FRED PETELO MULENGA v THE ATTORNEY GENERAL (1988) S.J. (S.C.)

SUPREME COURT
NGULUBE, D.C.J., BWEUPE AND CHAILA , A.JJ.S.
8TH MARCH AND 13TH JUNE, 1988.
(S.C.Z. JUDGMENT NO. 6 OF 1988)

Flynote

Preservation of Public Security - Detention for sheltering alleged escapee - Challenge to the detention powers under the Preservation of Public Security Act.

Headnote

The appellant was detained under the Preservation of Public Security Act on charges of having sheltered a person who was alleged to have escaped from lawful custody. There was evidence that the escapee was a member of a violent political party that intended to overthrow the legitimate government of the Republic of Zambia. The appellant challenged his detention.

Held:

(i) The measure taken of detaining the appellant was not excessive not ultra vires Article 26 of the Constitution.
(ii) There was sufficient material to enable the appellant to know what was alleged against him and to make representations on the substance of the activity complained of by the detaining authority
(iii) If a detainee shows that he could not conceivably have done the things alleged or been in the places alleged (and there is no controversy over such proof as is tendered in that respect), it would not be reasonably necessary to detain a person, who did not do the things alleged, for the purpose of dealing with the relevant situation.

Cases referred to:

(1) Re: Kapwepwe And Kaenga (1972) Z.R. 248
(2) Chisata And Another v The Attorney General (1981) Z.R..35
(3) Munalula And Six Others v The Attorney General (1979) Z.R. 154
(4) The Attorney General v Musakanya (1981) Z.R. 1

For the Appellant: G. Kunda, of George Kunda and Company.
For the Respondent: J. Mwanachongo, Senior State Advocate.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court

This is an appeal against the dismissal by a High Court Judge of the appellant's application for a writ of Habeas Corpus Ad Subjiciendum. The appellant was detained under a detention order dated 23rd February, 1987, made pursuant to the provisions of Regulation 33(1) of the Preservation of Public Security Regulations. The grounds of detention served on him read:

"(1) That you, FRED PETELO MULENGA, on a date unknown but between 1st September. 1986, and 20th September 1986, kept and accommodated HENRY KALENGA at House No.3222, Lubuto West, Ndola in the Ndola District of the Copperbelt Province of Zambia, an escape from Lawful custody
(2) That, you knew and had reason to believe that he was a wanted person who was detained under the Preservation of Public Security Act, for offences under the said Act

(3) That you assisted him in evading the Security Forces and in his attempt to flee the country to a country hostile to Zambia
(4) That you never reported KALENGA's presence to the Security Forces.

Your aforesaid activities are prejudicial to Public Security and there is apprehension that if left at large, you will continue to persist in these unlawful activities and therefore, the purpose of preserving Public Security it has been found necessary to detain you."

From the affidavit evidence, it transpired that Henry Kalenga referred to in the grounds was said to be a member of a clandestine political group styled "Peoples Redemption Organisation" which was suspected to be planning the unlawful and violet overthrow of the Government using persons to be trained militarily outside the country by a hostile regime. It was also not in dispute that the escapee Kalenga had escaped on 15th September 1986 and was recaptured in October 1986 and that, therefore, the appellant was detained in respect of activities and events which had occurred several months before his own detention.

The three grounds of appeal urged on behalf of the appellant were essentially the same challenges against the detention which the learned trial Judge did not uphold. The first ground alleged a misdirection on the part of the learned trial Judge in his finding to the effect that the measures taken to detain the appellant were neither excessive nor in contravention of Article 26 of the Constitution.

Article 26 reads:

"26. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Article 15,18,19,21,22, 23, 24 or 25 to the extent that is shown that the law in question authorises the taking, during any period when the Republic is at war or when a declaration under Article 30 is in force, of measures for the purpose of dealing with any situation existing or arising during that period; and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions unless it is shown that the measures taken exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question."

