

## **REPORTABLE ZLR**

JESTINA MUKOKO v THE ATTORNEY-GENERAL

SUPREME COURT OF ZIMBABWE  
CHIDYAUSIKU CJ, MALABA DCJ, SANDURA JA,  
ZIYAMBI JA & GARWE JA  
HARARE, JUNE 25, 2009 & MARCH 20, 2012

*J Gauntlett SC*, with him *Mrs B Mtetwa*, for the applicant  
*Mrs F Maxwell*, for the respondent

MALABA DCJ:

### **INTRODUCTION**

This case is about a permanent stay of a criminal prosecution because of torture and inhuman and degrading treatment to which the applicant was subjected by State security agents prior to being brought to Court on a criminal charge. Jestina Mukoko (hereinafter referred to as (“the applicant”)) appeared before a magistrate at Rotten Row Magistrates Court in Harare on 14 January 2009 in the case of *Manuel Chinanzvavana & Eight Ors No. 8801-5/08*. She was charged with the offence of contravening s 24(a) of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*] (hereinafter referred to as “the Act”). It was alleged that in the months of June and July 2008, the applicant and the co-accused persons “recruited or attempted to recruit or assisted in the recruitment of Ricardo Hwasheni to undergo military training in Botswana in order to commit any act of insurgency, banditry, sabotage or terrorism in Zimbabwe”.

The applicant alleged in the Magistrates Court, that she had been abducted from home and subjected to torture and inhuman and degrading treatment by State security

agents. She requested the magistrate to refer the question of contravention of her fundamental rights to the Supreme Court (“the Court”).

Two grounds were used to justify the request. The first was that the institution of the criminal prosecution was rendered invalid by the pre-charge ill-treatment to which the applicant was subjected. It was argued that the manner in which she was apprehended by State security agents and treated in detention prior to being brought to court on the charge constituted a violation of the fundamental rights not to be arbitrarily deprived of personal liberty guaranteed under s 13(1) and not to be subjected to torture or to inhuman or degrading treatment protected by s 15(1) of the Constitution. The argument was that the uncontested behaviour by State security agents in kidnapping the applicant from her residence and subjecting her to torture, inhuman and degrading treatment whilst she was in their custody rendered the institution of the criminal prosecution an abuse of legal process. It was also argued that the conduct of the State security agents offended the sense of what the judiciary expects as decent behaviour from law enforcement agents in the treatment of persons in their custody. The contention was that the Court was obliged to refuse to countenance the bringing of the criminal prosecution in the circumstances.

The second ground was that the decisions made by the public prosecutor to charge the applicant with the criminal offence and to bring the prosecution proceedings were based solely on information or evidence of the crime obtained from her by infliction of torture, inhuman and degrading treatment. It was argued that the institution of the criminal prosecution was rendered invalid by the use of inadmissible information or evidence. The assumption was that s 15(1) of the Constitution contains a rule that prohibits the admission or use, in legal proceedings by public officials responsible for the initiation and conduct of criminal prosecution and judicial officers, of information or evidence of the crime obtained

from an accused person or any third party by infliction of torture, or inhuman or degrading treatment.

The contention was that reliance on information or evidence of the crime obtained from the applicant or a third party by torture, inhuman and degrading treatment was a breach of the exclusionary rule and unlawful. It also engaged the responsibility of the State in the violation of s 13(1) of the Constitution. The effect of the argument was that the decision to charge the applicant with the criminal offence and the institution of the prosecution of it was not based on a reasonable suspicion of her having committed the criminal offence. The criminal prosecution was therefore not authorised by s 13(2)(e) of the Constitution.

The magistrate was of the view that the raising of the question as to the contravention of the applicant's fundamental rights was not frivolous or vexatious. He referred the question to the Court for determination. The relief sought by the applicant was an order of permanent stay of the criminal prosecution.

### **THE ORDER OF THE COURT**

On 28 September 2009, after reading documents filed of record and hearing argument by counsel for the applicant and for the respondent, the Court made the following order:

“The Court unanimously concludes that the State through its agents violated the applicant's constitutional rights protected under ss 13(1), 15(1) and 18(1) of the Constitution of Zimbabwe to the extent entitling the applicant to a permanent stay of criminal prosecution associated with the above violations.

Accordingly it is ordered that the criminal prosecution against the applicant arising from the facts set out in proceedings in the Magistrates Court Harare in the case of the *State v Manuel Chinanzvavana & Eight ors* case number 8801-5/08 is stayed permanently.

The reasons for this order will be furnished in due course. The question of the costs of the application will be dealt with in the judgment.”

### **THE FACTS**

The reasons for the order are now given. The facts on which the determination of the question as to the contravention of the fundamental rights referred to in the order was based, were conveyed by oral testimony given by the applicant in the Magistrates Court. They were also conveyed through the affidavit deposed to by her on 12 January 2009 as well as by the arguments addressed to the Court by counsel on behalf of the applicant. The truthfulness of the evidence conveyed by the means and methods referred to was not contested by the respondent.

The evidence is to the following effect. On 3 December 2008 at 5a.m., the applicant was in bed at the family home in Norton. In the house were her son, nephew and an employee. The son came to the bedroom and said there were people at the gate to the premises who wanted to talk to her. She woke up in a night dress only. The son came back saying he understood that the people were members of the police. Wearing a night dress only she walked to the kitchen where she met seven men and one woman in plain clothes. They said they were members of the police but did not produce identity cards to show that they were police officers. Two of the men took positions on each side of the applicant. They each held her by the hand and led her to a Mazda Familia motor vehicle that was parked at the gate. In the car was another man.

The applicant asked her captors for permission to go back into the house and dress properly. She was instead pushed into the rear seat of the car. She was ordered to lie on the back seat between two men with her face on the lap of one of them. The man on whose lap she was forced to put her face had a gun across his thighs. Across the floor of the

car in front of the rear seat there was another firearm. A jersey was used to blindfold her. She could hardly breathe as the jersey was pressing against her nose. When she complained of suffocation the tightness of the jersey was loosened a little bit. She said she was terrified by what was happening to her.

The car was driven for about 40 minutes before it was stopped at a secret place. During the journey the car radio had been switched on to produce a very loud sound. She was led out of the car into a room where she was told to sit on a chair. A woman gave her a dress which she said she reluctantly put on in place of the night dress.

After 30 minutes of their arrival at the secret place, the applicant was taken to another room and told to sit on the floor with legs stretched forward. When the blindfold was removed, six men and one woman started interrogating her. She was told to agree to become a State witness in the case under investigation or be killed. She was asked to give the name of an ex-police officer who visited her work place seeking financial assistance to go outside the country. The questions sought to solicit from her information to the effect that she had used her organisation's funds to enable the ex-police officer to go outside the country and undergo military training in insurgency and terrorism.

The applicant said when she told the interrogators that she could not remember the name of the ex-police officer who had visited her office in 2008, one of the men took a piece of a hosepipe about one metre long. Another man took a coiled piece of iron. The two men took turns to beat her with these objects several times on the soles of her feet using severe force. She said her assailants were quite zealous in what they were doing. She yelled in pain. When the first stretch of beatings ended, a woman brought her pants to wear. The interrogation and beatings stopped in the afternoon of the first day at the secret place.

