IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., MFALILA, J.A., And LUBUVA, J.A.)

CRIMINAL APPEAL NO. 190 OF 1994

B e t w e e n

NURDIN AKASHA. . . . . APPELLANT

A n d

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Chua, J.)

dated the 13th day of July, 1994

in

Miscellaneous Economic Criminal Cause No. 10 of 1994

JUDGEMENT OF THE COURT

MFALILA, J.A.:

In the Resident Magistrate's Court at Dar es Salaam, the appellant Nurdin Akasha was charged with three counts under the Economic and Organized Crime Control Act 1984. The charges involved unlawful importation and possession of dangerous drugs and corrupt transactions. The drugs involved were 1,096,719 kilogrammes of Methaqualone alias Mandrax valued at Shs. 4,997,500,000/=. The trial Resident Magistrate found and held that the charges in all three counts had not been proved beyond reasonable doubt and acquitted the appellant with an order that he be released from remand custody. But he was arrested soon after leaving the court premises and taken to the Central Police Station. He was served with a detention order.

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Since then he has been detained under the Preventive Detention Act. Following this detention, a habeas corpus application was lodged in the High Court seeking the following directions and orders:

> (1) That Nurdin Akasha having been acquitted by the Dar es Salaam Resident Magistrate's Court (Matui, PRM) on 20/5/94, the immediate detention of the said Nurdin Akasha on the said 20/5/94 infringed his rights as a freeman and this infringed the constitution of the United Republic of Tanzania.
>
> (2) That the said illegality be remedied by this honourable Court nullifying the detention of Nurdin Akasha.
>
> (3) That Nurdin Akasha be released immediately.

These were the three orders and directions contained and sought in the application filed on behalf of the appellant, and this application was supported by the affidavit of one Shamsa Abdulrahman Niran who described herself as the appellant's aunt. After the respondent Republic had filed their counter affidavit and a reply thereto had been filed by the appellant, the hearing of the application was set down. But what is clear from the record of proceedings is that the nature of the application took a completely different turn. Instead of proceeding on the basis of the application before it, the Court was misled into considering the constitutionality of the Act under which the appellant was detained. After hearing arguments from both sides, the learned judge held that although the Preventive Detention Act has a number of shortcomings i.e. a detainee is not given the

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right to be heard, still it had sufficient safeguards to pass the test of constitutionality. Accordingly he held that the Act was constitutional and that therefore the appellant was validly detained under it. The appellant lodged this appeal complaining in the substantive ground that the learned High Court Judge erred in law in holding that the Preventive Detention Act had sufficient safeguards and as such constitutional.

During the hearing of this appeal, Dr. Lamwai learned Counsel who appeared for the appellant, submitted forcefully on the constitutionality of the Preventive Detention Act. He argued that the Act is unconstitutional because it lacked basic safeguards before the powers under it are invoked and that if the detainee has a right to make any representations, these are limited to the formalities and procedures not the reasons for such detention. Mr. Sengwaji learned Principal State Attorney argued to the contrary on behalf of the Republic.

In our view these arguments are neither here nor there because as we have indicated the High Court was misled and went astray. In the result it went off course and decided an issue which was not formally before it, leaving the formal prayers in the application unanswered.

As already indicated, the application before the High Court was for the issuance of directions in the nature of habeas corpus that:

> (1) Nurdin Akasha having been acquitted by the Dar es Salaam Resident Magistrate's Court (Matui, PRM) on 20/5/94, the

immediate detention of the said Nurdin Akasha on the said 20/5/94 infringed his rights as a freeman and this infringed the constitution of the United Republic of Tanzania.

(2) The said illegality be remedied by this honourable Court nullifying the detention of Nurdin Akasha.

(3) Nurdin Akasha be released immediately.

In all the three prayers asked for, none of them challenges the Constitutionality of the Act under which the appellant was detained. They challenge the legality of his detention not because the Act under which this was done is unconstitutional, but because such detention was ordered after the appellant was acquitted by a court of law and that therefore such detention infringed his rights as a freeman, the rights which are protected by the constitution. This was the basis of the application before the Court and that therefore because the detention is illegal for the aforementioned reasons, the Court was asked to remedy the situation by nullifying the detention order and ordering the immediate release of the appellant. The constitutionality of the Act is raised for the first time in the reply to the counter affidavit. This part of the reply therefore was just hanging in the air for it was not supporting anything in the original application. In the course of his submissions in the High Court, Counsel for the appellant asked for the following prayers which played a major role in misleading the Court:

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(a) That the Court under Section 390 (1)(b) of the CPA make a finding that the applicant is being illegally and improperly detained and order that he be set at liberty immediately.

(b) That whoever has the custody of the applicant be ordered to produce him in Court.

(c) That the Court declare the Preventive Detention Act unconstitutional and void to be struck off the statute book.

It is clear then that while prayers in (a) and (b) above are contained in and supported by the application before the Court, the prayer in (c) seeking to have the Preventive Detention Act declared unconstitutional is not part of the original application and the affidavit supporting it. Indeed, Dr. Lamwai's reply in Court confirms this when he submitted:

> "However we concede that there was a preventive detention order signed on 20/5/94. We concede that our appellant was detained, what we are not conceding is the legality of the President to use his powers under Section 2 of the Preventive Detention Act to counteract the decision of the Court."

This was a correct statement of the issue before the Court based on the application before it. As a matter of fact the question of the constitutionality of the Act being a new issue was raised by Mr. Naali Counsel for the respondent Republic. In his submissions. in the High Court, he said:

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"The chamber application and the affidavit in support which were drawn up by Kashumbugu advocate and the counter affidavit drawn up by myself all have covered matters regarding the legality of the detention under the Preventive Detention Act that:

(1) It amounts to an infringement of the basic rights of the applicant

(2) That the Executive interferes with the judiciary.

These are the matters at issue. In reply to the counter affidavit drawn up by Dr. Lamwai, there is raised a fresh issue and that is the issue of constitutionality. This amounted to taking the Court by surprise and he is estopped from bringing matters which were not in the affidavit. The Court should not consider the question of constitutionality of the Preventive Detention Act. Dr. Lamwai is estopped from bringing the matter. This is because it was not in the original affidavit of the applicant."

In answer to this objection, Dr. Lamwai told the Court that in his submission the references to the constitution in the application to the effect that the appellant's detention infringed the constitution of the United Republic raised the issue of the constitutionality of the Preventive Detention Act under which the detention was ordered. The learned judge did not make any ruling on this but in our view Dr. Lamwai's reply had no validity. In the application, it is stated that the detention of Nurdin Akasha on 20/5/94 infringed his rights as a freeman and this

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(i.e. the infringement of rights) infringed or was in violation of the constitution of the United Republic of Tanzania. The Court was therefore asked to quash this detention which infringed the constitutional rights of the appellant and order his immediate release. The Court was being asked to order the immediate release of the appellant not because the Act under which he was detained is unconstitutional, but because the detention was ordered following his acquittal by a court of law and that this violated his basic rights to personal freedom under the constitution. In other words what was being challenged by the application was not the constitutionality of the Act used to detain the appellant, but the legality of his detention following an acquittal by a court of law. It is therefore our task to bring the whole case back on track and determine the appeal solely on the basis of the application before the High Court - namely that the application in the High Court was in the nature of a habeas corpus.

In support of his argument that the Preventive Detention Act was wrongly used after a Court order acquitting the appellant, Counsel cited the decision of this Court in DPP vs. Mehboob Akber Haji and Others CA Criminal Appeal No. 28/92 in which this Court stated that the Preventive Detention Act was not meant to supplement the Criminal Law and that the two should not be used in tandem as it were. In Dr. Lamwai's view, this is what the Government did in this case, they were pursuing criminal and administrative measures at the same time. Mr. Sengwaji countered this argument by distinguishing the two cases. In his submission, the Mehboob Akber Haji case is different from the present case in that in the Mehboob case the Government invoked administrative measures to detain the

It was brought in through the back door. Whether or not the Preventive Detention Act is constitutional will have to await a relevant occasion.

Accordingly we dismiss the appeal in its entirety.

DATED AT DAR ES SALAAM THIS 23RD DAY OF OCTOBER, 1995.

R.H. KISANGA
JUSTICE OF APPEAL

L.M. MFALILA
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(M.S. SHANGALI)
DEPUTY REGISTRAR