The argument under this ground was that, as the activities complained of amounted to an offence under Regulation 36 of the Preservation of Public Security Regulations, namely, harbouring and concealing a suspected person, and since the said Regulation provides for a fairly light sentence on conviction, the detention of the appellant in respect of such a minor offence was an excessive measure and accordingly not a reasonable one in terms of Article 26. For the contention-which we accept-that a court can inquire into the reasonableness aspect of a detention (as envisaged by Article 26 itself) reference was made to *Re:Kapwepwe and Kaenga* (1) and to *Chisata and Another v The Attorney-General* (2) . It was submitted that, unless the detaining authority regards the sanctions in the other provisions of the various laws as inadequate, then detention should be regarded as an excessive measure when such other provisions would, in the circumstances of the case, be adequate to deal with the situation.

As both counsel acknowledged and accepted, it is entirely up to the detaining authority to choose the measure to be taken when the activity also happens to amount to an offence. There has never been any obligation to prosecute recognised by our courts. However, the contention here is that it is unreasonable to detain for what is in effect a fairly minor offence. We think this contention misses the point of the allegation made against the appellant. The allegation of habouring and concealing is contained in paragraph 1 of the grounds but paragraph 2 and 3 allege in effect that the detainee not only had knowledge of Kalenga's

position as a person who was regarded as a danger to public security but, more significantly, that the appellant actively assisted Kalenga in the manner alleged in the third paragraph of the grounds. It seems obvious to us that, from such past conduct, the detaining authority would necessarily regard as suspect the appellant's own sympathies and position in relation to the cause espoused by Kalenga and the Peoples Redemption Organisation . Thus, the authority, having recited events from the past, concluded with an expression of future apprehension as to the appellant's own conduct. It is trite that past activities can, in certain circumstances-such as those here-induce future apprehension. In relation to a different ground of appeal, counsel for the appellant quoted a passage from the judgment of Baren, in Re *Kapwepwe and Kaenga,* at page 260, which reads:

> "The machinery of detention or restriction without trial(I will hereafter use "detention" and cognate expressions 'to include restriction and cognate expressions) is, by definition, intended for circumstances where the ordinary criminal law or the ordinary criminal procedure is regarded by the detaining authority as inadequate to meet the particular situation. There may be various reasons for the inadequecy; there may be insufficient evidence to secure a conviction; or it may not be possible to secure a without disclosing sources of information which it would be contrary to the national interest to disclose; or the information available may raise no more than a suspicion, but one which someone charged with the security of the nation dare not ignore: or the activity in which theperson concerned is believed to have engaged may not be a criminal offence ;or the detaining authority may simply believe that the person concerned, if not detained, is likely to engage in activities prejudicial to public security. And one must not lose sight of the fact that there is no onus on the detaining authority to prove any allegation beyond reasonable doubt, or indeed to nay other standard, or to support any suspicion. The question is one purely for his subjective satisfication.These are far-reaching powers. In particular it must be stressed that the President has been given power by Parliament to detain persons who are not even thought to have committed any offence or to have engaged in activities prejudicial to security or public order, but who, perhaps because of their known associates or for some other reason, the President believes it would be dangerous not to detain."

Although, with respect, some of the statements in the above passage are expressed in somewhat sweeping terms, yet in essence they are basically a correct analysis of the extent and object of the machinery of detention. The appellant associated with Kalenga in the manner described in his grounds of detention and the detaining authority believed that it would be dangerous not to detain him on the basis of his past activities which induced a future apprehension. We cannot say that the learned trial judge was wrong when he held that the measure taken of detaining the appellant was not excessive not ultra vires Article 26. This ground of appeal fails.

The second ground of appeal alleged error on the part of the learned trial judge when he rejected the contention that the third ground of detention was vague, raving and expleratory. The ground which we have already quoted above-was attacked for not specifying the type of assistance given, the date when it was given and the hostile country. Mr. Mwanachongo countered the submissions under this head by arguing that it was not necessary for the ground to go into such details. We have considered this ground of appeal and the ground of detention called in question. As Mr Kunda correctly pointed out, the test for determining the vagueness or otherwise of a ground is that formulated and restated by this court in such case as *Re: Kapwepwe and Kaenga* (1), *Munalula and Six Others v The Attorney-General* (3), and *The Attorney-General v Musakanya* (4). Briefly restated, the Constitution in Article 27 requires that the grounds furnished must be specified in such adequate detail that, looked at from the detainee's point of view, the reasons and conclusions of fact therein stated permit him to know what is alleged so that he can bring his mind to bear upon the allegation and so be in a position to make meaningful representations, that is to say, representations which, on being

considered, may bring him relief. In practice such meaningful representations will normally relate to the merits of the case and the detainee will be seeking to refute the conclusions reached or to explain his role or to demonstrate his own innocence in the matter or, indeed, to confess and then advance such prayers, explanations or other assurances as to his future conduct as may be favourably considered by the detaining authority. Questions of vagueness are factual and relate to a material failure to specify the ground in sufficient detail to enable the detainee to understand the allegation and to make a meaningful representation. In our considered view, the ground under attack should be looked at in the context of the whole of the grounds which are in effect a single allegation of one and the same transaction stated in progression. However, even if it is considered to be an independent ground, it can not be called vague simply because of the absence of details which are not the essence of the activity complained of by the detaining authority. We agree with Mr. Mwanachongo that, for instance, it would not make the slightest difference on which specific day, during the period in question, the assistance was given or to which hostile country Kalenga was proposing to flee. The learned trial judge was not wrong when he held that, in certain cases, the details of the form the activity took-which forms the basis of a conclusion stated as a ground-would be peculiarly within the knowledge of the detainee. As a matter of plain fact, therefore, the ground concerned was clear and intelligible and, as a conclusion of fact, the measure taken of detaining the appellant was not excessive not ultra vires Article 26. This ground of appeal is also not successful.

The third and final ground of appeal also concerned the question of reasonableness under Article 26 of the Constitution . The basic difference between the first ground and this ground is that the former raised a legal objection on the footing that the appellant had committed a minor offence while the latter raises factual objections. It was argued that it was impossible for the appellant to have either assisted or accommodated Kalenga during the period of alleged in the first ground, namely, on a date unknown but between 1st September 1986 and 20th September, 1986, because Kalenga only escaped from custody on 15th September, 1986, and because one Chisala Mukunto was also alleged to have kept Kalenga for two weeks, having received him on a date unknown but between 15th September, 1986 and 30th September, 1986. It was submitted that on such allegations, the detaining authority could not have been furnished with correct information and that the detention itself had, accordingly, no reasonable basis. While the point about inclusion of the period before Kalenga's escape was well taken, the rest of the arguments appear to us to have been misconceived and largely expletive. As the learned trial judge stated, the allegations which refer to a single day in either case within an overlapping period could not conceivably be construed as meaning that an impossible factual situation was alleged. We agree with the learned trial judge that it was not factually impossible for either detainee to have received the fugitive on one of the days within the overlapping period. The case of *Chisata and Another v The Attorney-General* (2) which was relied upon - and which did have facts disclosing an impossibility on the part of the detainees to have been in the places alleged and doing the activities alleged - is authority for the proposition only that there can be cases where the undisputed facts established disclose that the detainee could not possibly have done the things alleged so that it is not reasonably necessary to detain such a person. Where such a situation is established, the detainee would clearly have discharged the burden which is on him of showing the court that, in the language of Article 26, the measures taken exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought-by the detaining authority to be required for the purpose of dealing with the situation in question. Quite clearly, if, as in *Chisata* (2), a detainee shows that he could not conceivably have done the things alleged or been in the places alleged (and there is no controversy over such proof as is tendered in that respect), it would not be reasonably necessary to detain a person, who did not do the things alleged, for the purpose of dealing with the relevant situation. This ground also fails.

The result is that the whole appeal fails and it is dismissed, with costs