



JUDICIARY
IN THE HIGH COURT OF MALAWI PRINCIPAL
REGISTRY CRIMINAL DIVISION
Review Cause No. **14** of **2015**
[being criminal cause no. 197 of 2013, FGM, Midima Magistrates' Court/
CSA/HC/CC/Rev/131/2015]

THE REPUBLIC

versus

CHRISTOPHER NKHOMA KONGWE & ROSE
KAPESA

ORDER ON REVIEW

(Kamanga, J., 24th January 2017)

The defendants appeared before the First Grade Magistrate sitting at Midima Magistrates' Court where they were charged with the offence of receiving stolen property contrary to section 328(1) of the Penal Code. The criminal matter was commenced in 2013 and registered at the abovementioned subordinate court as criminal cause number 197 of 2013. The brief particulars of the offence reveal that defendants during the month of June 2103 at Kachere township in the city of Blantyre and Kaporo in the district of Karonga received copper wire valued at over K27 million which belonged to ESCOM and MTL.

The trial commenced around July 2013 and as of 14 August 2013 about three prosecution witnesses had testified when the court adjourned the hearing to 4 September 2013. On 4 September 2013 the public prosecutor sought an adjournment to allow public prosecutors from ESCOM prosecute the matter as well as secure the arrest of more suspects. The public prosecutors from ESCOM were duly appointed by the Director of Public Prosecutions (hereinafter the DPP) under section 100 of the Criminal Procedure and Evidence Code (hereinafter the CP and EC) on 17th July 2013. The matter was then adjourned to 17 October 2013. There is no record as to what transpired on 17 October 2013. The next entry in the record of the case after that date are the proceedings which took place on 21 November 2013 when an unnamed defence lawyer, in the absence of the prosecution, applied to have the accused discharged under section 247(1) of the CP and EC. Although the unnamed legal representative of the accused in his address to the court mentions that a 'notice was served to Escom lawyers and the public prosecutors', there is no such notice on the case file. Regardless of this

irregularity the court proceeded to discharge the accused and stated that such order was not absolute.

After the above ruling discharging the accused there is on the record notes to restore proceedings which took place on 20 November 2013, where on the coram the magistrate indicates that 'both parties' were present. The trial court proceeded to make orders to restore the proceedings and stay the release of the goods. On an unrecorded date the trial was adjourned to the following three successive dates: 12 March 2014, 13 March 2014 and 14 March 2014. However, there is no record on the case file as what transpired on the above scheduled dates of hearing.

After the dates of hearing that were set in March 2014, there is no record that the court set down the matter for continued hearing. However, the court seems to have been inundated with considering preliminary applications which only succeeded in facilitating the accused to play delay tactics and evade trial, as shown by documents appearing on the court file such as the following:

1. A notice of change of legal practitioner which was issued by Messrs P & S Associates on 25th November 2013 and filed at South Lunzu Magistrates' Court on 28th November 2013 informing the court that they had been appointed to represent the Christopher Nkhoma in place of Messrs Nyasulu & Co.
2. A formal order of discharge of accused persons which was prepared by Messrs P & S Associates and filed at South Lunzu Magistrates' Court on 28th November 2013. It was issued by the trial magistrate on 28 November 2013.
3. A formal order for release of goods which was prepared by Messrs P & S Associates and filed on 28 November 2013 at South Lunzu Magistrates' Court. It was issued by the trial magistrate on 29th November 2013.
4. An *ex parte* summons and order for stay of proceedings which was filed by the State at South Lunzu Magistrates' Court on 3 December 2013 and issued by the trial magistrate on 3 December 2013.
5. A summons to restore proceedings which was filed by the prosecution and issued by the trial magistrate on 11 December 2013 setting the matter for hearing on 23rd December 2013. There is no record of what transpired on 23rd December 2013.
6. An order restoring proceedings which was filed by the State at South Lunzu Magistrates' Court on 11 December 2013 and issued by the trial magistrate on 11 December 2013.
7. A notice of *inter partes* hearing to set aside the accused's order of release of goods, order of discharge of the accused persons and application of restoration of proceedings which was filed by Messrs P & S Associates in January 2014 and issued by the magistrate on 13th January 2014 setting the matter for hearing on 20th January 2014. There is no record of what transpired on 20th January 2014.