She was blindfolded and taken to a room in which she was kept in solitary confinement. The blindfold was removed each time she was in solitary confinement. In the evening of the first day of her arrival at the secret place she was blindfolded and taken to a room. She was made to sit on a chair. When the blindfold was removed she saw the same people who had interrogated her earlier that day. When the interrogation commenced she was ordered to lift both legs and place the feet on the edge of a table. She did as ordered. Two men struck the soles of her feet repeatedly with severe force using the same objects used to beat her in the morning. She said her feet felt very sore. She could hardly walk the following day.

On 4 December 2008, the applicant was interrogated in the morning and afternoon without being beaten. In the evening she was told that as she was not co-operative, a decision had been made that she be surrendered to a merciless group of men and women. A blindfold was put around her head. She said she was gripped by fear. She thought she was going to be killed as she was pushed into a car and told to lie face down on the rear seat.

The motor vehicle was driven for a considerable time before being stopped at a secluded place. There was a sound of shuffling movement of people outside the car. She thought her captors were preparing to execute her. The car suddenly reversed and then drove on. The captors asked about her workplace. They alleged that she worked for Voice of America Studio. She said she told them she worked for Voice of the People. The car got back to the secret place at 1.00a.m.

In the morning of 5 December 2008, the applicant was taken to an interrogation room. When the blindfold was removed she saw Rodrick Takawira who was her workmate in the same room. One of the interrogators said to her:

“You have been lying all along, Rodrick has told us everything”.

Rodrick was taken out of the room. One of the men brought gravel and put it on the floor to form mounds. She was told to pull up her dress above knee-level and kneel on the gravel. The interrogation began and continued with her in that position. She said she was injured on the knees and felt severe pain. Each time she tried to move the knees to relieve the pain the interrogators ordered her to move back into position. She remained in that position for one hour.

The applicant said the interrogators wanted her to say that she had assisted Ricardo Hwasheni to go to Botswana for military training so as to carry out insurgent and terrorist activities in the country. She said she told the interrogators that she had a brief interaction with Ricardo when he visited their offices asking for assistance to leave the country. She said she told the interrogators that she referred Ricardo to Fidelis Mudimu who worked in the counselling services unit of the organisation.

On the fourth day she was blindfolded and taken to a room where she was made to sit on a chair. When the blindfold was removed she saw nine men and one woman sitting at a conference table. One of the men had interrogated her before. They said they wanted to know more about Zimbabwe Peace Project and documents it had in its possession on human rights violations in the country. They asked about her interaction with Ricardo Hwasheni. She said she told the interrogators that she had told Ricardo that her organisation did not give money to people who wanted to go out of the country. They asked her why she did not ask him which country he wanted to go to. When she said that was not her business, the interrogation became very aggressive.

The applicant said the men became visibly angry. One of them threatened to make her suffer. He said they were going to make her defecate. Shaking with fear and not sure whether she would come out of the room unhurt, she was given a paper and told to write a statement. The interrogators told her to write about the trip she had made to Botswana. She did as told. The next day she was told that there were some things the interrogators wanted deleted from the statement. She removed from the statement what the interrogators did not want and added what they said was to be added to the statement.

She said she wrote the statement in the manner her interrogators wanted before signing it. According to her, it was not true that she had referred Ricardo Hwasheni to Fidelis Mudimu of the counselling unit. She said she did not make the statement freely and voluntarily. The statement contained what she was told to write by her captors because she believed that would make them release her.

On 14 December 2008 the applicant was taken to a conference room where there was a cameraman. The men and women who had interrogated her were present. The cameraman was introduced to her. She was told that she was to be video recorded whilst making a statement about how she met Ricardo Hwasheni. It was said a decision was to be made on the basis of the statement whether to prosecute her or turn her into a State witness. After saying what the interrogators wanted her to say, she was blindfolded and taken to the room where she was kept in solitary confinement. She was held in solitary confinement incommunicado until 22 December 2008.

On 22 December 2008 the applicant was blindfolded and taken by car in the company of Rodrick Takawira to a place where they were turned over to a police officer called Magwenzi. The police officer told them not to remove the blindfolds before those who brought them left. She said when the blindfold was removed she recognised the place where



they were left by their captors at Braeside Police Station. She was detained there. The police later obtained from a magistrate a warrant authorising a search to be carried out at her house in Norton. She was taken to the house. For the first time she saw members of her family. Whilst under the custody of her captors she had not been allowed to communicate with members of her family or her lawyer.

The search of the house did not yield anything relevant to the allegation that she recruited Ricardo Hwasheni to undergo military training for purposes of carrying out insurgency and terrorism in the country. On 23 December 2008 she was charged with the offence of contravening s 24(a) of the Act.

The facts on which the charge was based were extracted from the applicant by interrogation at different times during the period of detention extending from 3 to 14 December 2008. On the basis of the information on which the charge was brought against the applicant, the public prosecutor instituted the criminal proceedings. The applicant was then brought before the magistrate for remand pending trial. The public prosecutor did not adduce evidence challenging what the applicant said happened to her from the time she was kidnapped to the time she appeared before the magistrate.

### **Meaning of s 15(1) of the Constitution**

The first point taken on behalf of the applicant was that the treatment to which she was subjected by State security agents prior to the charge being laid on her constituted a contravention of s 15(1) of the Constitution. Section 15(1) of the Constitution provides that:

“(1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.”

In this case the only relevant concepts are “torture”; “inhuman treatment” and “degrading treatment”. They make up the three key elements of the protection of a person’s dignity and physical integrity from the prohibited treatment at the hands of public officials.

Section 15(1) of the Constitution enshrines one of the most fundamental values in a democratic society. *Chahal v United Kingdom* [1996] 23 EHRR 413 para 79. It is an absolute prohibition. It is because of the importance of the values it protects that the rules by which the prohibition imposes the obligations on the State are peremptory in effect. The most conspicuous consequence of this quality is that the principle at issue cannot be derogated from by the State even in a State of public emergency. (see s 25 of the Constitution).

The provision is subject only to the exercise by Parliament, when properly constituted, of the power under s 52 of the Constitution to amend, add to or repeal any provision of the Constitution upon strict compliance with the procedure prescribed for the purpose. *Mike Campbell (Pvt) Ltd v Ministry of Lands* 2008(1) ZLR 17(S).

It was in the exercise of the power conferred on it by s 52 of the Constitution, that Parliament, by means of Act No. 30 of 1990 (Amendment No. 11) and Act No. 9 of 1993 (Amendment No. 13) provided that six specific instances of treatment of individuals by the State, shall not be held to be in contravention of s 15(1) of the Constitution. These are: treatment to prevent the escape from custody of a person who has been lawfully detained (s 15(2)); moderate corporal punishment inflicted upon a person under the age of eighteen years by his parent or guardian or by someone in *loco parentis* (s 15(3)(a)); moderate corporal punishment inflicted on a male person under the age of eighteen years in execution of the judgment or order of a court (s 15(3)(b)); execution of a sentence of death in the manner prescribed in s 315(2) of the Criminal Procedure & Evidence Act [*Cap. 9:07*](s 15(4)); delay

in the execution of a sentence of death (s 15(5)) and delay in the execution of any sentence imposed by a competent court (s 15(6)).

