ELIAS KUNDIONA v THE PEOPLE (1993) S.J. 49 (S.C.)

SUPREME COURT
NGULUBE,C.J., BWEUPE, D.C.J., AND MUZYAMBA, J.S.
5TH OCTOBER, AND 2ND DECEMBER, 1993
S.C.Z. JUDGMENT NO. 14 OF 1993

Flynote
Criminal Law - Contempt of Court - General principles.
Criminal Law - Duress - When defence of duress is established - Whether the threat has to be continuing.
Evidence - Competence and compellability - The Head of State.

Headnote
The appellant was convicted of two counts of contempt arising out of his failure to appear before court without reasonable excuse and also his filing an affidavit in which he accused the learned judge in the court below of conspiring with three others to convict Kambarange Kaunda, the son of former president Dr. Kenneth Kaunda in order to embarrass the latter. The appellant appealed against both conviction and sentence.

Held:
(i) The learned trial judge did not act out with R.S.C. Order 52 as read with the relevant section of the Penal Code when he continued the proceedings which had been promptly initiated and would have long been disposed of but for the appellant's own action.

(ii) An aggrieved judge in summary contempt should show restraint and maintain equanimity; a Judge subjected to contempt should not be prosecutor and judge in his own case.

(iii) A person may be regarded as having acted under duress when he acts solely as the result of threats of death or serious injury to himself or another which operates on his mind at the time of his act.

(iv) A serving President, while no doubt a competent witness, could not be coerced by criminal process or sanction if he declined to cooperate because the constitution grants immunity.

Cases referred to:
(1) Zulu v The People S.C.Z. Judgment No. 7 of 1991.
(2) Fraser v R. Meredith v R. (1985) L.R.C. (Crim.) 732
(3) Balaugh v Crown Court of St. Albans (1974) 3ALL E.R. 283
(4) Gusta and Another v The People S.C.Z. Judgment No. 29 of 1988
(5) Nguila v The Queen (1963-64) Z.N.R. 14
(6) R v Hoowe and others (1987) A.C. 417
(7) R v Graham (1981) I All E.R. 801
(8) DPP for Northern Ireland v Lynch (1975) A.C. 653

For the Appellant: Mr. E.J. Shamwana, S.C., of Shamwana and Company with him Mr. Hakasenke.
For the Respondent: Mr. D.K. Kasote, State Advocate.

Judgment

NGULUBE,C.J.: delivered the Judgment of the Court.

The appellant was sentenced to undergo three months imprisonment with hard labour on one count of contempt and six months imprisonment with hard labour on a second count of contempt of court. The sentences were concurrent, making an effective total of six months , four of which were suspended on the usual terms. The effective sentence was to be served with effect from the date of conviction. The charge of contempt of court on the first count related to the appellant's failure without good cause to appear before the learned trial judge in response to a summons to the accused issued against him which he was cited for contempt, the subject of the second count. The charge on the second count related to a scandalous affidavit attributed to him and instituted in the matter of *The People v Kambarange Kaunda* the burden of which was to allege that the learned trial judge and three others had entered into a pact to be partial and biased in favour of MMD the now ruling party against the then ruling party and Government and that the learned trial judge had assured the MMD in advance that he would convict Kambarange Kaunda of murder in order to embarrass President Kaunda. The appellant was proceeded against under Order 52 R.S.C. as read with s.116(3) of the Penal Code and this appeal is against the conviction and sentence.

The facts emerging were that the learned trial judge was presiding over the trial of Kambarange Kaunda when towards the tail end of that trial, counsel for the defence, Mr. S.S. Zulu, moved the court to abort the trial on grounds of alleged bias and partiality and produced in support a document purporting to be an affidavit sworn by the appellant. The advocate was cited for contempt, tried and convicted and the details of his case sufficiently appear in Zulu v The people (1) . The appellant was to be tried as the second accused with the advocate but when he was served with a Summons to accused, he did not come to court on 14th August, 1991, but was hastily flown out of the country with his family on arrangements allegedly made by the former President and others. A bench warrant was issued and it was not until 19th October, 1992, when it was executed and the contempt proceedings heard. The court conducted an elaborate hearing involving eight witnesses for the prosecution and four for the defence and thereafter delivered a lengthy judgment in which the appellant was found guilty.

