

IN THE SUBORDINATE COURT OF THE 1ST

CR NO. 9/04/13

CLASS OF THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(CRIMINAL JURISDICTION)

BETWEEN:

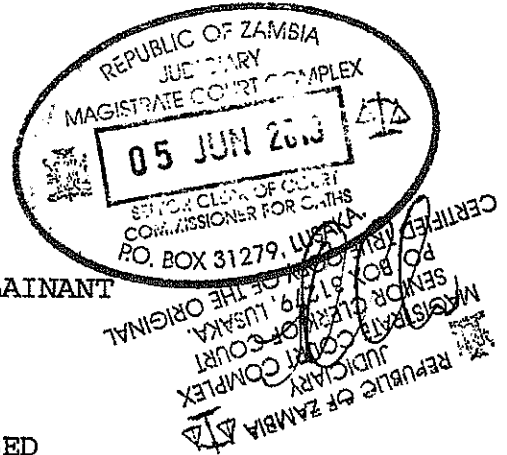
THE PEOPLE

COMPLAINANT

AND

PAUL KASONKOMONA

ACCUSED



RULING ON PRELIMINARY ISSUES FOR CONSTITUTIONAL REFERENCE

In this case the accused stands charged with Idle and Disorderly conduct contrary to section 178 (g) of the Penal Code Cap. 87 of the Laws of Zambia. The particulars of the offence are that the accused on 7th April 2013 at Lusaka in the Lusaka District of the Republic of Zambia, being in a public place namely Muvi Television Studios on a programme called "The Assignment" did solicit for immoral purposes for Homosexual rights to be respected in Zambia.

Before trial commenced the Defence raised the preliminary issues hereunder. The issues for reference are firstly the constitutionality of section 178 of cap. 87, the section creating the subject offence. The defence contends that the said section was vague and unconstitutionally overbroad contravening Article 20 of the Constitutional of Zambia. Secondly, the

defence contends that failure by the prosecution to avail them with witnesses statements and the video recording of the accused's interview before commencement of trial has been, is being and is likely to contravene his fundamental rights under Article 18 (1) of the Constitution of Zambia.

The application is premised on Article 28 of the Constitution of which I take Judicial Notice of. On the vagueness of section 178 (g) the defence drew the court's attention to a number of cases from United States of America and Namibia to which I am indebted. They argued that the section in question does not a clear indication of the conduct which is prohibited as it assumes that there is uniform understanding of the phrase "immoral purposes".

The defence further argued that the section in question contravenes the provisions Article 20 (1) which guarantees the freedom of expression. The said Article states:

"Except with his 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."

The right in question is not absolute as Sub- Article 3 restricts the enjoyment of that right. The issue is on the balance of the restrictions and the right itself. The court was invited to take Judicial Notice of the International treaties that Zambia ratified. In this regard the defence relied on the case of Sara Longwe 1992/HP/765. In that case Judge Musumali stated that if there is an issue not covered by local legislation by is covered by international an international instrument, he would take Judicial Notice of such an international instrument in resolving his resolution of a dispute. Reliance was also placed on the case of Alekseyev V. Russia 4916/07, Judgment 21, a Russian case.

The prosecution on the other hand argued that application was Frivolous and vexatious. They relied on the case of THE PEOPLE v. ANDREW BWEZANI BANDA HPR/11/2012 where it was held that a matter can be referred to the High Court under Article 28 (2) if there is a contravention of Articles 11 to 26 inclusive and if there is not contravention of the provisions of Article 28 cannot be invoked. They added that the accused needed to show and demonstrate that he had a right under Articles 11 to 26 but to solicit for immoral purposes was not one of those rights protected by the constitution. According to them the provisions of section 178 (g) is a limitation to the freedom of expression under Article 20 (3) of the Constitution.

Further, the prosecution argued that section does not offend the provisions of Article 18 of the Constitution because will be afforded a fair trial. They relied on the case of FREDERICK

CHILUBA V. PEOPLE [2004] ZR 11 where it was emphasized that the burden of proof lies on the prosecution and the accused need not prove anything. Further they submitted that there is no law obliging the prosecution to avail the accused with witness statements. On the vagueness of section they contended that the lack of definition immoral does not make the provisions vague.

I am indebted to both parties for their detailed and insightful submissions. I have critically looked submission and a plethora of authorities cited by both parties as well. I will start with submission that the failure by the state to provide the defence with witness statements contravenes the provision of Article 18 (1) of the Constitution. The Supreme Court has had occasion to rule on this aspect in the case of GODFREY MIYANDA V. THE ATTORNEY GENERAL [1986] ZR 58. In that case the Supreme Court stated inter alia:

The appellant in this case has also addressed us on the question of what he considers to be a contradiction between the provisions of section 255 of the Criminal Procedure Code as it relates to summary trial and those of Article 20 of the Constitution of Zambia, in particular clause 2 (d) of that article. That is the clause which provides that when a person is charged with a criminal offence he must be given an opportunity to defend himself either in person or by legal counsel. In his view the provisions of that article should be extended to the person appearing before a court of committal. In his view, to the extent that the said section 255 of the Criminal Procedure Code provides for summary trial it thereby violates the

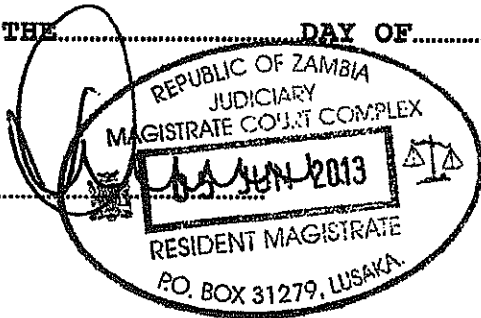
rights of a person charged before a criminal court in that such person on summary committal proceedings is not allowed to defend himself at the time of committal. The function of courts of law is to interpret the law and not to make it in the manner that the legislature makes laws. The court must follow therefore what the legislature in its wisdom enacts as laws to govern proceedings in courts of law. The courts would be over-stretching their powers if they were to translate laws in a manner contrary to the intention of the legislature. But this is not to say that we uphold the contention that the provisions of the Criminal Procedure Code and those of Article 20 Clause 2(b) of the Constitution of Zambia are in conflict. We are satisfied that when a man is committed for summary trial he has still the right to defend himself at the trial. Similarly any question of discrediting the charge can be raised at the trial. In our view there is no inherent prejudice occasioned to an accused person who is committed for summary trial.

Trial at the Subordinate Court is still summary. The prosecution is under no obligation to provide the statements and that is settled law. Therefore, that point fails.

Coming to the vagueness of Section 178 (g), I find that the said section is not vague. There are so many words that are not defined in the Penal code and the courts have not failed to resolve dispute based on those provisions in this jurisdiction. What is vague is a question of fact. That point also fails.

Finally, the third point is that 178 (g) is in contravention of Article 20 which guarantees the freedom of expression. From the particulars of facts on the indictment it is alleged that the accused solicited for immoral purposes on a programme on Muvi Television. The question is whether the appearance by the accused and the views expressed by the accused are protected under the ambit of Article 20 or whether 178 is constitutional. I find some merit on the third point. Therefore, I grant the application and refer the matter to the High Court for determination of the constitutional issues raised and stay these proceedings.

DELIVERED THE DAY OF 2013



L. NG'AMBI

AG. SENIOR RESIDENT MAGISTRATE.

