AND THE PEOPLE - RESPONDENT (1984) Z.R. 38 (H.C.)

HIGH COURT
D.K. CHIRWA, J.
5TH AND 13TH NOVEMBER, 1984
(H.C. JUDGMENT NO. HNR4381984)

Flynote
Constitution - Act in conflict with constitution - Not endorsed with Speaker's certificate of required majority - Direct of.
Constitution - Amendment by implication - Impossibility of.
Corrupt Practices Act - Statement of accused to be on oath under s. 53 (1) Whether contravenes Article 20 of constitution.

Headnote
The applicant was standing trial in the subordinate court for an of fence under the Corrupt Practices Act. Section 53 (1) of the Act required that where such an accused elected to say something in his defence, he had to say it on oath only (thus excluding the option to malice an unsworn statement). The defence submitted that the provisions of the section referred to above were in contravention of Article 20 (7) of the Constitution.

The subordinate court referred the issue to the High Court for determination.

Held:
(i) There can be no implied amendment of the constitution.
(ii) An accused person charged under the Corrupt Practices Act cannot be compelled to give evidence on oath if he elects to make an unsworn statement.

Case cited:
(1) Bribery Commissioner v Ranasinghe, [1964] 2 All E.R. 785.

Legislation referred to:
Acts of Parliament Act, Cap. 16, ss. (3) (4) and 9 (c).
Prevention of Corruption Act, 1916 (UK)
Constitution of Zambia, Cap. 1, Arts. 20 (7) (12) 26, 29 (3) and 80.
Corrupt Practices Act, No. 14 of 1980, ss. 53 (1), 64 and 65
Criminal Procedure Code, Cap. 160, s. 207.

Authority referred to:
Judges Rules.

For the Applicant: M. Chitabo, of Mwanawasa and Company.
For the respondent: Mrs Nhekairo, State Advocate.

Judgment

D.K. CHIRWA, J:

This matter has been referred to the High Court for in opinion as to whether section 53 (1) of the Corrupt Practices Act, Act number 14 of 1980 contravenes Article 20 (7) of the Republican Constitution. The matter has been referred to this Court under Article 29 (3) of the Constitution.

At the hearing of this matter, Mr Chitabo for the applicant, submitted that the provisions of section 53 (1) of the Corrupt Practices Act contravene the provisions of Article 20 (7) of the Constitution in that the said section compels the accused, if he elects to say something in his defence to give evidence, whereas Article 20 (7) of the Constitution says that one, in a criminal matter, should not be compelled to give evidence. He submitted that since the section is in conflict with the Article of the Constitution, it should be declared null and void and unconstitutional.

On the other hand, Mrs Nhekairo, on behalf of the people submitted that section 53 (1) of the Corrupt Practices Act is not in conflict with the Constitution in that that section does not compel an accused to give evidence, his right to remain silent is still maintained; all the section says is that if he elects to say something he has to do so on oath.

The applicant is charged with corrupt practice by a public officer, contrary to section 25 (1) of the Corrupt Practices Act, which is an offence under part IV of the said Act.

Section 53 (1) of the Corrupt Practices Act reads as follows:

> "A accused person charged with an offence under part IV shall not, in his defence be allowed to snake an unsworn statement, but may give evidence on oath or affirmation from the witness box."

Article 20 (7) of the Constitution reads as follows:

> "No person who is tried for a criminal offence shall be compelled to give evidence at the trial."

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In considering this matter, one has to look at the Criminal law jurisprudence applicable in Zambia, or indeed any country that practises common law system. It has always been law that an accused person in a criminal trial has had the following choices: either to remain silent or say something. If he elects to say something, he has either to say it on oath (giving evidence) or say something by way of an unsworn statement. (See Section 207 of the Criminal Procedure Code and the Rule against self-incrimination as embodied in the caution in the Judges Rules).

In countries like Zambia where there is a written constitution, the Constitution is the supreme law, any other laws are made because the Constitution provides for their being made; and are therefore subject to it. It follows therefore that unless the Constitution is specifically amended, any Act that is

in contravention of the Constitution is null and void.

There is no doubt that the provisions of Section 53 (1) of the Corrupt Practices Act is in direct conflict with the provisions of Article 20 (7) of the Constitution. Under ordinary interpretation of statutes one would have said that the latest Act impliedly repealed or amended the old Act but there can be no implied amendment to the Constitution. The Constitution is sacrosanct and it cannot be amended by implication. To amend the Constitution certain requirements have to be met as provided for in Article 80 of the Constitution and a certificate has to be issued or inserted on the Bill as provided for under Section 5 (3) of the Acts of Parliament Act, Cap. 16. The Corrupt Practices Act does not in its own body purport to amend the Constitution. Section 64 of the Act amends the Penal Code and Section 65 ceases the application of the Prevention of Corruption Act, 1916 of the United Kingdom to Zambia. Section 53 (1) of the Act, therefore, is blatantly in conflict with Article 20 (7) of the Constitution. This conflict cannot even be resolved by reference to Article 20 (12) of the Constitution as sub-article (7) is not mentioned in that sub-article.Neither can it be resolved by reference to the general derogatory Article 26 as Article 20 is deliberately left out.

