STEPHEN LOVE MASEKA v ATTORNEY-GENERAL (1979) Z.R. 136 (H.C.)

HIGH COURT
SAKALA, J.
5TH MARCH, 1979
1979/HP/97

Flynote
Constitutional law - Prerogative writs - Writ of habeas corpus ad subjiciendum - Preservation of Public Security Regulations - Whether need to prove allegations - Whether proper to detain on criminal charges of which accused discharged.
Costs - When shared.

Headnote
The applicant was arrested by the police and charged with several counts of obtaining money by false pretences. He was subsequently discharged, and immediately detained by order of the President pursuant to the Preservation of Public Security Regulations. He applied for the issue of a writ of habeas corpus.

Held:
(i) It is quite proper to detain a person for offences which have been the subject of criminal charges which have been withdrawn if it is in the interests of public security.
(ii) The detaining authorities have no duty to prove or support their allegations when detaining someone since the question is one purely for his subjective satisfaction.
(iii) Costs may be shared by the parties if a difficult point of law or even a constitutional point of great importance was raised for the first time by the application.

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Cases referred to:
(1) Kapwepwe and Kaenga v The People (1972) Z.R. 248.
(2) Vincent Namushi Munalula & 6 Ors v A-G (1979) Z.R. 154.
(3) State of Bombay v Atma Ram Vaidya A.I.R. (1951) S.C. 157.
(4) Naresh Chandra v State of West Bengal A.I.R. (46) (1959) S.C. 1335.
(5) Eleftheriadis v The Attorney-General (1975) Z.R. 69.
(6) Sharma v The Attorney-General S.C.Z. Judgment No. 13 of 1978.

Legislation referred to:
Preservation of Public Security Regulations, Cap. 106, reg. 33 (1).
Penal Code, Cap. 146, ss. 8, 309.
Preservation of Public Security Act, Cap. 106, s. 2.

For the applicant: D.M. Lewanika, Shamwana & Co.
For the respondent: A.G. Kinariwala, State Advocate.

Judgment

SAKALA, J.: This is an application for the issue of a writ of habeas corpus *ad subjiciendum*. The applicant was detained by the order of His Excellency the President dated 22nd December 1978, pursuant to reg. 33 (1) of the Preservation of Public Security Regulations.

The circumstances leading to the applicant's detention as can be deduced from the affidavit are that on the 19th October, 1978, the applicant was arrested by police at Zambezi in North - Western Province of the Republic of Zambia. On the 13th November 1978, he was served with a detention order issued pursuant to provisions of reg. 33 (1) of the Preservation of Public Security Regulations. On the 29th November 1978, he was charged together with others on five counts of obtaining money by false pretences contrary to s. 309 of the Penal Code, Cap. 146. He appeared in court on the 30th November 1978, before the senior resident magistrate here in Lusaka and pleaded not guilty to the said charges. The case was then adjourned to the 14th and 19th December 1978, for mention and 29th January, 1979, for trial. On the 19th December 1978, a *nolle prosequi* was entered and the applicant was accordingly discharged by court. Immediately he was arrested by the police and taken to Lusaka Central Prisons. On the22nd December 1978, he was served with a detention order signed by His Excellency the President. On the 29th December, 1978, the applicant was served with a statement setting out the grounds for his detention.

Paragraphs (11), (12) and (13) of the affidavit sworn by Mr Lewanika on behalf of the applicant read as follows:

> "That I am advised and verily believe that the grounds set out in the said statement are not within the ambit of the Preservation of Public Security Regulations and further and/or in the alternative they are improper grounds in that they relate to the same allegations upon which criminal charges were brought against the applicant and withdrawn;

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> That I am further advised and verily believe that the allegations contained in the statement cannot possibly be prejudicial to the Public Security and there is no cause for the said Steve Love Maseka to be detained."

The affidavit sworn by Mr Lewanika exhibited a photostat copy of a charge sheet containing five counts of obtaining money by false pretences. It also exhibited a photostat copy of the order of detention as well as a photostat copy of the grounds of detention. The respondent also filed an affidavit in opposition. The affidavit consisted mainly of denials.

