

**THE PEOPLE v FRED M'MEMBE, MASAUTSO PHIRI AND BRIGHT MWAPE (1997)
S.J. 63 (H.C.)**

HIGH COURT
CHITENGI, P, J.
22ND MAY, 1997.
1996//HP/38

Flynote

Publication of classified material -Edition 401 of The Post newspaper - Whether Edition 401 of The Post was a classified document

Headnote

The three accused were employees of The Post, an independent newspaper. In issue number 401 of the newspaper, the accused carried a story in which they revealed a devious plot by the government to hold a secret referendum on the proposed constitutional amendments. The story caused much uproar especially among government ranks and the President banned the paper that very day. Later in the day the three accused were arrested and charged under the State Security Act for publishing a classified document. In court, the defence made submissions of no case to answer.

Held:

- (i) For one to be held criminally liable the information received must be classified and that he must receive the information with knowledge or reasonable grounds to believe at the time when he receives the information that the same information has been communicated to him in contravention of the State Security Act.
- (ii) The matters to be classified for the purposes of the State Security Act must be those which the Legislature intended to be covered by the State Security Act.

For the People: Mr. Muchenga, State Advocate
For 1st Accused: In Person
For 2nd Accused: Mr. Sakwiba Sikota of Central Chambers
For 3rd Accused: Miss Kunda of Zambia Civic Education Association.

Judgment

CHITENGI, P.J.: delivered the judgment of the court.

This is a Ruling on a No Case to Answer Submission by the defence.

The Prosecution called five witnesses and placed before the court a lot of evidence to support the alleged offence. But reduced to a narrow compass, for the purpose of this ruling, the sum and substance of the prosecution case amount to simply this. On the 5th February, 1996 the Post, a newspaper for which the three accused work, produced its No. 401 Edition. That day was a Monday. The front page carried an arresting headline entitled "REFERENDUM SET FOR MARCH" Though D/Inspector Wakwinji denied it, the import of the evidence of the other witnesses points to the view that at the material time there was debate going on in the country regarding proposed Constitutional Amendments. On the evidence before me it is difficult to

say what the general public's reaction to the article in the Post was. In Government circles it appears the article caused considerable disquiet and the reaction was dramatic. The 401 Edition was banned that day. The Police swung into action. The police ringed the Offices of the Post and put them on surveillance from morning of that day until about later that day when the accused were spotted at the Post Offices in Kanjombe House. From that time there appears to have been heavy police presence at the Post Offices. Armed with a search warrant, the police searched The Post Offices in Kanjombe House and Chandwe Musonda Road from 18:00 hours to 03:00 hours or 04:00 hours the following day looking for Edition No. 401 of The Post. The nine or ten hours period taken suggest that the search was thorough. The search yielded nothing in the office of Fred M'membe (Accused one) and Masautso Phiri (Accused two). In Bright Mwape's (Accused three) Office the document Programme of work on Constitutional Reform Activities (Ex P1) was found under a table calendar. The document Ex P1 was not and is not marked secret. The document Ex P1 contains nothing more than what its title suggests and the projected costs for the activities to be undertaken in the Provinces.

The search at Chandwe Musonda Road Offices yielded only 12 copies of the allegedly offending 401 Edition of the Post found in the Office of one Bright Mwape. Although the Editor 401 was the offending document the police were looking for Bright Mwape was not arrested and no explanation was given for this non arrest. May be the reason was, D/Sgt Ulayi said in his evidence, the whole operation was a ploy to arrest the three accused whether or not they found something with them.

After the searches the accused were taken to the police Headquarters where they were later arrested for the subject offence. The basis for the accused's arrest appears to be that they are either owners or senior staff of the Post and that the information contained in Ex P1 found in Bright Mwape's Office came from document Ex P3 which is a classified document.

The first accused made no submission of no case to answer. By agreement with Miss Kunda, Mr. Sikota made a submission on behalf of the second and third accused. In fact Mr. Sikota's submission covered all the accused.

