NEBUKADNEZA OCCO v THE PEOPLE (1979) Z.R. 112 (H.C.)

HIGH COURT
MOODLEY, J.
27TH APRIL, 1979
HNA/39/79

Flynote
Immigration and deportation - Deportation order - Resident convicted of criminal offence - Whether liable to deportation under s. 26 (1) of the Immigration and Deportation Act.
Immigration and deportation - Deportation - Deportee not a citizen - Necessity to deport him to country of origin or of which he is citizen - Immigration and Deportation Act, Cap. 122.

Headnote
The appellant, a citizen of Uganda and a resident in Zambia, was convicted of a criminal offence. After the expiry of his sentence the Minister, after receiving the particulars of the conviction under s. 33 of the Penal Code, signed a deportation order in terms of s. 26 (1) of the Immigration and Deportation Act for the appellant to be deported to his country of origin. The appellant was then escorted by immigration officials and handed over to the Tanzanian officials at the border between Zambia and Tanzania for them to deliver the appellant to Uganda immigration officials on behalf of the Government of Zambia.

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The appellant was convicted of returning to Zambia after a deportation order had been made against him contrary to ss. 29 (3) and 30 of the Immigration and Deportation Act. It was submitted that since the appellant was an established resident, he should not have been made the subject of a deportation order. Secondly, it was submitted that there was no evidence showing that the appellant had been effectively deported from Zambia to Uganda.

Held:
(i) Although the appellant had enjoyed the status of an established resident, he was not immune from being the subject of a deportation order, and as a non-citizen once he was convicted of a criminal offence the prosecution was duty bound in terms of s. 33 of the Penal Code to forward particulars of the conviction to the Minister in terms of s. 26 (1) of the Immigration and Deportation Act, and it was mandatory on the part of the Minister at the expiration of the sentence to sign a deportation order.
(ii) The warrant signed by the Minister required the deportee to be deported from Zambia to Uganda. However due to prevailing circumstances between Uganda and Tanzania the court was bound to inquire whether the order was effectively executed against the appellant.
(iii) The provisions of the Immigration and Deportation Act require a deportee who is not a citizen to be sent to his country of origin, or country of which he is a citizen. He cannot be convicted of this offence unless such actual deportation is proved.

Case referred to:

(1) King v Secretary of State for Home Affairs [1917], 1 K.B. 922.

Legislation referred to:
Immigration and Deportation Act, Cap. 122, ss. 26 (1), 29 (3), 30.
Penal Code, Cap. 146, a. 33.

For the appellant: J.R. .Matsiko, Legal Aid Counsel.
For the respondent: L. Nyembele, State Advocate.

Judgment
MOODLEY, J.:

This is an appeal against conviction and sentence. The appellant was convicted by a magistrate of the first class at Ndola of returning to Zambia after a deportation order had been made against him, contrary to ss. 29 (3) and 30 of the Immigration and Deportation Act, Cap. 122, and was sentenced to nine months' imprisonment with hard labour. Mr Matsiko who appeared for the appellant had argued two principal grounds, the first being in the alternative. Mr Matsiko submitted that the appellant, a citizen of Uganda was an established resident in the Republic of Zambia and in those circumstances should not have been made the subject of a deportation order. In the alternative, he argues that the appellant was a refugee from Uganda and, accordingly, it would have been contrary to the provisions of the Refugee (Control) Act, Cap. 122, for the appellant to be deported to Uganda since his life would be in danger. Mr Matsiko's second ground of appeal is that there was no evidence that the appellant had in fact been deported from the Republic of Zambia

and, in any event, there was no evidence that in terms of the deportation warrant he had been deported to Uganda. In those circumstances, he should not have been convicted of the offence charged. Mr Nyembele for the State supports the conviction.

The evidence before the trial court in a nut-shell is that the appellant who was a citizen of the Republic of Uganda and resident in the Republic of Zambia was convicted of a criminal offence. In those circumstances, the Minister of Home Affairs after receiving the particulars of the conviction under s. 33 of the Penal Code signed a warrant in terms of s. 26 (1) of the Immigration and Deportation Act, Cap. 122, that the appellant be deported from Zambia to his country of origin, namely, Uganda. The prosecution evidence is that after the expiry of his sentence, the appellant was escorted by immigration officials to Nakonde and the immigration officials stationed at Nakonde handed the appellant over to the Tanzania immigration officials at the border between Zambia and Tanzania who would then deliver the appellant to the Uganda immigration officials on behalf of the Government of Zambia. It would appear from the prosecution evidence that this was the practice followed by the Zambian immigration officials in relation to citizens of Uganda who were deported from Zambia. The learned magistrate resolved the issue on the basis of credibility of witnesses and found that the appellant was in fact handed by the Zambian immigration officials to the Tanzania immigration authorities at the border and in those circumstances convicted the appellant. It was the appellant's contention that he was never in fact deported from Zambia and that he was never taken in custody by the Tanzanian immigration officials. The appellant stated that he did not have any travel documents on him and, accordingly, the Tanzanian immigration officials had refused to

accept him from the Zambia immigration officials. He further stated that when it was apparent 30 that he was not allowed to enter Tanzania, he was permitted to re-enter Zambia. He contended that he had never been deported from Zambia to his country of origin. As I have said, the learned trial Magistrate disbelieved the appellant, accepted the evidence for the prosecution and convicted the appellant.