On behalf of the applicant, Mr Lewanika submitted that the exercise of the power to detain under reg. 33 (1) of the Preservation of Public Security Regulations was improperly done. He contended that the grounds on which the applicant is detained are the very grounds on which the criminal prosecution was based and hence are not within the expression "public security" as defined in section two of the Preservation of Public Security Act. Mr Lewanika argued that the grounds are not only similar but worded in such a manner that they are vague and imprecise whereby the applicant will not be able to make any meaningful **20** representation at the time of the tribunal. Mr Lewanika specifically attacked the words "on a date unknown but between November 1976 and

1977", in the first ground as being vague and improper. It was Mr Lewanika's further argument that the grounds upon which the applicant is detained relate to previous acts which amount to criminal cases of defrauding money. He submitted that reg. 33 (1) is intended for persons who threaten public security. He pointed out that the use of the word "crime" in the expression "public security" envisages crimes relating to disorder and not crimes like obtaining money by false pretences. He also pointed out that the other meaning includes crimes relating to incitement to assault people or overthrow the Government.

Mr Lewanika also submitted that apprehension in the mind of the detaining authorities must show that if not detained, the individual will still continue committing the crimes and the apprehension must exist and must be stated in the grounds in support of the detention. He submitted that in the instant case, the grounds furnished to the applicant did not disclose that there is an existing apprehension. He submitted that the omission to state that the apprehension still exists is fatal and renders the detention unlawful. He contended that the regulations were not intended as a way of punishing for crimes which the authorities are unable to bring to the courts of law.

With regards to vagueness Mr Lewanika submitted that the grounds must "specify in detail" the reasons for the detention. He submitted that the way the grounds were drafted are vague. Firstly the dates or months when the applicant is alleged to have committed the acts are not stated. In these circumstances, Mr Lewanika submitted that the applicant cannot make a meaningful representation to the authorities. Hence the detention is also unlawful.

On behalf of the respondent, Mr Kinariwala contended that the grounds for the detention cannot be said to be the same as the offences

he was charged with when he was first before the subordinate court. Before the subordinate court, he argued, the allegations were those of obtaining money by false pretences. In the grounds of detention, he contended it is not stated that he obtained money by false pretences Mr Kinariwala pointed out that the charges against the applicant related to the months of June, July and August 1977, while the period of the acts subject of the grounds of detention are November 1976 to 1977. He submitted that in the grounds of detention the offences are of conspiracy, destruction of lawful documents and misappropriation of Government funds. Mr Kinariwala also argued that withdrawal of charges does not mean that a person cannot be detained. He contended that the expression "public security" is inclusive and not exhaustive. Among the meanings of public security, prevention of crime is one of them and another one being maintenance of supplies and services, essential to life of the community. He contended that the applicant's acts disrupted Government transport which is essential to the life of the community. Hence, if the applicant is not detained, he would cause more damage to public security.

On vagueness, Mr Kinariwala contended that the grounds are clear and the applicant knows why he is detained. He pointed out that the purpose of grounds is to furnish the detainee the reasons for detention. On the question of the omission to include the words "apprehension of future danger", Mr Kinariwala argued that it cannot be fatal as it is not necessary to state them. He submitted that it is for the court to determine whether the grounds justified a detention under reg. 33 (1).

I have very carefully considered the affidavit in support of the application as well as the submissions by both learned counsel. Mr Lewanika's arguments can be set out very briefly as follows:

(a) the grounds for detention are not within the ambit of the Preservation of Public Security;
(b) the grounds are improper in that they relate to allegations upon which criminal charges had been brought against the applicant and withdrawn;
(c) the grounds are vague and imprecise;
(d) the allegations contained in the grounds cannot possibly be prejudicial to public security.

