

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/222/2010

BETWEEN:

THE PEOPLE

AND

JOSEPH CHIPAWA
WEBBY CHIBENDE

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 7th day of January, 2011.

*For the People: Ms. M.C. Mwape, State Advocate, Director of Public Prosecutions
Chambers.*

For the Accused: Mr. H. Chanda of Messrs Henry Chanda and Company.

R U L I N G

Cases referred to:

1. *R v Doule [1888] Ont. R 347.*
2. *Ibrahim v The King [1914] A.C. 599.*
3. *Weeks v United States [1914] 2321. I.S 383.*
4. *State v Reynolds [1924] 101 Conn 224.*
5. *The People v De Foe [1926] 242 W.Y. 413.*
6. *Olmstead v United States [1928] 277 U.S. 438.*
7. *Wolf v Colorado [1949] 338 US 25.*
8. *Chwa Hum Htive v Hing Emperor [1950] Scots*
9. *Karuma Son of Kaniu v R [1955] A.C. 1977, [1955] 1 ALL E.R. 236.*
10. *Mapp v Ohio [1961] 367 U.S. 643.*
11. *Liswaniso v The People (1976) Z.R. 277.*

Legislation referred to:

1. *Penal Code Cap 87, s. 294 (2).*
2. *Constitution Cap 1, Articles 1 (3), and (4), and 17.*
3. *Criminal Procedure Code, Cap 88 s. 118.*

Works referred to:

1. *Lee Epstein and Thomas G. Walker, Constitutional Law For a Changing America: Rights, Liberties, and Justice, Seventh Edition, (CQ Press Washington D.C 2010).*
2. *Wigmore on Evidence, 3rd Edition, 1940, Volume VIII.*

The accused are charged with two counts of aggravated robbery contrary to section 294 (2) of the Penal Code, chapter 87 of the laws of Zambia.

In the first count it is alleged that the accused on 6th November, 2009, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst armed with firearms did steal from Saeed A. Patel, one motor vehicle, namely Toyota Corolla registration number ABT 6965, one Nokia cell phone 62301, and K 1, 500, 000=00 cash, all valued at K 40, 000, 000=00, the property of Saeed A. Patel. And at or immediately before the time of such stealing, did use or threatened to use actual violence to the said Saeed A. Patel in order to prevent or overcome resistance to its being stolen.

In the second account it is alleged that on 6th November, 2009, at Lusaka in the Lusaka District of the Lusaka province of the republic of Zambia, jointly and whilst acting together with other

persons unknown and whilst armed with firearms did steal from Patel Maskud K 133,200=00 cash, and at or immediately before the time of such stealing did use or threatened to use actual violence to the said Patel Maksud in order to prevent or overcome resistance to its being stolen.

During the trial that commenced on Monday 13th September, 2010, the People called four witnesses. In the course of the testimony of Lazarus Sulwe; PW4, the defence objected to the admission in evidence of a licence disc relating to the Toyota Corolla ABR 2582, the vehicle that was allegedly stolen by the accused. The basis of the objection by Mr. Chanda, defence counsel, was that the State did not obtain a search warrant to search the house where the disc was recovered. As a result of the objection, I invited counsel to address me on this point. Mr. Chanda contended that there was no evidence that a search warrant was obtained to enable and empower the police search the premises. That being the case, Mr. Chanda submitted that the search was not only illegal, but also violated the Constitution. Mr. Chanda argued that although the common law position is that evidence illegally obtained is admissible, with the enactment of the Constitution, and the concomitant Bill of Rights, the common law rule ceased to apply. Thus Mr. Chanda contends that evidence obtained in breach of the Constitution is inadmissible. In response Ms. Mwansa contends on behalf of the People in the main that evidence illegally obtained is admissible.

In addition to the brief oral arguments referred to above, counsel took the liberty to file written submissions. Thus on 18th November, 2010, Ms. Mwansa filed written submissions on behalf of the People. Ms. Mwansa contends that there was no need for the police officer who conducted the search to obtain a search warrant because he was led to the house in question by the accused -A1- himself. This was after A1 had given the police officer the details regarding the crime that the police officer was investigating.

Ms. Mwansa further contends that since A1 was a suspect, and the police officer was carrying out investigations, the police officer was entitled to search A1. Ms. Mwansa argued that although the disc was obtained illegally, it was still admissible in evidence. In support of this contention, Ms. Mwansa relied on the case of *Liwaniso v The People* 1976 Z.R. 277. Ms. Mwansa submitted that in the *Liswaniso* case the Supreme Court held that:

“...evidence illegally obtained, e.g. as a result of an illegal search and seizure or as a result of an inadmissible confession is, if relevant, admissible on the ground that such evidence is a fact (i.e. true) regardless of whether or not it violates a provision of the Constitution (or some other law).”

