz.* the Government, which for this purpose must be taken to be different from the police. It is also clear that the allegation of *non-application* of mind by the detaining authority is without any basis, in view of the affidavit of the Chief Secretary."

The decision in that case is not binding on this court, but it has very persuasive influence. In the instant case, I have found there was in mala fides on the part of the police. The police did act bona fide. Assuming I

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had found that there was mala fides on the part of the police, what effect would that have on the Presidential detention? According to the decision in *De Souza's* case, mala fides on the part of the police would not affect the detention order by the President. In this case the detaining authority is the President. According to the decision in *Kapwepwe and Kaenga's* case, the question of detaining a person is one purely for the President's subjective satisfaction. In this case I would follow the decision of the Supreme Court of India in *De Souza's* case. I hold that what got to be made out is not the want of bona fides - on the part of the police, but want of bona fides as well as the non-application of mind, on the part of the detains authority *viz*., the President, which for this purpose must be taken to be different from the police. The applicant has therefore to prove that there was a want of bona fides on the part of the President in detaining him. The applicant has not adduced or proved anything to show that the President acted mala fide. The contention that the President or detaining authority acted mala fide fails. I have found that the grounds are not the same as those in the first detention. The President is empowered by law to detain people for preservation of Public Security. It cannot be argued that in detaining the applicant the President was being punitive. In

accordance with the decision of the Supreme Court in *Eleftheriadis v The Attorney-General* (7), the court cannot question in any way the discretion of the detaining authority - if it is exercised within the power conferred. The President in this case had the power to detain and I cannot question his discretion. From the grounds of detention the State security was at stake. I find therefore that the detention of the applicant was not used as a punitive measure. A faint suggestion has been made in the course of the arguments before me that the State is acting with inconsistence by first appealing against the decision of Bweupe, in the first application by the applicant while at the same time they are keeping the applicant under the second detention.

I wish only to State briefly that the State has a legal right to appeal to the Supreme Court against a decision of the High Court if the State is dissatisfied with the decision of the High Court. I do not therefore agree that the State is acting with inconsistence in pursuing the appeal against the decision of Bweupe, J.

I now turn to the last ground. Sir Mwanakatwe has submitted that the applicant should be released under Article 15 (3) of the Constitution. Mr Mwanakatwe has argued that since the applicant has not been tried in good time, he must be released conditionally or unconditionally. Mr Kinariwala has submitted that the applicant should not be allowed to argue under Article 15 (3) since the application before this court was in a form of a writ of habeas corpus. I am aware that applications for redress under Article 29 of the Constitution should be commenced by an originating notice of motion. I considered this issue in the case of *Edward Jack Shamwana v Attorney-General* 1980/HP/1656. I allowed Mr Mwanakatwe to argue this applicant's point under Article 15(3) because this court was actually moved. The State has been asked to produce the body of the applicant before this court, which they have

done and have been asked to show cause why the applicant is being held. In other words, the applicant is seeking redress under Article 29 even by applying for a writ of habeas corpus ad subjiciendum. Omitting provisions and words not relevant to this case, Article 29 of the Constitution provides:

> "29 (1) Subject to provisions of clause (6), if any person alleges that any of the provisions of Articles 13 to 27 (inclusive) has been, is being or is likely to be contravened in relation to him, without prejudice to other action with respect to the same maker which is lawfully available, that person may apply to the High Court for redress.
>
> (2) The High Court shall have original jurisdiction :
>
> (b) to determine any question arising in the case of any person which is referred to it in pursuance of clause
>
> (3) and may, subject to the provisions of clause (8) make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the endorsement of any of the provisions of Articles 13 to 27 (inclusive)."

Clause (7) of Article 29 gives authority for the making of rules to regulate the practice and procedure in respect of proceedings under Article 29. I have been unable to see these rules. In their absence, High Court Rules Order VI Rule (3) applies which provides that:

"Any application to be made to the court in respect of which no special procedure has been provided by any law or by these Rules shall be commenced by an originating notice of motion."

In this case, I consider the matter as having been commenced by an originating notice of motion. I have therefore jurisdiction to hear arguments under Article 15 (3). The acts are simple. The applicant was first detained under Presidential order issued under regulation 33(1) of the Regulations.

On 26th November, 1980 Bweupe, J declared the detention unlawful. On the same day, the applicant was arrested and was charged with treason. He appeared before a subordinate court in Lusaka on first December, 1980. The Director of Public Prosecutions entered a *nolle prosqui* and the applicant was discharged. In the morning of that day the applicant was served with a detention order signed by the President under regulation 33(1) of the regulations subject of this application.

On 13th December, 1980, the applicant was served with the grounds of detention, which I have considered earlier on in my judgment. Section 15 (1) of the Constitution reads:

"No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say:

(a) In execution of the sentence or order of a court, whether established for Zambia or some other country in respect of criminal offence which he has been convicted;

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(b) in execution of the order of a court of record punishing him for contempt of that court or of a court inferior to it;

(c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;

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

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

(f) under the order of a court or with the consent of his parent, guardian, for his education or welfare during any period ending not later than the date when he attains the age of eighteen years;

(g) for the purpose of preventing the spread of an infectious or contagious disease;

(h) in the case of a person who is, or is reasonably suspected to be of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

(i) for the purpose of preventing the unlawful entry of that person into Zambia, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Zambia or for the purpose of restricting that person while he is being conveyed through Zambia in the course of his extradition or removal as a convicted prisoner from one country to another; or

(j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Zambia or prohibiting him from within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Zambia in which, in consequences of any such order, his presence would otherwise be lawful."

Mr Kinariwala has argued that the provisions of Article 15(3) do not apply to the applicant since the applicant is detained for the purposes of preserving public security. Article 15(3) of the Constitution provides:

"(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; or

(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

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as mentioned in paragraph (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."

From the grounds of detention, and the detention itself, the applicant is detained under Regulation 33(1) of the Regulations. From the facts before me, the applicant is being detained for the purposes of preserving public security. The facts on this point fall on all fours with the case of *Edward Jack Shamwana v The Attorney-General* 1980/HP/1656 which I dealt with. In that case, I found that Mr Shamwana was not being held or kept in confinement for the purposes listed in Article 15 of the Constitution but was being held for the purpose of preserving public security. In that case I came to the conclusion that the provisions of Article 15(3) did not apply to Mr Shamwana. In this case, I come to the same conclusion. The applicant is being held for the purpose of preserving public security. The provisions of Article 15(3) in my view do not apply to the applicant. The remedies are clearly spelt out in Article 27 of the Constitution. I would state here that my view persons detained under Regulation 33(1) of the regulations do not come under provisions of Article 15(3). If they did, then the whole purpose of exercising control over the movement of such persons would be defeated.

All the contentions which have been put forward in this application have failed. The application is therefore dismissed with costs.

Application dismissed