I will deal with these arguments in the order as set out. The first is that the grounds for detention are not within the ambit of the Preservation of Public Security Regulations. Mr Lewanika argued that the grounds for detention as furnished on the applicant being grounds on which criminal prosecution was based did not fall within the expression "public security" as defined in s. 2 of the Preservation of Public Security Act. He submitted that reg. 33 (1) is intended for persons who threaten public security and the crimes envisaged in that, regulation relate to disorder and not obtaining money by false pretences. Mr Lewanika further pointed out that the regulation was not intended as a way of punishing people for crimes which the authorities were unable to bring before a court of law. On the

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other hand, Mr Kinariwala submitted that the grounds of detention are not the same as criminal charges that were withdrawn against the applicant. He submitted that the offences alleged in the grounds of detention are those of conspiracy involving destruction of lawful documents and misappropriation of Government funds. He further submitted that withdrawal of charges does not mean a person cannot be detained under the Preservation of Public Security Regulations. He contended that the definition of "public security" is inclusive and not exhaustive and prevention of crime is one of the meanings of "public security" another being maintenance of supplies and services essential to life of the community. In this regard Mr Kinariwala further submitted that the applicant's acts disrupted Government transport essential to the life of the community and if not detained, he would cause to cause more damage to the public security.

Section 2 of the Preservation of Public Security Act Cap. 106 reads as follows:

> "In this Act, the expression 'public security' includes the securing of the safety of persons and property, the maintenance of supplies and services essential to the life of the community, the prevention and suppression of violence, intimidation, disorder and crime, the prevention and suppression of mutiny, rebellion and concerted defiance of and disobedience to the law and lawful authority, and the maintenance of the administration of justice."

While Mr Lewanika's contention is that the definition does not include crimes like obtaining money by false pretences, I do not understand him and he could not have said that the definition does not include crimes. In point of fact he himself cited crimes of disorder as well as incitement as

being crimes intended by the expression "public security". The grounds of detention read as follows:

> "NOW THEREFORE you are hereby informed that the grounds upon which you are detained are:
> THAT you on an unknown date, but between November 1976 and 1977 being a person employed in the Public Service, namely Mechanical Services Branch, in a capacity as acting Senior Accountant, by virtue of your employment you conspired with other persons unknown to form fictitious Companies which purported to have supplied motor spare parts to Mechanical Services Branch, and that in your capacity as acting Senior Accountant, you had access to cleared cheques, payment vouchers, local purchase orders, banking sheets, receipt vouchers and other documents of accounts used to effect payments for the falsely supplied motor spare parts to the Mechanical Services Branch by these fictitious companies the money of which amount to about K1,000,000.
> AND THAT after these documents were processed by you to their final stages, you with other persons unknown destroyed them to avoid detection, the acts of which are tantamount to economic sabotage as the money intended for the genuine

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purchase of motor spare parts for repairs of Government vehicles was misappropriated, hence you disrupted the Government transport system of the Republic of Zambia.
These acts are prejudicial to the Public Security and its Preservations, for the Preservation of Public Security, it has been found necessary to detain you."

I agree with the submissions of Mr Kinariwala that the allegations contained in the grounds relate to conspiracy, destruction of lawful documents and misappropriation of Government funds. The grounds further allege that the acts of the applicant were tantamount to economic sabotage, and disrupted Government transport system. I am satisfied on a consideration of these grounds that while they cannot be divorced from the criminal charges, which the applicant had originally faced and subsequently dropped, they cannot be said not to fall within the expression "public security". The expression at any rate is inclusive and not exclusive. For my part, I cannot say that conspiracy leading to destruction of lawful documents and misappropriation of public funds resulting in the disruption of Government transport system is not a danger to "public security". I hold therefore that the way the grounds are drafted is within the expression "public security".

