

AMOCK ISRAEL PHIRI v JOHN CHIWALA BANDA (1979) Z.R. 110 (H.C.)

HIGH
CULLINAN,
5TH MARCH, 1979
1978/HP/EP3

COURT
J.

Flynote

Election petition - Corrupt and illegal practice - Electoral Act, s. 28 (6) - High Court Report - Persons to be stated in the Report.

Election petition - Corrupt and illegal practice - Election Agent involved in such practice - Whether candidate guilty - Whether can be stated in the High Court Report under s. 28 (6) of Electoral Act.

Headnote

The respondent's agent was found guilty of committing an illegal practice before the National Assembly primary election for the Chipata Constituency. There was no evidence to show that this had been committed with the knowledge of the respondent. The court considered the issue of whether the respondent's name should be stated in the Report under s. 28 (6) of the Electoral Act.

Held:

In contrast to the Representation of the People Act, 1949, of the United Kingdom, s. 28 (6) of the Electoral Act cannot be construed to import an extended degree of guilt; therefore there is no question of the respondent's name being stated in the Report.

Legislation referred to:

Electoral Act, Cap. 19, ss. 8 (3), 17 (3), 28 (6), 68 (4).

Representation of the People Act, 1949 (England), ss. 124, 138, 140.

For the petitioner: R.M.A. Chongwe, R.M. A Chongwe & Co.

For the respondent: S.M. Patel, Solly Patel, Hamir & Lawrence

Judgment

CULLINAN, J.: These proceedings are based on the provisions of s. 28 (6) of the Electoral Act which read as follows:

"28. (6) Where it appears to the High Court upon the trial of an election petition that any corrupt practice or illegal practice has been committed by any person in connection with the election to which the election petition relates, the High Court shall, at the conclusion of the proceedings, prepare a report stating -

- (a) the evidence given in the proceedings in respect of such corrupt practice or illegal practice;
- (b) the names and particulars of any person by whom such corrupt practice or illegal practice was, in the opinion, of the High Court, committed:

Provided that the High Court shall not state the name of any person under this paragraph unless such person has been given an opportunity of appearing before the High Court and of showing cause why his name should not be so stated."

p111

In a judgment delivered on the 13th February 1979, the court found that an illegal practice had been committed by the election agent of the respondent before the National Assembly primary election for the Chipata Constituency held on the 19th October 1978. The primary purpose of these proceedings is to provide the election agent with an opportunity of showing cause as to why his name should not be stated in any report under the above provisions. It also falls to be considered however as to whether those provisions apply to the respondent. The provisions refer to the situation where "it appears to the High Court ... that any corrupt practice . . . has been committed by any person in connection with the election". The report referred to in s. 28 (6) seems to be that contemplated in Art. 68 (4) of the Constitution, which reads -

"68. (4) Parliament may provide that a person who is convicted by any court of any offence that is prescribed by Parliament and that is connected with elections of the members of the National - Assembly or who is reported guilty of such an offence by the court trying an election petition shall not be qualified to be nominated or elected as a member of the Assembly for such period (not exceeding five years) following his conviction or, as the case may be, following the report of the court as may be so prescribed."

Parliament has in fact made such provision under section 8 (3) of the Electoral Act which reads:

"8. (3) Any person who is convicted of any corrupt practice or who is reported guilty of any corrupt practice or illegal practice by the High Court upon the trial of an election petition under this Act shall not be qualified to be nominated for election as a member of the National Assembly for a period of five years from the date of such conviction or of such report, as the case may be."

It will be seen that the expression "unreported guilty" contained in Art. 68 (4) of the Constitution is repeated in s. 8 (3) of the Electoral Act. Many of the provisions of the Electoral Act are based on those of the Representation of the People Act, 1949, of the United Kingdom: in particular those of s. 28 are based on those of ss. 124, 138 and 140 of the 1949 Act. Section 138 of the 1949 Act however makes the following distinction: generally speaking a candidate is reported "personally guilty" of certain corrupt or illegal practices where it is proved that such was committed by or with the knowledge or consent of the candidate: a candidate is reported "guilty by his agents" of such practice where an election agent is involved in such practice without the candidate's knowledge or consent: he may also be "guilty by his agents" where a polling agent is involved in the commission of such a practice, except where the offence involved in is of a "trivial, limited and unimportant character" and also here the circumstances set out in paras (a), (b) and (c) of s. 17 (3) of our Act apply.

In the present case there was no evidence to show that the illegal practice committed by the election agent of the respondent was committed with the knowledge and consent or approval of the

respondent. The question arises however as to whether the word "guilty", apparently
p112

imported from the 1949 Act, contained in s. 8 (3) of the Act should be construed to embrace the varying degree of guilt found in s. 138 of the 1949 Act. The question is one of importance of course in view of the sanction to be found in s. 8 (3) of the Act.

Both Mr Chongwe and Mr Patel submit that the express provisions of the 1949 Act have not been repeated in our Act and that therefore the extended degree of guilt contained in the 1949 Act is not to be found in our Act. With these submissions I agree. It seems to me that if the legislature had wished to provide for the various degrees of guilt set out in s. 138 that it would have made clear provision therefore. Further s. 28 (6) refers only to the position where a corrupt or an illegal practice has been "committed" by any person; it is only that person who can be reported.

In the course of the argument this morning the question arose as to whether the word "guilty" in s. 8 (3) should be construed in the criminal sense, that is to say, involving the degree of participation as a principal offender contained in s. 21 of the Penal Code. That as I see it will have to be left to another day, as I have found that there was no evidence that the illegal practice in this case was committed with the knowledge and consent or approval of the respondent.

In my judgment therefore s. 28 (6) cannot be construed to import the extended degree of guilt contained in the 1949 provisions, and there can be no question therefore of stating the name of the respondent in any report under s. 28 (6) of the Electoral Act.
