

ATTORNEY- GENERAL v EDWARD JACK SHAMWANA, VALENTINE SHULA
MUSAKANYA, GOODWIN YORAM MUMBA, ANDERSON KAMBWALI
MPOROKOSO, MACPHERSON MBULO, PATRICK MKANDAWIRE,
MATINANGA LISWANISO, THOMAS MUPUNGA MULEWA, GODFREY
MIYANDA, DEOGRATIAS SYMBA, ALBERT CHILAMBE CHIMBALILE,
ROGER KANYEMBU KABWITA (1981) Z.R. 8 (H.C.)

HIGH
E.L.
20TH AUGUST, 1981
(1981/HP/1103)

SAKALA,

COURT
J.

Flynote

Courts - Jurisdiction - Prohibition and mandamus - Whether High Court can grant in criminal proceedings pending before a Magistrate's court.

Civil procedure - Prohibition and mandamus - When can be issued in a Magistrate's court.

Civil procedure - Prohibition and mandamus - Power to make order - Whether vested in High Court against matter before subordinate court.

Headnote

This was an application by the Attorney-General by way of notice of motion in which he applied for an order of prohibition, to prohibit the Magistrate from hearing arguments on the objection raised by Shamwana and the others who were jointly charged with the offence of treason and misprision of treason. The application was also for an order of mandamus directing the magistrate to comply with the provisions of the Criminal Procedure Code, s. 255 and commit the respondents to the High Court for trial forthwith.

The respondents argued that an order of mandamus could not issue against a subordinate court in a criminal case. It was further argued that in absence of the criminal record the court could not deal with the matter, and also that since the magistrate did not hear the arguments and had not made any decision in the criminal proceedings before him the present application was misconceived.

Held:

- (i) Prohibition issues to restrain all inferior courts, whether temporal, ecclesiastical, maritime or military, civil or criminal whenever such courts take cognisance of matters outside their jurisdiction and lies so long as such courts act, or purport to act in the exercise of judicial functions and in the course of judicial proceedings.
- (ii) Whether or not the orders of prohibition and mandamus will issue does not depend on the nature of the proceedings before a subordinate court, but on whether a particular subordinate court has acted or not acted within its jurisdiction.

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- (iii) Prohibition may be sought before an inferior court has made any decision on the matter.
- (iv) The High Court has power to make orders of prohibition and mandamus in criminal matters before any subordinate court. However, this power is discretionary and the discretion is

exercised according to the circumstances of each case.

Case referred to:

(1) R. v Electricity Commissioners, [1924] 1 K.B. 171

Legislation referred to:

Penal Code, Cap. 146, ss. 43 (1) (a), 44 (b).

Criminal Procedure Code, Cap. 160, ss. 255, 341.

Supreme Court Rules, 1976, O. 53.

For the applicant:

R. Balachandran Esq., Senior State Advocate.

For E. J. Shamwana:

A.F. Munyama Esq., Nkwazi Chambers.

For V. S. Musakanya:

G. Chaane Esq., Chaane and Company.

And all the other respondents: In person.

Judgment

E.L. SAKALA, J.: This is an application by the Attorney-General for Zambia by way of notice of motion in which he is asking this court for an order of prohibition prohibiting the Senior Resident Magistrate of the Subordinate Court of the First Class from hearing arguments on the objection raised by Mr Edward Jack Shamwana and twelve others who are jointly charged with the offence of treason contrary to s. 43 (1) (a) of the Penal Code, Cap. 146 of the Laws of Zambia and in which the other two in addition have been separately charged with the offence of misprision of treason contrary to s. 44 (b) of Penal Code, Cap. 146 of the Laws of Zambia. The applicant is also asking this court for an order of mandamus directing the Senior Resident Magistrate to comply with the provisions of s.255 of the Criminal Procedure Code, Cap. 160 of the Laws of Zambia and commit the respondents in the criminal case to the High Court for trial forthwith.

At the commencement of the hearing this morning, Mr Munyama, counsel for Mr Shamwana raised a preliminary objection to the application. He contended that the proceedings before this court were improper on the ground that an order of mandamus cannot issue against the Senior Resident Magistrate's court because to allow such a procedure would be tantamount to withdrawing the jurisdiction of the court below. He submitted that the proceedings which prompted the present application are criminal in nature and the court is being asked, in the absence of the case record to adjudicate on a matter still pending in the court below. He pointed out that the best course in this case for the applicant was to apply for a case stated in terms of s. 341 of the Criminal Procedure Code. He thus submitted that the application for mandamus was misconceived.

Mr Chaane on behalf of Mr Musakanya indicated that he had no submissions to make at this stage.

