OLIVER JOHN IRWIN v THE PEOPLE (1993 - 1994) Z.R. 7 (S.C.)

SUPREME COURT
GARDNER, SAKALA AND CHAILA., JJ.S.
2ND FEBRUARY AND 17TH MARCH,1993.
(S.C.Z. JUDGMENT NO.4 OF 1993)

Flynote

Criminal law and procedure - Bail - Whether available on a murder charge.
Criminal Law of Procedure - Inquest - Whether pre-empted by committal proceedings.

Headnote

The appellant, who was charged with murder, was denied bail and committed to trial in the High Court before an inquest was held. The High Court's ruling arose from a referral by the Magistrates' Court in response to the appellant's application for bail, for an order that a preliminary inquiry be held, and for an order that an inquest be held under the provisions of s.7 of the Inquest Act while the ongoing proceedings were discontinued. The appeal raised some preliminary procedural issues as whether the matter was properly before the Supreme Court. Having so ruled, the Court considered the substantive questions and held as follows.

Held:

(i) The High Court has power to admit to bail in all cases including those relating to persons accused of murder and treason, subject to the rule that such persons are rarely admitted to bail. Such application must be made to the High Court. The subordinate court has no power to grant bail in a murder case, and the Supreme Court enjoys only appellate jurisdiction.

(ii) An inquest is subject to the mandatory provisions of s.6 of the Inquest Act that cannot be commenced and would have to be adjourned until the conclusion of criminal proceedings.

Cases referred to:

(1) Kaunda v The People (1990-92) Z.R. 215.
(2) Kaindu v The People (Application No. 6 of 1991).
(3) Mumbuna v The People (1984) Z.R. 66.
(4) Kaunda v The People (1990-92) Z.R. 91.
(5) Sikatana v The People (1982) Z.R. 109.
(6) Warner v Metropolitan Police Commissioner [1968] 2 All E.R. 356.
(7) Beswick v Beswick [1967] 2 All E.R.1197.

Legislation referred to:

1. Inquest Act, Cap. 216, ss.6, 7.
2. Criminal Procedure Code, Cap.160, s. 123(1), (3).

For the appellant: E. J. Shamwana, with him G. Chilupe and J. Naik.
For the respondent: C. Godwin, Senior State Advocate .

Judgment

GARDNER, J.S.: delivered the judgment of the Court.

This is an appeal from a ruling by the High Court on a case stated that there should be no inquest but that the appellant should be committed to the High Court for trial and that bail

could not be granted because the appellant was charged with murder.

The appellant was charged with murder, the particulars of the charge

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being that he, on 27th May, 1987, murdered one Maria Somers Vine. When he appeared before the principal resident magistrate, Lusaka, counsel on his behalf made three applications:

(1) for bail;
(2) for an order that a preliminary inquiry be held; and
(3) for an order that an inquest be held under the provisions of s.7 of the Inquest Act and that the original proceedings be discontinued.

The learned magistrate ruled that s.123 of the Criminal Procedure Code debarred her from granting bail in murder cases and that, as the order for exhumation of the body of the deceased was for the purpose of holding an inquest, the charging of this appellant for the offence of murder was illegal and an inquest should have been held in accordance with the earlier order of the coroner.

The learned magistrate was of the opinion that the criminal proceedings were illegal *ab initio* and that the Court should discharge the appellant and order an inquest. However, she was of the view that she had no jurisdiction to make such orders and referred the issue to the High Court by way of case stated.

The learned trial judge found that s.6(1) of the Inquest Act was mandatory in its provision that when a person is brought before a magistrate on a charge of (*inter alia*) murder an inquest shall not be commenced, or, if commenced, shall not be continued until after the conclusion of the proceedings. He also found that none of the facts put forward on behalf of the appellant as reasons to the contrary had been proved, and that the powers of the Director of Public Prosecutions enabled him to choose whether to commit for summary trial or to prefer an inquest before the coroner.

As to bail, the learned judge found that he was bound by the cases of *Kaunda v The People* [1] and *Kaindu v The People* [2] in which the Supreme Court ruled that no application for bail lies in any court in cases of murder or treason. However the learned trial judge indicated that the Supreme Court's judgments may have been best delivered *per incuriam* in that art.94 of the Constitution, which gives the High Court unlimited jurisdiction, had not been considered by this Court.

