JAMES CHANDA KASAMANDA v THE ATTORNEY- GENERAL (1988 - 1989) Z.R. 132 (S.C.)

SUPREME COURT
SILUNGWE,C.J.,NGULUBE, D.C.J., AND SAKALA ,J.S.
11TH APRIL, AND 1ST SEPTEMBER, 1989.
(S.C.Z. JUDGMENT NO. 5 OF 1989)

Flynote

Constitutional Law - Detention without trial - Habeas corpus - Grounds must be in existence at time of detention.

Headnote

The appellant was detained under the Preservation of Public Security Regulations. The circumstances relating to his detention were that at the suggestion of a friend he travelled to Malawi with the friend to collect a car. Whilst in Malawi the friend contacted agents of South Africa. The South African agents then asked the appellant to supply them with information in return for payments. The appellant telephoned a senior investigations officer in Lusaka and disclosed what had transpired. He returned to Zambia and made a report to the Zambian authorities. The appellant, acting on the advice of Zambian security officers, telephoned the South African agents and kept the Zambian authorities informed of so doing and the information received. Thereafter, the appellant was detained.

The grounds of detention, *inter alia*, were that he had gone to Malawi to disclose intelligence information to South African agents. The appellant applied for a writ of *habeas corpus* and put in an affidavit denying his intention to disclose information and stating that the allegations arose from information he had disclosed to the Zambian intelligence authorities. The respondent replied by alleging, *inter alia*, that the appellant's report to the Zambian authorities was a cover-up of his previous and clandestine subversive activities.

The court found the detention was lawful and dismissed the application. The appellant appealed and argued, *inter alia*, that the allegations of a cover-up was fresh evidence or additional grounds which were non-existent at the time of detention and that grounds for his detention did not exist.

Held:
When a person is detained under Regulation 33 (1) there must be a basis to underpin such grounds to justify such detention. The existence of such

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material at the time the detention order is made is imperative because it is from this material that grounds for detention are formulated.

Cases referred to:
(1) In re Cain (1974) Z.R. 71

(2) Joyce Banda v The Attorney -General (1978) Z.R. 233
(3) Shamwana v The Attorney- General (1981) Z.R. 261
(4) The Attorney-General v Musakanya (1981) Z.R. 1
(5) Naresh Chandra v The State of W.B.A. (1959) S.C. 1335
(6) Malyo v The Attorney-General (1988-89) Z.R. 36

Legislation referred to:
1. The Constitution, Cap. 1
2. Preservation of Public Security Regulations, Cap. 106

For the appellant : E.B. Mwansa, of E.B.M. Chambers.
For the respondent : G.S. Phiri, Senior State Advocate.

Judgment

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

This appeal arises out of the High Court's refusal to grant to the appellant a writ of habeas corpus ad subjiciendum.

The appellant, a former captain in the Zambia National Service, joined the Anti-Corruption Commission in 1985 and was still with the Commission at the time of his detention by the President on 24th March 1987 under regulation 33 (1) of the Preservation of Public Security Regulations, Cap. 106. On 6th of the ensuing month, the appellant was served with grounds for his detention in compliance with the provisions of Article 27 (1) (a) of the Constitution. The circumstances that led to his detention were as set out hereunder.

At the beginning of November 1986, the appellant planned to undertake a visit to Chipata in the Eastern Province in order to go and fetch some money from a Mr Joseph Nkole of LINTCO, a cousin of his, so that he could obtain an air ticket to seemingly enable him to visit his girl-friend in London. When a Zairean by the name of Paul Mbaya Ngalu, whom the appellant had known as a friend for some six years, got wind of the impending trip, he suggested that they travel together as he was to fetch a car from Chipata which both of them could then use on their return journey to Lusaka.

On 8th November, the appellant and Paul travelled from Lusaka to Chipata by bus. Upon arrival there, it turned out that neither the appellant's cousin nor Paul's car was available. Paul then intimated that, as his friends who were using the car were journalists, they might have crossed into Malawi.

