Judgment No SC 145/04

Civil Appeal No 217/03

(1) NANCY KACHINGWE
(2) WELLINGTON CHIBEBE
(3) ZIMBABWE LAWYERS FOR HUMAN RIGHTS

v.

(1) THE MINISTER OF HOME AFFAIRS N.O.
(2) THE COMMISSIONER OF POLICE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA MALABA JA & GWAUNZA JA
HARARE JUNE 17 2004 & JULY 18, 2005

E. Matinenga, for the appellants

C.C. Mudara, for the respondents

CHIDYAUSIKU CJ: This application is brought in terms of s 24(1) of the Constitution of Zimbabwe. Section 24(1) of the Constitution provides that any person who alleges that the

Declaration of Rights has been, is being, or is likely to be, contravened in relation to him that person may apply to the Supreme Court for redress. The relief sought by the applicants in this matter is set out in the draft order which provides as follows:-

"IT IS DECLARED:

1. That police holding cells at police stations in Zimbabwe are degrading and inhumane and unfit for holding criminal suspects.

IT IS ORDERED:

1. That the 1st and 2nd respondents are directed to take all necessary steps and measures within their power to ensure that:

(a) police holding cells are of reasonable size for the number of persons they are used to accommodate.

(b) police holding cells should have good ventilation.

(c) police holding cells should have lighting sufficient to read by.

(d) police holding cells should be equipped with a means of rest such as a fixed chair or bench.

(e) each person obliged to stay overnight in police custody should be provided with a clean mattress and blankets.

(f) police holding cells should have clean and decent flushing toilets with toilet paper in a sanitary annex in the police cell.

(g) police holding cells should have full sanitary provision for women who are menstruating at the time of their detention and should, on request, be permitted to buy personal necessities with their own money.

(h) police cells should have clean, decent and adequate washing facilities including soap.

(i) police cells should have running water available in the cell.

(j) police cells should have good drinking water available in the cell.

(k) persons in holding cells should be given wholesome food at appropriate times and should, on request, be permitted to buy food and refreshments with their own money.

(l) police holding cells should be cleaned daily and a good standard of hygiene maintained in the police holding cells.

(m) persons detained in police holding cells should have reasonable access to medical treatment.

2. The 1st and 2nd respondents are directed to publish regulations in the Government Gazette governing the treatment and maintenance of persons detained in police holding cells.

3. The 1st and 2nd respondents are directed to publish regulations in the Government Gazette permitting and regulating the inspection of police holding cells by Magistrates and official visitors.

4. That the 1st and 2nd respondents pay the costs of this application."

The relevant facts of this case are to a large extent common cause. The first and second applicants (hereinafter referred to as Kachingwe and Chibebe respectively) were arrested by the police and detained in police cells overnight in respect of Kachingwe, and for two days in respect of Chibebe. The third applicant is Zimbabwe Lawyers for Human Rights, a non-governmental organisation with capacity to sue and be sued in accordance with the laws of Zimbabwe. The third applicant has not filed a separate draft order but avers in its supporting affidavit that it seeks an order declaring all police holding cells throughout Zimbabwe as degrading and inhuman.

The first respondent is the Minister of Home Affairs, who is being sued, in his official capacity, as the government Minister to whom is assigned the administration of the Police Act [Chapter 11:10].

The second respondent is the Commissioner of Police who has command, superintendence and control of the Zimbabwe Republic Police.

On Friday, 13 June 2003, at about 3.30am Kachingwe was driving home along Enterprise Road. When she turned right into Ardnalea Road, she noticed a white pick-up truck on the side of the road. There were three or four men in the vehicle. The pick-up was driving very slowly on the edge of the road. When she drove past the pick-up it picked up speed and followed her. She turned into Sunninghill Close and the pick-up truck also turned after her. She immediately became concerned that the occupants of the pick-up truck could be car jackers. The road was deserted and Sunninghill Close was a dead end. She decided to stop at Seasons Restaurant which is at the corner of Sunninghill Close and Ardnalea Road because she knew that these premises were guarded. When she stopped her motor vehicle the pick-up truck also came to a stop and the men inside got out and surrounded her car. She blew her motor horn and a woman came out of the restaurant. She explained to the woman why she had stopped outside the restaurant. It turned out that that very night there had been a burglary at the restaurant and that the men in the pick-up truck had been driving around trying to see if they could locate the burglar before he went far.

