JORAM DUBE	**APPLICANT**
AND	
OFFICER COMMANDING DISTRICT, NKAYI	**1ST RESPONDENT**
AND	
OFFICER IN CHARGE, NKAYI	**2ND RESPONDENT**
AND	
COMMISSIONER GENERAL OF POLICE	**3RD RESPONDENT**
AND	
CO-MINISTERS OF HOME AFFAIRS	**4TH RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 14 OCTOBER 2010 AND 21 OCTOBER 2010

Mrs Chanaiwa assisted by *Mr Jamela* for applicant
Respondent in default

Opposed Application

MATHONSI J: The Applicant is a political activist who has been organising political meetings for one Abednico Bhebhe, a former member of parliament for Nkayi South Constituency. He was arrested on 17 June 2010 at his home in Nkayi at around 2300 hours. He alleges that he was arrested without a warrant and was not informed of the reasons of his arrest but was merely taken to Nkayi Police Station where he was detained that same night.

The Applicant was not taken to Court and when his legal practitioner was notified of the continued detention of the Applicant she visited him at Nkayi Police Station on 21 June 2010

where she was able to talk to the Applicant through the fence. That interview revealed that, even at that stage, some four days after his arrest and detention, the Applicant had not been charged and did not know the reason for his arrest. He had not been taken before a judicial officer but was being held in communicado.

As the Applicant remained in detention without charge at Nkayi Police Station with the officer in charge of that station indicating that he had been arrested on the instructions of the first Respondent who was away and that it was only the first Respondent who could order his release, an urgent application was filed in this Court on behalf of the Applicant on 24 June 2010.

A provisional order was granted on the same date the interim relief of which reads as follows:

> "**TERMS OF THE INTERIM RELIEF GRANTED**
> 1. That 1st, 2nd, 3rd and 4th Respondents and any person or authority acting or purporting to act through him and/or on his behalf, be an is hereby ordered to take the applicant before a magistrate not later than 4:30pm on 25 June 2010.
> 2. That this Order shall stand notwithstanding the noting of any appeal."

That order was served together with the urgent application on the police in Nkayi on 25 June 2010 at 3pm. By then, it had been 8 days since the detention of the Applicant. Presumably in response the court order but certainly not in compliance with it, the Respondents released the Applicant from custody. *Mrs Chanaiwa* appearing for the Applicant submitted that since then, no further action has been taken against the Applicant and he has certainly not been prosecuted for any offence.

On 29 June 2010 days after releasing the Applicant from custody Respondents filed opposition to the application and the confirmation of the provisional order. In his opposing

affidavit, the first Respondent makes interesting revelations. The affidavit in question reads in part as follows:

> "1.0 I, Jairos Wilstaff Chiwona, do hereby make oath and swear that; I am currently the Officer Commanding Nkayi District and the first respondent in this matter and in that capacity I am authorised to depose to this affidavit.
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> 2.0 Ad Para 1-6 No issues arising
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> 3.0 Ad Para 7-9
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> It is admitted. The Applicant was arrested on the 17th June 2010 at about 2300 hours on the strength of a warrant of apprehension issued by myself on the 17th June 2010. A copy of which is attached and marked as Annexure 'A'. The warrant of apprehension clearly indicates that the applicant was being arrested for C/s 15(1)(c) of the Public Order and Security Act [Chapter 11:17]. The Applicant was arrested by number 054082J Sergeant Nkala and number 051531L Sergeant Makandizhe who showed the applicant the warrant of apprehension and informed him of the reason for his arrest. Nkayi CR 18/6/10 was subsequently opened and investigations commenced. It is thus not true that the applicant was arrested without a warrant of apprehension and that he was arrested without a charge. It is mischievous and deliberate misleading of the court by NOSIMILO CHANAIWA to say that there was no warrant of apprehension and the applicant was not informed of the reason of his arrest. As a matter of fact the report by officer in charge Nkayi Police Station indicates that NOSIMILO CHANAIWA was aware of the existence of the charge and of the warrant of apprehension before she made the founding affidavit on the 24th of June 2010.
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> 4.0 Ad para 10 – 11
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> ---.
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> 5.0 Ad para 12 – 16
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> ---.
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> 6.0 Ad para 17 – 21
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> It is not true. From the date of arrest to the 25th June 2010, which is the date the applicant was released on remand, we have been making investigations into the case and these investigations are yet to be completed.
>
> They are likely to be protracted since they will involve interviews with certain media houses that have published information to the effect that the meeting took place. The law provides for a person arrested with a warrant of apprehension to be detained for a period not exceeding 14 days and to be brought before a judicial officer as soon as possible. May it be pointed out that even before the application the police had already decided and had actually

made an effort to place the applicant on remand but unfortunately the magistrate THABEKHULU DUBE and the prosecutor MAXWELL HAPANYENGWI decided to recuse themselves from the case where they even denied the police the right to have the applicant appear before them. As a result we had to release him out of custody. They even refused to have a hearing of the case despite being shown the provisional court order, which directed the police to take the applicant before a magistrate. Because of the foregoing the police complied with all legal procedures from the time of arrest up to the time of the applicant's release. The question of costs should therefore not be raised. I pray therefore that the application be dismissed.

Thus sworn at Bulawayo this 29th day of June 2010.
Signed
Joram Wilstaff Chiwona
Signed
Commissioner of oaths."
(The underlining is mine.)

That the celebrated and time honoured principle of our criminal justice system that an accused person is innocent until proven guilty is still part of our law is beyond doubt. So is the principle that the police should investigate the alleged commission of a crime and formulate a reasonable suspicion that an accused person has committed an offence before effecting an arrest. These legal and social mores have been with us since time immemorial.

