CHRISTINE MULUNDIKA AND 7 OTHERS v THE PEOPLE (1995) S.J.

SUPREME COURT
NGULUBE, C.J, BWEUPE, D.C.J., CHAILA, CHIRWA AND MUZYAMBA, JJ.S.
30TH NOVEMBER AND 10TH DECEMBER, 1996
S.C.Z. JUDGMENT NO. 25 OF 1995
S.C.Z. APPEAL NO. 95 OF 1995

Flynote
Constitutional law - Provisions of Public Order Act Cap. 104, section 5(4) - Permit - Exemption - Discrimination.

Headnote
The appellant challenged the constitutionality of certain provisions of the Public Order Act Cap 104, especially section 5(4). The H challenge followed on the fundamental freedoms and rights guaranteed by arts 20 and 21 of the Constitution. A subsidiary challenge related to the exemption of certain office-holders from the need to obtain a permit.

Held:
Held (by a majority, CHAILA, J.S., dissenting):
(i) Section 5(4) of the Public Order Act Cap 104 contravenes arts 20 and 21 of the Constitution and is null and void.
(ii) The exemption granted to certain office-holders does not fall under the categories listed in the Constitution.

For the appellant: Mr S S Zulu of Zulu and Company and Professor M.P. Mvunga of Mvunga Associates
For the respondent: Mr A G Kinariwala, Principal State Advocates

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Judgment
NGULUBE, CJ.: delivered the Judgement of the majority (Ngulube, C.J., Chirwa and Muzyamba.)

The judgement I am about to read is that of the majority of the court comprising Justices Chirwa, Muzyamba and myself. Our brother Justice chaila will read his own separate dissenting decision. The learned Deputy Chief Justice who was the fifth member of the bench did not indicate his view and has since been injured in a road accident and he is in hospital. He will be at liberty to place on record - and deliver if required - his own opinion when he has resumed duties. In the circumstances, there was no need to delay delivery of judgement since the result of the appeal and the order of the court shall be in accordance with the judgement of the majority.

The appellants challenged the constitutionality of certain provisions of the Public Order Act, Cap.104, especially s.5(4) which requires any person to hold a peaceful assembly to obtain a permit and contravention of which is criminalised by S.7 of the same Act. The challenge relates both to the requirement of a permit and the prosecution based on the absence of such permit and it is grounded on the fundamental freedoms and rights guaranteed by Articles 20 and 21 of the Constitution. A subsidiary challenge relates to the exemption of certain offices from the need to obtain a permit which is said to be discriminatory contrary to Article 23 of the Constitution. The issues will best be understood if we first quote the provisions under

discussion. The whole of S.5 of the Public Order Act reads:

> "S.5 (1) The Inspector General of Police may, by Gazette notice appoint by name or office any police officer of or above the rank of Sub-Inspector to be the regulating officer for the purposes of this section in respect of such area as the Inspector General of Police may by the same or any other Gazette notice, define.
>
> (2) In any area in respect of which no police officer has been appointed to be the regulating officer under the provisions of subsection (1), the District Secretary of the District in which such area is situated shall be regulating officer for the purposes of this section:
>
> Provided that in the absence of such District Secretary from his headquarters the senior Assistant District Secretary present at such headquarters may exercise the powers conferred upon a regulating officer by subsection (3) and (4).
>
> (3) Any regulating officer may issue directions for the purpose of:
> (a) regulating the extent to which music may be played on public roads and streets within his area on the occasion of festivities or ceremonies; or
>
> (b) directing the conduct of assemblies and processions in any public place within his area, and the route by which and the times at which any procession may pass.
>
> (4) Any person who wishes to convene an assembly, public meeting or to form a procession in any public place shall first make application in that behalf to the regulating officer of the area concerned, and, if such officer is satisfied that such assembly, public meeting or procession is unlikely to cause or lead to a breach of the peace, he shall issue a permit in writing authorising such assembly, public meeting or procession and specifying the name of the person to whom it is issued and such conditions attaching to the holding of such assembly, public meeting or procession as the regulating officer may deem necessary to impose for the preservation of public peace and order.

The relevant parts of Article 21 of the Constitution read:

> "Article 21 (I) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that it to say, his right to assembly freely and associate with other persons and in particular to form or belong to any political party, trade union or other association for the protection of his interests.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it i shown that the law in question makes provision
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> (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
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> and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society."