There were also two officers from the Zimbabwe Republic Police at the restaurant. The two police officers came out and Kachingwe explained to them the circumstances of her stopping her vehicle outside the restaurant. The police officers were satisfied with the explanation of Kachingwe and allowed her to proceed to her home. She drove off and the police officers watched her turn into the gate of her residence at 309 Sunninghill Close.

On Thursday, 19 June 2003, a detective constable Charamba (hereinafter referred to as "Charamba") drove to Kachingwe's house and obtained personal details of Kachingwe from her housekeeper. He thereafter telephoned Kachingwe round about mid-day. Charamba informed Kachingwe that he was a police officer and that he wished to interview her at Highlands Police Station. Kachingwe consulted her lawyer, Ms Cathrine Chitiyo. It was arranged between them that Chitiyo would accompany her to Highlands Police Station. Kachingwe thereafter telephoned Charamba to re-arrange the time for their meeting at the Police Station and to advise him that she would be accompanied by her legal practitioner. According to Kachingwe the involvement of a legal practitioner infuriated Charamba who insisted that Kachingwe comes to the Police Station before 4 pm that day.

At about 4 pm Kachingwe, in the company of her legal practitioner, arrived at Highlands Police Station. Her legal practitioner identified herself to the police officers at the reception. Charamba was standing near the reception at the entrance of the Criminal

Investigations Department Office. He identified himself as the officer whom Ms Chitiyo and Kachingwe had come to see. According to Kachingwe, Charamba immediately launched into a tirade about Kachingwe's refusal to see him immediately upon his request and that he was incensed with Kachingwe for coming to the police station accompanied by her legal practitioner. He advised Kachingwe that he was not prepared to interview her in the presence of her legal practitioner. Charamba advised Kachingwe that he wanted to interrogate her in connection with the theft that had recently occurred at Seasons Restaurant in Glen Lorne but that he would only do so the following morning. Kachingwe was told that she would have to spend the week-end in police custody and would be taken to Remand Court on Monday 16 June 2003. Ms Chitiyo and Kachingwe protested at this turn of events to no avail.

Charamba then directed that Kachingwe be detained in a police cell. Before being taken to the police cell a policewoman led her into another office where she was instructed to remove her shoes, her T-shirt, her jacket and her bra and these, and other personal belongings, were placed in a safe.

The police officer informed her that she could only have one layer of clothing in the police cell and that she therefore had to choose one item of clothing from among the T-shirt, the jumper and the jacket. She elected to wear the jumper as she thought that it was warmer than the jacket. This was in June when the weather is fairly cold. The police officer accompanied her barefoot to the police cell. The police cell wherein she was detained is in an outbuilding at the rear of the police station. She alleges that the cell was pitch black. She further alleges that as she stepped into the cell she was greeted by a foul choking stench of human excreta. She also found three other women in the cell. The floor of the cell is concrete and it being in the midst of winter the cell was very cold. She contends that there was one small dirty torn blanket in the cell which the police expected all the inmates to share. She denies the contention by the police that she was given a blanket and some bedding facility.

At about 7 pm her legal practitioner, Ms Chitiyo, arrived back at the police station with a warm cardigan and food. She was permitted to swap the jumper for the warmer cardigan. She was also allowed to eat the food that was brought by Ms Chitiyo and she shared the food with other women in the cell. She contends that the police never offered her any food and refused her request for more blankets.

Later on in the evening one woman was admitted into the cell bringing the total number to five. It was Kachingwe's contention that the five of them were forced to suffer the indignity of huddling together under a single blanket in order to keep warm. She estimated that the temperature that night was in the region of 7◦C.

When she woke up the following morning the police cell was no longer dark because it was now daylight and she observed that there were no windows in the cell. She looked around the

cell and made the following observations. The cell was about 3 metres wide and 8 metres long. The cell did not have a flushing toilet. The only toilet facility was a toilet bowl on a raised concrete platform on which one squats. The toilet bowl had faecal matter close to the brim and that caused the whole cell to stink. It appeared to her that the toilet bowl is evacuated at the pleasure of the police officers at the Police Station. She also observed a pool of water that had collected around the bottom of the platform. The concrete platform on which the toilet bowl is set is not partitioned from the rest of the cell and no provision is made for the use of the toilet bowl in privacy. As a result the occupants of the police cell are forced to use the toilet bowl in the full view of the other occupants of the cell much to the disgust and humiliation of everyone forced to endure such indecency. There was no toilet paper in the cell. There was no soap, no hand basin and no shower in the cell. There was no running water in the cell and no drinking water either. It was her observation that the floor and the walls of the cell were dirty and dusty. The holding cell had no electric light.

