

IN THE SUBORDINATE COURT OF THE 1ST

CR NO. 9/04/13

CLASS OF THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(CRIMINAL JURISDICTION)

BETWEEN:

THE PEOPLE

COMPLAINANT

AND

PAUL KASONKOMONA

ACCUSED

FOR THE PROSECUTION: MR. S. ZULU

FOR THE DEFENNCE: MR S. NKONDE OF SNB PRACTITIONERS

STATUTES

1. THE PENAL CODE CAP. 87 LAWS OF ZAMBIA
2. THE CRIMINAL PROCEDURE CODE CAP. 88 LAWS OF ZAMBIA

CASES

1. HKSAR v Cen Zhi Cheng [2008] 2 HKCFI 142.
2. Hutt v the Queen [1978] 2 SCR 476
3. Whitney v California 27 US 357 1927.
4. Sara Longwe v. Intercontinental Hotel
5. HKSAR v Mok Yu Ming, Wong Wai Fun and Lau Cheung Wai [2001] HKCFI 980
6. Behrendt v Burridge [1977] 1 WLR 29
7. Smith v Hughes (1960) 2 All ER 857
8. THE PEOPLE v JAPAU (1967) Z.R. 95 (H.C.)

RULING ON CASE TO ANSWER PURSUANT TO SECTION 206 OF CAP. 88.

In this case the accused stands charged with Idle and Disorderly conduct contrary to section 178 (g) of the Penal Code Cap. 87 of the Laws of Zambia. The particulars of the offence are that the accused on 7th April 2013 at Lusaka in the Lusaka District of the Republic of Zambia, being in a public place namely Muvi

Television Studios on a programme called "The Assignment" did solicit for immoral purposes for Homosexual rights to be respected in Zambia.

In order to warrant putting the accused on his defence the prosecution must establish the essential ingredients of the offence charged. After analyzing all the evidence adduced by the prosecution if there is any doubt in my mind as to the guilty of the accused, the accused will be acquitted. The elements of the offence herein under section 178 (g) are soliciting, in a public place, for immoral purposes.

PW1 was Mabvuto Phiri a Journalist at working for MUVI TV. He was the programme produce for the Assignment. The gist of his testimony was to confirm that on 7th April 2013 he had made a prior invitation to the accused to discuss ^{gay} rights because that was the topic of the week. He was the one that came up with the questions for the discussion. He produced a copy of the recorded programme in its entirety which was marked P1. The topic was Gay or Human Rights. In cross examination he maintained what he stated in his evidence in chief.

PW2 was Reverent Pukuta Ndombi Mwanza the Executive Director of the Evangelical Fellowship of Zambia. He came to speak for the umbrella Organization that what the accused person was discussing was contrary to they believed as an organization. He said it was wrong for the accused to request the condoms should be distributed gay people because the rectum was not intended to

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be used for penetration. He also said it was wrong for the accused to say Zambia should decriminalize homosexuality because it was natural who practice it. In cross examination he admitted that he led a group that discussed the issue of gay rights but no one was arrested in that group.

PW3 was Detective Sergeant Joseph Simuchembo service no. 32202 from Woodlands Police Station. He was one of the officers that were assigned to go and arrest the accused on 7th April 2013 at MUVI TV. He stated that when he and the others officer reached MUVI TV they were not allowed to enter. They waited at the gate where according to him they were able to watch part of the programme. He said he personal heard the accused on TV promoting gay rights in Zambia by stating that homosexuals and gay people have always been there since time immemorial. When he heard that what came to his mind was that the accused was soliciting for immoral purposes. According to him the words used were encouraging people to practice homosexuality. In cross examination he stated that he did not watch the whole programme and he could not remember the questions that were asked to the accused.


PW4 was detective constable Kalowa Mwanamwalye service no. 36059. His testimony was on all fours with PW3. He also believed that the accused was soliciting for gay rights to be legalized in Zambia. According to him, that amounted to soliciting for immoral purposes. In cross examination he said he did not master the words used by the accused but what he remembers was that the accused wanted gay rights to be legalized. When asked whether he

heard the accused being introduced as a human rights activist he said he heard. He further stated that the accused was advocating for gay marriages though from the video the accused appeared not to agree to gay marriages.

PW5 was Costa Mwansa a Journalist with Muvi TV and presenter of the Assignment Programme. The gist of his testimony was to confirm what PW1 stated. He identified P1 was the programme that he conducted on the material day with the accused.

He stated that as a media they provide a platform for people to express their opinion. When asked what the Minister of Home Affairs said that morning he said the Minister said those advocating for gay rights will be arrested.

