REPORTABLE (51)

Judgment No. S.C. 88/99
Civil Application No. 93/99

(1) GARY GEORGE BLANCHARD

(2) JOSEPH WENDELL PETTIJOHN

(3) JOHN LAMONTE DIXON v

(1) THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS

(2) THE OFFICER IN CHARGE OF CHIKURUBI MAXIMUM PRISON

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA, EBRAHIM JA, MUCHECHETERE JA & SANDURA JA
HARARE, JULY 7 & 9, 1999

J C Andersen SC, for the applicants

J Musimbe, for the respondents

GUBBAY CJ: This application was brought jointly by Gary George Blanchard, Joseph Wendell Pettijohn and John Lamonte Dixon direct to this Court pursuant to s 24(1) of the Constitution of Zimbabwe. It concerned an alleged violation of s 15(1) of the Declaration of Rights by both the first respondent, who is the Minister responsible for the administration of the Prisons Act [*Chapter 7:11*] and the second respondent, who is the Officer-in-Charge of Chikurubi Maximum Security Prison. It is there where the three applicants are presently incarcerated.

On 9 July 1999, two days after argument was addressed by the parties, an order was made in the following terms:

> "1. The individual cells occupied by the applicants, as unconvicted prisoners in Chikurubi Maximum Prison, are to remain unlocked and open between the hours of 0700 and 1600 every day of the week, including Saturdays, Sundays and Public Holidays, thereby affording them freedom of movement and communication within the cell block in which they are detained.
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> 2. The electric light in each applicant's cell is to be switched off between the hours of 2200 and 0600.
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> 3. The applicants, while remaining unconvicted prisoners, shall be entitled to use and wear their own civilian clothing at all times.
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> 4. The applicants, while remaining unconvicted prisoners, shall be entitled to receive every day, from sources outside the prison, as much food as they require.
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> 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."

These are the reasons that led to the grant of the redress specified in the order.

The three applicants are citizens of the United States of America, the country where they are ordinarily resident. They claim to be missionaries and

members of the Harvestfield Pentecostal Church. During the late afternoon of 7 March 1999 they were arrested at Harare International Airport when about to depart aboard a Swiss aircraft destined for Zurich. An X-ray screening of their luggage had revealed the presence of a large quantity of offensive weapons and offensive materials. A subsequent search of a locked Sierra truck left by the applicants in the paid for security parking area of the airport resulted in the discovery of a further quantity of weaponry and ammunition.

The applicants were held in custody for six days, at different police stations, while under investigation by members of the Criminal Investigation Department and Law and Order Section of the police. In breach of s 32 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] they were only taken before a court for remand on 13 March 1999, several days beyond the prescribed period. At that hearing, presided over by a regional magistrate, they were jointly charged with contravening s 51(2) of the Law and Order (Maintenance) Act [*Chapter 11:07*] - plotting the commission of acts of terrorism and sabotage - alternatively, with contravening s 37(2) of the same Act - the unlawful possession of offensive weapons and offensive materials. Both offences permit of a sentence of imprisonment for life. The legal practitioner who appeared made it known to the regional magistrate that, in the course of interrogation, members of the Criminal Investigation Department had subjected the applicants to various forms of inhuman treatment, including torture, assault, intimidation and a denial of fundamental human rights. The occurrence of such abuse, which was particularised in later correspondence, was not denied by the respondents. Nor was it put in issue that at that time the applicants were in a state of

shock. They were suffering from physical and mental trauma and fearful of a recurrence of ill-treatment.

