

IN THE SUPREME COURT OF ZAMBIA

Appeal No. 136/2005

HOLDEN AT LUSAKA

SCZ NO.18 OF 2005

(Civil Jurisdiction)

B E T W E E N:

LT. GENERAL WILFORD JOSEPH FUNJIKA

Appellant

AND

THE ATTORNEY GENERAL

Respondent

Coram: Sakala, CJ, Lewanika, DCJ, Chirwa, Chitengi and Silomba, JJS
on 5th October, 2005 and 18th October, 2005.

For the Appellant:

Mr. M. Kalima of
Messrs Kalima Chambers

Mr. R. Mainza of
Messrs Mainza & Company

Mr. Frank Tembo of
Messrs Tembo & Partners and

For the Respondent:

Mr. M. Nchito
State Prosecutor of MNB

JUDGMENT

Chitengi, JS, delivered the judgment of the court.

Cases referred to:-

- 1. Mumba V The People (1984) ZR 38***
- 2. John Banda V The People HPA/06/99 (Unreported)***
- 3. Sussex Peerage 1843-1845 (65 RR) 11***
- 4. Seafood Court Estates Limited V Asher (1949) 2
KB481***

Statutes referred to: -

- 1. *Mutual Legal Assistance in Criminal Matters Act Chapter 98 of the Laws of Zambia: Sections 9 and 38(1)***
- 2. *The Constitution of Zambia Article 18 Sub Articles (1) and (2)(e).***

The history and facts of this case can be briefly stated. The Appellant, who was at the material time the Commander of the Zambia National Service, appeared before the Principal Resident Magistrate, Lusaka, charged with one count of Corrupt Practices by a public officer and one count of abuse of authority of office. According to the indictment, as drafted, the first count was contrary to Section 29(1) and Section 41 of the Anti-Corruption Commission Act No. 42 of 1996; while the second count was contrary to Section 37(2), as read with Section 41 of the Anti Corruption Act No.42 of 1996. The particulars of these offences alleged some corrupt practices and abuse of authority of office in the purchase of some uniforms for the Zambia National Service from a company called Semyon Holdings Limited and in the dealings, the Appellant had with one Anuj Kumar Rathi Krishna, the executive officer of Semyon Holdings Limited.

From the record of appeal, it appears that the trial of the Appellant started and progressed well until when the tenth

prosecution witness took the witness stand. The tenth prosecution witness was Mr. Kakoma Kanganja, an Assistant Superintendent of Police at the Police Headquarters but at the material time attached to the Task Force on Corruption. Mr. Kanganja gave evidence that he was assigned to investigate the charges against the Appellant. Mr. Kanganja's investigations took him to the United Kingdom where he interviewed, among others, officials at Habib Bank AG Zurich, London and Semyon Holdings Limited. After his investigations, and with the assistance of the Home Office and the Serious Crimes Office in London, Mr. Kanganja caused a deposition to be sworn by one Syed Itrat Hussain before a Magistrate. The Magistrate certified the deposition and the exhibits annexed to the deposition. When we peruse the deposition and the exhibits annexed thereto, we find that these documents are about bank transactions relating to the allegations against the Appellant.

When the prosecution sought to produce the deposition and the exhibits attached thereto, the Defence objected to their production contending that **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act, Chapter 98 of the Laws of Zambia⁽¹⁾**, under which the documents were to be produced is in serious conflict with **Article 18(2)(e) of the Constitution of Zambia⁽²⁾**. Further, counsel for the Appellant, said that what had arisen was a question of

constitutional importance affecting the rights of the Appellant and requested the learned trial Magistrate to refer the issue to the High Court for determination.

The State Prosecutor argued otherwise and joined issue with the Defence and lengthy arguments ensued. In a somewhat lengthy Ruling, the learned trial Magistrate agreed with the arguments by the Appellant's counsel and held that allowing the deposition in evidence will not give the Appellant the opportunity to cross-examine some of the deponents. The learned trial Magistrate then ended his Ruling in these words:

"..... I consider that the question raised is significant and should be referred to the High Court for determination. I will accordingly refer the matter to the High Court.

The question to be determined by the High Court is whether allowing the production of a deposition under Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act is in conflict with Article 18(2)(e) of the Republican Constitution."

