**IN RE THOMAS JAMES CAIN (1974) ZR 71 (HC)**

HIGH COURT

DOYLE CJ

18th APRIL 1974 35

**Flynote**

**Constitutional Law - Article 27 (1) (a) - Meaning of "as soon as is reasonably practicable and in any case not more than fourteen days."**

**Administrative Law - Detention order made under Regulation 33 (1) *- Order* revoked and another made - Detainee continuing in detention - Whether the mandatory period of fourteen days within which grounds to**40 **be supplied under Article 27 (1) of the Constitution starts with the first detention.**

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**Headnote**

On the 25th February, 1974, the applicant was arrested by a police officer and was served at the Kitwe Police Station with a detention order under reg. 33 (6) of the Preservation of Public Security Regulations. He was held there until the 28th February, 1974, and then was taken to 5 Ndola and Lusaka. On the 28th February, 1974, the order was revoked. On the 31st March, 1974, at Lusaka Central Police Station, he was served with another detention order under reg. 33 (6). Thereafter he was detained at Lusaka Police Station. On the 13th March, he was served with a revocation of the police order and immediately thereafter was served with 10 a Presidential Detention Order under reg. 36 (1). On the 25th March, he was served with a revocation of that order and immediately thereafter was served with a further Presidential Detention Order made under the same Regulations. No reasons for his detention were served upon him and on the 2nd April, 1974, he applied for and obtained leave to apply for 15 a writ of *Habeas Corpus ad Subjiciendum* on the ground that the applicant had not been furnished with a statement in writing specifying in detail the grounds upon which he was detained as required by s. 27 (1) *(a)* of the Constitution.

*Held,* allowing the application:

   (i)   That 20 the Presidential orders of detention were made under the Preservation of Public Security Regulations which were in turn made under s. 3 of the Preservation of Public Security Act, Cap. 106, referred to in Article 26 of the Constitution, and accordingly it was necessary for Article 27 (1) *(a)* of the Constitution to be 25 complied with and that failure to do so would render the detention unlawful.

   (ii)   That where an order is made under reg. 33 (1) of the said Regulations the grounds for such an order must then be in existence and although it was not necessary to furnish grounds for an 30 order which has been revoked before the expiry of the 14 day period, it was, however, necessary that grounds should exist at the time the order is made.

   (iii)   That since the applicant was in detention in Lusaka Central Prison at the relevant times, it must have been practicable to 35 serve him with grounds much earlier than the 11 days, and even if the grounds had only been known at the date of the issue of the second order it still would have been practicable to serve the grounds before the 11 days.

   (iv)   That the words "as soon as is reasonably practicable" in Article 40 27 (1) *(a)* of the Constitution were intended to impart a sense of urgency, but that the true time limit for the furnishing of grounds for detention was the period of 14 days.

   (v)   That on the evidence the applicant was in continuous physical detention at all relevant times; that there was no interruption 45 of the detention by the minimal fraction of time which elapsed between the handing over of the order of revocation and the handing over of the new order of detention; that there was no

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      interruption in law since the detention was by the same detaining authority and for the same reason, and the revocation and further detention were *co - terminus*; that the principle of the *de minimus* and the principle that the law did not heed fractions of less than a day applied and that, accordingly, the applicant 5 neither in law nor in fact was at liberty for any fractional period of time at all.

   (vi)   That Article 27 (1) *(a)* of the Constitution referred to detention for not more than 14 days but did not make any reference whether that detention was in respect of different orders; that 10 in the circumstances of this case the two orders by the same detaining authority and for the same reason must be treated as one continuing detention and the applicant had been in detention for the purpose of Article 27 (1) *(a)* for a period exceeding 14 days before the grounds were served; that his continued 15 detention after the period of 14 days was unlawful and, accordingly, the applicant would be released under Order 54, r. 4 of the Rules of the Supreme Court.

Cases cited:

   (1)   *Attorney-General v Chipango,* 1971 SJZ No. 12. 20

   (2)   *In Re. Robinson Puta,*1973 ZR 133.

   (3)   *Naresh Chandra v State of WBA* 1959 SC 1335.

