THE ATTORNEY-GENERAL v VALENTINE SHULA MUSAKANYA (1981) Z.R. 1 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER, AG. D.C.J., AND CULLINAN, J.S.
8TH SEPTEMBER AND 8TH OCTOBER, 1981
(S.C.Z. JUDGMENT NO. 17 OF 1981)

Flynote

Constitutional law - Detention - Grounds for detention - Detainee furnished with grounds after thirteen days - Meaning of "as soon as is reasonably practicable" and "in any case not more than fourteen days" under Art. 27 (1) (a) of the Constitution.
Constitutional law - Detention - Grounds for detention - Vagueness - When grounds are vague - Test to be applied.
Constitutional law - Grounds for detention - Vagueness and alibi - Distinguished.
Costs - Application for costs - General principle of law.

Headnote

The respondent was detained in October, 1980, under reg. 33 (1) of the Preservation of Public Security Regulations, Cap. 106. His application for habeas corpus ad subjiciendurn succeeded in the High Court on the ground that the grounds for detention furnished to the respondent were vague, roving and exploratory. The Attorney-General appealed against the decision of the High Court on the question of whether a ground for detention can be said to be vague merely because of a failure to state in it a specific date on which the detainee allegedly participated in activities prejudicial to the public security. The respondent cross appealed on the sole ground that the detaining authority did not comply with the Constitutional requirements of Art. 27 (1) (a) in that the grounds for his detention were not furnished to him immediately at the tinge of his detention.

Held:

(i) The fundamental object intended to be secured by para. (a) of 30 clause (1) of Art. 27 is to provide a machinery for enabling a detained or restricted person to know as soon as possible but not later than fourteen days the reasons for his detention or restriction.

(ii) The expression in any case not more than fourteen days' represents the maximum, mandatory period within which detainee or restricted must be furnished with grounds for his detention or restriction, as the case may be.

(iii) Whenever an allegation of vagueness in a ground for detention is made, the test is whether a detainee has been furnished with sufficient information to enable him to know what is alleged against him so that he can bring his mind to bear upon it and to enable him to snake a meaningful representation to the detaining authority or the Detainee's Tribunal.

(iv) Only a period of time as opposed to a specific date or dates would enable the detainee to make representations on the basis of alibi or mistaken identity and also on the merits.

(v) Grounds are not necessarily vague merely because the absence of a specific date therein precludes a detainee from putting forward a particular alibi. The concept of alibi is a matter which is essentially separate and distinct from that of vagueness; its aspect is relative not to the length of period stated in the grounds but to the detainees movements during the period stated.

(vi) Where the detaining authority is aware of a specific date on which a detainee is alleged to have participated in activities prejudicial to public security, it is duty bound to specify the date. There is nevertheless no diminution in the detaining authority's duty to satisfy Art. 27 (1) (a) of the Constitution by providing adequate information to enable a detainee to make a meaningful representation.

(vii) The general principle of law is that costs should follow the event.

Cases referred to:

(1) In Re Kapwepwe and Kaenga (1972) Z.R. 248.
(2) Munalula & Ors. v The Attorney-General (1979) Z.R. 154.
(3) Chisata & Lombe v The Attorney-General (1981) Z.R. 35.
(4) Herbert v Phillips & Sealey, (1967) 10 W.I.R. 435.
(5) In Re Thomas James Cain (1974) Z.R. 71.

Legislation referred to:

Constitution of Zambia, Cap. 1, Art. 27 (1) (a).

For the appellant: A-G Kinariwala, Senior State Advocate.
For the respondent: In person.

Judgment

SILUNGWE, C.J.: This is an appeal by the Attorney-General against the decision of the High Court in respect of which the respondent succeeded in his application for habeas corpus ad subjiciendum and was subsequently discharged from detention.

The respondent was detained on October 31st, 1980, under reg. 33 (1) of the Preservation of Public Security Regulations, Cap. 106. Thirteen days later he was furnished with the following grounds for his detention:

"l. That on a date unknown but between 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.' "

During the course of hearing the application in the court below, Mr Puta submitted, inter alia, that the grounds for the respondent's detention were vague. The learned trial judge upheld that submission saying.:

> "Although the persons the applicant is alleged to have conspired with have been named and the offence spelt out the particular date on which the meeting took place and the nature of force to be applied for the commission of that alleged treason have not been spelt out. This offence is alleged to have been planned this year."

He then held that the grounds furnished to the respondent were vague, roving and exploratory and on that ground alone the application was allowed.

Fundamentally, the Attorney-General's appeal hinges on the question whether a ground for detention can be said to be vague merely because of a failure to state in it a specific date on which the detainee allegedly participated in activities prejudicial to public security. Mr Kinariwala argues, on behalf of the appellant, that although failure to specify a date in a ground may in some cases have the effect of depriving a detainee of the opportunity to put forward an alibi, it does not in itself constitute vagueness in a ground.