At Paul's suggestion, both crossed into Malawi by taxi through a regular immigration and customs entry point where the immigration and customs officials appeared to know Paul very well. Whilst still at the border, Paul showed the appellant both Malawian and Zambian currencies. Thereafter, they proceeded to Lilongwe, the capital of Malawi, and on arrival there, they went to the Capital Hotel where Paul appeared to be known.

As the appellant waited at the hotel reception, Paul went to the other side of the reception where he was overheard by the appellant making a

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secret telephone call to Pretoria. When the appellant tried a little while later to confirm the destination of Paul's telephone call, Paul initially said that he had been talking to someone in Blantyre but he shortly thereafter conceded that the destination of his telephone call had not been Blantyre but Pretoria. On being asked as to the whereabouts of his car, Paul replied that it was within Lilongwe and that it would soon be brought over by his friends. Paul then booked two rooms but, at the appellant's suggestion both agreed to share one room. By that time the appellant had become suspicious of Paul and had decided to monitor his movements.

On the following day the appellant once again enquired about Paul's car, Paul responded that his friends had driven the car to Pretoria in South Africa. Shortly thereafter two white South African men (hereafter referred to as South African agents) arrived at the hotel and Paul introduced them to the appellant as Gorge and Piche and said that they were journalists. The South African agents then asked the appellant to furnish them with Zambia Army and Zambia Airforce codes adding that if he co-operated by accepting to be employed by them for the purpose of supplying them with whatever security information they enquired they would open for him a bank account in Francistown (Botswana) and that he would be in receipt of a monthly payment of US $1000.00. They told him that the information required was classified into seven categories and that it was needed within ten days. According to the appellant he used his initiative and accepted the offer so that he could find out more from those people. It was agreed that the appellant would be paid US $ 5000.00 for any information given in respect of each of the seven classified categories. When the appellant told them it would be difficult to supply them with the requested information forthwith and that he needed to return to Zambia to collect the information, they produced for him an air ticket and further gave him 150 rands to facilitate his transportation. At their request he gave them his contact telephone number in Lusaka. When asked to be given their telephone numbers they declined to do so as they feared that any telephone call from Zambia to South Africa might be intercepted by South African security officials. Thereafter, the appellant telephoned his office and informed Mr Isaac Mbewe a Senior Investigations Officer at the Anti-Corruption Commission where he was and that on his return to Lusaka he would tell him about his business experience in Malawi.

On the following day the appellant returned to Zambia leaving Paul behind. During the morning of the next day he made a report to Mr Isaac Mbewe as well as to Mr Packson Muyandeka, the then acting Chief Investigations Officer of the Anti-Corruption Commission. This was later confirmed by Mr Mbewe in his *viva voce* evidence before the High Court. Moreover, the appellant decided to report and did in fact report the matter individually to Mr Sikuboni, then Director-General of the Zambia Intelligence and General Tembo, then Commander of the Zambia Army in the presence of his Deputy-General Kalenga (who has long since taken over as Commander). He was prompted to report to these senior ranking security personnel not just because of the nature of information that the South African agents wanted from him, but also because they had intimated to him that some security officers within the national

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security forces had been employed to do a similar job for them. The appellant wanted the security

leaders to institute investigations with a view to identifying the culprits. The army commander thanked the appellant and told him that he would put up a group of officers to work with him. Later on, Colonel David Lubasi from the Ministry of Defence and Messrs Membe and Paul Habulembe from the office of the President were assigned to work with the appellant.

As the appellant worked with the security officers assigned to him the South African agents telephoned him to find out what progress he was making. The appellant's response was in accordance with what the security officers had told him to say and he caused the telephone conversations to be tape-recorded using a blank tape previously provided by the security officers for the purpose. In his telephone conversations with the South African agents - all of which (about six in number) were tape-recorded he pretended to them that he had gathered the much sought after information but that he had been denied leave to go and meet with them in Malawi. When the appellant suggested to the Zambian security officers that he travel with them to Malawi so that the South African agents could be apprehended the suggestion was rejected and he was instead told to go to Malawi alone. As the appellant did not want to expose himself to the South African agents (in the absence of an official Zambian security presence) he did not go back to Malawi.