The qualities of absoluteness in the sense of being an unconditional prohibition and non-derogability articulate the notion that the prohibition is one of the most fundamental standards of a democratic society. They are also designed to ensure that the prohibition produces a deterrent effect in that it signals in advance to all public officials and private individuals that it is an absolute value from which nobody must derogate. The fact that torture, inhuman and degrading treatment is prohibited by a peremptory provision serves to render null and void any act authorising such conduct.

The prohibition protects the dignity and physical integrity of every person regardless of his or her conduct. No exceptional circumstance such as the seriousness of the crime the person is suspected of having committed, or the danger he or she is believed to pose to national security can justify infliction of torture, or inhuman or degrading treatment. There cannot be a value in our society over which there is so clear a consensus as the prohibition of torture inhuman and degrading treatment of a person in the custody of a public official. That such a treatment should never form part of the techniques of investigation of crimes employed by law enforcement agents, is a restatement of the principle that the law which it is their duty to enforce, requires that only fair and humane treatment ought to be applied to a person under criminal investigation.

There is a distinction intended to be made under s 15(1) of the Constitution between torture on the one hand and inhuman or degrading treatment on the other. The distinction between the notion of torture and the other two concepts lies principally in the intensity of physical or mental pain and suffering inflicted, in respect of torture, on the victim intentionally and for a specific purpose. Torture is an aggravated and deliberate form of

inhuman or degrading treatment. What constitutes torture, or inhuman or degrading treatment depends on the circumstances of each case.

The definition of torture often adopted by courts as a minimum standard by which a determination of the question whether torture has been committed or not, is that provided under Article 1(1) of the United Nations Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment 1987 (hereinafter referred to as “the UN Convention on Torture”). Article 1(1) of the UN Convention on Torture provides that:

“... torture means any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not indicate pain or suffering arising only from, inherent in or incidental to lawful sanction.”

The definition of torture provided in Article (1)(1) is consistent with the interpretation by the Court in its case law of the concept as used in s 15(1) of the Constitution. It is important to note that in terms of the definition, the torture must be inflicted for the purpose of obtaining information or a confession. This is the mischief at which the UN Convention on Torture is aimed.

Inhuman treatment is treatment which when applied or inflicted on a person intentionally or with premeditation causes, if not actual bodily injury, at least intense physical or mental suffering to the person subjected thereto and also leads to acute psychiatric disturbance during interrogation: *Ireland v United Kingdom* [1978] 2 EHRR 167 para 167.

Degrading treatment is treatment which when applied to or inflicted on a person humiliates or debases him or her showing a lack of respect for or diminishing his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking the person's moral and physical resistance. The relevant notions in the definition of degrading treatment are those of humiliation and debasement. The suffering and humiliation involved must go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate or fair treatment: *Woods v Commissioner of Prisons & Anor* 2003(2) ZLR 421(S) at 432C-B.

It follows from the definition of the relevant concepts that not every treatment which causes some discomfort to the person in detention violates s 15(1) of the Constitution. Otherwise no one could be arrested, detained and interrogated in the investigation of crime. The treatment must reach the minimum level of severity before it constitutes a breach of the absolute prohibition under the section. The assessment of the minimum level of severity is relative. The question whether or not the requisite threshold of breach of the fundamental right has been reached in a particular case is determined by the consideration of such factors as the nature and context of the treatment; manner and method of its execution, as well as the duration of the treatment, its physical and mental effects and in some cases the age, sex and state of health of the victim: *Ireland v United Kingdom supra* para 162, *S v Ncube & Ors* 1987(2) ZLR 246(S) at 271A-G, *Soering v United Kingdom* [1989] 11 EHRR 439 para 100. *Woods v Commissioner of Prisons & Anor supra* at 431G.

### **APPLICATION OF SECTION 15(1)**

Applying the principles of the law on what constitutes a contravention of s 15(1) of the Constitution to the facts, the Court finds a violation by the State, through its

agents, of the applicant's fundamental right not to be subjected to torture, or to inhuman or degrading treatment. The reasons for the decision are these.

The repeated beatings on the soles of the applicant's feet with a piece of a hosepipe and a metal object using severe force on each of the two occasions she was under interrogation, constitute torture. Repeated beating of the soles of feet with a blunt instrument is a serious form of torture called "falanga". Amris K, "*Long Term Consequences of Falanga Torture*". *Torture* Vol. 19 Number 1 IRCT 2009.

Forcing the applicant to kneel for a long time on mounds of gravel whilst being interrogated, falls within the meaning of torture. The treatment to which she was subjected was premeditated. The severe pain and suffering she was forced to endure was intentionally inflicted. It was in aid of the interrogation the purpose of which was the extraction from her of information on the assistance her organisation was suspected of having given to Ricardo Hwasheni to enable him to undergo military training outside the country.

The prolonged periods of solitary confinement incommunicado on the occasions she was not being interrogated constitutes inhuman and degrading treatment. *S v Masitere* 1990(2) ZLR 289(S) at 290F. It is important to note, however, that solitary confinement is not to be deemed to be contrary to the prohibition under s 15(1) of the Constitution. It must be in conjunction with other conditions, for example, prolongation and imposition on a person who has not yet been convicted of an offence. The severity of the specific measure, its duration, the objectives pursued by it, the cumulative effect of any further conditions imposed as well as the effects on the individual's physical and mental well-being, are all factors which have to be taken into account in the assessment of the question whether a specific instance of solitary confinement is in violation of s 15(1) of the Constitution.

It was inhuman treatment to keep the applicant blindfolded each time she was out of solitary confinement and not being interrogated. The treatment was intentionally applied and caused the applicant mental suffering. She was also subjected to inhuman and degrading treatment when she was blindfolded and driven at night to an undisclosed destination under threat of unspecified action. The treatment was intended to induce in her fear and anguish. She said she feared for her life when the motor vehicle was stopped in the middle of the night at the place she could not see. She heard the sound of people shuffling about as if preparing to execute her. The feelings of fear and anguish generated in her by the treatment had the intended effect of debasing her.

The purpose of the prohibition of acts violative of s 15(1) of the Constitution is to protect human dignity and physical integrity. Any recourse to physical force against a person in the custody of a public official which is not rendered strictly necessary by his or her conduct diminishes his or her dignity and implicates a violation of the prohibition.

### **FIRST GROUND**

#### **Effect of Pre-charge Abduction and Violation of Section 15(1) on Criminal Prosecution**

The grounds on which the relief sought were premised on the court making a finding that the applicant was kidnapped from home and subjected to ill-treatment in the form of torture, inhuman and degrading treatment by State security agents prior to being charged with the criminal offence by the public prosecutor.

The general effect of the contention advanced on the first ground was that the Court should not countenance a prosecution of an accused person for a criminal offence in circumstances in which he or she was kidnapped and subjected to torture, or inhuman or degrading treatment by public officials exercising executive authority prior to the charge

being brought against him or her. The argument was that the institution of criminal proceedings in the circumstances would be an abuse of court process.

The question for determination is whether ill-treatment in breach of s 15(1) of the Constitution prior to the charge being brought against the victim taints the subsequent decisions to lay the charge and institute criminal prosecution against him or her regardless of the question whether the requirements of s 13(2)(e) of the Constitution have been complied with or not.

