Namata v. Republic

Judgment

Court:	Supreme Court Of Appeal
Bench:	The Honorable Justice R.R. Mzikamanda SC JA, The Honourable Justice L.P Chikopa SC JA, The Honourable Justice A.D. Kamanga SC JA
Cause Number:	MSCA Criminal Appeal No. 13 of 2015 (Being Criminal Case Number 65 of 2013, High Court of Malawi, Lilongwe Registry)
Date of Judgment:	March 23, 2018
Bar:	G. Chipeta, Counsel for the Appellant Mrs M. Kachale - Director of Public Prosecutions,Mr Malunda - Principal State AdvocateMs. Piriminta - Senior State Advocate

INTRODUCTION

1. The appellant was convicted by the High Court[the Trial Court] sitting at Lilongwe on two counts. One for Theft contrary to section 278 of the Penal Code and another for Money Laundering contrary to section 35(1)(c) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act[the Act].

2. The exact allegations are that in the months of June and August 2013 in the City of Lilongwe the appellant stole the sum of K14,439,966.50 property of the Government of Malawi[GOM] and secondly that he had, within the same time, in his possession the above sum knowing or having reasonable grounds to believe that the same were proceeds of crime.

3. He was sentenced to three years IHL on the first count and five years on the second count. The sentences were ordered to run consecutively with effect from the date of conviction i.e. 21st January, 2015.

4. The appellant was dissatisfied with both convictions and sentences. He has appealed to this court.

GROUNDS OF APPEAL

5. Eight grounds were filed. We reproduce them verbatim.

1. 'That the learned judge erred in law and in fact in holding that the appellant had a case to answer at the end of the prosecution's case;

2. That the learned judge erred in law and in fact in holding that the appellant had fraudulently · converted the sum of K14,439,966.50 being property of Malawi Government when the money given to the appellant was Bank's money and not Malawi Government money;

3. That the learned Judge erred in law and in fact in holding that the appellant has laundered the sum of K14,439, 966.50 in the absence of any evidence that the appellant had possessed or concealed any money stolen from Malawi

Government or any money believed to be proceeds of a crime;

4. The learned Judge erred in law and in fact in convicting the appellant in the absence of any evidence and as a result the same occasioned miscarriage of justice;

5. The learned Judge erred in law and in fact in convicting the appellant for both offences of theft and money laundering when the facts supporting the two counts were one and the same set of facts thereby leading to miscarriage of justice in that there was duplicity of convictions;

6. The learned Judge erred in law in imposing the sentences of 5 years for money laundedng and 3 years for theft as the same are manifestly excessive;

7. The learned Judge erred in law and fact in ordering that the sentences of theft and money laundering were to run consecutively; and

8. The learned Judge erred in law and fact in holding that the appellant assumed the rights of the owner of a cheque for K14,439,~66.50 by simply giving it to Cross Marketing Ltd and cashing the same when there was no evidence supporting such conclusion.' [Sic]

FACTUAL BACKGROUND

6. There is a history to this matter. Some of it is still in contention before the courts. We will therefore, unless where such is unavoidable, not needlessly delve into the niceties thereof. We do not want to prematurely bind any courts to

certain facts or conclusions of acts.

7. Suffice it to say for purposes of this judgment that the story about the appellant's convictions/sentences revolves around two cheques issued by GOM. Allegedly via the Ministry of Tourism[MOT]. One was for the sum of K14,439,966.50 and another for K9,739,154.29. Both cheques were issued in favour of Crossmarketing [the Company]. They were admitted into evidence in the Trial Court as Exh. P1 and P2 respectively. It is alleged that the first one was collected by the appellant, handed over to PW3, who was at all material times an employee of the Company, deposited into the Company's account maintained with Standard Bank Lilongwe Branch, liquidated and the proceeds shared between the appellant and the Company. The second cheque was allegedly treated in much the same way. It was deposited in the same account as the first one. Its proceeds were also allegedly shared between the appellant and the Company.

8. In the view of the State and the Trial Court the above conduct amounted to theft and money laundering. Hence the above charges, convictions and sentences.

THE LAW

9. A lot of law was referred to by the parties both in this and the Trial Court. We can only be thankful. We however do not think that we should refer to all of it at this stage. We would rather, except where necessity leaves us with no option, do so while we debate and decide on the questions raised in this appeal. Accordingly we will, at this stage, make reference to statements of law that we think are not in much dispute, if at all, and are regarded, certainly by us, to be of general application.

10. Firstly therefore we reiterate the point that in determining this appeal we will ask ourselves the question whether on the facts and law before the Trial Court and now before us we would have come to the very conclusions arrived at by the said Court. If the answer be in the positive in all material aspects the appeal will fail. If however the answer be wholly or in part in the1negative, the appeal will succeed either wholly or to the extent of the negative response. See also **Gadabwali v R** where Chipeta JA said:

' *.... Appeals like this one come to this Court by way of rehearing . .. Of necessity, therefore, this entails that I treat the matter as if it was coming before me for the first time. This means allowing myself to look at the very material the Honourable Judge looked at in the Court below before he came to his decision, and assessing the same myself to see whether I could have come to a different decision*'. *[Sic]*

11. Secondly, we remind ourselves of section 5 of the Constitution which we here quote in full.

'*Any act of government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid*'.