Later, when the appellant met Paul Ngalu at the Lusaka club he went to the Hotel Intercontinental where he found Colonel.Lubasi and made a report to him as to where Paul could be found. However, Colonel.Lubasi reacted to this by giving the appellant the sum of K50 and sending him to go back to the club so that he could arrest Paul and find out about his place of abode and that of his close associates. Despite his disappointment with Colonel.Lubasi's reaction the appellant returned to the club but drew a blank as Paul had since disappeared. Eventually however the appellant succeeded in causing Paul's arrest.

On 24th March 1987 the appellant was detained on the following grounds:

"1. That you and Paul Mbayu Ngalu on 8th November, 1986 left Zambia for Lilongwe in Malawi where you met some South African intelligence officers who wanted to obtain intelligence information on Zambia's defence, Tazara, strategic industries, organisational charts of Zambia's security forces, location of the South African National Congress bases and their residences in Zambia.

2. That you on 10th November 1986, met the South African intelligence officers at Lilongwe in Malawi and received money in rands for the security information you supplied to them.

Your aforesaid activities are prejudicial to public security and there is genuine apprehension that if left at large you will persist in the foresaid illegal activities and in order to prevent you from continuing the same and to ensure effective preservation of public security it has been found necessary to detain you."

The appellant applied for a writ of *habeas corpus* ad subjiciendum in support of which he swore an affidavit on 20th October 1987, containing 30 paragraphs, the substance of which was in conformity with the facts of the case as outlined above with the exception of the core of the grounds

furnished for his detention. In essence, paragraphs 24, 25 and 28 show that the grounds for detention were based on the information that the appellant had supplied to the security officers; that there was nothing in them to indicate that his activities were prejudicial to public security; that he had conducted himself in a patriotic manner; and that he hoped that his detention would not discourage other loyal Zambians from reporting enemies of the State to the authorities.

On behalf of the Respondent, an affidavit in opposition was sworn on 11th November,1987, by Colonel Lubasi who was the chief investigations officer in this case. It is necessary to refer to the essential parts of the affidavit which are in these terms:

" 7. That with regards to paragraphs 4 to 10 of the affidavit it is true that during the period from 8th November to 11th November 1986 the applicant together with one Paul Mbayu Ngalu, a Zairian national, went to Malawi and was in physical contact with South African intelligence officers.'

8. That with regard to paragraphs 10 to 30 of the said affidavit it is true that the applicant did report his contacts with the South African intelligence officers to Zambia authorities on 12th November, 1986, and that it was as a result of this report that investigations were instituted.

9. That I was present when the applicant reported his contacts to the persons named in paragraph 15 of the said affidavit which persons directed me to carry out the investigations into the truth of the report.

10. That the investigations revealed that the applicant's report was in fact a cover-up of his previous and continuing subversive and clandestine activities in concert with the South African intelligence agents in Zambia, Malawi and elsewhere.

11. That further investigations have since revealed further activities by the applicant which activities have led to his being charged with counts of espionage under the State Security Act for which he has been committed to the High Court for trial.

12. That in the light of the seriousness of the applicant's previous and continuing involvement and contacts with the South African agents there is a genuine apprehension in the minds of the detaining authority that if left at large the applicant will continue his clandestine activities prejudicial to public security.

13. That the detention is legal and that the applicant is clearly a threat to public security."

The appellant's affidavit in reply dated 23rd December, 1987 contained 17 paragraphs, 8 of which will be referred to here for what they are worth. These are:

"5. That as regards paragraphs 9 to 12, the State has clearly failed to substantiate my grounds of detention for they are merely alleging that reports and investigations have revealed that my report was a cover-up of previous and continuing subversive and clandestine activities which are unsupported in their affidavit in opposition. Further, the State has agreed with my affidavit in support and their only contention is that they believe my reporting the whole matter, and the further investigations were just a cover-up.

7. That in fact my reporting was not a cover-up for I did go to Malawi as earlier stated and that investigations by the State, after my reporting, confirmed this and that my report was true, as deposed to by one David Pumulo Lubasi in paragraph 8 of his affidavit.