It was Mr. Sikota's Submission that the ingredients of the charge have not been proved. The Document (Ex P1) found with the accused is not classified. Nothing was found with accused one and two. The police arrested accused one and two simply because they are senior officers of the paper. The police could as well have charged the directors. Although Ex P1 is similar to pages one to four of Ex P3, Ex P1 and Ex P3 are not one and the same document. It was Mr. Sikota's submission that this case was badly investigated and urged the court to dismiss the charges and acquit the accused.

Mr. Muchenga, the learned State Advocate submitted that a prima facie case has been made out against the accused. It was Mr. Muchenga's submission that the charge is not one of receiving document but one of receiving information. Mr. Muchenga submitted that the issue is not whether Ex P1 is the same with the appendix to the Cabinet Memorandum (Ex.P3) but whether Ex.P1 contains information contained in the Cabinet Memorandum, which is the same except for minor variation. The cabinet handbook (Ex.P4) is not law. It is merely an administrative guide. Failure to comply with the provisions of Ex.P4 does not mean that the document was not classified. It was Mr. Muchenga's submission that Ex.P3 being one document the whole document was classified.

Mr. Sikota's reply to this was that according to the evidence only the blue pages are classified. Failure to comply with the provisions of the handbook (Ex.P4) negates due notice to the public. There is no evidence to show that somebody receiving Ex.P1 would know that it is a classified information.

I have carefully considered the evidence so far placed before the court and the submissions of counsel.

The accused are charged with an offence under section 4 (3) of the State Security Act Cap. 110 of the Laws of Zambia. Leaving out what is not necessary, section 4 (3) aforesaid provides thus: "Any person who receives Any information knowing or having reasonable grounds to believe at the time when he receives it that the same information has been communicated to him in contravention of the Provisions of this Act shall be guilty of an offence".

Section 2 (1) of the Act aforesaid defines "Classified matter" as to mean any information or thing declared to be classified by an authorised officer.

It can be seen from the provisions quoted above that for one to be held criminally liable the information received must be classified and that he must receive the information with knowledge or reasonable grounds to believe at the time when he receives the information that the same information has been communicated to him in contravention of the State Security Act.

The question that has nagged my mind is whether for the purpose of the State Security Act anything classified by the authorised officer becomes a State Security matter. For instance, if the authorised officer classified a document containing government proposals to build another International Airport at Kabwe as secret, would that kind of classification come with the ambit of the State Security Act?

On proper construction of State Security Act it seems to me that not everything classified by the authorised officer necessarily becomes a classified matter under the State Security Act. The matters to be classified for the purposes of the State Security Act must be those which the Legislature intended to be covered by the State Security Act.

The preamble to the State Security Act clearly reveals the mischief the legislature intended stop by passing this Act. The preamble reads:

"An Act to make better provisions relating to State Security, to deal with espionage, sabotage and other activities prejudicial to the interests of the State; and to provide for purposes incidental to or connected therewith."

Clearly the State Security Act is intended to deal with serious matters like espionage and sabotage. And applying the ejusdem generis rule of interpretation the other activities referred to must be activities akin to espionage and sabotage. They must be activities that tend to subvert the interests of the The heavy penalties prescribed for these offences and the provision to deny accused bail indicate that the conduct aimed at must be very harmful to the interests of the State. Indeed in the NIKUV case SCZ/8/75/96 the Supreme Court was held, for instance that it was wrong to classify a contract for the registration of voters as secret because transparency required that it be not.

I now deal with how the accused are supposed to be linked to this offence.

There is no evidence whatever that the first accused, Fred M'membe received the information in question. The first accused appears to have been linked to the alleged offence by the reason that he is the owner or one of the senior staff of the Post, as it was put by the prosecution witnesses, particularly Deputy Inspector Wakwinki (W5P).

The second accused, Masautso Phiri, has also not been proved to have received the information complained of. He too like the first accused Fred M'membe, is linked to this offence because is a senior member of staff the Post.