The High Court heard the arguments in support and against the reference. In a well researched and reasoned judgment, the learned Appellate Judge held that the production of the

deposition under **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act⁽¹⁾** is not in conflict with the provision of **Article 18(2)(e) of the Constitution of Zambia⁽²⁾**. In reaching this holding, the learned appellate Judge visited many authorities and referred to other statutes whose provisions are in pari materia with the provisions of **Section 38 (1) of the Mutual Legal Assistance in Criminal Matters Act⁽¹⁾**, in so far as these other provisions allow the admission of evidence by Affidavit or deposition. The learned Appellate Judge also rationalized the impugned provisions by saying that the **Mutual Legal Assistance in Criminal Matters Act⁽¹⁾** is in fact a domestication of International Instruments in the fight against transnational crime. According to the learned Appellate Judge, this is a noble cause which Zambia must join and contribute to. Consequently, the learned Appellate Judge found no merit in the reference, refused to strike down Section 38(1) of the **Mutual Legal Assistance in a Criminal Matters Act⁽¹⁾** and referred the case back to the Subordinate Court for continued trial.

The Appellant now appeals to this court against the judgment of the High Court and has filed three grounds of appeal.

The first ground of appeal is that the Court below misdirected itself in law in holding that Section 38(1) of the **Mutual Legal Assistance in Criminal Matters Act Cap 98 of the Laws of**

Zambia is not in conflict with **Article 18(2)(e) of the Constitution of Zambia Cap 1 of the Laws of Zambia.**

The second ground of appeal is that the court below misdirected itself in law in holding that allowing or production of the deposition under Section 38(1) of the **Mutual Legal Assistance in Criminal Matters Act Chapter 98 of the Laws of Zambia⁽¹⁾** is not in conflict with the provisions of **Article 18(2)(e) of the Constitution of Zambia Cap 1 of the Laws of Zambia.**

The third ground of appeal is that the court below erred in law when it adjudicated upon matters, which are subject of trial before the Subordinate Court.

Counsel for the Appellant and Respondent filed detailed heads of argument which they augmented with oral submissions.

Mr. Mainza argued grounds one and two together. Mr. Kalima argued ground three while Mr. Tembo was content to adopt the arguments of Mr. Kalima and Mr. Mainza.

The written submissions on grounds one and two are that the Court below erred when it held that the production of the deposition of Mr. Syed Itrat Hussain without him being cross examined by the Appellant or his legal representative does not

conflict with **Article 18(2)(e) of the Constitution**. It is further submitted that the production of Mr. Syed Itrat Hussain's deposition without him being cross-examined will deprive the Appellant a fair trial. It is pointed out that **Article 18(1) of the Constitution** makes it mandatory that a person charged with a criminal offence should be afforded a fair trial; that allowing the production of the deposition obtained by Mr. Kanganja abroad without the accused or his counsel having the opportunity to cross-examine the deponent is a breach of **Article 18 of the Constitution**. Counsel then urged the court to reverse the decision of the court below that production of the depositions under **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act** is not in conflict with **Article 18(2)(e) of the Constitution**⁽²⁾.

Further, it is submitted that since **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act**⁽¹⁾ conflicts with **Article 18 of the Constitution** this court must declare it unconstitutional, null and void and strike it down. Counsel then referred us to the High Court cases of: **Mumba V The People**⁽¹⁾ and **The People V John Banda**⁽²⁾ where the High Court struck down some impugned provisions on the ground that they were in conflict with the Constitution.

The written submissions on ground three are that the question whether or not the depositions were admissible is a triable

issue; that the holding by the court below that production of the deposition under **Section 38(1) of the Mutual Legal Assistance in Criminal Law Act⁽¹⁾** does not conflict with **Article 18(2)(e) of the Constitution⁽²⁾** amounted to directing the trial Magistrate to allow the production of the disputed documents. According to counsel for the Appellant, the court below should have restricted itself to determining whether or not **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act⁽¹⁾** contravenes **Article 18(2)(e) of the Constitution⁽²⁾**.

