
Banda v The People (2002) AHRLR 260 (ZaHC 1999)

John Banda v The People ☐☐

High Court, Lusaka, 29 November 1999

Judge: Chulu

Corporal punishment

Cruel, inhuman or degrading treatment (corporal punishment, 9-13, 15, 19; absolute right, 13, 16-18)

Constitutional supremacy (14)

Chulu J

[1.] The appellant herein pleaded guilty to, and was convicted of malicious damage to property. The learned magistrate sentenced him to one month simple imprisonment which he suspended for a period of twelve months. In addition, the learned magistrate ordered ten strokes of a cane. It is this latter part of the sentence against which the appellant now appeals.

[2.] The brief facts of the case are that on 14 November 1998 at about midnight, police were patrolling Mulamba Street in Libala Stage 4B in their motor vehicle, a Jetta. They met and challenged the appellant, who was in company of his friends to stop. [The appellants and his friends] did not stop, but ran away in different directions. [The police gave] chase and the appellant was apprehended. In the process of executing an arrest, the appellant became violent and broke the rear window of the police vehicle.

[3.] He now appeals on the following grounds:

1. The sentence of ten strokes of the cane is too brutal, inhuman and barbaric. This brutality and barbarism are affirmed by section 27(5)(d) of the Penal Code which mandatorily requires a medical doctor to supervise the infliction of the corporal punishment [to ensure that the victims life is not threatened].

2. This honourable Court should declare this sentence null and void on the grounds of unconstitutionality in that the sentence, by reason of its brutal and barbaric nature, conflicts with the appellants guaranteed and entrenched constitutional right against torture, inhuman and degrading punishment under article 15 of the Constitution of Zambia.

3. The honourable Court being the sole custodian of the Bill of Rights, should now declare sections 24(c) and 27 of the Penal Code, chapter 87 of

the Laws of Zambia which provide for corporal punishment, unconstitutional. These two [malevolent] provisions should be excised or severed from the Penal Code.

4. The honourable Court should also pronounce, obiter, that all statutory provisions relating to corporal punishment are unconstitutional.

5. This brutal and barbaric sentence of corporal punishment is always administered discriminatively. The sentence is handed down mostly to the under privileged members of our

society from shanty compounds. Affluent members of our society who commit similar or even more heinous crimes are never subjected to corporal punishment.

6. This Court should take judicial notice of the fact that the provisions of the Penal Code on corporal punishment were passed before the 1964 Independence Constitution, which contains the Bill of Rights. Before this Bill of Rights, corporal punishment was lawful in that the question of unconstitutionality did not arise at that time.

[4.] Learned counsel for the appellant Mr Chanda, submitted that the main grounds of appeal are that the sentence of ten strokes of a cane is unconstitutional on the grounds that it is against article 15 of the Constitution of Zambia. He also asked the Court to take note of the fact that there is no derogation of these guaranteed rights. He asked the Court to declare the sentence null and void on the grounds of unconstitutionality by reason of its brutal and barbaric nature, and further to declare that sections 24(c) and 27, chapter 87 of the Laws of Zambia, which provide for corporal punishment, [are] unconstitutional, and that these sections should be excised or severed from the Penal Code.

[5.] Section 24(c) of chapter 87 reads as follows: The following punishments may be inflicted by a court: (c) Corporal punishment' and section 27 sub-sections (2), (3), (4) and (5) of chapter 87 stipulates instances where corporal punishment may be administered. On the other hand, article 15 of the Constitution of Zambia states: A person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment'.

[6.] There are two aspects to this appeal. The first is the actual appeal against the sentence imposed by the lower Court of ten strokes of a cane. The second aspect arising from this appeal is of a constitutional nature. As such, I am aware of the provisions of article 28, clauses 1 and 4 of the Constitution regarding enforcement of protective provisions,' and that Mr Chanda should have made a proper application to the Court in terms thereof.

[7.] However, since the matter was already before me, and taking into account the fact that the state was duly represented by a very senior officer in the name of the Director of Public Prosecutions, who had been duly served with the notice and grounds of appeal, and who raised no objection to being heard on the constitutionality of the matters herein, the Court exercised its inherent jurisdiction by treating the application before it as if the same had been properly brought under article 28 of the Constitution for the sake of a speedy determination of the matter.