We will return to Article 23 regarding the alleged discrimination a little later. The learned High court Judge who dealt with the constitutional reference from the trial magistrate held that the

impugned provisions were not contrary to the constitution and were not unjustifiable in a democratic society. He held that to strike down the requirement for a permit would leave a vacuum in the law and would conduce to chaos and anarchy. We will deal with the very able submissions and arguments from counsel on both sides as we proceed but broadly speaking Professor Mvunga and Mr Zulu argued very forcefully against the impugned provisions while Mr Kinariwala stoutly defended them, arguing that the requirement of a permit as provided for simply needs amendments in order to offer proper guidance to the regulating officer and to prevent possible abuse by the officer.

> (3) The officer in charge of police or any magistrate may stop any procession for which no permit has been issued under this section, or which violates any of the conditions specified in such a permit, and may order such procession or any assembly which has been convened without a permit issued under this section or which violates any of the conditions specified in such a permit to disperse.
>
> 29. Any person who:
>
> (a) opposes or disobeys any order issued under subsection (1) of section twenty- eight of this ordinance;
>
> (b) violates any condition of a permit issued under subsection(2)of section twenty-eight of this Ordinance;
>
> shall be liable on conviction to a fine not exceeding twenty pounds or to imprisonment for a period not exceeding three months.
>
> 30. Any assembly, meeting, or procession--
>
> (a) which takes place without a permit issued under subsection (2) of section twenty eight of this Ordinance;
>
> (b) in which three or more persons taking part neglect or refuse to obey any order given under subsections (1) and (3) of section twenty eight of this Ordinance;
>
> shall be deemed to be an unauthorised assembly, and all persons taking part in such assembly, meeting or procession for which no permit has been issued, all persons taking part in convening, collecting, or directing such assembly, meeting, or procession, shall on conviction be liable to a fine not exceeding fifty pounds or to imprisonment for a period not exceeding six months or to both such fine and imprisonment

It is obvious that in 1993, the authorities did not have in mind anything like the fundamental freedoms and rights of assembly and speech. The effect of the provisions in the 1953 ordinance was discussed by the Federal Supreme Court in *Attorney-General For Rhodesia v Hagamata (1959)1 R & N 226* where the High Court of Northern Rhodesia had acquitted the accused of unlawful assembly in Chief Chongo's Village allegedly because it was not a designated area. In the course of reversing the High Court Judge, the Federal Supreme Court observed, at pages 230 to 231:

> "The offence of unlawful assembly is created by Section 30. Section 28 simply provides for the permits by which the offence is avoided. Section 30 is in very wide terms and makes every assembly, meeting or procession in Northern Rhodesia unlawful, unless it is held under permit. It is therefore to be expected that provision should be made for a permit system covering the whole Territory and not only areas designated by the Commissioner of Police. Unless 28(2) was intended to deal with

> residual areas covering all undesignated parts of the country, lawful assembly would be impossible in extensive areas. Indeed, if the Commissioner of Police designated no areas, no lawful assembly could be held in the Territory."

By the Public order (Amendment) Ordinance No. 10 of 1959 of the legislature of Northern Rhodesia, the provisions for permits were deleted from the Northern Rhodesia Police Ordinance and relocated into the Public Order Ordinance. They have survived in substance and form to this day under the public Order Act. The effect of the provisions under this Act is still that, unless exempted or under permit, no lawful assembly can be held in Zambia, every public assembly, meeting or procession in Zambia is unlawful unless it is held under a permit. This question arises whether these elderly provisions born in 1953 which still have the effect observed by the Federal Supreme Court are consistent with the freedoms of assembly and speech enshrined in the constitution.