8. A notice of inspection and hearings for 12th, 13th and 14th March 2014 which was filed by the prosecution at South Lunzu Magistrates' Court and issued by the magistrate on 11th March 2014. There is no record of what transpired on the abovementioned three dates of hearing.
9. An *ex parte* summons for discharge of restoration order and resultant discharge of the accused and release of the goods which was filed by Messrs P & S Associates and issued by the trial magistrate on 24th March 2015 setting down the matter for 25th March 2015. Although there is no record of what transpired on 25th March 2015 and whom appeared before the magistrate and at what time there is a formal order discharging the restoration order and resultant order discharging of the two accused persons and an releasing the goods which was issued by the trial magistrate on 25th March 2015.
10. A notice of change of legal practitioners which was issued by Messrs Robert Lexis Law Consultants on 30th March 2015 and filed at South Lunzu Magistrates' Court informing the court that they had been appointed to represent the accused in place of Messrs P & S Associates.
11. An *ex parte* summons for an order of delivery of property which was filed on 7th April 2015 by Messrs Robert Lexis Law Consultants at South Lunzu Magistrates' Court and issued by the trial magistrate on 7th April 2015.
12. An order of delivery of property which was filed on 7th April 2015 by Messrs Robert Lexis Law Consultants at South Lunzu Magistrates' Court and issued by the trial magistrate on 7th April 2015.
13. A *praecipe* for warrant of delivery and a warrant of delivery which was filed on 30th March 2015 by Messrs Robert Lexis Law Consultants at South Lunzu Magistrates' Court and issued by the trial magistrate on 30th March 2015.
14. A letter from ESCOM to the Chief Resident Magistrate dated 2nd April 2015 seeking review by the High Court of the criminal matter.
15. An *ex parte* summons on an application for stay of proceedings and execution of order of delivery of property pursuant to the courts inherent jurisdiction which was filed by the prosecution and issued by the trial magistrate on 9th April 2015 setting the application for hearing on 10th April 2015. There is no record as to who appeared before the magistrate and what transpired on the appointed date of hearing.

An observation to be made about the record of the case and the abovementioned documents is that there is no correlation between the dates on the formal orders and record of proceedings. For instance, the record shows that the magistrate discharged the accused on 21st November 2013 but the formal order is dated 28th November 2013. A further disconnect is seen when the record shows that on 20 November 2013 the court presided over the hearing to restore proceedings and made an order, yet the summons and order restoring proceedings were filed by the prosecution on 11 December 2013 and issued by the magistrate

on the same date. The need to maintain an accurate record of proceedings cannot be overemphasised as the record is supposed to speak for itself.

On 15 September 2015 the Public Prosecutor, who the DPP appointed to prosecute all criminal matters involving ESCOM filed a summons for review of order of subordinate court taken under section 362(1) of the CP and EC. On 20th October 2015 this court issued an order for directions which included a requirement that the respondents file and serve their affidavit in opposition to the summons for review by 30th October 2015. When the review matter was set down on the following dates for hearing: the 14th September 2015, the 20th October 2015, the 2nd August 2016, the 12th August 2016, the 25th August 2016 and 18th October 2016 the hearing failed to proceed for various reasons which included: requests for adjournment by both the defence and the prosecution; the unavailability of the Public Prosecutor as well as the defendants and their counsel. Almost a year after the prosecution had filed the summons for review, on 2nd August 2016, the court noting that the defence had not complied with directions the court granted the defendants/respondents an extension of time within which to file and serve a response and skeleton arguments. The record shows that on date the hearing finally took place, on 20th December 2016, and as late as on the date of delivering this order the defendants have not yet complied with the order for directions. In simple terms this review process has proceeded as uncontested by the defence.

