

IN THE HIGH COURT FOR ZAMBIA  
HOLDEN AT LUSAKA  
(CRIMINAL JURISDICTION)

HPR/05/2013

**THE PEOPLE**

**V**

**PAUL KASONKOMONA**

**BEFORE: HONOURABLE N.A. SHARPE-PHIRI, IN CHAMBERS**

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## **RULING**

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**Legislation referred to:**

1. The Constitution of Zambia, Chapter 1, Article 28 (2) (b)
2. The Penal Code, Chapter 87, Section 178 (g)

This matter was brought before me by way of reference from the learned Senior Resident Magistrate of the Subordinate Court at Lusaka following an application made by the accused for determination of Constitutional issues within the terms of *Article 28 (2) (a) of the Constitution of Zambia*.

The facts giving rise to this reference are that the accused stands charged as being idle and disorderly contrary to *Section 178 (g) of the Penal Code*.

Prior to the commencement of the proceedings, the accused raised the following preliminary issues before the Magistrate;

1. That the failure of the prosecution to avail them with witnesses statements and the video recording of the accused's interview before the commencement of trial has been, is being and is likely to contravene his fundamental rights under *Article 18 (1) of the Constitution of Zambia*;
2. That *Section 178 (g) of the Penal Code*, the section creating the subject offence for which he stands accused was vague and unconstitutionally overbroad and contravened *Article 20 of the Constitution of Zambia*;
3. That the said *Section 178 (g) of the Penal Code* violates *Article 20 of the Constitution of Zambia*, which guarantees the freedom of expression.

The prosecution argued that the application was frivolous and vexatious and that the section pursuant to which the accused had been charged does not offend *Article 18 or 20 of the Constitution of Zambia* as the accused would be afforded a fair trial.

The said preliminary issues were put in motion pursuant to *Article 28 (2) (a) of the Constitution of Zambia*, which states as follows:

***'28(2)(b) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of Articles 11 to 26 inclusive, the person presiding in that Court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion the raising of the question is merely frivolous or vexatious.'***

In determining the issues, the learned Magistrate dismissed issues number 1 and 2 above but found that there was merit in the third preliminary issue raised by the accused, that *Section 178 (g) of the Penal Code* violates *Article 20 of the Constitution of Zambia*, which guarantees the freedom of expression. He therefore referred the said constitutional issue to the High Court and ordered that the proceedings before him be stayed pending the hearing and determination of this constitutional issue by the High Court.

The question before me is whether or not this reference ought to have been made to the High Court in accordance with *Article 28 (2) of the Constitution of Zambia*. *Article 28 (2) of the Constitution of Zambia* defines the process by which the provisions of Part III on the protection of the fundamental rights and freedoms of the individual can be enforced.

The issue raised is whether *Section 178 (g) of the Penal Code* violates the accused's constitutional rights under *Article 20 of the Constitution of Zambia*. The accused stands charged with the offence of being an idle and disorderly person contrary to *Section 178 (g) of the Penal Code*. The offence is proscribed by law and properly constituted under a statutory provision which provides that,

***'178 The following persons:***

- (a) every common prostitute behaving in a disorderly or indecent manner in any public place;***
- (b) .....***
- (c) .....***
- (d) .....***
- (e) .....***
- (f) .....***

**(g) every person who in any public place solicits for immoral purposes...**

**are deemed idle and disorderly persons, and are liable to imprisonment for one month or to a fine exceeding sixty penalty units or to both.'**

On the other hand, the provisions of Article 20 of the Constitution of Zambia states as follows,

**'20(1) Except with this own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.**

**(2) Subject to the provisions of this Constitution, a law shall not make any provisions that derogates from freedom of the press.**

**(3) 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:**

**(a) that is reasonable required in the interests of defence, public safety, public order, public morality or public health; or**

**(b) that is reasonably required for the purpose of protecting the reputation, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or in the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television, or**

**(c) that imposes restrictions upon public officers;**

**And except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.'**

A review of the two relevant pieces of legislation shows that *Section 178 (g) of the Penal Code* refers to a person being 'idle and disorderly by soliciting for immoral purposes' whereas *Article 20 of the Constitution* refers to the fundamental freedoms of expression. I am of the considered view that the subject contained under *Section 178 (g) of the Penal Code* is not the same as that contained in *Article 20 of the Constitution*. The two issues are different. I therefore find that there was no constitutional issue concerning

the contravention of fundamental rights of the accused and there was no ground for the court below to make this reference to the High Court.

I therefore send this file back to the Senior Resident Magistrate in the Subordinate Court to deal with the matter before him.

Dated at Lusaka this 15<sup>th</sup> day of August 2013.



**N.A. SHARPE-PHIRI**  
**HIGH COURT JUDGE**