IN THE MALAWI SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA CRIMINAL APPLICATION NO. 21 OF 2021

[Being Criminal Case Number 35 of 2014 at the High Court of Malawi, Lilongwe Registry]

BETWEEN

YUN LIN HUA — APPLICANT

AND

THE REPUBLIC — RESPONDENT

CORAM: HON. JUSTICE L P CHIKOPA SC JA

Maele, M G[Mr.] of Counsel for the Applicant

Supply[Ms.]/ Chione[Mr.], State Counsels for the Respondent

Minikwa[Mr.], Clerk

RULING/ORDER

The applicant's conflicts with the law arises out of his dealings with wildlife, listed species and government trophies as defined under the National Parks and Wildlife Act[NPWA]. We will not go into exact details of the conflicts because it is not, strictly speaking, necessary for the determination of this application. Suffice it to say that the applicant was in September 2019 convicted on his own plea of the offence of Possession of a Specimen of Listed Species Without Licence contrary to section 86(1) of the National Parks and Wildlife Act as read with section 110B(b) of the National Parks and Wildlife Act.

On September 28, 2019 he was sentenced by the Chief Resident Magistrate[Centre][CRM[C]] to 14 years IHL on that count. The sentence was ordered to run concurrent to other sentences imposed for other convictions based on the same facts.

The applicant did not appeal against the above convictions or sentences. The same were thus confirmed in December 2021 by the High Court Lilongwe Registry.

On November 2022 the applicant applied to the High Court in Lilongwe seeking leave to appeal out of time against the sentences imposed by the CRM[C]. The High Court dismissed the application for inordinate tardiness on December 22, 2022.

In May of 2023 the applicant was at it again. He approached this court for leave to appeal against the High Court's confirmation of the CRM[C]'s sentences referred to above and also for permission to appeal out of time against the confirmation by the High Court of the CRM's sentences referred to above. This court declined to entertain the leave application. It instead advised him to first seek the said leave in the court below and only come to this Court if the same was refused. In the alternative when it was granted to then seek permission to appeal out of time.

On October 13, 2023 he made the applications for leave to appeal in the court below. It was declined. The Honorable Court was of the view that it was *functus officio*. It had already declined him leave to appeal on December 9, 2022.

The applicant is again in this Court. He has brought essentially the same applications he brought in May of 2023 plus another namely for leave to appeal against the High Court's confirmation of the sentences, to appeal out of time and for bail pending appeal.

The applications are opposed. We will get to the specifics later in this opinion.

The applications are premised on sections 11[2], 17[3] and 24 of the Supreme Court of Appeal Act[Chapter 3:01 of the Laws of Malawi]. For the record section 11[2] provides that any person aggrieved by a decision of the High Court in *inter alia* the exercise of its powers of review conferred on it under Part XIII of the Criminal Procedure and Evidence Code[CP&EC Chapter 8:01 of the Laws of Malawi]

may appeal to the Supreme Court of Appeal on a point of law but that such decision shall be final as to matters of fact and severity of sentence.

The proviso thereto provides *inter alia* that no appeal shall be made under that subsection without leave of this Court or of the High Court.

In section 17[3] the law says this Court may extend the time for giving notice of intention to appeal notwithstanding that the time for giving such notice has expired.

Section 24 on the other hand allows this Court, on application by an appellant, to admit such appellant to bail pending appeal on such conditions as it deems fit.

Now to the totality of the facts as we found them.

The facts show that the applicant was one of a group of Chinese nationals charged with wildlife offences. The applicant, as indicated above, pleaded guilty to one count and was sentenced, again as said above, to 14 years IHL. The others namely **Jinfu Zeng, Yanwu Zhuo, Ya Shen Zhuo, Li Hao Yaun and Qinthua Zhang** were convicted after a full trial in Criminal Case Number 492 of 2019 by the Senior Resident Magistrates Court sitting at Lilongwe. The 4th and 5th accused were sentenced, in relation to the offence for which *the* appellant was sentenced to 14 years IHL, to 7 years imprisonment with hard labour[IHL]. The sentence was ordered to run consecutive to another sentence imposed by the said court in relation to another conviction.