At about 6 am the following day Kachingwe's legal practitioner brought her a wet towel and a fresh change of clothing and some breakfast. She was permitted to change her clothing and freshen up with the towel. She thereafter had her breakfast in the fenced enclosure where she observed litter of rubbish and scraps of food eaten by previous occupants of the cell.

It was Kachingwe's contention that the police did not offer the women detained with her any breakfast. Kachingwe's office hired another legal practitioner to assist her. A Mr Gula-Ndebele of Gula-Ndebele and Partners arrived at the Highlands Police Station between 9 am and 10 am. Kachingwe was then interviewed in the presence of her new legal practitioner and she denied any knowledge of the theft at the Seasons Restaurant. She was eventually released at about 12 pm.

In brief the contention of Kachingwe is that the conditions under which she was detained constitute inhuman and degrading treatment and violated her fundamental right conferred by s 15(1) of the Constitution. She particularized the condition that constituted the inhuman and degrading treatment as follows:

(1) The cell in which she was detained was filthy as human excrement and urine collected in an open toilet bowl causing her much distress.

(2) The toilet bowl was not partitioned off from the rest of the cell and therefore there was no privacy in the use of the toilet.

(3) The cell was unhygienic as there was no toilet paper, no soap, no running water and no shower.

(4) The cell had no windows and therefore there was no natural light in the cell.

(5) There was no lighting in the cell and therefore at sunset the occupants are in the dark all the time.

(6) She was required to be barefoot in the cell that was filthy and in spite of the low temperatures in the cell.

(7) There was no bedding in the cell.

(8) The cell did not have clean drinking water.

(9) She was forced to wear one layer of clothing in spite of the temperature in the cell being very low.

There is a striking resemblance between the treatment accorded Kachingwe and that of Chibebe. I will, therefore, not recount it in any detail as that will amount to recounting a similar story.

Chibebe was arrested on 9 December 2002 and was detained in police cells at Matapi Police Station. Before being detained in the police cell he was ordered to remove his shoes, socks, jacket, tie, belt and watch. He was left with only his shirt and trousers. The conditions of the cell at Matapi Police Station were very similar to the conditions at Highlands Police Station as described by Kachingwe.

He too alleges that upon entering the cell he was assaulted by the choking smell of human faeces and urine. He was detained in the same cell with seven other inmates. There was insufficient bedding for each prisoner in the cell and that he and his companion, Mr Shambare, spent the better part of the night standing against the wall and that the in-mates had to share a few blankets in the cell. Shortly after being detained he learnt that the stench in the cell emanated from the toilet inside the cell. The toilet was not a flushing toilet and consisted of a hole in a corner of the cell. Owing to the fact that there was no light in the cell the prisoners were forced to use their bare feet to locate the hole in the floor. In a situation where one is naturally fearful of soiling one's feet people attempted to relieve themselves around the toilet hole instead of the hole itself.

He also discovered that the toilet hole was not partitioned off for privacy and that if the inmates want to relieve themselves they had to do so in the full view of the other inmates. Chibebe contends that the police cell was most unhygienic because there was no running

water, no soap, no hand basin, no shower and no toilet paper. There was no drinking water in the cell.

Chibebe and the other inmates were allowed out of their cell into the fenced enclosure for about 10 minutes per day. Chibebe contends that while detained he received no food and the police cells were never cleaned. The inmates had to clean it themselves during the period they were allowed out into the fenced enclosure for exercise. Chibebe contends that his treatment while in detention was inhuman and degrading for substantially the same reasons as Kachingwe.

The third applicant is cited as a Human Rights Organisation whose object is to encourage the growth and strengthening of human rights at all levels of Zimbabwean society. It is a *universitas* that can sue and be sued. The third applicant contends that all the police cells in Zimbabwe are much the same as those described by Kachingwe and Chibebe. On that basis the third applicant, in its affidavit, is seeking a declarator that all police cells throughout Zimbabwe are unfit for the holding of criminal suspects and that the first and second respondents be ordered to take the necessary corrective measures to right the violation of the Constitution of Zimbabwe, or any other relief.

Members of the court visited the police holding cell in question at Highlands Police Station. Kachingwe's description of the police holding cell is consistent with the observation made by the members of the court. In particular it was observed that the toilet is not partitioned off from the rest of the cell to provide for privacy to the users. There was no toilet paper, no wash-basin, no drinking water, no sitting place. The toilet is flushed from outside and windows were broken. The police holding cell in question is old having been built in 1935.