Mr. Maluza's oral arguments are a repeat of the written heads of argument except to add that **Article 18 of the Constitution⁽²⁾** lays down the standard of proof that the guilt of an accused person must be proved beyond all reasonable doubt. He emphasized that **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act⁽¹⁾** is in conflict with **Article 18 of the Constitution⁽²⁾** and should be struck down.

In his written submissions on grounds one and two Mr. Nehito, counsel for the Respondent, relied on the judgment of the court below and the list of authorities he has filed in this Court.

On ground three, Mr. Nchito's written submissions are that the High Court, at the instance of the Appellant, was asked to determine the question whether allowing the production of the documents under **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act⁽¹⁾** is in conflict with **Article 18(2)(e) of the Constitution⁽²⁾**; that the Appellant cannot now be heard to say that the High Court did wrong by giving its opinion on the question.

In his oral submissions on ground one and two, Mr. Nchito submitted that the practice and procedure under inquiry is not unknown in Zambia. He pointed out that the learned trial Judge was at pains to give examples. It was Mr. Nchito's submission that it would be preposterous to suggest that exceptions to the rule against hearsay is a breach of **Article 18 of the Constitution⁽²⁾**. He pointed out that **Article 18** is very simple and very clear. He said the emphasis is on cross-examination of the witnesses called by the prosecution. He further pointed out that there is no witness called by the prosecution, which the Appellant was told not to cross-examine. Mr. Nchito then went on to explain how similar documents are similarly treated under our Laws and under the European Convention. Mr. Nchito ended by saying that there has been no derogation from **Article 18 of the Constitution⁽²⁾**.

In his reply, Mr. Mainza repeated his earlier submissions on the conflict between **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act⁽¹⁾** and **Article 18(2)(e) of the Constitution⁽²⁾** and pointed out that contrary to the statement by the Court below that the admissibility of the documents is within the discretion of the Court, the provisions of **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act⁽¹⁾** are mandatory. Mr. Mainza ended by saying that failure by the prosecution to call the deponent of the deposition will result in an unfair trial in the sense that the Appellant will not have an opportunity to cross examine the deponent.

Mr. Kalima pointed out that **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act⁽¹⁾** is framed in such a manner that no Magistrate will not accept the documents.

We have considered the facts of this case, the submissions of counsel and the judgment of the court below.

We propose to deal with the third ground of appeal first. This ground of appeal basically attacks the learned Appellate Judge's opinion on the question framed by the learned trial Magistrate and referred to him for his opinion. According to counsel for the Appellant, the learned Appellate Judge's

opinion determined an issue that was supposed to be determined by the learned trial Magistrate. It was argued that it was the duty of the learned trial Magistrate to determine whether or not the documents were admissible. The argument goes on to say that the learned Appellate Judge's opinion amounted to a directive to the learned trial Magistrate to admit the documents in evidence.

We regret, but we are bound to say that we find this ground of appeal and the arguments on it by counsel for the Appellant strange and startling. As Mr. Nchito rightly pointed out in his submissions on this ground, how can the learned Appellate Judge be faulted for answering the very question that was posed to him by the learned trial Magistrate, at the instance of the Appellant. We have no doubt whatsoever that if the learned Appellate Judge did not express an opinion on the reference, the Appellant would have expressed dissatisfaction and would have appealed to this court. We must characterize this ground of appeal as frivolous and totally unmeritorious. This ground of appeal fails.

We now deal with grounds one and two. These grounds, although couched differently, are actually one ground of appeal and it is proper that they were argued together and as one. Counsel have addressed us at length and referred us to many authorities. Mr. Nchito in his list of authorities even

took us on a voyage to the European Continent where depositions are admissible in circumstances similar to those in **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act⁽¹⁾**. But on account of the view we take of this appeal, we do not find it necessary to go into the details of these authorities. Suffice it to say, that we have given these authorities our careful consideration. However, we were constrained to comment on the cases of **Mumba V People⁽¹⁾** and **John Banda V The People⁽²⁾** which are High Court decisions and which counsel for the Appellants relied upon. We do not see the relevance of these two cases to the case on appeal. The facts of these two cases are totally different from the facts of this case. The **Mumba case⁽¹⁾** dealt with Section 53(1) of the Corrupt Practices Act which required an accused person to give evidence on oath only if he elected to say something in his defence, thus excluding the option to make an unsworn statement. The **John Banda case⁽²⁾** dealt with the constitutionality of corporal punishment. The case at hand is dealing with admissibility of evidence obtained abroad pursuant to an Act of the Zambian Parliament. If these two High Court cases are cited as authority for the proposition that any law which is in conflict with the Constitution is void, then we must remind counsel for the Appellant that in their submissions before us they should not lose sight of the fact that this is the Supreme Court. The issue of conflict between an Act of Parliament and the Constitution is very basic. We