Via Criminal Appeal Number 36 of 2020[unreported] the 4th and 5th convict mentioned above appealed against the consecutive nature of the sentences in Criminal Case Number 492 of 2019. Speaking specifically about that the High Court said:

> *'the case of **R v Lin Yun Hua & Another** is related to the present case ..... it appears to this court that for uniformity and fairness, the sentences against the 5th also ought to run concurrently. For this reason, only, this court therefore sets aside the order of the lower court for the sentences against the 5th appellant to run consecutively and substitutes therefor an order that the said sentences will run concurrently'.*

Somehow the applicant became aware of the 7-year sentence in the other case and the above sentiments. He was convinced that in the spirit of uniformity and fairness he should also have been sentenced to seven as opposed to fourteen years IHL seeing especially as he pleaded guilty whilst the others had not. He, on the very day the above appeal judgment was rendered i.e., on November 10, 2022, applied to the High Court for leave to appeal against the CRM's sentencing opinion out of time. It was dismissed for being unduly tardy on December 9, 2022.

In May 2023 the applicant applied to this court for leave to appeal against the High Court's decision on review and further for leave to appeal out of time. We refused to entertain the applications. Applications for leave under the *proviso* to section 11[2] abovementioned can be obtained either from the court below or this court. It is now settled practice that where jurisdiction on a particular point is vested in both the High Court and this Court a litigant should first approach the court below before coming to us. The applicant had clearly not abided by such practice. We asked him to regularize the situation and then, depending on circumstances, approach us.

The Court below refused to grant leave to appeal. It was of the view that it had dealt with a similar request in December 2022 and was to that extent *functus officio*.

This time around the applicant has three applications. Not in any particular order the first is for leave to appeal. The second for an extension of time within which to appeal. And the third for bail pending appeal. It was his view that prosecuting the three applications simultaneously was not only most convenient but would also save time and treasury.

We will first deal with the question of leave to appeal. Whether or not to grant is in the discretion of the court before whom the request for leave is made. Such discretion should of course be exercised judiciously. The court in the exercise of such discretion takes into consideration only relevant factors/considerations and disregards those that are irrelevant. Top of the list of such considerations are whether or not there is a question of law that will benefit from an appeal to a higher court. Another is whether or not there is good chance of the appeal sought

being decided in favour of the applicant. Leave will therefore not be granted if it is obvious that the intended appeal is an exercise in futility. A frivolous and vexatious exercise. The result will be the same if there is no question of law that will benefit from the appeal or where the point raised is one about which there is no doubt. One, in other words, that has been litigated, clarified and is settled.

In the instant case the applicant has raised the issue of uniformity of sentences and/or sentencing approaches for convictions grounded on similar or identical facts. It is his opinion that the court below disregarded that principle in denying him leave to appeal the confirmation of the CRM's 14-year sentence or in the alternative in confirming the said sentence. Further the applicant believes that his appeal if heard stands a good chance of success. The court below in dealing with a similar matter reiterated the need to sentence uniformly those that have committed similar offences or those whose convictions are based on similar/identical facts. He wants such sentiments to impact the sentence in issue herein.

The State opposes the application for leave. To be fair to them it would appear that they oppose the application for leave largely because the appeal is out of time and that there have been no good grounds advanced for failing to lodge the appeal within the time provided for by law. In that regard they pray that the application for leave be dismissed for being an abuse of court process.

About an extension of time within which to appeal the law is equally clear. It will be granted only where there is good cause to do so and the interests of justice so dictate. The applicant must therefore advance good enough reasons why they could not appeal within time and also that it is in the interests of justice that time to appeal be extended.

