**PATEL v ATTORNEY-GENERAL IN THE SECTIONS 20 AND 28 OF THE CONSTITUTION OF ZAMBIA AND THE PROTECTION OF FUNDAMENTAL RIGHTS RULES (1969) ZR 97 (HC)**

HIGH COURT 40

SKINNER CJ

24th JUNE 1969

**Flynote and Headnote**

[1]   **Constitutional law - Fundamental rights - Alleged contravention - Magistrate's court - Duty to refer to High Court - Constitution, section 28 (3) construed.** 45

**1969 ZR p98**

SKINNER CJ

   Under section 28 (3) of the Constitution a magistrate is under clear duty to refer any question of a contravention of Chapter 3 to the High Court if one of the parties so requests.

[2]   **Courts - Magistrate's court - Transfer of proceedings - Duty to transfer -**5 **Constitution, section 28 (3) construed.**

   See [1] above.

[3]   **Courts - Magistrate's court - Transfer of Proceedings - Constitution, section 28 (3) - Procedure - Magistrate must refer.**

   A magistrate in such a case should not simply adjourn the 10 proceedings and direct that one of the parties should apply to the High Court pursuant to the Constitution, section 28 (1), but should have issues framed and refer them to the High Court.

[4]   **Constitutional law - Fundamental rights - Alleged contravention - Application to High Court - Constitution, section 28 (1) - Procedure -**15 **Should be by way of petition.**

   By virtue of rule 2 of the Protection of Fundamental Rights Rules, 1969, an application under section 28 (1) of the Constitution should be made by way of petition.

[5]   **Constitutional law - Fundamental rights - Alleged contravention -**20 **Reference to High Court by Magistrate - Protection of Fundamental Rights Rules, 1969 - Not an application within meaning of rule 2 - Procedure - Magistrate must refer.**

   A reference by a magistrate to the High Court under the Constitution, section 28 (3), is not an application within the meaning of 25 rule 2 of the Protection of Fundamental Rights Rules, 1969, and the procedure is by way of reference by the magistrate, not petition by one of the parties.

[6]   **Constitutional law - Legal representation - Right to free choice - meaning of "Legal representative" - Constitution, section 30 construed.**

   In 30   the definition of "legal representative" contained in section 30 - of the Constitution the words "entitled to practise in Zambia" mean that the legal representative must be:

   (a)   a lawyer who is entitled to appear before the courts in terms of section 22 (1 ) of the Legal Practitioners 35 Ordinance (Cap. 144); and

   (b)   a person who is not disabled under any law in Zambia from appearing and exercising his right of audience.

[7]   **Legal Profession - Representation - Right to free choice - Meaning of "Legal representative" - Constitution, section 30 construed.**

   See 40   [6] above.

[8]   **Constitutional law - Legal representation - Right to free choice - Extent of right - Constitution, section 20 (2) (d) construed.**

**1969 ZR p99**

SKINNER CJ

   The right conferred by section 20 (2) (d) of the Constitution (which gives an accused person the right to be represented by a legal representative of his own choice) does not extend so far as to give an accused the right to choose a legal representative who is disabled by law from appearing. 5

[9]   **Legal profession - Representation - Right to free choice - Extent of right -  Constitution, section 20 (2) (d) construed.**

   See [8] above.

[10]   **Legal Profession - Right of audience - Who has right - Legal Practioners Ordinance (Cap. 144), section 22 construed.**10

   A person whose name is on the Roll of Practitioners and who has in force a practising certificate is a person entitled to a right of audience before the courts by virtue of section 22 of the Legal Practitioners Ordinance (Cap. 144).

[11]   **Aliens - Immigration and Deportation - Employment permit - Not**15 **required by counsel - Immigration and Deportation Act, 1965, section 19 construed.**

   Counsel instructed by a solicitor on behalf of his client is not engaged in "paid employment under an employer" within the meaning of section 19 (1) of the Immigration and Deportation Act, 20 1965 (as amended), and, the profession of legal practitioner not being a prescribed occupation under section 19 (2) of that Act, he does not require an employment permit.

