HH 85-03
HC 29211/03
CHARLES NYATANGA
versus
OFFICER-IN-CHARGE, HARARE CENTRAL HOLDING CELLS
(INSPECTOR MLAMBO)
and
CONSTABLE CHIKUNDILA
and
INSPECTOR ZONDO
and
INSPECTOR ZIKI
and
MINISTER OF HOME AFFAIRS
and
ATTORNEY-GENERAL

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 2 May, 2003

SMITH J: The applicant (hereinafter referred to as "Nyatanga") is the Master of the High Court and is also acting as Registrar of the High Court. He has held the office of Master for a number of years. He filed an urgent application seeking an order declaring that his arrest and detention was illegal and unlawful. The interim relief claimed was that he be released forthwith from the holding cells at the Harare Central Police Station, or any other police station. I granted the provisional order. My reasons for doing so are based on the following considerations.

At about 1.00 p.m. on Friday 2 May the second respondent (hereinafter referred to as "Chikundila"), who was the investigating officer, arrived at Nyatanga's offices in the High Court in the company of one, Bobby Maparanyanga. Nyatanga was allowed to call his lawyer, who arrived soon after. Chikundila indicated that he wanted to record a warned and cautioned statement from Nyatanga in connection with a fraud case wherein it was alleged that Nyatanga had fraudulently transferred a piece of land belonging to Maparanyanga to an unidentified third party. Nyatanga and his lawyer went with Chikundila and Maparanyanga to the Harare Central Police Station. On arrival, despite repeated requests for such, details of the offence were not

provided. However Chikundila proceeded to type out the preamble to the warned and cautioned statement that he wished to record. The allegation in the preamble was that Nyatanga "unlawfully and with intent to defraud, misrepresented to Fidelis Maredza of the Deeds Office to transfer the Title Deed No. 00899/95 belonging to Bobby Maparanyanga meant for Lot 1 of Willowvale". Nyatanga, in his statement, denied the allegation, saying that the transfer was effected lawfully pursuant to a lawful sale in execution; that the charge is being brought 8 years and 3 months after the transfer; that Maparanyanga was entitled to challenge the sale in accordance with the High Court Rules; that he had done so but withdrew the challenge of his own free will in 1995.

The proceedings were being conducted in the presence of Maparanyanga until Nyatanga's lawyer objected and asked that he be ordered to leave the room. That was done before Nyatanga made his statement. The statement was recorded and completed at 13.45 p.m. When Nyatanga's lawyer asked for a copy of the warned and cautioned statement Chikundila said that he required authority from the Officer-in-Charge before he could release a copy. Chikundila took them to see the third respondent (hereinafter referred to as "Zondi"), allegedly the Officer-in-Charge of Investigations, who indicated that because of the allegations against him, Nyatanga would be detained over the weekend. That was the first that Nyatanga and his lawyer learnt that the former was to be kept in the cells over the week-end. They asked Zondo if they could be shown the allegations but he refused. He then left the office. Chikundila then took Nyatanga and his lawyer to the alleged Officer-in-Charge of Shift 4, Inspector Chingere. Chingere heard what had happened and then said that he was knocking off duty and the matter should be dealt with by the fourth respondent (hereinafter referred to as "Ziki") who was allegedly the Officer-in-Charge of the next shift. Ziki said that she had no authority to overrule Zondo and accordingly signed the document authorizing that Nyatanga be detained over the weekend.
As Nyatanga was detained in the cells, the founding affidavit was deposed to by his lawyer. He contended that there were no valid reasons for the detention of Nyatanga. He based that contention on the following. Nyatanga was not advised of the allegations against him, other than what was stated in the preamble in the warned and cautioned statement. The allegation of fraud relates to a sale in execution and the subsequent transfer of property that belonged to Maparanyanga in 1995 which was done in the execution of his official duties as Sheriff of the High Court. At the time Maparanyanga exercised his right to challenge the sale but subsequently withdrew the challenge. Maparanyanga was present when Nyatanga was arrested and during the recording of the preamble to the warned and cautioned statement. He only left when Nyatanga's lawyer threatened to stop the process until he left. Maparanyanga saw each of the police officers involved before Nyatanga and his lawyer saw them in an effort to get information about the allegations or to secure his release. He even went

so far as to accompany Nyatanga and his lawyer to the holding cells.