The grounds for review

The main ground for review is that the order of 25th March 2015 is irregular in that it contravenes the provisions of section 247(1) and (2) of the CP and EC. In support of the summons the prosecution filed an affidavit in support and skeleton arguments. In affidavit one of the public prosecutors, Mr. Kambauwa, avers from paragraph 3 as follows:

3. 'The accused in this matter were charged with the offence of receiving stolen property contrary to section 328(1) of the Penal Code.
4. Trial in the matter commenced on 12 July, 2013 where 3 witnesses gave evidence in court.
5. The matter was adjourned to allow the State to parade its remaining witnesses.
6. The court set down the matter for further hearing on 17th and 18th April, 2014.
7. Unfortunately hearing of the matter failed to proceed and the court did not set another date for hearing.
8. Since the last day of hearing, the court did not set down another date of hearing as such it came as a surprise to me when I was served with a copy of an order dated 25th March, 2015 discharging a restoration order of 3rd February, 2014. I hereby produce and exhibit a copy of the said order marked "YDK1".
9. The court further discharged the accused persons absolutely with no option of having the proceedings restored against them based on the same facts. The court also ordered that goods that were seized and detained in connection with the matter should be released.

10. On 7th April, 2015 the court made a subsequent order for delivery of property to the accused persons. I hereby produce and exhibit a copy of the said order marked "YDK2".
11. The State is dissatisfied with the orders and contents that they were erroneously made for the following reasons:
 - i. on both occasions preceding the grant of the orders, the State was never served with any application on the part of the accused hence the State was never accorded an opportunity to respond to the application and to show cause why there had been a halt in proceedings.
 - ii. The order discharging the accused persons without according the State the liberty to restore the matter contained in the Court's order dated 25th March, 2015 falls foul of the clear provisions of section 247(2) of the Criminal Procedure and Evidence Code.'

As has already been noted above, exhibit YDK1, the order of discharge dated 25th March 2015 was prepared by Messrs P & S Associates and issued by the magistrate on 25th March 2015. While exhibit YDK 2, the order of delivery of property was prepared by Messrs Robert Lexis Law Consultants and was filed at South Lunzu Magistrates' Court on 7th April 2015 and was issued by the magistrate on the same date.

The two grounds for review in this criminal matters are as follows:

1. that the court erred in law in proceeding to hear an *ex parte* application for discharge on behalf of the accused persons which was contrary to section 247(1) of the CP and EC.
2. That the court erred in law in discharging the accused person completely without the State being accorded an opportunity to restore the proceedings against the accused person based on the same facts which was contrary to section 247(2) of the CP and EC.

The arguments of the State

The first argument advanced by the prosecution is that the subordinate court erred in law in proceeding to hear an *ex parte* application for discharge on behalf of the accused persons as the same was contrary to s 247(1) of the CP and EC. The prosecutor states that the matter was last adjourned to 17th and 18th April, 2014 after which the court did not set another date of hearing. It is observed that there is no record on the case file of the abovementioned dates of hearing. The prosecutor contends that the court only heard the side of the accused without affording the State an opportunity to show cause why there had been a halt in proceedings before granting the orders. It is the argument of the prosecution that according to section 247(1) of the CP and EC the order for discharge has to be made on the date or the time which a case has been adjourned. The state submits that the court has to satisfy itself that the complainant or prosecutor has had reasonable notice of the date of hearing and that the complainant is either absent

or unable or unwilling to proceed with the case against the accused. The State contends that the procedure followed was flawed as the requirements of section 247(1) were not satisfied before the court granted the prayer for discharge and made subsequent orders.

The second argument advanced by the prosecution is that, the subordinate court erred in law in discharging the accused person completely without the State being accorded an opportunity to restore the proceedings against the accused person based on the same facts which was contrary to section 247(2) of the CP and EC. The State submits that under section 247(2) of the CP and EC a discharge can only become absolute and operate as an acquittal only after the lapse of 12 months from the date of the discharge where the State has failed to recommence proceedings against an accused based on the same facts. In the present case the State had already recommenced proceedings against the accused persons however on the date set down for hearing the case had to be adjourned and the court did not set another date of hearing. The prosecutor submits that the State was ready and willing to proceed with the matter.

It is further submitted on behalf of the State that the provisions of section 261(1) of the CP and EC which deal with prosecution time limits for trials in subordinate courts do not apply to the present case as the offence which the accused were charged with carries a maximum penalty of 14 years imprisonment and that section 261(1) of the CP and EC only applies to offenses whose maximum penalty does not exceed 3 years imprisonment.

In summary, the State asserts that the lower court was not justified to grant the orders which were prayed for by the accused persons and the State prays to this court that they should be set aside and that this court should make an order in the manner set out below:

- 1) That the matter which was dismissed for want of prosecution be restored, as discharge does not operate as a bar to any subsequent proceedings.
- 2) That the orders of discharge of accused persons and release of goods be set aside.

