IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: KISANGA, J.A., RAMADHANI, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPLICATION NO. 8 OF 2000

B e t w e e n

S. M. Z. . . . . APPLICANT

A n d

MACHANO KHAMIS ALI & 17 OTHERS. . . . . RESPONDENTS

(Application for Revision from the Ruling of the High Court of Zanzibar at Zanzibar)

(Tumaka, Deputy C.J.)

dated the 3rd day of April, 2000

in

Session Case No. 7 of 1999

ORDER OF THE COURT

RAMADHANI, J.A.:

This matter came to us as an appeal by the accused persons against the decision of the learned Deputy Chief Justice of Zanzibar. We heard the appeal but reserved our judgment to a later date. As the appeal was of its own kind and raised grave constitutional issues for the determination by this Court for the first time in its history, there was a need to research and be thorough in our judgment. When the judgment was ready and the Court was in the process of setting the date of its delivery, we learnt of the order of MSHIBE ALI BAKARY, Ag. J. of the High Court of Zanzibar, of 9th November, 2000, discharging the accused persons following a nolle prosequi entered by Mr. Toufiq, Principal State Attorney, for the prosecution. However, despite the nolle prosequi, the decision of the High Court of Zanzibar to the effect that the offence of treason can be committed against the Revolutionary Government of Zanzibar remains intact,

.../2

and might be relied upon in future by the High Court. We are satisfied that that decision ought to be revisited and that it cannot be allowed to stand.

In view of the changed circumstances, therefore, we decided to revise that decision under section 4 (3) of the Appellate Jurisdiction Act, 1979, as amended by Act No. 17 of 1993.

However, we are duty bound to point out that that subsection empowers this Court "to call for and examine the record of any proceedings before the High Court ...". We did not have to call for the record in this case because the record was already with us.

The eighteen accused persons stand charged with treason c/s 26 of the Penal Decree (Cap. 13 of the Laws of Zanzibar). The litigation has been protracted and when the matter landed in the High Court of Zanzibar, the accused persons raised four preliminary issues. The S. M. Z. conceded the first issue; that the charge was defective. Leave was given by the learned Deputy Chief Justice to amend the charge.

The remaining three issues were highly contentious. First, the accused persons argued that the charge is time barred. They also claimed that the charge of treason against the authority in Zanzibar is not maintainable as Zanzibar is not a sovereign state. Lastly, they repeated the "the old, old story" of a request for bail. All the three issues were decided against the accused persons. Our concern here is the constitutional issue of whether or not treason can be committed against the Revolutionary Government of Zanzibar.

The accused persons' learned advocates were Mr. Hamidu Mbwezeleni, Mr. Salim Mnkonje and Mr. Nassor Hamisi. The Serikali ya Mapinduzi ya Zanzibar, that is, the Revolutionary Government of Zanzibar, in short,

.../3

S. M. Z., on the other hand, was represented by Mr. Othman Mohammed Othman, learned Deputy Attorney General, and Mr. Salum Toufiq, learned Principal State Attorney. Because of the seriousness of the matter, and upon our advice, the Honourable Chief Justice agreed to invite some amici curiae, friends of the Court, to assist the Court. So, we had Mr. Kipenka Musa, the Director of International and Constitutional Department in the Attorney General Chambers of the United Republic of Tanzania, who was accompanied by Mr. Syrilius B.G. Matupa, learned Principal State Attorney. There was also Prof. Jwan Mwaikusa who holds the chair of constitutional law at the University of Dar es Salaam. The three friends of the Court addressed the Court right at the end after the counsel of the two parties completed their submissions.

As already said, the accused persons were faced with a charge of treason contrary to section 26 of the Penal Decree (Cap. 13). After mentioning the names of the accused persons, the indictment alleges the following particulars:

> ... all together by your words and actions you intended and devised ways of treason in order to overthrow the Government of Zanzibar and to remove from authority the President of the Revolutionary Government of Zanzibar.

We have to be clear in our minds what is treason. What does it entail generally: against who can it be commited and by whom?