In light of the decision in the *Liswaniso* case, Ms. Mwansa contends that the disc is admissible. It is admissible, Ms. Mwansa argued, because it is factual and relevant to the proceedings.

Conversely, Mr. Chanda filed the submissions on behalf of the accused on 30th November, 2010. Mr. Chanda contends that the disc is inadmissible because it was obtained from A1's house without the consent of A1. And more importantly in breach of Article 17 of the Constitution which guarantees the right to privacy of a home and other property. Mr. Chanda submitted that Article 17 of the Constitution makes it mandatory that before any entry, search, and seizure is effected, a police officer must first obtain a search warrant as stipulated by section 118 of the Criminal Procedure Code, Chapter 88 of the laws of Zambia. Mr. Chanda went on to argue that the common law rule laid down in the case of *Karuma, Son of Kaniu v R [1955] A. C. 236*, that illegally obtained evidence is admissible, and was later approved in the *Liswaniso case*, cannot be applied to the present case in light of the provisions in the current Constitution.

Mr. Chanda contends that in the *Liswaniso case*, the Supreme Court failed to direct their minds to the distinction between “*illegally obtained evidence*”, and “*evidence obtained in breach of an entrenched Bill of Rights.*” Mr. Chanda contends that on one hand the rule in the *Karuma's case* related to a search under a statute without warrant. On the other hand, the instant case relates to a warrantless search which is in breach of both a statute-section 118 of the Criminal Procedure Code, and Article 17 of the Constitution.

Thus Mr. Chanda maintains that the *Karuma case*, and by extension the *Liwaniso case* should not be followed.

Mr. Chanda argued further that under Article 2 (1) of the Constitution, the common law rule in the *Karuma case* fell under the rubric of “existing laws” in Zambia. However, Article 1 (3) of the Constitution provides that the Constitution is the supreme law of the land, and that if any other law is inconsistent with the Constitution, then that other law shall to the extent of the inconsistency be void. Mr. Chanda also pointed out that Article 17 (1) provides that: “*except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises*”. Mr. Chanda submitted that Article 17 (2) (d) provides the justification when it provides that:

(2) “Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision_

(d) That authorizes for the purpose of enforcing the judgment or order of the Court in any civil proceedings, the search of any person or property by order of Court or entry upon any premises by such order”.

In light of the preceding provision, Mr. Chanda submitted that in Zambia, the Criminal Procedure Code provides in section 118 the procedure for obtaining a search warrant from a magistrate.

Mr. Chanda argued that the net result of these provisions is that in Zambia Article 17 of the Constitution stipulates that a search may only be undertaken with a search warrant. Mr. Chanda argued that the terms of Article 17 are mandatory and the Court has no discretion to admit evidence procured in contravention of Article 17 of the Constitution. Mr. Chanda argued further that to admit evidence procured in contravention of Article 17 of the Constitution would be to render the entire Bill of Rights, a dead letter. This is so Mr. Chanda maintained because persons would not be protected from abuse of power by the legislative, executive, and indeed judicial arms of the State. It is for this reason, Mr. Chanda submitted, that Article 1 (4) of the Constitution stipulates that:

“The Constitution shall bind all persons in the Republic of Zambia and all legislative, Executive, and Judicial organs of the State at all levels.”

Lastly, Mr. Chanda submitted that even the Supreme Court, which is the highest organ of the judicature, is bound to enforce the Bill of Rights to the letter.

I am indebted to counsel for their spirited arguments and submissions. The question that falls to be determined in this application is narrow. The question is: is a Court entitled to admit, evidence procured illegally? That is to say, evidence procured in contravention of the law? A convenient starting point in considering this question is the case of *Karuma Son of Kaniu v Queen [1955] A.C. 197*. The facts of the case are that the appellant, Karuma Son

of Kaniu had leave of absence from a European farmer by whom he was employed to visit his reserve. Thus about 10 a.m. he started off on his bicycle along a main road on which he knew there was a road block where he would be liable to be stopped and searched. At the block he was stopped and a police constable examined his papers, which were in order, and then ran his hands over the outside of his clothing. The constable, believing that he felt in the fob pocket of the appellant's shorts what seemed to be a pocket knife and ammunition, he blew his whistle to summon a superior officer. Neither of those police officers was of or above the rank of assistant inspector. The appellant was taken by the police officers to an enclosure where he was made to take off his shorts, which were shaken and a pocket knife and two rounds fell out. He was then taken to the police station and charged with the offence. The two rounds were marked and were subsequently produced in evidence.