know that the Constitution is the supreme law of Zambia and that **Sub Article (3) of Article 1 of the Constitution**⁽²⁾ provides that the Constitution is the supreme law of Zambia and that if any other law is inconsistent with the Constitution that other law is, to the extent of the inconsistency, void.

As we see it, the determination of this appeal turns on the proper interpretation of **Article 18 of the Constitution**⁽¹⁾. Properly read, **Article 18** provides for the accused individual's right to protection by law. It protects a fair trial of a person charged with a criminal offence. In this regard, even the reference to the High Court should not have been framed in the manner it was but should have posed the question whether in terms of **Article 18** the admission of a deposition under **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act**⁽¹⁾ without the Appellant or his legal representative having an opportunity to cross-examine the deponent, would contravene the Appellant's right to protection by law because he will not have a fair trial.

The question arises whether the production of the deposition under **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act**⁽¹⁾ threatens a fair trial of the Appellant. Counsel for the Appellant have argued that the admission of the impugned documents will result into the appellant not

having a fair trial. Counsel for the prosecution has argued otherwise.

From the current of the arguments and submissions by counsel for the Appellant, it is clear to us that there is a misperception of law on the part of the Appellant's counsel as to what a fair trial is. **Sub Article(1) of Article 18** states what the essential elements of a fair trial are. **Sub Article (1)** reads:-

“18(1). If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within reasonable time by an independent and impartial court established by Law.”

The provisions in **Sub Article (2) of Article 18** merely direct how a person charged with a criminal offence should be treated by those who arrest him and by the court, which tries him. It is significant to note that all the provisions in **Sub Article (2) of Article 18** can in a proper case be waived while the provisions in **Sub Article (1) of Article 18** cannot. At the expense of being repetitive, it is significant to note that none of the cardinal elements of a fair trial, that is, the trial taking place within reasonable time, the independence and impartiality of the trial court and the court being established by law, is repeated in **Sub Article (2)(e) of Article 18(2)**.

The arguments by Counsel for the Appellant that **Sub Article (2) of Article 18(1)** defines a fair trial are, therefore, not tenable in law. In fact, these arguments fly in the teeth of Article 18 itself. A fair trial, is a fair trial in terms of **Sub Article (1) of Article 18**. Therefore, for the Appellant to bring himself within the protection of Article 18 he must show that the intended production by the prosecution of a deposition under **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act⁽¹⁾** will breach the provisions of **Sub Article(1) of Article 18**. But, we waited and read the record of appeal in vain for evidence that the Appellant's case was not heard in reasonable time and that the court trying him was not independent and impartial and not established by law.

What the issue boils down to, therefore, is whether **Sub Article(2)(e) of Article 18⁽²⁾** was breached and if so whether that breach vitiates a fair trial as envisaged by **Sub Article(1) of Article 18**. **Sub Article 2 (e) of Article 18** reads as follows:-

"(2) Every person charged with a criminal offence -

(a).....

(b)

(c)

(d)

(e) shall be afforded the facilities to examine in person or by his legal representative the

witnesses called by prosecution before the court, and obtain the attendance and carryout the examination of witness to testify on his behalf before the court on the same conditions as those applying to the witnesses called by the prosecution; and

(f)”

The impugned documents, the proposed production of which, stimulated the objection that led to the reference to the High Court were obtained in terms of **Section 9 of the Mutual Legal Assistance in Criminal Matters Act⁽¹⁾** and were to be produced under **Section 38(1)** of the same Act. **Section 38(1)** reads: -

“38(1). A record or copy and any Affidavit, certificate or other statement pertaining to the record sent to the Attorney General by a foreign state in accordance with a Zambian request, shall not be inadmissible in evidence in a proceeding with respect to which the Court has jurisdiction by reason only that the statement contained in the record, copy, certificate or other statement is hearsay or a statement of opinion”

We have reproduced the provisions of **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act⁽¹⁾** not because they are critical to the interpretation of **Sub Article**

(2)(e) of Article 18⁽¹⁾, but only to show that **Section 38(1)** deals only with the mode of gathering evidence but does not take away the trial Court's discretion in deciding whether conditions for obtaining the evidence were met and what weight to attach to the evidence in each particular case. We shall say no more than this, because we are mindful of the danger of prejudicing the trial.

