IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CRIMINAL APPEAL NO 17 OF 2009
(Being Kasungu First Grade Magistrate's Court Criminal Case No 209 of 2007)

Between
DUSTER BINEX MBUGHI ..... APPELLANT

and

THE REPUBLIC .....RESPONDENT

Coram: **Hon. Justice R. Mbvundula**
Chiphwanya, Counsel for Appellant
Khunga, Counsel for the State
Nyirenda, Official Interpreter

JUDGMENT

The appellant, Duster Binex Mbughi, was convicted by the Kasungu First Grade Magistrate's Court of two counts of corrupt practices by a public officer contrary to section 25(1) of the Corrupt Practices Act, and one count of obtaining by false pretences contrary to section 319 of the Penal Code.

The appellant was a police officer stationed at Ndonda Police Unit in Kasungu district when the incidents giving rise to the allegations levelled against him occurred. It was alleged that after he had arrested two brothers, Anderson and Yonasi Malenga, the appellant demanded from them a sum of money as a condition for releasing them on bail.

The account against the appellant is that on the day after their arrest their father and their brother Emmanuel went to the police unit and had a discussion with the

appellant. Anderson and Yonasi did not hear the conversation. Following the discussion the two were released on bail. A few days later the two and their father went to the police unit where their father had a private discussion with the appellant. Thereafter the appellant re-called the two brothers to his office and informed them that the complainant in their case had decided to drop the case on condition that the two pay him K2 000.00, which they did not have then, and so they pleaded with the appellant to allow them to go and look for the money. The appellant refused and locked up Yonasi, releasing only Anderson to go and look for the money. Anderson managed to bring only K1 200.00. The appellant then allowed both of them to go and find the balance. Their mother provided the balance which they gave to the appellant. After some two weeks they were called again to the police unit and re-arrested, then taken to Kasungu Police Station and later to prison before being released three days after their statements were recorded. The evidence of Yonas and Anderson was corroborated by that of their other brother Raphael, and their mother Joyce who said the K800.00 was made available by Joyce who borrowed the same from her friends.

The evidence of the suspects' father Yowasi Malenga, and their brother, Emmanuel, was to the effect that when they visited the suspects at the police unit, the appellant told them that the matter was minor and could be settled by payment of K2 000.00. They went home and sold a goat to raise the money which they gave to the appellant, who thereby promised to release the two boys, and which he did around 6pm that day. It was during the course of these events that that they learnt from the two suspects that they had earlier on equally given the appellant another amount of K2 000.00.

Three days after the second release, according to the evidence of Sgt Kathumba who was then stationed at Ndonda police unit, the suspects' father went to the unit looking for the appellant. Kathumba recalled seeing the suspects in custody but did not establish what offence they were accused of. Mr Malenga told him that he had come to collect an official receipt for the money he had paid. Kathumba told him that he knew nothing about the matter so they should wait for the appellant.

The evidence of Evelyn Maseya, an investigations officer at the Anti-Corruption Bureau (ACB), was that the ACB received information that the appellant and Kathumba had demanded and received K4 000.00 in order to release Yonasi Malenga on bail. The director of the ACB authorised investigations and she investigated the matter and recorded statements from several people. Her investigations revealed that Yonasi and Anderson Malenga had been arrested for

assaulting one Edson Wahera and the two had been released following a payment of K2 000.00 by their father and when they subsequently went back to the police unit to report for bail they found Edson Wahera there and they were told to pay K2 000.00 to compensate Wahera, and since they did not have the money they were told that Anderson should go back and look for the money while Yonasi was locked up again. Anderson went and initially brought K1 200.00 and later K800.00. He also said he rearrested the two a week later after he had received information from Kasungu police station that there was a complaint from ACB that he had received a bribe; that the reason for re-arresting the two was to catch early transport. Maseya recorded a caution statement from the appellant who denied to have demanded K2000.00 as compensation for Wahera. Sgt Kathumba was exonerated.