Before the Judicial Committee of the Privy Council it was argued on behalf of the appellant that the appellant having been searched by a police constable without a warrant, when Regulation 29 of the Emergency Regulations provided, that only a police officer of above, the rank of an assistant inspector had the power of searching, the evidence obtained in the course of and by means of that illegal search was inadmissible. It was pressed that the Court ought not to countenance or appear to be countenancing the commission of an illegal act (*Ibrahim v The King* 1914 A.C. 599, was referred to).

Reliance was also placed on the dictum by *Holmes. J. in Omstead v United States* 277 U.S. 438, 469, that, “*the government ought not to use evidence obtained by a criminal act.*” I will revert to this case later. (See also *Wolf v Colorado* 1949 338 U.S. 25, 28, 42).

However, in delivering judgment in the *Karuma case*, Lord Goddard C. J. observed at page 203, that the Board would deal with the case on the footing that there was no power in any police officer under the rank of assistant inspector to search the appellant. Thus as it was a direct result of the search that the ammunition was found on the appellant, it was submitted that the evidence was illegally obtained and therefore could not be given. And that the Court was bound to ignore it. Lord Goddard C. J. went on to observe succinctly at page 203 as follows:

“In their Lordships opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how the evidence was obtained.”

Our *locus classicus* case on the point under discussion is the case of *Liswaniso v The People* 1976 Z.R. 277. The facts in the *Liswaniso case* were that the applicant, an inspector of police was convicted of official corruption, the allegation being that he corruptly received a sum of K 80 in cash as consideration for the release of an impounded motor car belonging to the complainant. The evidence on which the applicant was convicted was obtained by means of a

trap; the handing over of the currency notes in question by the complainant was pre-arranged with the police, and they were recovered from the complainant's house during a search conducted pursuant to a search warrant. It was common cause that at the time the police officer in question applied for the search warrant to be issued, he swore that the money in question was in the applicant's house when in fact it was in that officer's possession. It was argued on behalf of the applicant that the search warrant was invalid, and the resultant search illegal. And that anything found as a result of such search was inadmissible in evidence.

In the arguments, the Supreme Court's attention was drawn in particular to Article 19 of the Constitution which provided as follows: "*19 (1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.*"

It was further argued on behalf of the applicant that since the United Kingdom has no written Constitution, English case law on evidence illegally procured, for instance, *Karuma Son of Kaniu v R [1955] A.C. 197*, is not relevant. It was also urged on behalf of the applicant that decisions of the United States of America on the matter are relevant because that country, like Zambia, has a written Constitution. In aid of this submission reliance was placed upon the case of *Mapp v Ohio [1961] 367 US. 643*.

In delivering the judgment in the *Liswaiso case* on behalf of the Supreme Court, erstwhile Chief Justice Silungwe observed at page 280, that it is the Fourth Amendment in the United States of America that brings search and seizure into the realm of the Constitution. The Fourth Amendment is in the following terms:

“The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches, and seizures shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized”.

Silungwe C.J. went on to refer to the decision of the Supreme Court of America in *Weeks v United States (1914) 232 1.S. 383*. He, noted that the *Weeks* case involved the seizure of personal papers and effects including letter from a man’s house without a search warrant. A Federal District Court refused to order the return of anything that would be used as evidence at the trial stating that the question of how evidence was obtained, was not material. The evidence of search and seizure was then introduced at the trial resulting in the defendant’s conviction. On appeal, the Supreme Court reversed the conviction. Delivering the opinion of the Supreme Court, Day. J, observed as follows:

“If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offence, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures is of no value and so far as those thus placed are conceived, might as well be stricken from the Constitution”.

The decision in *Weeks* represents one of the Supreme Court's earliest attempts to grapple with the issues of constitutional violations by police while gathering evidence and what to do when such violations occur. (See Lee Epstein and Thomas G. Walker: Constitutional Law for a Changing America: Rights, Liberties and Justice (C Q Press Washington DC) 2010 at page 449). Silungwe, C.J, observed in the *Liswaniso case* that a different position was taken in many States within the United States of America. For instance, in the State of Connecticut in *State v Reynolds [1924] 101 Conn 224 Wheeler J* observed as follows:

“When evidence tending to prove guilt is before a Court, the public interest requires that it be admitted. It ought not to be excluded upon the theory that individual rights under these constitutional guarantees are above the right of the community to protection from crime. The complexities and conveniences of modern life make increasingly difficult the detection of crime. The burden ought not to be added to by giving to our constitutional guarantees a construction at variance with that which has prevailed for over a century at least”.