The criticism relating to the structural conditions of the detention cell, such as the failure to partition off the toilet area, the absence of a wash-basin and a shower are irrefutable. The respondents however contend that Kachingwe and Chibebe were provided with food and blankets. The respondents also averred that the holding cells were cleaned regularly in compliance with standing orders. The respondents also pleaded scarcity of resources for the failure to provide better facilities in the holding cells.

Counsel for the respondents also raised a point *in limine*, namely, that Kachingwe has no *locus standi* to bring these proceedings on two grounds. Firstly, it was argued, that she is a foreigner and, as such, is not entitled to any protection under the Constitution, in particular s 15. Secondly, it was argued that she is not entitled to the relief set out in the draft order as it was too wide and did not relate to her.

Dealing with the first objection, s 15(1) of the Constitution provides that:-

> "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

While s 24(1) of the Constitution provides that:-

> "If any person alleges that the Declaration of Rights has been, is being, or is likely to be contravened in relation to him … then, without prejudice to any other action with respect to the same matter which is lawfully available, that person … may, subject to the provisions of subsection (3), apply to the Supreme Court for redress."

It is quite clear from the language of s 15(1) of the Constitution that there is no distinction between a citizen and a non-citizen in respect of the protection availed under that section. Section 15(1) prohibits the subjection of any person, irrespective of the status of that person, to torture, or to inhuman or degrading treatment. I see nothing in the language of s 15(1) that the lawmaker intended to limit the protection provided therein to citizens only.

I am, therefore, satisfied that a resident such as Kachingwe is entitled to approach this Court in terms of s 24(1) of the Constitution and seek redress for the alleged violation of her constitutional right conferred by s 15(1) of the Constitution. It is also quite clear from the language of s 15(1) of the Constitution that it applies to both citizens and non-citizens. This point, *in* limine, therefore fails.

Turning to the second ground of objection, namely that the applicant Kachingwe is not entitled to the relief sought in the draft order filed of record. I accept that there is substance in this objection. The relief sought by the three applicants in the draft order is wider than what they are entitled to on the evidence. The applicants seek a *mandamus* compelling the respondents to do all the things set out in the draft order. Mr *Mudara*submitted that Kachingwe has no interests in obtaining such a general order. He argued that for Kachingwe to have *locus standi* she must have direct and substantial interest in the relief sought. In this regard it was submitted that the Court must be satisfied that her interest in the relief sought in the draft order satisfies the following criteria:

> (a) a direct interest that is not too remote from the relief sought;

(b) a substantial interest that is not too abstract or academic;

(c) a real interest not a hypothetical one;

(d) a sufficient or patrimonial interest

In support of the above submissions the following authorities were cited. See *Dalrymple and Others v Colonial Treasurer* **1910 TS 372** at 379; *De Waal & Ors v Van der Horst & Ors* **1918 TPD 277** at 284; *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* **1933 AD 87** at 101; *Ex parte Mouton and Another* **1955 (4) SA 460**(A) at 464 A-B; *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* **1988 (3) SA 369** at 387-389D.

On the facts of this case I am satisfied that neither Kachingwe nor any of the other applicants have established any of the above interests to entitle them to the general relief sought in the draft order. Apart from this the only evidence before this Court relates to two specific police holding cells. There is no evidence regarding the condition of police holding cells throughout Zimbabwe. Although Kachingwe and Chibebe do not seek, in the draft order, a declarator that their constitutional right conferred by s 15(1) of the Constitution was violated by the respondents, that is the essence of their complaint in the founding affidavits. In my view s 24(4) confers jurisdiction on this Court to enable it to make an order to address this complaint even though it is not specifically sought in the draft order.

In regard to the alleged degrading and inhuman treatment the respondents' stance is that although s 15(1) of the Constitution prohibits inhuman and degrading treatment Kachingwe's and Chibebe's treatment did not amount to inhuman and degrading treatment. It was argued that the conditions of the police holding cells where the applicants were held, and prisons in general, are not required to and cannot match those of a free person.

In support of this submission, counsel for the respondents referred the court to the remarks of GUBBAY CJ in the case of *Blanchard and Ors v Minister of Justice, Legal and Parliamentary Affairs* **1999 (2) ZLR 24(S)** at p 30E-F. The learned CHIEF JUSTICE had this to say:-

> "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 un-incarcerated individuals."

