

Judgment 4, 1960

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IN THE PRIVY COUNCIL

No. 14. of 1959

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF RHODESIA
AND NYASALAND

B E T W E E N

EDWARD LISO MUNGONI
(Plaintiff) Appellant

- and -

THE ATTORNEY GENERAL OF
NORTHERN RHODESIA
(Defendant) Respondent

UNIVERSITY OF LONDON
W.C.1.
- 7 FEB 1961
INSTITUTE OF ADVANCED
LEGAL STUDIES

10 EC 900

CASE FOR THE APPELLANT

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1. This is an Appeal from a Judgment of the Federal Supreme Court of Rhodesia and Nyasaland reversing a Judgment of the High Court of Northern Rhodesia. The Appellant was granted by an Order in Council dated the 11th day of March, 1959, special leave to appeal in forma pauperis.

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2. The substantial question raised by this appeal is whether the requirement to be satisfied of the necessity of a detention order prior to the making of such order under Regulation 16 of the Northern Rhodesian Emergency Powers Regulations of the year 1956 is a duty or a power and, if it is a duty and not a power, whether or not the Governor is enabled to delegate a duty by virtue of Regulation 47 of the aforesaid Regulations which specifically permits the delegation of powers but makes no mention of the delegation of duties.

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3. The circumstances giving rise to this appeal are shortly as follows:

The Appellant is one of Her Majesty's protected persons of the territory of Northern Rhodesia in the Federation of Rhodesia and Nyasaland and at the material time was Senior Provincial President of the African National Congress Western Province. He was supporting a Trade Union of African Mineworkers

p.4 L.15

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which was involved in a strike essentially caused by reason of a dispute with another Trade Union of African Mineworkers.

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4. On the 16th day of September 1956, at Ndolo, Northern Rhodesia, the Appellant and 53 others of Her Majesty's protected persons were arrested by the Police by order of the Provincial Commissioner and were detained in custody under prison conditions until the 29th day of November, 1956, when they were released as a result of habeas corpus proceedings. Upon their release the Governor of Northern Rhodesia under the Emergency Transitional Ordinance of 1956 restricted the movement of the Appellant and the said other protected persons to defined areas and these restriction orders still persist.

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p.147 L.20

5. When the Provincial Commissioner made the said detention orders he purported to act in terms of Regulations 16 and 47 of the aforesaid Emergency Powers Regulations 1956, which Regulations were intended to take effect under the Emergency Powers Orders in Council 1939 and 1956. The said Regulations 16 and 47 are quoted in paragraph 6 infra. So soon as the Governor is satisfied that a public emergency exists he may invoke and act under, inter alia, the following articles of the Emergency Powers Orders in Council aforesaid which articles are quoted verbatim and are as follows:

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"6. (1) The Governor may make such Regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the Territory, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community

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(2) Without prejudice to the generality of the powers conferred by the preceding subsection, the Regulations may so far as appears to the Governor to be necessary or expedient for any of the purposes mentioned in that subsection -

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(a) make provision for the detention of persons and the deportation and exclusion of persons from the territory;

(b) authorise -

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(i) the taking of possession or control, on behalf of Her Majesty, of any property or undertaking;

(ii) the acquisition on behalf of Her Majesty of any property other than land;

(c) authorise the entering and search of any premises;

10 (d) provide for amending any law, for suspending the operation of any law and for applying any law with or without modification;

(e) provide for charging, in respect of the grant or issue of any licence, permit, certificate or other document for the purposes of the Regulations, such fee as may be prescribed by or under the Regulations;

(f) provide for payment of compensation and remuneration to persons affected by the Regulations;

20 (g) provide for the apprehension, trial and punishment of persons offending against the Regulations;

Provided that nothing in this section shall authorise the making of provision for the trial of persons by Military Courts.

30 "7. The Regulations may provide for empowering such authorities or persons as may be specified in the Regulations to make orders and rules for any of the purposes for which such Regulations are authorised by this Order to be made, and may contain such incidental and supplementary provisions as appear to the Governor to be necessary or expedient for the purposes of the Regulations.