The position of the appellant, who had no visible connection with the case involving Kambarange Kaunda, was that, in relation to the first count, he was misled into believing that the summons to the accused which cited him for contempt was a summons to a witness and he could choose to attend court or not to attend court since he was not involved in the criminal trial then in progress. In relation to the second court, his position was that he was prevailed upon, under threats and compulsion by or on behalf of the former President and others, as well as on promises of a favour in the matter of his disputed citizenship, to collaborate in a mischievous scheme to discredit four judges, including the learned trial judge. He understood his collaboration in the affidavit which was, according to him, a fabrication the advocate and others, to have been to facilitate the setting up of a tribunal, a step taken only for the purpose of inquiring into the question of removing a judge from office for inability or for misconduct. Although the document was headed in the matter of the pending criminal trial, the appellant's position was that he did not expect it to be produced in that trial.

Before we come to the grounds of appeal and the arguments which were argued before us on both sides, we consider it appropriate to say a few words on the subject of contempt generally and to make some preliminary observations on this case. It was not in dispute that wilful disobedience to a summons to an accused to attend court is a contempt. It was also clearly a contempt (subject to the arguments based on duress which we will consider shortly) to attack the personal character of the learned trial judge by alleging bias and lack of impartiality, and to

such to abort a trial in progress on such grounds. Such acts are, prima facie, calculated to bring a court or a judge into contempt, or to lower his authority, or to interfere with the due course of justice. It should be borne in mind, as the learned authors of Halsbury's Laws of England, 4th Edition, Vol.9, observe in paragraph 27, that contempts of this kind are punished not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the attack, but of protecting the public, and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from the mischief they will incur if the authority of the tribunal is undermined or impaired. It would not be a legitimate object of punishment for an aggrieved judge to seek solely to vindicate his personal honour or sate his wrath. It is the public which must be protected against loss of confidence and respect for the courts engendered by acts calculated to undermine authority or to expose the courts to contempt. It is also necessary to bear in mind, as was observed in the Australian cases of *Frazer v R., Meredith v R.* that the summary power to punish for contempt is part of the inherent jurisdiction of the court. It is an extraordinary power imposing an unusual concatenation of roles upon the judge, resulting in special responsibilities . This is precisely the reason why cases like Balauch v Crown Court of St. Albans (3) Counsel that it should be "exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt" adding that "a judge should act of his own motion only when it is urgent and imperative to act immediately. In all other cases he should not take it on himself to move. He should leave it to the Attorney-General or to the party aggrieved to make a motion in accordance with the Rules in RSC order 52. The reason is so that he should not appear to be both prosecutor and judges for that is a role which does not become him well". The requirements of due process and natural justice also demand that a contemnor be given a hearing. In an obvious case, the proceedings are swift and punishment instant, in keeping with the summary character of this extraordinary jurisdiction. It was in this light that this court in the related Zulu case did not comment favourably on the holding of an elaborate and protracted hearing which served only to accentuate the uncustomary role of a judge as prosecutor at the same time. However, while this court in the *Zulu* (1) case held that the holding of such a trial was unnecessary in summary proceedings, the conviction was nonetheless upheld on its own merit. Neither the statutes nor the Rules have provided how the summary trial for contempt should proceed and it will therefore depend on what actually did take place in each case whether there was a fair hearing or not. The circumstances of each case will also suggest whether the aggrieved judge properly took cognizance of the offence or if it should have been referred for prosecution before another court having regard to the need to balance between the undesirability of a judge possibly testifying and being cross-examined as a witness before another court and the desirability of swift action in a proper case.

This brings us to the grounds of appeal in this case. The first ground alleged error on the part of the learned trial judge in deciding to hear the case against the appellant. The first limb of the argument was to the effect that it was wrong for the aggrieved judge to hear the case himself after the lapse of a period of over one year from 14th August,1991, to 20rh October,1992. It was submitted that the learned trail judge acted out with s.116 of the Penal Code as read with R.S.C. Order 52 because he did not heed the guidelines in Gusta and Another v The people (4) and S.S Zulu v The People (1) . The argument was that as the learned trial judge did not deal with the case on the same day of offences under s.116 (2), he should have reported the matter to the Director of Public Prosecutions as was suggested in Gusta (4). The postea in Gusta (4) is significant and attention should be paid to it. This court actually revised its original criticism of the proceedings and held that they were not ultra vires if grounded in RSC Order 52. The case of ZULU (1) was said to be distinguishable because the court took action immediately and remanded the contemnor in custody so that the case was adjourned merely for an enquiry, as opposed to the proceedings here which took place after a period of more than year. It was argued that, even if RSC Order 52 did not specify a time limit, the caution in the Balough (3) case should have been heeded that action ought to be taken by a judge of his own motion only where it was urgent and imperative to act immediately. It was submitted that the appellant had not even committed contempt in the face of the court.

