GODFREY MIYANDA v THE ATTORNEY-GENERAL (1983) Z.R. 78 (S.C.)

SUPREME COURT
SILUNGWE ,C.J., NGULUBE, D.C.J., AND GARDNER, J.S.
7TH SEPTEMBER AND 30TH NOVEMBER, 1983
(S.C.Z. JUDGMENT NO. 22 OF 1983)
APPEAL NO. 2 OF 1982

Flynote
Criminal law and Procedure - Arrest - Foreign country - Repatriation to Zambia - legality of court proceedings.
Constitutional law - Extradition - No law or statutory order providing for - Effect of.
Courts - Jurisdiction - Improper extradition of fugitive - Rights of Zambian courts over him.
Constitutional law - Detention - Delegation of function to furnish grounds - Secretary to the Cabinet - Legality of.

Headnote
The appellant was arrested in Zaire by Zambian security forces and brought back to Zambia to stand trial for treason, pending which he was detained. He sued for habeas corpus.

Held:
(i) If person arrested abroad and brought before this country charged with an offence which is within the court's jurisdiction, then the court cannot dismiss the matter without a hearing, for it is irrelevant whether he was arrested against the laws of the foreign country unless there was something irregular or improper in the arrest.
(ii) Where there no extradition machinery in existence, the government is entitled to procure, and if it does so procure, a mutual agreement with the foreign government for the repatriation of the fugitive, there is nothing improper, unlawful or unconstitutional about the resultant repatriation.
(iii) If the person repatriated is within the competent jurisdiction of a court, the court can hear his case notwithstanding the circumstances in which he may have been brought into its jurisdiction.

(iv) There is no power specifically requiring the President to personally furnish a detained person with grounds for his detention i.e. as an aspect of executive power the Secretary to the Cabinet, being subordinate to the President may exercise it by virtue of his post.

Cases cited:
(1) R. v O/C Depot Battalion, R.A.S.C., Colchester.; Ex. parte Elliott; [1949] 1 All E.R. 373.
(2) Ex. parte Scott, (1829) 9 B.& C .446.
(3) Sinclair v H. M .Advocate (1890) 17 R. (Ct. Sess.) 38.
(4) Edward Liso Mungoni v Attorney General of Northern Rhodesia [1960] A.C. 336.

Legislation referred to:
Extradition Act, Cap. 161.
Constitution of Zambia, Cap. 1, Arts 27 (1) (a), 53 (1).
Preservation of Public Security Regulations, Cap. 106 reg. 33 (1).
Statutory Instrument No. 88 of 1983.
Extradition and Fugitive Offenders Act, Cap. 162.
Emergency Powers Regulations, Cap. 108, regs. 16 (1), 47.

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

Judgment
SILUNGWE, C.J.: delivered the judgment of the court.

On or about October 29, 1980, the appellant, who was being sought by Zambia Police and other security officers for having allegedly taken part in an attempted coup d'etat here, took refuge in the neighbouring Republic of Zaire. However, on May 22, 1981, he was taken into custody in Zaire by the Zambian security officers and immediately flown to Lusaka, Zambia, where he was then served with Presidential detention order, pursuant to Regulation 33 (1) of the Preservation of Public Security Regulations, and was, in terms of Article 27 (1) (a) of the Republican Constitution, served with grounds for his detention.

Within about two months of his detention, the appellant moved the High Court for writ of *habeas corpus* but his application was unsuccessful. He then appealed to this Court for redress. However, before the appeal could be heard, the detention order was revoked (following his acquittal on a charge of treason).

Notwithstanding, the revocation of the detention order, the appellant was desirous to prosecute his appeal. But most of his grounds of appeal had then become merely of academic interest, regard being had to the fact that the remedy sought had already been secured, and the issues raised in those grounds had been the subject of previous decisions of the court. In the event, the appellant was allowed to argue two grounds, both of

which were considered to be of public interest and, above all, they had not previously been decided by the court. The essence of these grounds is as follows:

1. That the purported extradition of the appellant from Zaire was illegal, unlawful and unconstitutional, and that, consequently, his detention in Zambia was equally illegal, unlawful and unconstitutional and, therefore, of no legal effect; and

2. That the purported grounds for detention furnished to him by the Secretary to the Cabinet were null and void because, although the detaining authority is entitled to delegate its powers under the Preservation of Public Security Act, no such delegation was ever made to

the Secretary to the Cabinet.