The Concise Dictionary of Law defines treason as "Conduct comprising a breach of allegiance owed to the sovereign or the state". That is also stated by Halsbury's Laws of England, 4th ed. paragraph 77, that is, "the essence of the offence of treason lies in the violation of allegiance owed to the sovereign". Again in The Digest (Annotated British, Commonwealth and European Cases). Volume 14 (1), 1993 (2nd reissue), paragraph 1734,

.../4

at page 208, it is stated: "On an indictment for high treason it must appear unequivocally that the criminal owed allegiance to the Crown". Sir David Yardley, too, at page 123 of his book: Introduction to Constitutional and Administrative Law, 8th Ed., reiterates the same requirement of allegiance to the Crown:

The classic case on treason is Joyce v. DPP, /1946/ AC 347. Joyce was an American citizen resident in a British territory for 24 years. He obtained a British passport on pretence that he was a British subject by birth. He renewed the passport and before the renewal expired, the Second World War broke out. It was then discovered that he was in the employment of a German radio company and that from enemy territory he had broadcasted in English some talks hostile to Great Britain. He was charged and convicted of treason. He unsuccessfully appealed to the House of Lords where LORD JOWITT, L.C., had this to say at page 365:

> It is necessary then to prove not only that an act was done but that, being done, it was treasonable act. This must depend upon one thing only, namely the relation in which the actor stands to the King to whose enemies he adheres. The act that is in one man treasonable, may not be so in another ... The question whether a man can be guilty of treason to the King has been treated as identical with the question whether he owes allegiance to the King. (Emphasis is ours).

His Lordship continued at page 368:

> The principle which runs through feudal law and what I may perhaps call constitutional law requires on the one hand protection, on the other fidelity: a duty of the sovereign lord to protect, a duty of the liege or a subject to be faithful. Treason, "trahison", is the betrayal of a trust: to be

faithful to the trust is the counterpart of the duty to protect.

To their lordships it was immaterial that in law Joyce was not a British subject because the passport was obtained by a misrepresentation. It was enough that the possession of that document enabled him to obtain in a foreign country the protection extended to British subjects.

From the authorities cited, therefore, the following four matters have to be proved in an indictment for treason: one, an act has been committed; two, the act is treasonable; three, the act is against a sovereign or a state; and lastly, the act was done by a person who owes allegiance to the sovereign or the state.

This brings us to the next question: who is a sovereign, in other words, what is sovereignty, and what is a state? To focus the matter squarely to the matter before us, the questions are: is Zanzibar a state and is the Revolutionary Government of Zanzibar sovereign?

Mr. Musa submitted that there are four requirements for the existence of a state in international law: a defined territory, population, a stable government and independence or sovereignty. He went further, quoting Caglar v. Billingham, /1996/ LRC Vol. 1 p. 565, stating that sovereignty is the capacity to enter relations with other states.

Mr. Mbwezeleni had submitted earlier that sovereignty is not a day-to-day activity of a country but supreme authority independent from any outside interference. He further stated that a sovereign must have power to protect its citizens both internally and externally. Mr. Mbwezeleni then posed a question whether Zanzibar has such capacities. We shall deal with this issue later.

.../6

S. M. Z., as properly pointed out by Mr. Mbwezeleni in his reply, made no submissions on what is a state and what is sovereignty. The other friend of the Court, Prof. Mwaikusa, also did not say anything on threse two issues.

What is a state in international law? The Rt. Hon. The Earl of BIRKENHEAD, in International Law, 6th Ed. edited by Ronw Moelwyn-Hughes (1929) at page 31 provides the following definition:

> A state within the meaning of international law may be described as a permanently organised society, belonging to the family of nations, represented by a Government authorised to bind it, independent in outward relations, and possessing fixed territories.

As rightly submitted by Mr. Musa, there are four conditions that need to be satisfied for a state to exist. In that regard we are indebted to L. Oppenheim's International Law: A Treatise Vol. 1. - Peace, 5th Ed. by H. Lauterpacht, 1937 (Longmans) and to J.L. Brierly The Law of Nations (An Introduction to the International Law of Peace) 6th Ed. by Sir Humphrey Waldock, 1963 (Oxford), for most of what follows.

The first of the four conditions is that there must be a people. This is an aggregate of individuals of both sexes, regardless of race or colour or creed, living together as a community. Secondly, there must be a country in which the people have settled down. The size of the country is immaterial. Thirdly, there has to be a Government i.e. a person or persons who are the representatives of the people who rule according to the law of the land. Lastly, the Government has to be sovereign.

.../7

What is sovereignty? Oppeinheim says at page 113, "Sovereignty is supreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all-round, within the without the boarders of the country."

It may help if the look at how this doctrine came into being. At the end of the Middle Ages, the word souverain was used in France to describe an authority which did not have another authority above itself. Thus, for instance, this Court would have been referred to as Cours Souveraines since there is no other authority above it. A legal philosopher, Jean Bodin, it was, in his work, De la Republique, 1577, who introduced the term sovereignty. To him sovereignty was an essential principle of internal political order. Sovereignty was supreme power within a state without any restriction, whatsoever, except the Commandments of God and the Law of Nature.

