AD1901 24.2.

IN THE SUPREME COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG, this 14th day of AUGUST, 1964.

In the matter between:

LESLIE ERICA SCHERMBRUCKER Applicant

A N D

COL. KLINDT N.O. Respondent

SNYMAN, J.: This matter came before me on the evening of Friday the 7th August, 1964 by way of an urgent application. The applicant is the wife of one Ivan Frederick Schermbrucker who is presently in the custody of the South African Police having been detained for interrogation in terms of Section 17 of the General Law Amendment Act, No. 37 of 1963 (I shall refer to it merely as Section 17). The respondent is the officer in charge of the Security Branch of the South African Police at Johannesburg. The matter was not argued on Friday evening but was postponed by consent to the 11th August and again to the 13th August, the respondent having given an undertaking that in the meantime no interrogation of the detainee would take place until the application had been heard and disposed of by me. The purpose of the postponements was to allow the respondent to answer the allegations made against him and to consider whether he would allow a legal representative to see the detainee.

The complaint of the applicant is that on the 4th August, 1964 she received a message, which in itself is undated, from her husband which had apparently surreptitiously, and indeed in the circumstances, unlawfully, been sent to her. She does not

disclose/...

disclose in what manner she received this message but she has placed a photostatic copy of the document before me. She says - and it is accepted -- that the document is in her husband's handwriting.

The contents of the document ~~is~~ are set out in the petition. According to it the detainee was interrogated on the day before he wrote the note for a continuous period of 28 hours during which period he twice collapsed and was revived by cold water being poured over him. The message also says that during the interrogation the detainee was being questioned by anything f from two to six policemen who vilified him and threatened him during the interrogation. The police, so the message states, had also threatened to continue with this mode of interrogation in the future.

The following day the applicant obtained the permission of the respondent to see her husband, the detainee, in order to discuss certain business matters with him and also the welfare of their children. This interview took place on the 5th August in the presence of two policemen. She says she then noticed that her husband was pale, depressed and exhausted, and that his eyes were bloodshot and that when he signed a document his hand trembled. From that she concluded that his complaint in the message was well-founded and that he was being subjected to ill-treatment. It was on that basis that she brought this application before this Court. She seeks the following relief:

"An Order: (a) Declaring that the method adopted by the police of interrogating your Petitioner's husband is unlawful;

(b) An interdict restraining the police from continuing this form of interrogation, and from maltreating your Petitioner's husband, and more particularly

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"particularly an interdict that they refrain from interrogating him in such a way and for such continuous length of time as is calculated to impair his physical or mental health;

(c) Other or alternative relief;

(d) Costs of suit."

Respondent has now placed his answering and supporting affidavits before me. He states that he is possessed of the original document, that is the alleged message by the detainee to the applicant. He avers that certain words in the document were heavily struck out from it. In the form that it is before me these words are illegible, but the respondent has caused it to be examined by an expert who has said under oath that the words struck out read as follows:

"... send this news overseas immediately & ...".

With the words struck out the document reads:

"You must ..... see what can be done".

If these words are read into the document it reads:

"You must send this news overseas immediately & see what can be done".

In these circumstances the respondent alleges that the true purpose of the alleged message by the applicant is to make propaganda against the South African Police.

The respondent has also himself interviewed the officers who interrogated the detainee and he says that he has satisfied himself that this alleged ill-treatment did not take place. He denies it completely and says that no unlawful method was employed in the interrogation. The respondent also caused the detainee to be examined by a senior district surgeon, Dr. Rosenberg. His affidavit is before me./...

I will not read the whole of it as it is not necessary, but the more relevant portion of it reads:

> "At 4.15 p.m. on Friday the 7th August, 1964, at the request of Col. Klindt, I examined Detainee Ivan Frederick Schermbrucker at the Fordsburg Police Sation.
>
> I proceeded to do a routine examination of his heart, chest, abdomen, including blood pressure (158/90) and reflexes. There were no fine tremors of his fingers, his reflexes were normal and not exaggerated in any way. No clinical abnormality was detected.
>
> He indicated that he had pains in his back pointing to the lumbar region. I asked him to stand up and examined his back, subjecting his spine to various movements. He elicited no particular tenderness to pressure in the lubar muscular area.
>
> At the time of my examination I found no evidence of any physical or mental exhaustion and I found no reason on clinical grounds why the said Schermbrucker should have been examined by a private practitioner."