[12]   **Legal profession - Immigration and Deportation - Employment permit - Not required by counsel - Immigration and Deportation Act, 1965,**25 **section 19 construed.**

   See [11] above.

[13]   **Constitutional law - Fundamental rights - Alleged contravention - Legal representation - Right to free choice - Chosen legal representative not issued with employment permit - Employment permit not required**30 **- No contravention.**

   The fact that a legal representative chosen by an accused is not issued with an employment permit (which he does not in any case require) is not an infringement of the right guaranteed by the Constitution, section 20 (2) (d). 35

Cases referred to:

(1)   *Patel v Att. - Gen.*

(2)   *Prematatne v Cunaratna,* SC 1393 of 1964 (Ceylon).

(3)   *Public Prosecutor v Venkata A,* 1961 AP 104 (India).

(4)   *Awolowo v Federal Minister of Internal Affairs,* 1962 Lag. LR 177 40 (Lagos, Nigeria).

Statutes and Rules construed.

**1969 ZR p100**

SKINNER CJ

(1)   Constitution of Zambia (App. 3), s.20 (1), s.20 (2) (d), s.28 (1), s.28 (3), s.30

(2)   Legal Practitioners Ordinance (Cap.144), s.22.

(3)   Immigration and Deportation Act, 1965 (as amended), s.18, s.19(1), 5 s. 19 (2).

(4)   Protection of Fundamental Rights Rules (SI No.156 of 1969), Rule 2.

(5)   Constitution of India, Article 22 (1).

(6)   Constitution of Nigeria (1960), s.21 (5).

*Yousuf,* for the petitioner. **10**

*Chuula, Attorney-General*, for the respondent.

**Judgment**

**Skinner CJ**: This is a petition to the High Court pursuant to section 28 (1) of the Constitution of Zambia in which the petitioner alleges that his right to counsel of his own choice guaranteed to him under section 20 (2) (d) of the Constitution is and has been contravened. 15

In his opening address counsel on behalf of the petitioner informed me that the petition was brought under section 28 (1) as a result of a ruling by the Senior Resident Magistrate at Ndola, and he sought the guidance of the court as to the correct procedure to be followed where in a subordinate court a question arises as to the contravention of the provisions of Chapter 3 of the Constitution. Section 28 (3) provides that a subordinate court is under a duty to refer the question to the High Court if one of the parties to the proceedings so requests, unless the court is of opinion that the raising of the question is merely frivolous or vexation, [1] [2] If the constitutional point is taken before a subordinate court the magistrate is 25 under a clear duty to refer the matter to the High Court where one of the parties to the proceedings requests him to do so. [3] He should have the issues framed by the parties and refer such issues to the High Court. It is not correct for the magistrate simply to adjourn the proceedings and direct that one of the parties should apply to the High Court pursuant to 30 section 28 (1) of the Constitution.

*Patel v The Attorney-General* [1] decided by the High Court of Zambia last year, but not yet reported, was a reference to the court pursuant to section 28 (3). The applicant in that case was being tried in the court of the Senior Resident Magistrate at Ndola and the court was asked to refer 35 a question to the High Court in terms of section 28 (3). The reference was signed by counsel on behalf of the parties and referred to the court by the Senior Resident Magistrate and Magnus J approved of the procedure and was satisfied that it was the proper procedure to be adopted. Since Patel's case was decided, the Protection of Fundamental Rights Rules, 40 1969, have been made. Rule 2 provides that an application under section 28 of the Constitution should be made by petition. [4] I am satisfied that the true construction of rule 2 of the Protection of Fundamental Rights Rules is that an application under section 28 (1) of the Constitution has to be made by way of petition to the High Court. [5] A reference under 45 section 28 (3) is not an application to the High Court and the Protection of Fundamental Rights Rules do not apply to such reference and do not

**1969 ZR p101**

SKINNER CJ

in any way inhibit the magistrate from adopting the procedure which was followed in *Patel v The Attorney-General* [1].

The petitioner has brought these proceedings by way of a petition and he has done so as a result of a ruling in the court below. I propose to consider the petition on the footing that it was properly brought, but 5 it should be borne in mind for the future that where a subordinate court is asked to refer such a question to the High Court it should do so and avoid the necessity of duplicating the proceedings by insisting on the bringing of a petition under section 28 (1) of the Constitution.