The decision of the Court on this point is that ill-treatment *per se* has no effect on the validity of the decisions to charge the victim with a criminal offence and institute prosecution proceedings against him or her. It is the use of the fruits of ill-treatment which may affect the validity of the decisions depending on compliance or non-compliance by the public prosecutor with the requirements of permissible deprivation of personal liberty under s 13(2)(e) of the Constitution. The reasons for the decision are these.

The requirements which a public prosecutor has to bear in mind and comply with to make a valid decision to charge an accused person with a criminal offence and institute a criminal prosecution on the charge are prescribed by s 13(1) of the Constitution. The section recognises that every person has a fundamental right to personal liberty. It then makes provision for the protection of the right against interference by the State by declaring that no person shall be deprived of personal liberty. Recognising the principle that the right to personal liberty is not an absolute right, the section goes on to specify cases listed as exceptions to the prohibition in which deprivation of personal liberty is permissible upon strict compliance with the prescribed requirements.



The requirements of permissible deprivation of personal liberty in the case of a person suspected of crime are in s 13(2) (e) of the Constitution. They constitute the standard by which the validity of the decision by the public prosecutor to charge the accused person with the criminal offence and institute criminal proceedings is to be measured. The effect of prohibition of arbitrary deprivation of personal liberty is the promotion of lawful arrest or detention and prosecution of persons suspected of having committed crimes. It is the deprivation of personal liberty in connection with the criminal justice process that is relevant to the determination of the issues raised.

Once a measure such as a criminal prosecution is based on a decision to charge the accused person with the criminal offence which complies with the requirements of permissible deprivation of personal liberty it is a lawful measure. It cannot be a subject of an order of permanent stay on the ground that the accused person was kidnapped and subjected to torture, or inhuman or degrading treatment before the charge was brought against him or her. The ill-treatment to which the accused person would have been subjected would have taken place when he or she was in a state of lawful deprivation of personal liberty. It is usually inflicted after the person has been deprived of personal liberty by arrest and detention.

Section 13(1) of the Constitution provides that:

“(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the cases specified in subsection (2).

(2) The cases referred to in subsection (1) are where a person is deprived of his personal liberty as may be authorized by law –

(a) ...

(b) ...

(c) ...

(d) ...

(e) upon reasonable suspicion of his having committed or being about to commit, a criminal offence.”

Section 13(4)(b) provides that:

- “(4) Any person who is arrested or detained –
- (a) ...
  - (b) Upon reasonable suspicion of having committed or being about to commit a criminal offence;  
and who is not released shall be brought without undue delay before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to the trial.”

Failure to comply with the requirements for a valid decision to charge the accused person with a criminal offence and the institution of criminal prosecution proceedings against him or her implicates a violation of the principle of legality or rule of law enshrined by s 18(1) of the Constitution. The principle of legality requires that every decision or act of a public official which affects the rights or interests of an individual must be in accordance with an existing law otherwise it violates the rights of the individual concerned. The requirements for permissible deprivation of personal liberty are part of the protection of that right. Compliance with the requirements is consistent with the principle of the rule of law. In that way the public prosecutor and the Court are prevented from acting arbitrarily.

Section 18(1) provides that:

- “(1) Subject to the provisions of this Constitution every person is entitled to the protection of the law.  
“(1(a)) Every public officer has a duty towards every person in Zimbabwe to exercise his or her functions as a public officer in accordance with the law and to observe and uphold the rule of law.”

The provisions of ss 13(1) and 15(1) of the Constitution protect two separate but related fundamental human rights. One right is not constitutive of the other. They are

autonomous and under protective requirements peculiar to their nature and ambit. That means that the rights may be violated independently of each other. The infliction of torture or inhuman or degrading treatment on an accused person affects his dignity and physical integrity. It does not in itself affect his or her criminal liability. The other right protects the individual from arbitrary arrest, detention and prosecution by agents of the State. The same person may be a victim of ill-treatment by law enforcement agents whilst at the same time he or she is a villain having committed a criminal offence against another person. The applicability of a particular constitutional provision should turn on the reasons it was included in the Constitution and the evils it was designed to eliminate.

The existence of reasonable suspicion of the accused person having committed the criminal offence with which he or she is charged and prosecuted is critical to the determination of the validity of the decisions to charge him or her with the criminal offence and institute criminal prosecution on the charge. A charge is an official act by which notification is given by the competent authority of an allegation that the accused person has committed a criminal offence. In *Attorney General v Blumears & Anor* 1991(1) ZLR 118(s) AT 122A-B GUBBAY CJ said:

“The standard for the deprivation of personal liberty under s 13(2)(e) of the Constitution are facts and circumstances sufficient to warrant a prudent man in suspecting that the accused person had committed, or was about to commit, a criminal offence. This standard represents a necessary accommodation between the individual’s fundamental right to the protection of his personal liberty and the State’s duty to control crime.”

It is the existence or absence of reasonable suspicion of the accused person having committed the criminal offence he or she is charged with which provides an answer to the question whether pre-charge ill-treatment of an accused person had anything to do with the institution of the criminal prosecution. The purpose of instituting criminal proceedings against an accused person on reasonable suspicion of having committed the criminal offence

with which he or she is charged is to prove the circumstance of his or her guilt. It is also to give effect to the law which proscribes the conduct he or she is charged with as a crime. The decision to charge the accused person with the criminal offence and prosecute the crime would be based on the evidence of acts he or she would be suspected of having committed before he or she was subjected to ill-treatment by law enforcement agents. The prosecution would be directly connected with the crime.

If each time an accused person was subjected to torture, or inhuman or degrading treatment prior to being charged with a criminal offence, the Court was obliged to order a permanent stay of the criminal prosecution, the requirements of permissible deprivation of personal liberty which form the standard for the validity of the decision by the public prosecutor to institute the criminal proceedings against the accused person would be reduced to mere words. It would implicate the principle of legality which requires the Court to uphold conduct which is in accordance with law.

The availability of the procedure under s 13(2)(e) of the Constitution means that where the criminal prosecution meets all the requirements of permissible deprivation of the accused person of liberty, it cannot be impugned notwithstanding the fact that the accused person was kidnapped and subjected to torture or inhuman or degrading treatment before the charge was brought against him or her. Section 24(4) of the Constitution provides a remedy to the individual whose fundamental right has been violated. No right to personal liberty would have been violated in relation to the accused person by the institution of criminal proceedings in the circumstances. An illegal arrest or detention without more, has never been viewed as a bar to subsequent prosecution for an offence the accused person is reasonably suspected on untainted evidence of having committed.

That does not mean that the accused person has no remedy for the pre-charge contravention of fundamental rights. Kidnapping a person is a criminal offence. Compensation under s 13(5) of the Constitution is payable to a person who is unlawfully arrested or detained. It is also an appropriate remedy for the redress of a contravention of a fundamental right available to the Court in the exercise of the wide discretionary power under s 24(4) of the Constitution.

A finding that the decision by a public prosecutor to charge an accused person with a criminal offence was based on reasonable suspicion of his or her having committed the offence effectively means that the criminal prosecution is lawful. It means that there is evidence on which proof of the commission of the acts defined as the crime with which the accused person is charged would be based at the trial. It also means that the wrongful conduct of ill-treating the accused person prior to being charged with the criminal offence had nothing to do with the decisions to institute and conduct the criminal prosecution. *S v Harington* 1988(2) ZLR 344(S); *Blanchard & Ors v Minister of Justice* 1999(2) ZLR 24(S); *Mthembu v The State* 2008 SCA 51 para 35.