As we hope to make very clear in the course of this judgement, it was common cause between the parties that there is absolutely nothing wrong with provisions which are purely regulatory in the interests of public order as envisaged by the constitution itself, for example, the matters mentioned in S.5 (3) and S.5 (a) (b) (d) and (e). A major argument against section 5(4) was with regard to its effect upon the enjoyment of the freedoms of expression and assembly. The argument was that although the freedoms under the constitution are not absolute, they should only be regulated but not abridged or denied. It was submitted that the subsection could not reasonably be justifiable in a democratic society when it reduced the fundamental freedoms to the level of a mere licence to be granted or denied on the subjective satisfaction of a regulating officer. Counsel for the same submitted that the law required amendments to offer adequate guidelines and to prevent abuse. There was much merit in these submissions which are supported by judicial authority from around the world. The requirement of prior permission is an obvious hindrance to two very important freedoms under the constitution since the right to organise and participate in a public gathering is inherent in the freedom to express and to receive ideas and information without interference and to communicated ideas and information without interference. The fact or possibility that permission to assemble and to speak may be refused - so that the constitutional freedoms are denied altogether - on improper or arbitrary ground or even on unknown grounds, renders the subsection objectionable for a variety or reason. In the *Patriotic Party v The Inspector -General Of Police* (Writ No. 4/93 - unreported - Judgement of the supreme Court of Ghana) in relation to Ghanaian legislation making it a requirement to obtain a permit prior to holding an assembly, Hayfron - Benjamin, JSC, opined at P.41 and 42 of the transcript we have that such legislation:

> "..... creates a prior restraint on the freedom of the citizen to form or hold meeting or procession and in terms of Article 21 (d) also to demonstrate in a public place. A prior restraint is an injunction prohibiting the freedom of assembly procession or demonstration, whether such injunction or prohibition is imposed by statute or by order of court ..... the citizens freedoms may be restricted by law on the grounds stated in the constitution but they cannot be denied. Any such denial will be unconstitutional and void."

We respectfully endorse the learned judge's sentiments. Quite apart from the possibility of unconstitutionally denying the fundamental rights, the absence of adequate and objective guidelines in subsection 4 leaves it seriously flawed. In this connection, we consider that there is persuasive force in *Shuttllesworth v Brimingham* US 394 (1969) vol.22 at 166; or 22L Ed. 2d. 162 cited by counsel for the appellants. The relevant parts of S.1159 of the General Code of Birmingham alleged to have been violated read:

> "It shall be unlawful to organise or hold, or to assist in organising or holding or to take part or participate in any parade or procession or other public demonstration on the

streets or other public ways of the city, unless a permit therefore has been secured from the Commission."

"To secure such permit, written application shall be made to the commission .... The Commission shall grant a written permit for such parade, procession or other public demonstration ..... unless in its judgement the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused....."

The Supreme Court of the USA held, at page 167.....

"There can be no doubt that the Birmingham ordinance, at it is written, conferred upon the city Commission virtually unbridled and absolute power to prohibit any "parade", "procession," or "demonstration" on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the commission were to be guided only by their own ideas of "public welfare, peace, health, safety, good order, morals or convenience." This Ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to prior restraint of a licence, without narrow objective and definite standards to guide the licensing authority, is unconstitutional."

In *Pumbum and Another v Attorney General and Another* (1993) 2 L.R.C. 317, the Court of Appeal of Tanzania had occasion to consider the principle that any discretion must be subject to adequate guidelines and effective control. They held, at p. 323, that:....

"..... a law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will be saved by article 30(2) of the Constitution only if it satisfies two essential requirements. First, such a law must be lawful in the sense that it is no arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality. The principle requires that such law must not be drafted too widely so as to net everyone including even the untargeted members of society. If the law which infringes a basic right does not meet both requirements such law is not saved by article 30(2) of the constitution, it is null and void. And any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it conforms with these requirements otherwise the guaranteed rights under the constitution may easily be rendered meaningless by the use of the derogative or claw back clauses of that very same constitution."

There is no basis for disagreeing with the view expressed by the Tanzanian court on the need for adequate guidelines so that the exercise of a discretion by the competent authorities should have the scope indicated and the manner of its exercise set out in the affected law with sufficient clarity. Our subsection under discussion does not meet the test described. We are, of course, alive to the fact that the challenge in this case was not of the act of the regulating officer in refusing or neglecting to process a permit for the particular gathering for which the appellants were arrested. What is challenged is the vires of the subsection itself, among others, because the power granted to the regulating officer is unguided and allows for arbitrary decisions without effective control. There may be situations of unconstitutionality where it is