The applicant contends that there is good cause to grant the extension in the instant case. He instructed his then counsels to appeal within the time by law allocated for appeals. They for some reason did not do the needful. The failure to appeal within time is therefore not his fault. He should not be made to suffer for something that is not of his doing. More than that the interests of justice also weigh more towards an extension of time within which to appeal. If the application

is not granted, he will be denied a chance to appeal, which is his constitutional right, and challenge a sentencing decision that is in his view clearly wrong.

The State also opposes the application for an extension. In its view there has been advanced no good cause why the applicant failed to appeal within time. There was of course mention of previous counsels having failed to carry out instructions as given. The State however contends that the applicant should have done more than just say that he gave instructions that were never carried out. He should have proffered evidence to show that instructions were indeed given to his then counsels to appeal but that they were never carried out. In the absence of such evidence the probability is high that the applicant might not be telling the whole truth and also that this application is no more than an abuse of the court process. It therefore prays that this court refuses to exercise its discretion in the applicant's favour.

The last question is about bail pending appeal. The applicant argues that he is entitled to bail pending appeal. He is not a flight risk. He has businesses in this jurisdiction worth substantial amounts of money. He cannot therefore jump bail and risk losing them. On the other hand, his appeal has a good chance of success. The interests of justice therefore weigh more towards the grant of bail pending appeal.

The State thinks otherwise. The applicant is in their view a flight risk. They referred us to an affidavit sworn by a police officer to the effect that the applicant has while lawfully committed to prison been enjoying irregular time out. He is to that extent a flight risk. If he is able to get in and out of prison as he wishes while serving a sentence there is nothing to stop him getting out of Malawi and frustrating the final disposal of the anticipated appeal while on bail. The interests of justice in that regard weigh more towards a refusal of bail pending appeal.

More importantly, the State contends that talk about an appeal pending bail is at this stage presumptuous, premature and superfluous. There is no appeal herein. The applicant should not therefore be even talking about bail pending appeal. The State prays that we dismiss the prayer for bail pending appeal.

We will not belabour the issues.

In our view the interests of justice in the instant case require that an explanation be made available to the applicant why on virtually identical facts he was sentenced to 14 years IHL and his co-accused to 7 years IHL. That he be given an opportunity to show why he should be sentenced to a similar sentence or not sentenced to one higher than 7 years IHL. That in our view can only be done if an appeal is had. An appeal on the other hand will only be had if leave to appeal is granted.

It should also be remembered that this is a criminal matter. The applicant has something to lose. He is in prison. How long he stays there is to an extent surely dependent on whether the appeal is heard. On the other hand, the State has, strictly spoken, nothing to lose. Indeed, it might be said that it will gain from any clarity that will come from the envisaged appeal in so far as it relates to convictions based on the same/similar facts. See **Paul Montfort Mphwiyo & 18 Others v R** MSCA Criminal Appeal Number 21 of 2021[unrep].

Much of the above applies to the application for an extension. True their previous Counsels could and should have done better. Indeed, the applicant should himself have done better to ensure that his instructions were carried out and that evidence was brought before court to show that instructions were given but not carried out. We are of the view however that more harm will be done if we denied the applicant a chance to have his day in court by way of appeal than if we allowed him so to do.

About bail we agree with the State that there is no pending appeal herein. An application for bail pending appeal is therefore clearly anomalous. But we would not grant it even if it were not. The applicant is a convict. He is a foreigner. One who on the facts put before us is not keen to abide by the normal prison regulations. One who, the evidence strongly suggests, was while in prison for the sentences in issue herein able to wrongly influence prison procedure to his advantage. The interests of justice militate against his admission to bail.

By way of conclusion therefore leave is granted for the applicant to appeal against the decision, on review, of the court below about the sentence in issue herein. An extension is also granted allowing him to file his notice of appeal outside the time

otherwise and ordinarily permissible under the law. In that regard a period of 21 days from this date is granted within which the applicant can lodge his notice of appeal. Bail pending is however not granted for the reasons advanced above.

If only in passing let us say something about the powers of criminal review exercisable by the High Court and the Resident Magistracy.