Upon admission to Chikurubi Maximum Security Grade IV Prison the applicants were classified as 'D' class prisoners, a category relating to those prisoners, whether convicted or unconvicted, who are deemed to require the utmost security and vigilance. This was on account of the serious nature of the charges the applicants were due to answer and the belief that they might attempt to escape. Since then each of the applicants has been confined in a single cell in the same heavily guarded and very secure cell block. There are eleven cells in the block. A row of five cells faces another row of six. Each cell is small, measuring approximately 4.5 metres long by 1.5 metres wide. The side and rear walls are solid and windowless. Across the front of the cell are a number of closely spaced iron bars; attached thereto is a steel mesh screen or grill in which is a locked gate of similar construction. Inside the cell is a self-flushing toilet and a low concrete platform covered with a mattress and blanket. Eight of the eleven cells are occupied, four by convicted prisoners, three by the applicants and one by another awaiting trial prisoner. Those holding the applicants are not adjoining. They are not able to see one another by looking out of the grill gate. Nor are they permitted to call out to each other. Save for being allowed an adequate period every day to exercise and shower, which activities must be taken alone, the applicants are kept locked in their individual cells. An electric light burns in each cell and is never extinguished. The applicants receive personal visits from the prison chaplain and have been seen infrequently, yet again individually, by United States consular officials. The only occasions when the applicants are in one

another's company and able to converse with each other are during consultations with their legal representative and when taken to court on remand under armed escort.

Until towards the end of April 1999 the practice adopted was that after the evening meal (provided at mid-afternoon to each cell) the applicants, preparatory to going to sleep, were stripped naked and shackled in leg-irons. It was only at the first meal of the next day that the leg-irons were removed and the clothing returned. This manifestly inhuman measure was discontinued upon the instruction of the Attorney-General, though a resumption of it was threatened.

I feel bound to condemn any recourse by prison authorities to the use of leg-irons and handcuffs except for the prevention of escape during transportation or in order to restrain violent behaviour provided, in the absence of other effective methods, the prisoner would endanger his own or other persons' safety or significantly damage property.

The applicants are dressed in prison clothing. They are not being permitted to wear their own civilian attire. They are also without their wristwatches which were removed from them, along with other items of value, upon admission to Chikurubi Prison.

More recently the Attorney-General has decided not to indict the applicants upon a contravention of s 51(2) of the Law and Order (Maintenance) Act. At their trial the applicants are to be charged, first, with a contravention of s 37(2) of the same Act; and, second, with an attempt to contravene s 7(1)(a) of the Aircraft

(Offences) Act [*Chapter 9:01*] - attempting to carry, place or cause to be placed dangerous goods aboard an aircraft. In extra-curial statements made to the police the applicants deny that they were in possession of the weapons and materials recovered from them for any sinister purpose and that they had undertaken any illegal activity with them either within or outside Zimbabwe. Notwithstanding that the most serious charge is not being proceeded with, the conditions under which the applicants are incarcerated have not been relaxed.

In *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs & Anor* 1991 (1) ZLR 105 (S); 1992 (2) SA 56 (ZS), and *Woods & Ors v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1994 (2) ZLR 195 (S); 1995 (1) SA 703 (ZS), this Court emphatically recognised that while prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices which in their judgment are needed to preserve internal order and discipline, and to maintain institutional security, it nonetheless remains the continuing responsibility of courts to enforce the constitutional rights of all prisoners. For a prisoner retains all the rights of a free citizen except for those withdrawn by law, expressly or by implication; or those inconsistent with the legitimate penological objectives of the corrections system. See also *Goldberg & Ors v Minister of Prisons & Ors* 1979 (1) SA 14 (A) at 39 C-E; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 141 C-D; *August & Anor v Electoral Commission & Ors* 1999 (3) SA 1 (CC) at para 18; *Strydom v Minister of Correctional Services & Ors* (1999) 3 BCLR 342 (W) at para 14.

Insofar as awaiting trial prisoners are concerned it must never be overlooked that they are unconvicted and, accordingly, presumed to be innocent of any wrongdoing. The purpose of their detention is merely to bring them to trial. Sufficient security must assure that they will remain in custody and will not pose a danger to themselves or to other inmates or staff. Punishment, deterrence or retribution in such a context are out of harmony with the presumption of innocence. Indeed, it has been well established since the days of BLACKSTONE that an awaiting trial prisoner must otherwise be treated with all of the consideration that the need for confinement will allow:-

> "Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice …, there to abide till delivered by due course of law. … But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only …". (See 4 *Commentaries* 300).

This valid principle was also given expression to by SOLOMON J in *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92 at 130:-

> "(The) whole object of the detention of awaiting trial prisoners is to ensure their attendance at the trial, and that object is properly borne in mind by the authorities in their general treatment of such prisoners while in gaol. Any further encroachment upon their liberty than is necessary to secure this object or is required by the prison rules for the discipline or management of the gaol, is an infringement of their personal rights, and cannot be justified on the ground that the authorities considered it desirable in the interests of public safety."