In any event the learned judge found that no application for bail accompanied by necessary documents was properly before him and he consequently made the orders referred to against which the appellant now appeals.

Mr Godwin, on behalf of the State, raised a number of preliminary objections against our hearing the appeal. First he argued that, as a certificate for summary trial under s.254 of the Criminal Procedure Code had been issued by the Director of Public Prosecutions on 11th December, 1992, and produced to the subordinate court on a date thereafter which he could not particularise, the question of holding an inquest or a preliminary inquiry no longer arose because, under art. 5, 6(6), the exercise of the powers of the Director of Public Prosecutions could not be questioned or subjected to control.

In reply Mr Shamwana, on behalf of the appellant pointed out that whether or not an inquest

should have been held was one of the issues

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to be decided on the appeal and was not a matter for preliminary objection.

We are of the view that although the Director of Public Prosecutions has power to initiate criminal proceedings when he deems fit, such power is always subject to any laws which determine whether such proceedings may be commended at all. If there is an argument that the provisions of the Inquest Act prevent the commencement of criminal proceedings until after an inquest, we must hear that argument. This preliminary objection must fail. We will deal with the next two preliminary points together because they both relate to the question of the correct procedure which should have been adopted in the circumstances of this case.

Mr Godwin drew our attention to the case of *Mumbuna v The People* [3] in which this Court held that no case would be stated by a subordinate court for consideration by the High Court until a full hearing before a subordinate court had been determined. He argued that as there could be no case stated there could be no appeal.

We agree with Mr Godwin that a case stated did not lie in this case; but, as we indicated in the *Mumbuna* case, there is provision in art.28(2) of the Constitution for reference by a subordinate courts to the High Court of any question as to the contravention of arts.11 to 26, and thereafter for appeal to the Supreme Court. The learned judge dealt with the first application before him as being by way of case stated. He criticised the form in which it was presented to him by the learned magistrate as not being in accordance with s.350 of the Criminal Procedure Code relating to cases stated, and sent it back to the learned trial judge in his ruling, but, in view of the fact that the learned judge proceeded to hear argument and to deliver a ruling, we presume that he decided to deal with the matter as reference under the provisions of art.28(2) as this Court did in the *Mumbuna* case where proceedings had been started by similar irregular procedure.

In the event we are satisfied that, although the appropriate procedure was not followed in this case, the questions referred under the improper case stated were questions which could properly have been referred under art.28(2) and an appeal consequently lies to this Court. Mr Godwin's argument as to the proper form of reference to the High Court therefore falls away.

As we have decided to treat this matter as having started with a reference under art.28(2) we now have to consider it in the light Mr Godwin's fourth preliminary objection namely that no interlocutory appears into the Supreme Court during the course of a criminal trial. In support of this argument Mr Godwin referred us to the case of *Kaunda v The People* [4] in which this Court held that no interlocutory appeal could be entertained by the Supreme Court during the course of a High Court criminal trial which is still in progress. In that case we specifically pointed out that s.20 of the Supreme Court Act, which would enable this Court to hear references from the High Court would enable this Court to make such a reference. We referred in that case to the case of *Sikatana v The People* [5] in which we indicated that there was clear statutory provision for reference by a subordinate court to the High Court under art.29(3) (now article 20(2) of the Constitution).

That is the situation in this case,

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and, because the reference was from a subordinate court to the High Court under art.28(2)(a),

the Supreme Court has jurisdiction to entertain an appeal therefrom under art.28(2)(b). We agree with Mr Godwin that a case stated did not lie in this case; but as we indicated in *Mumbuna* case, there is provision in art.28(2) of the Constitution for reference by a subordinate court to the High Court of any question as to the contravention of arts.11 to 26, and thereafter for appeal to the Supreme Court. The learned judge dealt with the first application before him as being by way of case stated. He criticised the form in which it was presented to him by the learned magistrate as not being in accordance with s.350 of the Criminal Procedure Code relating to cases stated, and sent it back to the learned magistrate to be re-stated. At the second hearing Mr Godwin drew the learned trial judge's attention to the *Mumbuna* case and argued that no case could be stated. This argument was not dealt with by the learned trial judge in his ruling, but in view of the fact that the learned judge proceeded to hear argument and to deliver a ruling, we presume that he decided to deal with the matter as a reference under the provisions of art.28(2) as this Court did in the *Mumbuna* case where proceedings had been started by similar irregular procedure.