The appellant's evidence was that he indeed handled the case of Yonasi and Anderson, the complaint being that they had assaulted Wahera. He issued a letter for Wahera to get a medical report and granted the suspects bail. In the course of waiting for the medical report he received a message from the station officer of Kasungu police that he had received K2 000.00 from the suspects as a condition for them to be released on bail. He requested that he should bring the suspects to Kasungu police together with their file which the station officer accepted. So he did. He left it to Kasungu police to look into the allegations against him. The rest would be explained by the CID officer who investigated the allegation, Detective Sub Inspector Tryness. Ng'ambi.

According to the evidence of Sub Inspector Ng'ambi she was invited to the station officer's office where Yonas and Anderson were interviewed about the inquiry from ACB and they both denied to have reported the matter but that it was their father. Their father was not present then. Ng'ambi told the court below that Raphael Malenga told the station officer in her presence that he gave Wahera K1 200.00 for him to go to hospital for medication. After the interview Ng'ambi took the statements of Yonas and Anderson on the instructions of the station officer for the offence of giving false information. Raphael Malenga also recorded an ordinary statement. Yonas and Anderson had two sets of statements one recorded at Ndonda the other at Kasungu.

The state objected to the statements recorded at Kasungu to be tendered in evidence on the ground that this was new matter introduced during the trial and had not been served on the defence. The state therefore requested for cross examination of Ng'ambi to be postponed until they could study the statement and to also be allowed to recall some of the prosecution witnesses, ostensibly under section 201 of the

Criminal Procedure and Evidence Code, so that the witnesses could be examined on the new matter that they had been cautioned and formally charged for the offence of giving false information to ACB, as prosecution doubted the validity of the statements on account of the fact that they bore thumbprints when the suspects were able to read and write. Consequently Raphael, Yonasi and Anderson were recalled who disowned the statements.

There are five grounds of appeal:

1. That the magistrate erred in failing to give the appellant the benefit of all the doubt existing on the facts of the case;
2. That the magistrate erred in disbelieving the defence evidence on the contents of caution statements of Anderson Malenga, Yonas Malenga and Raphael Malenga which could have exculpated the appellant altogether, when there was no sufficient reason for doing so;
3. That the magistrate erred in admitting, and believing, rebuttal evidence of the aforesaid three prosecution witnesses when there was no *ex improviso* defence evidence which could not have been obtainable by reasonable diligence on the part of the prosecution;
4. That the magistrate erred in recalling the said prosecution witnesses under section 201 of the CP&EC when the correct section in the circumstances was section 257 of the Code, which, on the facts of the case, could not have been invoked since there was no new matter introduced by the defence;
5. That the conviction is against the weight of the evidence.

The appellant states under ground 1 that this is a general ground that goes to show that the prosecution did not prove their case beyond reasonable doubt. The specifics are more clearly stated in the rest of the grounds.

Section 201 of the Code allows a trial court of its own motion to, *inter alia*, summon or call any person as a witness, or to examine any person present as a witness or to re-call or re-examine any person already examined if his evidence appears essential to the just decision of the case. On the other hand section 257 provides that if an accused person adduces evidence in his defence introducing new matter which the prosecutor could not by reasonable diligence have foreseen, the court may allow the prosecution to adduce evidence in reply to rebut the said matter.

At the trial of the appellant prosecution witnesses 1, 2 and 5, namely Anderson, Yonasi and Raphael were recalled in apparent reliance on section 201 on the basis that caution statements which the 2nd defence witness sought to tender was new

matter as the defence had not been made aware of those statements prior to that moment. The appellant submits, correctly, that the applicable provision is section 257 and not 201 because it is section 257 which deals with cases where new matter is introduced by the defence. It was not the case envisaged under section 201 where the court of its own motion calls or re-calls a witness to be examined or re-examined, as the case may be.