Counsel also referred us to the dicta of Justice REHNQUIST in *Bell v Wolfish* **[1979] USSC 82**; **441 US 520** (1979), which was cited with approval in *Blanchard, supra*, wherein the learned judge (as he then was) stated as follows 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 centre, 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'."

Mr *Mudara* further submitted that the order sought by the applicants was of an administrative nature which the courts are unable to regulate. In support of this proposition he relied on the remarks of GUBBAY CJ in *Blanchard, supra*, wherein he stated at 34C-D:-

> "… 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."

It was further argued that similar sentiments were expressed in the case of *Soobramoney v Minister of Health, Kwazulu-Natal* **[1997] ZACC 17**; **1997 (12) BCLR 1696** (CC) wherein CHASKALSON P made the following remark at 1705-1706, para 29:-

> "The provincial administration which is responsible for health services in Kwazulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility is to deal with such matters."

In conclusion Mr *Mudara* submitted that the obligations sought by the applicants from the respondents are dependent upon the resources available for such purposes and that the corresponding rights themselves are limited by reason of lack of resources. The respondents further submitted that the application was fraught with many practical difficulties and that it is not clear from the papers what the applicants want to be remedied or rectified. It was also argued that the relief sought was vague and unenforceable and that on that basis the application should be dismissed.

While the relief as set out in the draft order presents the applicants with some difficulty in that the applicants have no *locus standi* to demand such relief and that no evidence was placed before the Court to justify the grant of such relief, that does not preclude the Court from determining whether the treatment meted out on Kachingwe and Chibebe constitute degrading and inhuman treatment. The issue in this regard is whether or not Kachingwe and Chibebe were subjected to inhuman and degrading treatment contrary to s 15(1) of the Constitution, and whether Kachingwe and Chibebe, as detainees, are entitled to any protection in terms of s 15(1) of the Constitution, and, if so, was such right violated by the respondents? As already stated s 15(1) of the Constitution provides that no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.

I entertain no doubt that the law maker intended s 15(1) of the Constitution to protect all persons irrespective of whether or not they are imprisoned or detained in police cells. Indeed detained and imprisoned persons must have been in the forefront of the lawmaker's mind when he enacted s 15(1) of the Constitution. Incarcerated persons are particularly vulnerable and in need of such protection as they are liable more than anyone else to torture, inhuman and degrading treatment. Indeed this Court has held that convicted persons are not, by the mere fact of their conviction, denied the constitutional rights they otherwise possess and that no matter the magnitude of their crime they do not forfeit the protection afforded them by s 15(1) of the Constitution of Zimbabwe. See *Conjwayo v Minister of Justice Legal and Parliamentary Affairs and Ors***1992 (2) SA 56** (ZSC) and *Woods and Ors v Minister of Justice, Legal and Parliamentary Affairs and Ors* **1995 (1) SA 703** (ZSC).

I am persuaded by the applicants' further submission that the legal principles enunciated in the cases of *Conjwayo supra,* and *Woods, supra,* extend equally to persons who are detained in police holding cells on suspicion of having committed criminal offences. On this basis I am satisfied that s 15(1) of the Constitution of Zimbabwe applies to people like Kachingwe

and Chibebe who are held by the police in holding cells on suspicion of having committed an offence.

Having come to that conclusion the next issue that falls for determination is whether the treatment Kachingwe and Chibebe received whilst under detention constitutes a violation of their constitutional right guaranteed by s 15(1) of the Constitution.

The following facts are common cause in this case.

1. That the police cells in which both Kachingwe and Chibebe were detained measured roughly 24 square metres.
2. That inmates had to relieve themselves in the full view of others.
3. That the toilet could only be flushed from outside the cell.
4. There was no toilet paper.
5. There was no wash-basin.
6. There was no soap.
7. There was no running water in the cell and there was no drinking water either.
8. There was no electric light in the cell.
9. That the detainees were allowed out of the cells for only a short period of time per day.
10. That there were several inmates in one cell.

Kachingwe and Chibebe make further allegations regarding the denial or failure to provide food, blankets, the cleanliness of the cells, etc. These allegations are disputed by the respondents. The respondents contend that Kachingwe and Chibebe were provided with food, blankets, bedding and that this was done in terms of the standing orders and directives regulating conditions of detained persons in police custody.