Those then are the facts before me. It must be quite apparent that on those facts, which of course are not conclusive -- it is evidence by way of affidavit which has not been properly tested , that a serious dispute has arisen on the facts. On the papers it would seem that the prospect of success is against the applicant. A dispute of fact such as

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this cannot properly be decided on affidavit and Mr. Rathouse, no doubt realising his difficulty, has asked that the detainee himself be ordered to be brought to Court under Rule 9(a) of the Rules of Court, so that he may give evidence and be examined and cross-examined.

This raised a difficulty, namely, that the respondent in stating his case to this Court has indicated that he has refused the request for a legal representative to see the detainee. It is common cause that he was within his rights in so refusing. Furthermore, the respondent says that he has also refused the detainee permission to come to Court in person. He makes the submission -- and that is the respondent's case before me -- that this Court has no power to make an order compelling the respondent to produce the detainee in Court. Finally, he says that in any event it is not in the public interest that the detainee should be brought into a public Court.

By agreement between counsel this submission by the respondent has been taken before me as a preliminary point and they have confined themselves to arguing whether or not this Court has the power to order the detainee to be brought before it. It was also inherent in the preliminary point that if I found in favour of the applicant that I should also decide whether I should exercise my discretion under Rule 9(a) of the Rules of Court and order that the detainee be brought to Court to give viva voce evidence.

No argument was addressed to me on the point whether or not the applicant was entitled to act as a negotiorum gestor for her husband. The husband has not brought these proceedings, nor has he in any manner, save perhaps by this document, indicated that he desired an application to be made to Court. The basis

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upon which the applicant claims to act as she does is the alleged wrongful treatment of the detainee during his interrogation. She does not base her right to act as <u>negotiorum gestor</u> on the ground of his detention as such. The detainee is detained under Section17, and it is common cause that that detention is lawful in terms of that Section. The basis of her application therefore differs from the ordinary writ of <u>habeas corpus</u>, or as it ismore correctly known the <u>writ de homine libero exhibendi</u>. But Mr. <u>Kotze</u>, for the respondent, did not contest the applicant's right to bring the application and in the circumstances I have given audience to the applicant without applying my mind to this aspect of the matter.

The issue then before me is whether Section 17 of the General Law Amendment Act No. 37 of 1963 deprives this Court of its power to order any person to give evidence before it in terms of Rule 9(a) of the Rules of Court. These rules have been cincorporated in the Supreme Court Act No. 59 of 1959, by section 30 thereof.

Section 17reads as follows:-

"(1) Notwithstanding anything to the contrary in any law contained, any commissioned officer as defined in Section 1 of the Police Act, 7, of 1958, may from time to time without warrant arrest or caused to be arrested any person whom he suspects upon reasonable grounds of having committed or intending or having intended to commit any offence under the Suprression of Communism Act, 44 of 1950, or under the last mentioned Act as applied by the Unlawful Organisations Act, 34 of 1960, or the offence of sabotage, or who in his opinion is in possession of any information relating to the commission of any such offence or the intention to commit any such offence, and detain such person or caused him to be detained in custody for interrogation in connection with the

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"the commission of or intention to commit such offence, at any place he may think fit, until such person has in the opinion of the Commissioner of the South African Police replied satisfactorily to all questions at the said interrogation, but no such person shall be so detained for more than 90 days on any particular occasion when he is so arrested.

(2) No person shall except with the consent of the Minister of Justice or a commissioned officer as aforesaid have access to any person detained under sub-sec.(1); Provided that not less than once during each week such person shall be visited in private by the magistrate or an additional or assistant magistrate of the district in which he is detained.

(3) No court shall have jurisdiction to order the release from custody of any person so detained, but the said Minister may at any time direct that any such person be released from custody."

This section has received the consideration of the Appellate Division in the case of Rossouw v. Sacks, 1964(2) S.A. 551, and although the facts in that case are different from the facts in the matter before me the construction placed upon the section by the Appellate Division affords guidance to me in this matter.

In that case the proceedings were instituted on behalf of a detainee by an attorney holding his power of attorney. If Mr. Kotze's contention is correct that a detainee is excluded from the jurisdiction of the Courts during his detention, then Sacks should have been so excluded. But neither before the Cape Provincial Division nor the Appellate Division was that point taken; nor did the Courts do so mero motu, although in matters of jurisdiction the courts must do so. Furthermore,

at p. 559 of the report OGILVIE THOMPSON, J.A. deals with the question of jurisdiction thus:

> "Although Section 17(3) in terms only excludes the jurisdiction of the Court in relation to ordering the release of the detainee, the inability of the latter to have access (save with the consent of the Minister or a commissioned officer) to his legal adviser is likely in practice effectively to preclude any resort to the Court during the period of his detention."