The second argument of Mr Lewanika is that the grounds are improper in that they relate to allegations upon which criminal charges had been brought against the applicant and withdrawn. With greatest respect, I find nothing improper on the part of the detaining authorities to detain a person on criminal charges which had earlier been withdrawn. This point was considered in the case of *Kapwepwe and Kaenga v The People* (1). At p. 260 there is a passage in the judgment of Baron, D.C.J., as he then was which reads as follows:

> "The machinery of detention or restriction without trial . . . is, by definition, intended for circumstances where the ordinary criminal law or the ordinary criminal procedure is regarded by the detaining authority as inadequate to meet the particular situation. There may

be various reasons for the inadequacy; there may be in sufficient evidence to secure a conviction; or it may not be possible to secure a conviction without disclosing sources of information which it would be contrary to the national interest to disclose; or the information available may raise no more than a suspicion, but one which someone charged with the security of the nation dare not ignore; or the activity in which the person concerned is believed to have engaged may not be a criminal offence; or the detaining authority may simply believe that the person concerned, if not detained, is likely to engage in activities prejudicial to public security. And one must not lose sight of the fact that there is no onus on the detaining authority to prove any allegation beyond reasonable doubt, or indeed to any other standard, or to support any suspicion. The question is one purely for his subjective satisfaction.

These are far-reaching powers. In particular it must be stressed that the President has been given power by Parliament to detain

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persons who are not even thought to have committed any offence or to have engaged in activities prejudicial to security or public order, but who, perhaps because of their known associates or for some other reason, the President believes it would be dangerous not to detain."

In a recent Supreme Court close of *Vincent Namushi Munalula and Six Others v The People* (2) Silungwe, C.J., after citing the above passage after counsel for the appellants had contended that the grounds upon which the appellants were detained were tantamount at to criminal charges for criminal courts had this to say:

"I think that the foregoing extract expresses an accurate legal position on the question whether the detaining authority may detain rather than lay a criminal charge."

Firstly, may I say I entirely agree with the passage of Baron, D.C.J., and I am in total agreement with the observations of Silungwe C.J., on the passage cited. In the circumstances, I cannot again with greatest respect accept Mr Lewanika's submissions on this point.

The third argument on behalf of the applicant is that the grounds are vague and imprecise. I am not quite sure why Mr Lewanika used both words "vague and imprecise". In my view the word "imprecise" is synonymous with "vague". The question of vagueness has been dealt with in Zambia in very many cases including the case of *Kapwepwe and Kaenga v The People* (1). In that case, both Doyle, C.J., and Baron DCJ, as both were then, cited with approval the passage in the judgment delivered by Kania CJ, in *State of Bombay v Atma Ram Vaidya* (3) which reads as follows:

"What is meant by vague? Vague can be considered as the antonym of 'definite'. If the ground which is supplied is incapable of being understood or defined with sufficient certainty it can be called vague. It is not possible to state affirmatively more on the question of what is vague. It must vary according to the circumstances of each case. It is however improper to contend that a ground is necessarily vague if the only answer of the detained

person can be to deny it. That is a matter of detail which has to be examined in the light of the circumstances of each case. If on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention it cannot be called vague."

Quite clearly the amount of detail and what constitutes vagueness will always depend upon the circumstances of each case. In the Supreme Court of India in the case of *Naresh Chandra v State of West Bengal* (4) the court had this to say:

"Vagueness is a relative term. Its meaning must vary with the facts and circumstances of each case. What may be said to be vague in one case may not be so in another and it could not be asserted as a general rule that a ground is necessarily vague if the only answer of the detained person can be to deny it. If the statement

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of facts is capable of being clearly understood and is sufficiently definite to enable the detained person to make his representation it cannot be said that it is vague."

