

Edward Liso Mungoni - - - - - Appellant

v.

The Attorney General of Northern Rhodesia - - - - Respondent

FROM

THE SUPREME COURT OF RHODESIA AND NYASALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 25TH JANUARY, 1960

Present at the Hearing:

LORD TUCKER

LORD DENNING

MR. L. M. D. DE SILVA

[*Delivered by* LORD DENNING]

The appellant Edward Liso Mungoni is an African resident in Northern Rhodesia. He claims damages for wrongful arrest and detention. The High Court of Northern Rhodesia (Mosdell, J.) found in his favour and awarded him £25 damages. That decision was reversed by the Federal Supreme Court of Rhodesia and Nyasaland (Tredgold, C.J., Lewey, F.J., Paterson, C.J.N.R.) who held that he had not been wrongfully arrested or detained. Edward Liso Mungoni now appeals to Her Majesty in Council asking not only that the judgment in his favour should be restored but also that the damages should be increased, because the sum of £25 was, he says, inadequate.

On the 11th September, 1956, the Acting Governor of Northern Rhodesia made a proclamation in which he said he was satisfied that a public emergency existed and he proclaimed that the provisions of the Orders in Council (those dealing with emergencies) should have effect in the Western Province of Northern Rhodesia. On the very same day he issued emergency regulations which gave the authorities wide powers, and in particular gave the Governor power to make detention orders. He also issued an instrument delegating many of his powers to the Provincial Commissioner of the Western Province.

At the time when the emergency was declared the appellant was living in the Twapia African Township, Ndola, which is in the Western Province of Northern Rhodesia. He was an official of the African National Congress. At 6 a.m. on the 16th September, 1956, police officers came to his house and arrested him. He was arrested for breaking the Emergency Regulations by attending a meeting which had been prohibited. He was not tried on this charge because at 7.30 p.m. that day the Provincial Commissioner for the Western Province made a detention order against him. It was in these words:

“NORTHERN RHODESIA

THE EMERGENCY POWERS REGULATIONS, 1956.

DETENTION ORDER

WHEREAS it is provided by regulation 16 of the Emergency Powers Regulations, 1956, that 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 against such person directing that such person be detained.

AND WHEREAS it is further provided by the said regulation that any person detained in pursuance of the said regulation shall be detained in such place as may be authorised by the Governor ;

AND WHEREAS the powers conferred upon the Governor by the said regulation have been delegated under the provisions of regulation 47 of the said Regulations to the officer for the time being carrying out the duties of the Provincial Commissioner, Western Province ;

AND WHEREAS I am satisfied that for the purpose of maintaining public order it is necessary to exercise control over one EDWARD MUNGONI LISO.

NOW, THEREFORE, I, GLYN SMALLWOOD JONES, Member of the Most Excellent Order of the British Empire, Provincial Commissioner, Western Province, do hereby order that the said

EDWARD MUNGONI LISO

be detained and do hereby authorise the

Local Prison, MUMBWA,

as the place where the said

EDWARD MUNGONI LISO

shall be detained.

Given under my hand at NDOLA this 16th day of September, 1956.

(SIGNED) G. S. JONES,
Provincial Commissioner."

Their Lordships draw particular attention to the fact that it was the Provincial Commissioner who made the detention order—it was he who said he was satisfied that it was necessary to exercise control over the appellant—and not the Governor himself.

In pursuance of the detention order, the appellant was taken to the detention camp at Mumbwa. Fifty-three others were taken as well. On the 2nd November, 1956, Mr. Stewart, on behalf of the 54 detained persons, applied to the Chief Justice of Northern Rhodesia (Bell, C.J.) for a writ of *habeas corpus ad subjiciendum*. On the 28th November, 1956, the Chief Justice held that the 54 orders of detention were invalid and ordered that the 54 detainees should be discharged forthwith (see *Stewart v. The Chief Secretary of Northern Rhodesia* [1956] R. & N. 617). They were so discharged but the Governor of Northern Rhodesia himself immediately made restriction orders against them. The restriction order against the appellant was dated 28th November, 1956, and prohibited him from being in the Western Province except under written permit. It was signed by the Governor himself. This order was subsequently continued by further orders, all signed by the Governor himself. Then in 1959 one of the restricted persons named Mwenya applied to the High Court in London for leave to issue a writ of *habeas corpus ad subjiciendum*. The High Court (Lord Parker, C.J., Slade and Winn, JJ.) held that the Courts of England had no jurisdiction to issue the writ (see *Ex parte Mwenya* [1959] 3 W.L.R. 509) but the Court of Appeal (Lord Evershed, M.R., Romer and Sellers, L.J.J.) on 13th October, 1959, held that the courts had jurisdiction, though they did not determine whether it was proper to exercise it (see [1959] 3 W.L.R. 767). A week later, on the 20th October, 1959, the Governor of Northern Rhodesia revoked the restrictive orders. The appellant thereupon became free.

This appeal only concerns the period during which the appellant was detained under the detention order made by the Provincial Commissioner, that is to say, from 7.30 p.m. on 16th September, 1956, to the time of his discharge on 29th November, 1956. The appellant contends that his detention during that period was unlawful and claims damages for false imprisonment. He has in his favour the ruling of Bell, C.J., in the *habeas corpus* proceedings, holding that the detention order was invalid. But he,

through his counsel, admits that that ruling is not conclusive in his favour. The validity of the detention order can be investigated afresh in this civil action, see *Budd v. Anderson* [1943] K.B. 642. And indeed it has been investigated afresh by each of the courts. Mosdell, J., who tried the case at the first instance thought that the decision of Bell, C.J., was a proper one and held that the detention order was invalid. Accordingly he awarded damages for wrongful detention. But the Federal Supreme Court thought the decision of Bell, C.J., was wrong and likewise the decision of Mosdell, J., was also. They held that the detention order was valid and reversed the award of damages.

The difference of opinion between the judges arises upon this: Bell, C.J. (and Mosdell, J., following him) held that, in order for the detention order to be valid, it was the duty of the *Governor* of Northern Rhodesia *himself* to be satisfied it was necessary to exercise control over the appellant. It was his personal duty to be satisfied. He could not delegate it. The Governor had not himself performed this duty and the detention order was therefore invalid. But the Federal Supreme Court held that it was not necessary for the Governor himself to be satisfied. He could delegate this task to the Provincial Commissioner of the Western Province. He had so delegated it and, inasmuch as the Provincial Commissioner was satisfied, that was enough, and the detention order was valid.

The point at issue is therefore to what extent, if any, the Governor of Northern Rhodesia can delegate his functions in respect of detention orders to the Provincial Commissioner. In order to enable him to delegate, it is necessary to find some express authority in that behalf. Their Lordships recall that in England the powers of the Secretary of State under Regulation 18B were personal and could not be delegated. As Lord Wright said in *Liversidge v. Anderson* [1942] A.C. at p. 265: "The regulation places on the Secretary a public duty and trust of the gravest national importance. As I understand the regulation, it is a duty which he must discharge on his own responsibility to the utmost of his ability, weighing on the one hand, the suspect's right to personal liberty, and on the other hand, the safety of the State in the dire national peril in which during this war it has stood and stands."

But in Northern Rhodesia, the Emergency Regulations contain an express provision enabling the Governor to delegate his powers. And the question is how far that enables him to delegate his power to make detention orders. The authority to make detention orders is given by Emergency Regulation 16 (1) which is in these terms:

"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."

Their Lordships would pause for a moment to notice that, under the Regulation, the Governor cannot make a detention order unless he is first "satisfied" of what is there stated. In a sense that puts a *duty* on him to be "satisfied" before he makes an order. Can this duty be delegated by the Governor to someone else? Mr. Mallalieu argues that it cannot. The authority of the Governor to delegate applies, he said, only to *powers* and not to *duties*. He bases this on the words of Emergency Regulation 47, which defines the Governor's authority to delegate:

"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."

Turning back now to Regulation 16 (1) Mr. Mallalieu said that it contained a duty and also a power. The *duty* laid upon the Governor was to be "satisfied" that it was necessary to exercise control over any person. The *power* was to make an order directing that such person be detained. The effect of Regulation 47, said Mr. Mallalieu, was to authorise the Governor to delegate his *power* to make an order, but it did not authorise him to delegate his *duty* to be satisfied. He was bound to fulfil this duty himself personally. This would not give rise to any practical difficulty, said Mr. Mallalieu, because Regulation 16 (6) enables a police inspector to detain a suspect for 28 days pending a decision whether a detention order should be made against him.

Mr. Mallalieu said that this restriction of the Governor's authority to delegate (limiting it to powers and not extending it to duties) must have been deliberate. He said that Regulation 47 was in striking contrast to section 28 of the Interpretation Ordinance which empowers the Governor (in the cases to which it applies) to depute both powers and duties. It reads as follows:—

"28. Where by any law the Governor is empowered to exercise any *powers* or perform any *duties*, he may, unless by law expressly prohibited from so doing, depute any person or persons by name, or the person or persons for the time being holding the office or offices designated by him, to exercise such powers or perform such duties on his behalf, subject to such conditions, exceptions and qualifications as the Governor may prescribe, and thereupon, or from the date specified by the Governor, the person or persons so deputed shall have and exercise such powers and perform such duties, subject as aforesaid: Provided that nothing herein contained shall authorise the Governor to depute any person to make rules under the power in that behalf conferred upon him by any law."

Their Lordships appreciate the significance of this point so made by Mr. Mallalieu. It is clear that section 28 does not apply to the Emergency Regulations. Regulation 47 was inserted instead. And Regulation 47—in contrast to section 28—only authorises the Governor to delegate powers, not duties. This was the determining factor which influenced Bell, C.J. in the *habeas corpus* proceedings. He said: "The wording of Regulation 47 follows so closely the wording of section 28 that, when the two stand side by side, the omission from Regulation 47 of the delegation of the performance of *duties* imposed by law is very apparent."

Their Lordships can now turn to the instrument of delegation itself. It followed the words of Regulation 47 very closely. It spoke of powers and not of duties. It was in these terms:

"Government Notice No. 221 of 1956.

The Emergency Powers Orders in Council 1939 and 1956.

The Emergency Powers Regulations 1956.

Delegation of Powers

In exercise of the powers conferred by Regulation 47 of the Emergency Powers Regulations 1956, all the *powers* conferred upon the Governor by the provisions of the said Regulation, other than the powers conferred by Regulations 10, 16 (7), 16 (9) and 20, are hereby delegated to the officer for the time being carrying out the duties of the Provincial Commissioner, Western Province.

Given under my hand at Lusaka this eleventh day of September, 1956.

A. T. WILLIAMS,

Acting Governor."

Bell, C.J., regarded that instrument as a valid delegation to the Provincial Commissioner of the *power* to make a detention order but no delegation at all of the *duty* of the Governor to be satisfied. That duty remained with the Governor himself and was, he thought, a "very proper

limitation": and, as the Governor had never fulfilled this duty in regard to the 54 detained persons, they must be released. In the key passage of his judgment he said: "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*. In the result the 54 Orders of Detention, the subject matter of this application, are, in my opinion, invalid, and I have no option but to order the release of the detained persons, which I accordingly do."

While their Lordships share with the Chief Justice his concern for the liberty of the subject, they cannot agree with this line of reasoning. The power and the duty under Regulation 16 (1) are so interwoven that it is not possible to split the one from the other—so as to put the duty on one person and the power in another. Whosoever exercises the power, he it must be who has to carry out the duty. It seems clear to their Lordships that, if the Governor has any authority at all to delegate his functions under Regulation 16 (1), he must be able to delegate both the power and duty together to one and the same person. He cannot delegate the power to another and keep the duty to himself. Even this did not daunt Mr. Mallalieu. He said that if the power cannot be split from the duty, then it means that the Governor cannot delegate his functions under Regulation 16 (1) at all: for he cannot delegate his duty under it to anyone.

It seems to their Lordships that the arguments for the appellant proceed on this fallacy: they assume that the duty under Regulation 16 (1) is something separate and distinct from the power therein contained. Their Lordships cannot accept this view. In their opinion Regulation 16 (1) contains not so much a duty, but rather a power coupled with a duty. The power of the Governor to make a detention order can only be exercised when he is "satisfied" that it is necessary. The requirement that he is to be satisfied—though in one sense a duty—is nevertheless also a condition or limitation on the exercise of the power. And when Regulation 47 authorises the Governor to delegate the power to any person, it authorises him to delegate to such person the fulfilment of all the conditions and limitations attaching to it, even though they be also duties. There are many powers in the Emergency Regulations to which the like applies. They start off "Whenever the Governor is satisfied" or "If it appears to the Governor", or the like. Mr. Mallalieu was forced to say that, whenever such a condition or limitation was expressed, the Governor had to fulfil it himself and could not delegate it. Their Lordships cannot accept this view. A detailed study of the Regulations convinces them that it was intended that in all these cases the Governor should be able to delegate the power together with the fulfilment of the condition precedent to its exercise.

The reason why Regulation 47 refers only to "powers" and not to "duties" became apparent in the course of the argument. The Emergency Regulations impose no duties on the Governor *simpliciter*—nothing, for instance, which a mandamus would issue to command him to perform. The only duties on him are those which are appurtenant to powers conferred on him and are in the nature of conditions or limitations on the exercise of the powers. All these can be delegated under Regulation 47 and there was no reason to apply section 28 of the Interpretation Ordinance.

For these reasons, which are substantially the same as those given by Tredgold, C.J., in the Federal Supreme Court, their Lordships are of opinion that the detention order was valid. No question arises therefore about damages.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant being *in formâ pauperis*, there will be no order as to costs.

In the Privy Council

EDWARD LISO MUNGONI

v.

THE ATTORNEY GENERAL OF
NORTHERN RHODESIA

DELIVERED BY LORD DENNING

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