In the event we are satisfied that, although the appropriate procedure was not followed in this case, the questions referred under the improper case stated were questions which could properly have been referred under art.28(2) and an appeal consequently lies to this Court. Mr Godwin's argument as to the proper form of reference to the High Court therefore falls away.

As we have decided to treat this matter as having started with a reference under art.28(2) we now have to consider in that light Mr Godwin's fourth preliminary objection, namely that no interlocutory appeals lie to the Supreme Court during the course of a criminal trial. In support of this argument Mr Godwin referred us to the case of *Kaunda v The People* [4] in which this Court held that no interlocutory appeal could be entertained by the Supreme Court during the course of a High Court criminal trial which is still in progress. In that case we specifically pointed out that s.20 of the Supreme Court Act, which would enable this Court to hear references against any person in the High Court to make such a reference. We referred in that case to the case of *Sikatana v The People* [5] in which we indicated that there was clear statutory provision for reference by a subordinate court to the High Court under art.29(3) (now art.28(2)(e)). The Supreme Court has jurisdiction to entertain an appeal therefrom under art 28(2)(b). Had a similar statutory provision existed to make s.20 of the Supreme Court Act effective, the appellant in the *Kaunda* case would have had, as we indicated in this case, a right of reference to the Supreme Court. We are satisfied that by treating this matter as having originated as reference by a subordinate court to the High Court this appeal is properly before us. The final preliminary objection taken by Mr Godwin was that there was in fact no application for bail before the High Court. Although this was disputed by Mr Chilupe for the appellant, there is no need for us to consider whether or not there was such an application because we are quite satisfied that there was an application for bail before the learned magistrate and a ruling thereon by

the learned judge. The question of the availability of bail in this case is therefore properly before us on appeal. During the course of the hearing we indicated that none of the preliminary objections was successful and we proceeded to hear arguments on the merits of the appeal.

Mr Shamwana, on behalf of the appellant, argued that the State, by charging the appellant with the offence of murder, before an inquest has been held as ordered, acted illegally and rashly so that the appellant suffered injustice.

In support of his argument Mr Shamwana referred to ss.6 and 7 of the Inquest Act cap.216 which read as follows:

''(1) Whenever the coroner is informed that some person has been or is about to be brought before a magistrate on a charge of murder, manslaughter or infanticide of the deceased or of a motor vehicle or complicity in the death of deceased under s.8 of the Suicide Act, in the absence of reason to the contrary the inquest shall not be commenced or if commenced shall not be continued or resumed until after the conclusion of the proceedings.

(2) After the conclusion of the criminal proceedings the coroner, may, subject as hereinafter provided, hold an inquest or resume the adjourned inquest. . . .

(7) Notwithstanding any law or custody to the contrary enacted or obtaining, whenever it shall appear to any coroner that the body of any person who has died in circumstances requiring the holding of an inquest having been held or where such inquest, although held, has been quashed or reopened it shall be lawful for such coroner by his warrant in form 1 in the schedule to order the examination of such body; and he should, after such examination, proceed to hold an inquest on such body and thereupon direct the reinterment thereof. . .''

Mr Shamwana stressed the words in s.6 ''in the absence of reason to the contrary'' and argued that where there were reasons to the contrary it was mandatory that an inquest be held. He argued that it was illegal to take any proceedings against the appellant without holding an inquest first. He did not cite any authority in support of his contention but maintained that it would be illegal and unjust to treat the appellant in any other way. In support of the argument that in this case there were reasons to the contrary Mr Shamwana pointed out that the matter arose out of a death which occurred in 1987, that the appellant had been charged within one month of the exhumation of the body, that the facts pointed to the suggestion that the prosecution had intended to charge the appellant even before the exhumation, that the prosecution had disregarded the rules relating to the holding of inquests and that the circumstances suggested *mala fides* on the part of the prosecution. In the Court below it was pointed out that the coroner's order had named a Dr Patel as the pathologist to examine the body after exhumation, that Dr Patel had previously been deported from Zambia and was out of the jurisdiction when he was named by the coroner, that the exhumation, and that s.7 of the Inquest Act specifically provided that after an exhumation the coroner should proceed to hold an inquest. It was argued by Mr Shamwana that the language of s.7 was mandatory and did not allow for the stay or adjournment of the inquest pending criminal proceedings.

