

~~Conf. G. 2~~

4, 1960

IN THE PRIVY COUNCIL

No. 14 of 1959

ON APPEAL
FROM THE FEDERAL SUPREME COURT OF RHODESIA AND
NYASALAND

UNIVERSITY OF LONDON
W.C.1.

- 7 FEB 1961

INSTITUTE OF ADVANCED
LEGAL STUDIES

B E T W E E N :

EDWARD LISO MUNGONI (Plaintiff) Appellant

- and -

THE ATTORNEY-GENERAL OF NORTHERN RHODESIA
... (Defendant) Respondent

50392

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C A S E FOR THE RESPONDENT

RECORD

1. This is an Appeal by Special Leave granted by Order in Council dated the 11th day of March, 1959, from a Judgment of the Federal Supreme Court of Rhodesia and Nyasaland delivered on the 10th day of September, 1958, allowing with costs the Respondent's Appeal from the Judgment of the High Court of Northern Rhodesia delivered on the 19th day of April, 1958, awarding the Appellant a sum of £25 as damages for wrongful imprisonment. p.140 pp.131-139 pp.110-128

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2. The Appellant by his Writ of Summons in the above action had claimed damages for wrongful arrest and imprisonment against the Respondent in the following circumstances.

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3. On the 16th day of September, 1956, at Ndola, Northern Rhodesia, the Appellant was arrested by the Northern Rhodesia Police, and subsequently, by a written order of the Provincial Commissioner, Western Province, dated the 16th day of September, 1956, was detained in custody under prison conditions until the 28th day of November, 1956, when he was released as a result of habeas corpus proceedings. p.143

4. In making his order of detention the Provincial Commissioner purported to act in terms of Regulations 16 and 47 of the Emergency Powers Regulations, 1956, made under the Emergency Powers Orders in Council, 1939 and 1956.

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5. By proclamation dated the 11th 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 of the Territory from the same day. On the same day the Acting Governor, acting under the said Orders in Council, made the Emergency Powers Regulations, 1956, (Government Notice No.220 of 1956), Regulations 16 and 47 of 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.

(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.

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(3) Without prejudice to the generality of the last preceding sub-regulation, where a detention order is suspended the person against whom the order is made may be subjected to conditions -

(a) imposing upon him such restrictions as to place or residence, business or employment, or association or communication with other persons as the Governor may think fit;

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(b) prohibiting him from being out of doors between such hours as may be specified except with the authority of a written permit granted by a competent authority;

(c) requiring him to notify his movements in such manner, at such times and to such authority or person as may be specified;

(d) prohibiting or restricting the possession or use by him of any specified article;

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(e) prohibiting him from travelling except in accordance with permission given to him by a competent authority.

(4) If any person fails to comply with a condition attached to the suspension of a detention order that person shall, whether or not the suspension is revoked or the order varied in consequence of the failure, be guilty of an offence against these Regulations.

10 (5) Any person detained in pursuance of this regulation shall be deemed to be in lawful custody and shall be detained in such place within the Territory as may be authorised by the Governor and in accordance with such instructions as the Governor may issue in that behalf.

20 (6) Any police officer of or above the rank of Assistant Inspector may without warrant arrest any person in respect of whom he has reason to believe that there are grounds which would justify his detention under this regulation and any such person may be detained for a period not exceeding twenty-eight days pending a decision whether a detention order should be made against him, and the provisions of the last preceding sub-regulation shall apply in respect of his detention during such period.

(7) For the purposes of this regulation there shall be one or more Advisory Committees consisting of persons appointed by the Governor and the chairman of any such committee shall be a judicial officer.

30 (8) The function of an Advisory Committee shall be to consider and make recommendations to the Governor in respect of any objections which are duly made to the committee by any person detained under this regulation.

40 (9) The Governor may make rules as to the manner in which such objections may be made to such an Advisory Committee and such rules shall contain provisions for enabling any person to whom this regulation relates to make objections either in person or by a legal representative or an agent, and it shall be the duty of the Governor to secure that every such person is informed of his right to make objections under this regulation."

" 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

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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."