The petitioner appeared before the Senior Resident Magistrate at 10 Ndola on a charge containing two counts. The first count related to an offence of official corruption, contrary to section 348 (2) of the Penal Code and the second count related to an offence contrary to regulation 9 of the Exchange Control Regulations. He pleaded not guilty to both counts and at the time the plea was taken he had the assistance of a legal 15 representative other than Mr Yousuf. He later instructed Mr Yousuf to appear to defend him at the trial. Mr Yousuf is a legal practitioner and practises both as a barrister and solicitor in Zambia. The petitioners instructed Mr Yousuf to brief Mr Thomas Kellock. Mr Kellock came to Zambia, and the petitioner says that he spoke to him in Zambia and 20 instructed him himself. Mr Kellock is a member of the English Bar. He is also a member of the Bar of Zambia, and has in force a current practising certificate issued to him by the Law Society in terms of the Legal Practitioners Ordinance (Cap. 144). He does not, however, ordinarily practise in Zambia. The practitioner instructed Mr Yousuf to apply for a work 25 permit for Mr Kellock and he, the petitioner, handed the application to the Immigration Office in Lusaka after Mr Kellock's arrival in Zambia. He was given a written reply by the Immigration Department which stated that the application on behalf of Mr Kellock was unsuccessful. The petitioner said in evidence, that he had chosen Mr Kellock as his legal 30 representative and that he still wishes Mr Kellock to appear for him at his trial. It is argued on behalf of the petitioner that his right to be represented by a legal practitioner of his own choice has been contravened. His case is that Mr Kellock was the legal representative of his choice and that section 20 (2) (d) of the Constitution guarantees that he can be 35 defended by him and that the action of the authorities in refusing Mr Kellock a work permit infringes the constitutional right guaranteed to him.

The Constitution of the Republic provides that every person charged with a criminal offence shall be permitted to defend himself before the 40 court in person, or, at his own expense, by a legal representative of his own choice. The right which is guaranteed in our fundamental law has for a long time been recognised to be of great importance to the maintenance of the freedom of the individual in many countries having a similar jurisprudence to our own, and indeed in many countries whose basic 45 system of law differs from our own. I do not find it necessary to refer in

**1969 ZR p102**

SKINNER CJ

detail to the history of the struggle which took place in England and which resulted in accused persons having the right to be represented by counsel. It is well known both to historians and lawyers and does not need to be re-stated by me, nor is it necessary for me to embark upon an 5 exhaustive examination of the law relating to the right to counsel in other countries. The position has been well summarised by Mr Justice Fernando in *Prematatne v Gunaratna* [2] he was giving judgment in the Supreme Court of Ceylon and he said:

   "The right of a person who is accused of a criminal offence to be 10 defended by a lawyer of his choice is one now ingrained in the Rule of Law which is recognised in the law of criminal procedure of most civilised countries."

In a number of Commonwealth countries the right to counsel is enshrined in the fundamental law as it is in Zambia. Both the Constitutions 15 of Uganda and Kenya contain provisions to secure the protection of law and in each country a right is given to an accused person to defend himself before the courts by a legal representative of his own choice.

In India the right to counsel is provided for in the fundamental law and Article 22 (1) of the Indian Constitution reads as follows: 20

   "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and to be defended by, a legal practitioner of his own choice."

This article has been the subject of interpretation by the Supreme 25 Court of India in a number of cases and the court has been vigilant to strike down as void any law which is inconsistent with it.

Section 21 (5) of the Nigerian Constitution of 1960 reads as follows - I have omitted the words of the subsection other than the words which are material - 30

   "(5) Every person who is charged with a criminal offence shall be entitled -

      (c)   To defend himself in person or by legal representatives of his own choice." 35

In the instant case the petitioner's rights have to be ascertained on the wording of our own Constitution. Judicial decision in other countries may be of service to us in interpreting a doubtful phrase whose origin can be traced but the rights of people within Zambia have to be ascertained by reference to our own Constitution and law and by reference to that 40 alone.