As a matter of law and fact it is clear that where reasonable suspicion of the accused person having committed a criminal offence existed at the time the public prosecutor charged him or her with the offence in question and commenced criminal prosecution proceedings, the prosecution must be taken to have been properly instituted regardless of the fact that the accused person was subjected to torture, or inhuman or degrading treatment prior to the charge being brought against him or her. The charge and prosecution would be a product of the consideration by the public prosecutor of evidence on the conduct of alleged wrong doing by the accused person.

There is nothing in the Constitution which requires the Court to permit an accused person, reasonably suspected of a criminal offence and properly charged, to escape prosecution because he or she was subjected to torture or inhuman or degrading treatment prior to the charge being brought against him or her. The Constitution does not guarantee protection against prosecution to an accused person reasonably suspected of having committed a criminal offence on account of having been subjected to torture, or inhuman or degrading treatment before the charge was laid on him or her. Giving effect to the proposition advanced on behalf of the applicant would violate the constitutional principle of proportionality. The principle requires that a fair balance be struck between the interests of the individual in the protection of his or her fundamental rights and freedoms and the interests of the public in having those reasonably suspected of having committed criminal offences tried and if convicted, punished according to law.

Acting in the manner suggested by the applicant, would mean that the purpose of criminal law is to protect the interests of a person suspected of crime at the expense of the victim and society. That would be tantamount to providing a guarantee of immunity from prosecution to a person reasonably suspected of having committed a criminal offence in every case in which proof is produced that he or she was kidnapped and subjected to torture or inhuman or degrading treatment by agents of the State prior to being charged with a criminal offence. The victims of crime would be denied the right to the protection of the law. Justice demands, however, that each man and woman be given what is due by his or her conduct.

It would also mean that one person who fell into the hands of law enforcement agents who decided to break the law and maltreat him or her would escape prosecution whilst another person who fell into the hands of law abiding law enforcement agents would not.

That would be despite the fact that they were both reasonably suspected of having committed the criminal offences with which they were charged. Each would have known that his or her act was criminal. He or she would have committed the act before being placed in the custody of law enforcement agents.

Where there is no direct connection between the fruits of the torture or inhuman or degrading treatment to which the accused was subjected and the institution of the criminal prosecution, justification for an order of permanent stay of the criminal proceedings cannot be found in the pre-charge ill-treatment of the accused person. If the order were made it would be on the ground that there was no reasonable suspicion of the accused person having committed the offence with which he or she was charged.

In urging the first ground on the Court, Mr *Gauntlett* relied on the decision of the South African Appellate Division in *S v Ebrahim* 1991(2) SA 553(A). It is necessary to briefly look at the circumstances in which the decision was made to see whether the principles relied upon in that case are applicable to the facts of this case.

The appellant, a South African citizen by birth, fled to Swaziland whilst under a restriction order which confined him to Pinetown in Natal. In December 1986 he was forcibly abducted from his home in Mbabane by persons acting as agents of the South African State. He was taken to South Africa and handed over to the police. The police detained him in terms of security legislation. He was subsequently charged with treason, convicted and sentenced to twenty years imprisonment with labour.

Prior to pleading to the charge, the appellant launched an application seeking an order that the court lacked jurisdiction to try him. The contention was that his abduction

was in breach of international law and thus unlawful. The application was dismissed. An appeal against the ruling succeeded.

STEYN JA carried out a review of Roman and Roman-Dutch authorities on the question whether the court lacked jurisdiction. The learned Judge of Appeal came to the conclusion that under both systems the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area was considered to be tantamount to abduction. The court held that there was a rule at common law which limited a court's jurisdiction in criminal cases. That rule was to the effect that even if an offence was committed within the area of jurisdiction of the court it does not have jurisdiction to try the offender if he was abducted from another area of jurisdiction by agents of the State.

The head note to the judgment shows that the court continued at p 582C-E as follows:

“Several fundamental legal principles are implicit in these rules (of the Roman-Dutch Law) namely, the preservation and promotion of human rights, good international relations and sound administration of justice. The individual must be protected against unlawful detention and against abduction, the boundaries of jurisdiction must not be violated, State sovereignty must be respected, the legal process must be fair towards those who are affected by it and the misuse of the legal process must be avoided in order to protect and promote the dignity and integrity of the administration of justice. The state is also bound thereby. When the State itself is a party to a case, as for example in criminal cases, it must as it were come to court with “clean hands”. When the State is itself involved in an abduction over territorial boundaries, as in the present case, its hands are not clean. Rules such as those mentioned are evidence of sound legal development of high quality.”

The court in *Ebrahim's* case approved of the decision of the Federal Court of Appeal for the Second Circuit in *United States v Toscanino* 500F 2d 267(1974). The appellant, an Italian National protested that agents of the United States government had abducted him from Uruguay and taken him to Brazil where he was held in custody and



tortured. From there he was conveyed by aeroplane to the United States. He was arrested and brought to trial on a charge of conspiring to import narcotics into the country.

The trial court had followed the prevailing judicial authorities on the interpretation of the principle of due process and its application to such cases. Judicial policy at the time was represented by the decisions of the *United States Supreme Court in Ker v Illinois* (1886) 119US 436 and *Frisbie v Collins* (1952) 342 US519. These decisions held that where an accused person was brought to court on a proper charge he or she was in the lawful custody of the court and as such the court had no right to inquire into the means or method used to secure his or her presence before the court.

In holding that the concept of due process under the Fourth Amendment of the United States Constitution had been broadly interpreted and as such justified an inquiry by a court into the circumstances in which an accused person had been brought before the court, the Federal Court of Appeal departed from the line of binding decisions of the Supreme Court of the United States. In *United States v Alvaren – Machain* (1992) 119 Led. 2<sup>nd</sup> 441 that court re-affirmed its previous decisions by a majority thereby effectively overruling the decision in *Toscanino's* case.

The reasoning in *Ebrahim's* case was endorsed by the Court in *S v Beahan* 1991(2) ZLR 98(S) as having “the quality of being in accord with justice, fairness and good sense”. The principles have been applied in subsequent similar type situations in South Africa; in *Mohammed v President of the Republic of South Africa & Ors* 2001(3) SA 893(CC).

The same principles have been adopted and applied by the United Kingdom courts in similar cases of accused persons who had been forcibly abducted from territories of

sovereign States by security agents of the receiving State, in some cases with the connivance of the prosecution agency, in *R v Horseferry Road Magistrates* (1994) 1AC 42; *R v Mullen* [2000] QB 520; and *R v Loosely* [2001] UKHL 53.

There is no doubt that the contention urged on the Court was animated by the principles enunciated in *Ebrahim's* case. What is clear from the cases is that the principles in question provided a basis for an answer to a defence to the charge placed on the accused person to the effect that the court lacked jurisdiction to try him. The reason given in each of the cases was that the appearance of the accused person before the court was brought about by his forcible removal by agents of the receiving State from the territory of another sovereign State in breach of international law and the sovereignty of that State. The accused person would at the time of the abduction have been under the protection of the laws of the State in which he lived. He would have been outside the boundaries of the territorial jurisdiction of the court.