The third accused, Bright Mwape, is linked to this offence because the document Ex P1 was found under a table calendar on his desk. When read with appendix 1 to Ex P3 it is clear that the information in Ex P1 is substantially the same with that in appendix 1 to Ex P3 which marked "secret". The burden of the article in The Post "REFERENDUM SET FOR MARCH", leaving out value judgement statements by the authors and commentators, is the same as that of Ex P1. It can not, therefore, be seriously contended that the information in Ex P1 did not come from appendix 1 to Ex P3.

Counsel submitted and argued whether Ex P3 as a whole is a classified document, the appendix 1 not being marked secret at the top and bottom as required by the guidelines in the handbook (Ex P4). I think in deciding this issue one has to be practical. Whether Ex P3 as a whole is a classified document or not is in my view a question of fact. What impression would one have about Ex P3 if one found it dropped on his table in the form and manner it appears? There can be no doubt that one would take the whole document as a secret document. Be that as it may, other than show how senior civil servant like an Assistant Secretary can be slovenly in handling matters which the government considers important, the document Ex P3 does not have a critical hearing on this case. Ex P3 was not found with any of the accused. There is no evidence that the place where Ex P3 was kept broken into and perhaps the accused or any one of them photostated the document Ex P3. In fact the document Ex P1 is hand written and who ever gave it to accused three must be one of those who were attending the meetings and preparing the drafts. This leak brings into sharp focus, the frightening indiscipline among some civil servants charged with the handling of matters the government considers sensitive.

There being no other evidence to suggest that the accused received the information from another source other than the document Ex P1, I find that the source of the information that appears in the allegedly offending article in the Post is only Ex P1.

For the purpose of this ruling I proceed on the premises that the three accused saw document Ex P1 from which the information that appeared in the allegedly offending article in The Post came.

However, the fact that the accused saw Ex P1 does not make them criminally liable. Except in cases of strict liability, which this case is not one of such cases, the basis for criminal liability is still the Maxim Actus non facit reum mens sit rea. An act alone does not make a man guilty unless it is accompanied by guilty mind. In this case the offence with which the accused are charged requires mens rea. The accused must either know or have reasonable ground to believe that the document or information is classified. Ex P1 bore no indication whatever that it could be a secret document. Neither could the contents of the document make the accused have reasonable grounds to believe that the document Ex P1 could be secret. The subject matter of Ex P1 and the article is a Referendum. Referendum are the known lawful ways or asking the general citizen to decide by plebiscite certain contentious issues which the government does not want to decide on its own. The Zambian Constitution contains provisions for Referendum. In any case a Referendum is nothing more than an election and there can be no secret about an election in these days of transparency, the revelation of which should invite the stiff penalties under the State Security Act. I think it would surprise many and eveninstincts to hear that in Zambia three nosey journalists have been imprisoned for 20 years for prematurely announcing government intentions to hold a Referendum to decide a thorny Constitutional issue. In fact the announcement shorn of the political statements it contains, and which political statements are no concern of this court, would boost the image of the government locally and abroad. Such announcement has nothing to do with the security of

the state. I venture to say that while Ex P3 could bear some classification for the purposes of security of Cabinet documents it may not, by reason of its contents, be brought within the ambit of the State Security Act. The revelation of the contents of Ex P3 can not subvert the interests of State. In fact reading through Ex P3 one finds that it contains nothing new and secret but matters that were publically discussed during the constitutional reform debates, which matters are common knowledge and which I take judicial notice. The document Ex P3 contains no matter which if it fell into the hands of the enemy or the general public would imperil or prejudice the interest of the State.

If anything what the Post Editors, who are the accused, did was an embarrassment to Government. They announced the Referendum proposals before the Government decided to or not to conduct a Referendum.

For the reasons I have given above I rule that the accused have no case to answer. The essential ingredient of knowledge or reasonable ground for belief that the information is covered by the State Security Act have not been proved. It has not been proved that the contents of the document Ex P1 or indeed also those of Ex P3 are matters of State Security. Accordingly, I dismiss the charges against the accused. Each accused is acquitted and should be set at liberty.

Charges dismissed, accused acquitted.
