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IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CRIMINAL APPEAL CASE No. 18 OF 2019

(being Criminal Case No. 325 of 2019, FGM, Blantyre Magistrates' Court)

In the matter between:

THE REPUBLIC	APPELLANT
AND	
YOUSSEF NASSOUR	1ST RESPONDENT
KASHIF GILBERT	2ND RESPONDENT
ABBAS NASSER	3RD RESPONDENT

RULING ON A PRELIMINARY OBJECTION

nyaKaunda Kamanga, J.,

The three Respondents, Youssef Nassour, Kashif Gilbert and Abbas Nasser, appeared before the First Grade Magistrate sitting at Blantyre Magistrates' Court where they were charged with two offences under the Corrupt Practices Act. In the first count the 1st Respondent was charged with corrupt practices with a public officer, contrary to section 24(2) of the Corrupt Practices Act. In the Second count the 2nd and 3rd Respondents were charged with aiding, contrary to section 35 of the Corrupt Practices Act.

The Respondents pleaded not guilty to the charges and before the trial could commence the Respondents on 17th May 2019 filed an application for a permanent stay of proceedings on the grounds that the proceedings were an abuse of the process of the court. On 24 May 2019 the presiding Magistrate made an order permanently staying the case on the grounds that the Respondents were entrapped to commit the

offences. The ruling also made an order that any property seized and detained by the State, which was the sum of K10 million seized from the 1st Respondent, be refunded to the Respondents 'forthwith utmost by the close of business' on that day.

The prosecution filed a notice of appeal on the 27th May 2019 and on the 30th May 2019 they obtained from the High Court a stay of the order to refund the money. Through a notice of 3rd December 2019 the matter was set down for hearing of the appeal on 29th January 2020. The 1st and 3rd Respondents through their newly appointed lawyers filed a notice of preliminary objection to the hearing of the appeal. Their objection is on the ground that "the ruling of the learned Magistrate was not a final judgment or order in terms of section 346(1) of the Criminal Procedure and Evidence Code hence not subject to any appeal."

This court has observed that although the legal practitioner of the two Respondents in his skeleton arguments under para 1.13 states that "the facts of the case are as contained in the affidavit of Fostino Y. Maele sworn in support of the present of the objections herein" unfortunately the affidavit does not seem to have been filed and it has not be located on the case file of this criminal matter.

The two Respondents in asserting that the ruling of the First Grade Magistrate on the application for permanent stay of proceedings was not appealable, as it was an interlocutory order on an interlocutory application, rely on the provisions of s.346 of the Criminal Procedure and Evidence Code, hereinafter the CP and EC. They argue that under s.346(1) of the CP and EC a person may only appeal to the High Court if aggrieved by a final judgment or order made by a subordinate court. The Respondents have also referred to s. 349(1) of the CP and EC which provides for limitation of appeals. According to the Respondents the critical question to ask is whether the ruling on the application for permanent stay of proceedings is a final judgment order.

The Respondents contend that the application for permanent stay of proceedings herein was an interlocutory application and the ruling delivered by the court was equally an interlocutory order which in terms of section 346 (1) of the CP and EC. The legal practitioner for the two Respondents has referred the court to the cases of *Chihana v Republic (2)* [1997] 2 MLR 86 at 86-91 and *Rep v Abdul Rehman Abdullah and Others* HC/PR Criminal Case No. 4 of 2017 (19th September, 2019 unreported) which considered the test for finality of a case. The case of *Chihana v Republic* considered the test for finality of a case in light of the provisions of section 11 (1) of the Supreme Court of Appeal Act.