9. That in paragraph 9 of his affidavit, I would like to state that I co-operated with the security officers carrying out investigations and I briefed them in detail of all that had transpired including the surrendering of the South African rands. I further went to the extent of apprehending Paul Mbayo Ngalu, an agent who confirmed my contact with the South African spies.

10. That the doubting by the security officers of my credibility and reports is unreasonable and unsubstantiated due to the fact that I work under oath, with allegiance to the State and further that I am a commissioned infantry professional officer who has worked in such offices for a number of years.

13. That the contents of paragraph 11 of the affidavit in opposition are not only misleading but false in that I was only charged with retaining official documents which was another cover-up by the security officers to support their continued detention. Further, as regards the charges before the High court, the said proceedings are still continuing and the said official documents are actually my personal lecture notes which were brought into my home by ZNS personnel.

14. That in my report to the authorities, I told the said authorities that I was informed by the said South African agents that there were security officers in Zambia who were supplying information to South African Intelligence and that they now promised to introduce some of these people to me. That is one of the reasons for only reporting to Generals individually, because I was not sure of who was involved in giving away information.

15. That the continuing detention is illegal since it is only supposed to be a punitive measure and also the fact that I complied with the Corrupt Practices Act No. 14 of 1980 that requires a public officer to report matters like the one before this honourable Court.

16. That the said affidavit in opposition is only supporting the detention to cover-up for the wrongful (act) and failure by security officers to plan properly the arrest of the South African intelligence agents and further to cover-up for the disclosure by myself of officers within our security forces who have communicated, and still continue to do so, information to South Africans."

The learned trial judge considered all the material before him as well as the submissions of the learned counsel and thereafter came to the conclusion that the detention was lawful and so dismissed the application. In doing so, the learned trial judge relied on certain of his findings to which we shall presently allude.

The facts of this case are substantially not in dispute, the only bone of contention is reflected in the grounds for detention and paragraphs 10 to 13 of Colonel Lubasi's affidavit of 11th November,1987.

We shall, in the first place, deal with certain aspects of the trial court's findings which led to the result of the case.

Firstly, the trial court found that it was not in dispute that while in Malawi, the appellant met and spoke to two white South African Intelligence officers about Zambia's security. This was a misdirection because, as the learned Senior State advocate rightly stated during the hearing of the appeal, there was no evidence against the appellant to suggest that he had supplied intelligence

information to the South African Intelligence officers prejudicial to public security.

Adjunctively, it was held that in view of the fact that the appellant had been alone when he spoke to the South African "agents in secret". It was difficult to dismiss the assumption that he disclosed sufficient damaging

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information. This too was a misdirection for the reason already given in the preceding paragraph.

Secondly, the trial court held that although there was no evidence as to the appellant's past conduct, it was satisfied that his conduct in Malawi on that occasion was gravely prejudicial to Zambia's public security. Here again, this was a misdirection based on unproven allegations.

Thirdly, it was held that the grounds served on the appellant revealed his activities which he admitted. This was also a misdirection because the appellant never admitted those grounds. What he did say and assert was that the said grounds were based on the information that he had himself supplied to the Zambian security officers including Colonel Lubasi.

As to the contents of Colonel Lubasi's affidavit, paragraphs 10 and 11 only need be commented upon.

According to paragraph 10, it is alleged that further investigations reveal that the appellant's report was in fact a cover-up of his previous and continuing subversive and clandestine activities in concert with the South African intelligence agents in Zambia, Malawi and elsewhere. Here, Mr Mwansa, learned counsel for the appellant, argued before us that this paragraph as well as paragraph 11 introduced new grounds which had not been served on his client and which were in any case unsubstantiated.

Firstly on this issue, the learned trial judge rightly found that there was no evidence as to the appellant's past conduct. Secondly, there was no evidence whatsoever to disclose that there were continuing (let alone present) subversive and clandestine activities on the part of the appellant in concert with South African Intelligence agents in Zambia, Malawi or elsewhere. Thirdly, there was nothing in support of the allegation that the appellant's report was a cover-up.

We now come to paragraph 11. This (like paragraph 10) contains extraneous material and is no more than allegation intended to justify the appellant's detention. In response, the appellant averred in his affidavit in reply that the paragraph was not only misleading but also false in that he had, on the contrary, been charged with retaining official documents which were in fact his personal lecture notes.