What transpired at the trial in regard to the caution statements, according to the judgment of the trial court, was that during the defence case the second defence witness was shown caution statements taken from the three at Kasungu police station in respect of the charge of giving false information to prove the fact that in those caution statements they had denied giving any money to the appellant, thereby showing that the allegation against the appellant was false, or in the least, doubtful. At this point the prosecution raised an objection pointing out that this was new matter and applied that if the caution statements were to be admitted then the prosecution be allowed to recall the PW1, 2 and 5 to give rebuttal evidence. The court allowed the application, and when recalled, all the three prosecution witnesses disowned the caution statements pointing out that they were all thumb-printed when all the three could read and write. In other words they were alleging that their authentic statements would have been duly signed by them, respectively, rather than thumb printed. In view of this the trial magistrate found that "this defeated the defence case".

The appellant's submission in this regard is that if the proper procedure under section 257 had been followed he would have been exculpated. He submits that the issue of the caution statements was not new matter as the prosecution witnesses were well aware that they had recorded caution statements at Kasungu police station, and had the prosecution used reasonable diligence by asking DW2 about the said statements the prosecution could easily have discovered the statements. For the state it is submitted, firstly that although both the court and the prosecution made reference to section 201 of the CP&EC, the procedure followed was clearly that provided for under section 257 in that the prosecution applied and the court allowed the re-calling of the three prosecution witnesses. The state is correct in this observation. It is clear from the trial record that although there was reference to section 201 of the CP&EC the actual procedure followed was that provided under section 257. The trail court cannot be faulted in this regard.

It is secondly submitted for the state that since the said caution statements pertained to the charge, preferred against the three at Kasungu police station, of giving false

information when the case before the court was one of assault, the prosecutor could not, by exercise of reasonable diligence, have foreseen it as apparent, throughout the investigations, that the caution statements in the 'giving false information' case would be relevant since his concern was the assault case. The prosecutor, it is submitted, could not therefore have known of any other caution statements. Therefore, it is submitted, the rebuttal evidence was correctly admitted by the magistrate. I again agree with the position taken by the state on this point. The case the prosecutor was concerned about was that which was before the trial court, namely the three charges the appellant was facing in that trial. Neither the court nor the prosecutor, nor even the appellant or the witnesses would be reasonably expected to concern themselves with the charge of giving false information which was not before the trial court. What the parties were reasonably expected to focus upon were the charges before the trial court.

The appellant submits further that state should have brought evidence to prove that the fingerprints on the caution statements were those of the suspects. For the state it submitted that the onus of proving the fingerprints to be those of the witnesses was on the appellant (then accused) and not on the prosecution because it is the appellant who sought to rely on the statements to his advantage, since the witnesses denied that the statements were theirs. It is the state's view that the magistrate was right in considering the caution statements as a mere calculative move by the defence to destroy the prosecution's case.

The law regarding this is that the onus lies on the party alleging a fact to prove it to be true. The claim that the thumbprints on the caution statements were not of prosecution witnesses was made by the prosecution witnesses, who were alleged to have made the statements. The onus was therefore upon the prosecution to prove that that the statements were not theirs, and so the thumbprints. And having not done so the trial court should have found in favour of the appellant on that point. The record will also show that the trial court observed that the duplicate copies of the bail bonds of the three prosecution witnesses (for the giving false information charge at Kasungu Police Station) were also thumbprinted, a pointer to the fact that although they may have been able to read and write they nevertheless thumbprinted some documents. That, as submitted by the appellant, should have raised reasonable doubt as to the guilt of the appellant because in the caution statements the witnesses denied giving the appellant some money, but only to Wahera to enable him to go to the hospital.

It was further submitted by the state that whatever the appellant has argued pertains to the recalling of PW1, 2 and 3 related only to the third count as neither PW 3 nor PW 4 was present at Kasungu Police Station. They were not recorded caution statements. It was submitted therefore that the appellant is not appealing on the first two counts but only on the third. This submission however overlooks the fact that all the three counts, although separate, pertain to one and the same transaction, and must be treated as such. The submission cannot, for that reason, stand.

The doubt arising from the fact that the witnesses denied in their caution statements at Kasungu police station to have given the appellant money should have resulted in his acquittal. As such I hereby set aside the conviction as well as the sentence imposed on the appellant.

Pronounced in open court at Blantyre this 15th day of August 2018.

R Mbvundula
JUDGE