Further, Silungwe, C.J; referred to the case of the *People v De foe [1926] 242 W.Y. 413*. In that case Cardozo J forcefully expressed himself in the following terms:

“... A room is searched against the law and the body of a murdered man is found. If the place of discovery cannot be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free”.

Wigmore, Silungwe C.J, noted in the *Liswaniso case*, is an ardent supporter of admissibility, and states quite categorically that

legality in the method of obtaining evidence does not affect its admissibility at common law, and he strongly attacks what he regards as an aberration on the part of certain American Courts in departing from this rule. Wigmore attacked the decision in the *Weeks case*. Wigmore's general principle, Silungwe C.J, observed, is that logically relevant evidence should be admitted unless there is a powerful policy reason to the contrary. (See *Wigmore on Evidence, 3rd Edition (1940) VI VIII*).

Clearly, in the United States of America, this area of law has not yielded easy answers. Initially, the prevailing view was that the Fourth Amendment protected individuals from government searches of their "*persons, houses, and effects*". If the government did not physically search through a person's belonging or on his property, Fourth Amendment restrictions on law enforcement did not apply. (See *Lee Epstein and Thomas G Walker, Constitutional Law For a Changing America: Rights, Liberties and Justice, supra, at page 450*).

The Supreme Court articulated the preceding position best in its 1928 ruling in *Olmstead v United States 1928 277 US 438*. The *Olmstead case* was the first major electronic eavesdropping case to come before the Supreme Court. In *Olmstead*, Federal agents had reasons to believe that Roy Olmstead was importing and selling alcohol in violation of the National Prohibition Act. To collect

evidence against him, the agents, without first obtaining a search warrant, placed wiretaps on Olmstead's telephone lines. They did so without setting foot on Olmsted's property. One tap was applied in the basement of a large office building in which Olmstead rented space and the other on a telephone line on the street outside Olmstead's home. These taps allowed the agents to overhear conversations involving illegal activities.

Olmstead challenged the evidence. He claimed that even though the agents had not entered his home or office, they had, through the wiretaps, searched and seized his conversations in violation of the Fourth Amendment. The government maintained that because the agents had not trespassed on the Olmstead's property, the wire tapping was a procedure that need not comply with Fourth Amendment requirements.

The Supreme Court ruled in favour of the government. After reviewing the general history of the Fourth Amendment, the Supreme Court concluded that it did not protect Olmstead's conversations because it covers only searches of "*material things_ the person, the house, his papers or his effects*". Therefore, the Amendment does not forbid what was done. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

Four of the justices of the Supreme Court wrote dissenting opinions. Justice Louis Brandeis is the best remembered. He echoed the words of those who had fought against the general warrants when he wrote:

“The makers of our Constitution undertook to secure conditions favourable to the pursuit of happiness... They conferred, as against the government, the right to be let alone. The most comprehensive rights and the rights most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment”.

Silungwe, C.J, in the *Liswaniso* case also referred to the case of *Mapp v Ohio* [1961] 367 U.S. 643. In the *Mapp*'s case the defendant stood convicted of knowingly having had in her possession and under her control certain obscene materials in violation of Ohio's Revised Code. Her house was searched under a purported “warrant”. At the trial there was “considerable doubt” as to whether there had been any warrant for the search of the defendant's house. Accordingly, the search and seizure was found to be contrary to the letter and spirit of the Fourth Amendment. The Supreme Court came to the conclusion that all evidence obtained by unconstitutional search and seizure is inadmissible in both Federal and State Courts, regardless of its source.

Apart from the American cases, the Supreme Court in the *Liswaniso* case, also considered Canadian cases. The Canadian cases, Silungwe C.J, observed, proceed on the principle that

evidence procured through illegal searches and seizures is admissible because it is a fact (i.e. true) and relevant. In this regard, Silungwe C.J, referred to the dictum of Wilson C.J. in *R v Doyle* [1888] 12 Ont. R. 437, when he observed that:

“In think the evidence is admissible so long as the fact so wrongly discovered is a fact apart from the manner it was discovered___ admissible against the party”.