40 "8. A Regulation or any order or rule made in pursuance of such a Regulation shall have effect notwithstanding anything inconsistent therewith contained in any law; and any provision of a law which may be inconsistent with any Regulation or any such order or rule shall, whether that provision shall or shall not have been amended, modified or suspended in its operation under Section 6 of this Order, to the extent of such inconsistency have no effect so long as such Regulation, order or rule shall

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remain in force."

6. By proclamation dated the 11th day of September, 1956, the Acting Governor declared that he was satisfied that a public emergency existed within the territory of Northern Rhodesia and proclaimed that the provisions of Part II of the Emergency Powers Orders in Council 1939 and 1956 should have effect in the Western Province from the same day. Part II of the said Emergency Powers Order in Council includes the Articles quoted above in paragraph 5 supra. Further on the same day the Acting Governor, under the Orders in Council aforesaid made the Emergency Powers Regulations 1956 (G.N. 220 1956) the material portions of which are Regulations 16 and 47 and which read as follows:

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"16. (1) Whenever the Governor is satisfied that for the purpose of maintaining public order it is necessary to exercise control over any person, he may make an order (hereinafter called a detention order) against such person directing that such person be detained, and thereupon that person shall be arrested and detained.

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(2) The Governor may at any time vary or revoke any detention order, or may direct that the operation of such order be suspended subject to such conditions as the Governor may think fit."

"47. The Governor may, by writing under his hand, and either generally or specially, depute any person or persons, either by name or by office, to exercise all or any of the powers conferred upon the Governor by these Regulations, subject to such conditions, if any, as he may specify, and thereupon any person so deputed shall have and exercise such powers accordingly, but no such delegation shall affect or impair the power of the Governor to act himself under these Regulations."

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7. As aforesaid in paragraph 5 supra the Provincial Commissioner in making the detention orders purported to act under Regulations 16 and 47 quoted in paragraph 6 supra. The Acting Governor under Regulation 47 had delegated his powers contained in Regulation 16 to the Provincial Commissioner. The Provincial Commissioner on making the detention orders assumed that the function of being satisfied

of the necessity of a detention order prior to the making of such order was a power that had been delegated to him by virtue of the fact that the Acting Governor under Regulation 47 had delegated to him inter alia the Governor's powers contained in Regulation 16.

10 8. As a consequence of the aforementioned detention orders an application to the Chief Justice of Northern Rhodesia was brought on behalf of the fifty four persons (including the Appellant) detained for writs of habeas corpus which proceedings are reported at page 617 of the Rhodesian and Nyasaland Reports as Stewart v. The Chief Secretary of Northern Rhodesia. The Application succeeded and an order was made by the learned Chief Justice Bell that these fifty four persons (including the Appellant) be discharged forthwith out of the custody of the officer in charge of the prison camp. The Headnote to the report of these proceedings at page 618 summarises the basic reasons of the learned Chief Justice's Judgment and reads as follows:

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"Held. (1) that before the Governor could lawfully exercise the power of detaining a person under the Regulations, he must first fulfil the duty incumbent upon him to be satisfied that it was necessary for the purpose of maintaining public order to exercise control over that person;

30 (2) that the delegation to the Provincial Commissioner purported to be, and was, a delegation of the Governor's powers under the Regulations, but not a delegation of his appurtenant duties;

40 (3) that the detention orders, issued by the Provincial Commissioner by virtue of the delegated powers, recited that the Provincial Commissioner was satisfied that, for the purpose of maintaining public order it was necessary to exercise control over the various persons named in the various detention orders; but there was no evidence that the Acting Governor had performed the duty incumbent upon him of being so satisfied;

(4) that, therefore, it did not appear that a prerequisite essential for the valid making of the detention orders had been performed by the Acting Governor, and, so, the detention orders were invalid and the detained persons must be discharged.

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Application accordingly granted."