The applicable law

The law relevant to this review process is contained in section 42(2)(f)(viii) of the Constitution and several provisions in the CP and EC. The procedure for trials in subordinate courts is provided for under part VII of the CP and EC and in regard to the absence of a complainant or a prosecutor section 247 of the CP and EC provides as follows:

- (1) when proceedings have been instituted under section 83 and, at the time fixed for the hearing of the case or the time to which a hearing is adjourned, the complainant or the prosecutor, as the case may be, is either absent or unable or unwilling to

proceed with the case against the accused, the court, if it is satisfied that the complainant or the prosecutor has had reasonable notice of the time and place fixed for the hearing, shall, unless it considers there is good reason to adjourn the hearing, discharge the accused.

- (2) A discharge under subsection (1) shall not operate as a bar to any subsequent proceedings against the accused commenced within twelve months of the date of the discharge on account of the same facts after which period the discharge shall become absolute and operate as an acquittal for all purposes.
- (3) If the court is not satisfied as provided in subsection (1) or considers that there is a good reason for adjournment, the court shall adjourn the hearing.

The decisions in *P.T. v The Director of Public Prosecutions*¹, *P.M. v Malone*² and *P.M. v The Director of Public Prosecutions*³ from the Supreme Court of Ireland set out a test to be applied to determine if there would be a fair trial in situations where prosecutorial delay is alleged and is described as

'being whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of all the circumstances of the case'.⁴

Disposal of the matter

Generally there is a public interest in the prosecution and conviction of those found guilty of criminal offences. The public nature of criminal law is that prosecutions are taken on behalf of the citizens by the DPP and the court should not interfere lightly with the decisions of the DPP, such as to discharge accused persons through *ex parte* summons, as happened in this criminal matter. Section 99 of the Constitution and section 76 of the CP and EC gives the DPP an independent role in determining whether or not to institute, undertake and maintain criminal proceedings against any person. The DPP having taken such a decision the courts are slow to intervene. However, since the courts also have a duty to protect the constitutional rights of all persons, which include the accused's right to an expeditious trial under section 42(2)(f)(i) of the Constitution, the trial magistrate is supposed to maintain at all times the duty to ensure due process and a fair trial. The provisions for prosecution time limits under s 261 of the CP and EC and how to address the absence of a complainant or a prosecutor under section 247 of the CP and EC are there to promote the principle of trial within a reasonable time. However as has been correctly noted by the prosecution, section 261(1) of the CP and EC does not apply to the present case as the offence of receiving stolen property, which the accused were charged with, carries a

¹[2007] IESC 39.

²[2002] 2 IR 560.

³[2006] IESC 22.

⁴*P.T. v The Director of Public Prosecutions* [2007] IESC 39 at para 13.

maximum penalty of 14 years imprisonment under section 328(1) of the Penal Code.

What this court is left to determine is whether the provisions of section 247 of the CP and EC were complied with by the trial court in this criminal matter. This will be approached by considering whether there were unreasonable prosecutorial delays in this criminal trial subsequent to commencing the prosecution which led to a breach of the accused's right to an expeditious trial. In considering prosecutorial delay as described in law the defence has an onus of establishing on a balance of probabilities that they had been prejudiced by the delay to such an extent that there was a real or serious risk of an unfair trial. The delay must result in a prejudice to an accused so as to give rise to a real or serious risk of an unfair trial.

The time period for conducting criminal matters cannot be left at the mercy of either the prosecution or the defence as the law under section 250(3)(a) of the CP and EC provides for time limits for adjournments which guide the court. The record of the case shows that on the dates the court was presented with the requests to discharge the two accused persons, there were no notices of hearing or adjournment which were filed for issuing by the prosecution or defence or issued by the court for service on the parties. Assuming that the notices were issued the proofs of service of such notices are not on the record. Accordingly, the trial court did not comply with the provisions of section 247(1) of the CP and EC which requires that the issue of discharge of accused be considered 'at the time fixed for the hearing of the case or the time to which a hearing is adjourned'. It is not clear why the court did not make an effort to assign dates and cause notices of hearing or adjournment to be served on the prosecution and defence. Since dates of hearing are supposed to be set by the court and not by the prosecution or defence it would be erroneous for a magistrate to hold the prosecution to blame for any delays in hearing when such dates have not been set and communicated to the parties. In practice where there are delays in assigning dates of hearing, the prosecution or defence can prompt the allocation of dates of hearing by filing an appropriate notice. There is nothing to that effect on the record of this case.