We have carefully considered **Sub Article 2(e) of Article 18⁽²⁾**. As Mr. Nchito rightly observed, the provisions in Sub Article(2)(e) are very clear. The provisions provide that a person accused of a criminal offence shall be afforded the facilities to, inter alia, examine either by himself or his legal representative, the witnesses **called by the prosecution before** the court. The underlining is ours. From the record of proceedings before the Subordinate Court there is no evidence that the Appellant or his legal representative was stopped from cross-examining any witness called by the prosecution before Court. Indeed, it has not been suggested by the Appellant that he or his legal representative was stopped from cross-examining any witness called by the prosecution before the court.

The position taken by the Appellant is that the production of the impugned documents without the Appellant or his legal representative having the opportunity to cross-examine the

deponent will result into an unfair trial. These arguments are not tenable. The provisions of **Sub Article (2)(e) of Article 18** are very clear. We do not require any aid to interpret these provision.

It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention of the Legislature cannot be ascertained from the words used by the Legislature that recourse can be had to the other principles of interpretation. As Tindal CJ, said in old English case of **Sussex Peerage⁽³⁾**: -

“If words of a Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.”

But as Lord Denning said in the case of **Seafood Court Estates Limited V Asher⁽⁴⁾**: -

“A Judge must not alter that of which it (a Statute) is woven, but he can and should iron out the creases”

As we have said above, the provisions in **Sub Articles (2)(e) of Article 18** are very clear. We see no creases in the provisions which we should iron out in order to give effect to the intention

of the Legislature whose duty it is to make law. As a court whose duty is to interpret the law we have no right to introduce glosses and interpolations in the clear provisions of **Sub Article(2)(e) of Article 18⁽²⁾**. Doing so will not be giving effect to the intention of the Legislature. We are certain in our minds that the issues that counsel for the Appellant are canvassing for never crossed the minds of the framers of the Constitution. If they did and were found weighty enough, the framers of the Constitution would have expressly said so in **Sub Article (2)(e) of Article 18⁽²⁾**. We would, in fact, say that taken to its logical conclusion, the interpretation placed on **Article 18** by the Appellant's counsel will lead to a situation where the rules of evidence and the laws of procedure would stand on their heads.

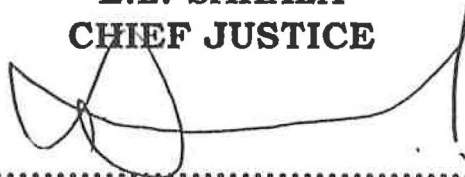
In the event, we are satisfied that the proposed production of the impugned documents did not threaten breach of **Sub Article (2)(e) of Article 18** as contended by counsel for the Appellant. **Sub Article (2)(e) of Article 18⁽²⁾** does not require the examination of a deponent. The only witness to be cross-examined is the witness called by the prosecution before court. Having said this, it is not necessary for us to consider whether the proposed production of the impugned documents threatened a fair trial as envisaged by **Sub Article (1) of Article 18⁽²⁾**. We are satisfied that **Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act⁽¹⁾** does

not conflict with any of the provisions in **Article 18 of the Constitution⁽²⁾**.

The result of our judgment is that we find no merit in this appeal and we dismiss it. Having regard to the fact that this appeal raised a constitutional issue we make no order as to costs. We remit the matter to the Subordinate Court with directives that the trial of the Appellant should continue with due dispatch.



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E.L. SAKALA
CHIEF JUSTICE



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D. M. LEWANIKA
DEPUTY CHIEF JUSTICE



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D.K. CHIRWA
SUPREME COURT JUDGE



.....
PETER CHITENGI
SUPREME COURT JUDGE



.....
S. S. SILOMBA
SUPREME COURT JUDGE