See also INNES J *infra* at 122 *in fine*-123; *Cassiem & Anor v Commanding Officer, Victor Verster Prison & Ors* 1982 (2) SA 547 (C) at 551 F-G; and the decisions of the United States Federal District Courts in *Jones v Wittenberg* 323 F. Supp. 93

(1971) at 100, *Brenneman v Madigan* 343 F. Supp. 128 (1972) at 138, *Inmates of Suffolk County Jail v Eisenstadt* 360 F. Supp. 676 (1973) at 685-686, *Rhem v Malcolm* 371 F. Supp. 594 (1974) at 622, and *Dillard v Pitchess* 399 F. Supp. 1225 (1975) at 1232-1233.

The lawful incarceration of the applicants causes the necessary withdrawal or limitation of many privileges and rights previously enjoyed in a free and democratic society. Persons in custody simply do not possess the full range of freedoms of unincarcerated individuals. They cannot come and go as they please. In the words of JUSTICE REHNQUIST (as he then was) in *Bell v Wolfish* 441 US 520 (1979) at 537:-

> "Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment'."

But such restraints must be circumscribed. They must encompass only those which are absolutely necessary. They must be measured against the State's sole objective in presenting the awaiting trial prisoner for trial. They must be judged against a standard of basic humanity towards men innocent in the eyes of the law, and not against abstract penological standards. See *Inmates of Suffolk Country Jail v Eisenstadt supra* at 686.

The first and most important complaint to consider is that the applicants are not being treated in the same manner as other awaiting trial prisoners. They are locked up in small single cells for most of the day. They cannot walk freely outside their cells in the section patrolled by a warder. They must endure the continuous lighting of their cells. They are deprived of the sight of each other. Except when interviewed by their legal representative, they speak to no other inmate, only to the prison chaplain and a consular official. In effect, for prolonged periods of each day, for many months now, the applicants are being held in solitary confinement in the wide meaning conveyed in Black's *Law Dictionary* Abrig. 5 ed at 723:-

> "In a general sense, the separate confinement of a prisoner, with only occasional access of any other person, and that only at the discretion of the jailer. In a stricter sense, the complete isolation of a prisoner from all human society, and his confinement in a cell so arranged that he has no direct intercourse with or sight of any human being, and no employment or instruction."

There may well be special circumstances in which it is permissible to subject an awaiting trial prisoner to more severe treatment than the rest - to effectively isolate him from the others. This was acknowledged by SOLOMON J in *Whittaker v Roos and Bateman supra* at 128 *in fine*-129. The learned JUDGE OF APPEAL was quick to point out, however, that where resorted to the *onus* lies upon the prison authorities to justify such stringent action. See also, *Governor of Johannesburg Gaol v Whittaker* 1911 TPD 798 at 806 *in fine*; *Minister of Justice v Hofmeyr supra* at 153D.

The respondents strove to justify the harsh treatment meted out to the applicants on the ground that they face serious charges and may be induced to attempt to escape. Yet no allegation has been made to the effect that the applicants, by their

conduct, have done anything to give rise to such apprehension. Realistically, the extensive security precautions that are in place make it highly unlikely that they would succeed if they were to try to escape, which they deny it is their intention to do. Such zeal for security is recognised as among the most common varieties of official excess. See *Bell v Wolfish supra* at 566.

Furthermore, the present charges are not as serious as they were initially. The applicants were intending to remove the weaponry from Zimbabwe. There is now no suggestion by the State that it was the purpose of the applicants to use the offensive weapons and materials in this country. This being so, I can only agree with their counsel that for the Attorney-General to brand the applicants as "messengers of death" is a description shown to be unsubstantiated by the evidence.

