



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 10 OF 2021

(Being Criminal Case No. 1736 of 2018 before the Senior Resident Magistrate Court sitting at Dalton Magistrate Court)

THE REPUBLIC

V

AZEEM IQBAL AND SEVENTEEN OTHERS

Coram: Justice Vikochi Chima

Mr Rapozo, Senior Legal and Prosecutions Officer, for the appellant

Mr Fostino Maele, for the respondent

Mrs Moyo, Court Clerk

RULING

1. The respondents were before the Senior Resident Magistrate Court charged with misuse of public office contrary to section 25B (2) of the Corrupt Practices Act, an offence under Part IV of the Corrupt Practices Act. Offences under this Part require consent from the Director of Public Prosecutions for their prosecution.¹
2. By the time the ACB had started prosecuting this charge, they had not yet obtained consent from the DPP. In accordance with section 42 (4) of the Corrupt Practices Act, the magistrate discharged the respondents' bail conditions.
3. The ACB then sought to have the respondents charged with three offences that were outside the Corrupt Practices Act. These were: uttering a false document contrary to section 360 of the Penal Code; illegal entry contrary to section 37 (d) of the Immigration Act; and aiding and abetting illegal entry contrary to section 36 (1) of the Immigration Act.

¹ Section 42 (1) of the Corrupt Practices Act

4. The respondents objected to the ACB prosecuting these charges for being outside the realm of ACB powers. The magistrate agreed with them.
5. The ACB thus appealed against that decision.
6. At the hearing of the appeal, the defence objected to the appeal being heard arguing that the decision that the court below had made was not under section 346 of the Criminal Procedure and Evidence Code a final decision from which an appeal could lie. They cited two Supreme Court of Appeal decisions in support of their assertions: *Chihana v Rep (2)*² and *Rep v Abdul Rehman and others*.³
7. The appellant argued that in section 346 of the Criminal Procedure and Evidence Code, the word “order” should take its meaning from the preceding words of “final judgment” and that it should be read *ejusdem generis* with these words such that an appeal to the High Court should lie against either a **final judgment** or a **final order**. The appellant cites the case of *Advanx (Blantyre) Ltd v R*⁴ for this proposition.
8. The appellant further contends that the two cases cited by the respondents dealt with interlocutory applications whose orders would not lead to the conclusion of the case. The appellant states that on the authority of the High Court decision of *Rep v Youssef Nassour and others*⁵ the magistrate’s ruling was a final order since it set the respondents at liberty as they are no longer facing criminal prosecution.
9. Section 346 of the Criminal Procedure and Evidence Code states that:

“Save as hereinafter provided, any person aggrieved by any **final judgment or order**, or any sentence made or passed by any subordinate court may appeal to the High Court.”

(2) An appeal under subsection (1) may be upon a matter of fact as well as on a matter of law.

(3) Save as provided in subsection (4), no appeal shall lie against a finding of acquittal made by a subordinate court.

(4) The Director of Public Prosecutions may appeal to the High Court against any final judgment or order, including a finding of acquittal of any subordinate court, if, and only if, he is dissatisfied upon a point of law; and the provisions of this Part shall apply to an appeal under this subsection with such modifications as the circumstances may require.’
10. In the Supreme Court decision of *Chihana v Rep*, the accused faced five counts in the High Court. The defence made certain preliminary objections as regards the counts, inter alia, that counsel for the prosecution had no right of audience before the court, that the Chief Public Prosecutor had not given his consent to prosecute the counts that needed his consent, that one count was statute barred and that one count did not disclose an offence known to the law. The trial court ruled that the Chief Public Prosecutor had in fact given his consent on some of the counts and that the one count which allegedly did not involve any offence did disclose an offence known to law. The court then ordered the accused to be tried on the specified counts. Counsel for the appellant applied for leave to appeal against the ruling and leave was granted. The Supreme Court of Appeal held that it had

² [1992] 15 MLR 86

³ Criminal Case No 4 of 2017

⁴ 10 MLR 193

⁵ Criminal Case No 18 of 2019

no jurisdiction to hear an appeal from an interlocutory matter for its jurisdiction is confined under section 11 of the Supreme Court of Appeal Act to appeals from a final judgment. It stated that a judgment was to be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below decides the issues before it. It was held that in this case that the main issue which was to be determined was whether or not the appellant was guilty of the offences charged and not those preliminary issues on which the ruling was made like whether consent to prosecute had been given or not or whether the respondent had a right of audience.

11. In *Abdul Rehman and others*, the accused were charged with a number of offences in the High Court. They then applied under section 302A of the Criminal Procedure and Evidence Code to be discharged from prosecution on two of the counts arguing that the maximum period of three years within which they could be tried in these offences had expired. The judge dismissed the application. On appeal, the Supreme Court of Appeal held that no appeal could lie from the decision dismissing the application for discharge. The court affirmed its decision in *Chihana v Rep* and adopted therefrom the meaning of a final judgment. It was held that the ruling on discharge was an interlocutory matter and that such ruling did not decide the guilt or innocence of the accused, which was the main issue in the matter.
12. In the *Youssef Nassour* case, the three accused (respondents) appeared before the First Grade Magistrate Court. The first accused was charged with corrupt practices with a public officer contrary to section 24 (2) of the Corrupt Practices Act. The other two accused faced the charge of aiding contrary to section 25 of the Corrupt Practices Act. They all pleaded not guilty to the charges. Before the evidence had been led, the respondents filed an application for a permanent stay of proceedings on the ground that the proceedings were an abuse of the process of the court. Later the magistrate made an order permanently staying the case on the ground that the respondents were entrapped to commit the offences. He also made an order that the ten million kwacha that had been seized from the first respondent was to be returned to him by close of business on the day of the ruling.
13. The prosecution filed an appeal against the decision. Counsel for the accused objected to the hearing of the appeal arguing that the magistrate's ruling was not appealable as it was not a final judgment but an interlocutory order on an interlocutory application. He relied on the cases of *Chihana* as well as the *Abdul Rehman*. The prosecution relied on the *Advanx* case.
14. The High Court held that the stay order and the further ancillary order releasing the seized property were final orders and that therefore they could be the subject of appeals. Further, the court stated that even if the appeal were to fall away, the High Court still retained the powers of review in criminal matters under sections 360, 361 and 362 of the Criminal Procedure and Evidence Code and could exercise them in the matter. She stated that:

'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....Entrapment being a plea in bar of trial, the respondent's argument that it was an interlocutory order is neither here nor there...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 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...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 as 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 High Court still has jurisdiction to review the criminal proceedings that were before the FGM under s362 (1) of the CP and EC: *Rep v Genti* [2000-2001] MLR 383; *Rep v Bandawe* [1990] 13 MLR 376...*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 to 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.'

15. I agree with the appellants that under section 346 of the Criminal Procedure and Evidence Code, an appeal can lie against a final order. A final order is what we have in this matter since the court having ruled that the appellants could not prosecute the charges, the respondents were at liberty and were no longer facing these charges. The present matter is indeed distinguishable from the circumstances that obtained in the two cited Supreme Court of Appeal decisions where after the ruling on the interlocutory matter, the trial would and must have continued to decide the substantive issue in the matter, which issue was the guilt or innocence of the accused. In the present matter, the court below curtailed the proceedings such that the substantive question of the guilt or lack thereof of the respondents was not going to be decided upon. That decision to stop the criminal proceedings can be the subject of appeal.
16. Even further, this court has powers of review of the matter under the relevant sections.
17. Thus this court will proceed to hear the appeal in the matter on a date to be set.

Made this day the 17th day of February 2022


Justice Vikochi Chim