It is common cause that Police Standing Orders promulgated under s 9 of the Police Act [Chapter 11:10] make provision for adequate food to be given to prisoners, that prisoners should be given sufficient bedding, refreshments, and rations etc. In terms of these Police Standing Orders every detainee is supposed to be issued with three clean blankets

which are required to be returned to the police upon his release. The Police Standing Orders also require that the blankets should be cleaned, dried and folded. They provide that blankets issued to a prisoner who remains in police custody for a lengthy period shall be washed and dried after seven days. The standing orders provide that a general hand should scrub each police cell daily with detergent and disinfectant. The cell cleaning should take place during the daily exercise period whenever possible.

Further the Police standing orders provide that the Member-in-Charge should arrange for cells to be checked daily after scrubbing out by the general hand. The standing orders also provide that the exercise yards and cells surrounding should be swept out daily by the general hand and should be inspected simultaneously with the cells inspection, etc.

There is a dispute of fact on the papers on whether the police complied with the requirements of the Police standing orders on the days the first and second applicants were in detention.

The respondents contended that they did while the applicants' contend that whilst they were in detention the police did not carry out their duties as required of them by the Police standing orders. This dispute of fact, in my view, cannot be resolved on the papers. However, this matter can be determined without resolving these factual disputes for the following reasons.

The question of whether the police carried out their duties as set out in the Police standing orders or not is essentially an administrative issue and not a constitutional issue. The question of whether or not the police have complied with what is required of them in terms of the standing orders is more of a matter for review than a constitutional issue. I, however, accept that police compliance with the standing orders is of some relevance to this application but not critical for its determination.

I now turn to deal with the issue of what constitutes torture, inhuman or degrading punishment or treatment and whether the first and second applicants were subjected to treatment or conditions that constitute torture, inhuman or degrading punishment or treatment.

Counsel for the applicants submitted that the court can derive some guidance in determining this issue from decisions of some international tribunals on human rights that have adjudicated on this issue and the reports of the African Commission on Human and Peoples' Rights. The American Convention on Human Rights, in Article 7, prohibits torture, inhuman and degrading punishment. The African Charter on Human and Peoples' Rights also prohibits torture, inhuman and degrading punishment in Articles 1 and 5. The International Covenant on Civil and Political Rights also outlaws torture, inhuman and degrading punishment. The United Nations Body of Principles for the Protection of All Persons under Any Form of

Detention or Imprisonment also prohibits torture, inhuman or degrading punishment and sets out minimum standards for the treatment of detained persons. One can safely say that torture, inhuman or degrading punishment is universally proscribed.

In the case of *Hilaire, Constantine and Benjamin et al* v *Trinidad and Tobago,* Inter-American Court of Human Rights Series C No 94 (21 June 2002), the Inter-American Court of Human Rights found that the conditions under which the applicants were held were inhuman and degrading because the cells received little or no natural light, lacked sufficient ventilation, the sanitation facilities were primitive and degrading, the cells were tiny and overcrowded, exercise was very limited and medical facilities were virtually non-existent. The cells were so overcrowded that some of the prisoners had to sleep sitting or standing up and the inmates were confined to those conditions for long periods of at least twenty-three hours a day.

The Court also found that the applicants suffered these conditions for an extensive period of time and concluded that the State had failed to ensure respect for the dignity inherent in all human beings as well as their right not to be subjected to cruel, inhuman or degrading treatment or punishment.

The Court declared that the detention conditions in Trinidad and Tobago were completely unacceptable and that that was sufficient to constitute a violation of Article 5(1) and 5(2) of the Convention.

In the course of its judgment the Inter-American Court of Human Rights also stated that any person deprived of his liberty has the right to be treated with dignity and the State had the responsibility and the duty to guarantee the detained person's integrity while detained. The court also observed that the State, being responsible for the detention facilities, is the guarantor of the rights of detainees.

In the case of *Kalashnikov v Russia* **[2002] ECHR 596**; **(2003) 36 EHRR 34** the European Court of Human Rights ruled that the detention of the complainant in a cell that was overcrowded, poorly ventilated, infested with cockroaches and ants, with a lavatory that provided insufficient privacy, with no bedding material and other necessary items constituted inhuman and degrading treatment contrary to the provisions of Article 3 of the European Convention which provides:-

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

There are striking similarities between *Kalashnikov's* case, *supra*, and this case. In particular, the defence raised by the Russian Government are similar to the defence raised by the respondents in this case. There is also a similarity in what is alleged to constitute inhuman and degrading treatment in the two cases. *Kalashnikov* alleged that he was subjected to inhuman and degrading treatment in the following respects:

(1) The cell in which he was detained was overcrowded and insanitary.