In *Re Kapwepwe and Kaenga* (1), followed by *Munalula and Six Others v The Attorney-General*, (2), this court laid down the test to be applied whenever an allegation of vagueness in a ground for detention is made. The test is whether a detainee has been furnished with sufficient information to enable him to know That is alleged against him so that he can bring his mind to bear upon it and so enable him to make a meaningful representation to the detaining authority or the Detainees' Tribunal. An illustration which is entirely in point here was given by Baron, D.C.J., as he then was, in *Re Kapwepwe 444 and Kaenga,* (1) concerning the application of the foregoing test. He said at p. 262 lines 29-44, that :

> ". . . if the grounds were -
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> > ' . . . that during the months of January and February, 1972, you addressed meetings in Lusaka at which you advocated the use of violence against persons of different political or tribal affiliations . .'
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> this would enable the detainee to make representations on the basis of alibi or mistaken identity and also on the merits. For

p4

> instance, he could say 'I have never addressed meetings in that place' or 'During the months in question I was engaged in course of study in Dar- es -Salaam' . . .
> Or the detainee night say 'It is true that I addressed meetings in Lusaka during the months in question, but I deny that I advocated violence of any kind'. This representation is no more than a denial, but the information given cannot be held to be inadequate only for that reason."

Another way of looking at the illustration without in any way altering its meaning is this:

> ". . . that on dates unknown but between 1st January and 29th February, 1972, you addressed meetings in Lusaka at which you advocated the use of violence against . . ."

This formulation is similar to the first ground for detention in the present case. One thing that immediately strikes one's eye is that only a period of time, as opposed to a. specific date (or dates), is given in the illustration. And yet it is apparent that the information contained therein would, in the words of Baron, D.C.J., "enable the detainee to make representations on the basis of alibi or mistaken identity and also on the merits". That is to say, the information supplied would be adequate to enable a detainee to make a meaningful representation. In regard to alibi, however, it is evident that a. detainee would encounter obvious difficulties, unless the alibi is capable of covering the entire period rejected in the ground. In other words, the aspect of alibi is relative: that is, relative not to the length of period stated in the grounds, but to the detainee's movements during the period stated. In one case, a detainee might well be able to put forward an alibi in respect of a period f one year, and in another, detainee might be unable to provide an alibi in respect of one day.

In my new, the concept of alibi is a netter which is essentially separate and distinct from that of vagueness, and it is capable of succeeding even where, for instance, a ground is free from vagueness or the question of vagueness is simply immaterial or does not arise. A good example is to be found in *Chisata and Lombe v The Attorney-General*, (3), where the appellants (who had been given specific dates in their respective grounds) succeeded on the uncontroverted evidence of alibi. As against that, grounds which do not provide a specific date are not necessarily vague. Conversely, grounds which do give a specific date might well be vague.

What all this comes to is that alibi is not synonymous with, or analogous to, vagueness. It, therefore, fellows that grounds are not necessarily vague merely because the absence of a specific date therein precludes a detainee from putting forward a particular alibi. Obviously, where the detaining authority is aware of a specific date on which detainee is alleged to have participated in activities prejudicial to public security, it is duty-bound to specify the date. Where, however, such a date is not known to the detaining authority, then there is, of course, no requirement to give a specific date. There is nevertheless no diminution,

in the detaining authority's duty to satisfy requirement of Art. 27 (1) (a) of the Constitution by providing adequate information to enable a detainee to make a meaningful representation.

It is trite that a criminal charge which alleges in its particulars that the offence charged was committed on a date unknown, but during a certain specified period, is a perfectly valid charge, even though the accused person may or may not be deprived of the opportunity to put forward an alibi in respect of the particular period. It would then, of course, be the duty of the prosecution to prove the commission of the offence during the particular period. In the case of detention, as Baron, D.C.J., observed in *Re Kapwepwe and Kaenpa*, (1), at p. 263, the evidence on the basis of which the grounds were framed, would he advanced at the hearing before the Tribunal. It is, of course, true to

say that the detainee would have some twelve months to wait for such evidence to be advanced, while an accused person would not face such a delay. Nonetheless, an absence of a specific date in the grounds for detention cannot, per se, render the grounds vague, just as in the case of a criminal charge.

There can be no doubt that the learned trial judge erred in holding that failure to give a specific date in a ground for detention constitutes vagueness. This then disposes of the fundamental issue raised by the appellant.

It remains for me to consider the second issue which seeks to at tribute vagueness to a failure in "spelling out" the nature of force that was to be used in the commission of the alleged treason.

It will be seen that the first ground for detention refers to the passing of a resolution for the overthrow, by force, of the lawfully constituted Government of the Republic. There is no indication, either in the ground itself, or in the affidavit evidence, that the nature of force to be used in the implementation of the said resolution was ever discussed at the meeting. The trial court's assumption that such a discussion took place was, therefore, erroneous. But even if it were to be assumed, for the sake of argument, that the nature of force to be applied had been discussed at the meeting, it is difficult to see how, given the circumstances of this case, a failure to specify it in the grounds would, per se, constitute vagueness.