We have considered the arguments under this limb and we do not agree that a different attitude should be adopted from that in the Zulu (1) case. The events which moved the learned trial judge occurred in open court when Mr. Zulu tried to stop the criminal case in progress. It is trite that the principles governing principal offenders apply equally to criminal contempt so that those who have, for instance, counseled, procured, sided or abetted the commission of the offence are equally liable and can not escape liability simply because they were not physically present at the scene. Sight cannot be lost of the fact that the learned trial judge took action immediately and issued a summons to accused followed by a bench warrant returnable before himself. The appellant left the jurisdiction and we can not see that a contemnor can oust the jurisdiction of an aggrieved judge at derive any advantage or benefit by going into hiding and thereby making it impossible to be dealt with forthwith. Learned State Counsel referred to the lapse of time as affording the aggrieved judge time for passion to cool off so that some other court should deal with the impertinence offered. As we have already indicated, the punishment of contempt can not be for the gratification of a judge in some sort of fit of passion. On principle, therefore, a case can not lose the immediacy or urgency originally attaching to it where was imperative to take swift action such that a judge should not proceed with it himself when it is the offender himself who by his own act occasioned the delay which he later seeks to rely upon to criticize the proceedings against him.

As far as we are able to recollect, neither a bench warrant issued nor a case already in hand of a judge can expire automatically by lapse of time. We are satisfied that the lapse of time here should make no difference and that all the criticism under discussion should attract the same response as we gave in the Zulu case, a response which it is here unnecessary to repeat. We are satisfied that the learned trial judge did not act out with R.S.C. Order 52 as read with relevant section of the Penal Code when, in essence, all that he did was to continue the proceedings which had been promptly initiated and would have long been disposed of but for the appellant's own action. We, therefore, do not uphold the arguments under this limb.

The second argument on the first ground of appeal was that the appellant was the victim of an unfair trial because the learned trial judge was not impartial and independent. Admittedly a judge reacting to an attack upon himself necessarily assumes many roles in the proceedings against a contemnor. This is what makes summary contempt extraordinary and it is an unavoidable collorary that the tribunal is not completely impartial or independent. This is the precise reason why circumspection is urged, but a conviction, properly recorded, can not be criticised on the ground that the victim of a serious contempt has himself summarily dealt with the contemnor. Another submission was that the trial was unfair because the case proceeded as an ordinary criminal trial and other persons implicated by the appellant were not similarly cited for the contempt. As we pointed out in the *Zulu* 9(1) case, an elaborate trial is unnecessary in summary proceedings but the fact that one was conducted does not ipso iacto invalidate the proceedings. We have already made the observation that no specific procedure is prescribed for summary contempt and the important point will be the observance of the basic principles of fairness, such as affording the accused the right to be heard in his own behalf. The argument concerning the non punishment in a similar manner of persons implicated by the appellant was, we consider, expletive. We can think of no authority, and none was cited, for a proposition that a trial will be unfair if all the possible accused persons are not brought before the court. This limb is also not upheld.

The second ground of appeal alleged error on the part of the learned trial judge in convicting the appellant. It was submitted that the two counts were not proved against the appellant to the required standard, the argument being that the prosecution witnesses did not establish the ingredients of the offences charged with the result that the learned trial judge relied on the defence story. On our considered opinion, there was ample evidence on the first count that the appellant was duly served with a summons to accused and the initial story of the appellant that

the officers who served the document had misled him into believing that he had the option to respond or to ignore it was, quite properly, abandoned by the appellant. His final story was that he was virtually in the custody of officials from State House and was not free to come to court , Contrary to Learned State Counsel's submissions, the contempt could only be expunged by the appellant offering a reasonable excuse so that it is not competent to argue that the court should not have examined the defence story. The burden was on the appellant to explain his failure to come to court when evidence had established service of the summons. With regard to his final story, it was clear that he chose not to come to court preferring instead to participate in arrangements for his own departure from the country. We will return to the question whether he so acted under duress in a moment.

In relation to the second count, we note that the learned trial judge had considered the allegation that the appellant signed the affidavit which was authored by others and which had already been signed by a Commissioner for Oaths so that he was not called upon to actually swear it before such commissioner. On the evidence, including that of the appellant himself which can only be regarded as the most favourable from his point of view, the learned trial judge found that it was enough that he appellant had knowingly appended his signature to the document whose contents he was aware of. The learned trial judge was on firm ground and we are satisfied that, subject to the question of duress, the ingredients of the second count were well and truly established.