Legislation referred to:

Constitution of Zambia, Articles 26, 27 (1) *(a)*.

Preservation of Public Security Act, Cap. 106; s. 3. 25

Preservation of Public Security Regulations, Regs 33 (6); 36 (1).

*J  Hadden, Ellis & Co.,* for the petitioners.

*M S  Chaila, Senior State Advocate*, for the State.

**Judgment**

**Doyle CJ:** This is an application for a writ of *habeas corpus ad subjiciendum* on the ground that the applicant, having been detained 30 under the Preservation of Public Security Regulations (references hereafter in the judgment to Regulations are as references to these Regulations) has not been furnished with a statement in writing specifying in detail the grounds upon which he was detained as required by section 27 (1) *(a)* of the Constitution. 35

The facts set out in the affidavit of the applicant are that on 25th February, 1974, he was arrested by the police and was served at the Kitwe Police Station with a detention order under regulation 33 (6) of the Regulations. He was held there until 28th February, 1974, then he was taken to Ndola and Lusaka. On 28th February, 1974, the order was 40 revoked and on 1st March, 1974, at Lusaka Police Station he was served with another detention order under regulation 33 (6). Thereafter from 1st March he was detained at the Lusaka Central Prison and is still so detained.

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On 13th March he was served with a revocation of the police order and immediately thereafter was served with a Presidential Detention Order under regulation 36 (1). On 25th March he was served with a revocation of that order and immediately thereafter was served with a further 5 Presidential Detention Order under the same regulation.

No reasons for his detention were served upon him and on 2nd April, 1974, he applied for, and obtained, leave to apply for the writ. The ground set out in supporting affidavit are that he was not served "as soon as is reasonably practicable" but clearly the applicant is entitled to rely 10 on any ground that arises from the facts set out and uncontradicted.

It is not entirely clear from the affidavit whether there was any period between 28th February, when he was served with the first revocation, and the 1st March, when he was served with the second police detention order, when he was at liberty but thereafter he was under 15 detention at the Lusaka Central Prison under one or other of the orders.

The only affidavit put in for the Attorney-General who appears as respondent states that on 5th April, 1974, applicant was served with a statement containing the grounds for detention. The statement refers to the order of 25th March and gives the grounds for detention as follows - 20

   "That between April, 1973 and March, 1974 and whilst acting in collaboration with Kurt Jesensek, Klaus Dieter Schwabe and David Knowles you received for the purpose of disposal a camera from Kurt Jesensek which David Knowles had used to take photographs intended to be used by Zambia's enemies to undermine the 25independence and security of the Republic the said camera has since not been traced."

The argument has largely been directed to the Presidential orders and for the moment I disregard the police orders.

Section 27 (1) *(a)* of the Constitution reads as follows: 30

   "27 (1) Where a person's freedom of movement is restricted or he is detained, under the authority of any such law as is referred to in Article 24 or 26, as the case may be, the following provisions shall apply:

*(a)*   he shall, as soon as is reasonably practicable and in any case 35 not more than fourteen days after the commencement of his detention or restriction, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is restricted or detained ;"

The orders have been made under the Regulations which are in turn 40 made under section 3 of the Preservation of Public Security Act which is a law referred to in Article 26 of the Constitution. It is therefore necessary for section 27 (1 ) *(a)* to be complied with. The Court of Appeal has already decided in *Attorney-General* v *Chipango* (1), Selected Judgment No. 12 of 1971, that failure to comply with the section renders the continued 45 detention thereafter unlawful.

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It was argued on behalf of the applicant:

   (1)   That the statement in section 27 (1) *(a)* that the grounds must be served "as soon as is reasonably practicable" were not extended by the later reference to a period of 14 days, that in fact it was reasonably practicable to serve these grounds 5 earlier than the day upon which the writ was sought, namely 2nd April, 1974, and that detention thereafter was therefore unlawful.

   (2)   That even if the period within which service must be made was 14 days, the two presidential orders constituted a 10 continuing period of detention totalling twenty - three days before service of the grounds on 5th March.

Counsel for the respondent argued:

   (1)   That the words "as soon as is reasonably practicable" were not mandatory words but were introduced to instil a sense of 15 urgency and that the mandatory period for service was the 14 days later referred to.