Chapter III of the Constitution deals with the fundamental rights of the people of the State. The section within that chapter upon which argument before me turned is section 20 which contains provisions to secure the protection of the law. It provides in subsection (1) that a 45 person charged with a criminal offence shall be afforded a fair hearing by an independent and impartial court. Subsection (2) contains a number of

**1969 ZR p103**

SKINNER CJ

specific protections which are guaranteed to an accused person. The words of the subsection insofar as they are material to the instant case read as follows:

   "(2) Every person who is charged with a criminal offence - 5

      (d)   shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice."

The words "legal representative" are defined in section 30 which is the interpretation section for Chapter III, as follows: 10

   "Legal representative" means a person entitled to practice in Zambia as an advocate."

It was contended by counsel for the petitioner that the intention and effect of section 20 (2) (d) was that an accused person was entitled to be defended by the legal practitioner chosen by him, provided such 15 practitioner had in force a current practising certificate and that any action whatsoever which prevented such legal practitioner from exercising his right of audience was an infringement of the client's right as guaranteed by the subsection. His argument was founded on the construction which he said should be placed on the words "entitled to practise in Zambia as 20 an advocate" as used in the interpretation section. He argued that the words must be construed in the narrow sense of a right of audience before the court.

I am unable to accept Mr Yousuf's proposition. I am of opinion that, so far as possible, the fundamental rights section of the Constitution 25 should be construed so as to give them life and reality. The manifest object of section 20 is to ensure that every accused person is accorded a fair trial. The provisions of the section including those guaranteeing the right to counsel are designed to ensure that the accused has a fair trial. It seems to me that the words in the interpretation section defining a 30 legal practitioner admit of two constructions. I refer specifically to the words "entitled to practise". These words could be construed as urged by Mr Yousuf, to mean a person who is entitled to exercise a right of audience before the courts, by virtue of the provisions of section 22 of the Legal Practitioners Ordinance (Cap. 144). These words also admit of another 35 equally reasonable interpretation, namely, that the legal practitioner must be a person who is not only qualified to exercise his right of audience in terms of the legal Practitioners Ordinance, but in addition is not disabled under the ordinary law of the land from exercising such right of audience, in other words, that he has an unqualified right under the law to exercise 40 his right of audience. It seems to me that the interpretation urged by Mr Yousuf would lead to obvious absurdity and unreasonableness.

If, for example, a legal practitioner was in custody awaiting trial, could it have been the intention of the framers of the Constitution that a refusal by a court to grant him bail in order to appear for his client would 45

**1969 ZR p104**

SKINNER CJ

constitute an infringement of his client's right to counsel as guaranteed by the subsection. Again, to take the example given by Mr Attorney, could it have been the intention of the framers of the Constitution that a person who is disabled by law from entering Zambia and whose presence 5 in Zambia would constitute a criminal offence was entitled to appear for an accused person and that any interference with him would constitute a violation of his client's constitutional rights.

[6] [7] In my opinion the words "entitled to practise in Zambia" mean something more than that the legal representative is qualified to 10 practise before the courts. It appears to me that the choice of counsel open to the accused person is limited as follows:

   (a)   the legal representative must be a lawyer who is entitled to appear before the court in terms of section 22 (1) of the Legal Practitioners Ordinance; and 15

   (b)   he must be a person who is not disabled under any law in Zambia from appearing before the court and actually exercising his right of audience.

It is unfortunate that the Nigerian and Indian law reports are not available to me. I have referred earlier in this judgment to article 22 (1) of the 20 Indian Constitution. It will be remembered that this section gives a right to an accused person to be defended by a legal practitioner of his choice. Basu in his *Commentary on the Constitution of India* (Fifth Edition) Volume 2 page 105 states that the articles do not confer any right to engage a lawyer who is disabled under the law. He cites an Indian case 25 in support of this proposition, namely, *Public Prosecutor v Venkata A.* [3]. Again in the *Nigerian* case of *Awolowo v Federal Minister of Internal Affairs* [4] the High Court of Lagos held that the words "legal representative" as used in section 21 (5) (c) of the Constitution of Nigeria meant a legal representative not under a disability of any kind. 30

The origin of section 20 (2) (d) of our Constitution can be traced back to the Nigerian and Indian Constitutions. The wording of our provision is very similar to that of the like provision in the Nigerian Constitution of 1960, and it seems to me to follow closely that of the Indian Constitution. It is to be assumed that the interpretation given 35 by the courts to such like provisions was known to the framers of our Constitution, and I see nothing in the wording of our subsection which suggests that it was intended to confer a different and more fanciful guarantee to the people of Zambia.