In the sixteenth centry the British philosopher, Thomas Hobbes in Leviathan, went further to exclude any restriction on the sovereign. His views were that men needed for their security a common power to keep them in awe and to direct their actions to the common benefit. To him that power was the sovereign. However, there were others like Samuel Pufendorf who did not subscribe to the view of unfettered authority of the sovereign.

That is one aspect of sovereignty: supreme authority. It has been recognised that sovereignty has dual aspects; internally it relates to the power of making and enforcing laws, externally to freedom from outside control. The curtailment of external authority and the dependence on another power are not in themselves fatal to the internal sovereignty of the state concerned. For the purposes of treason internal sovereignty is

.../8

the more relevant. Authority for law making and law enforcement is essential to the existence of any sovereign. This dual aspect itself begets the issue of the divisibility of sovereignty. Is sovereignty divisible?

There are two schools of thought. The prevailing one amont authors in the sixteenth and seventeenth centuries was that sovereignty was indivisible. This tallied with the original concept of sovereignty that it has an attribute of a personal ruler inside the state. After the Peace of Westphalia the many member-states of the German Empire were practically independent and this provided a fertile environment for nurturing the idea of divisibility of sovereignty.

The theory of concurrent sovereitnty of the Federal State and the member-states canvassed by The Federalist (Alexander Hamilton, James Madison and John Jay) in 1787 when the United States of America turned from Confederation of States into a Federal State, added nourishment to this second school of thought. We may add that this was because of the constitutional set-up of the USA itself. But even then there were still some authors like Rousseau in his Contrat Social, and Calhoun in A Disquisition on Government, (1851) who defended the indivisibility of sovereignty.

However, the modern development of the theory of sovereignty has been to give up the attempt to locat absolute power in any specific person or body within the state and to ascribe it to the state itself. As there are semi-independent states, like those under the protectorate of another state or are member-states of a federal state, then we are at one with Oppeinheim that "it may well be maintained that sovereignty is divisible."

.../9

Alongside that, the demands of modern international law require partial surrender of sovereignty by states to accommodate the process of international legislation and decisions of international tribunals. The development of international human rights law has curtailed further the sovereignty of states. Previously, under the doctrine of national sovereignty, "what a state did with its own citizens was its own affair beyond the reach of international law of legal intervention by other states". /J.P. Humphrey's "The International Law of Human Rights" in The Present State of International Law and Other Essays, (1973)/. But that is not the case now. What a state does to its citizens is a matter of concern for other states. /Paul Sieghart: The International Law of Human Rights, 1983 (Oxford)/.

Now, a sovereign state is an International Person in the eyes of international law and is recognised as such by the other Powers. As a rule, International Persons are single sovereign states with one central political authority as government within and without the borders. These form simple International Persons. But there are also composite International Persons of varying permutations. Two or more sovereign states may be linked together in such a way that they are exclusively or to a great extent one International Person. The union may be such that the supreme power for all purposes, both foreign and domestic, is in one body. In that case it is referred to as an incorporate union, as is the case of the United Kingdom. However, if in such a union the states exist separately for domestic purposes and as one entity for purposes of foreign affairs, the entity is called a real union. There are no existing real unions nowadays. However, the two classic examples of real unions were Sweden-Norway (1814 - 1905) and Austria-Hungary that came to an end in 1918.

.../10

There are other forms of international persons like federations. However, The Rt. Hon. The Earl of Birkenhead cautions, and rightly so, in our opinion, that the division "is a question of nomenclature of no very great importance" /page 34/. The categorization, according to Prof. Westlake /International Law, Vol. 1 (Cambridge) at page 35/ does not depict the closeness of the international connection existing between the states united. He suggests that the nomenclature may be descriptive of how the union came into being.

Be it as it may, that discussion, though interesting, should not detain us but suffice it is to say that the constitutional set-up of the United Republic is unique. It is a union but with some elements of federalism. However, a definition and a description of the nature of a real union given by Oppenheim at page 157 may shed some light on the matter before us. He says:

> A Real Union is in existence when two sovereign States are, by an international treaty, recognised by other Powers, linked together for ever under the same monarch, so that they make one and the same International Person. A Real Union is not itself a State, but merely a union of two full sovereign States which together make one single but composite International Person. They form a compound Power, and are by the treaty of union prevented from making war against each other. On the other hand, they cannot make war separately against a foreign Power, nor can war be made against one of them separately. They can enter into separate treaties of commerce, extradition, and the like, but it is always the Union which concludes such treaties for the separate States, as separately they are not International Persons.