It is difficult to ascertain from the record of the case if there was blameworthy prosecutorial delay as the prosecution was not afforded an opportunity to explain the cause of the delay. Having been presented with an *ex parte* summons seeking an absolute discharge of the accused, the trial court should have proceeded carefully and cautiously in granting the reliefs that were sought by the defence. One of the procedural strategies that the trial magistrate could have implemented was to direct that the summons proceed by way of *inter partes* hearing on a scheduled date. Thereby giving reasonable notice to the prosecution to show cause and afford the prosecution opportunity to make representations as to alleged delays. Representations from both the defence and prosecution would have given the magistrate the necessary facts to assess the

circumstances of the case and conduct a balancing exercise in order to ascertain whether there was prejudice arising from such alleged delay. The balancing exercise verifies whether the harm suffered by the accused as a result of the violation of their constitutional right to a reasonable expeditious trial justifies the discharge of the accused at this stage. Overall it was irregular for the defence to file *ex parte* summons for discharge of the accused and seek restoration orders of seized property which were obtained through an *inter partes* hearing. It was also erroneous for the court to proceed to entertain such an irregular summons and grant the reliefs sought. The defence could have filed a notice of adjournment to prompt the court to assign a date of hearing and give notice to the prosecution that on the appointed date of hearing the defence will seek to have themselves discharged and property released.

In addition the move taken by the defence and the trial court to have the accused discharged absolutely did not comply the provisions of section 247(2) of the CP and EC.

Another irregularity in this criminal matter is in regard to the change of venue as that there is no clear explanation on the record of the case as to why the trial magistrate was sitting at South Lunzu Magistrates' Court in this criminal matter which was registered and commenced at Midima Magistrates' Court. The accused having appeared and charged at Midima Magistrates' Court, that court was set as the ordinary place of trial in accordance with section 69(2) of the CP and EC. Section 250(1) of the CP and EC only allows the court to adjourn the hearing to a time and place to be stated to the parties. It is not clear under what legal authority the magistrate decided to change the venue of the court from Midima Magistrates' Court to South Lunzu Magistrates' Court. In any event, the change of venue of the court should have been communicated in reasonable time to the parties and a note made on the record of the case. Since the law only allows the court to adjourn the hearing to a time and place to be stated to the parties the prosecution was entitled to be suspicious of the decision to change venue and challenge it.

Upon reviewing the record of case of this criminal matter this court is of the opinion that there seems to have been no evidence before the magistrate to support an assertion that there was a real or substantial risk of an unfair trial or that there was unnecessary or inordinate delay in prosecuting the matter. This court is not satisfied that the requirement in law to establish absence of the prosecutor, prosecutorial delay and the procedural steps to prove them were established, as to result in the discharge of the accused persons. The defence did not comply with the provisions of sections 247(1) and (2) of the CP and EC when they sought and obtained the orders for discharge and release of goods.

Therefore the orders discharging the accused persons and release of goods are hereby set aside. This criminal matter which was dismissed for want of prosecution is hereby restored.

Accordingly, the record of the case is remitted to Chief Resident Magistrate (South) for a continued hearing of the allegations against the accused before a professional magistrate. The prosecution is at liberty to recommence the prosecution of this matter at Blantyre Magistrates' Court before a professional magistrate within 30 days from the date this case file will be received by the Chief Resident Magistrate (South).

While the professional magistrate who will be assigned to handle this matter will be at liberty to give directions on the further conduct of this criminal matter it is ordered that a plea of *autre fois* acquit or discharge will not be open to the defendants.

Pronounced in open court this 24th day of January 2017 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga JUDGE

Case information

	:	
Date of hearing	:	20th December 2016.
Mrs. Sally Mtambo	:	Counsel & Public Prosecutor.
1st and 2nd Defendants	:	absent.
Counsel for the defendants	:	absent.
Mrs. Pindani	:	Chief Court Reporter.
Mr. Ng'ambi	:	Senior Court Clerk.