   (2)   That each order constituted a separate detention, that the period of 14 days ran from the date of the second detention order of 25th March and that service of the grounds having 20 been effected on 5th April, section 27 (1) *(a)* was complied with.

Counsel for the respondent relied strongly on Re Robinson Puta (2). In that case Puta had been detained under regulation 33 (1) on 18th October, 1972, but there was in the order an error of recitation of the regulation number as 31A.  Another order was served on 21st October, 25 1972, revoking the detention order and on the same day a further order under regulation 33 (1) was made. On 29th October, 1972, Puta was served with a statement of the grounds for detention. That was within 14 days of either order but again an error was made in that it was recited that the grounds referred to the detention under the earlier order of 30 18th October.

It was argued for the applicant that the two detentions were separate, a point not contested by the Attorney-General, and that as the reference was only to the earlier order no grounds had been served in relation to the later order which was the only one in force. It was 35argued for the Attorney-General that despite the error in recitation the grounds must have been taken to refer to the later order as being the only order in force.

I must confess that I have some difficulty in appreciating the precise *ratio decidendi* of the case. A considerable part of the learned judge's 40 judgment is directed to the question whether the *Gazette Notice* under paragraph *(b)* of section 27 (1) should have referred to both orders. He then discussed whether the furnishing of grounds was necessary in respect of an order which had been revoked before the expiry of 14 days and held that it was not, though it was desirable that grounds should be 45 furnished even in this case. Then at page 7 of the judgment he ventured

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the opinion that "emphasis is upon the obligation to furnish grounds as soon as is reasonably practicable rather than within fourteen days," but does not indicate whether in the case he was finding that grounds had or had not been served as soon as practicable. If this was a finding of 5 law relevant to his decision, it is an authority against learned counsel's argument that the 14 days is the mandatory period, and that the reference to "as soon as is reasonably practicable" is merely an indication of urgency.

At page 9 of the judgment the learned judge states that he "does not 10 accept therefore that the reference to regulation 33 (1) in the statement furnished on 28th October necessarily indicates that reference to the order of detention on 21st October was intended.

As it was the Executive's intention to refer to that detention then it can at least be said that the statement was uncertain in its reference. 15 He then went on to deal at length with the question of vagueness, a question which would not have arisen unless the grounds did relate to the later order.

It seems to me that the ground of failure relied on by the learned judge was this question of vagueness and that the other observations in 20 the case were merely *obiter dicta*. In any event as the case was decided on an agreed basis of two separate detentions, the point at issue before me, namely that there was one continued detention although under two separate orders, was never before the court. As I also consider in these circumstances that the observation in relation to the words "as soon as 25 is reasonably practicable" are *obiter*, the case is not an authority for or against either of the issues I have to determine.

Counsel for respondent also relied on *Attorney-General* v *Chipango* (1), *Selected Judgement No.* 12 of 1971. He referred to the statement at page 63 of the record where the Chief Justice, who delivered the leading judgement, 30 stated "It is open to the detaining authority, in this case the President, if he is still satisfied that it is necessary for the purpose of preserving public security to detain the respondent, to make another order and ensure that the provisions of section 26A are observed". That passage was uttered in the context of the case the result of which would have 35 effected the release of the detained person. An order of detention made thereafter would not be on all fours with the present case. It may be that the observation of Gardner, J A (as he then was) in the same case that "As soon as the Executive discovered that the time for service of notice or issuing a publication had expired the remedy was entirely in its hands, 40 that is to say, a new order for detention could have been made and thereafter the terms of section 26A could very well have been observed" is more nearly in point; but in any event neither the observations of the Chief Justice nor of Gardner JS in this respect were essential to the decision and were clearly not in contemplation of an issue such as is now 45 before me. Chipango's case is not a binding authority in relation to the points I have to decide.

I will deal first with the point in relation to the words "as soon as is reasonably practicable and in any case not more than fourteen days after the commencement of the detention".