At the commencement of the hearing of the appeal, the appellant made it known that the first ground was his principal ground of appeal For the sake of convenience, this ground will be subdivided into three parts: (a) the appellant's arrest in Zaire; (b) his repatriation to Zambia; and (c) his detention in Zambia.

The first part of the subdivision consists of a subsidiary issue The appellant argued that, prior to his improper extradition to Zambia, he had been the victim of an unlawful and unconstitutional arrest, in Zaire, by the Zambia Police, as they were devoid of jurisdiction in that country. He went further than that: he alleged that he had in fact been kidnapped by the Zambia Police. It is rather astonishing that the appellant should have made the allegation of having been kidnapped, in the face of clear affidavit evidence to the contrary, strongly complemented by his warn and caution statement which he himself had placed before the court below, by way of an exhibit. On that evidence, it is undeniable that, on or about October 29, 1980, the appellant was held in custody by the Zairean security forces in whose custody he remained until May 22, 1981, when they drove him to their airforce base at Nsele and there handed him over to the Zambian security personnel, who then flew him to Zambia. On these facts, it would be preposterous to persist in the allegation that the appellant had been kidnapped by the Zambian security officers, for nothing can be further from the truth.

Now comes the further allegation that the Zambian security personnel had no jurisdiction to arrest the appellant, and that, as such, everything that followed from such an arrest was itself unlawful and unconstitutional. We are here persuaded by the ratio decidendi in the English case of *R v O/C Deport Battalion, R.A.S.C.*, Colchester. *Ex parte Elliott*, (1), where the applicant, a private in the Royal Army Service Corps, on failing to report under his orders of recall, was arrested at Antwerp by British officers, accompanied by two Belgian police officers. Having been detained for two days in police station at Antwerp, he was escorted to British Army quarters in Germany, and thence to England where he was charged with desertion and detained without a court martial being convened. He applied for writ of *habeas corpus*. Lord Goddard, C.J., delivering the judgment of the court, had this to say, at page 376, letters E-H:

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> "On the applicant's behalf two points have been taken. It is said that his arrest was illegal because (i) the British authorities had no authority to arrest him in Belgium and he was arrested contrary to Belgian law, and (ii) his arrest was not in compliance with the provisions of s.154 of the Army Act. The point with regard to the arrest in Belgium is entirely false. If a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country: 'I was arrested contrary to the laws of the State of A or the State of B where I was actually arrested.' He is in custody before the court which has jurisdiction to try him. What is it suggested that the court can do? The court cannot dismiss the charge at once without its being heard. He is charged with an offence against English laws, the law applicable to the case. If he has been arrested in foreign county and detained improperly from the time that he was first arrested until the time he

> lands in this country, he may have a remedy against the persons who arrested and detained him, but that does not entitle him to be discharged, though it may influence the court if they think there was something irregular or improper in the arrest."

In adopting the foregoing reasoning, we wish to observe that, in the present case, the appellant was flown to Zambia immediately on being handed over to the Zambian security officers, and that there was nothing irregular or improper in the appellant's arrest. Hence, the argument that the appellant's arrest was unlawful and unconstitutional, for the alleged lack of jurisdiction, is unacceptable.

This brings us to a consideration of the second part of the subdivision. This is obviously the kernel of the first ground of appeal. The issue here is whether the appellant's repatriation from Zaire to Zambia was unlawful and unconstitutional? The appellant's submission was in the affirmative. He contended that what had transpired amounted to no more than an informal hand over by the Zairean authorities to the Zambian authorities, for which no provision existed in our extradition laws. He drew our attention to the Extradition Act, Cap. 161 of the Laws and submitted that the respondent had failed to comply with extradition formalities as set out in that Act.

Having examined our extradition laws, and, in particular, Cap.161, we are of the view that the Act is inapplicable to this case because although paragraphs A and C of Part II of the Act pertain to extradition to Zambia from foreign countries, no statutory order appears to have been made by the President under section 3 of the Act, so as to make the Act operational, in relation to Zaire. Further, the Extradition and Fugitive Offenders Act, Cap. 162 (which was operational at the material time, but which now stands repealed, with effect from June 17, 1983, pursuant to section 67 of the Extradition Act, as read with Statutory Instrument No.

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88 of 1983), is equally inapplicable here because, section 3 of the Act, which is the only operative section, merely relates to extradition from Zambia.