PW6 was Detective Chief Inspector David Kalaluka Mwanamwalye service no. 8496, the CIO Woodlands Police Station. He stated that on the material day around 18:30 there was advert on MUVI TV that MUVI TV was going to conduct the programme called assignment to discuss gay rights. Up on hearing that, he got interested and decided to wait for the programme to start. When the programme started on the screen appeared Costa Mwansa and the accused, the introduction was made by Mr. Costa Mwansa that the views on the programme were not the views of Muvi TV but the interviewee. Members of the public were to hear the views of Paul Kasonkomona over gay rights. As the programme continued he realized as a police officer the accused was soliciting to immoral purposes which is against the law. Paul Kasonkomona was soliciting for the rights of homosexuals to be legalized in the Zambia. Up on seeing that, he dispatched two of his officers to


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Muvi TV whilst he remained following the programme. Before the programme could end he made a follow up to MUVI TV accused, Paul Kasonkomona was apprehended.

In cross examination he said what made him arrest the accused is because he said 'gay rights is not wrong act. If I slept with a fellow man would I be depriving someone of his rights?' The question put to him was whether gay rights it is illegal. According to him it is an offence for someone to say we should decriminalize gay rights.

This was the summary of the prosecution's evidence. I shall go through the elements of the offence one by one to establish whether the prosecution has adduced evidence enough to constitute the offence. I searched anxiously in Zambia for authorities on this particular offence and I found no refuge. I am indebted to the parties for the well researched submissions files where several foreign authorities have been cited.

English courts have interpreted the word "soliciting" to mean:

- Conduct reflecting more than a mere act of loitering;
- "Conduct amounting to an importuning of prospective customers";
- Conduct which requires physical presence on the part of the prostitute;
- Conduct extending into a public place;
- Conduct which were constituent of persistent persuading, begging or entreating.

To constitute soliciting in a public place, it is not necessary that a sex worker be physically present in the public place itself, meaning that a place seen by the public (such as a

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window or doorway) sufficed for the purposes of the statute. A sex worker would not, however, be committing this offence in the privacy of her room.

The definition of "soliciting" in terms of the specific offence of soliciting for an immoral purpose was discussed in the Hong Kong High Court case of *HKSAR v Cen Zhi Cheng*. In this case, the appellant was convicted of soliciting in public for an immoral purpose after approaching an under-cover police officer and seeking to engage in acts of prostitution in exchange for money. In evaluating the appellant's contention that the evidence at hand was insufficient to establish the solicitation of the police officer, the court cited the Shorter Oxford English Dictionary. In dismissing the appeal, the High Court stated:

The Shorter Oxford English Dictionary defines the word 'solicit' in a number of ways. The most apt of these definitions would appear to involve an individual seeking to obtain something or some response from another, or to persuade them to do something. In my view to solicit someone for an immoral purpose within the terms of [the applicable law, which parallels that at issue in our case] would include enticing or persuading that person to do some act or thing, or seeking from them some response, so as to bring about an eventuality or state of affairs which is sexually immoral.

In the Supreme Court of Canada case of *Hutt v the Queen*, the Court considered the offence of soliciting for the purpose of prostitution in the Criminal Code. The case concerned a sex worker who had smiled at an officer and then voluntarily got into his car. The Supreme Court noted that the offence was located under the section Disorderly Houses, Gaming and Betting,

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and considered that this means the section dealt with "offences which do contribute to public inconvenience or unrest and again I am of the opinion that Parliament was indicating that what it desired to prohibit was a contribution to public inconvenience or unrest. The conduct of the appellant in this case cannot be characterised as such." The Supreme Court held that the word "solicit" carries with it an element of persistence and pressure and that there was no evidence of such an element in the evidence presented of the appellant's activities. The position is similar under our penal code except that ours includes the word nuisance. But the intention of parliament was similar to avoid public inconvenience or unrest.

I have watched the programme in question and considered the evidence by the prosecution witnesses, PW1 and PW5 who stated that the accused person was an invited guest on the programme and he went on the programme to give his views because during the course of that week gay rights was the topic in the headlines. For me to feel safe to convict I am satisfied that the accused whilst on the programme was enticing or persuading other people to do some act or thing, or seeking from them some response, so as to bring about an eventuality or state of affairs which is sexually immoral. If it is true that the accused was invited to give his views through the programme then I he was exercising his freedom of expression as provided for under articles 20 of the Constitution of which I take judicial notice. I am alive to the fact that right is not absolute by reason of sub article 3 of the same article which states nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes

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provision that is reasonably required in the interests of defence, public safety, public order, public morality or public health.

Justice Brandeis of the United States Supreme Court eloquently stated the importance of freedom of expression, when he observed in *Whitney v California* that:

"Those who won our independence believed that the final end of the state was to make them free to develop their faculties and that the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed that freedom to think is a means indispensable to the discovery and spread of political truth, that without free speech and assembly, discussion would be futile, that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine, that the greatest menace to freedom is an inert people; that public discussions is a political duty and that this should be a fundamental principle of American Government".

From the evidence on the record there is no element of persistent importunation on the part of the accused. The fact accused was speaking on a topic that was repulsive to many people that in itself does not mean he was soliciting under the ambit of the section in question. There is no evidence that the accused was enticing or persuading anyone to engage immoral conduct.

Coming to the word public place, section 4 of the criminal procedure code defines "public place" or "public premises" to includes any public way and any building, place or conveyance to which for the time being the public are entitled or permitted to have access, either without any condition or upon condition of making any payment, and any building or place which is for the

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time being used for any public or religious meetings, or assembly or as an open court.

In the case of Sara *Longwe v. Intercontinental Hotel* it was stated that the hotel is open to the public, and must be considered a public institution and not private property. In the case of *HKSAR v Mok Yu Ming, Wong Wai Fun and Lau Cheung Wai* a Hongkong case the High Court found the massage room to be a public place. MUVI TV in the instant case is a place to which only those members of the public who are licenced have access. However the activities that go on in the studio are for public consumption. Members of the public listen and watch what goes on of TV, for the programme if question members of the public were even allowed to participate to engage directly with the accused through text messages. Having said that I find definition of public place does not involve physical access. Members of the public have access to what goes on in the studios. In the case of *Behrendt v Burrige* [1977] 1 WLR 29 it was held that the conduct of a scantily-clad woman sitting in a window with a red light amounted to soliciting because, even though she did not actively approach customers, her presence at the window sought to attract prospective clients for the purpose of prostitution. Further In the English case of *Smith v Hughes* (1960) 2 All ER 857, the court held that where sex workers had not been physically present in the street, but rather solicited clients from a window, doorway or balcony, the sex worker was guilty of soliciting because she had actively sought to attract the attention of prospective clients. In the light of these authorities I find that indeed was in I am fortified to find that the appearance on TV was an act the engaged the public and would qualify for the purposes of 178.

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Finally coming to 'immoral purposes' in the Hong Kong High Court case of *HKSAR v Cen Zhi Cheng*, the court stated "In my view by making such a clear and unambiguous offer he was soliciting [the police officer] for the purpose of prostitution. There was no real suggestion before me that such a purpose could not be found to be immoral and I agree with the magistrate's comment: 'Immoral purpose must refer to some kind [of] sexual activity.'"

It is a matter for the tribunal of fact by applying the standards of the community." In the case before me I find that indeed the topic the accused was discussing was immoral to the extent that sexual intercourse with the same sex is prohibited. I mean homosexuality is immoral in Zambia, but to discuss homosexuality is something else. In fact homosexuality is something that is frowned upon by most people in Zambia. I judicially note this fact. However, from the evidence on the record the accused was not engaging anyone to practice homosexuality. What I heard was that he was advocating for the rights of those already practicing it to be protected. By way of analogy, if someone was to go on TV and advocate that the law on defilement should be amended will they be soliciting for immoral purposes? Or if someone was to engage the public discussing that death sentence should be abolished, will they also be soliciting for immoral purposes? The answer is not. It is through debate that people share information and ideas whether good or bad. In the premises I find this element not been proved.

From the above analysis I find that only the 2nd ingredient has been established. However, the 1st and 3rd ingredients have not been established. Therefore, applying the case of Japau and section 207 of cap 87, I find that no case has been established

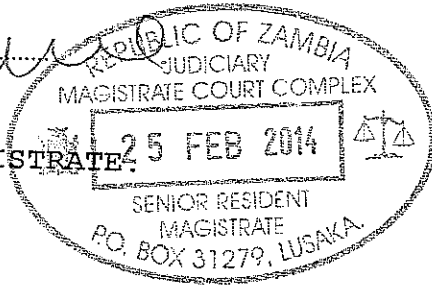
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by the Prosecution. Accordingly I acquit the accused person of the charge of Idle and disorderly conduct contrary to section 178 (g) of cap. 87 laws of Zambia.

DELIVERED THE DAY OF 2014.

L. NG'AMBI

SENIOR RESIDENT MAGISTRATE.



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