We can in all fairness say that The United Republic of Tanzania closely resembles a real union but for the stipulation that a real union is not itself a state. There is no speck of doubt that the United Republic of Tanzania is a state. The two parts forming the United Republic of Tanzania can neither separately go to war against a foreign power nor can war be made against one of them separately as was amply demonstrated in the war against Iddi Amin Dada of Uganda. The whole of Tanzania went to war and each part contributed towards the cost of that war. The United Republic of Tanzania is the treaty-making power. This was illustrated by the abortive attempt of Zanzibar to join the Organization of Islamic Conference.

May be this is the proper juncture of turn to the question posed by Mr. Mbwezeleni: is Zanzibar a sovereign state in international law?

After the above exposition, we have no difficulty at all to answer that question in the negative. The Internation Persons called Tanganyika and Zanzibar ceased to exist as from 26th April, 1964 because of the Articles of Union. The two states merged to form a new international person called the United Republic of Tanzania.

The Rt. Hon. The Earl of Birkenhead has said at page 36: "A nation cannot indefinitely surrender the treaty-making power to another, and at the same time retain its existence as a sovereign state". We concur with this contention and we wish to point out that both Tanganyika and Zanzibar, and not Zanzibar alone, surrendered their treaty-making powers to the United Republic of Tanzania.

Thus, Zanzibar, just like its sister Tanganyika, is neither a state nor is it sovereign. The state and the sovereign is the United Republic of Tanzania.

.../12

However, we have already said that in modern times sovereignty is divisible. The question then is whether sovereignty vested in the United Republic of Tanzania is divisible as between the two parts. To determine that question we have to analyse the provisions of the Constitution of the United Republic of Tanzania, 1977.

Mr. Mbwezeleni submitted that sovereignty is not divisible. We think that we better pause here for a moment and reiterate our finding that in international law sovereignty is divisible. So, we take it that what Mr. Mbwezeleni has submitted is that in Tanzania sovereignty is not divided and that is exactly the determination confronting us.

Mr. Mbwezeleni started by pointing out that Article 1 of the Constittution of the United Republic of Tanzania, 1977 (hereinafter referred to as the Union Constitution) proclaims that Tanzania is one country. Also he pointed out that Article 1 of the Constitution of Zanzibar, 1984, reiterates that position by declaring that Zanzibar is part of the United Republic of Tanzania. The learned advocate contended that sovereignty is then in the Executive of the Union.

In an endeavour to drive home his argument he cited a number of examples: One, it is the President of the Union, and not the President of Zanzibar, who divides Zanzibar into regions and districts though after consulting the President of Zanzibar. Two, a Zanzibari is defined in terms of being a Tanzanian citizen first. Three, Zanzibar is not in a position to protect its residents because the Police and the military belong to the Union Government. Mr. Mbwezeleni argued that the raising of the Jeshi la Kujenga Uchumi and Kikosi Maalum cha Kuzuia Magendo, both of which are paramilitary, is a violation of Article 147 (2) of the Union Constitution. That Article permits the Government of the United Republic only to raise and maintain military forces of any kind.

.../13

Mr. Othman, the Deputy Attorney General, started by saying that treason is not covered by any of the two constitutions and that it is left to the individual penal statutes. Moreover, he submitted that treason is not one of Union Matters and so it is possible to commit treason against the Zanzibar authority. However, he conceded that committing treason against Zanzibar is committing treason against the United Republic of Tanzania since Zanzibar is part of the United Republic.

Mr. Toufiq came out clearly on the issue of divisibility of sovereignty. He submitted that the United Republic as well as Zanzibar is each sovereign in its own sphere of jurisdiction. He cited the case of Haji v. Nungu and Another, /1987/ LRC (Const.) 224, as authority for the principle of exclusive jurisdiction of Zanzibar over non-union Matters in Zanzibar.

In reply, Mr. Mbwezeleni used Haji v. Nungu to argue that treason is a Union Matter and hence it cannot be committed against the Revolutionary Government of Zanzibar. The learned advocate went on to argue that the cumulative effect of Articles 28 (4) and 64 (5) of the Union Constitution is to repeal section 26 of the Penal Decree, that is, to expunge treason from that Decree. Mr. Mbwezeleni admitted that national security has not been defined, however, his opinion was that matters of treason obviously fall under the portfolio of national security.

Mr. Musa cited Caglar v. Billingham, /1996/ LRC Vol. 1 p. 516, which prescribes that sovereignty is a relative term and that much depends on the internal structure of a country. He pointed out that though Article 1 of the Union Constitution provides that Tanzania is one sovereign country, Article 4 provides two executives, two legislatures and two judiciaries. He, too, relied on Haji v. Nungu as authority for the principle of duality and the recognition that there are matters for the Union and others

.../14

exclusively for the Revolutionary Government of Zanzibar.

