



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL CASE NUMBER 13 OF 2006

BETWEEN:

DR. CASSIM CHILUMPHA, SC 1ST APPLICANT

-and-

YUSUF BULLIAT MATUMULA 2ND APPLICANT

AND

THE DIRECTOR OF THE PUBLIC PROSECUTIONS RESPONDENT

CORAM: THE HON. THE CHIEF JUSTICE, MUNLO, SC.

Mbendera, Kanyuka (Mrs.), Berry, Kayira,
DPP/CSA/Counsel for the State
Kalekeni Kaphale, Representing the Accused
Moyo (Mrs.), Official Interpreter

RULING

The history leading to this application is that the 1st and 2nd applicants stand charged in criminal case number 13 of 2006 with treason contrary to section 38 of the Penal Code and conspiracy to murder contrary to section 277 of the Penal Code. For almost two years now, the substantive trial in this

case has not yet commenced because of the numerous preliminary applications that are being made by both the prosecution and the defence.

In the course of these preliminary applications, the DPP took out summons seeking to have the evidence of two of the prosecution witnesses, namely; Graham Raymond Alistair Minaar and Thomas Elias Ndhlovu heard in camera; to have the identity of the two witnesses in the form of face, photograph or howsoever concealed and to have the two witnesses hooded whenever they are coming and going out of the court to ensure that they are not seen. This application was opposed in its entirety by the accused persons.

After considering in great depth the extensive submissions made by counsel on both sides, Justice Nyirenda considered section 41(2)(f)(1), section 211 (1) and (2) of the Constitution, Article 14 of the Covention on Civil and Political Rights and concluded that trial in public is a protected right under our Constitution and by virtue of our commitment to international legal order. He observed that the limitations envisaged in section 60 of the Courts Act and 71 of the Criminal Procedure and Evidence Code are only permissible subject to considerations in section 44 of the Constitution. After examining whether the prosecution had made out a case to warrant taking away the present case from the public eye to the extent prayed for in the summons the Judge concluded that the prosecution had not made out any factual basis or circumstances that would justify the court to make any of the orders sought.

After the court ruling, counsel for the applicants then wrote on 1st February 2008 to the Director of Public Prosecutions requesting him to make available to the defence the recent photographs of the two prosecutions witnesses, namely; Graham Alistair Minaar and Thomas Ndhlovu in order to enable the defence to conduct some research into the character and

antecedent conduct of the said witnesses in readiness for trial. On 15 April 2008, the Director of Public Prosecutions informed counsel for the defence that the request would not be honoured as supplying the said photographs would violate the right to privacy of these witnesses.

On 5 May 2008 the 1st and 2nd applicants filed a summons under Criminal Case number 13 of 2006 in which the 1st and 2nd applicants are the 1st and 2nd accused. In the summons the applicants sought certification under section 9(3) of the Courts Act in order to have the summons heard as a constitutional matter pursuant to section 9(2) of the Courts Act which provides as follows:-

“Every proceeding in the High Court and all business arising thereout, if it expressly and substantively relate to, or concerns the interpretation or application of the Constitution, shall be heard and disposed of by or before not less than three Judges.”

Mr. Kaphale has argued in his skeleton argument that the matters raised in the summons expressly and substantively relate to or concern the interpretation of the provisions of the Constitution and therefore must be heard before not less than three Judges.

Mr. Kaphale has further argued that the application is premised on the accused person's right to information in the possession of the State where the same is needed to advance the accused's right to fair trial. Mr. Kaphale has submitted that the right to fair trial includes the right of access to materials relevant to the credibility of prosecution witnesses and also the right to see and know the identity of the accusers including prosecution witnesses. Pursuant to these rights the applicants seek to be availed with recent photographs of the two State witnesses so that the applicants can do some investigations into the creditworthiness of these witnesses or in the alternative,

they seek information from the State as to the creditworthiness of these witnesses.

Mr. Kaphale further submits in his skeletal arguments that the summons raises the following issues of a constitutional nature:-

- (a) the content of the right to information as enshrined in the Constitution;
- (b) the content of the right to a fair trial as enshrined in the Constitution. More especially, whether the Constitutional right to fair trial includes the right of an accused person to know the identity of his accusers and State witnesses prior to the trial with the aim of facilitating the accused person's investigation into the creditworthiness of State witnesses.
- (c) Whether the need for an accused person to investigate the creditworthiness of State witnesses is a component of the right to a fair trial;
- (d) Whether prosecution witnesses have a right to privacy;
- (e) Whether by furnishing the accused persons with photographs of State witnesses, the witnesses' right to privacy will be infringed?
- (f) What is the interplay and relationship between the right to privacy, the right to a fair trial and the right to information.

Mr. Kaphale further submits that the summons expressly and substantively relates to and concerns the interpretation or application of provisions of the Constitution identified above and prays for the certification of this matter.

Finally, Mr. Kaphale submitted that in the wake of section 9(2) of the Courts Act a High Court Judge no longer has the power to substantively interpret the Constitution. And for as long as the issue of the interplay between the two constitutional rights does not have any prescribed solution in

the Criminal Procedure and Evidence Code the matter is basically a constitutional one.

Submitting on behalf of the DPP learned counsel Mbendela adopts the skeleton arguments that were filed in this court and he has expanded on them. He observes that the summons before the court has been framed in lofty terms with the intention of giving it the necessary gravitas. He acknowledges that this may have emanated from the lofty response the DPP gave regarding the right to privacy. It is his submission that the issue is really a simple one. The application which is coming either before the High Court or the Constitutional Court is whether the State shall be compelled to produce the photographs of witnesses that are going to testify.

After drawing the court's attention to the factual background of this matter counsel dwelt on the test for certification. He submitted that the language used in section 9(2) is materially significant. The proceedings must:-

expressly and **substantively** relate to or concern the interpretation of the provisions of the Constitution; or

expressly and **substantively** relate to or concern the application of the provision of the constitution.

Mr. Mbendera submitted that the use of peculiar phraseology in section 9(2) of the Courts Act is deliberate and means that Parliament intended something totally different from mere connectivity to the Constitution. The constitutional provision under consideration must be a core issue to the determination of the case. The following examples which appear on page 4 and 5 of the prosecution's skeleton arguments are highlighted:-

“Examples abound. A case dealing with employment law does not qualify for certification under the section when it alleges unfair treatment. Yet s.31 of the Constitution guarantees fair labour practice to every person. That by itself does not make every case alleging unfair treatment to qualify for certification under s.9(2) of the Act.

In the recent case **Sauti Phiri v. The Privatization Commission and the Attorney General**, Civil Cause No. 2569 of 2005 the Chief Justice duly certified the matter under s.9(2) of the Act. When the case came up for hearing, it was doubted whether the Chief Justice had properly certified the matter. The matter alleged unfair treatment and breach of contract by the Malawi Government and the Privatization Commission.

Almost all divorce matters will require consideration of disposition of property and maintenance for the spouse and children. These are matters provided for under s.24(1)(b) of the Constitution. It has never been provided for under s.24(1)(b) of the Constitution qualified the proceedings under s.9(2) of the Act. The Courts have regularly dealt with such matters as falling within the general business of the High Court.”

Mr. Mbendera kindly referred me to the case of **The State and The President of the Republic of Malawi v. Ex parte Dr. Bakili Muluzi, Hon. John Z U Tembo** which was **Misc. Civil Cause No. 99 of 2007** where the Acting Chief Justice Honourable Justice Kalaile declined to grant certification. In that case Learned Counsel for the applicants, Mr. Kasambara argued that section 43 of the Constitution was relevant for the purposes of certification.

While conceding in paragraph 27(b)(1) that the proceedings in question indeed refer to the application of or interpretation of section 42 and 37 of Constitution he argues

that the Constitutional Court would be a wrong forum to deal with this matter as that court deals with broad issues of interpretation and not specific issues that are determined on an application for specific discovery or disclosure in the High Court before a single judge presiding over the criminal trial.

I am indebted to the erudite and instructive submission by counsel on both sides which I found very useful.

The first point which I want to dispose of is the submission by the Learned Counsel Kaphale to the effect that in the wake of section 9(2) of the Courts Act, a High Court Judge no longer has the power to substantively interpret the Constitution. I found this proposition novel and I would caution against any enthusiasm to go that far. Section 108 of the Constitution gives the High Court unlimited original jurisdiction to hear and determine any civil or criminal proceedings, to review any law and any action or decision of the Government, for conformity with the Constitution. Section 9(1) of the Courts Act makes it clear that every proceeding in the High Court and all business arising thereout is to be heard and disposed of by a single Judge. The original jurisdiction of the High Court Judges is therefore intact and has only been tampered with by those cases which come within the narrow confines of section 9(2) and which need certification under section 9(3) of the Courts Act. In my view a single judge of the High Court has jurisdiction to interpret the Constitution.