In the final analysis, therefore, it was not feasible for the Zambian Government to set in motion an extradition machinery which was non-existent. In the circumstances, they were entitled to procure, and did in fact procure mutual agreement with the Zairean Government for the appellant's repatriation to Zambia. The agreement was an act of two sovereign states and, given the circumstances of this case, we do not see anything improper, unlawful or unconstitutional, as regards the resultant repatriation of the appellant, in so far as the Zambian Government is concerned.

In any event, whether a case involves an application for *habeas corpus*, as here, or a criminal charge, the critical factor is always one whether an applicant or accused, as the case may be, who has been delivered to this country, is within the competent jurisdiction of a court. Once he is, the court can hear his case, notwithstanding the circumstances in which he may have been brought into its jurisdiction. *Ex parte Scott* (2), referred to in *R. v O/C Depot Battalion, R.A.S.C. Colchester,* (1) is a case in point. Indeed, this latter case is on all fours with the case now before us, to the extent that there, as here, the applicant was arrested in a foreign country and administratively or informally returned to his country. Citing the Scottish case of *Sinclair v H.M. Advocate,* (3), Lord Goddard,

C.J., said at page 377 (omitting parts not here material):

> "There a person was brought before the Court of Justiciary who had been arrested in Portugal. The Lord Justice - Clerk (LORD MACDONALD), who gave the judgment, said (17 R. (Ot. Sess.) 41):
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> > 'It is said that the government of Portugal did something wrong, and that the authorities in this country are not to be entitled to obtain any advantage from this alleged wrong doing.... What we have here is that a person has been delivered to a properly authorised officer of this country, and is now to be tried on charge of embezzlement in this Country. He is therefore properly before the court of a competent jurisdiction on a proper warrant. I do not think we can go behind this... "

Lord Goddard, C.J., then went to say, on the same page:

> "LORD M'LAREN put the matter extremely shortly and clearly in a judgment in which he said
> (ibid. 45):
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> > 'With regard to the competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state which surrenders him. Each country has its own ideas and its own rules in such matters. Generally it is done under treaty arrangements, but if a state refuses

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> > to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and we have neither title nor interest to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody.'
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> > That, again, is perfectly clear and unambiguous statement of the law administered in Scotland. It shows that the law of both countries is exactly the same on this point and that we have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here . . . "

We would agree with the reasoning contained in the preceding passages and conclude that there was, in this case, no impropriety in the repatriation of the appellant to Zambia.

The third part of the appellant's first ground of appeal was based on the premises that, as his arrest in Zaire and extradition to Zambia were both unlawful and unconstitutional, his subsequent detention was, therefore, null and void. In view of our decision that there was no impropriety attaching to either of these events, as against the police, this aspect of the ground cannot be sustained.

Finally, we are to consider the second and final ground of appeal, which is that, the purported grounds for detention, furnished to the appellant by the Secretary to the Cabinet, were null and void

because, although the detaining authority was entitled to delegate its powers under the Preservation of Public Security Act, no such delegation had ever been made to the Secretary to the Cabinet. He sought to draw a parallel between this case and that of *Edward Liso Mungoni v Attorney-General of Northern Rhodesia,* (4). The point at issue there was this: to what extent, if any, could the Governor of Northern Rhodesia (now Zambia), delegate his functions in respect of detention orders to Provincial Commissioner? The authority to make detention orders was given by Regulation 16 (1) of the Emergency Powers Regulations, 1956, of Northern Rhodesia in these terms:

> "16. (1) Whenever the Governor is satisfied that for the purpose of maintaining public order it is necessary to exercise control over any person, he may make an order (hereinafter called a detention order) against such person directing that such person be detained, and thereupon that person shall be arrested and detained."

And, by Regulation 47 of the said Regulation, the Governor was given the following authority to delegate:

> "47. The Governor may, by writing under his hand, and either generally or specially, depute any person or persons, either by name or by office, to exercise all or any of the powers conferred upon by the Governor by these Regulations, . . . "

The Acting Governor, having by instrument delegated " all the power" conferred upon him by Regulation 47, aforesaid, to the Provincial Commissioner for the Western Province (now the Copperbelt Province), the latter, in purported pursuance of Regulations 16 (1) and 47, made an order for the appellant's detention.