We have already said that the constitutional set-up of the Union is unique. It is our considered opinion that it is not necessary to delve into academic exercise of determining the exact docket in International Law in which to put the constitutional set-up of the United Republic of Tanzania. The starting point for our determination is what Mr. Mbwezeleni pointed out, and which was repeated by Mr. Musa, the provisions of Article 1 of the Union Constitution:

Tanzania ni nchi moja na ni Jamhuri ya Muungano.

That has been translated in English as "Tanzania is one State and is a sovereign United Republic". An element of sovereignty, which does not appear in the Kiswahili version has been introduced in the English version. Admittedly, we are not aware of a single Kiswahili word for sovereignty. This Court said in Daudi Peto v. Republic, [1993] TLR 22 at p. 33 that the controlling version of the Constitution is the Kiswahili one and not the English version because the Constitution was enacted in Kiswahili. So, the translation should be "Tanzania is one country and is a United Republic".

If we may digress for a second, the formulation of Article 1 of the Interim Constitution of Tanzania, 1965, which was enacted in English, was by far poignant: "Tanzania is a United Sovereign Republic". We wish that rendering could have been repeated in the current Constitution. A number of other matters were clearer in the 1965 Constitution than in the 1977 Constitution as we shall see.

It is further provided in Article 2 (1) that the territory of the United Republic consists of the whole area of Mainland Tanzania, of Tanzania Zanzibar and the territorial waters. As already said, the proclamation of Article 1 of the Zanzibar Constitution that "Zanzibar is part of the United Republic" supports this declaration.

.../ 5

In addition, we may as well point out that Article 103 of the Union Constitution provides that:

> There shall be a Head of the Revolutionary Government of Zanzibar who shall be the President of Zanzibar and the Head of the Revolutionary Government of Zanzibar and also the Chairman of the Revolutionary Council of Zanzibar. (Emphasis supplied).

It is significant to note that that Article categorically provides for the Head of the Revolutionary Government of Zanzibar and not for the Head of State of Zanzibar even though this Head of the Revolutionary Government is also titled the President of Zanzibar. This clinches the debate and drives home the fact that Zanzibar is not a state, not only in international law but also under the Union Constitution. Louis XIV of France bragged: "the State is me". In the like manner, here at home, the unflinching legal position is that "the State is the Union". There is absolutely no iota of dispute that the United Republic of Tanzania is indeed one country, one state.

After such a stark and authoritative declaration that the United Republic is one country, Article 4 of the Union Constitution goes on to prescribe that all functions of the state authority shall be exercised and controlled by two Governments: the Government of the Union and the Revolutionary Government of Zanzibar; two Judiciaries: one for the Union and the other for Zanzibar; and two legislatures: the Parliament of the Union and the House of Representatives of Zanzibar.

For more efficient discharge of public affairs and the effective division of the functions spelled out above amongst the designated organs, Article 4 (3) of the Union Constitution categorises affairs into Union Matters, which are contained in the First Schedule, and non-Union Matters,

.../16

which "are all other matters not so listed". The list of Union Matters has now doubled to 22 from the original eleven matters.

Among the Union Matters listed in the First Schedule is item 3, "defence and security". It may not be out of place to observe that whereas defence is one of the original eleven Union Matters, security was added to the list in 1984 after the 'pollution of the political air' which resulted in the resignation of Mr. Aboud Jumbe Mwinyi from his position as the President of Zanzibar, the Chairman of the Revolutionary Council, the Vice-President of the Union, and the Vice Chairman of the Chama Cha Mapinduzi! We shall revert to item 3 in due course.

It is categorically provided in Article 34 of the Union Constitution that the Government of the Union has authority with respect to all Union Matters in and for the Union and all other matters in and for Mainland Tanzania. The Revolutionary Government of Zanzibar, on the other hand, has executive authority with respect to all non-Union Matters in and for Zanzibar under Article 102 of the same Constitution. Thus with respect to Zanzibar, each of the two Governments in the United Republic has exclusive jurisdiction in its own sphere.

Again, to digress a bit, the earlier version of the 1977 Union Constitution was silent as to which government had authority over Mainland Tanzania for the non-Union Matters. The categorization that such authority was vested in the Union Government existed in the interim Constitution of the United Republic, 1965, but it was not reproduced in 1977. Professor B.P. Srivastava in his Professorial Inaugural Lecture, "The Constitution of the United Republic of Tanzania, 1977 - Some Salient Features - Some Riddles", delivered on 6th March, 1982, pointed out that omission. He argued that it was unconstitutional for the Government of the United Republic to deal with non-Union Matters for the Mainland Tanzania. Probably that criticism prompted the reinstatement of the 1965 position. We make this observation to underscore the need to be painstaking in writing our

/17

Constitution.