Silungwe C.J. also referred to the Indian authorities that support the admissibility of evidence obtained through illegal searches and seizures on the basis that such evidence whatever the mode of obtaining, it is relevant and therefore admissible. In this regard, Silungwe C.J referred to the case of *Chwa Hum Htive v King Emperor* [1926] 1.L.R. Rang 107, where Bugulay J observed that the irregularity in the search was a mere technicality but stated in general terms that evidence obtained consequent upon the commission of irregularities was nevertheless admissible. Bagulay J observed crisply that:

“...it must be remembered that the acquittal of a guilty accused is just as much miscarriage of justice as the conviction of an innocent person”.

In reference to the Scottish cases, Silungwe C.J. noted that the Scottish cases have regard to the circumstances of each case in determining the admissibility of evidence procured by illegal search and seizure. In this respect reference was made to the case of *Larrie v Muir* [1950] Scott L.T. 133. The brief facts of the case were that milk bottles obtained as a result of an illegal search by inspectors

employed by the Scottish milk Marketing Board was held inadmissible because the Court was apparently influenced by the fact that the illegal search had been made not by policemen possessing a “*large residuum of common law discretionary power,*” but by privately employed inspectors. Lord Justice General Cooper, who delivered the unanimous judgment of the Court, reviewed Scottish authorities and proceeded to make the following instructive observation:

“It seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict_

(a) The interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any mere formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful, and perhaps high handed interference, and the common sanction is an action for damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and offering a positive inducement to the authorities to proceed by irregular methods”.

All said and done, Silungwe, C.J, went on to conclude in the *Liswaniso* case that it would appear that in common law jurisdictions there is one unanimity that clearly stands out. Namely, that Courts of law do deprecate any illegal or irregular invasions by the authorities of the individual liberties. Nonetheless,

Silungwe C.J. went on to sum up the tension in this area of the law as follows at page 286:

“On an examination of the authorities on the subject with which we are here concerned two opposing views emerge. The first one is that it is important in a democratic society to control police methods and activities in order to secure a satisfactory assurance of respect for the law. It is argued that this can be achieved by denying to the police the right to use evidence that has been illegally obtained on the basis that it is better that guilty men should go free than that the prosecution should be able to avail itself of such evidence. The second is that it is not desirable to allow the guilty to escape by rejecting evidence illegally procured and that what is discovered in consequence on an illegal act should, if relevant, be admissible in evidence but that the policeman, or anyone else, who violates the law should be criminally punished and or made civilly liable for his illegal act. Although the law must strive to balance the interests of the individual to be protected from illegal invasions of his liberties by the authorities on one hand and the interests of the State to bring to justice persons guilty of criminal conduct on the other, it seems to us that the answer does not lie in the exclusion of evidence of a relevant fact”.

Ultimately, Silungwe C.J. concluded as follows at page 287:

“On the authorities, it is our considered view that (the rule of law relating to involuntary confessions apart) evidence illegally obtained e.g. as a result of an illegal search and seizure or as a result of an inadmissible confession is, if relevant, admissible on the ground that such evidence is a fact (i.e true) regardless of whether or not it violates a provision of the Constitution or some other law”.

In the instant case Mr. Chanda submitted that Article 17 of the Constitution provides that except with his own consent a person shall not be subjected to the search of his person or his property or the entry by others on his premises. Further Mr. Chanda argued

strenuously that under Article 17 a search can only be conducted with the aid of a search warrant. As *sequitur*, Mr. Chanda argued that a Court of law has no discretion to admit evidence obtained in breach of an entrenched provision. To admit such evidence, Mr. Chanda argued would be to render the entire Bill of Rights a dead letter.

The issue as I see it, is not whether or not it is lawful to conduct a search of a person or his property without a search warrant ___ it is incontrovertible that a search conducted without a warrant is illegal and may be visited by an action for damages. The issue is rather whether the evidence obtained as a result of the illegal search of a person or property, should, if factual (i.e. true), and relevant be admissible in evidence. This question represents and manifests a tension between two competing public interests. On one hand there is need to protect persons from illegal or irregular invasions of their liberties by especially investigating authorities. On the other hand, it is also in the interest of the public for the investigative authorities to obtain evidence that may be vital to ensure that justice is done. This is therefore a question of broad legal policy. This legal policy was categorically resolved by the Supreme Court in the *Liwaniso case*, when it was held that apart from involuntary confessions, evidence illegally obtained, is, if relevant, admissible regardless that it violates a provision of the Constitution, or some other law.

In view of the foregoing, the objection by Mr. Chanda to the admission of the disc is not sustained. And accordingly, Ms. Mwape is at liberty to tender the disc in evidence, despite the fact that PW 4 did not obtain a search warrant to search the premises of A 1.

DR. P. MATIBINI, SC.
HIGH COURT JUDGE