the official who acts ultra vires the constitution when the law itself within constitutional limits. In the instant case it is the pervasive threat inherent in the very existence of the offending subjection which constitutes the danger to the relevant constitutional freedoms. As can be seen, and as conceded by Mr Kinariwala, there are no adequate guidelines in subsection 4. All meetings and processions require prior permits and, as Professor Mvunga observed, this law is routinely contravened when we have for example funeral processions and other gatherings. Fortunately, there are no prosecutions for all these infringements. In our considered view, the frames of the constitution could not have contemplated criminalisation of gatherings in this wholesale fashion by some surviving colonial statute. In the second place, the subsection is highly subjective and expressed on negative terms when it speaks of the regulating officer issuing a permit only if " satisfied that such assembly, public meeting or procession is unlikely to cause or lead to a breach of the peace."

The implication is that the permit must be refused unless the regulating officer is able to satisfy himself or herself to the contrary. It is difficult to imagine a clearer recipe for possible arbitrariness and abuse. The constitutional arrangements for democracy can hardly survive if the free flow of ideas and information can be torpedoed by a misguided regulating officer.

The other aspect whether there are any effective controls on the exercise of the power to grant or refuse a permit under the subsection being discussed. There are infact none so that the regulating officer is not required to give reasons for refusal and there is no procedure provided to act as a safeguard for an aggrieved unsuccessful applicant which is reasonable, fair and just. Fundamental constitutional rights should not be denied to a citizen by any law which permits arbitrariness and is couched in wide and broad terms. In *The State Of Bihar v K.K Misra and others* AIR 1971 1667 at 1675, the Supreme Court of India expressed the view on laws imposing restrictions on fundamental rights that:.....

> ".....in order to be a reasonable restriction, the same must not be arbitrary or excessive and the procedure and the manner of imposition of the restriction must also be fair and just. Any restriction which is opposed to the fundamental principles of liberty and justice cannot be considered reasonable."
>
> "One of the important tests to find out whether a restriction is reasonable is to see whether the aggrieved party has a right of representation against the representation against the restriction imposed or proposed tobe imposed."

We find the foregoing to be a round exposition of the attitude to be adopted in these matters. The principles of fairness, let it be said, are principles in their own right and ought to be allowed to pervade all open and just societies.

The complaint against the provision that leaves an unfettered and uncontrolled subjective discretion to a regulating officer was well founded.

This brings us to consider if s.5(4) is reasonably justifiable in a democratic society, especially one that is re-establishing the essential elements of democracy based on plural politics and the genuine exercise by the people of their free will and choice and their freedoms. Even in the best of the democratic traditions, some regulation of public gatherings is required. For example, the Public Order Act 1986 of England which both sides referred to is instructive. Provision is made for notifications to be given by organisers of processions or gatherings so that the regulating authorities have the opportunity to perform the very necessary function of giving directions and imposing conditions, if any, for the sake of upholding public order and preserving the peace. The giving of notice to a regulating authority for the latter to give regulatory directions is one thing; the giving or refusal of permission to meet and to speak is

quite another matter.

For an attempt at the definition of what is a “democratic society” reference should be made to *Patel v The Attorey General* (1968) ZR99 at pages 128 to 129. We begin from the premise that there are certain minimum attributes in any democracy, including the availability of a Government which reflects the will of the majority of the people expressed at periodic and genuine elections; the power of the state should reside in the people and where this is exercised on their behalf, the mandatory is accountable. Apart from the free and informed consent and maximum participation of the governed, it is also common to expect that the people have and actually enjoy basic rightrs and freedoms available to the majority as well as to any minority. Although there are many shades of democracy and an adequate definition elusive -- and certainly not necessary for our present purposes -- the courts have long recognised the importance of freedom of speech and assembly in a democratic society. For example, the European Court of Human Rights has placed high value on the freedom of expression. We read at paragraph 49 of the judgement of 7th December 1976, Series A No. 24 *Handyside v U.K:*.....

> “The Court’s supervisory functions oblige it to pay the utmost attention to the principles characterising a “democratic society”. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man..... it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb the state or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society.”

In *The State v The Ivory Trumpet Publishing Company Ltd* and others (1984) 5 N.C.L.R. 736. Araka, C.J., of the High Court, Enugu said at page 747------

> “Freedom of speech is, no doubt the very foundation of every democratic society for without free discussion particularly on political issues, no public education or enlightenment, so essential for the proper functioning and execution of the processes of responsible government is possible.”