Therefore, it appears to us that there are only two lists: one of Union Matters and the other of matters in the exclusive jurisdiction of the Revolutionary Government of Zanzibar. From the arrangement of things under the Union Constitution, it does not appear that there is a third list of concurrent jurisdiction. So, a matter is either exclusively for Zanzibar or it is for the Union. Here we are required to determine to which of the two pigeonholes we slot in treason.

It is our considered opinion that on the basis of this principle of duality and the established fact of exclusive jurisdiction of the Revolutionary Government of Zanzibar over all non-Union Matters in Zanzibar, the only logical conclusion is that sovereignty is divisible within the United Republic. Now, in order to determine which of the two Governments exercises sovereignty over any given matter one has to determine whether or not the matter is Union or non-Union.

The reflex action and the enticing attraction is to rush to the conclusion that the First Schedule to the Union Constitution cataloguing Union Matters readily provides that determination. But is that list exhaustive?

This Court has said in Hajji v. Nungu at p. 232, per NYALALI, C.J.:

> ... there are matters which concern both sides of the Union, that is, they concern Tanzania Mainland as well as Zanzibar. According to the basic scheme or sturcture of the Constitution of the United Republic, these matters appear to be dealt with in triple ways:
>
> > First, some of these matters of common concern are listed in the First Schedule to the Constitution ...

.../18

> Secondly, there are other matters of concern both to Zanzibar and to Tanzania Mainland and which are not listed in the First Schedule, but are specifically provided for under the Constitution of the United Republic. Such is the right of audience of Attorney General of the United Republic in the courts of the United Republic ...

His Lordship went on to cite other examples of Union Matters which are not contained in the First Schedule, like, the Permanent Commission of Enquiry which has now been replaced by the Human Rights Commission established under Article 129 and the Constitutional Court established under Article 125. After that the Court observed further:

> Other matters which are specifically provided for under the Constitution of the United Republic is certain legislation of the Parliament of the United Republic which is enacted in accordance with the provisions of Article 64 (4). The Election Act, 1985, which applies throughout the United Republic of Tanzania, appears to be one such legislation Enacted under Article 64 (4) (a). Undoubtedly this legislation does not concern a union matter listed under the First Schedule to the Union Constitution and would appear to infringe the provisions of Article 78 (1) of the Constitution of Zanzibar, which provides, in effect that: "All legislative power in Zanzibar over all non-union matters is vested in the House of Representatives".

Thus, and as properly pointed out by both Mr. Musa and Mr. Mbwezeleni, from that decision there are three bases for classifying an issue as being a Union Matter: if the matter is listed in the First Schedule as a Union Matter or if the matter is specifically provided for under the Union

.../19

Constitution to concern both sides of the Union or thirdly, if the matter is regulated by a legislation enacted under Article 64 (4) extending to the entire Union.

By using the first test, that is, of the list in the First Schedule, one is tempted to jump to the conclusion that treason is a Union Matter because "security" is listed as a Union Matter in item 3 of the First Schedule. But one is forced to stall by the gaping omission that the Union Constitution does not provide a definition of what is "security". Fortunately, however, there is the Tanzania Intelligence and Security Services Act, 1996 (Act No. 15 of 1996). It is a matter of great pity that none of the learned counsel cited this Act to us. Therefore, we have not had the benefit of their expertise in construing its provisions.

Section 3 of that Act defines "security" in the following terms:

> the protection of the United Republic from acts of espionage, sabotage and subversion, whether or not it is directed from or intended to be committed within the United Republic; (Emphasis is ours).

That section goes further to define "subversion" in the following words:

> attempting, inciting, counselling, advocating or encouraging -
>
> (a) the overthrow by unlawful means of the Government of the United Republic or of the Revolutionary Government of Zanzibar.
>
> (b) the undermining by unlawful means of the authority of the State in the United Republic. (Emphasis is ours.)

.../20

There is no doubt at all in our minds that "subversion" and treason are cognate offences. Both are about the overthrow of or the revolting against Authority. The distinction is that: while subversion is an attempt to overthrow Authority by any person irrespective of the relationship of that person to the Authority concerned, treason is an attempt to overthrow Authority by one who has allegiance to that Authority. As such treason, like subversion, falls squarely under the label of security and by virtue of item 3 of the First Schedule is a Union Matter.