12. Thirdly, we restate what, in our judgment, we consider obvious namely that those that proceed with criminal trials in disregard of the Constitution do so at their great peril. Why? Because whereas before 1994 the CP&EC was the alpha and omega of criminal procedure and practice in Malawi the same cannot be presently. Now there is a Constitution perspective to contend with. The High

Court said as much in Witney Douglas Selengu v Republic Criminal Appeal Case Number 26 of 2004 [High Court of Malawi Mzuzu Registry, unreported] and R v Given Visomba Confirmation Case Number 627 of 2007[High Court of Malawi, Mzuzu Registry, unreported]. They are sentiments we adopt.

13. Fourthly, and on the pain of being repetitive, we reiterate the fact that in criminal matters the burden is always on the State to prove its allegations beyond reasonable doubt. The accused has no obligation to prove his/her innocence. Where therefore there is at the close of a prosecution doubt as to an accused person's guilt the doubt will always be resolved in favour of the accused by way of acquittal.

14. Perhaps the best exposition of what amounts to proof beyond reasonable doubt is to be found in Miller v Ministry of Pensions (1947) 2 All ER 372 at 373 where the venerable Denning J [as he then was] said as follows:

'*that degree [of proof beyond reasonable doubt] is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is probable, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.*'

15. In this jurisdiction we think the sentiments of Mwaungulu J[as he then was] in Mputahelo v R [1999] MLR 222 at page 252 deserve special mention. He said:

'*in criminal ,cases the standard of proof has always been and remains to be proof beyona reasonable doubt. The court should examine the whole matter before it and decide whether on the case as a whole the State has discharged that duty. The defence case must be considered and treated like the prosecution case. The prosecution case should be so formidable that in*
the face of it the defence pales. The reverse is also true. A trial court, however, should not think that the prosecution's case is made out simply because the defence is weak or unreasonable. That is tantamount to placing the burden, which is always on the State, on the defence to prove the case beyond reasonable doubt. Even if the defence case is untenable the trial court must, to satisfy itself that the State has discharged the duty, approach the State's case with the rigour the burden and standard of proof require'.

16. Fifthly, we also find it important to point out that our Constitution has specified the kind of criminal trials Malawi must have, the calibre of persons who must preside over them and the manner in which they should preside. According to section 42(2)(f) of the Constitution Malawi can only have what the constitution has described as fair trials. As to what amounts to a fair trial paragraphs (f) and (g) of section 42(2) have essayed a description. Our trials must therefore *inter alia* ordinarily be held in public within a reasonable time after an accused has been charged; the accused must be informed with sufficient particularity of the charge[s] against them; the accused must be presumed innocent and has the right to silence during plea taking and the d1~ion of th~ V ialt t~e accused must

also be allowed to adduce and challenge evidence. The trials themselves must only be presided over by independent and impartial courts '*in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of the law*'. See section 9 of the Constitution.

17. Sixthly we should emphasise what is now also trite namely that if an accused opts to exercise their right to silence this will not be an indication, one way or the other, of their guilt. See section 42(2)(a), (c) and (f)(iii) of our Constitution. The foregoing is in contrast to the law as it was before 1994 where under the then section 256(1) of the CP&.EC, now somewhat rehashed into section 256(2) of the CP&EC, the State was allowed to comment on an accused person's silence and a court permitted to take an accused's silence into account in determining their guilt. A case, if we may say so, of silence being equated to an admission of guilt.

18. Where however an accused decides to testify or gives an explanation the court's approach to the accused's story should never be 'is the accused's story true or false?' resulting, if the answer were false in a finding that the accused must be taken to have been lying. The proper question to be asked is 'is the accused's story true or might it reasonably be true?' with the result that if the accused might reasonably be telling the truth then she in fact is. See Gondwe v R 6 ALR Mal 33 at 37.

19. Seventh, it is important to note that our criminal justice system is adversarial. This we say to differentiate it from, for instance, the investigative style obtaining in parts of continental Europe. The Malawian court's role is therefore in many

ways akin to that of a soccer referee. Intervening only where it is necessary but otherwise content to watch the protagonists go after each other and the ball while at all times ensuring that the rules of the game are complied with. They watch over the proceedings while the State tries to prove its allegations against the accused beyond reasonable doubt. They ensure that the rules of engagement are complied with and intervene only for good cause. This is so so none is left in any I doubt whatsoever as to the Court's independence and impartiality. Sections 9 and 42(2)(f) of the Republican Constitution refer.