For a senior police officer, commanding an entire district to swear that a suspect was arrested only for a crime docket to be opened later and for investigations to commence when the suspect was already languishing in custody is disturbing to say the least. It means that at time of the arrest, the arresting detail could not countenance any reasonable suspicion that the suspect had committed an offence.

Section 25(1) of the Criminal Procedure and Evidence Act, authorises a police officer to arrest without warrant where "he or she has reasonable grounds to suspect", that a person has committed a 1st Schedule or 9th Schedule offence. In casu, the police have maintained that this

was an arrest with a warrant. It is therefore not necessary to discuss the law on arrest without warrant. The warrant in question has not been produced. It is unlikely that such warrant existed and where the police have failed despite having more than four months to spare, to produce it, the reasonable inference is that it does not exist.

The deposition made by the first Respondent is shocking indeed. He has confidently said that where a warrant of apprehension has been issued by him, they are entitled to detain the suspect for a period of up to 14 days. Regrettably in heads of argument filed on behalf of Respondents they could not refer me to any such provision because it simply does not exist. It is not counsel's failure to dig up a law applied by the police in Nkayi that is regrettable but the knowledge that senior officers policing an entire region would believe that they have a legal right to detain suspects for a period of 14 days when no such right exists. To think that other suspects out there not so fortunate to afford legal representation have their rights trampled upon as a result of the ignorance of law enforcement agents is shuddering.

The position of our law relating to the arrest of suspects is a simple one. It is that before arresting a person, except one who commits an offence in the presence of the arresting detail, such arresting detail must formulate a reasonable suspicion that an offence has been committed. Section 25(1) (b) of the Criminal Code talks of "reasonable grounds to suspect" that an offence has been committed.

Section 33 allows a judge, magistrate or a justice of the peace to issue a warrant of arrest of a suspect or for further detention of a suspect arrested without a warrant on written application made to him or her by the Attorney General, local prosecutor or an officer in charge

of a station holding a rank of at least assistant inspector. Even then the Applicant must show that he has reasonable grounds of suspicion against that person.

Once arrested and brought to a police station, section 32 of the Criminal Code demands that a suspect can only be detained for a period not exceeding 48 hours at a police station unless he is brought before a judicial officer who is the only authority empowered to order a further detention.

Even where an arrest warrant is issued section 34(3) requires the suspect to be brought "as soon as possible before a judicial officer on a charge of the offence" mentioned in the warrant.

The proviso to subsection (3) of section 32 makes it absolutely clear that no reckoning of time shall allow the detention of a suspect for a period exceeding 96 hours before being brought before a judicial officer

This procedure applies even in respect of 9th Schedule offences as the 21 day detention allowed for such offences can only be ordered by a judicial officer. Police officers do not have any authority whatsoever to detain suspects beyond the prescribed period of time.

Officer Chiwona has sworn to an affidavit that the warrant that he issued for the arrest of the Applicant was for contravention of section 15(1) (c) of the Public Order and Security Act, [Chapter 11:17]. This was despite the fact that the section in question was repealed by section 282 of Act 23 of 2004, that is, the Criminal Law Code, [Chapter 9:23]. At the time he purportedly issued the warrant, the section under which he wanted to arrest the Applicant did not exist.

Even if I am wrong in my finding that the warrant in question did not exist, reference to a repealed section of the Public Order and Security Act, rendered it invalid and unenforceable. If the Applicant was arrested on the strength of an invalid warrant, that arrest was therefore unlawful. As that icon of English Law, Lord Denning put it; "You cannot put something on nothing and expect it to stand, it will collapse."

The Applicant was not brought to court within 48 hours or as soon as possible as provided by the law. In fact he was not brought to court at all while first Respondent wallowed in the mistaken view that he was entitled to detain him for a period of up to 14 days. Section 13(2) of the Constitution guarantees every citizen's right to liberty.

In *Chiyangwa v The State* 2005 (1) ZLR 163 HUNGWE J at 169 C – E quoted with approval the following pronouncement in the United States of American case of *McNabb v United States* 318 US 332 (1943) at 343:

> "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of the cherished liberties. Experience has therefore counselled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The lawful instruments of the criminal law cannot be trusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon who the criminal law relies for its indication."

This is apposite in this case because the requirement to bring suspects before a judicial officer within the prescribed period is meant to curb the excesses of police officers who erroneously believe they can keep suspects for 14 days without charge. In fact in this case, even the contemplated charge was in terms of a non-existent section of the Public Order and Security Act.

In *S v Makwakwa* 1997 (2) ZLR 298 at 305 C – D GILLESPIE J said:

> "The lesson to be learned from this is that delay in bringing a detained person before a magistrate will only be countenanced when that delay is excusable on some objective ground."

See also *Kinfe v State* S 60/98 (unreported) at page 4.

The Respondents have alleged that Applicant could not be brought to court because the Magistrate and the prosecutor recused themselves. It has not been explained how and why this bizarre occurrence came to pass. I am of the view however that this excuse is as lame as it is unsustainable. The police could have easily brought the Applicant to a Magistrate in Bulawayo if indeed this unlikely occurrence happened. They did not.

In any event, the tone of first Respondent's affidavit suggests that this was done after the provisional order had been issued directing that Applicant be brought before a Magistrate. By then, the Applicant's detention was already unlawful, in fact it was unlawful from the very beginning and could not be cured by the belated reference to the resident Magistrate and the prosecutor for Nkayi.

In the result I make the following order:

(1) That the provisional order granted on 24 June 2010 be and is hereby confirmed.

(2) That there is no lawful basis for the first and second Respondents to have the applicant detained in police cells for a period exceeding that provided for at law.

(3) That Respondents shall bear the costs of this application on a legal practitioner and client scale, jointly and severally, the one paying the others to absolved.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners