R. v. NELSON SIAME alias PETER KAFWIMBE.

CRIMINAL APPEAL CASE NO. 1 OF 1938.

Deportation order must contain a specific command.

Deportation Order recited the recommendation made by the Magistrate but did not contain any order setting out the time for which the accused had to be kept in the Isoka District, held that the order was invalid.

As to the final paragraph of the following judgment see *R. v. Labson Jesa* 1 N.R.L.R. 120.

Francis, C.J.: This is a case stated by the Resident Magistrate, Ndola, sitting at Luanshya, at the request of the Crown Counsel, Ndola, acting under the directions of the Attorney-General. At the hearing Mr. Mills appeared on behalf of the Attorney-General, while the respondent was not represented.

The facts briefly are as follows:

On the 28th November, 1938, one Nelson Siame alias Kafwimbe (the respondent) was charged before the Magistrate for that he on or about the 23rd November, 1938, without the consent of the Governor did leave the area to which he had been deported by order of the Governor issued under the authority of section 35 (3) of the Penal Code, while such order was still in force. There was in evidence the original warrant of deportation under the hand of the Governor's Deputy, dated the 17th September, 1936.

This warrant recited—

(*a*) that the respondent was on the 2nd July, 1936, convicted before the Resident Magistrate, Ndola, of the offence of leaving the district to which he had been deported while an order of deportation was still in force and was sentenced to two months imprisonment with hard labour;

(*b*) that the Magistrate recommended upon expiration of the said sentence that the respondent be deported to the Isoka District for three years; and

(*c*) that such recommendation had been approved by the High Court.

After these recitals, the operative clause followed:

"You (the Commissioner of Police) are hereby commanded to take the said (respondent) and deport him to Chief Kafwimbe's village in the District of Isoka."

At the close of his case, the Public Prosecutor submitted that the warrant was evidence that the deportation of the respondent had been ordered for the period recommended by the convicting court.

The Magistrate was of opinion however that mere recitals, not followed by a distinct command defining precisely the period of deportation, did not constitute evidence that the Governor's Deputy had ordered the respondent to be deported for a period of three years. He held, therefore that the warrant was invalid and in consequence there was no evidence that the order of deportation was still in force. The accused was thereupon found " Not Guilty " and discharged.

The question now submitted is whether the warrant was evidence that the Governor's Deputy had ordered the respondent to be deported for the period of three years as recommended.

In arriving at his conclusion, the Magistrate had before him a Revisional Order by this Court in *Rex* v. *Kalemba Shendo*, Choma Case 50/1938, dated 27th May, 1938, in which the very point now in issue was decided. I am informed by the Registry that a copy of this order was, in the usual course of business, transmitted to the Attorney-General, and in these circumstances it is difficult to understand why it has been sought on his behalf to re-open the question in this manner. In the light of the proviso to section 314, Criminal Procedure Code, the Magistrate no doubt considered himself bound to comply with a request purporting to come from the Attorney-General.

Now it is quite definitely settled that a warrant is the sole authority to a police constable or gaoler, and for that reason it is most necessary that it should be precise in its commands; and following this requirement, it is elementary that after the recitals of the conviction and adjudication, every properly drawn warrant of commitment proceeds with the specific command that the keeper of the prison do receive the defendant into his custody and keep him to hard labour for the period corresponding with that recited in the adjudication. There are decisions in *Rex* v. *Smith*, 94 E.R. 403 and in *In re* Peerless 113 E.R., p. 1089, indicating the importance which the courts attribute to regularity in such a matter. In this connexion it is interesting to note two examples locally in which this principle is illustrated. Firstly, the form of the Governor's warrant which was used under the Punishments Ordinance (Cap. 10) now repealed by the Penal Code; and secondly the particularity with which the Governor's Commission to his Deputy defines the limits of powers previously recited. There can be no doubt that the warrant in question is incomplete, and in an attempt to overcome the result flowing from defective drafting, it did not impress me to hear the submission made on behalf of the Attorney-General that the Governor would, as a matter of course, follow the recommendation of the convicting court. But the Governor is not bound to do so, the wording of the law permits him a discretion. In any event it would be following correct practice in such matters to state definitely on the face of the warrant, for the information of all concerned, that the Governor has in fact approved the recommendation of the courts. In my view the learned Magistrate came to a proper decision on the point of law submitted.

I am left wondering whether the question of the application to the Magistrate ever came personally before the Attorney-General. There is a suggestion, but nothing precise, in the record, that his power under

Criminal Procedure Code, section 314 had been invoked in setting this appeal in motion. Confirmatory of this is the fact that certain conditions precedent attached to alternative procedure under section 313 have not been discharged. Now as the power referred to appears not to be one subject to delegation under section 77, would I be going too far to assume that the Attorney-General did indeed give directions? If he did so, then I imagine that the importance attached by him to a re-opening of a point of law long ago decided by the High Court might well have been indicated by the appearance of one of the two Law Officers of the Crown before the Court in support of the appeal. In the circumstances of this case I consider that such an appearance was a courtesy due to my Court.

It is noticeable that in the phraseology of sections 34 and 35 Penal Code which deal with deportation within the Territory, the expression "Order" is used throughout, and it is only in the very last line that the expression "warrant" ("fresh warrant") appears. A warrant in the sense of a warrant of arrest, is a precept which more usually issues from a court of law. The expression does not normally describe an act of the Executive. For example, in all cases where the Home Secretary sanctions deportation, the written authority upon which action is taken is referred to as an Order of Deportation, and that is the same expression used seven times in the two relative sections of the Code. It is difficult, therefore, to understand why the Law Department Form is headed and drafted as a "Warrant" instead of an "Order". This departure from usual practice leads to confusion amongst the magistracy, particularly in view of the intrusion of the expression "fresh warrant" at the conclusion of section 35 (3).