In the Court below the learned judge found that none of the facts relied

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on as ''reasons to the contrary'' had been proved, but that, in any event, the Director of Public Prosecutions had jurisdiction to prefer a prosecution to an inquest.

As to bail, Mr Chilupe on behalf of the appellant argued that the High Court had unlimited jurisdiction to admit to bail in any case. He referred to s.123(1) and (3) of the Criminal Procedure Code which read as follows:

> ''123(1) When any person, other than a person accused of murder or treason, is arrested or detained without warrant by an officer-in-charge of a police station or appears before or is brought before a court, he may at any time, while he is in the custody of such officer, or at any stage of the proceedings before such court, be admitted to bail upon providing a surety or sureties, sufficient in the opinion of such officer or court, to secure his appearance, or released upon his own recognisance.
>
> (3) The High Court may, at any time, on the application of an accused person, order

him, whether or not he has been committed for trial, to be admitted to bail or released on his own recognisance, and the bail bond in any such case may, if the order so directs, be executed before any magistrate.''

He argued that ss.(1) which excludes persons accused of murder or treason applies only to persons detained by a police officer or who appears before a subordinate court, and that ss.(3) applies to persons who make applications for bail to the High Court, which has unlimited jurisdiction to grant bail in all cases including those involving persons charged with murder or treason.

Mr Chilupe also adopted the comments of the learned trial judge to the effect that as the Constitution gave the High Court unlimited jurisdiction such jurisdiction included the power to grant bail in all cases. Mr Chilupe also argued that the words of limitation relating to persons accused of murder or treason appear only in ss.(1) and are omitted from ss.(3). The reason for this, argued Mr Chilupe, must be that the High Court has different powers.

Referring to the learned trial judge's finding that there had been no formal application for bail with appropriate documents made to him in the High Court, Mr Chilupe maintained that such affidavits in support, when making verbal applications for bail.

Finally Mr Chilupe drew attention to art.13(3) of the Constitution which provides that any person who is arrested or detained and who is not tried within a reasonable time shall be released either unconditionally or on reasonable conditions to ensure that he appears for trial. It was pointed out that in such a case there are no exceptions for persons charged with murder or treason and it was argued that this indicated an intention in the Constitution that bail could be granted without limitation of the types of offence with which a person was charged.

In reply Mr Godwin argued that the question whether or not there should be a prosecution was in the hands of the Director of Public Prosecutions whose decision could not, in terms of art.66(6), be questioned. He argued that, although s.7 of the Inquest Act provided that here should be an inquest after an exhumation, s.6 expressly prevented such an inquest's being held until after criminal proceedings had been concluded.

With regard to bail Mr Godwin maintained that the exclusion of

persons charged with murder or treason in s.123(1) applied throughout the section and prevented such excluded persons being granted bail by any court.

He relied on the settled law, as indicated in the *Kaunda* and the *Kaindu* cases, that s.123(1) prevents the granting of bail by any court to a person accused of murder.

In reply Mr Shamwana maintained that the power of the Director of Public Prosecution was not in question but he questioned the exercise of those powers in this case when the time that had passed since the death of the deceased was five years and the conduct of the prosecution suggested *mala fides.* He maintained that the proviso in s.6 of the Inquest Act, that if there were reasons to the contrary the inquest should not be stayed, was mandatory. He argued, on the question of bail, the ss.(3) of s.123 of the Criminal Procedure Code should be constructed separately from ss.(1), so that the High Court had power to grant bail in all cases except those specifically excluded by ss.(4), which relates to persons charged under the State Security Act.

In considering whether in any circumstances there could be reasons for not staying an inquest

which could render the charging of a person with a criminal offence illegal, we have considered the purpose of s.6 of the Inquest Act.