In the circumstances it seems to me that a detainee is not denied the right to seek relief in the Courts in appropriate circumstances, provided he can do so through an agent. In other words, his access to the courts remains unimpaired save for the obstacles placed in his way by Section 17.

The question which remains and which is really the crisp issue before me is whether a detainee is entitled to appear in Court in person either to conduct his own case or to give viva voce evidence.

In terms of Section 17 no person, and this includes his legal advisers, may have access to a detainee except with the consent of the Minister of Justice or of a commissioned officer of the South African Police. If such consent is not forthcoming it may well be, in the words of the learned Judge of Appeal, that in practice he might effectively be precluded from his resort to the courts during the period of his detention. This dicta by the Appellate Division has a bearing on the question whether a detainee can appear in court in person. If a detainee could appear in person the learned Judge would hardly have put the proposition as high as he did for the detainee with whom he was concerned was a practising advocate.

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In dealing with the purpose of Section 17 the learned Judge of Appeal remarked as follows at p. 560:

"Counsel for appellant (the ~~detainee~~ State), while maintaining that certain contentions had been wrongly attributed to him in the jdugment of the Court a quo and expressly repudiating any intention on the part of the Legislature to authorise what counsel for appellant described as "any form of psychological compulsion", submitted that the purpose of detention under sec. 17 is to imprison - that is to say, punish - the detainee while he continues to decline to speak. Counsel for respondent (the ~~State~~ Detainee), on the other hand, submitted that the sole purpose of the detention was for the convenience of recurrent interrogation. Neither of these submissions is, in my view, entirely correct. No doubt, the initial arrest and the detention in custody is, as counsel for respondent says, for the purpose of interrogation. But, in the case of a detainee who declines to speak, or who fails, in the opinion of the Commissioner of Police, to "reply satisfactorily to all questions", the continued detention authorised by sec. 17 is, in my judgment, designed to induce him to speak - that is to say, to reply, in the opinion of the Commissioner of Police, "satisfactorily to all questions".

At p. 561 the learned Judge of Appeal goes on:

"It mayreadily be postulated that Parliament can never have intended that the detainee should, in order to induce him to speak, be subjected to any form of assault, or that his health or resistance should be impaired by inadequate food, living conditions, or the like. Equally, the interrogation expressly authorised by sec. 17 cannot, in my judgment, be construed as in any way sanctioning what are commonly described as third degree methods."

At p. 562 the learned Judge goes into the question of the approach that a court should have in dealing with applications of this kind. I do not think it is necessary to

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read the whole but the learned Judge of Appeal deals fully with the manner in which a statute interfering with the liberty of a subject should be construed. After having analysed both the English and South African authorities on the point and having indicated that they are all to the same effect, he concludes:

> "I accordingly conclude that in interpreting sec. 17 this Court should accord preference neither to the "strict construction" in favour of the individual indicated in Dadoo's case, supra, nor to the "strained construction" in favour of the Executive referred to by LORD ATKIN in Liversidge's case, supra, but that it should determine the meaning of the section upon an examination of its wording in the light of the circumstances whereunder it was enacted and of its general policy and object."

Dealing with the purpose and terms of Sec. 17 the learned Judge of Appeal says at p. 564:

> "The purpose and express terms of sec. 17 -- all as analysed above -- do not appear to me to reveal any intention on the part of the Legislature to alleviate the lot of a detainee during his detention. Having said that, I would, however, again emphasise that the Legislature cannot be presumed to have authorised any maltreatment of the detainee in either body or mind. The weekly visit of a magistrate provided for in sec. 17(2) was, in my opinion, designed by the Legislature in order that detainees, isolated as they are from all contact with the outside world, should have access to a responsible independent person at least once a week. It is perhaps almost unnecessary to add that it would manifestly be the duty of the visiting magistrate to take appropriate steps in regard to any irregularity in the conditions of detention or the treatment of the detainee."

The words used by the learned Judge of Appeal, namely, "isolated as they are from all contact with the outside world", again have a bearing on the question before me, namely whether a detainee can be allowed personally to appear in Court.

