

REPORTABLE (2)

KENNY MURRAY

v

**(1) DONALD NDIROWEI N.O.
(2) THE ATTORNEY-GENERAL
(3) THE MINISTER OF HOME AFFAIRS N.O.**

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JCC, GWAUNZA JCC,
GARWE JCC, GOWORA JCC, HLATSHWAYO JCC,
MAVANGIRA AJCC, CHIWESHE AJCC & MAKONI AJCC
HARARE, JULY 2, 2014
JUDGMENT RELEASED ON 28 FEBRUARY 2017**

F Mushoriwa, for the applicant

No appearance for the first respondent

Ms R Hove, for the second and third respondents

CHIDYAUSIKU CJ: This is an application in terms of s 85(1) (a) and (d) of the Constitution of Zimbabwe (hereinafter referred to as “the Constitution”), in which the applicant seeks the relief set out in the draft order. The draft order seeks the declaration of s 95(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (“the Act”) as unconstitutional. The applicant was charged with contravening the above section. The applicant also seeks an order declaring certain conduct of the State unconstitutional.

It is alleged that the applicant uttered the words “Bullshit, idiot, *hauna zvaunondiita, hausuwe Parehwa*”. The charge alleges that the words were intended to impair the dignity of

the complainant seriously or that there was a real risk or possibility of such impairment in contravention of s 95(1) of the Act.

The applicant contends that the words he is alleged to have uttered, even if proven, do not constitute an offence in terms of s 95(1) of the Act. The State concedes that the conduct of the applicant, even if proven, does not constitute an offence. Accordingly, the constitutional challenge in respect of s 95(1)(a) of the Act falls away.

The applicant, however, urged the Court to grant the applicant the relief sought in paras 2 and 3 of the draft order, which read:

“Whereupon after reading the documents filed of record and hearing counsel for the parties, it is declared that –

2. That (*sic*) the practice by which accused persons who freely attend at court from their homes are arrested at court for purposes of appearing in court from custody is illegal and unconstitutional;
3. Consequently, that the applicant’s arrest and detention on 3 December 2013 was illegal and unconstitutional.”

Counsel for the applicant contended that there was need for the Court to make a ruling on these issues to control or put an end to the practice of arresting accused persons at court and lodging them in the cells pending their appearance in court. This practice, it is common cause, is common at the magistrates’ courts.

The applicant averred that on the fateful day he attended at court from his home, having been advised by the police officer in charge of the matter that it would be heard on that day. He attended freely and voluntarily, but was surprised upon arrival at court to be told by the police officer, a Mr Mutonhodzi, that he was to be taken into the holding cells and

would appear in court as a person in custody. He entered the holding cells at Rotten Row Magistrates' Court under protest. He was taken over by the prison officer and appeared in court from the said cells. In the cells he mixed with accused persons of all types from the remand prison and other police stations. The court released him on free bail and remanded him out of custody. The court remanded him on free bail at about 0900 hours. Despite his being remanded on free bail, he was again led down to the holding cells and held there for the rest of the day until he was released at about 1600 hours.

The applicant's case is that he should never have been deprived of his liberty for the seven hours in the circumstances of this case. Put differently, he lost his liberty for seven hours as a result of the actions by the police or the State. The actions of the police were arbitrary and without legal basis.

The issue that falls for determination is whether or not the deprivation of the applicant's liberty in the circumstances of this case constitutes an unlawful arrest and/or detention, which violated his right to liberty as guaranteed by s 49(1)(b) of the Constitution. It is alleged that the deprivation of liberty experienced by the applicant is routinely meted out to accused persons in similar circumstances at the Magistrates Courts throughout the country.

The Law

The law relating to the right to liberty has been commented on in a number of cases. In the case of *Allan v Minister of Home Affairs and Anor* 1993 (1) ZLR 92 (H) REYNOLDS J had this to say:

“Since time immemorial the liberty of the individual has been regarded as one of the fundamental rights of man in a free society. Long before the *Magna Carta* codified the principle almost eight hundred years ago, man has pursued and jealously guarded his right to

freedom of person. In the words of Thomas Jefferson: ‘The God who gave us life gave us liberty at the same time.’ Revolutions have been staged and wars have been fought in the name of freedom. This includes Zimbabwe’s own long and bitter struggle. The protection of this right is enshrined in the Constitution of Zimbabwe, and the courts will certainly play their part in preserving this right against all infringements, and all attempts to erode or violate the principle involved.”