It is clear to us that the purpose of paragraphs 10 and 11 was to prop up the grounds for the appellant's detention. We can see force in Mr Mwansa's argument that these paragraphs amount to fresh or additional grounds which can only be presumed to have been non-existent at the time of the appellant's detention. As we have repeatedly stated (see, for instance, *In re Cain*; (1) *Joyce Banda v The Attorney-General* (2) and *Shamwana v The Attorney-General* (3). Grounds must be in existence

at the time that the detention order is made.

We wish to emphasise the point. Grounds must exist at the time that the detention order is made otherwise there is no legal or lawful basis to give rise to such detention.

Those grounds must then be furnished to the detainee in writing (and in a language that he understands) as a matter of urgency (see In *re Cain* (1); and *The Attorney-General v Musakanya* (4) but in any event not more than fourteen days after the commencement of the detention in compliance with the provisions of article 27 (1) (a) of the Constitution. It is on the

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basis of the grounds so furnished that the detainee is given an opportunity to make meaningful representations to the detaining authority or to the Detainees' Review Tribunal in an effort to secure his early release. No part of those grounds can be held back nor can any more grounds be added thereto afterwards (see *Naresh Chandra v State of W. B. A* (5) (1959) S. C. 1335 at P. 1340

It must always be borne in mind that when a person is detained under regulation 33 (1) of the Preservation of Public Security Regulations, mere formulation and communication of written grounds to him (in terms of article 27 (1) (a) of the Constitution), is not enough. There must be a basis, that is, there must be material in existence to underpin such grounds and to therefore justify the detention. This is the material, or the gist thereof, that will invariably be put forth by way of evidence when the detention is challenged in Court. The existence of such material at the time that the detention order is made is imperative because it is from this material that grounds for detention are, or should be, formulated. If this were not so, individual liberty would be in jeopardy at the hands of an over-zealous agent of State who might be tempted to frame plausible but baseless or hollow allegations against an innocent person under the guise of preserving public security.

In this case, no cogent evidence was put forward to buttress the grounds and, therefore, show that what the appellant had done was prejudicial to public security.

We can only deal with this case purely on its own merits based on the facts before us. In our view, the conduct of the appellant was consonant with that of a responsible and patriotic Zambian who, on discovering the enemies of his country in Malawi who wanted him to co-operate with them on a regular basis by supplying them with intelligence information for monetary reward wasted no time in returning home and reporting about his encounter with them not only to his superiors at his place of work but also to the top leadership of the national security forces; he co-operated with a team of investigation officers led by Colonel Lubasi and tape-recorded all his telephone conversations with the enemies at the directions of security officers who had supplied him with blank tapes for the purpose and had told him what to say to the enemies - an instruction that he complied with; he surrendered what had been given to him by the enemies (to facilitate his transportation); he apprehended Paul Ngalu who appeared to be a collaborator with, and an agent of the enemies of Zambia and without whom he would not have suffered loss of his freedom of movement; and he was condemned instead of being lauded for his patriotic conduct. This appears, on the facts, to be a case of a good Samaritan finding himself in trouble with the beneficiary or intended beneficiary of his good conduct.

This case must be distinguished from that of *Mario Malyo v The Attorney-General* (6) where certain named persons, who appeared to be bent on overthrowing the legally constituted Government of the Republic of Zambia, approached the appellant and solicited support from him on a couple of occasions but he failed to report these activities to the Government authorities (security officers). On the contrary, the appellant in this case was approached once by South African agents who solicited his co-

operation in intelligence gathering and transmission thereof to them for pecuniary reward but who immediately reported about the agents' activities to his superiors at his place of work as well as to the top leadership of the National Security Forces.

In view of the misdirections of the trial court and the lack of evidence in support of the grounds for the appellants detention to which we have already referred, the decision of the court below must be interfered with. Accordingly, the appeal is allowed, the judgment is set aside, and we order the release forthwith of the appellant unless he is lawfully in custody for some other matter. The respondent will bear the costs in this court and in the trial court.

Appeal allowed.
