ATTORNEY -GENERAL v MILLION JUMA (1984) Z.R. 1 (S.C.)

SUPREME COURT
SILUNGWE, C.J., NGULUBE, D.C.J. AND GARDNER, J.S.,
14TH SEPTEMBER, 1982 AND 3RD OCTOBER, 1984
(S.C.Z. JUDGMENT NO. 14 OF 1984)

Flynote
Constitutional Law - Detention - Grounds of detention - Language which a detainee understands - Whether requirement mandatory or directory.

Headnote
The respondent was detained and served with the grounds of his detention written in the English language, language he could neither read nor understand. The grounds were explained to him in a vernacular language which he was able to understand. The respondent was granted a writ of habeas corpus by the High Court on the ground that the constitutional provision requiring that the grounds for detention be written in a language that the detainee understood was mandatory. The Attorney-General appealed.

Held:
The constitutional provision requiring the grounds of detention to be written in a language which a detainee understands is directory and failure to comply with it is a defect which may be remedied.

Cases cited:
(1) Barnes v Jargons (1953) 1 All E.R. 1061.
(2) Molu Butchery Ltd. v The People (1978) Z.R. 339.
(3) Yorkshire Insurance Company v Clayton (1881) 8 Q.B.D. 421.
(4) Geofrey Chakota and Others v A.G. (1980) Z.R. 10.
(5) A.G. v Chipango (1971) Z.R. 1.
(6) Poke v Clarke (1953) 2 All E.R. 704.
(7) Barker v Palmer (1818) 8 Q.B.D. 9.

Works referred to:
1. Basu's Commentary on the Constitution of India, (5th Edn), Vol. 1. pp 59 and 60.
2. Craies on Statute Law, 7th Edn, p. 65.
3. Halsbury's Laws of England, 3rd Edn, Vol. 36, para. 533

For the appellant: F. Mwiinga, Senior State Advocate.
For the respondent: P. L. Mwanawasa, Mwanawasa and Company.

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

This is an appeal by the Attorney-General from a judgment of the High Court in which the respondent's application for a writ of habeas corpus ad subjiciendum was granted on account of what the court held to be the appellant's non-compliance with the provisions of Article 27 (1) (a) of the Constitution. Consequently, the respondent was forthwith discharged from detention.

The respondent was detained on October 4th, 1978, under regulation 33 (1) of the Preservation of Public Security Regulations, Cap. 106. Nine days later, he was served with a detailed statement in writing containing grounds for his detention. The statement was expressed in the English language. It was there alleged that the respondent, being a member of the notorious Mushala gang, had participated in the commission of homicide, arson and malicious damage to property. It is common ground that when the respondent was furnished with the statement, the grounds therein were " fully explained " to him in the Kaonde language by a Superintendent of Prison and that the statement, which is exhibit R2, bears a certificate to that effect.

On November 19th, 1979, the respondent swore his first affidavit before a Commissioner for Oaths. This was a detailed affidavit, consisting of four typed pages, expressed in the English language. On January 18th, 1980, he swore another affidavit in which he stated that the statement of his grounds for detention had been written in the English language, a language he could neither read nor understand. The affidavit was certified by a Commissioner for Oaths to have been interpreted to the deponent in Bemba, a language he understood.

It is contended by Mr Mwiinga, on behalf of the appellant, that the Superintendent's explanation of the grounds to the respondent constituted compliance with Article 27 (1) (a) of the Constitution. The provisions of that Article read 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:
>
> > (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; ".

In considering the expression that the detainee shall be furnished with a " statement in writing in a language that he understands . . . " the learned trial Commissioner of the High Court said in his Judgment that:

> "The object of Article 27 (1) of the Constitution presumably is to bring to the notice of the detainee the grounds for his detention in a language that he understands. This has no doubt been done by the Superintendent of Prisons according to the certificate at the back of R2. The spirit of the provisions has, therefore, been observed but not the letter. Besides, the applicant has not been prejudiced in any way by the mere fact that the grounds were furnished in English. The quarrel now is whether the grounds were furnished in accordance

> with Article 27 (1) (a) of the Constitution which counsel for the applicant states is mandatory. The question now is what is the effect of a non-observance of Article 27 (1) (a)? Is it fatal or is it at this stage a matter of mere technicality or can it tee said that the

> detainee has waived his right by filing an affidavit which is very comprehensive in respect of grounds of detention as he has not been prejudiced in any way?"

The learned Commissioner then came to the conclusion that the respondent understood and spoke Kaonde and Bemba; that he did not know English; that the provisions of Article 27 (1) (a) of the Constitution requiring that the grounds for detention shall be in writing in a language that the detainee understands, were mandatory; and that, as such, the constitutional requirement ought to have been followed both in spirit and to the letter; that as the constitutional requirement had not been followed to the letter, Article 27 (1) (a) had been infringed, thereby rendering the respondent's continual detention invalid and illegal.

It is submitted by Mr Mwiinga that the trial court erred by holding that the respondent's detention was invalid and illegal, because, although the requirement of Article 27 (1) (a) had not been followed to the letter, it had been followed in spirit; that failure to observe the letter of the constitutional requirement was not fatal; and that, to insist upon such observance would lead to absurdity as there are many tribal groupings and dialects in Zambia.

Mr Mwanawasa, on the other hand, urges us to uphold the trial court's decision, namely, that the constitutional requirement that grounds for detention shall be in writing in a language which the detainee understands is mandatory and; that the wording is itself clear and unambiguous.