Recently, in the case of *Rep v Abdul Rehman Abdullah and Others* the High Court considered the test of finality of a case when the defendants applied for a discharge from prosecution on the grounds that some of the offences they were charged with had become statute barred since over 12 months had passed without the State concluding the trial as required under section 301A of the CP and EC. The

in the criminal case. The lower court's order had a time line of 4 hours. The Appellant contends that the permanent stay order which was issued by the lower court coupled with the ancillary order to the State, to surrender to the accused persons the exhibits that the State had in its possession within 4 hours, automatically led to an acquittal of the accused person. They contend that the effect of the permanent stay order and the acquittal of the accused persons was in essence a final order of the matter. To buttress the point, the Appellant states that when they applied to the lower court, as per procedure, to have the orders stayed pending appeal pursuant to section 355 of the CP and EC, the magistrate refused to grant the order on the grounds that he no longer had jurisdiction as the matter was *functus officio.* The Appellant asserts that there can never be a better conclusion than to say that the magistrate basically acquitted the accused persons from the case and the orders which he made were final orders. The Appellant contends that the lower court issued a permanent stay order and had an ancillary order to surrender all exhibits the State had against the Respondents. Which in essence was the finality of the matter because the State would not have recommenced the matter. The prosecution correctly argues that the order was equivalent to a permanent discharge under section 247 of the CP and EC which was equal to acquittal of the accused person.

The Appellant also argues that the two cases which the Respondents heavily rely on were premised on interlocutory applications whose final orders would not lead to a finality of the cases. The Appellant distinguishes the two cases with the case at hand, by stating that the court in the two cases did not make the final orders sought as the interlocutory applications were dismissed and the court refused to discharge the accused person, respectively. The prosecution's view is that a reading of the two cases and the orders which the court made were not final. However, in the case herein the lower court made a final order. That the matters in the two cases were proceeding before the courts and neither s. 11 of the Supreme Court of Appeal Act nor s. 346 (1) of the CP and EC would under the circumstances have applied as there were no final orders in the cases. The Appellant humbly prays that this court should dismiss the objection raised by the Respondents and that the court should proceed to hear the petition filed by the Appellant.

It is trite law that any person aggrieved or who is dissatisfied with a final judgment or order has a right to appeal. As correctly argued by both parties that right is entrenched under s. 346 (1) of the CP and EC as well as s. 42(2)(*f*)(*viii*) of the Constitution for accused persons. The Appellant has appealed against the order of the FGM Court ordering a permanent stay of proceedings on the grounds that the Respondents were entrapped. The Respondents have filed a preliminary objection to the petition of appeal filed by the Appellant. The Respondents' main argument is that the ruling by the Magistrate was not a final judgment or order in terms of section 346 (1) of the CP and EC and hence not subject to any appeal. The Respondents are

relying on the cases of *Chihana v Rep* (2) MLR 86 and that of the *Rep v Abdul Rehman Abdullah and Others* Crim Case no. 4 of 2017 (HC) (PR) unreported. In relying on the case of *Rep v Chihana* the Respondents contends that as long as an order of court does not determine guiltiness then it cannot amount to a final order of a subordinate court. Indeed the subject matter in the case of *Chihana v Rep* (2) MLR 86 were interlocutory and the subject matter in the *Rep v Abdul Rehman Abdullah and Others* case was the ruling by the court refusing to discharge the accused from misdemeanour offences. The Respondents' contention is that if the case continued, then that order could not be a final order.

However, in this case the underlying issue is the application of the doctrine of entrapment. Entrapment arises when a person is encouraged by someone in some official capacity to commit a crime. If entrapment occurred, then some prosecution evidence may be excluded as being unfair, or the proceedings may be discontinued altogether as was noted by the FGM in his ruling. At common law the procedure is that the question of whether the proceedings should be stayed on the grounds of entrapment is logically decided before the proceedings have begun, as correctly happened in the lower court in the present criminal matter. In English law entrapment is considered to be either a plea in bar of trial or a challenge to the admissibility of evidence obtained through entrapment: *Jenkins v Govt of USA and Benbow v Govt of USA and Another* [2005] EWHC 1051 (Admin). Although a plea is commonly understood as a formal statement by or on behalf of a defendant stating guilt or innocence in response to a criminal charge it can also be a statement offering an allegation of fact or claiming that a point of law should apply like the issue of entrapment. Therefore the remedy is a plea in bar of trial which halts further legal process in a trial or other legal proceedings. In other words, the plea of entrapment as a bar to trial can also be understood as a form of estoppel.