20. Eighth and with respect to appeals against sentences appellate courts will not interfere with a sentence merely because they would have imposed a different sentence if they were the Sentencing Court. They do that only when they are certain that the sentence is manifestly excessive or inadequate or is wrong in law and/or principle. See R v Ndove 19,23 - 60 ALR Mal 941.

THE ISSUES

20. Proceeding from the grounds of appeal this appeal, in our view, raises three broad issues. Firstly there is the matter of procedure. The appellant contends that the charges and therefore the convictions are defective. Specifically that the charges/convictions are on the one hand duplicitous for being based on the same facts and on the other bad for want of sufficient particularity. Then there is the matter of section 201 of the CP&EC. The appellant's question being whether the Trial Court proceeded properly by, of its own volition, summoning a witness namely one David Kandoje PW5.

21. Second is the challenge against the convictions. Again there are two sides to the challenge. First that the Trial Court misdirected itself in law in holding that the appellant had cases to answer at the close of the prosecution's cases and secondly that there is no evidence to justify conclusions of cases to answer or the convictions themselves.

22. Third are the sentences. The appellant contends that they are improper for being manifestly excessive in the main because they were made to run consecutively.

THE PARTIES' ARGUMENTS

PROCEDURE

Alleged Duplicity

23. The appellant contends that the charges and therefore the convictions against him are bad for duplicity. They are based on the same facts: It makes no sense that he should on their basis be charged on two counts except to the unwelcome extent that it embarrassed his defence and allowed the prosecution to secure a longer than justified sentence. To illustrate the point the appellant argues that the money laundering charge depended on him having committed and been convicted of the offence of theft. There was therefore no need to charge him with both theft and money laundering. The better thing, in his view, was for the State to charge him with only one offence. To proceed as the State did was to persecute him.

24. So when is a count bad for duplicity? It is when the particulars of an offence allege more than one offence. In the instant case the appellant was charged as follows:

'***COUNT 1***

Statement of Offence

Theft contrary to section 278 of the Penal Code

Particulars of Offence

Maxwell Namata in the months of June and August 2013 in the City of Lilongwe stole K24179120.79 the property of Malawi Government

COUNT 2

Statement of Offence

Money Laundering contrary to section 35(1)(c) of the Money Laundering Proceeds of Serious Crime and Terrorist Financing Act

Particulars of Offence

Maxwell Namata and Luke Kasamba in the months of June and August 2013 in the City of Lilongwe had in their possession K24179120.79 knowing or having reasonable grounds to believe that the said property were proceeds of crime' ***[Sic]***

25. The appellant clearly has a misapprehension of duplicity. Duplicity does not come about because an accused has been charged with two ;:aunts on the same facts. Only because particulars of the of fence she is charged with disclose more than one offence. In so far as therefore he contends that the charges[and therefore the convictions] are bad for duplicity because they ehianate from the same set of facts his argument has no leg to stand on.

26. Actually, and from a practical prudence perspective we think it only proper that the State proceeded as they did. The money laundering prosecution was clearly dependent upon proof that the money in issue derived from the theft alleged in count one. While therefore it might not be imperative that the theft be prosecuted and a conviction secured there are, in our judgment, more positives to be had from proceeding~· in the manner the prosecution did than not. It is easier to conclude money laundering following a conviction of theft than essaying to do the same in the absence of one.

27. Just in case there are any lingering doubts we will confirm going through the cases cited in support' of not charging and prosecuting both the predicate offence and money laundering. More importantly the case of R v GH[Respondent] [2015] UKSC 24. We think, with respect, that they have more to do with convenience than the strict application of legal principle. True there was a suggestion that a court should be willing to use its powers to discourage the practice complained of by the appellant. What was called inappropriate use of penal provisions. We are reluctant, for reasons to do with the separate functions of the Courts and the Director of Public Prosecutions as set out in our Constitution[which we also touch on hereinafter] to do as the English courts have

done. We therefore remain unable to agree that the charging and conviction of the appellant of theft and money laundering on the same facts is bad for duplicity. True it may lead to longer than justifiable sentences. But the cure, in our view is not not to charge/prosecute. It is to appropriately address the sentencing court.

28. This might have arisen out of the State not being sure which way their evidence was going to fall. Or trying as best as they could to, in a manner of language, hedge their bets. There was a better way to go about it if such were the State's concerns. It was to put the allegations in the alternative. The allegation would then have been either that the accused knew or had reasonable grounds to believe that the money in issue was proceeds of a crime.

29. We pondered over what effective remedy to give to the appellant. The cases of Mijiga v Rep Cr. App. No. 100 of 1973 Mal, [unreported], Ndau v Rep Conf. Case Number 80 of 1975 Mal, [unreported] and Rep v Dambuleni Conf. Case Number 1181 of 1973 Mal, [unreported] held that duplicity is not an infraction to warrant the setting aside o_f a conviction. It does not ordinarily result in an accused suffering an injustice. They felt this is a proper case in which section 5(1) of the CP&EC should be resorted to.