The inescapable conclusion, then, is that: the overthrow of the Revolutionary Government of Zanzibar, and this includes the overthrow of the Head of the Revolutionary Government of Zanzibar or, as he is also called, the President of Zanzibar, is a Union Matter and not a matter of exclusive jurisdiction of the Revolutionary Government of Zanzibar.

For the sake of clarification, we may point out here that we have used the definition provided by the Tanzania Intelligence and Security Service Act, 1996, to fill in the lacuna in the Union Constitution on two grounds. First, this Act, according to section 2, applies to both sides of the Union. Second, it is a legislation directly connected to item 3 of the First Schedule to the Union Constitution adding security to the list of Union Matters.

Our attention was drawn to the provisions of Article 28 (4) of the Union Constitution:

> Treason as defined by Law shall be the most grave offence against the United Republic.

We agree with Mr. Othman, the Deputy Attorney General, that that article does not create an offence in the sense that it does not define or prescribe the ingredients of the offence. That clause, however, acknowledges the existence of the offence of treason as defined by law. What is crucially significant, in our opinion, is that that clause declares the offence of treason to be "the most grave offence against the Unit

Republic". Treason is the only offence so elevated in the Constitution. There is no flicker of doubt in our minds that that clause makes the offence of treason a Union Matter though the offence is not contained in the First Schedule. And this tallies with the second leg of the decision in Haji v. Nungu, that is, a matter that is specifically provided for under the Union Constitution and concerns both sides of the Union.

Again, because of the last mentioned reason, treason is a matter for the Union Government and it is not a matter for the exclusive jurisdiction of Zanzibar.

Mr. Musa brought to our attention a book The Digest, Annotated British, Commonwealth and European Cases, 1993, 2nd issue (Butterworths, London, 1993) which cites in paragraph 1758 R v. Christian, (1924) App. D. 101 (SAF), an appeal from South-West Africa, now Namibia. He produced that authority in support of his contention that it is feasible to commit treason against the Revolutionary Government of Zanzibar.

We were made anxious and curious by that submission and we resolved to lay our hands on that decision. We are much obliged to Mr. Ciaran MacGlinchey of JUTA Law of Cape Town, South Africa, who availed us with a copy of that judgment.

It was decided in that appeal that it is possible to commit the crime of high treason against a state possessing internal sovereignty even though its external sovereignty is restricted. This holding alone makes that appeal distinguishable from the one before us. Here we have categorically found that Zanzibar is not a state both in international law and under the Union Constitution. However, having travelled through the judgment, we are of the opinion that it has some relevance in this matter before us as we are going to demonstrate shortly.

.../22

South-West Africa, as it was then called, (hereinafter referred to as SWA) was a German possession which after the First World War and under the peace treaty, popularly called the Treaty of Versailles, was taken by the League of Nations and was put under the mandate of His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa.

Before the High Court of SWA, the appellant, Christian, was charged with and convicted of two counts of treason which were to the effect that in May and June, 1922, he had engaged in active hostilities against the forces of the mandatory power. A preliminary objection to the indictment was overruled. However, a question of law was reserved for the Court of Appeal of South Africa: whether the Union of South Africa as the mandatory power over SWA possessed sovereignty in SWA which if offended gave rise to treason. The Chief Justice and the four other Justices of Appeal gave a positive reply.

The argument for the appellant was that under Article 119 of the Peace Treaty the sovereignty over South-West Africa passed on to the Principal Allied and Associated Powers, which were the USA, the British Empire, France, Italy and Japan, and that is where sovereignty lay. However, for the Crown/respondent it was contended that the authority of the Principal Allied and Associated Powers was transferred to the mandatory and that the mandate conferred full sovereign power on the mandatory.

It was the opinion of their Lordships that the League of Nations was not a state and so could not have sovereignty. Most importantly, it was held that the Council of the League of Nations issued a mandate for South-West Africa reciting that the Principal Allied and Associated Powers had agreed to confer the mandate on His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa. It was also

.../23

held that Article 22 of the Covenant of the League of Nations provided that SWA was to be administered by the Union of South Africa "under the laws of the mandatory, as integral portions of its territory". Thus, SWA was governed as part and parcel of the Union of South Africa.

For those reasons their Lordships were satisfied that the Union of South Africa was responsible for the maintenance of public order and so, had sovereignty over SWA.