9. As a consequence of these habeas corpus proceedings these fifty four persons including the Appellant sought compensation for wrongful arrest and imprisonment but the Government of Northern Rhodesia rejected their claim. Whereupon all these persons determined to seek redress in the Courts and it was agreed that upon the issue of liability a test case should be instituted by the Appellant. Thereupon the Appellant commenced proceedings against the Attorney General of Northern Rhodesia as the representative of the Northern Rhodesian Government, and the case was heard by Acting Judge Mosdell on the 26th day of March, 1958, at Lusaka. Judgment was given in the Appellant's favour on the 19th day of April, 1958 at Lusaka, and the sum of £25 as general damages and costs was awarded. The learned Judge found that no special damage had been suffered and also declared in effect that whether or not he was bound by the learned Chief Justice's Judgment in the said habeas corpus proceedings he agreed with the Judgment. 10
- p.1 et sequitor
- p.110 et sequitor
10. The Attorney General appealed to the Federal Supreme Court of Rhodesia and Nyasaland against the Judgment of Acting Judge Mosdell and as aforementioned the Federal Supreme Court allowed the appeal with costs. The Federal Supreme Court therefore decided that the Stewart habeas corpus case was wrongly decided by Bell C.J. in the High Court of Northern Rhodesia. It was specifically held inter alia by the Federal Supreme Court that the Governor himself need not be satisfied of the necessity of a detention order before such order is made by a person to whom he has delegated the power to make it, as this function was not a duty or an obligation simpliciter and that when in terms of lawful authority powers are delegated such a delegation cannot be stultified by the fact that there are obligations attendant upon such powers and that it was intended that all the functions prescribed in the Regulations should be exercised by one and the same person, as there would be no purpose in appointing a person actually to make the detention order whilst it remained with the Governor to decide the necessity of such an order. 20
- p.129
- p.139 L.34
- p.136 L.25
- p.136 L.38
- p.137 L.25
11. It is humbly submitted that the Judgment of Bell C.J. in the Stewart habeas corpus proceedings was correct for the reasons given by the learned Chief Justice Bell. 30 40

12. It is further humbly and respectfully submitted that the Right Honourable Sir Robert Tredgold, Chief Justice of the Federation of Rhodesia and Nyasaland in his Judgment in the Federal Supreme Court wrongly inferred and or concluded that there could be no purpose in appointing a person actually to make the detention order whilst it remained with the Governor to decide on the necessity of such an order. The emergency was confined to one small area of Northern Rhodesia and the Governor in any event could well and properly have decided that before taking the drastic and arbitrary step of detaining the Appellant (and the said other persons) without trial that he desired all relevant facts placed before him so that he personally could satisfy himself of the necessity of such an order. This contention is further manifest by the fact that Regulation 47 empowered delegation to any person or persons. There is no evidence that the necessary information could not have been given to the Governor and it can be inferred that he was well situated to receive such information.

13. Accordingly the Appellant humbly submits that the Judgment of the Federal Supreme Court given on the 10th day of September, 1958, is wrong and should be reversed for the following amongst other

R E A S O N S

1. That the decision in the High Court of Northern Rhodesia of Bell C.J. in the habeas corpus proceedings of Stewart v. The Chief Secretary of Northern Rhodesia, 1956 Rhodesia and Nyasaland Reports, page 617 aforesaid is correct and the Judgment of Mosdell J. delivered in the Appellant's (then the Plaintiff) favour in the High Court of Northern Rhodesia on the 19th day of April 1958, should not have been reversed by the Federal Supreme Court.
2. That under Regulation 16(1) the function of being satisfied of the need of a detention order prior to the making of it is a duty which the Governor is in no manner whatsoever empowered to delegate to anyone.
3. There could and would have been a good and sound purpose in appointing a person actually to make the detention order whilst it remained with the Governor to decide on the necessity of such order. Tredgold C.J. said there would be no good purpose for so doing. For the reasons stated in paragraph 12 supra the Governor might

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well have conceived it his duty to be satisfied that a detention order was necessary and so retained that function for himself.