(2) The cell measured between 17 and 20 square metres and each bed in the cell was used by two or three in-mates and, at any given time, there was between .9 and 1.9 square metres of space per inmate in the applicant's cell. Inmates took turns to sleep on the basis of 8 hours of sleep per person. In this regard the Court observed that the European Committee for the Protection from Torture, Inhuman or Degrading Punishment had set 7 square metres per prisoner as an approximate and desirable guideline of the detention cells.

(3) There was inadequate ventilation.

(4) That the inmates were allowed 3 to 4 hours of outdoor activity per day.

(5) The cell was infested with pests.

(6) Toilet facilities were inadequate in that only a partition measuring 1.1 metres high separated the lavatory pan in the corner of the cell from a wash stand next to it but not from the living area. There was no screen at the entrance of the toilet. The applicant had to use the toilet in the full view of other inmates.

(7) The applicant was detained for a long period of time under the above conditions. He was detained for 4 years and 10 months.

The Russian Government submitted that it was doing its best but did not have adequate resources to provide better facilities. In this regard it was common cause that for economic reasons conditions of detention in Russia were very unsatisfactory and fell far below the requirements set out for penitentiary establishments in member states of the Council of Europe. However, the Government of Russia contended that it was doing its best to improve conditions of detention in Russia and that it had adopted a number of programmes aimed at

the construction of new pre-trial detention facilities, the reconstruction of the existing ones would lead to the elimination of diseases within the prisons. It was also accepted that the implementation of programmes being undertaken would allow for a two-fold increase of space for prisoners and for the improvements of sanitary conditions in pre-trial detention facilities.

It was further accepted by the Court that the Russian Government had taken measures to improve the detention facilities where the applicant's cell was located and the Court was satisfied that the Russian Government had no positive intention of humiliating or debasing the applicant and that although such intent is a factor to be taken into account, the absence of any such intent does not necessarily exclude a finding of violation of Article 3 which prohibits torture, inhuman or degrading punishment.

On the basis of the above factors the Court concluded that the applicant's condition of detention, in particular, the severely crowded and insanitary environment and its detrimental effect on the applicant's health and well-being combined with the length of the period during which the applicant was detained in such conditions amounted to degrading treatment. The Court, accordingly, concluded that there had been a violation of Article 3 of the Convention, that is to say, that the applicant had been subjected to cruel, degrading and inhuman treatment.

Mr *Matinenga* also argued that the provision of the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights (hereinafter referred to as the "African Charter" and the "ICCPR") are part of our national law and that in terms of these international instruments inhuman and degrading punishment is prohibited. In this regard he argued that the Constitution of Zimbabwe Amendment (No **7) Act 1987** (No. 23 of 1987) which came into effect on 31 December 1987, amended the Constitution of Zimbabwe by inserting a new section 111B which provides:-

> "Any International Convention, treaty or agreement which –
>
> (a) has been entered into or executed by or under the authority of the President; and
>
> (b) imposes fiscal obligations upon Zimbabwe
>
> shall be subject to ratification by the House of Assembly."

The House of Assembly was later repealed and substituted by Parliament. He argued that the effect of that amendment to the Constitution in 1987 was that international conventions and treaties that were signed or acceded to, by, or under the authority of the President and that did not impose a fiscal obligation on Zimbabwe were integrated into the domestic national law of Zimbabwe without explicit legislation, as they did not require the approval or ratification of Parliament.

He further argued that s 111B was, however, later amended by the Constitution of Zimbabwe Amendment (No **12) Act, 1993** (No. 4 of 1993) so that any convention, treaty or agreement which was acceded to, concluded or executed by or under the authority of the President before 1 November 1993 and which, immediately before that date, did not require approval or ratification by Parliament, remained part of the law of Zimbabwe after the 1993 amendment.

He submitted that Zimbabwe signed and ratified the African Charter and the ICCPR in 1986 and 1991, respectively. On that basis, he submitted that by assenting to the African Charter and the ICCPR Zimbabwe is bound by the provisions of these treaties which are part of our national law. In support of this proposition he relied on the case of *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* **[1977] 1 All ER 881** (CA) at p 888F-G. He also relied on the case of *S v Petane* **1988 (3) SA 51** (CPD) at p 56F-G in which the court held that the attributes of customary international laws which are directly operative in the national sphere are those that are either universally recognised or have received the assent of the country.

