

ROY LESLIE BENNETT  
and  
THE PARLIAMENT OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
HUNGWE J  
HARARE, 9 November 2004 and 18 February 2005

Mr *Matinenga*, for the applicant  
Mr *Chihambakwe*, for the respondent

HUNGWE J: The applicant is a Member of Parliament for the Chimanimani constituency. He is currently serving a sentence of 15 months imprisonment with labour of which three months were suspended for a period following his being found guilty of contempt of Parliament on 28 October 2004.

Upon his committal to prison, his legal practitioners filed this application on an urgent basis seeking the following relief:

- "1. The Applicant be released from prison pending the determination of the Appeal in SC 332/04, the review proceedings and constitutional challenges to be instituted by the 5<sup>th</sup> November 2004.
2. The Applicant's committal to prison be stayed pending the determination of all proceedings referred to in paragraph 1 hereabove.
3. The applicant reports to the Speaker of Parliament, Clerk of Parliament or any other official they may designate between the hours of 0600 hours and 1600 hours every Tuesday and Thursday.
4. The respondent pay the costs of this application."

Briefly the events leading to this application may be summarised as follows:

On the 18<sup>th</sup> May 2004 during the course of a debate of the Stock Theft Amendment Bill in Parliament a fracas occurred in the august house. A Parliamentary Select Committee on Privileges was established two days later and tasked to enquire into the conduct of the applicant and to report its findings to Parliament. The said Committee duly proceeded with the inquiry and produced a report as mandated.

Before the committee could present its report before Parliament the applicant on 26 October 2004 filed an urgent application in which he sought an interdict

preventing the Select Committee from tabling its report before the Parliament pending the determination of the effect of the prorogation of Parliament and a Constitutional challenge he intended to mount.

At the hearing of that application in HC 11689/04 the Speaker of Parliament, who was cited as the first respondent, invoked the provisions of section 16(1) of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*].

After argument was presented, the court did not find favour with the applicant. It stayed these proceedings thereby giving effect to the Speaker's Certificate. In the result the Select Committee tabled its report to Parliament. Following upon a debate of the report, the applicant was found guilty of contempt of Parliament and sentenced as aforesaid.

In his submissions on applicant's behalf, Mr *Matinenga* urged this court to take judicial notice of the extremely harsh sentence imposed on the applicant for common assault and by inference find that his prospect of success on review or appeal were eminently bright. We were urged to give regard to the unconstitutionality of the provisions of the Privileges Immunities and Powers of Parliament Act aforesaid. Mr *Matinenga's* argument, as I understood it, was this. Section 13 of the Constitution guaranteed protection of the right to personal liberty. It specifically forbids the deprivation of personal liberty unless such deprivation is authorised by law. One such exception is where such deprivation of liberty is in execution of the order of a court punishing him for contempt of that court or of another court or tribunal or in execution of an order of Parliament punishing him for contempt. But as the Committee which inquired into the allegations had a majority of ruling party members who were biased against him, his rights to a fair trial as enshrined in section 18(2) of the Constitution were infringed. Resultantly the whole process was unlawful and infringed upon his constitutional rights so patently that on appeal he will easily overturn the findings and sentence.

As to the certificate issued by the Speaker of Parliament, I understand applicant's argument to be that once the proceedings of the Parliament were terminated with applicant's committal this court cannot be prevented from reviewing the whole process by the mere production of the certificate. This court has original jurisdiction to review all proceedings of inferior tribunals and courts. Any citizen

aggrieved by the determination of an inferior court, tribunal or quasi judicial body has the right to approach this court for relief.

This argument raises an important issue, the all important question of whether the courts could lift the veil of privilege where Parliament merely claims privilege without stating anything further. Put differently, in my view, the issue is whether on the say so of the Speaker of Parliament the court must accept that a matter is one of the privileges recognized at law before the exclusive jurisdiction of Parliament.

As the issue of parliamentary privilege has its roots in the Westminster Parliamentary system, it is helpful to trace its development in that jurisdiction and its subsequent adoption in our jurisdiction. Erskene May in his book *Parliamentary Practice* 21<sup>st</sup> Edition points out that COKE CJ in the early seventeenth century regarded the law of Parliament as a particular law, distinct from the common law. For that reason COKE CJ held that:

"Judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws but *secundum legem et consuetudinem parliamenti*."

Over the years there has been a discernible shift from this purist position with the courts in England having recognized the need for an exclusive Parliamentary jurisdiction as a necessary bulwark of the dignity and efficiency of Parliament.

Thus in general the English courts accepted that when a matter is a proceeding of the house beginning and terminating within its own walls it is obviously outside the jurisdiction of the courts; though there may be an exception for criminal acts so far as they may be understood within the term of proceedings of Parliament.

With the passage of time the English courts came to realise that there may be instances where the courts cannot avoid going behind an Act of Parliament and investigate whether it had been properly obtained.

The case of *British Railways Board v Pickin* [1974] WLR 208 demonstrated that although the British courts have been careful not to act so as to cause conflict with Parliament there were two views in the judiciary about where the boundary between the concerns of each should be drawn. On the one hand Lord Denning MR held that

**"... it is the function of the court to see that the procedure of Parliament itself is not abused and that undue advantage is not taken of it. In so**

**doing the court is not trespassing on the jurisdiction of Parliament itself. It is acting in aid of Parliament and, I might add, in aid of justice."**

On the other hand the House of Lords held an entirely opposite view. It held that the function of the court was to consider and apply enactments of Parliament. Accordingly it was not lawful to impugn the validity of the statute by seeking to establish that Parliament in passing it, was misled by fraud or otherwise. Any investigation into the manner in which Parliament had exercised its function would or might result in a conflict. (May @ p 158-9).

In our jurisdiction the position as applied has been heavily influenced by the contemporary changes in the jurisprudence of the region. To begin with the South African courts have steered away from the neo - conservatism of the pre-1994 era. The development of the South African Constitutional law has been heavily influenced by their new constitution which in a way permitted for judicial review of Parliamentary proceedings. (Constitution of the Republic of South Africa Act 108 of 1996)

See *De Lille and Another v Speaker of the National Assembly* 1998 (3) SA 430 and also *Speaker of the National Assembly v De Lille* 1999 (4) SA 803 (SCA).

See also *Mutasa v Makombe* 1997(1) ZR 330

In Zimbabwe the Privileges, Immunities and Powers of Parliament Act regulates the position.

Section 6 of that Act which corresponds with the South African Section 5 of the Powers and Privileged of Parliament Act 91 of 1963 requires the officer presiding over any case in which proceedings have been instituted for or on account of any matter of privilege to stay the proceedings on production of the Speaker's certificate.

It states;

"(1) Upon production at any stage of proceedings instituted for or on account of or in respect of any matter of privilege, to the presiding officer by the person against who the proceedings are instituted of a certificate by the Speaker or, in his absence or incapacity by the Secretary, relating that the matter in question is one concerning the privilege of Parliament the presiding officer shall immediately stay the proceedings which shall thereupon be deemed to be finally determined."

In the present case the Speaker again issued his certificate Exhibit 1 of the papers in terms of section 6(1) of the Privileges Immunities and Powers of Parliament Act, [*Chapter 2:08*].

The certificate issued in terms of section 6(1) mentions in its body two Parliamentary privileges known to the law. These are:

- (a) The privilege of absolute control over the internal proceedings of the House and
- (b) The parliamentary privilege of exclusive jurisdiction over a committal for Contempt of the House.

It seems to me there is sufficient jurisdictional grounds upon which to uphold the effect of the certificate. I did not hear counsel to argue against the merits of the finding of contempt by parliament. It is the manner by which the finding was arrived at that is put in issue. It is the process by which the finding was arrived at which will be urged in the Supreme Court to have offended the rule against bias. Thus the finding of guilty of contempt is not itself challenged. If that is the case, as I understand it to be, then there are very little prospects of the appeal succeeding. I say this because the procedure adopted to challenge the applicant's incarceration is based on the assumption that because Parliament sat in a judicial capacity, therefore its order should be subjected to the rigours of a normal review or appeal process. That argument is misplaced. It has been held that a finding of guilt by Parliament on a contempt charge is not a crime in the conventional sense.

In *Mutasa v Makombe (supra)* GUBBAY CJ @ p 337C- p 338B stated:

"A finding of guilt by Parliament on a contempt offence is not a crime in the conventional sense. When dealing with these contempt offences Parliament, though sitting as a court, does not sit as a court of law. Its proceedings are not in the nature of a public criminal trial as envisaged in s 18(2) of the Constitution; for Parliament is not 'an independent and impartial court established by law'. It exercises its own jurisdiction and powers conferred upon it by the Privileges, Immunities and Powers of Parliament Act. That it does so is recognized in the Constitution. Section 13(2)(b) thereof provides that no person shall be deprived of his personal liberty save, *inter alia*, as may be authorised by law

'in execution of the order of a court punishing him for contempt of that court or of another court or tribunal or in the execution of the order of Parliament punishing him for a contempt'.

(Emphasis added.) And s 16(7)(b) of the Constitution prohibits the compulsory acquisition of property of any description or interest or right therein, but provides that it shall be lawful where such deprivation occurs.

'by way of penalty for breach of any law whether under civil process or after conviction of an offence, or forfeiture in consequence of a breach of the law or in *pursuance of any order referred to in s 13(2)(b)*'.

(Emphasis added)

The line drawn in the Constitution between punishment for contempt under an order of court or tribunal, and that imposed by Parliament, is significant and important. It indicates plainly, to my mind, that, in utilizing its powers under the Privileges, Immunities and Powers of Parliament Act in dealing with contempt offences, Parliament is not exercising a criminal or civil jurisdiction. Rather one *sui generis*, being the jurisdiction expressly authorised by law.

Thus in respect of contempt offences s 18(2) of the Constitution, which stipulates that every person charged with a *criminal offence* is to be afforded a fair hearing by an independent and impartial court, is of no application. Nor is s 18(9). It concerns the determination of the existence of civil rights and obligations and provides that in respect thereto every person is entitled to be afforded a fair hearing by an *independent and impartial* court or other adjudicating authority. Parliament is *not* such a court or authority."

If the certificate was properly issued, I have no doubt that to issue an order for release of the applicant would interfere with an order of Parliament when there was no proper basis to do so.

In argument it was suggested that the sentencing process for the applicant was flawed for reason that party political considerations were at play rather than the strict principles of sentencing as are applied in the courts of law. The simple answer to that argument is to be found in GUBBAY CJ's summation quoted *in extenso* above.

Parliament is not a court of law properly so called. Although it sits as such when imposing punishment on its members, it is not bound by the public sentencing principles as they are known to courts of law. It is exercising special power vested in it as Parliament. It is the "High Court of Parliament," as the old authorities would say. It is one of those facets of its sovereignty. It may sound abstruse for this court to so state but to those schooled in constitutional law I am stating the obvious.

What may well be at issue when the matter is placed before the Constitutional Court is whether Parliament should continue to enjoy such wide *quasi* judicial powers which, may be exercised in such a manner as to deprive a private citizen of his liberty without due process. Whilst applicant had his rights infringed upon, his victim in turn had his rights withheld as he cannot sue for the assault. Contemporary Parliamentary practice shows a dearth of similar cases elsewhere in the region or overseas. Yet as long as the law is in the statute books it is not for the court to change it but to interpret it. The Law Development Commission and human rights

groups might find this to be fertile ground for activism but for the purposes of the application before me I am of the firm view that the Speaker's certificate is properly relied upon. I am enjoined to give it effect.

In the result I dismiss the application with costs.

*Kantor & Immerman*, legal practitioners for applicant

*Chihambakwe & Mutizwa*, legal practitioners for respondent