It is common cause that the appeal rests on a proper construction of Article 27 (1) (a) of the Constitution in regard to the requirement that grounds for detention shall be in writing " in a language " that the detainee understands. An examination of this constitutional requirement reveals that the words there used are plain and unambiguous. Craies on Statute Law, 7th edition, says at page 65 that:

> "If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law given. 'The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in view.' In 1953 Lord Goddard, C.J. said (in *Barnes v Jarvis* (1)) 'A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered.
> ' Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.' "

The question of giving effect to statutory words was considered by this court in *Molu Butchery Ltd. v The People* (2) where, with reference to Halsbury's Laws of England, 3rd Ed., Vol. 36 para. 533 and *Yorkshire Insurance Company v Clayton*, (3). Gardner, J.S., said at page 341:

> "It is a fundamental principle in construing statutes that it may be presumed that words are not used in a statute without a meaning and are not tautologous or superfluous, and effect must be given if possible, to all the words used, for the legislature is deemed not to waste words or to say anything in vain. "

As the constitutional requirement we are here considering is couched in words that are explicit and unambiguous, there is need for it to be observed.

Even in the case of a detainee who is completely illiterate, as in *Geofrey Chakota, Benda Makondo, Johnson Dakota and Morris Kapepa v Attorney-General*, (4) grounds for his detention should be written in a language that he understands. This measure is necessary so that anyone reading them to such a detainee will convey the exact words and meaning intended by the detaining authority.

The only issue that must now be resolved is: what is the effect of non-observance of the requirement aforesaid? The answer here turns on whether the requirement that the grounds for detention shall be written in a language that the detainee understands, is mandatory or directory.

In discussing mandatory and directory provisions, Basu's Commentary on the Constitution of India, 5th Edition, Volume One, says this at pages 59 and 60:

> "The distinction between mandatory and directory provisions applies in the case of constitutions as in the case of ordinary statutes. The distinction is that while a mandatory enactment must be obeyed or fulfilled 'exactly', it is sufficient if a directory enactment be obeyed or fulfilled substantially. Secondly, if a provision is merely directory, penalty may be incurred for its non-compliance, but the act or thing done is regarded as good notwithstanding such non-compliance; if, on the other hand, a requirement is mandatory, non-compliance with it renders the act invalid.The general rule about constitutional provisions is that they should be regarded as mandatory where such construction is possible."

However, it is a truism that there are exceptions to every general rule. Whether or not this case is an exception to the general rule remains to be seen.

In considering mandatory and directory provisions of statutes, including those of the Constitution, Doyle, C.J., said in *Attorney-General v Chipango*, (5) at page 6:

> "It seems to me that the proper way to approach the problem is to be found in a passage on pp. 314 and 315 of the 12th Ed. of Maxwell's Interpretation of statutes.'The first such question is: when a statute requires that something shall be done, or done in a particular manner or form, without

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> expressly declaring what shall be the consequence of non-compliance, is that requirement to be regarded as imperative (or mandatory) or merely as directory (or permissive)? In some cases, the conditions or forms prescribed by the statutes have been regarded as essential to the act or thing regulated by it, and their omission has been held fatal to its validity. In others, such prescriptions have been considered as merely directory, the neglect of them involving nothing more than liability to a penalty, if any were imposed, for breach of the enactment. An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.'It is impossible to lay down any general rule for determining whether a provision is imperative or directory. 'No universal rule', said Lord Campbell, L.C., 'can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.' And Lord Penzance said: 'I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provisions that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.' Without impugning in any way the correctness of the decisions of courts of other countries in relation to their own statutes and their own particular circumstances, I would approach s. 26A (now Article 27 of the Constitution) in the way pointed out in particular by Lord Penzance."

He continued at page 7:

> "The courts have in the past held that where a provision laid down a number of requirements, some might be held to be mandatory while others might merely be directory. See for example, *Pope v Clarke* (6).

These passages in, our view, correctly state the law in relation to mandatory and directory provisions of statutes.

In *Chipango* (5) the Court of Appeal held that the provisions of Article 26A of the Constitution, so far as they related to the necessity to deliver written grounds for detention and to publish a notice in the *gazette* within a specific time, were mandatory. The provisions referred to in that case related to specific time limits and as Grove, J. said in *Barker v Palmer* (7):

> "Provisions with respect to time are always obligatory unless power of extending the time is given to the court."

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We have held that the requirement of Article 27 that the grounds must be in detail means that they

must not be vague but that they must be such as to enable a detainee to make meaningful representations. In such a case, we have held that the provision as to detail is mandatory.

In the above cases, that is, as to time and as to detail, a failure to comply cannot be remedied and no other action taken by the detaining authority (other than revocation of a detention/restriction order and where necessary, a proper compliance with the provisions of Article 27) can put right the default. The reason for this is that time limits cannot be extended and vague grounds for detention amount to no grounds at all.

The object of furnishing a detainee with grounds for his detention in a language that he understands, is to enable him to know what is alleged against him so that he can bring his mind to bear upon it and so enable him to make meaningful representations to the detaining authority or, at later stage, to the detainees' Tribunal.

In the case presently before us, the danger to be guarded against is that the detainee may not understand the grounds for detention and the defect here is that the grounds for detention were not written in a language that the respondent understood. There was, however, evidence that the grounds were in writing and were fully explained to the respondent in his own language and that there was a certificate to that effect. As such, the spirit of the constitutional requirement had been observed. Therefore, as the court below said, the respondent had " not been prejudiced in any way by the mere fact that the grounds were furnished in English ". As the defect was capable of being cured and was in fact cured, a failure to comply with this provision in these circumstances did not have the same effect as non-compliance with the other provisions to which we have referred. We find, therefore, that the provision is not mandatory but directory.

The appeal is allowed. We understand from the learned Senior State Advocate that the State does not intend to re-detain the respondent.

In view of the circumstances of this case, we make no order as to costs.

Appeal allowed