Ancillary to the complaint of the inhumanity of the conditions of confinement and unnatural isolation, is that relating to the continuous lighting of the cells occupied by the applicants, which disturbs their sleep. The respondents seek to vindicate this particular practice by drawing attention to clause 113(3) of the Prison Security Standing Orders, made by the Commissioner of Prisons in terms of s 21(1) of the Prisons Act. This provides that when confined to their cell 'D' class prisoners (whether convicted or unconvicted) shall be inspected every twenty minutes by the officer on duty. He, so it is claimed, would be unable to monitor properly the movements and intentions of the applicants, during the hours of darkness, without the facility of such lighting.

I find this reasoning unpersuasive. A warder with back-up is always present in this cell block and a torch could be used effectively to check upon the presence of the applicants in their cells at night. The likelihood of them being able to escape therefrom is, as already mentioned, extremely remote, if not fanciful. The insistence upon lighting is therefore irrational and, so it seems to me, directed at exacerbating the effect of the condition of confinement by making it as uncomfortable and severe as possible for the applicants.

The same complaint was raised in *Le Maire v Maass* 745 F. Supp. 623 (1990). The plaintiff, a convicted murderer, serving a life sentence, objected that the twenty-four hour continuous lighting in his cell disturbed his sleep and caused other psychological effects. It amounted, so he contended, to cruel and unusual punishment in breach of the Eighth Amendment. The defendant, the prison superintendent, justified the constant illumination as a security measure so the disciplinary segregation unit could see into the cell. There was no evidence, however, that there was a need to see into the cell for twenty-four hours per day. No reason was offered why the cell could not have a switch outside so that guards could see into it when they needed to. PANNER, CHIEF JUDGE, held at 636 that:-

> "There is no legitimate penological justification for requiring plaintiff to suffer physical and psychological harm by living in constant illumination. The practice is unconstitutional."

Even if it be assumed that a serious security problem attaches to the applicants which must be afforded weight, I would repeat what was said in *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs & Anor supra* at 116B (ZLR) and 65 F-G (SA), that:-

> "nonetheless there must be mutual accommodation between such institutional need and the provisions of the Constitution. A just balance must be struck. It is not an acceptable proposition that undue harshness under the guise of prison security or discipline attracts immunity from judicial review."

The nature of the trauma to which the applicants, as awaiting trial prisoners, are being subjected, was graphically described by HOEXTER JA in *Minister of Justice v Hofmeyr supra* at 145 G-H as follows:-

> "Man is by nature a social animal whose well-being depends upon his association with others. Recluses who voluntarily seek exclusion are known, but they are the exception to the rule. In most people the gregarious instinct is strongly implanted; and to deprive the average person of contact with his fellows is to cause him to suffer anguish of mind. It cannot be gainsaid that any enforced and prolonged isolation of the individual is punishment. It is a form of torment without physical violence. This fact has been recognised since the beginning of time … ."

See also, the similar remarks of DIEMONT J (as he then was) in *Hassim & Anor v Officer Commanding, Prison Command, Robben Island & Anor* 1973 (3) SA 462 (C) at 480 B-C; and *Herczegfalvy v Austria* (1993) 15 EHRR 437 at para 251.

The abuse of the applicants by police interrogators prior to admission to prison is also to be borne in mind. Their condition was known to the second respondent. It was aggravated by the oppressive manner of their confinement - by isolating them from other awaiting trial prisoners, by depriving them of freedom of movement for the greater part of the day, and initially, by stripping them naked and placing them in leg-irons.

Akin to article 7 of the International Covenant on Civil and Political Rights, the aim of s 15(1) of the Constitution is to protect both the dignity and the physical and mental integrity of the individual. The prohibition relates not only to

acts that cause physical pain but also to those that cause mental suffering to the victim. It is the duty of the State to afford everyone protection against such acts by legislative and other measures, as may be necessary; not, through its officials, to be responsible for their perpetration.

Taking account of all the circumstances, I am satisfied that the prolonged duration of the ill-treatment the applicants have been compelled to endure and its physical and mental effects upon them, attain that minimum level of severity necessary to constitute a violation of s 15(1) of the Constitution. See *Ireland v United Kingdom* (1979-1980) 2 EHRR 25 at para 162; *Koskinen v Finland* (1994) 18 EHRR CD 146 at 158. In the result, I am quite unable to hold that the applicants are simply being made to suffer from the inevitable consequence of the operation and administration of a high security prison and the usual element of humiliation associated with detention on remand.