The second point which I would like to deal with is the case of **The State and the President of the Republic v. Ex-parte Dr. Bakili Muluzi, John Z U Tembo, Misc. Civil Cause No. 99 of 2007** which was kindly referred to me by Learned Counsel Mbendela. I would like to observe, as Learned Counsel Kaphale has done, that, in that case the Learned Acting Chief Justice correctly declined to grant the certification because it was clear from the facts of that case that the

appointment of the commissioners was governed by section 4 of the Electoral Commission Act and not section 43 of the Constitution, therefore the proceedings in that case neither expressly nor substantively related to or concerned the interpretation or application of the Constitution.

The question for me is simple and it is this; do the proceedings in the High Court and all business arising thereout expressly and substantively relate to or concern the interpretation or application of the provisions of the Constitution so as to bring such proceedings within the ambit of section 9(2) of the Courts Act? If the answer is in the affirmative I must grant certification. In the instant case both Mr. Kaphale and Mr. Mbendera agree that the proceedings under consideration, namely the summons taken out by the applicants, relate to the application or interpretation of sections 42 and 37 of the Constitution. The only point of departure for the prosecution are those found in paragraphs 2.4, 2.5 and 2.6 of the prosecution's skeleton arguments. These indicate that the use of peculiar phraseology in section 9(2) of the Courts Act is deliberate and means that Parliament intended something totally different from mere connectivity to the Constitution. The constitutional provision under considerations must be a core issue to the determination of the case.

In addition to the above, I have also looked at the prosecution's skeleton argument which will only be better appreciated from the written submissions appended hereinunder:-

"2.7 In the present case, whatever dressing the applicants seek to give to the pending application, the application is simply one about whether the Prosecution has satisfied the disclosure requirements for a criminal case set down for trial before the High Court. The fact

that the disclosure requirements emanate from or derive from s.42 of the Constitution is irrelevant.

“(1) Indeed s.42 of the Constitution does not confer the right to fair trial to the extent postulated in the proposed summons, that is to say

- (a) right to know the identity of prosecution witnesses to the degree sought is not covered by the Constitution.

On this issue, the Prosecution contend that information relating to identity of the witnesses has already been provided. Such information was provided following an order of Justice Nyirenda who dealt with an earlier application to conceal the identity of the witnesses.

- (b) As to the question whether the contemplated application constitutes proceedings which expressly and substantively relate to the application of s.42 (Right to fair trial) and s.37 (Right to access information) the Prosecution contend as follows:-

- (i) Granted that the proceedings refer to the application of or interpretation of ss.42 and 37 of the Constitution, they are the type of proceedings that are determined on an application for specific discovery or disclosure in the High Court before a single judge presiding over the criminal trial.

- (ii) No special case has been shown to warrant a departure from the procedures in the Criminal Division of the High Court.

- (iii) The special procedure under the Criminal Procedure & Evidence Code is geared towards guaranteeing the defence's right for fair trial.

- (iv) The Constitutional provisions (s.47 and 37) in the 1994 Constitution do not introduce new

rights. These rights were in the Universal Declaration of Human Rights. The provisions of the Criminal Procedure & Evidence Code do no more than accentuate such rights."

I will not deal with each and every point raised in the prosecution's skeleton argument, but as I said earlier on in this Ruling, the issues raised in the summons by the applicants expressly and substantively deal with the accused person's right to information in the possession of the State prior to the commencement of the trial. The prosecution think that the information sought by the accused will violate the witnesses' right to privacy. In response to the position taken by the prosecution on this issue the applicants think that their right to fair trial which is guaranteed under section 42 of the Constitution is at stake. These issues are not issues that deal with mere connectivity to the Constitution but deal with fundamental issues regarding the extent to which the constitutional right to fair trial in an open and democratic society can be claimed by an accused. Although the right to fair trial and the right to information are not new rights, they have, nevertheless, been elevated to constitutional rights under section 42 and section 37 of the 1994 Constitution.

Whether section 42 of the Constitution does not confer the right to fair trial to the extent postulated in the summons, and whether section 37 of the Constitution does not confer the right to know the identity of prosecution witnesses to the degree sought, are legitimate constitutional matters that the three Judges will have to decide.

I would in the circumstances grant the certification of these proceedings pursuant to section 9(3) of the Courts Act.

DATED this 30th day of May, 2008, at Blantyre.

L. G. Munlo, SC.
CHIEF JUSTICE