I now come to the first ground of appeal argued in the alternative. It is quite clear that even if the appellant had enjoyed the status of an established resident in the Republic of Zambia, he was not immune from being the subject of a deportation order. The appellant is not a citizen of the Republic of Zambia. Accordingly, the moment he was convicted of a criminal offence, the prosecution was duty bound in terms of s. 33 of the Penal Code to forward particulars of the conviction to the Minister of Home Affairs and in terms of s. 26 (1) of the Immigration and Deportation Act, Cap. 122, it was mandatory on the part of the Minister at the expiration of the sentence to sign a warrant to deport such convicted person who was not a citizen from Zambia. Thus in my view the fact that the appellant was an established resident did not protect him from the provisions of s. 26 (1) of the Immigration and Deportation Act and accordingly, a deportation warrant in this case.

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was validly made against the appellant. With regard to the alternative argument that the appellant was a refugee, I would simply dispose of the matter by saying that this was a defence that was never put forward or relied upon by the appellant in the course of his trial. There was no evidence before the trial Court that he was a refugee and accordingly, eligible for protection under the Refugees (Control) Act, Cap. 122. It is not now open for this appellant to put forward this argument as a ground of appeal before this court. In any event, there was no evidence before the trial court that he was a bona fide refugee. The appellant cannot have his cake and eat it at the same time. He was either an established resident or a refugee. He could not be both. Accordingly, this particular ground of appeal fails.

I now come to the second ground of appeal. Mr Matsiko has argued that the appellant had never been deported from Zambia to Uganda and in those circumstances he could not have committed the offence charged. Mr Nyembele for the State relied on the case of King v Secretary of State for Home Affairs (1) at p. 922 where it was held that:

> "The provisions of section 1 subsection 1 of the Aliens Restriction Act, 1914, and of the Aliens Restriction Order, 1916, made thereunder, do not give a Secretary of State power to order the deportation of an alien to any particular country. Those provisions, however, empower a Secretary of Stake, upon making a deportation order, to cause the alien to be detained and placed on board a ship which the Secretary of State selects and there detained until the ship finally leaves the United Kingdom, with the result that the alien may be obliged to disembark at the port to which the ship sails."

In my view, I do not regard this case as an authority to justify the alleged deportation in the instant case. King's case (supra) confines itself to the provisions of the Aliens Restriction Act of 1914 and the Order made thereunder and does not state a general proposition of law. The warrant in this case as signed by the Minister, required the deportee to be deported from the Republic of Zambia to

Uganda. The form of the warrant as set out in the schedule to the Immigration and Deportation Act uses the following words: "Now THEREFORE you are commanded to cause the deportee to be deported from the Republic of Zambia to . . ." Mr Nyembele's argument would have some foundation if the warrant had contained only the following words: "Now THEREFORE you are commanded to cause the deportee to be deported from the Republic of Zambia". But this is not the position here. In this case the appellant was required by the warrant to be deported from Zambia to Uganda.

I now turn to the method employed by the immigration officials to deport the appellant from Zambia. The trial court and, certainly this court, must take judicial notice of the fact that at the material time there were no diplomatic relations between the Republic of Zambia and the Republic of Uganda. Neither do these two countries enjoy a common border. It is common knowledge that Tanzania and Uganda do have a common border and that there is a common border between

Zambia and Tanzania. It is also common knowledge that at the material time there were no diplomatic relations between Tanzania and Uganda and in fact the relationship between those two countries was marked with considerable hostility. On one occasion the regime in Uganda had actually violated the territorial integrity of the Republic of Tanzania. All these facts should have been considered by the trial court when it came to finding whether the deportation order was effectively executed against this appellant.

The prosecution evidence was to the effect that the Zambian immigration officials handed the appellant to the Tanzanian immigration authorities who would ensure that the appellant was escorted to Uganda. No evidence was forthcoming as to whether there was any agreement between the Governments of Zambia and Tanzania to the effect that citizens of Uganda who are to be deported from Zambia could be handled over to the Tanzania immigration authorities who in turn would ensure that the deportee was escorted to Uganda on behalf of the Government of Zambia. One would have also thought that, whether or not such an agreement existed, the appellant would be furnished with necessary travel documents for travel to Uganda through Tanzania. No such travel documents were produced in court and, certainly, there were no documents from the Tanzanian authorities to the effect that they had accepted the appellant from the Zambian authorities for deportation to Uganda. The appellant had testified that he was the owner of a passport which had since expired but this passport was never produced to the court.

It would appear that the provisions of the Immigration and Deportation Act, Cap. 122, require a deportee who is not a citizen to be sent back to his country of origin or country of which he is a citizen.
Section 26 (6) provides:

> "For the purpose of establishing in relation to a person liable to be deported under this section his identity, his citizenship and the country of his origin, an immigration officer may require such person -
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> (a) in writing or otherwise to answer such questions as the immigration officer may put to him;
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> (b) to produce any passport and any other pertinent document in his possession."

Thus if one considers the provisions of s. 26 (1) and (6) of Cap. 122, as well as the form of the deportation warrant, it becomes apparent that the order for deportation is to ensure that the person is repatriated from Zambia to his country of origin or country of which he is a citizen. Thus I am satisfied that the evidence concerning the deportation of the appellant in this case must be supported by documentary evidence and cannot be resolved on the basis of credibility of witnesses alone. It is quite clear therefore that the learned trial Magistrate had misdirected himself both on the law and on the facts when he held that this appellant had been effectively deported from Zambia. I find that the statutory provisions

concerning the order for deportation had not been fully complied with and that the appellant had not been legally deported from the Republic of Zambia to Uganda. In the result therefore, the appear against conviction is allowed and both the conviction and sentence in this case are set aside.

Appeal allowed

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