Under the Courts Act[Cap 3:02 of the Laws of Malawi] they are provided for from sections 25 to 28. Without going into specifics, the powers are exercisable in accordance with the law for the time being in force in relation to criminal procedure. In other words, the Criminal Procedure and Evidence Code[CP&EC]. The powers are supervisory and revisionary. In that regard the High Court can, if it appears desirable in the interests of justice, either by its own motion or on application call for the record of any matter before a subordinate court and give such directions for the further conduct of that matter as justice may require. The emphasis is on the **interests of justice** and **justice**. The High Court should therefore only act if it is convinced that the same is in the interests of justice. Similarly whatever directions it gives should only be motivated by justice.

In the exercise of the above powers the parties to the matter have no right to be heard. Except where the court seeks to make an order prejudicial to any such party.

There are similar provisions in the CP&EC. In section 360 the High Court can call and examine the record of proceedings before a subordinate court in order to satisfy itself as to the correctness, legality propriety or regularity of any finding, sentence, order or the proceedings themselves. In section 361 the High Court can receive from a Resident Magistrate for purposes of review records of proceedings before a subordinate court.

Just like under the Courts Act parties whose matters are up for review do not have the right to be heard. Except where the High Court intends to make an adverse order.

Of great importance in the above scheme is the fact that reviews are not appeals. As much as possible therefore neither the State nor the accused should be allowed

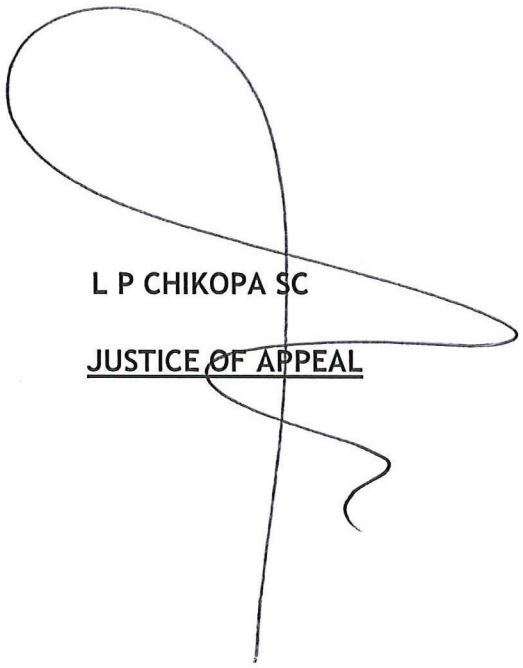
to bring appeals via the backdoor by dressing them up as reviews. When the Courts Act speaks of reviewing **at the instance of any party or person interested** it is talking more about *locus standi* and obvious irregularities being brought to the attention of the High Court as opposed to providing an avenue, alternative to appeals, for taking any and all grievances within a proceeding to the High Court in the manner of an appeal. That will only serve to delay proceedings.

Similarly, the High Court itself must never call files for review willy nilly. They should as much as possible only intervene in cases where intervention is clearly merited. Apart from occasioning delay needless reviews will most likely amount to undue/unwelcome interference with the trial court's management of its case load. But perhaps more importantly they might raise questions about the reviewing court's impartiality. The Constitution in section 42 assumes an impartial court. Jumping into proceedings in the name of reviews might needlessly create the impression that the reviewing court is favouring one litigant as against the other. Let the aggrieved party appeal.

Thirdly reviewing courts should be careful how they deal with the right to a hearing during reviews. The rule of thumb is that the parties have no right to be heard unless invited by the reviewing court and only where an adverse order is a possibility. We are also of the view that it is best practice that parties are heard where a review is on request by a party or other interested person. An impression must never be created that one party was heard to the exclusion of the other.

Lastly it is imperative that the basis for a review and any resultant orders are clearly set out. It allows, where applicable, for the parties to properly respond and for a higher court to better understand and appreciate the reason[s] for the review and the consequent orders/directions.

Dated at Blantyre this 15th day of March, 2024



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JUSTICE OF APPEAL