



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 Blantyre)

AZEEM IQBAL AND OTHERS

V

THE REPUBLIC

Coram: Justice Vikochi Chima

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

Mr Fostino Maele, for the respondent

Mrs Moyo, Court Clerk

JUDGMENT

Chima J

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

¹ Section 42 (1) of the Corrupt Practices Act

Act; and aiding and abetting illegal entry contrary to section 36 (1) of the Immigration 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. They submit that the court below erred in law in holding that even where ACB officers were duly appointed by the Director of Public Prosecutions as public prosecutors, those officers have no power to prosecute offences outside the Corrupt Practices Act.
6. Section 100 of the Constitution states:
 - ‘Save as provided in section 99 (3), such powers as are vested in the office of the Director of Public Prosecutions may be exercised by the person appointed to that office or, subject to his or her general or special instructions or to an Act of Parliament, by—
 - (a) persons in the public service acting as his or her subordinate; or
 - (b) such other legally qualified persons on instructions from the Director of Public Prosecution...’
7. Section 2 (1) of the Corrupt Practices Act states that:
 - ‘(1) Save as otherwise provided, the provisions of this Act shall apply notwithstanding anything to the contrary contained in the Criminal Procedure and Evidence Code or in any other written law.
 - (2) Subject to subsection (1), all offences under this Act shall be inquired into, tried and otherwise dealt with in accordance with the provisions of the Criminal Procedure and Evidence code.’
8. Section 10 of the Corrupt Practices Act states that:
 - ‘(1) The functions of the Bureau shall be to—
 - (a) take necessary measures for the prevention of corruption
 - (e) investigate any offence under any written law disclosed in the course of investigating any alleged or suspected corrupt practice or offence under this Act;
 - (f) subject to the directions of the Director of Public Prosecutions, any offence under this Act;’
9. Section 79 of the Criminal Procedure and Evidence Code states that:
 - ‘(1) The Director of Public Prosecutions may, by writing under his hand, appoint generally, or in any case or any class of cases, any person employed in the Public Service or such other legally qualified person to be a public prosecutor.
 - (2) Every public prosecutor shall be subject to the express directions of the Director of Public Prosecutions.’
10. The appellant cited the case of *Rep v Charles Mchacha*,² as having held that duly appointed public prosecutors by the Director of Public Prosecutions of the ACB are competent to prosecute offences under the Penal Code or any other law apart from the Corrupt Practices Act and that section 10 (1) (f) of the Corrupt Practices Act does not proscribe the appointment of public prosecutors from the ACB as public prosecutors under the Criminal Procedure and Evidence Code. They quote this passage of the judgment:
 - ‘The state argues, correctly in this court’s view, that the prosecutors from the ACB are public officers, therefore entitled at law to be appointed public prosecutors by the DPP. Having been so appointed they have the power to prosecute the offences under the Penal Code cited in the charge sheet. Clearly section 10 (1)(f) of the CPA does not proscribe the appointment of prosecutors under the CPEC. It is thus absurd to interpret section 10 (1) (f) to mean that the DPP cannot appoint officers from the ACB as public prosecutors to prosecute any other offences under any other law, including the Penal Code.’

² Criminal Case No 1 of 2021, High Court (Lilongwe Registry)

11. I agree with the holding in the *Mchacha* case. Section 10 (1) (f) of the Corrupt Practices Act does state that one of the ACB's mandate is of prosecuting any offence under the Corrupt Practices Act. It, however, does not state that officers from ACB cannot be appointed public prosecutors to prosecute any other offences. Even the appointing authority made by the then Director of Public Prosecutions IY Wadi dated 26 July 2004 of Moses Louis Iron, Patrick Naliya and Benard Mlozoa Albert Phiri extends to prosecution of offences outside the Corrupt Practices Act. It states:

'I am pleased to advise that in exercise of powers vested unto me under section 79 (2) of the Criminal Procedure and Evidence Code, I have appointed the above named persons to be public prosecutors, to conduct prosecution of offences under the Corrupt Practices (Amendment) Act 2003 and any other offences under any written law discovered during investigations of an alleged corrupt practice.'

12. In section 10 (1) (e), the Corrupt Practices Act itself mandates the ACB to investigate non-corruption cases discovered in the course of investigating corruption cases. Thus, if the DPP decides to extend an ACB prosecutor's authority to prosecuting non-corruption cases discovered while investigating corruption, he (the DPP) is entitled so to do under the Criminal Procedure and Evidence Code and the Constitution, for section 10 (1) (f) of the Corrupt Practices Act does not say the Bureau prosecuting officers cannot prosecute offences under other laws.

13. The order of the court below is thus set aside. The charges will have to be adjudicated upon by the same court.

14. I also need to point out one thing that I found disconcerting. When the accused had applied before the lower court to have the charges dismissed, he had brought two points, namely, that the ACB had no power to prosecute matters outside the Corrupt Practices Act, and also that the amended charges were statute barred. The magistrate dismissed the charges on the basis of only the first point and stated that he would not bother to consider the second limb as it was of no consequence if the ACB lacked the mandate to prosecute. It was not proper for the magistrate to only deal with one issue and leave the other hanging, regardless of what he thought of the outcome, for, now that the lower court's order has been set aside, that undecided issue is likely to become live.

Made this day the 7 April 2022


Chima J