This contention was not disputed by the respondents. I have no doubt that, in all probability, Mr *Matinenga* is correct in this regard. However, I feel that this point was not sufficiently argued for me to make a firm determination of this point. The determination of that point of law is not necessary for the determination of this case.

In any event the provisions proscribing torture, inhuman and degrading punishment as set out in those international instruments are almost identical to the wording of s 15(1) of the Constitution of Zimbabwe that proscribes torture, inhuman or degrading punishment.

Mr *Matinenga* also referred us to a number of reports of the African Commission which was established to promote human and peoples' rights and to ensure their protection in Africa. I agree with Mr *Matinenga* that these reports are persuasive. The following are some of the

reports which Mr *Matinenga* cited. He cited the case of *Huri-Laws v Nigeria* 225/98 reported in the 14th Annual Activity Report 2000 -2001. At p 300 of the above-mentioned Compilation the complainant, a non-governmental organisation, had alleged, amongst other things, that a member of the Civil Liberties Organisation, another human rights non-governmental organisation, had been detained in a sordid and dirty cell under inhuman and degrading conditions where he was denied medical attention and access to his family and lawyer, and also denied access to journals, newspapers and books.

The African Commission ruled in paragraph 41 at p 306 that the detention of the member in a sordid and dirty cell, in health threatening conditions and in which access to medical attention and the outside world was denied amounted to cruel, inhuman and degrading treatment in violation of Article 5 of the African Charter.

Similarly in the case of *Civil Liberties Organisation v Nigeria* 151/96 reported in the 13th Annual Activity Report: 1999 – 2000 at p 266 of the above-mentioned Compilation, a complaint was filed against the detention of various persons in dark cells, with insufficient food, no medicine or medical attention. The African Commission made a finding in paragraph 25 at p 270 that the deprivation of light, insufficient food and lack of access to medicine or medical attention constituted a violation of Article 5 of the African Charter.

In the case of *John D. Ouko v Kenya* 232/99 reported in the 14th Annual Activity Report: 2000 – 2001 at p 144 of the above-mentioned Compilation the complainant alleged that throughout the period of his detention he was detained in a 2 by 3 metre basement cell with a 250 watts electric bulb which was left on throughout his 10 months' detention and that he was denied bathing facilities and was subjected to both physical and mental torture. The African Commission ruled that the conditions of the complainant's detention were a violation of the complainant's right to the respect of his dignity and amounted to inhuman and degrading treatment in violation of Article 5 of the Charter. The African Commission further ruled that the treatment and conditions of *Ouko's* detention ran contrary to the minimum standards contained in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, particularly Principles 1 and 6.

Principle 1 of the United Nations Body of Principles provides as follows:-

> "All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person."

Principle 6 of the United Nations Body of Principles provides:-

> "No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance

whatsoever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment."

The above international norms provide a useful guideline for the determination of this case.

I have no doubt, in my mind, that the holding cell that the court inspected at Highlands Police Station, the same holding cell in which Kachingwe was detained overnight, does not comply with elementary norms of human decency, let alone, comply with internationally accepted minimum standards. In particular, the failure:

(a) to screen the toilet facility from the rest of the cell to enable inmates to relieve themselves in private;
(b) to provide a toilet flushing mechanism from within the cell;
(c) to provide toilet paper;
(d) to provide a wash-basin; and
(e) to provide a sitting platform or bench;

constitute inhuman and degrading treatment prohibited in terms of s 15(1) of the Constitution. The evidence clearly establishes that Chibebe was subjected to similar treatment.

The third applicant has alleged that conditions in the police holding cells throughout Zimbabwe are the same as those described by the first and second applicants. This may be the case but the matter cannot be determined on the basis of the third applicant's mere say so. Accordingly the Court cannot grant the relief sought in the draft order but will make the following declaration and order:-

1. That the first and second applicants, that is, Kachingwe and Chibebe, were detained under conditions that constituted inhuman and degrading treatment in violation of s 15(1) of the Constitution.

2. That the conditions of detention in police cells at Highlands and Matapi Police Station are inhuman and degrading.

3. The respondents are directed to take immediate measures to ensure that the holding cells at Highlands and Matapi Police stations have toilets that are screened off from the living area, with flushing mechanisms from within the cells, wash-basins and toilet paper.

4. The first and second applicants are awarded costs but there will be no order as to costs in respect of the third applicant.

SANDURA JA: I agree.

CHEDA JA: I agree.

MALABA JA: I agree.

GWAUNZA JA: I agree.

Honey & Blanckenberg, applicants' legal practitioners

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