As I said that the Corrupt Practices Act itself does not purport to amend the Constitution. It was not argued by the State that when the Act was passed the bill carried the certificate of the Speaker or Deputy Speaker before the President assented to it, because in terms of Section 9 (c) of the Acts of Parliament Act the Act should have carried the certificate. Section 5(3), (4) of Acts of Parliament Act read as follows:

> "(3) Where a special Bill is passed in the National Assembly after having been supported on second and third readings by the votes of not less than two-thirds of all We members of the Assembly, the Speaker, or the Deputy Speaker if the Speaker is absent or otherwise unable to act shall, before the Bill is presented to the President for his assent, insert in the Bill in whatever form he considers appropriate a certificate that the Bill was passed after having been so supported.

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> (4) For the purposes of this section "special Bill" means a Bill for an Act which is required by the Constitution to be supported in the manner described in subsection (3) before it may be passed in the National Assembly."

And Section 9 (c) reads as follows:

> "9. Every Act shall be published by the Government Printer as soon as may be after the President's assent has been signified, and shall be so published:
>
> (c) where appropriate, with the inclusion of any certificate given in pursuance of the provisions of subsection (3) of section five."

The Corrupt Practices Act as published by the Government Printer does not contain this certificate, therefore the Act cannot be said to have amended the Constitution. In the case of *The Bribery Commissioner v Ranasinghe* [1964] 2 All. E.R. 785 the Privy Council had this to say per Lord Pearce at page 790:

"The Bribery Amendment Act, 1958, contained no section similar to s. 2 of the Act of 1954 nor did the bill bear a certificate of the Speaker. There is nothing to show that it was passed by the necessary two-thirds majority. If the presence of the certificate is conclusive in favour of such a majority, there is force in the argument that its absence is conclusive against such a majority. Moreover, where an Act involves a conflict with the Constitution, the certificate is a necessary part of the Act-making process and its existence must be made apparent. The fact that the 1958 bill did not have a certificate and was not passed by the necessary majority was not really disputed in the Supreme Court or before their lordships' Board, but it has been argued that the court, when faced with an official copy of an Act of Parliament, cannot enquire into any procedural matter and cannot now properly consider whether a certificate was endorsed on the bill. That argument seems to their lordships insubstantial, and it was rightly rejected by the Supreme Court. Once it is shown that an Act conflicts with a provision in the Constitution the certificate is an essential part of the legislative process. The court has a duty to see that the Constitution is not infringed and to preserve it inviolate. Unless therefore there is some very cogent reason for doing so, the court must not decline to open its eyes to the truth. Their lordships were informed by counsel that there were two duplicate original bills and that after the royal assent was added one original was filed in the registry where it was available to the court. It was therefore easy for the court, without seeking to invade the mysteries of Parliamentary practice, to ascertain that the bill was not endorsed with the Speaker's certificate."

Further down he says:

"When the Constitution lays down that the Speaker's certificate shall be conclusive for all purposes and shall not be questioned in

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any court of law, it is clearly intending that courts of law shall look to the certificate but shall look no further. The courts therefore have a duty to look for the certificate in order to ascertain whether the Constitution has been validly amended. Where the certificate is not apparent, there is lacking an essential part of the process necessary for amendment. The argument that by virtue of certain statutory provisions the subsequent reprint of an Act can validate an invalid Act cannot be sound. If Parliament could not make a bill valid by purporting to enact it, it certainly could not do so by reprinting it, however august the blessing that it gives to the reprint.Counsel for the Bribery Commissioner further contended that, since the original Bribery Act, 1954, had on it a certificate, any amendment of that Act was automatically franked and did not need a certificate. The effect of that argument would be that serious inroads into the Constitution could be made without the necessary majority provided that they were framed as amendments to some quite innocuous Act which had borne a certificate. No authority was cited on this point. Their lordships feel no doubt that every amendment of the Constitution, in whatever form it may be presented, needs a certificate under s.29 (4)."

I respectfully agree and adopt the views of the Privy Council. In the absence of the certificate from

the Speaker the Corrupt Practices Act was not passed with the required majority to amend the Constitution.

I do recognise that the Zambian Parliament is sovereign and can pass any law but it has to follow the laid down procedure in the instrument giving it power to legislate. I would again adopt the Privy Council in above quoted case at page 793:

> "The legislate power of the Ceylon Parliament is derived frontal s.18 and s.29 of its Constitution. Section 19 expressly says "Save as otherwise provided in sub-s. (4) of s. 29". Section 29 (1) is expressed to be "subject to the provisions of this order" and any power under s. 20 (4) is expressly subject to its proviso. Therefore in the case of amendment and repeal of the Constitution the Speaker's certificate is a necessary part of the legislative process and any bill which does not comply with the condition precedent of the proviso, is and remains, even though it received the royal assent, invalid and ultra vires. No question of sovereignty arises. A parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the constitution there is only a bare majority, if the constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of numbers does not limit the sovereign powers of parliament itself

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> which can always, whenever it chooses, pass the amendment with the requisite majority. . The case of Thambiayah v Kalasingham (14) is authority for the view that, where invalid parts of the statute which are ultra vires can be severed from the rest which is intra vires it is they alone which should be held invalid."

As the Constitution is supreme and above all the laws and as Section 53 (1) of the Corrupt Practices Act is in direct conflict with Article 20(7) of the Constitution, I have no hesitation in *declaring that Section* 53 (1) *of the Corrupt Practices Act is unconstitutional and therefore null and void and it should be severed from the Act.* An accused person in a criminal trial cannot be compelled to give evidence if he wants to say something in his defence.

Delivered at Ndola in open court this 13th day of November,1984.

Section 53 (1) of the Corrupt Practices Act declared unconstitutional, null and void.