In the United Kingdom, rule 22(1) of the Coroners Rules 1953 provides for the adjournment of an inquest at the request of the police when criminal proceedings are contemplated but no charge has yet been preferred. Although no such rules have been promulgated in Zambia they give an indication of the reason for s.20(1) of the English Coroners (Amendment) Act, 1926, which provides that, when a coroner is informed before the jury have given their verdict that some person has been charged with (*inter alia*) murder, he shall, in the absence of reason to the contrary, adjourn the inquest until after the conclusion of the criminal proceedings. *Jervis on Coroners* (9th ed.) at page 157 points out that the reason for the provision for adjournment is that the holding of an inquest might be prejudicial to the investigations of the police. It will be seen that the wording of the English section is similar, especially as regards the words ''in the absence of reason to the contrary'', to the Zambian section. It is clear that in both countries the intention of the Legislature is to make the time of the holding of an inquest subordinate to any criminal proceedings. We are unable to accept Mr Shamwana's argument that a reason contrary to the desirability or necessity of a stay of an inquest could ever make the preferring of a criminal charge illegal. If there were reasons of such importance that they made it absolutely essential for an inquest to be held, and we are not saying that such reasons exist here, the most that could be done would be for an application to be made for an order of *mandamus* to compel the coroner to hold an inquest.

As to the effect of s.7 which Mr Shamwana argued made it mandatory for the coroner to proceed to hold an inquest after an exhumation, we are of the view that any inquest so held would be subject to the mandatory provisions of s.6, and could not be commenced or would have to be adjourned until the conclusion of the criminal proceedings. Counsel for the appellant and the learned magistrate seem to be under the impression

that s.7 must be construed as if it meant that after an exhumation an inquest must be held immediately. No such immediacy can be construed from the wording of the section and the resulting inquest is subject to the mandatory provision for stay contained in s.6, which applies to all inquests. This ground of appeal cannot succeed.

As to bail, this question has already been decided by this Court in the *Kaunda* case and the principle of *stare decisive* applies. However, Mr Chilupe and the learned judge have suggested that the decision in the Kaunda case was made *per incuriam*.

The learned magistrate and counsel for the appellant argued that, because capital punishment did not now apply in all murder cases, bail should now be available in such cases. As we pointed out in the *Kaunda* case the appellant was charged with murder, rightly or wrongly, and remains so charged. In this case as in all cases where persons are charged with murder the question of sentence, as the learned judge indicated, does not arise until conviction. In any event, in all such cases there is a possibility of an acquittal or a conviction for manslaughter but this does not affect the construction of s.123(1) which specifically states that persons accused of murder or treason are excluded from the provisions as to bail. The section does not refer to the exclusion of persons who on conviction will be subject to capital punishment but specifically refers to persons charged with the offences of murder and treason, not to the possible punishment therefor.

Before the learned judge and this Court counsel for the appellant argued that ss.(3) of s.123 should be constructed separately from ss.(1) and that it gives the High Court unlimited power to grant bail in all cases without any exceptions.

Again in connection with his argument we have considered the intention of the Legislature. Counsel for the appellant have asked us to assume that the Legislature intended to limit the powers of subordinate courts but to give the High Court unlimited powers because of the higher stature of judges. In pursuance of this argument we are asked to construe ss.(1) as applying to subordinate courts only. We are asked to construe the words ''when any person appears before or is brought before a court'' as referring to a person's appearing before a subordinate court only. The result of this construction would be that after a refusal of bail by a subordinate court a person accused of murder could apply to the High Court, which he is quite entitled to do under ss.(3), and the High Court would have power to grant bail when a subordinate court had no such power.

There is nothing to prevent this situation obtain. Prior to 1957, s.116 of the Criminal Procedure Code, which related to bail, read as follows:

> ''116(1) When any person, other than a person accused of murder or treason, is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared, at any time while in the custody of such officer, or at any stage of the proceedings before such court, to give bail, such person may be admitted to bail.''

This had the same effect as the present s.23(1) and excluded persons accused of murder and treason from the provisions as to bail. Subsection (3) read as follows

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> ''(3) Notwithstanding anything contained in ss.(1) of this section, the High Court may, in any cases, direct that any person be admitted to bail or that the bail required by a subordinate court or police officer be reduced.''