The lawyer also submitted that this was a clear case where undue influence had been brought to bear on the police for one reason or another. Maparanyanga has been harassing Nyatanga for many years with allegations of fraud. In the recent case of *Maparanyanga*v *Sheriff of the High Court & 4 Ors*SC 132/02, which was handed down on 18 March 2003, where the court was dealing with the case of a sale in execution of another piece of property owned by Maparanyanga, the court said that the case had attracted considerable media publicity. It point out that Nyatanga was vilified for his part in the sale, which was perceived to have been biased against Maparanyanga, if not criminal, and that Nyatanga had even been threatened with prosecution for fraud. In the court *a quo*the learned trial judge had noted that Nyatanga had acted throughout "in the impartial and professional manner required of his office and had taken all decisions in good faith and in accordance with his reasonable view of the rights of the matter". The Supreme Court concurred with the views expressed and added that Nyatanga had "acted in good faith and genuinely believed he was acting in the interests of all the parties".

The lawyer further pointed out that no investigation had been commenced. Nyatanga was not advised of the allegations against him and therefore had no fair opportunity to answer them. This was not a matter which ordinarily would have required that the culprit be detained. Nyatanga is a senior official of the High Court and is well respected. He owns a house in Harare where he has been resident for more than 5 years. He is not a "flight risk".

In *Feldman*v *Minister of Home Affairs*1992(2) ZLR 304 (SC) the applicant sued for damages for wrongful imprisonment. GUBBAY CJ, at p 308, referred to what the Supreme Court had said in *Attorney-General*v *Blumears & Anor*1991(1) ZLR 118 (S) at 122 A-C -

> "The standard for the deprivation of personal liberty under s 13(2)(e) of the Constitution are facts and circumstances sufficient to warrant a prudent man in suspecting that the accused person had committed, or was about to commit, a criminal offence. The standard represents a necessary accommodation between the individual's fundamental right to the protection of his personal liberty and the State's duty to control crime. It seeks, on the one hand, to safeguard the individual from rash and unreasonable interference with liberty and privacy, and from unfounded charges of crime, yet, on the other, to give fair leeway for enforcing the law in the community's protection. The criterion of reasonable suspicion is a practical, non-technical concept which affords the

> best compromise for reconciling these often opposing interests. Requiring more would unduly hamper the legitimate enforcement of the law. To allow less would be to leave law-abiding persons at the mercy of the whim or caprice of the authorities".

Then at p 309 the learned Chief Justice continued -

> "It had to be shown by the respondent that, in effecting the arrest of the appellant at Woolworths Store, the police officers not only subjectively harboured a suspicion that she, individually, had stolen the money, but that, on an objective appraisal, there existed reasonable grounds for that suspicion, resulting from what they had ascertained prior to arresting her. In other words, the circumstances giving rise to the suspicion were such as would ordinarily lead a reasonable man to form the suspicion that the arrestee had committed an offence mentioned in the First Schedule to the Criminal Procedure and Evidence Act (which includes theft)".

The Supreme Court again considered the question of wrongful arrest and detention in *Muzonda*v *Minister of Home Affairs & Anor*1993(1) ZLR 92(SC). At p 95-96 GUBBAY CJ said -

> "Section 29(1)(b) of the Criminal Procedure and Evidence Act [Chapter 59] makes it clear that a peace officer must have reasonable grounds to suspect a person of having committed any of the offences mentioned in the First Schedule - which includes an offence at common law - before he is empowered to arrest him without a warrant. Without such an important protection, even the most democratic and enlightened society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens in the case of an arrest made without a warrant, it is essential for a peace officer to demonstrate the reasonable grounds upon which the arrest was based. The importance of this to citizens of a democracy is self-evident. Yet society must also be protected against crime. Thus what has to be struck is a necessary accommodation between the individual's right to liberty and that of society to be protected from crime. It is done by requiring of a peace officer that before arresting without a warrant he must satisfy himself that reasonable grounds for suspicion of guilt do exist. That requirement is very limited. He is not called upon before acting to have anything like a *prima facie*case for conviction. Certainty as to the truth is not involved, for otherwise it ceases to become suspicion and becomes fact. Suspicion, by definition, is a state of conjecture or surmise whereof proof is lacking."