The learned judge in the Nigerian case quoted with approval, as we now also do, the words of justice Brandels of the United States Supreme Court in Whitney v California 274 US 357 (71 Lawed) when he said, at page 375:

> “Those who won our independence believed that the final end of the sate was to make men free to develop their faculties; and that it its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means ..... They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the

> power of reason as applied through public discussion, they eschewed silence coerced by law - the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the constitution so that free speech and assembly should be guaranteed."

The requirement of prior permission to gather and to speak, which permission can be denied sometimes for good and at other times for bad cause not contemplated by the constitutional derogation, directly affects the guaranteed freedoms of speech and assembly. It is little wonder that these are freedoms most discussed by the courts whenever a democratic society is being considered. The weight of judicial authority in Commonwealth countries argues against the constitutionality of a provision like our subsection 4 of sections 5 of Cap. 104. Thus, in *Thappar v State Of Madras S.C.R.* (1950)594 the Supreme Court of India pointed out at page 603:.....

> "Where a law purports to authorise the imposition of restrictions on a fundamental right in a language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such a right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the constitution cannot be ruled out, must be held to be wholly unconstitutional and void."

The foregoing disposes of the argument on behalf of the state that the subsection can not be ultra vires because there is a possibility of using it strictly for the authorised purposes. Unfortunately, experience teaches and it is sadly not hypothetical that in this country, the requirement for a permit to gather and speak has been used since 1953 to muzzle critics and opponents as well as alleged troublemakers. It has also been used to deny permission on grounds that had nothing to do with securing public order and safety. For example, there was much litigation in our courts during the recent transition to plural politics engendered by denials of permits on spurious grounds.

The right to assemble and speak is too important to be conditioned upon subsection 4 as conceived and first drafted in 1953. The right to assemble and express views is so important to democracy that the Supreme Court of India was constrained to observe, rather aptly, in *Rangrajan v Jagjivan ram and others* (1990) L.R.C. (const.)412 at page 424:

> "In a democracy it is not necessary that everyone should sing the same song .....Democracy is a government by the people via open discussion..... The public discussion with people's participation is a basic feature..... of democracy ..... democracy can neither work not prosper unless people go out to share their views. The truth is that public discussion on issues relating to administration has positive value."

Our neighbours in the Supreme Court of Zimbabwe had occasion to deal with a similar case to this one in *RE MUNHUMESO AND OTHERS* (1994) 1 L.R.C. 282 when they considered the constitutionality of section 6 of their Law and Order (Maintenance) Act under which the applicants were charged with organising and holding a public procession for which a permit had not been granted. The applicants, who were members of the Zimbabwe Congress of Trade Unions, had unsuccessfully applied to a regulating officer for a permit which was denied without explanation. They held their procession and the six applicants were arrested. Section 6 was deemed to be ultra vires the constitution and invalid.

They were dealing with legislation and a constitution very similar to ours and that case was

cited to the learned judge below. He declined to follow it because, as he said, he feared to create a vacuum by striking down the only provision whereby the police are enabled to know about planned public meetings and processions. We doubt whether it was a legitimate function of the court to construe the constitutionality of the law under discussion by reference to the possible administrative consequences of pronouncing against it. The Supreme Court of Zimbabwe commented upon the importance of the freedom of expression as follows at page 288:.....

> "Freedom of expression, one of the most precious of all the guaranteed freedoms has four broad special purposes to serve: (i) it helps an individual to obtain self fulfilment; (ii) it assists in the discovery of truth; (iii) it strengthens the capacity of an individual to participate in decision making; and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change."

Commenting upon their law which required a permit, they found that section 6 was plainly at variance with the enjoyment of the freedom of expression and assembly protected under sections 20 and 21 of their constitution and in considering whether such a law was reasonably justifiable in a democratic society, they said at page 293:

> "What is reasonably justifiable in a democratic society is an illusive concept, one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge it to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right."