No explanation has been given by the second respondent for the refusal to permit the applicants to use and wear their own clothing at all times. That such a right is accorded to an awaiting trial prisoner is implicit in ss 78 and 80 of the Prisons Act, and is expressly spelt out in Rule 88(1) of the United Nations Standard Minimum Rules for the treatment of prisoners. The reason is obvious. An awaiting trial prisoner is presumed innocent. Hence, he should not be forced to wear clothing which imparts the appearance of guilt. To create a situation in which an awaiting trial prisoner is by virtue of prison garb physically indistinguishable from prisoners who have been convicted is to debase and humiliate him in his own eyes; and lower him in the estimation of others. It connotes treatment which is calculated to, or in all

probability will, adversely affect the status of the recipient. This inherently degrading requirement is, of course, lacking where the objection to the wearing of prison clothing emanates from a convicted prisoner. See *McFeeley v United Kingdom* (1981) 3 EHRR 161; *X v United Kingdom* (1983) 5 EHRR 162.

I did not understand counsel for the respondents to resist the submission that the applicants, as awaiting trial prisoners, were entitled to receive food at proper hours every day from private sources. Such a right is stipulated in ss 78 and 80 of the Prisons Act. See also Rule 87 of Standard Minimum Rules for the treatment of prisoners. However it is not appropriate for this Court to direct, as requested on the applicants' behalf, that the food supplied should not first be tasted by the person delivering it. The power to examine the food and the method employed is not the sort of administrative procedure that courts are inclined to interfere with. To do so would amount to an unnecessary intrusion into the sphere of those charged with and trained in the running of penal institutions. In any event, it can hardly be claimed that the practice of food tasting amounts to degrading punishment or treatment insofar as the applicants themselves are concerned. It causes them no humiliation. It does not affect their receipt of the food provided the supplier is willing to comply with the tasting of it.

Finally there remains the question of whether the refusal to permit the applicants possession of their wristwatches infringes s 15(1) of the Constitution. Here again I do not consider that it behoves the Court to interfere. The second respondent has deposed that:-

> "Use of wristwatches by the applicants at any time whilst in prison custody constitutes a grave security risk. Valuable items like watches are a medium of exchange in shady deals and racketeering in prison and are prohibited and kept away from the inmates just like cash. Such items are capable of being used to conceal contrabands like dangerous drugs, which will make the watches subjected to routine searches and causing inevitable damage to them. Use of wristwatches by the applicants is opposed for security reasons and for the maintenance of law and order in prison. Should the applicants need to know the time, for whatever reason without ill intent, they are free like other inmates to ask the officers on duty round the clock."

It seems to me that this deprivation is reasonably related to legitimate penological interests. The practice of the prison officials in applying it must be afforded appropriate deference. See *Wolff v McDonnell* 418 US 539 (1974) at 555-556; *Rhodes v Chapman* 452 US 337 (1981) at 361.

Counsel for the applicants sought an order for costs on the higher scale of legal practitioner and client. He stressed that the practice of stripping a prisoner of his clothing and forcing him to remain naked from late afternoon until early morning had been resorted to in apparent contempt of the ruling in the *Conjwayo* case *supra* at 108 G-H (ZLR) and 60 D-E (SA), that had outlawed it. To make matters worse, such degrading treatment had been accompanied by the use of leg-irons. It had persisted for a period of about five weeks. Its ultimate cessation was without any expression of remorse or official acknowledgment of wrongdoing. Moreover, in breach of prison regulations, the applicants were not permitted to wear their own clothing and for some time were prevented from receiving food from outside sources.

To my mind, recourse to such unwarranted punitive measures gravely aggravated the condition of solitary confinement to which the applicants were subjected. As awaiting trial prisoners they were the victims of arbitrary harshness,

with no regard taken of the trauma they had already suffered at the hands of the police.

As a mark of the Court's disapproval of the treatment meted out to the applicants, the respondents deserve to be penalised by the payment of costs on the higher scale. Accordingly, costs are so ordered against the respondents, jointly and severally, the one paying the other to be absolved.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Stumbles & Rowe, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners