

THE ATTORNEY-GENERAL v NGOYI KITENGE (1985) Z.R. 165 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, JJ.S
5TH JUNE, 1985
(S.C.Z. JUDGMENT NO. 22 OF 1985)

Flynote

Constitutional Law - Detention - Grounds of detention - Sworn allegation by a detainee that the grounds are untrue - Effect of failure by the State to contradict.

Headnote

The respondent was detained on the grounds that in 1980 he was recruited from North - Western Province and transferred to Lusaka with a view to overthrow the Government of the Republic of Zambia. He was granted writ of habeas corpus on the ground, inter alia, that his sworn allegation that the grounds of detention were untrue had not been contradicted by the detaining authority. The State appealed.

Held:

Where there is sworn allegation by detainee that the grounds of detention must be untrue by virtue, for instance, of an alibi, such an allegation by the detainee must be contradicted by the State otherwise the court is left with uncontradicted evidence that it would be unreasonable to detain the detainee on the ground put forward by the State. Chisata and Lombe v Attorney-General (1981) Z.R. 35 explained.

Cases referred to:

- (1) Million Juma v The Attorney-General (1984) Z.R. 1.
- (2) Chisata and Lombe v The Attorney-General (1981) Z.R. 35.

For the appellant: B.L. Goel, Senior State Advocate.
For the respondent: N.D. Patel, of N.D. Patel and Company.

Judgment

GARDNER, J.S.: delivered the judgment of the court.

This is an appeal against a judgment of the High Court granting a writ of Habeas Corpus to the respondent.

The facts of the case were that the respondent was detained on grounds that between 1st of March, 1980, and the 16th of October, 1980, he was recruited from the North - Western Province and transferred to Lusaka with a view to overthrow the Government of the Republic of Zambia by force. There was a second ground that he failed to report that to the police or other security forces and there was apprehension that if he was left at large he would continue to proceed with these unlawful activities and therefore for the preservation of public security it was necessary to detain him

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In his affidavits in support of his application for a writ of Habeas Corpus the respondent claimed that grounds of the detention were vague, that he entered Zambia on the 10th of August, 1980, at Sakania Border Post between Zaire and Zambia, and the purpose for his coming to Zambia was to collect University fees from his elder brother.

There was evidence that the grounds of detention were written in English and that the respondent did not understand English but did understand some Swahili. There was further evidence by affidavit and by a certificate endorsed on the back of the grounds of detention that they had been explained to the respondent in Swahili which he understood.

On behalf of the appellant Mr Goel has argued that in the case of *Million Juma v The People* (1), this court has held that the provision of Article 27 (1) (a), requiring that grounds of detention must be furnished in writing in a language that the detainee understands, is directory and not mandatory, and that, provided a detainee has such grounds explained to him and, in all other ways no injustice is done, the detention is not unlawful. We agree with this submission by Mr Goel and confirm our decision in *Million Juma's* case. The appeal on that ground therefore succeeds.

The second ground of appeal put forward by Mr Goel is that the learned trial commissioner in this case held that, by saying that he had come to Zambia to collect educational fees and not for the overthrow of the Government, the respondent had made a statement which was uncontradicted by the State and therefore his detention was unlawful. The learned trial commissioner referred to a case which has already been decided in this court, that is the case of *Chisata and Lombe v The Attorney-General* (2). In his reference to that case the learned trial commissioner said that it was held by this court that if any statement made by a detainee is uncontradicted, there is triable issue, and in consequence the State has not proved that the detainee is properly detained. He indicated that for these reasons he would in this case have granted the writ of Habeas Corpus on that ground also. In fact what this Court said in the case of *Chisata and Lombe* was that, where there is a sworn allegation by detainee that the grounds of detention must be untrue by virtue, for instance, of an alibi, such an allegation by the detainee must be contradicted by the State, otherwise the Court is left with uncontradicted evidence that it would be unreasonable to detain the detainee on the ground put forward by the State. As Cullinan J.S. said that case page 53:

"As it is I am satisfied that both appellants have made out their case and have shown on the basis of uncontradicted evidence of alibi that it was not reasonable to suspect them of the alleged activities and hence that it was not reasonably necessary to detain them..... "

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We are satisfied that in this particular case the learned trial commissioner applied a wrong test and we are equally satisfied that had he applied the proper test he would have found on the facts, that the respondent did not put forward an alibi for the whole period referred to in the grounds of detention. In this appeal both grounds of appeal raised on behalf of the appellant have already been previously dealt with by this court.

The appeal therefore succeeds and the judgment of the High Court is set aside.

There will be no order to costs in this court or in the court below. The order for costs in the court below is set aside.

Appeal Allowed