There is much force in the foregoing and we can not see how that case could be distinguished from the present. It is highly persuasive and we share the views expressed. They found their section to be unconstitutional because, when certain features were taken cumulatively, the provision was not reasonably justifiable in a democratic society. The features were firstly the uncontrolled nature of the discretionary power vested in the regulating authority; secondly the fact that the regulating authority was not obliged, when imposing a ban, to take into account whether disorder or breach of the peace could be averted by attaching conditions upon the conduct of the procession such as a relating to time, duration and route; thirdly, the fact that although the rights to freedom of expression and assembly are primary and the limitations thereon secondary, section 6(2) reversed the order, in effect denying such rights unless the public procession was unlikely to cause or lead to a breach of the peace or public disorder; and fourthly, the criminalisation of a procession held without a permit irrespective of the likelihood or occurrence of any threat to public order. All these features are present in our case also. In truth, there is nothing to suggest that the legal principles involved here are any different. Of course, we do not share Mr Kinariwala's view that the politicians in this country are immature and irresponsible and that those in Zimbabwe are more responsible and mature. On the contrary, the people of this country have come a long way and would not like ever again to be oppressed or caged by any other individual or group of individuals.

It is therefore not true that there would be chaos and anarchy if the requirement of obtaining permission with the chance of being denied such permission is pronounced against. For one thing, there are other laws such as those under Chapter IX of the Penal Code. For another, the holding that section 5(4) is unconstitutional will simply mean that the police and other authorities can no longer deny the citizens of this country their freedom to assemble and speak. The requirement of a prior permit is a left over from the days of Her Majesty's Governors and the British themselves do not require permission to assemble and speak. Why should we require it?

Although not guided by concern for the administrative consequences, we readily accept and

acknowledge that there are many regulatory features in CAP 104 which are perfectly constitutional and very necessary for the sake of public peace and order. This was common cause. For instance, there are subsections authorising the issuing of directions and conditions for the purpose of regulating the route of a procession; the date, place and time of an assembly or a procession; their duration and any other matter designed to preserve public peace order. These regulatory functions of the police can only be in the highest interest of peace and order. Though therefore the police can no longer deny a permit because the requirement for one is about to be pronounced against, they will be entitled-- indeed they are under a duty in terms of the remainder of the Public Order Act -- to regulate public meetings, assemblies and processions strictly for the purpose of preserving public peace and order. The police and any other regulating authority can only perform this other very necessary function of giving directions and imposing conditions if they are notified, in advance, of any gathering proposed to he held. Such notification would necessarily differ in form and content from an application for permission under the subsection challenged in these proceedings. While, therefore, we would urge that the whole Public Order Act should be reviewed and modernised in its entirety to enable the police to carry out their duties effectively without contravening any provision in our constitution we are satisfied that, meanwhile, it would not be unlawful for the Inspector General of Police, as the appropriate authority under the Act, to devise some simple and practical method of receiving notifications. Quite clearly, all those organising meetings and processions have a corresponding obligations to enable the police to carry out the regulatory function by giving notice. We repeat our conviction that, contrary to the submission by learned counsel for the state, the people of this country have long since come of political age and they will not fail to cooperate to make workable the remainder of the Public Order Act.

We turn to the argument that the exemption granted to certain government officials (including the Head of State and the Ministries) was discriminatory, contrary to the constitutional provisions. The learned trial judge was on firm ground when he held that the provisions did not fall within the categories listed in the constitution. This is self-evident. In any event, the exemption attached to the offices tabulated and it is unrealistic for the rest of the citizenry, even if they be opposition politicians, to expect persons charged with executive and governmental functions and duties not to be accorded treatment which facilities the performance of their governmental function. Above all, in view of what we say about subsection 4 of section 5, the arguments are now otiose.

In sum and for the reasons which we have given we hold that subsection 4 of section 5 the Public Order Act, CAP 104, contravenes Articles 20 and 21 of the constitution and is null and void, and therefore invalid for unconstitutionality. It follows also that the invalidity and the constitutional guarantee of the rights of assembly and expression preclude the prosecution of persons and the criminalisation of gatherings in contravention of the subsection pronounced against. Accordingly, a prosecution based on paragraph (a) of section 7 which depends on subsection 4 of section 5 would itself be inconsistent with the constitutional guarantees and equally invalid. The appeal is allowed.

Since this was a constitutional reference in a criminal case emanating from the subordinate court and since the case has without a doubt raised very important public constitutional issues which are of general benefit, there will be no order as to Costs.