We now come to the third ground of appeal which alleged error in law and in fact on the part of the learned trial judge when he dismissed the defence of compulsion, or as it is now more commonly referred to duress or coercion. This defence is provided for under S. 16 of the Penal Code. As amended by Act No. 3 25 of 1990 which repealed and replaced the old section, S.16 now reads:-

> "16 (1) Except as provided in this section, a person shall not be guilty of an offence if he does or omits to do any act under duress or coercion.
>
> (2) For the purpose of this section a person shall be regarded as having done or omitted to do any act under duress if he was induced to do or omit to do the act by any threat of death or grievous harm to himself or another and if at the time when he did or omitted to do the act he believed (whether or not on reasonable grounds).
>
> (a) That the harm threatened was death or grievous injury;
> (b) That the threat would be carried out:
>
> (i) Immediately or
> (ii) Before he could have any real opportunity to seek official protection,
> (iii) If he did not do or omit to do the act in question and
>
> (c) That there was no way of avoiding or preventing the harm threatened
>
> (3) In this section "official protection" means the protection of the police or any authority managing any prison or other custodial institution, or any other authority concerned with the maintenance of law and order."

Before the amendment of 1990, s.16 of Penal Code read:

> "S. 16. A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the

> time in which it is being done or omitted to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses, but threats of future injury do not excuse any offence."

We note that, no doubt by an oversight, the learned trial judge and Counsel on both sides quoted the old section 16 and proceeded to deal with the defence of compulsion on that basis. This was also the basis of the arguments before us. In dealing with this defence the learned trial judge had this to say at P. 96 of the record :

> "The evidence I received in this case did not show that either the former President, or Mr. Nyirenda or Mr. Kamina or indeed Mr. Sebastian Zulu threatened the accused person with instant death or grievous bodily harm if he did not cooperate with them. The security officers who accompanied him to Mr. Zulu's office were meant to protect and the document he was signing and not to threaten him) and this is how the accused person understood their presence at the time. But after more than a year of thinking what to come and tell this court to strengthen his case that he was an unwilling participant, he came up with this story that the presence of those officers frightened him. What Mr. Zulu told him in his office on the 12th of August, was clearly understood by the accused person as well as this court as meaning that if he did not cooperate with the former President he may disappear without trace at some future time and not there and then."

It seems to us that the new section introduced a number of new elements which should have been taken into account. It is no longer a requirement that the offender pleading duress was jointly engaged in committing an offence with the person or persons who throughout the duration of the commission of that offence compelled him to participate by threats of immediate serious physical harm or death. That was the state of the law when *Nguila v The Queen* was decided in which the defence was not upheld when the threats were not of immediate danger to life or limb but consisted of threats to burn the reluctant offenders' own houses if they did not participate in a politically-inspired orgy of arson against opponents houses. Learned Counsel for the state Mr. Kasote has cited this case to support his submission that there was no immediate threat and that in any case the appellant was ambivalence in his explanation, that is to say, whether he acted out of fear for his life or the prospect of reward in the matter of resolving his disputed citizenship. It seems to us that under the new section, it is sufficient for a reluctant offender to show that he believed (apparently even on grounds which may not be regarded as reasonable when considered objectively) the harm threatened was death or grievous injury. Next, he had to show that he believed the threat would be carried out immediately or before he could have any real opportunity to seek official protection, as defined, and there was no way of avoiding or preventing the harm threatened. The prosecution would have the burden of disproving these. It is very doubtful whether the new section can be regarded as having clarified the law surrounding the defence of duress. In the normal course, duress is a defence to all crimes but would hardly ever be available to a person charged with murder: See *R v Howe and others* (6) which has extensive discussions on duress. A person may be regarded as having acted under duress when he acts solely as the result of threats of death or serious injury to himself or another which operates on his mind at the time of his act. Previously, the threat had to be of immediate death or injury but the new section suggests that an immediate threat of future death or injury may have to be taken into account. If the Defendant is made to do the act before he has had any real opportunity to seek protection. The court now has to consider also whether the Defendant could have reasonably avoided doing the act such as by running away or by seeking police protection. Whatever may be said about the new section, it seems to us that it still supports the view that the test of whether a Defendant was compelled to act as he did is still objective , not subjective. In this regard, we respectfully concur with the sentiments in *R v Howe* (6) above which applied dicta from *R v Graham*(7) to the effect that a Defendant is required to have the steadfastness reasonably to

be expected of the ordinary citizen in his situation.