[8.] As regards the first aspect of this appeal, the Director of Public Prosecutions, Mr Mukelabai, has expressly stated that the state does not support the sentence of ten strokes imposed by the learned magistrate on a charge of malicious damage to property.

[9.] The appellant in this case caused damage to the [rear window] of the Zambian police motor vehicle during his arrest. Neither the particulars of the offence nor the statement of facts discloses the value of the damaged property. Since it was a window of a small motor vehicle, I would be right to assume that it was of [low] intrinsic value. Taking into account the nature of the offence and circumstances of the appellant's arrest, I agree, as I did at the time of hearing this appeal, that the sentence of corporal punishment comes to me with a sense of shock, and is most inappropriate and entirely wrong in principle. Mr Chanda referred this Court to the case of Adam Berejena v The People (1984) ZR 19, and also to the Zimbabwe Supreme Court Judgment SC 156/87 of 6 October and 14 December 1987, reprinted in the Commonwealth Law Bulletin volume 14, no 2, April 1988 pages 593-595 [S v Ncube and Others 1987 (2) ZLR 247 (SC)].

[10.] In Adam Berejena case, the accused was convicted of theft of a motor vehicle and sentenced to five years imprisonment, plus ten strokes of a cane. In setting aside the sentence of corporal punishment, the Supreme Court had this to say:

Corporal punishment ... should be imposed very sparingly ... only in the most serious circumstances, such as grave brutality or a most serious outbreak of crime; mere prevalence of crime is not enough. We think that in this modern day and age, this form of punishment should be discouraged in Zambia. Indeed, the legislature itself has moved towards this direction by its recent repeal of mandatory caning in stock theft cases.

[11.] In the Zimbabwean cases of Stephen Ncube v the State; Brown Ishuma v the State and Innocent Ndhlovu v the State whose judgment I have referred to supra, all the three accused were convicted and sentenced to various terms of imprisonment plus a whipping of six strokes for raping their victims of tender ages. The Supreme Court, sitting as full court, upheld the challenge to the constitutionality of a sentence of whipping. The Court instead ordered corporal punishment to be deleted from the sentences. In doing so, the Court greatly relied on the following adverse features regarded to be inherent in the infliction of whipping:

1. The manner in which it is administered ... is somewhat reminiscent of flogging at the whipping post, a barbaric occurrence particularly prevalent a century or so past. It is a punishment, not only inherently brutal and cruel, for its infliction is attended by acute pain and much physical suffering, but one which strips the recipient of all dignity and self-respect. It is relentless in its severity and is contrary to the traditional humanity practised by almost the whole of the civilised world being incompatible with the evolving standards of decency;

2. By its very nature it treats members of the human race as non-humans. Irrespective of the offence he has committed, the vilest criminal remains a human being possessed of common human dignity. Whipping does not accord him human status;

3. No matter the extent of regulatory safeguards, it is a procedure easily subject to abuse in the hands of sadistic and unscrupulous prison officer who is called upon to administer it; and

4. It is degrading to both the punished and the punisher alike. It causes the executioner, and through him society, to stoop to the level of the criminal. It is likely to generate hatred against the prison regime in particular and the system of justice in general.

[12.] As I have already stated above, this sentence of corporal punishment cannot be sustained as it is inhuman, degrading and barbaric in nature. I therefore uphold the appeal and set aside the sentence of ten strokes of a cane imposed on the appellant by the lower Court.