In our opinion there were two matters: One, was the issue of sovereignty between the Allied and Associated Powers, on the one hand, and the Union of South Africa, on the other hand. The Court of Appeal decided that issue in favour of the Union. The second matter, which was raised in the High Court, was sovereignty between the Union of South Africa and His Britannic Majesty who was the Executive Government of the Union. This was solved by the proper recitation of the indictment as INNES, C.J. said:

> The Executive Government of the Union of South Africa is by the South African Act vested in the King and is administered on his behalf by a Governor-General acting under the advice of the Executive Council. That being so the allegation in the indictment that the accused owed allegiance to his Majesty King George the Fifth in His Government of the Union of South Africa was not in my opinion open to objections. Indeed it was not objected to on appeal. I therefore agree substantially with the very able reasons of the trial Judge pronounced when the original indictment was objected to.

It is our considered opinion that, in the like manner, the indictment in this appeal should have recited allegiance to the United Republic since treason, as we have reiterated a number of times in this judgment,

.../24

is a Union Matter and not a matter exclusively for the Revolutionary Government of Zanzibar. So, that decision fortifies our stand and that is all we wish to say on R. v. Christian.

We agree with Mr. Mbwezeleni that the combined effect of Article 28 (4), that treason is the most grave offence against the Union, and Article 64 (5) is to repeal section 26 of the Penal Decree. Article 64 (5) provides:

> Subject to the application of the Constitution of Zanzibar in accordance with this Constitution to Tanzania Zanzibar in relation to all matters in and for Tanzania Zanzibar which are not Union Matters this Constitution shall have the force of law throughout the United Republic, and if any other law is inconsistent with the provisions of this Constitution, the Constitution shall prevail and that other law shall, to the extent of the inconsistency, be void.

Indeed, the moment security was added to the list of Union Matters, then, first, security should have been defined and two, treason should have been provided for and defined in a law applicable to both parts of the Union as stated in Article 28 (4).

Let us make some quick observations on certain matters raised by the learned Deputy Chief Justice. He considered federalism and cited authorities from the USA and also from Nigeria. As already pointed out, our constitutional set-up is different from that obtaining in these countries. For example, sections 37 and 38 of the Criminal Code Law of Nigeria, as cited by the learned judge, provide that treason covers acts perpetrated against the President or a State Governor. We do not have such provisions. Therefore, we do not think that we need take time to consider this comparison.

.../25

As rightly pointed out by Mr. Mbwezeleni, there are a number of unfortunate inconsistent provisions in the two Constitutions but which we do not think it is necessary to go into. However, that state of affairs is not healthy at all.

The Court was faced with a similar situation in Seif Shariff Hamad v. SMZ, Criminal Appeal No. 171 of 1992 (unreported). Two of us dealing with this appeal were also in the panel for that appeal. We mused over a number of incongruent provisions of the two constitutions and after that we had this to say on page 18 of the type-written judgment:

> Tunapendekeza kuwa mamlaka zinazohusika katika pande zote mbili za Muungano zichukue hatua zipasazo kusawazisha vifungu hivi na vyengine vyenye utata ama uwezekano wa kuleta utata baina ya hizi Katiba mbili.

A free translation would be: "We recommend to the relevant authorities on both sides of the Union, to take necessary steps to harmonize these conflicting sections and other sections of the two constitutions which are potentially irreconcilable".

It burdens our hearts that such a solemn appeal went unheeded and failed to find purchase like the warning of the Soothsayer to Julius Caesar: "Beware the ides of March".

In that appeal we reserved constitutional matters for political solutions and we disposed of the appeal on a procedural ground. But it is time to look at such provisions and take remedial steps. The Court will not throw in the towel but will keep on drawing the attention of the Powers that be. That is our role.

.../26

We get encouragement from the stanza by John Masefield:

> ... Therefore, go forth, companion: when you
> find No highway more, no track, all being blind,
> The way to go shall glimmer in the mind ...
>
> Adventure on, for from the littlest clue
> Has come whatever worth man ever knew
> The next to lighten all men may be you ...

For the reasons given above, we revised the ruling of the learned Deputy Chief Justice of Zanzibar. In a nutshell we have found that treason can only be committed against a sovereign. However, as treason is a breach of security, which in the United Republic is a Union Matter, therefore, the sovereign is the United Republic and not the Revolutionary Government of Zanzibar or the Head of the Executive of Tanzania Zanzibar who is also called the President of Zanzibar.

Accordingly the said ruling of the learned Deputy Chief Justice is set aside, but in view of the nolle prosequi entered by the prosecution no further order is made.

DATED at ZANZIBAR this 21st day of November, 2000.

THE COURT OF APPEAL OF TANZANIA

R.H. KISANGA
JUSTICE OF APPEAL

A.S.L.RAMADHANI
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(A.G. MWARIJA)
DEPUTY REGISTRAR