Turning to our present case, the learned trail judge showed in the passage which we have quoted that he accepted that the appellant's will was overborne but dismissed the defence on the old formula that future threats did not avail. There was thus no discussion of the new alternative situations beside immediate harm, 30 such as the absence or presence of any real opportunity to seek protection or to avoid the harm by not doing the actions complained of which in this case were the signing of the offending document and the failure to come to court . To the extent that only the old provision was discussed, there was a misdirection and the question arises whether we can apply the provisio to Section 15 (1) of Cap.52. It should be borne in mind, as Lord Kilbrandon stated in DPP for Northern Ireland v Lynch (8) that:

> ''The decision of the threatened man whose constancy is overborne so that he yields to the threat, is a calculated decision to do what he knows to be wrong ,and is therefore that of a man with , perhaps to some exceptionally limited extent, 'guilty mind'. But he is at the same time a man whose mind is less guilty than is his who acts as a he does but under no such constraint".

It should also be borne in mind that the new section envisages, paraphrasing the words of Lord Griffiths in *R v Howe* (6) (above) when he was commenting on a draft bill very similar to our new S.16, duress is supposed to be a complete defence in certain circumstances and the law appears to have introduced it as a merciful concession in human frailty. The offender is to be taken as having acted under duress if he was induced to take the action by any threat of harm to himself or another and at the time he took it he believed (whether or not on reasonable grounds):

(a) That the harm threatened was death or serious personal injury;
(b) That the threat would be carried out immediately if he did not take the action in question or, if not immediately, before he could have any real opportunity of seeking official protection; and
(c) That there was no other way of avoiding or preventing the harm threatened, provided, however, that in all the circumstances of the case he could not reasonably have been expected to resist the threat.

The new section 16 does not say what is to be the position if any official protection which might have been available in the circumstances would or might not have been effective to prevent the harm threatened and this issues is important in this appeal because of the allegations, accepted by the learned trial judge, that the duress was coming from high up, including those who were supposed to provide the official protection. Can it be said that the appellant had the relevant opportunity to seek protection or to avoid or prevent the harm, bearing in mind that the relevant time to be taken into account is the time when he the action amounting to the commission of the offences? The court below did not discuss the application of the new section and the prosecution did not address itself to navigating the factors now relevant to duress.

However, it is quite clear from the facts accepted in the court below that duress came only from the Executive, Office of the President (Special Division) and Police at State House and not the Army, National Service, Prisons and courts who are also, in the words of Section 16 (3) Supra, concerned with the maintenance of law and order. On the facts of this case we cannot say that the appellant had no real opportunity to seek official protection from either the Army, National Service, Prisons or courts. He had such an opportunity but did not seek protection because, and this is quite obvious from the evidence on the record, he was, from the inception, a willing participant in the whole scheme to discredit the four Judges and that he stood to gain had the scheme succeeded by being granted Zambian Citizenship.

We are quite satisfied therefore that had the learned trail judge considered the provisions of the new Section 16 he would have come to the same conclusion as he did. We would therefore apply provisio to Section 15 (1) of Cap. 52 and dismiss the appeal against conviction.

We also find it unnecessary for a decision in this case to discuss the ground of appeal concerning the compellability of the Head of State as a witness. All we can say, obiter, is that a serving President while no doubt a competent witness could not be coerced by criminal process or sanction if he declined to cooperate because the constitution grants immunity.

With regard to the appeal against the effective sentence, we note that, although the appellant engaged in conduct which was mischievous in the extreme and a reprehensible contempt , yet there were factors which ought to have been taken into account and which have been urged before us. As Mr. Shamwana pointed out, the appellant was in custody for two solid months from 19th October, 1992 to 18th December 1992 pending trial before he was released on bail .

It seems to us that there were no good reasons for with-holding credit for this period. Instead, the learned trial judge preferred to criticise in unnecessarily uncomplimentary terms the sentence which this court substituted for his own in the related case involving the practitioner. The principles of stare decisis and binding superior predcedent so necessary in our hierachical system of justice received short shrift. It is wrong in principle and conducive of discord, uncertainty and inconsistency for lower court to adopt such a stance towards a senior court. The appellant was also a first offender, another factor urged before us. We emphasize: An aggrieved judge in summary contempt should try to show restraint and to maintain equanimity. For the reasons outlined, we are satisfied that the effective sentence should be adjusted. The sentence were concurrent, making a total of six months, four of which were suspended. We order and direct that credit be given for the two months already spent in custody during trial; which means the appellant has already served the two months he was required to spend in prison.. The appeal against sentence is allowed to the extent indicated.

Appeal partly allowed