- p.136 L.31
4. The requirement that the Governor should be satisfied of the necessity of a detention was specifically expressed in Regulation 16 and in the manner expressed created a duty which had to be performed prior to the making of a detention order and consequently Tredgold C.J. was wrong when he in effect concluded that this express requirement merely gave expression to an implied requirement and did not create a specific duty or obligation simpliciter. 10
- p.137 L.1
5. The fact that it was expressed in Regulation 16 that the Governor was required to satisfy himself of the necessity of a detention order before making it and the fact that the Governor under Regulation 47 could only delegate powers indicates that the fulfilment of the preliminary obligation rested with the delegator, the Governor, and consequently there was something (indeed much) to show that special reliance was placed on the Governor's personal Judgment. Tredgold C.J. in effect stated that there was nothing to show that special reliance is placed on the Governor's personal Judgment as to the necessity of a detention order. 20
6. That S.28 of the Interpretation Ordinance (Chapter 1 of the Northern Rhodesian Ordinance) which empowers the Governor to delegate powers and duties does not apply because Regulation 47 of the Emergency Regulations expressly empowers the Governor to delegate powers and only powers. 30
7. That the Plaintiff as aforesaid humbly maintains that the construction placed upon the delegating regulation (Regulation 47) by Bell C.J. in the said habeas corpus proceedings is correct. If however it is considered that there be ambiguity as to the meaning of Regulation 14 then the construction which is in favour of the Appellant should be given effect because the Appellant's freedom was jeopardised and the construction which is in favour of the freedom of the individual should be given effect. 40

14. An important question of damages is raised by this appeal. As aforesaid Mosdell, J. awarded the Appellant (then the Plaintiff) general damages in the sum of £25. The learned Judge declared that the sum was adequate as solatium for the wrongful detention suffered and as aforesaid the claim for special damages for loss of salary was rejected essentially on the grounds that the Appellant was put under a restriction order as soon as he was released from detention as a consequence of the habeas corpus proceedings.

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p.128 L.37
p.128 L.28
p.127 L.25

In the Appeal before the Federal Supreme Court the Appellant (then the Respondent) cross-appealed and prayed that the amount of damages awarded by Mosdell, J. should be increased by an award of special damages for loss of salary. Neither party in their notices of Appeal to the Federal Supreme Court prayed that the award of general damages be altered. However in the course of that Appeal Counsel for the Respondent the Attorney General of Northern Rhodesia (then the Appellant) submitted that the award of £25 as general damages was excessive. Consequently counsel for the Appellant (then the Respondent) was permitted to and did argue that the amount awarded as general damages was inadequate. The Federal Supreme Court in their Judgment did not consider the issue of damages as the Judgment of Mosdell, J. on the liability issue was reversed. The Appellant was earning £16 per month at the date of his detention by reason of his promotion to Deputy President General of the African Congress. Prior to his promotion he was earning £10 per month.

p.130 L.14
p.129
p.130

p.127 L.21

The Appellant humbly submits that the damages awarded by Mosdell, J. were wrong in that the general damages awarded were inadequate and in that the present Appellant was also entitled to an award of special damages. This humble submission upon the question of damages is made for the following amongst other

R E A S O N S

- 40 A. That the Appellant was detained by reason of the detention order from September 16th, 1956, until November 29th, 1956. The sum of £25 is inadequate and negligible compensation for the loss of liberty degradation, indignity, hardship and discomfort he suffered by reason of being detained in prison for the period September 16th, 1956, until November 29th, 1956.
- B. That the Appellant is entitled to special

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damages for loss of salary for the said period of detention because there is no evidence that the Governor had considered what he intended to do with him until he, the Governor, made the order restricting the Appellant's movement to a defined area which was on the date of his release from detention. Consequently it must be presumed that the Appellant would have been free to carry on his occupation aforesaid during the period he was detained.

E. L. MALLALIEU

A. IVAN KAUFMAN

JOHN HAINES

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE FEDERAL SUPREME COURT OF
RHODESIA AND NYASALAND

B E T W E E N

EDWARD LISO MUNGONI
(Plaintiff)
Appellant

- and -

THE ATTORNEY GENERAL
OF NORTHERN RHODESIA
(Defendant)
Respondent

CASE FOR THE APPELLANT

PARKE *CO*
~~POPEL~~ TATTERSALL & ~~LANE~~.,
59/60, Haymarket,
London, S.W.1.

Appellant's Agents