

Director of Public Prosecutions v. Daudi Pete
Court of Appeal
(Nyalali C.J., Makame and Ramadhani JJ.A.):
May 16, 1991
Criminal Appeal No. 28 of 1990

Constitutional Law-fundamental rights-enforcement-whether Articles 30(3) and (4) of Constitution sufficiently confer original jurisdiction upon High Court to entertain proceedings in respect of actual or threatened violations of Basic Rights, Freedoms and Duties in absence of basic legislation for enforcement

Constitutional Law-fundamental rights-enforcement- where specific provision under Constitution in article 30(3) and (4) concerning enforcement of Basic Rights and Duties, any proceedings for that purpose to be instituted under that specific article of Constitution.

Constitutional Law-fundamental rights- bail- denial-one of two situations under which person may be denied or deprived of personal liberty-Article 15(a)- denial to be under certain circumstances and a procedure law must prescribe.

Constitutional Law-fundamental rights-bail-denial-s. 148 of Criminal Procedure Act-whether any prescription in s. 148 or

elsewhere for the requisite procedure for denial of bail in terms of Article 15(2)(a) of the Constitution existed

Constitutional Law-discrimination-interpretation-whether selective prohibition against bail contained under s. 148(5)(e) of the Criminal Procedure Act not discriminatory in terms of Constitution Articles 13(4) and (5)

Constitutional Law- separation of powers-infringement-whether legislation prohibiting the grant of bail to persons charged with specified offences does not amount to a take over of judicial functions by the Legislature.

Constitutional Law-legislation- violation-whether saved if could be construed as being wholly for "ensuring the interests of defence, public safety, public order", - s.148 (5)(e) of Criminal Procedure Act-whether saved if the denial of bail was aimed at the interest of defence, public safety or public order.

This appeal by the Director of public Prosecutions concerned the right of bail. The respondent was charged with the offence of robbery with violence c/s 285 and 286 of the Penal Code. The District court of Musoma denied him bail, as the offence was not bailable under s.148 (5)(e) of the Criminal Procedure Act 1985. The respondent appealed to the High Court. The High Court (Mwalusanya J.) held

that s.148 (4) and (5) of the Act was unconstitutional for violating several articles of the Constitution concerning Basic Rights, and the doctrine of separation of powers between the Judicature and Legislature, and therefore granted bail. The DPP was aggrieved by the decision, hence this appeal.

Held:

1. Articles 30(3) and (4) of the Constitution sufficiently confer original jurisdiction upon the High Court to entertain proceedings in respect of actual or threatened violations of the Basic Rights, Freedoms and Duties. Until Parliament legislates under Article 30(4), enforcement of Basic Rights, Freedoms and Duties may be effected under the procedure and practice that is available to the High Court in exercise of its original jurisdiction, depending on the nature of the remedy sought.
2. The High Court has unlimited inherent jurisdiction to adjudicate upon any legal matter unless there is express statutory provision to the contrary. However, as there is a specific provision under the Constitution in Article 30(3) and (4) concerning the enforcement of the Basic Rights and Duties, any proceedings for that purpose must be instituted under that specific article of the Constitution.
3. One of the two situations under which Court may deny or deprive a person of personal liberty under the Constitution is Article 15(a). This may be done only under certain

- circumstances under a procedure law must prescribe. There was no prescription in s. 148 or elsewhere for the requisite procedure for denial of bail in terms of Article 15(2)(a)
4. of the Constitution.
 5. The selective prohibition against bail contained under s. 148(5)(e) of the Criminal Procedure Act is not discriminatory in terms of the Constitution Articles 13(4) and (5) as the accused are denied bail on the basis of their actions or conduct.
 6. The doctrine of separation of powers is fringed when either the Executive or the Legislature takes over the function of the Judicature involving the interpretation of laws and adjudication of rights and duties in disputes either between individual persons or between the state and individual persons. Legislation prohibiting the grant of bail to persons charged with specified offences does not amount to a take over of judicial functions by the Legislature.
 7. Any legislation that falls within the parameters of article 30 is constitutionally valid, notwithstanding that it may violate basic rights of the individual. But the legislation must fit squarely within the provisions of that Article in that it could be construed as being wholly for "ensuring the interests of defence, public safety, public order", etc. Thus the provisions of s.148 (5)(e) would be saved if the denial of bail was aimed at the interest of defence, public safety or public order.

8. The provisions of Section 148(5)(e) was so broad that it encompassed even accused persons who could not reasonably be construed to be dangerous in terms of Article 30(2)(b) of the Constitution.

TO THE EXTENT THAT S. 148(5)(E) VIOLATES THE CONSTITUTION, IT IS DECLARED NULL AND VOID IN TERMS OF ARTICLE 64(5) OF THE CONSTITUTION. IT IS STRUCK OFF THE STATUTE BOOK. APPEAL DISMISSED.

Legislation considered:

1. African Charter on Human and People's Rights
2. Criminal Procedure Act s.148
3. Constitution Articles 15, 30(3) and (4), 31, 64(5), 108(1) and (2)
4. Constitution (Consequential, Transitional and Temporary Provisions) Act No. 16 of 1984

Cases referred to:

1. Attorney General of the Gambia v. Momodu Jobo [1984] AC 689
2. Bull v. Minister of Home Affairs [1986] (1) ZLR 202
3. Clark v. Karika [1985] LRC (Const.) 732
4. Lindsley v. Natural Carbonic Gas Co. [1911] 220 US 61
5. Maneka Gandhi v. Union of India [1978] 2 SCR 621

6. Megowan v. Maryland [1961] 366 US 420

7. Republic v. Peregrin Mrope Criminal Cause No. 43 of 1989
(unreported)

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