In an action for damages for wrongful arrest and detention, it was argued, on behalf of the appellant, that Regulation 16 (1) contained a *duty* and also a *power.* The *duty* conferred upon the Governor was to be "satisfied" that it was necessary to exercise control over any person. The *power* was to make an order directing that such person be detained. It was further argued that, the effect of Regulation 47 was to authorise the Governor to delegate his *power* to make an order, but did not authorise him to delegate his *duty* to be "satisfied". In other words, the authority of the Governor to delegate applied only to powers and not to duties. He was bound to fulfil this duty personally. As the duty was not so fulfilled, the order for detention was said to be invalid.

The High Court found in favour of the appellant and awarded him damages in the sum of £25. That decision was, however, reversed by the Federal Supreme Court of Rhodesia and Nyasaland. On appeal to the Judicial Committee of the Privy Council, their Lordships were of the view that (*see* page 350);

> "The power and the duty under regulation 16 (l) are so interwoven that it is not possible to split the one from the other-so as to put the duty on one person and the power in another. Whosoever exercises the power, it must be he who has to carry out the duty. It seems clear to their Lordships that, if the Governor has any authority at all to delegate his functions under regulation 16 (1) he must be able to delegate both the power end duty together on one

> and the same person. He cannot delegate the power to another and keep the duty to himself. Even this did not daunt Mr Mallalieu. He said that if the power cannot be split from the duty, then it means that the Governor cannot delegate his duty under it to anyone.
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> It seems to their Lordships that the arguments for the appellant proceed on this fallacy : they assume that the duty under regulation 16 (1) is something separate and distinct from the power therein contained. Their Lordships cannot accept this view. In their opinion regulation 16 (1) contains not so much a duty, but rather a power coupled with duty. The power of the Governor to make detention order can only be exercised when he is 'satisfied' that it is necessary. The requirement that he is to be satisfied-though in one sense a duty-is nevertheless also a condition or limitation on the exercise of the power. And when regulation 47 authorises the Governor to delegate the power to any person, it authorises him to delegate to such person the fulfilment of all the conditions and limitations attaching to it, even though they be also duties. . ."

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For these reasons, their Lordship were of the opinion that the detention order was valid and agreed to advice that the appeal be dismissed.

It is noted that the present regulations 33 (1) and 27 of the Preservation of Public Security Regulations are similar to regulations 16 (1) and 47 of the Emergency Powers Regulation, respectively.

This case is distinguishable from Mungoni, (4), because, here, both the duty to be "satisfied" and the power to "detain" were not delegated to anybody else-they were exercised by the President. Unlike in 1960 when Mungoni, (4), was decided, we do now have Republican Constitution, Article 27 (1) (a) of which makes provision for the furnishing to a detained person of grounds for detention. Clearly, powers of delegation contained in Regulation 27 of the Preservation of Public Security Regulations cannot conceivably have any bearing upon Article 27, as the Constitution is superior to the Preservation of Public Security Act under which that regulation is made.

In any case, Article 27 (1) (a) of the Constitution provides that:

> "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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> > (a) he shall, as soon as is reasonably practicable and in any case not more than fourteen days after the commencement of his detention or restriction, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is restricted or detained."

Here, there is no power specifically requiring the President to personally furnish a detained person with grounds for his detention. The Article simply says that a detained person shall be furnished with such grounds the emphasis being on the detained person being furnished with grounds, not on who should so furnish the grounds. It seems to us, therefore, that grounds for detention may validly

be furnished by the President, if he so wishes, or by the Secretary to the Cabinet, as was the case here. Indeed, Article 53 (1) of the Constitution says that:

> "53. (1) The executive power of the Republic shall vest in the President and, subject to the provisions of this Constitution, shall be exercised by him either directly or through officers subordinate to him."

In our opinion, the furnishing of grounds for detention constitutes an aspect of executive power and, as such, the Secretary to the Cabinet, being subordinate to the President, may exercise it by virtue of his post. Of course, it is not every subordinate to the President that will qualify for the purpose of Article 53 (1) of the Constitution; much will depend upon the seniority of the portfolio held and the nature of duties attaching thereto. The category of subordinates would, for instance, include such officials as any Deputy Secretary to the Cabinet; the Principal Private

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Secretary to the President; and the Permanent Secretary in the Ministry of Legal Affairs. We would hasten to caution that this category is not exhaustive.

It is thus inevitable that the second ground of appeal should also fail.

For all these reasons, we hold that the appellant's detention was valid and that the appeal should accordingly be dismissed.

As the appellant appealed on a certificate as a poor person there will be no order as to costs.

Appeal dismissed