The court found that the police officer concerned had reasonable grounds for suspecting that the person arrested had committed the crime of assault and theft but went on to consider whether or not the power of arrest had been reasonably exercised. At p 98-99 GUBBAY CJ, referring to the Criminal Procedure & Evidence Act [Chapter 59 of 1974], said -

> "Section 29(1) of the present Act employed the phrase 'is hereby authorised… to arrest'. I am satisfied that, read with para (b), it is to be construed as imparting a discretion upon the peace officer in the exercise of his power of arrest. This conforms with common sense, for it would be absurd if, for instance, a peace officer were compelled to arrest a person whom he had reasonable grounds to suspect of having assaulted another by gesturing with his fist. It is also consistent with comparative provisions in both the South African Criminal Procedure Act 1977, and the Police and Criminal Evidence Act 1984, of England and Wales. See s 40(1)(b) and s 24(6) respectively. In

short, in enacting s 29(1)(b), the law-maker did not intend that the power given a peace officer to arrest is always, or even ordinarily, to be exercised.

In the celebrated case of *Holgate - Mohammed*v *Duke*[1984] 1 All ER 1054 (HL) the issue arose as to whether the exercise of the discretion to arrest was to be treated in the same manner as the assessment of the existence of reasonable grounds for suspicion. Stated otherwise : was the arrest rendered unlawful if the decision was one which the court believed to be unreasonable, applying the same general objective test as it would to the existence of grounds? The House of Lords held that the police constable's discretion to arrest was not reviewable in the same way as the grounds for arrest, but only on the principles applicable in administrative law, where an executive discretion is conferred on a public officer. This was explained by LORD DIPLOCK in the course of his speech at 1057 e-g:

> 'So the condition precedent to Det. Con. Offin's power to take the appellant into custody and the power of the other constables at Southsea police station to detain her in custody was fulfilled; and, since the wording of the subsection under which he acted is 'may arrest without warrant', this left him with an executive discretion whether to arrest her or not. Since this is an executive discretion expressly conferred by statute on a public officer, the constable making the arrest, the lawfulness of the way in which he has exercised it in a particular case cannot be questioned in any court of law except on those principles laid down by LORD GREENE MR in *Associated Provincial Picture Houses Ltd*v *Wednesbury Corp* [1947] 2 All ER 680; [1948] 1 KB 223, that have become too familiar to call for repetitious citation. The *Wednesbury*principles, as they are usually referred to, are applicable to determining the lawfulness of the exercise of the statutory discretion of a constable under s 2 (4) of the 1967 Act, not only in proceedings to judicial review but also for the purpose of founding a cause of action, at common law for damages for that species of trespass to the person known as false imprisonment, for which the action in the instant case is brought'.

See also *Shaaban Bin Hussein*v *Chong Fook Kam*[1969] 3 All ER 1626 (PC) at 1630E. Wade *Administrative Law 6* at p.405.

Accordingly, a far stricter test than reasonableness in the normal meaning of the word is to be applied. The decision will be held to be *ex facie*unreasonable and subject to interference only where it is 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it' p*er*LORD DIPLOCK in *Council of Civil Service Unions*v *Minister for the Public Service*[1984] 3 All ER 935 (HL) at 951 a-b. Later, in *Nottinghamshire County Council*v *Secretary of State for the Environment*[1986] 1 All ER 199 (HL) at 202f, LORD SCARMAN spoke of a decision having to be so absurd that the decision-maker 'must have taken leave of his senses for a challenge to succeed".

Then at p 99-100 the learned Chief Justice continued -

> "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 : (1) the possibility of escape; (ii) the prevention of further crime; and (iii) the obstruction of police enquiries.

It ought to have been apparent to Constable Makuvatsine that the plaintiff was a respectable and elderly lady of fixed abode. There was little, if any, risk of her absconding in order to evade being tried on such charges. Quite apart from the inherent pettiness of the offences and the consequent certainty that if convicted she would be granted the option to pay a fine, the plaintiff had a sixteen-year-old daughter to care for. In the knowledge that she was to be questioned about the assault and theft of the wrist-watch, she had complied with the request to be at the police station on the morning of 23 December 1988.

Moreover, there was absolutely no warrant to believe that if the plaintiff were permitted to remain at liberty she would commit further offences, especially since

Maria had removed herself and her belongings from the house".