6. The Provincial Commissioner, Western Province, in making the detention order aforesaid purported to act under the said Regulation 16. On the 11th September, 1956, the Acting Governor had by Government Notice No. 221 of 1956 delegated the powers conferred upon him by Regulation 16 to the Provincial Commissioner, under the power of delegation conferred by the said Regulation 47. 10

7. As a consequence of the aforementioned detention order, an application to the Chief Justice of Northern Rhodesia was brought in November, 1956, on behalf of the Appellant and fifty-three other persons similarly detained, for writs of habeas corpus in respect of them. These habeas corpus proceedings are reported at page 617 of the 1956 Rhodesia and Nyasaland Law Reports, as Stewart v. the Chief Secretary of Northern Rhodesia. 20

8. The said application succeeded, and on the 28th day of November, 1956, an order was made by the learned Chief Justice that these 54 persons detained in custody (amongst whom was the Appellant) be discharged forthwith out of the custody of the officer in charge of the prison camp. 30

9. The reasons given by the learned Chief Justice for his decision were contained in his Judgment, particularly in the passages set out at pages 628, 629 and 630 of the Report referred to above, as follows:-

"Regulation 16(1) also says that such an order shall only be made if the Governor is satisfied that it is necessary to exercise control over the person to be subjected thereto. There is a duty to be so "satisfied" imposed on the Governor. And because Regulation 47 stands silent on the subject of delegating the performance of duties, it leaves the duty of being satisfied still vested in the Governor - the Governor having done nothing to 40

10 divest himself of it. The effect of Regulation 47 and the present delegation in Government Notice 221/56 therefore, is that the Governor is saying "You may exercise the powers to make the Order but I still have to be 'satisfied' before you can validly do so". The terms of the delegation to the Provincial Commissioner, Western Province, in Government Notice 221/56 reflect this. It relies upon the power to delegate conferred by Regulation 47 and covers the "powers" conferred upon the Governor by the provisions of Regulation 16(1). It does not in any way deal with the duty of being satisfied also imposed on the Governor by Regulation 16(1). Indeed, had it done so, in view of the terms of Regulation 47, it would have been ultra vires Regulation 47."

20 "The delegation set out in Government Notice 221/56 is good as far as it goes. The Provincial Commissioner can make a Detention Order - but only when the Governor is satisfied that it is necessary in terms of Regulation 16(1); and no delegation of the duty of satisfying himself has been made by the Governor. Without the step of "satisfying" being taken, a Detention Order is ultra vires."

10. Consequently the Appellant commenced proceedings for false imprisonment against the Attorney-General of Northern Rhodesia as the representative of the Northern Rhodesia Government, and the case was heard before the Honourable Mr. Acting Justice Mosdell on the 26th day of March, 1958, at Lusaka.

30 11. On the 19th day of April, 1958, Judgment was given in the Appellant's favour, and the sum of £25, with costs, was awarded as general damages. The learned Judge found no special damage had been suffered, and declared in effect that, whether or not he was bound by the learned Chief Justice's Judgment in the habeas corpus proceedings, Stewart v the Chief Secretary of Northern Rhodesia, he agreed with that Judgment. p.128 p.128 l.4

40 12. The Attorney-General of Northern Rhodesia appealed to the Federal Supreme Court against the Judgment of the Honourable Mr. Acting Justice Mosdell, and as aforementioned the Federal Supreme Court allowed the appeal with costs on the 10th day of September, 1958. p.139

13. The reasons given by the Federal Supreme Court for allowing the appeal were summarised in the following passage from the Judgment of Sir Robert

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Tredgold, Chief Justice, the President of the Court:

p.136
1.38

"When, in terms of lawful authority, powers are delegated, such delegation cannot be stultified by the fact that there are obligations attendant upon such powers. The question in each case is whether the obligations and powers are so closely involved that they must clearly have been intended to pass together. Of course the instrument or legislative enactment giving the power to delegate may indicate that the fulfilment of the preliminary obligation is to rest with the delegator and with no one else. But, in the absence of something to show that special reliance is placed on his personal judgment, then I consider that the right to delegate powers carries with it the authority to delegate inextricably interwoven obligations."

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14. By Order in Council dated the 11th day of March, 1959, the Appellant was granted Special Leave to Appeal against the said Judgment of the Federal Supreme Court.

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15. The Respondent submits that the Appeal should be dismissed for the following (among other)

R E A S O N S

(1) THAT the delegation of powers made by the Acting Governor to the Provincial Commissioner, Western Province, by Government Notice 221 of 1956, referred to in paragraph 6 above, was a proper and valid delegation of all the functions conferred upon the Governor by Regulation 16 of the Emergency Powers Regulations, 1956, aforesaid.

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(2) FOR the other reasons given in the Judgments of the Federal Supreme Court referred to above.

B.C. ROBERTS

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Respondent

C A S E FOR THE RESPONDENT

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