The arrest of an accused person that involves placing the accused in custody invariably involves the deprivation of that person’s right to liberty. For that deprivation of liberty to be constitutional, it must be lawful. If the arrest is unlawful, then it must also be unconstitutional.

It is common cause that the applicant was arrested at court. Section 49(1)(b) of the Constitution protects the right to liberty against arbitrary or unlawful arrest. For an arrest to be lawful, it has to be predicated on a just cause. In *Muzondo v Minister of Home Affairs and Anor* 1993 (1) ZLR 92 (S) it was stated that the legality of an arrest has to be predicated on the proper exercise of the discretion to arrest. Section 25 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] authorises arrest, but such an arrest has to be based on a proper exercise of the discretion to arrest.

The factors to be considered in deciding whether the discretion to arrest was properly exercised are set out in *Muzondo’s* case *supra* at p 99 as follows:

“In making the determination of whether the decision to arrest the plaintiff is open to challenge, several important factors require to be considered. They are –

- (i) The possibility of escape;
- (ii) The prevention of further crime; and
- (iii) The obstruction of police enquiries.”

It is common cause that the applicant attended at the police station prior to the court date and during the period that investigations were conducted. He was sent home and not placed in custody. He was advised of the court date and he freely attended at court, where his liberty was curtailed by placement into the holding cells. The question of whether he could escape obviously does not arise once it is accepted that the applicant freely attended court on the day in question. The prevention of the commission of further crimes or the obstruction of police enquiries cannot have influenced the arresting police officers on the facts of this case. These are factors that must have already been weighed by the police during investigations and did not lead to placement into custody. It is quite clear that in this case none of the factors set as necessary for a lawful arrest set out in *Muzondo's case supra* existed before the applicant was arrested and placed into custody at the court.

Counsel for the second and third respondents did not make any meaningful submissions pertaining to the impugned practice. The second respondent did not appear before the Court but submitted heads of argument. He argued that there was no infringement of the applicant's personal liberty which entitles him to the relief that he is seeking. It appears the second respondent does not dispute what transpired on the day in question, as alleged by the applicant. Basically his argument is that this procedure is lawful because it is the standard procedure.

It is trite law that the police can only deprive a person of liberty in accordance with the law. A detention is a deprivation of a person's liberty, which is only permissible in terms of the law. It is common cause that the applicant was detained. Once that is established, it is for the respondents to establish the legal basis for the detention.

In this case, the applicant was not verbally arrested. He was simply told that he was going to be in police custody up until being granted bail by the court and even after being granted “free bail” he remained in custody up until the end of the day. No legal basis was advanced by the State justifying the detention of the applicant in the circumstances of this case. It follows, therefore, that the detention was unlawful and a violation of the applicant’s constitutional right to liberty.

It is also not disputed that what happened to the applicant is common practice at criminal courts. The Court is satisfied that this practice is unconstitutional, in that it interferes with an accused person’s right to liberty without any regard to the legal requirements set out in *Muzondo’s case supra*. I must, however, add the *caveat* that each case has to be determined on its own facts. It is only in those cases where the facts are on all fours with this case that this provides a precedent.

It is for these reasons that the Court, after reading documents filed of record and hearing counsel, issued the following order:

“IT IS DECLARED THAT (sic)

1. That the facts alleged by the State in this case even if proved do not constitute a criminal offence. Consequently, the first respondent’s refusal to refer this matter to the Constitutional Court violated the applicant’s right guaranteed by section 56(1) of the Constitution of Zimbabwe, as read with section 175(4) of the Constitution.
2. That the applicant’s arrest and detention on 3 December 2013 at court for the purpose of his appearing in court from custody when he had freely attended at court was unlawful and unconstitutional in terms of section 49(1)(b) of the Constitution of Zimbabwe.

IT IS ORDERED THAT:

3. The prosecution of the accused in this case is permanently stayed.
4. The second respondent and the third respondent shall pay the applicant’s costs of suit.”

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

MAVANGIRA AJCC: I agree

CHIWESHE AJCC: I agree

MAKONI AJCC: I agree

Mawere & Sibanda, applicant's legal practitioners

Civil Division of the Attorney-General's Office, second and third respondent's legal practitioners