

THE PEOPLE v IAN KAINDA

High Court
Mushabati, J.
16th February, 2000
HLR/01/2000

Flynote

*Criminal Law - Charge - wrong section cited - Effect of.
Criminal Law - Corporal Punishment - Propriety of.*

Headnote

The accused was found guilty of conduct likely to cause a breach of peace contrary to Section 178(f) of the Penal Code on his own confession and admission of facts by the Subordinate Court of the Third Class for the Livingstone District. He was convicted accordingly. The matter was subsequently referred to the High Court.

Held:

The accused was charged under a wrong Section and Corporal punishment contravenes the provisions of Article 15 of the Constitution of Zambia.

Legislation referred to:

1. Constitution of Zambia Cap 1 Article 15.
2. Penal Code Cap 87 s. 27, 178 and 179.
3. Zambia Police Act Cap 107 s.60 (1).

Case referred to:

1. *Banda v The People* HPA/06/1998.

There was no appearance for the parties because it was a judgment on review.

Judgment

MUSHABATI, J, delivered judgment of the court.

The accused was found guilty of conduct likely to cause a breach of peace contrary to Section 178(f) of the Penal Code on his own confession and admission of facts by the Subordinate Court of the Third Class for the Livingstone District. He was convicted accordingly.

He was sentenced to four strokes of the cane. The matter was referred to me in view of the recent High Court ruling on corporal punishment vis-à-vis the provisions of Article 15 of the Constitution of Zambia, Cap 1. This Article reads: *A person shall not be subjected to torture, or to inhuman or degrading punishment or other like*

treatment.

This Article was discussed in full by Chulu, J in the case of *Banda v The People (1)*. Corporal punishment was ruled as contravening the provisions of the above Article of the Constitution. In order to maintain precedents, the courts must bear in mind that judgments of superior courts bind on all inferior courts. I have nothing new to add to the judgment of my learned brother except to make available a copy of this judgment to the trial magistrate.

On perusal of the record I found two other serious errors committed by the trial court. The first one is that the accused was charged under a wrong section. Section 178 of the Penal Code deals with people deemed to be idle and disorderly. So a person who conducts himself in a manner likely to cause a breach of peace as per Section 178(f) of the Penal Code is deemed to be an idle and disorderly person. The proper Section under which the charge against the accused ought to have been framed is Section 179 of the Penal Code. This Section reads:- Every person who uses insulting language or otherwise conducts himself in a manner likely to give such provocation to any person as to cause such person to break the public peace or to commit any offence against the person, is liable to imprisonment for three months or to a fine not exceeding four hundred and fifty penalty units or to both.

In any case, the accused was alleged to have misbehaved himself in a Police Post. So perhaps he ought to have been charged under Section 60(1) of the Zambia Police Act, Cap 107. This Section reads:- Any person who, in any court, police station, police office or any lock-up is guilty of any riotous, indecent, disorderly or insulting behaviour shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five hundred penalty units or to imprisonment for a period not exceeding three months or to both.

The second error was the imposition of corporal punishment on an adult aged above 21 years. The Penal Code empowers (though now overruled by the High Court as being ultra vires the provisions of Article 15 of the Constitution of Zambia) to impose corporal punishment under Section 27 if the accused is below the age of 21 years. The accused is above the same age of 21 years. Corporal punishment could only be imposed in addition to some custodial punishment.

The Section (though a wrong one), under which the accused was charged imposes a maximum custodial sentence of one month imprisonment. So under Section 27(2) of the Penal Code he could not be liable to corporal punishment.

The 1st Schedule to the Penal Code at page 138 lists the offences upon which a court (if it were not for the recent ruling on corporal punishment) could impose corporal punishment against an accused. The offence under Section 178 of the Penal Code is not one of those listed offences. The magistrate acted ultra vires the law. The sentence imposed by the magistrate was not only null and void on the ground that it was in contravention of an order by a superior court but it was again null and void because it was imposed outside the law. The magistrate acted without jurisdiction. In light of what I have said above, the accused was first and foremost tried and convicted of an offence not supported by any provisions of the law. Secondly, the sentence imposed by the trial magistrate was outside his jurisdiction as it had no backing of the law. In passing, I wish to state that the High Court judgment which declared Sections 24 and 27 of the Penal Code as contravening Article 15 of the Constitution of Zambia basically overrules Section 73(1)(e) of the Juveniles Act, Cap 53. The accused has been in custody since his arrest on 25th January 2000. So I feel had he been properly convicted the period he has spent in prison would have been enough punishment. I do not therefore propose to order a retrial. I am instead

setting aside the conviction and the sentence is quashed. The accused is instead acquitted and I order for his release from custody.

Judgment on review.