The Appellate Division in Rossouw's case dealt with the issue whether the detainee there was entitled to be supplied with or to be permitted to receive and use a reasonable supply of reading ~~material~~ matter and writing material. It accepted without apparent question the fact that the detainee had brought proceedings before it whilst under detention.

These expressions however were clearly not intended by the Appellate Division to amount to a finding. I must therefore consider the issue before me in the light of sec. 17, but with the assistance and guidance which have been afforded me by the Appellate Division in Rossouw's case.

To paraphrase the relevant provisions of sec. 17, it provides:

(a) That a detainee may be detained in custody for interrogation at any place his detainer may think fit.

(b) He may be detained until he has satisfactorily answered all questions put to him but for not longer than 90 days on any particular occasion.

(c) No person shall have access to a detainee except with the permission of the Minister of Justice or a commissioned officer of police.

(d) A magistrate shall visit the detainee once a week to take steps in regard to any irregularity in the conditions of his detention or the treatment of the detainee.

(e) No Court shall have jurisdiction to order the release from custody of any detainee.

I must now put to myself the question: Having regard to the purpose of the section and the manner of its construction as laid down in Rossouw's case, did the Legislature by these

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these provisions intend that a detainee should be kept away from access by other persons so completely that even the right and duty of a Court to be open to all the country's citizens, is to be interfered with ? That the Court has a duty to the citizens of the State to protect them against the unlawful conduct of the Executive is axiomatic in our jurisprudence. It is equally axiomatic that the Legislature, as the supreme Sovereign body, can curtail the rights of the Courts. But the Courts will not lightly assume such an intention on the part of the Legislature. However, if the meaning and intention of the Legislature is clear upon an examination of the wording of an enactment in the light of the circumstances under which it was enacted and of its general policy and object, then the Courts will give heed and effect to it.

The circumstances here are that the Legislature had conceive of these harsh measures and provisions in order to gain information in regard to the commission of offences under the Suppression of Communism Act, 1950, the Unlawful Organisations Act, 1960, and the offence of sabotage: In other words, offences affecting the safety of the State. Sub-section 17(4) limits the period of time during which section 17 may operate, and thereby the Legislature has shown an intention that this section should only be applied whilst there exists a state of affairs harmful to the safety of the State and in order to combat it.

It seems to me that the Legislature intended to isolate possible informants and by means of that isolation to induce them to impart information to the police which will assist them in their task under the Acts mentioned. If that isolation is interrupted the object of the Legislature may well be defeated.

It seems to me that it is for that reason that the Legislature, recognising that some limited interruption might be

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be necessary in proper circumstances, has appointed the Minister of Justice and commissioned officers of the police as persons, and the only persons, who should have the right to allow an interruption.

It is for that reason also that the Legislature has provided specially that an independent person, namely a magistrate, should weekly see detainees and so ensure that there is no irregularity in their detention or in their treatment which might adversely affect their health. It is very clear that the magistrate who sees a detainee has a duty to take steps to put an end to any irregularity or improper treatment. It is equally clear that a detainee in such circumstances has access at least once a week to a magistrate and that he could andshould make his complaints, if any, to the magistrate so that the latter might investigate and deal with them.

In regard to the reason why only the Minister of Justice or ancommissioned officer of the police have been given the right to interrupt the detention, it is no doubt because these persons have special knowledge and are therefore in a position to decide when to allow access to a detainee, that is, in circumstances that will not materially interfere with the purposes of the enactment.

If I am right in my view of the circumstances whereunder the section was enacted, its general policy and object, then it follows that the Minister of Justice and the commissioned officer of the police are the only persons competent to judge of the position. Interruptions of detention by the Courts would, by a parity of reason, frustrate the general policy and object of the section. In my view therefore the meaning of section 17 is that only the Minister of Justice or a commissioned officer of the South African Police can grant access to a detainee and that

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that a Court cannot order that a detainee be brought before it in person during the period of his detention.

Mr. Rathouse has advanced the subtle argument that it is only access to the detainee which is forbidden and not access by him. He says he is only asking for access by the detainee to this Court. This argument seems to me to contain a fallacy: In human intercourse access involves a twofold concept, namely access by each of the persons involved to the other. There can be no such thing as access by one person alone, save in respect of inanimate objects. Access by one person to another inevitably involves access by that other to the first person.

I rule therefore that this Court is precluded from ordering the detainee to appear before it in person either to conduct his own case or to give viva voce evidence.

The applicant is ordered to pay the costs of the application up to this ruling.

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