The cases merely recognised a long standing principle of international law that abduction by one State of persons located within the territory of another, violates the territorial sovereignty of the second State. The breach of international law in the circumstances is usually redressed by the return of the person abducted.

The principles enunciated in *Ebrahim's* case and those that followed it, were applied in the determination of the question of lack of jurisdiction because the courts accepted that the principles formed part of the meaning of the applicable international norms. They do not provide a basis for challenging the validity of decisions by a public prosecutor to charge a person who is resident in the area of jurisdiction of the court with a criminal offence which it has jurisdiction to hear.

The principles are not an answer to the question whether a court, whose duty is to protect fundamental human rights, can decline jurisdiction in a case in which the accused person complains that his or her fundamental rights have been contravened by the institution of criminal prosecution proceedings after he had been kidnapped and subjected to torture, or inhuman or degrading treatment by agents of the State within the area of jurisdiction of the court. They are not applicable to facts of a case the consideration of which has to take into account the existence or absence of reasonable suspicion by the public prosecutor of the accused person having committed the criminal offence with which he or she has been charged.

The principles enunciated in *Ebrahim's* case cannot be transposed and applied to facts of cases which do not raise for determination questions of breach of boundaries of criminal law jurisdiction. Different principles apply in the determination of the issues raised by the facts of this case. The cocktail of the principles of the relevant international law would have to have been violated by the receiving State before a criminal prosecution which followed could be said to be an abuse of legal process and a breach of the principles of protection and promotion of the dignity and integrity of the administration of justice. The cocktail comprises the principles of the preservation and promotion of the human right to personal liberty; the protection of individuals from unlawful detention and abduction; the protection of boundaries of territorial jurisdiction and the protection of foreign State sovereignty. Needless to say the last two principles would not form part of the law applicable to the facts of this case.

The analogy was inappropriate. The forcible abduction of an accused person from foreign territory by agents of the receiving State has the effect of barring jurisdiction by the courts because it involves breach of an affront to the sovereignty of the refuge State. The

act of arresting a person is an act of sovereignty. In such a case that power would have been exercised by one State in the territory of another State. Deriving from the cases of foreign abduction the proposition that in every case in which the accused person was subjected to torture, or inhuman, or degrading treatment before being charged with the crime the Court is obliged to order a permanent stay of the criminal prosecution was an ingenious argument which was unhelpful in the determination of the issues. To discharge the constitutional mandate of enforcing or securing the enforcement of fundamental human rights and freedoms enshrined in the constitution, the Court must exercise the power expressly conferred on it. Its duty is to determine the question whether the conduct of the State forming the subject of complaint contravenes the fundamental right or freedom sought to be enforced. It must come up with an affirmative or negative answer to that question after consideration of all the circumstances of the case.

It is unthinkable, in the circumstances, that the Court can restrict the exercise of the power and not inquire into the method by which the presence of an accused person before it was secured. It has to inquire if the allegation is that the conduct of the public officers involved in bringing the accused person violated his or her fundamental right. The only occasion in which the Court can decline to exercise its powers under s 24(4) of the Constitution is if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person under other provisions of the Constitution or under any other law. What it cannot do is to decline to exercise the power to determine the question whether or not the fundamental right has been or is being or is likely to be contravened by the conduct of the State forming the subject of complaint properly brought before it.

The argument that a criminal prosecution following a pre-charge illegal arrest, detention and infliction of torture or inhuman or degrading treatment constituted abuse of

process requiring a stay of proceedings would have to contend with the requirements of s 13(2)(e) of the Constitution and show the fundamental right or freedom guaranteed by the Constitution that has been violated by the institution of the criminal prosecution in those circumstances. It is not necessary to consider the argument in this case.

## **THE SECOND GROUND**

### **Effect of Pre-charge Abduction and Violation of s 15(1) on Criminal Prosecution**

The second ground on which the validity of the decision to institute the criminal prosecution was challenged was that the prosecution was unlawful because it was based on information or evidence obtained from the applicant by infliction of torture, inhuman and degrading treatment.

In the raising of the issue of the wrongful conduct of public officers antecedent to the charge being brought against the accused person and its connection with the prosecution proceedings instituted was the suggestion that the responsibility of the State was engaged in occasioning a violation of the accused person's fundamental right to personal liberty. In such a case there had to be produced clear evidence of a direct connection between the antecedent breach of the fundamental right of the accused not to be subjected to torture, or inhuman or degrading treatment and the decision to charge and prosecute him or her. The institution of the criminal prosecution had to be shown to have been a direct consequence of the precedent wrongful conduct of the State. In other words it had to be a product of the outrageous conduct of pre-charge ill-treatment of the accused person by law enforcement agents.

According to the applicant the use by the public prosecutor of information obtained from her by infliction of the treatment prohibited by s 15(1) of the Constitution, is evidence of the existence of the requisite direct connection between antecedent violation of

the fundamental right and the criminal prosecution. The criminal prosecution was an outgrowth or fruit of the torture, inhuman and degrading treatment to which she was subjected.

The contention advanced on behalf of the applicant on the second ground was premised upon an interpretation of the provisions of s 15(1) of the Constitution which recognises that the prohibition contains a rule, by which it imposes an obligation on public officers charged with the responsibilities of initiating and conducting criminal prosecution and judicial officers who preside over them, not to admit or use information or evidence obtained from an accused person or any third party by torture, or inhuman or degrading treatment.

Three issues arise in this context for determination. They are: (i) whether or not s 15(1) of the Constitution contains a rule prohibiting the admission or use, in any legal proceedings, of information or evidence obtained from an accused person or defendant or any third party by infliction of torture or inhuman or degrading treatment. (ii) On whom does the burden of proving the essential elements of the rule lie and what is the standard for the discharge of the onus. (iii) What effect does a finding that the onus has been discharged have on the question of the contravention of the fundamental rights of the accused person protected under ss 13(1); 15(1) and 18(1) of the Constitution.

### **Section 15(1) of the Constitution and Evidence obtained by Torture**

The Court takes the first point for determination. Its decision on the point is that s 15(1) of the Constitution contains the rule by which it imposes on the State, through its agents, the obligation not to admit or use in any legal proceedings, information or evidence obtained from an accused person or defendant or any third party by torture, or inhuman or degrading treatment. The reasons for the decision are these.

Article 15 of the UN Convention on Torture requires State parties to ensure “that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings except against a person accused of torture as evidence that the statement was made”. Article 15 of the African Commission Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa and Article 16 of the Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders in Havana Cuba on 27 August to 7 September 1990 are important. They recognise the existence of an obligation on the public prosecutors not to use or rely on information or evidence obtained from an accused person or any third party by torture, or inhuman or degrading treatment to make decisions in the exercise of prosecutorial powers.

The relevance of the reference to the provisions of Article 15 of the UN Convention on Torture is not in the substance of the obligation imposed on State parties. It is on the principle of interpretation involved. Of importance to the determination of the question before the Court, is the recognition and acceptance of the principle that the rules in Article 15 of the UN Convention on Torture and the UN Guidelines on the Role of Prosecutors are based on the interpretation of Article 5 of the Universal Declaration of Human Rights (1948). Article 5 prohibits in absolute and non-derogable terms infliction of torture, inhuman or degrading treatment or punishment on any person.