It was in any event a misdirection to hold that the first ground was rendered vague because of failure to specify in it the nature of force that was to be used for the purpose of overthrowing the Government of the Republic. The misdirection could, I am sure, leave been avoided had the learned trial judge addressed his mind to the fact that grounds are reasons which, in the words of Lewis, C.J., in the West Indian case of Herbert v Phillips and Sealey, (4), at page 425, are "not required to contain the evidence". Baron, D.C.J., put it in thus Re Kapwepme and Kaenga, (1), at p. 263, lines 6-13:

> "No doubt when the matter comes before the tribunal, the evidence on the basis of which the detaining authority reach its

p6

> conclusion will be presented, and at that stage the detainee will have more particularised information to which to offer specific replies than is contained in the statement of grounds; but it must be stressed that the grounds are reasons, not detailed statements of the facts or the evidence, and the grounds cannot be said to be insufficiently detailed simply because they do not recite the words the detainee is alleged to have used."

Whenever vagueness is alleged in a ground for detention, the yardstick is always whether or not the test, to which reference has already been made, is satisfied.

In this case, the appellant is said to leave attended an unlawful meeting between March 1st and October 6th, 1980, at the residence of Mr Edward Jack Shamwana in Kabulonga, Lusaka, together with four named persons as well as other persons unknown, and that at that meeting, it was resolved

to overthrow, by force, the lawfully constituted Government of the Republic of Zambia. There is given here information about the holding of an unlawful meeting the purpose of which being to plan for the overthrow, by force, of the Government of the Republic; the venue of the meeting is specified; and names are given of some of the persons present at the meeting. In these circumstances, it seems untenable to me to say that the grounds furnished to the respondent were vague, roving and exploratory. In my opinion, those grounds contained adequate information to enable the respondent to know what was alleged against him so that he could bring his mind to bear upon it and so enable him to make a meaningful representaton.

I would allow the appeal by the Attorney-General.

Mr Musakanya has cross-appealed on the sole ground that the detaining authority did not comply with the constitutional requirements of Art. 27 (1) (a) in that the grounds for his detention were not furnished to him immediately, that is, at the time of his detention. He argues that the words in Art. 27 (1) (a) "as soon as is reasonably practicable" mean immediately, unless the magnitude and intricate nature of the allegations, or the detention of a large number of persons, or both, make this impracticable, in which event, grounds must be served not later than fourteen days after the detention or restriction.

Mr Kinariwala's position is that the expression "as soon as is reasonably practicable" should be interpreted to mean that the grounds must be served on a detained person as soon as they are available but that in any case, such grounds must be served within the maximum statutory period of fourteen days front the commencement of the detention.

As far as I am aware, this is the first occasion on which the point arises crisply for decision in this court. Article 27 (1) (a) of the Constitution reads, in part, as follows:

> "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:
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> p7
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> (a) he shall, as soon as is reasonably practicable and in any case not more then fourteen days after the commencement of his detention or restriction, be furnished with a statement writing . . ."

Taking the above quotation as a hole, it is clear that the fundamental object intended to be secured by para. (a) of cl. (1) is to provide a machinery for enabling a detained or restricted person to know as soon as possible, but not later than fourteen days, the reasons for his detention or restriction.

I would regard the expression "as soon as is reasonably practicable and in any case not more than fourteen days ..." as failing into two parts, namely, (a) "as soon as is reasonably practicable"; and (b) "m any case not more train fourteen days".

As to (a), my understanding of it is that it does not constitute a mandatory period; it serves as an injunction to urgency. In the High Court case of In *Re Thomas James Cain*, (5), Doyle, C.J.,

considered, at p. 77, the meaning of the words "as soon as is reasonably practicable" and came to the conclusion that those words "are intended to impart sense of urgency but that the true limit is the period of fourteen days." With that conclusion I am in full agreement.

With regard to (b), it clearly represents the maximum, that is, the mandatory, period within which a detainee or restrictee must be furnished with grounds for his detention or restriction, as the case may be I would dismiss the respondent's cross-appeal.

The appellant has also appealed against the costs which were awarded to the respondent in the court below. Mr Kinariwala says that there is no dispute as to the general principle of law that costs should follow the event. Mr Kinariwala contends, however, that in this case, the respondent challenged his detention on five grounds, but that he succeeded on one only and failed on the rest of them, including one which related to a constitutional issue of general importance and which had not been raised in our courts before. In the circumstances, therefore, it was, in his submission, only fair that the learned trial judge should have ordered each party to bear his own costs. Or Kinariwala's submission is obviously misconceived because the award of costs in the High Court was made on the basis that the respondent had succeeded in his application, albeit one one ground only and that it was, therefore, perfectly proper for him to be awarded the costs. However, in view of the fact that the lower courts' ecision has now been upset, I consider that justice will be served in this case by directing the parties to bear their respective costs both here and in the court below.

Judgment
GARDNER, AG. D.C.J.: I concur with the judgment of the learned Chief Justice.

Judgment
CULLINAN, J.S.: I also concur.

Appeal allowed