This quite clearly gave the High Court power to grant bail in all cases without the exclusion of persons accused of murder or treason.

By ordinance No.50 of 1957, s.116 was repealed and replaced by a section identical to the present s.123. We must consider whether the repeal and replacement was intended to alter the powers of the High Court to admit to bail in all cases. The words ''notwithstanding anything contained in ss.(1)'' are now omitted. It might be argued that the omission of such words meant that any restrictions contained in ss.(1) should now apply to the powers of the High Court; equally it could be argued that the intention of the Legislature to give the High Court unlimited powers is so clear that the words ''notwithstanding'' *etcetera* were considered by the draftsman to be superfluous and were for that reason omitted from the new section.

We are of the view that the latter construction is the correct one. There is nothing to indicate that the Legislature intended to deprive the High Court of its unlimited powers as to bail in all cases without exception merely by omitting the words to which we have referred.

In the Criminal Procedure Code, if sections are to be subject to the limitations or exceptions of other sections, they are expressly stated to be so subject. In s.123, itself, ss.(2) is made subject to s.126 which creates an exception to its provisions. In the same way in s. 221(9), para. (a) is made subject to para.(b) which creates an exception to its provisions. The ss.123(3) which we are construing stands alone and is not stated to be subject to any other section or subsection. In other Commonwealth countries we find that the United Kingdom has a provision empowering the High Court to grant bail to persons accused of treason (the only offence there for which

there is capital punishment) and denying such power to lower courts. The same rule in cases of treason and murder applies, so far as we are able to ascertain, in the other Commonwealth countries of Africa. There is no reason for Zambia to be an exception.

We are aware of the strictures against resorting to *Hansard* for the purpose of ascertaining the intention of the Legislature when the construction of statutes is considered by the Courts. However, in the case of *Warner v Metropolitan Police Commissioner* [6] Lord Raid said:

> '' The rule is firmly established that we may not look at *Hansard*, and in general I agree with that view for reasons which I gave last year in *Beswick v Beswick* [7]. This is not a suitable case in which to reopen the matter, but I am bound to say that this case seems to show that there is room for an exception where examining the proceedings in Parliament would not certainly settle the matter immediately one way or the other.''

We do not propose to suggest in this judgment that the previous practice should not be followed, but for the purpose of confirming that our construction of s.123 of the Criminal Procedure Code is correct we have referred to *Hansard.* The relevant report of the proceedings in Parliament on 8th November, 1957, when the Attorney-General, B.A. Doyle (as he then was) introduced the Bill to amend the Criminal Procedure Code, indicates

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at page 253 that he said (*inter alia*):

> ''Clauses 4 to 9 deal with matters of bail and indeed they are mere clarification from a draftsman's point of view except in respect of one matter. The only alteration to bail now is that the Courts have been given specific powers to impose conditions on bail . . .''

This supports the view we now take of the proper construction of s.123(3) which is contrary to the view we took in our judgment in the *Kaunda* case of 1992. As suggested by Mr Chilupe, our earlier judgment was made *per incuriam.* The question of construing ss.(3) separately from ss. (1) was not argued before the Court and not taken into consideration. We are not satisfied that the High Court has power to admit to bail in all cases including those relating to persons accused of murder and treason. We confirm, however, that the subordinate court is restricted and may not admit to bail persons accused of murder or treason.

The question of the jurisdiction of the High Court is of course irrelevant. Although art.94 of the Constitution gives the High Court unlimited jurisdiction that court is bound by all the laws which govern the exercise of such jurisdiction. If, contrary to our finding, s.123(1) did in fact limit the powers of the High Court, it would be bound by such limitation.

In view of our findings the appeal succeeds on the question of bail and the appellant has a right to apply for bail to a judge of the High Court. Such court will of course be bound by the general rule that persons accused of murder are very rarely admitted to bail.

This Court has no power to admit to bail where there is no appeal from a conviction in the High Court. As the learned judge in the Court below did not consider that a proper application for bail had been made of the High Court, despite the argument to the contrary by counsel for the appellant, we order that if bail is required a fresh application must be made to the High Court.

Appeal allowed in part.