Contrary to the argument advanced by the legal practitioner for the Respondents, in the context of entrapment the question is not whether the proceedings would be a fair determination of guilt but whether they should have been brought at all as 'entrapment goes to the propriety of there being a prosecution at all for the relevant offence, having regard to the state's involvement in the circumstance in which it was committed.'' *R v Loosely* [2001] UKHL 53 para 17. The abovementioned case is also the main case on the issue of entrapment which the Respondents rely on in this appeal case. Accordingly, the Respondents' arguments about guiltiness cannot apply at all on issues of entrapment and is a misplaced argument on the part of the Respondents. In the case of *R v Loosely* [2001] UKHL 53, which surprisingly was also an appeal on the issue of entrapment, it was held that:

'A successful application to stay a prosecution on the ground of entrapment enables the accused to escape from the charge. But the entrapment still cannot be properly described as a defence. It does not negative any of the ingredients requisite for guilt. The court's decision to allow the accused to go free is based upon its disapproval of the behaviour of the police officers, not upon the prosecution's failure to establish those ingredients.' at para 121.

Entrapment is a bar to prosecution and is a 'judicially crafted plea to safeguard the idea of justice and has developed from case law': Joseph A. Colquitt, Rethinking Entrapment, *American Criminal Law Review*, 1389 at 1400. Practically entrapment is one of the acceptable procedural means of ending criminal proceedings early and when a court arrives at such a decision it can be appealed against as happened in the case of *R v Loosely* [2001] UKHL 53. Unlike at common law where entrapment is not a defence, some jurisdictions such as USA and RSA have statutory provisions where entrapment can be pleaded as a defence to a criminal offence.

Entrapment being a plea in bar of trial the Respondent's arguments that it was an interlocutory order is neither here nor there. As generally, an interlocutory application is an application which is moved in the main petition. An interlocutory or interim order means the decision of the court which does not deal with the finality of the case but settles subordinate issues relating to the main subject matter which may be necessary to decide during the pendency of the case. While in this criminal matter the ruling of the Magistrate that the Respondents were entrapped was a final order and can be subject to appeal.

If proof of entrapment appears, the law requires that the court stops the prosecution, directs that the indictment be quashed, and that the defendant be set at liberty: Joseph A. Colquitt, Rethinking Entrapment, *American Criminal Law Review*, 1389 at 1395. In this criminal matter the ruling of the lower court managed to achieve the above requirements, in as much the magistrate did not formally write and order that the charges be quashed and that the defendants be set at liberty. In any event, it is not disputed that the defendants have their liberty and are no longer facing criminal prosecution. The fact that they are free men without any criminal proceedings hovering over their heads is augmented by the prayer by the Respondents that the State should return the sum of K10 million that was seized from them.

Apart from the finding that the ruling on entrapment was a final order and can be subject to appeal the 1st and 3rd Respondents should also be mindful that the High Court still has jurisdiction to review the criminal proceedings that were before the FGM under s. 362(1) of the CP and EC: *Rep v Genti* [2000–2001] MLR 383; *Rep v Bandawe* [1990] 13 MLR 376; *In re: Criminal Case No 42 of 2013 and related*

matters; Ex parte People's Trading Centre Ltd: S v Attorney General (The First Grade Magistrate Anthony C. Banda) [2013] MLR 96. The review process being a parallel and almost alternative process to the appeal system this court would still be able proceed to entertain the issues that have been raised by the Appellant through the window of review. In such a process the arguments that the Respondents are advancing under this preliminary objection would not be an issue at all.

The preliminary objection is accordingly dismissed and the appeal hearing is set down for 1st April 2020 at 9 am in open court.

Delivered and dated this 4th day of March 2020 at Chichiri, Blantyre.

Dorothy nyaKaunda Kamanga
JUDGE

Case information:

Mr. Chiwala,	Chief Legal and Prosecutions Officer ACB
Mr. Maele,	Counsel for the 1st and 3rd Respondents
1st Respondent,	Present/Represented
2nd Respondent,	Absent/Unrepresented
3rd Respondent,	Absent/Represented
Mrs. Ndunya,	Senior Personal Secretary
Ms. Msimuko,	Court Reporter
Ms. Ngoma,	Court Clerk