[8] [9] The essential nature of the right given by the subsection is 40 that an accused person should be defended by counsel, if he so wishes, and that he should be able to select a lawyer who can give him effective, independent and courageous representation. There are close on a hundred legal practitioners practising within Zambia. In Ndola alone, the city where the petitioner's trial was to take place, there are twenty - six members 45 of the Bar in active practice two of whom have attained the rank of Queen's Counsel. The choice open to an accused person is a wide one, and he can select counsel who will defend him with ability, courage and

**1969 ZR p105**

SKINNER CJ

independence without insisting that a lawyer disabled by law should appear for him.

[10] On the evidence I have no hesitation in finding that Mr Kellock is a person whose name is on the Roll of Practitioners and who has in force a practising certificate, consequently, he is a person who is entitled 5 to a right of audience before the courts by virtue of section 22 of the Legal Practitioners Ordinance (Cap.144).

I have had no evidence whatsoever which shows that Mr Kellock is in any way disabled under any law from exercising his profession in Zambia. The petitioner in evidence said that an application on Mr Kellock's 10 behalf was made to the Immigration authorities for a work permit and that such application was unsuccessful. I assume that the petitioner was referring to an employment permit which is issued by virtue of the provisions of section 18 of the Immigration and Deportation Act, 1965, as amended by the Immigration and Deportation Act, 1967. The 15 prohibition against engaging in employment in Zambia without a permit is contained in section 19 (1) of the Act.

   Section 19 (1) reads as follows:

   "19 (1) Save under permit issued in accordance with the provisions of this Act authorising such employment no person shall engage 20 in paid employment under an employer resident in Zambia."

[11] [12] It has been conceded by the Attorney-General that the provisions of sections 18 and 19 of the Immigration and Deportation Act do not apply to Mr Kellock. I am satisfied from the evidence that the relationship between Mr Kellock, Mr Yousuf and the petitioner was that 25 of counsel, solicitor and client. It cannot be said that by virtue of such relationship Mr Kellock was engaged in paid employment under an employer, and I have no hesitation in holding that he was in no way disabled by virtue of the provisions of section 19 (1) of the Act. Section 19 (2) of the same Act prohibits a person from engaging for gain in any 30 prescribed occupation save in accordance with the terms of an entry permit. The occupation of legal practitioner has not been prescribed for the purpose of the subsection and the prohibition contained therein could not be said to be applicable to Mr Kellock.

I am satisfied that Mr Kellock was entitled to appear before the 35 court and that he was not under any disability. I am also satisfied that the petitioner chose Mr Kellock as his counsel to defend him at the criminal trial. I have to consider whether Mr Kellock was stopped by the authorities from appearing before the court. There is no evidence before me which shows how Mr Kellock was prevented from appearing 40 for the petitioner. The petitioner's evidence was that Mr Kellock came to Zambia and that after his arrival an unsuccessful application was made for a work permit. I am satisfied that Mr Kellock did not require a work permit. [13] The fact that he was not issued with a permit which he did not require cannot be said to have contravened his client's right 45

**1969 ZR p106**

SKINNER CJ

to counsel. There was not an iota of evidence to suggest that the authorities have physically interfered with Mr Kellock or that they threatened to do so. I have had no evidence on affidavit or otherwise from Mr Kellock. The petitioner did say that Mr Kellock was not allowed to defend him 5 I have not been told by whom or by what method he was prevented from doing so. A number of averments have been made in the petition which have not been proved in evidence, and indeed no attempt has been made to prove them.

The petitioner has not proved that any of the provisions of section 20 10 of the Constitution has been, or is being, contravened in relation to him, nor has he shown that such provisions are likely to be contravened. The petitioner is not entitled to the relief sought.

*Petition dismissed*

**1969 ZR p106**