[13.] In respect of the second part, Mr Chanda submits that sections 24(c) and 27 of the Penal Code are in contravention of article 15 of the Constitution which guarantees the protection of the individual from inhuman treatment, and that as such, this Court must declare that they are unconstitutional, and should be severed from the Penal Code. On the other hand, the learned Director of Public Prosecutions, Mr Mukelabai, submits that the state concedes that corporal punishment can indeed be described as inhuman and degrading as per article 15 of the Constitution. However, he further submits that, since all articles dealing with the Bill of Rights under Part III of the Constitution are subject to derogation, so is the case with article 15. Mr Mukelabai states that these derogations are designed to ensure that the enjoyment of the said rights by any individual does not prejudice the rights and freedoms of others or the public interest.[14.] Upon consideration of the law before me, I hasten to point out that the Republican Constitution, which is a written Constitution of Zambia, is the supreme law of the land, and consequently all other laws derive their force of law from it, and are therefore subordinated to it. This being the legal position, it cannot therefore be doubted that unless the Constitution is

specifically amended, any provision of an Act of Parliament that contravenes the provisions of the Constitution is null and void.

[15.] Article 15 of the Constitution is couched in very clear and unambiguous language, that no person shall be subjected to torture, or to inhuman or degrading punishment or other like treatment. On the contrary, it cannot be doubted that the provisions of sections 24(c) and 27 of the Penal Code, which permit the infliction or imposition of corporal punishment on offenders, are in total contravention, and conflict with the above provisions of article 15 of the Constitution. At the moment, there is no evidence on record to show that article 15 of the Constitution has been amended in compliance with article 79 which lays down the rigorous procedure required to effect any such amendment. Similarly, the Penal Code itself does not anywhere make reference to the amendment of the Constitution.

[16.] Mr Mukelabai, in his submission, stated that article 15, like all other articles of the Constitution under Part III is subject to derogations. Mr Chanda, on the contrary, urged the Court to take note of the fact that there is no derogation from the provisions of the said article 15 of the Constitution. I have quoted in full supra, the provisions of this article and I entirely agree with Mr Chanda's assertion that this particular article, unlike the other articles under Part III of the Constitution, makes no derogation or any exceptions whatsoever.

[17.] As a matter of interest, I have revisited the provision of the now repealed 1973 Constitution, and also the 1991 Constitution, to see how a similar provision to the present article 15 was worded. The striking feature about the 1973 Constitution is that article 17, which is similar to the present article 15, was divided into two parts. It reads:

17(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question authorises the infliction of any description of punishment that was lawful in Zambia immediately before the coming into operation of this Constitution.

[18.] On the other hand, an examination of a similar provision under article 15 of the 1991 Constitution shows that the saving clause which existed in the 1973 Constitution was dropped. This status has been maintained by Parliament in the current Republican Constitution. Whatever the reason is for dropping the saving clause in the two successive Constitutions, Parliament must have had very good intentions for doing so, and it is not for this Court to query

its wisdom. The duty of this Court is merely to interpret the law as it exists on the statute books.

[19.] What all this means is that it is section 24(c) and 27 of the Penal Code which are in direct conflict, and contravention of the provisions of the Supreme Law, namely article 15 of the Constitution.

[20.] In Thomas Mumba v the People (1984) ZR 38 (HC judgment HNR/438/1984) which was a case referred to the High Court by the subordinate court for determination, the applicant was being tried in the lower Court for an offence under the Corrupt Practices Act. Under section 53(1) of the Act, it was a requirement that if the accused elected to say something in defence, he had to say it on oath only. This clearly excluded the option to make an unsworn statement.

[21.] The defence submitted that the provisions of section 53(1) of the Act contravened article 20(7) of the Constitution. The Court held in that case that an accused person in a criminal trial cannot be compelled to give evidence on oath if he elects to make an unsworn statement. Consequently, the Court declared that the said section 53(1) of the Corrupt Practices Act was unconstitutional and therefore null and void and that it should be severed from the Act.

[22.] In all the circumstances of this case, and upon due consideration of the law before me, I entirely agree with the senior learned defence counsel's submission that the Constitution does not provide for any derogation from the provisions of article 15. It follows therefore, that since this is the supreme law of the land, its provisions cannot be subordinated to any other statute. In the circumstances, I do not hesitate to find that section 24(c) and 27 of the Penal Code are in direct conflict with article 15 of the Constitution. In this regard, I therefore declare that the said sections 24(c) and 27 of the Penal Code, chapter 87 are unconstitutional and therefore null and void, and should be severed from the Penal Code.