Mr Lewanika's argument is that the date of the alleged act is abnormal. The appellant is not told what date or months he is alleged to have committed those acts. He submits that in the circumstances he cannot be expected to make meaningful representation. On the other hand Mr Kinariwala submits that the purpose of grounds is to furnish the detainee the reasons for his detention. In the instant case, he submitted that the grounds are not vague. When one examines these grounds the picture that emerges is that between a date unknown but between November 1976 and 1977, the applicant who was then employed in the public service as acting Senior Accountant in Mechanical Services Branch by virtue of that employment was party to acts which involved - (a) conspiracy with other persons unknown to form fictitious companies which companies purported to have supplied motor spare parts to Mechanical Services Branch; (b) the applicant who had access to various accountable documents which were used to effect payments for the alleged supplied motor spare parts had money paid in the amount of a million kwacha; (c) the applicant who had processed the relevant documents with other persons destroyed them to avoid detection. The grounds further state that these acts amounted to economic sabotage because the money was intended for genuine purchases to repair Government transport system. These acts are alleged to be prejudicial to public security. Can it be said for a man who was an acting Senior Accountant a fact which appears not to be disputed could not understand these allegations? Can these grounds be said to be vague or imprecise? The applicant was an acting Senior Accountant at Mechanical Services Branch which orders spare parts. These facts must or ought to be within the knowledge of the applicant. They cannot in my opinion be said to be vague.

The last argument is that the allegations contained in the grounds cannot possibly be prejudicial to public security. Mr Lewanika has argued that the apprehension must exist and must be stated in the grounds furnished. In the instant case, he contended that the grounds did not state this apprehension. He submitted that the omission to state that the apprehension still exists is fatal rendering the detention unlawful. It is perhaps fair to say at this stage that Mr Lewanika cited several eases in

support of his arguments. On this last argument, he cited the case of *Eleftheriadis v The Attorney-General* (5). In that case, the appellant had been detained pursuant to a detention order signed by His Excellency the President under Regulation 33 (1) of the Preservation of Public Security Regulations, Cap. 106. The grounds as required by the constitution were served on him. On appeal to the Supreme Court, the question which arose was whether an order and ground showed clearly that the order was within the powers conferred by reg. 33 (1) of the Preservation of Public Security Regulations. The court in that case held as follows:

"(i) Regulation 33 of the Preservation of Public Security Regulations, Cap. 106, is directed to the preservation of the public

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security. There is no doubt whatever that it cannot be used solely as a punitive measure;

(ii) Past activities can furnish good grounds for detention under the regulation provided that those activities have induced an apprehension in the mind of the detaining authority of future activities prejudicial to the public security;

(iii) The court cannot query the discretion of the detaining authority if it is exercised within the power conferred;

(iv) The construction of the detention order and grounds must relate solely to their natural meaning without any leaning in favour of the appellant."

It will be noted that the way the grounds of detention were framed in that case, the last sentence reads as follows:

"Which act was prejudicial to the security of the Republic of Zambia."

Counsel for the appellant in that case pointed out that the grounds show that the detention solely related to an alleged offence committed a year ago. The court in that case pointed out that past activities can furnish good grounds for detention under the regulation provided that "those activities have induced an apprehension in the mind of the detaining authorities to future activities prejudicial to the public security." My understanding of that case is not that the apprehension has to be specifically stated in the grounds of detention. In the instant case, the grounds for detention in a nutshell are that the applicant having conspired with others unknown to form fictitious companies, having destroyed lawful documents of the Government the detaining authorities still apprehend that "these acts are prejudicial to public security". They do not say the acts "Were prejudicial". I am satisfied that the detaining authorities have clearly expressed the existence of a future apprehension. I cannot therefore also accept this argument. In the result I hold that the applicant is lawfully detained by an order signed by His Excellency the President pursuant to reg. 33 (1) of the Preservation of Public Security Regulations. In the circumstances, I dismiss the application.

On the question of costs, in the case of *Sharma v The Attorney-General* (6), the appellant had also among others appealed against my order that the respondent pays costs. In allowing that appeal against my order of costs, the court noted that that case although it did not raise a difficult point of law, raised a constitutional point of general importance for the first time. Consequently the order of the court was that each party bears its own costs. From my analysis of the grounds relied upon in

the present case, I find firstly that there was no difficult point of law raised; secondly, that the case did not raise for the first time a constitutional point of great importance. In the circumstances, I order that the applicant pays the costs.

Application dismissed