The African Commission Guidelines on Legal Assistance are based on the interpretation of the relevant provisions of the African Charter on Human and People’s Rights (1981). Article 5 of the African Charter prohibits torture, inhuman and degrading treatment or punishment of any person. The principle of interpretation which emerges is that the fact that a stand-alone rule has been used to denote the meaning of a primary provision

does not prevent a court interpreting the meaning of a primary provision in similar language as covering the matters explicitly dealt with in the rule if the meaning of the primary provision has not been explained by a similar rule.

The principle under consideration was applied by the European Court of Human Rights in *Soering v United Kingdom* (1989) 11 EHRR 439. That Court held, on the interpretation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (“the ECHR”), that the prohibition by the Article was the basis for the rule against admission or use of information or evidence established to have been obtained or in respect to which there were substantial grounds for believing that it was obtained from the defendant or a third party by infliction of torture, inhuman or degrading treatment.

Considering the fact that Article 3 of the ECHR did not spell out in specific terms as did Article 3 of the UN Convention on Torture that no State “shall extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture”, the European Court of Human Rights at para 88 of the judgment in *Soering’s* case *supra* said:

“The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention.”

The obligation on the State, through its agents, not to admit or use in criminal proceedings, information or evidence obtained from an accused person or any third party by infliction of torture, inhuman or degrading treatment is not explicitly set out by a separate provision in the Constitution. It would be contrary to the object and purpose of the



prohibition under s 15(1) of the Constitution to allow admission or use of such information or evidence in any legal proceedings.

A proper interpretation of s 15(1) of the Constitution which takes into account the purpose and broadness of the language underlying the importance of the fundamental value protected, compels the Court to conclude that the obligation on the State not to admit or use information or evidence obtained from an accused person or any third party by infliction of torture, or inhuman or degrading treatment in any legal proceedings attaches to the prohibition of such treatment by s 15(1) of the Constitution.

The obligation is inherent in the general terms of the section. It enjoys with the general prohibition the same qualities of being absolute and non-derogable. The condemnation is more aptly categorised as a constitutional principle than as a rule of evidence. The obligation is an exception to the general rule of evidence enacted by s 48(1) of the Civil Evidence Act [*Cap. 8:01*]. That rule is to the effect that evidence of violation of a fundamental right or freedom is admissible in legal proceedings unless its admission would bring the administration of justice into disrepute. *Paradza v Chirwa & Ors NNO* 2005(2) ZLR 94(S) at 111G-112D; *A & Ors v Secretary for State for Home Affairs* [2005] UKHL 71 para 12.

At various stages of the whole process of proceedings by which the State deals with persons suspected of crime who are in the custody of public officers, the Constitution imposes duties for the protection of the fundamental rights of the suspect. The primary duty is on the law enforcement agents not to abuse executive authority in the investigation of crime by torturing or treating suspects in an inhuman or degrading manner to extract information or confessions to be used against them in legal proceedings anticipated to follow the ill-treatment. If the duty fails to achieve its intended purpose at this stage, the law

imposes the duty on public prosecutors not to admit or use information or evidence obtained from an accused person suspected of having committed a criminal offence or any third party by torture, inhuman or degrading treatment when making prosecutorial decisions. If the duty fails at this stage the law imposes the duty on judicial officers. Eventually it lies with the Court to intervene through the exercise of its original jurisdiction to enforce or secure the enforcement of fundamental rights.

The rationale for the exclusionary rule is the protection of any person suspected of a crime who is in the custody of a public officer from torturous, or inhumane or debasing invasions of his or her dignity and physical integrity. Its object is to ensure that criminal prosecutions which are a direct consequence of the pre-trial illegality violative of fundamental rights of an accused person to freedom from torture, inhuman and degrading treatment are not used to give legitimacy to such conduct.

The rule has nothing to do with the fair determination of the guilt or innocence of the accused person. Where there is independent evidence which has been obtained lawfully and on which reasonable suspicion of the accused person having committed the criminal offence with which he or she is charged is founded, an order of permanent stay of a criminal prosecution is not justified. The rule represents a device designed to deter disregard for constitutional prohibitions and give substance to constitutionally protected fundamental rights. The exclusionary rule as a remedy for the enforcement of the protection of fundamental rights under the Constitution is not intended to immunise an accused person from criminal prosecution for any action he or she is reasonably suspected of having committed which is provable at the trial by independent evidence lawfully obtained.

Information or evidence obtained from an accused person or any third party by torture, or inhuman or degrading treatment if admitted or used in legal proceedings would reduce s 15(1) of the Constitution to a mere form of words. As JACKSON J put it in the dissenting opinion in *Korematsu v United States* (1944) 323 US 214 at 246 “once judicial approval is given to such conduct it lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need”. In *People (Attorney-General) v O’Brien* (1965) IR 142 KINGSMILL MOORE J of the Supreme Court of Ireland said that:

“to countenance the use of evidence extracted or discovered by gross personal violence would ... involve the State in moral defilement.”

In *A & Ors supra* at para 35 LORD BINGHAM OF CORNHILL quotes from a report by *Mr Alvaro Gil – Robles*, the Council of Europe Commissioner for Human Rights on his visit to the United Kingdom in November 2004 (8 June 2005 Comm. D.H 2005) where he said:

“Torture is torture whoever does it, judicial proceedings are judicial proceedings, whatever their purpose - the former can never be admissible in the latter.”

Giving as a reason for holding in *S v Nkomo* 1989(3) ZLR 117(S) that a court was under an obligation not to admit or use in any proceedings evidence of objects pointed out as part of confessions extracted from an accused person by torture MCNALLY JA at p 131F said:

“It does not seem to me that one can condemn torture while making use of the mute confession resulting from that torture, because the effect is to encourage torture.”

In *A & Ors supra* at para 39 LORD BINGHAM OF CORNHILL quotes from the work on “*The United Nations Convention Against Torture*” (1988) where Burgers and Danelius suggest at p 148 that:

“... it should be recalled that torture is often aimed at ensuring evidence in judicial proceedings. Consequently, if a statement made under torture cannot be invoked as evidence, an important reason for using torture is removed and the prohibition against the use of such statements as evidence before a court can therefore have the indirect effect of preventing torture.”

Lastly, in *Mthembu's* case *supra* the South African Supreme Court of Appeal ruled that the admission of evidence obtained through the use of torture would compromise the integrity of the judicial process and bring the administration of justice into disrepute. The reason given is that torture is barbaric, illegal and inhuman and is one of the most serious of human rights violations. That court applied the exclusionary rule against the admission or use of information or evidence obtained by torture in legal proceedings as an exception to the general rule contained in s 35(5) of the Constitution of South Africa. The section provides that:

“evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render that trial unfair or otherwise be detrimental to the administration of justice.”

It is clear that the rationale for the exclusionary rule against the admission or use of information or evidence obtained from an accused person or any third party by infliction of torture, or inhuman or degrading treatment as contained in s 15(1) of the Constitution, is founded on the absolute obligation imposed on the State. It is also founded on the revulsion which attaches to the source of such information or evidence coupled with its offensiveness to civilized values and its degrading effect on the administration of justice. The rule applies even when the evidence is reliable and necessary to secure the conviction of an accused person facing serious charges. The reliability or probative value of the information or evidence is irrelevant because its admissibility is prohibited in absolute and peremptory terms. It is vital in a society governed by the rule of law that persons in the custody of public officials should not be subjected to ill-treatment of the level of severity prohibited by s 15(1) of the Constitution.

**ONUS**

The Court takes the second point for determination. Its decision is that the onus is on the applicant to establish, on a balance of probabilities, that the information or evidence of the crime used by the public prosecutor to charge her with the criminal offence and prosecute her for it was obtained by the infliction of torture, inhuman and degrading treatment at the hands of the State security agents prior to the charge being brought against her. The reason for the decision is that it is the accused person or defendant who has to raise the question of contravention of fundamental rights by the State. It is he or she who would have knowledge of what was done to him or her and what information was extracted as a result of the ill-treatment. It was then for the State to prove beyond reasonable doubt that the decision to charge the applicant with and prosecute the criminal offence was taken upon consideration of independent information or evidence of the crime lawfully obtained and on which reasonable suspicion of her having committed the criminal offence was based.

The applicant discharged the onus on her. She established by oral and affidavit evidence that in bringing the charge of contravening s 24(a) of the Act against her and initiating the prosecution proceedings, the public prosecutor relied solely on information on the commission of the alleged criminal acts obtained from her and a third party by torture, inhuman and degrading treatment. There was an inextricable link between the ill-treatment and the criminal prosecution. No evidence was placed before the Court by the respondent to show that the decisions by the public prosecutor were based on independent evidence of the crime which was lawfully obtained. It is important to emphasise the fact that the ordering of the exclusion of evidence obtained by torture or inhuman or degrading treatment assumes implicitly that the remedy does not extend to barring the prosecution based on evidence wholly untainted by the misconduct of the law enforcement agents. It is also important to point out that where the allegations by the accused are contested by the State, it is the court

before which the allegations are first made or the trial court which must hear the parties and decide question of facts.

### **Effect on Violation of Exclusionary Rule**

Finally, the Court takes the third point for determination. Its decision on this point is that the effect of the finding that the public prosecutor relied on information or evidence of the commission of the alleged criminal acts obtained from the applicant by torture, inhuman and degrading treatment in deciding to charge her with and prosecute her for the criminal offence, is that there was a breach of ss 15(1) and 13(1) of the Constitution. The breach of s 13(1) of the Constitution lies not in the use of torture, inhuman and degrading treatment to obtain the information or evidence of the crime from the applicant. That is a breach of s 15(1) of the Constitution.

The violation of s 13(1) of the Constitution lies in the use of, or reliance by the public prosecutor on, the information or evidence obtained by torture, inhuman and degrading treatment for the purposes of making the prosecutorial decisions. Had the public prosecutor rejected the information or evidence of the crime obtained from the applicant by torture, inhuman and degrading treatment, there would have been a violation of s 15(1) of the Constitution but no breach of s 13(1) provided the criminal prosecution was supported by a reasonable suspicion of her having committed the criminal offence with which she was charged. The reason is that the criminal prosecution would be a proceeding for the proof beyond reasonable doubt of the guilt of the accused person of the crime with which he or she is charged, based on no more or less evidence of the criminal acts than was available at the time of their commission.

The criminal prosecution was a direct consequence of the violation of s 15(1) of the Constitution. The absolute and non-derogable fundamental right of the applicant not to have information or evidence of the crime obtained from her or any third party by torture, or inhuman or degrading treatment used or relied upon by the public prosecutor in making the prosecutorial decisions to charge her with the criminal offence and institute the criminal prosecution was contravened. There was also a violation of the applicant's fundamental right to the protection of the law guaranteed by s 18(1) of the Constitution. By acting in the manner he did, the public prosecutor failed to act in accordance with the requirements of the protection of the fundamental rights prescribed by ss 15(1) and 13(1) of the Constitution. He acted in breach of the principle of the rule of law.

It is clear from the facts that at the time the State security agents kidnapped the applicant from home and later detained her at the secret place, they did not have reasonable suspicion of her having committed the criminal offence she was later charged with. They then used torture, inhuman and degrading treatment during interrogation to extract from her information or evidence on which they expected that the public prosecutor would act as a basis of a reasonable suspicion of her having committed the criminal offence with which she was then charged. The effect of the operation of the exclusionary rule is that the whole conduct of the State security agents in kidnapping and detaining the applicant and subjecting her to torture, inhuman and degrading treatment was a violation of the fundamental rights guaranteed to her by s 13(1), 15(1) and 18(1) of the Constitution. It also shows that the criminal prosecution was a direct consequence of the violation of s 15(1) of the Constitution thereby engaging the responsibility of the State in the contravention of ss 13(1) and 18(1) of the Constitution. In so far as the applicant suggested that she should not be prosecuted because her presence in court followed her unlawful arrest or kidnapping and ill-treatment by State security agents she could not claim immunity from prosecution on those grounds alone

because her body is not a suppressible fruit and the illegality of her detention and treatment could not deprive the Government of the opportunity to prosecute her and prove her guilt on independent evidence wholly untainted by the misconduct of law enforcement agents. *United States v Crews* 445 US 463(1980) p474, *Key v Attorney General & Anor* 1996(4) SA 187(CC) at 195G-196B.

### **COSTS**

The Court takes the question of costs for determination. Its decision on this point is that there be no order as to costs. The reasons for the decision are these.

Section 24(4) of the Constitution gives the Court a wide discretion as to the choice of a practical and effective remedy which can appropriately redress a violation of a fundamental human right or freedom. An order of permanent stay of the criminal prosecution was considered by the Court to be the appropriate remedy for the redress of the violation of the applicant's fundamental rights. The violation would otherwise have continued. In *re Mlambo* 1991(2) ZLR 339(S) at 355B-E. In selecting an appropriate remedy under the Constitution the primary concern of the Court must be to apply the measures that will best vindicate the values expressed in the Constitution and to provide the form of remedy to those whose rights have been violated that best achieves that objective. This flows from the Court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of the country. *Osborne v Canada* (1991) 82D.L.R. (4<sup>th</sup>) 321 at 346e-f.

Costs are in the discretion of the Court. It is permissible in cases of this nature to order that costs incurred should follow the event. *Bull v Attorney-General of Zimbabwe* 1987(1) ZLR 35(S). Nonetheless a constitutional question was raised with regard to which the answer was not self-evident. The question whether s 15(1) of the Constitution imposes an absolute and non-derogable obligation on the State, through its agents, not to admit or use



information or evidence of the crime obtained from an accused person or defendant by infliction on him or her or any third party of torture, or inhuman or degrading treatment had not been raised and exhaustively determined by the Court before.

The opportunity arose for the Court to clarify the law on the fundamental right of a person accused of a crime not to have information or evidence obtained from him or her by infliction of torture, or inhuman or degrading treatment admitted or used against him or her in any legal proceedings. The legal question had to be clarified not only for the benefit of accused persons in similar circumstances. It has been clarified for the benefit of public prosecutors and judicial officers. The victor is therefore not the applicant but the administration of justice. The respondent did not challenge the correctness of the factual basis of the constitutional question. He properly took the view that the resolution of the legal question was in the public interest. The Court considers that the respondent should not be penalised by an order of costs. There will be no order as to costs.

CHIDYAUSIKU CJ: I agree

SANDURA JA: I agree

ZIYAMBI JA: I agree

GARWE JA: I agree

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