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Mr Sikatana appearing in person argued that the application was grossly unfair because the affidavit sworn on behalf of the applicant contains what is alleged to have been matters that transpired in the court below. Yet, despite exhibiting some of the documents, the very record the subject of the application has been excluded. He submitted that this was a manifestation of gross injustice because the depositions contained falsehoods of what transpired in the court below. Mr Sikatana also argued that in these proceedings, he had not been given adequate time to prepare his case. He also

submitted that the mode of commencement of these proceedings was most irregular and most vexatious. He asks the court to dismiss the application with costs.

Mr Miyanda also appearing in person objected to the manner in which the application was made on the ground that the learned trial magistrate in the criminal proceedings has not made a decision yet.

Mr Symba also appearing in person submitted that the application be dismissed on account of the so many irregularities. He asks the court that he be provided with a fresh interpreter as his English which he has been learning while in prison is poor.

Suffice it to mention that the rest of the respondents did not make any submissions.

On behalf of the applicant, Mr Balachandran stated that these proceedings have been commenced before this court in compliance with 0.53 of the White Book. He submitted that in those circumstances it cannot be contended that the State should produce the record from the court below. Mr Balachandran also pointed out that at the stage at which the criminal proceedings have reached in the subordinate court there is no other procedure the State can adopt other than by seeking orders of prohibition and mandamus because s. 341, relating to cases stated, applies only where there has been a determination. This he submitted is not the case in the criminal proceedings before the Senior Resident Magistrate. He pointed out that by adjourning the case, the Senior Resident Magistrate acted in excess of his jurisdiction and by not committing the case to the High Court he did not exercise his jurisdiction properly. Mr Balachandran referred the court to the authorities reported in Halsbury's Laws of England, 3rd Edn. Vol. II at pp. 95 to 97.

I have very carefully addressed my mind to the arguments and submissions by both parties. On behalf of the respondents the contention is that an order of mandamus cannot issue against a subordinate court in a criminal case. It is also contended on behalf of the respondents that in the absence of the criminal record before the court below, this court cannot deal with this application. It is further contended that since the Senior Resident Magistrate has not heard the arguments and has not made a decision in the criminal proceedings before him, the present application is misconceived.

On the other hand, the applicant's contention is that this application is properly before this court and has not been misconceived.

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I must admit at the outset that the arguments and submissions by both parties have been well taken. The issue raised in this preliminary objection for determination by this court can be framed as follows:

Is it competent for the High Court to issue orders of prohibition and mandamus in criminal proceedings pending before a magistrate court?

In the short time I have had, I was unable to find any local decided cases on the matter. But in

resolving the preliminary objection, I am very mindful that I am not dealing with the merits of the application. I have no doubt in my mind that the High Court has powers to issue orders of prohibition and mandamus but that this power is discretionary. In Halsbury's Laws of England, third edition, volume eleven from pages 84 to 124, the orders of prohibition and mandamus are discussed at great length. A number of decided cases are cited in those pages. Among these cases are those cases in which the orders have been issued in respect of criminal proceedings and criminal cases. Thus at paragraph 180, the author states:

"Similarly a mandamus will lie to magistrates who decline to adjudicate in matters within their province."

In my view a criminal case subject to other consideration is a matter within the province of any subordinate court in Zambia. Under the heading "To what tribunal granted, paragraph 225 of the same volume of Halsbury reads as follows:

"Prohibition issues to restrain all inferior courts, whether those courts are temporal, ecclesiastical, maritime or military, civil or criminal whenever such courts take cognisance of matters outside their jurisdiction, and lies so long as such courts act, or purport to act, in the exercise of judicial functions and in the course of judicial proceedings."

Again, several cases both civil and criminal are cited in this paragraph in this support of the various principles stated. It would appear to me therefore that whether or not the orders of prohibition and mandamus will issue does not depend on the nature of the proceedings before a subordinate court, but on whether a particular subordinate court has acted or not acted within its jurisdiction. In the case of *R v Electricity Commissioners* (1), it was pointed out that an order of prohibition may be sought before an inferior court has made any decision on the matter. Adopting the foregoing principles which I accept as sound law, the answer to my question for determination posed earlier, is in the affirmative. I am thus satisfied that the High Court has power to make orders of prohibition and mandamus in criminal matters before any subordinate court. However, I am mindful that this power is discretionary and that the discretions exercised according to the circumstances of each case.

As regards the case record leading to the present application not being before this court, I am satisfied that the applicant complied with the provisions of Order 53 of the Supreme Court Rules, 1976 edition.

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However, the respondents still remain at liberty to file affidavits in opposition if they so wish. In the result I hold that the application is properly before this court and not misconceived. The preliminary objection is accordingly dismissed.

Objection dismissed