In *Botha*v *Zvada & Anor*1997(1) ZLR 415 (SC) the question of false arrest and detention was again under consideration. The court found that when Botha was arrested, there were no reasonable grounds for suspecting that he had shot and killed the deceased. KORSAH JA at p 422 went on to say -

> "Even assuming Zvada did have reasonable grounds to suspect the appellant of being the culprit, he was obliged to exercise his discretion to arrest and detain without flouting the Wednesbury principles; *CCSU*v *Min for the Public Service*[1984] 3 All ER 935 (HL) at 951. In the exercise of that discretion, submitted Mr Nherere, Zvada should have taken the following factors into account:
>
> (a) the possibility of escape;
> (b) the prevention of further crime; and
> (c) obstruction of police enquiries.
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> Having due regard to the appellant's age and condition, Zvada had no reason to believe that the appellant would, if not detained, escape. The appellant having been dispossessed of all guns available to him, the danger of his committing a similar crime had effectively been curtailed. All the evidence to be garnered from his employees was already at hand and there was not the remotest possibility that he could obstruct police investigations, especially as the instrument which Zvada believed was used in the perpetration of the offence was already in police custody. In the circumstances, no sensible person, who had addressed his mind to the question whether or not to arrest and detain the appellant, could have arrived at the decision reached by Zvada"..

seemed clear to me that the decision to arrest and detain Nyatanga flouted the Wednesbury principles referred to by KORSAH JA in the *Botha*case, *supra*. Nyatanga is a highly respected officer in the Public Service and has been one for very many years. He holds high office in the High Court. He is a family man of fixed abode. The offence he is alleged to have committed was supposed to have taken place more than 8 years ago. This is apparently the first time that there has been any suggestion that what Nyatanga did in relation to the property concerned was done fraudulently. Maparanyanga has made many allegations imputing fraud against Nyatanga in relation to another piece of property in Tynwald but, in that connection, both the High Court and the Supreme Court found that Nyatanga had acted in an impartial and professional manner and in good faith. The involvement of Maparanyanga makes the conduct of Chikundila, Zondo and Ziki very suspect. Why was Maparanyanga allowed to accompany Chikundila to Nyatanga's office in the High Court? Why was he permitted to be present when Nyatanga was warned and cautioned and asked to make his statement? Why was he allowed to wander from office to office in the police station speaking to the various policemen handling the case? Why was he allowed to help shepherd Nyatanga into the cells? It seems to me that the reasons for his involvement should be investigated.

Other factors which raised suspicions about the *bona fides*of Nyatanga's arrest are as follows. No details were given to him as to the fraud that he had perpetrated. He was told that "with intent to defraud" he had "misrepresented" to an official in the Deeds Office "to transfer the Title Deed No 00899/95 belonging to Bobby Maparanyanga meant for Lot 1 of Willowvale". The allegation as so expressed is difficult to comprehend. The police made no attempt to question him in order to investigate the allegations. Why was he arrested on a Friday afternoon and not on some other day of the week when he could be taken to court the following day? It seemed clear, to me, that the prime motivation was so that he would be locked up in the cells for the week-end. In other words, the intention was to punish him although it is not clear why he was to be punished.

Having regard to Nyatanga's position in society, the post he is holding and the length of his service in the Public Service, it should have been apparent to Chikundila that there was little, if any, possibility of Nyatanga fleeing the country. The alleged offence was allegedly committed more than 8 years ago. During that period there have been a number of police probes into the allegations of fraud. See *Nyatanga*v *The Editor, The Herald Newspaper & Anor*HH 13-2001 where the Herald reported police probes into Nyatanga's conduct and was sued for defamation. The defendants admitted that the article in question was defamatory and were ordered to pay damages. If no evidence of fraud had been discovered over the years why should Nyatanga now suddenly decide to flee the country when the same old allegations surfaced once again? Since there were no allegations in the intervening 8 years that Nyatanga had committed similar offences, why would it now be necessary to arrest him in order to prevent him committing further similar fraudulent acts. As the acts complained of were committed 8 years ago, the police have had ample time to complete their investigations. Nyatanga could not possibly, at this late date, obstruct their further enquiries. As I was satisfied that the decision of Chikundila to detain Nyatanga in the cells was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it', I issued the provisional order, ordering that he be released forthwith. I did not issue a final order because I had dealt with the application *ex parte*. I did that in order to spare Nyatanga the ordeal of spending the week-end in the cells unnecessarily. It was 7 p.m. and it would have been impossible to serve the papers on all the respondents and require them to file their opposing papers before morning. However, as the order is provisional, the path is open for the respondents to file papers to establish that there were reasonable grounds for suspecting that Nyatanga had committed fraud and also, that there were reasonable grounds for arresting him without warrant and incarcerating him in the police cells. If that is done, the provisional order will be discharged and there will be no order that the arrest was illegal and unlawful. If, however, no such papers are filed, then the order will be confirmed.

HC 2921/03
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