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The Supreme Court of India in relation to somewhat similar Indian provisions said in *Naresh Chandra v State of WBA* 1959 SC 1335 (3):

   "The first part of Article 22 clause (5) gives a right to the detained person to be furnished with "the grounds on which the order has been made" and that has to be done, "as soon as may be". The 5 second right given to such a person is of being afforded the earliest opportunity of making a representation against the order. It is obvious that the grounds for making the order as mentioned above, are the grounds on which the detaining authority was satisfied that it was necessary to make the order. These grounds therefore 10 must be in existence when the order is made".

It is this last sentence that I emphasise. It is clear that they are applicable to orders made under our legislation and that when an order is made under regulation 33 (1) the grounds for it must then be in existence. 15

In the instant case the grounds given were very simple. The gist was that the applicant had, while collaborating with certain persons, received from one of them for the purpose of disposal a camera which had been used by another of them to take photographs intended to be used by Zambia's enemies to Zambia's detriment. 20

On the evidence before me it is clear that these were also the grounds for the first Presidential order which had been revoked. No evidence was put before me that any other grounds existed. I agree that it is not necessary to furnish grounds for an order which has been revoked before the expiry of the 14 day period but it is necessary that grounds should exist 25 at the time the order is made. If other grounds had existed, I have no doubt these would have been given in relation to the second order. As the applicant was in detention in Lusaka Central Prison at all the relevant times it must have been practicable to serve him with these simple grounds much earlier than 11 days after the issue of the second order. 30 Indeed, even If the grounds had only been known at the date of issue of the second order which I do not consider to be the fact it still must have been practicable to serve these simple grounds before 11 days.

If, therefore, the words under consideration mean that the mandatory period is "as soon as is reasonably practicable", section 27 (1) *(a)* 35 has not been complied with. If they are to be so read, then the period of 14 days is a limitation of the period of practicability. In other words the phrase must read "as soon as is reasonably practicable and in any case not more than 14 days after the commencement of the detention even if it is then still not practicable". I cannot conceive that this was 40 the intention of the legislature and I agree with learned counsel for the respondent that, the words "as soon as is reasonably practicable" are intended to impart a sense of urgency but that the true time limit is the period of 14 days. It is indeed a pity that this injunction to urgency is so often disregarded. If it were adhered to many applications for writs of 45 *habeas corpus* and other civil actions would not have come before court.

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I now turn to the other point. There is no doubt that in fact the applicant was in continuous physical detention at all relevant times and that there was no interruption of that detention by the minimal fraction of time which elapsed between the handing over of the order of revocation 5 and the handing over of the new order of detention. I also do not consider that there was any interruption in law. The detention was by the same detaining authority and for the same reason. In law the revocation and further detention were *co - terminus.* The principle of *de minimus* certainly applies and in the circumstances of the case it seems to me that 10 the principle that the law does not heed fractions of less than a day also applies. The applicant, neither in law nor in fact, was at liberty for any fractional period of time at all.

Section 27 (1) *(a)* refers to detention for more than 14 days. It does not make any express reference to whether that detention is in respect of 15 different orders. In the instant case I have no doubt that these two orders by the same detaining authority and for the same reason must be treated as one continuing detention. I find that the applicant had been in detention for the purpose of section 27 (1) *(a)* for a period exceeding 14 days before the grounds were served and in consequence his continued detention 20 after that period of 14 days is unlawful. I must, therefore, in accordance with modern practice order his release under Order 54 rule 4 of the Rules of the Supreme Court.

I wish to make it clear that my decision is on the facts of this case and that I am not deciding what would be the position if the applicant 25 were without release detained by the same detaining authority upon different grounds. It may be that the result would be the same but my decision leaves the point open for argument in an appropriate case.

It is in the circumstances unnecessary for me to consider what is the effect of the detention order made by the police. I would, however, 30 express the opinion that section 27 of the Constitution applies equally to such orders. As a policeman, who merely suspects or has reason to believe that there might be grounds for a Presidential order of detention, might not be in a position to give the grounds required by section 27 (1 ) *(a)* of the Constitution, it would seem that the *vires* and form of regulation 35 33 (6) would merit consideration by the appropriate authority. It is also to be noted that the applicant was kept there, after the police order of detention was served, in a place which was not a place authorised by the President; as a place of detention under the provisions of regulation 33 (5).

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