IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 19 OF 2017

BETWEEN:

MASANKHO CHINGOLI.....APPELLANT

-AND-

THE REPUBLIC.....RESPONDENT

CORAM: Hon. Justice M L Kamwambe

Maele of counsel for the Appellant

JUDGMENT

Kamwambe J

This appeal arises from convictions of theft and money laundering for which appellant was sentenced to 3 years and 4 years imprisonment respectively by the Lilongwe Senior Resident Magistrate Court. The charges in issue read as follows:

COUNT 1

Offence (Section and Law)

Theft contrary to section 278 of the Penal Code

Particulars of Offence

Masankho Chingoli during the month of August 2013 in the City of Lilongwe stole K11, 260, 450.00 (Eleven million, two hundred and sixty thousand, four hundred and fifty kwacha) property of Malawi Government.

COUNT 2

Offence (Section and Law)

Money Laundering contrary to section 35 (1) (c) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act.

Particulars of Offence

Masankho Chingoli, during the month of August, 2013 in the City of Lilongwe had in his possession K11, 260, 450.00 (Eleven million, two hundred and sixty thousand and four hundred and fifty kwacha) knowing and having reason to believe that the said money were proceeds of crime.

The appeal covers nine grounds of appeal. The first one is that the lower court erred in law in trying the Appellant in his individual capacity for an offence committed by a corporate entity. This ground emanates from section 24 of the Penal Code which reads as follows:

> *"Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and shall be liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission."*

The Appellant submits that this section clearly provides that there must be an offence committed by a company. Where a company commits an offence, it is the company which is charged

with the offence and if found guilty, that guilt shall be extended to the person in control of the company. Evidence shows that the alleged cheque was drawn in favour of a limited liability company, namely, **BUSINESS ADVERTISING AGENCY**. The learned magistrate dismissed that the argument that the Appellant was wrongly personally charged and prosecuted for an offence committed by a corporate entity although to the contrary she said the Appellant acted in his capacity as a director. I see that the learned magistrate was crucifying herself since it was an indirect admission that Appellant was being prosecuted in his capacity as director. I find that the learned Magistrate did not just intend to admit the obvious since the cheque was drawn in the corporate name and not in the personal name of the Appellant. In such circumstances, section 24 of the Penal Code allows the corporate name to be prosecuted and not the personal name of the director who would merely suffer punishment on behalf of the corporate entity.

I have considered section 24 very closely and I discover that counsel for the Appellant has miscomprehended the section. Although his argument sounds persuasive, we should put matters in their right perspective. According to section 24, it is that person in control of the company that shall be held liable. Section 24 does not say that the company shall be prosecuted as suggested by counsel. It merely points to the fact that the company committed the offence. Neither does it explicitly say that the director or any one in a similar capacity shall be charged. What it means is that it does not really matter whether you charge the company or a natural person the end result as to liability will be same. What should be established simply is that the company committed the offence (as did in this case since the cheque was in company name) and that the person held liable was a director or one in control of the company. These two important elements were proved no doubt. Under such interpretation I would not fault the learned magistrate. In any case, counsel is right that penal sections should be interpreted strictly and that is what I have done.

In the alternative, I have been drawn to consider if indeed the learned magistrate erred, if such an error suffices to nullify conviction and sentence in the light of sections 3 and 5 of the Criminal Procedure and Evidence Code. Section 3 reads as follows:

> *"The principle that substantial justice should be done without undue regard for technicality shall at all times be adhered to in applying this Code."*

And section 5 provides that:

> "(1) Subject to section 3 and to other provisions of this Code, no finding arrived at, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal of complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code unless such error omission or irregularity has in fact occasioned a failure of justice.
>
> (2) In determining whether any error, omission or irregularity has occasioned a failure of justice the court shall consider the question whether the objection could and should have been raised at an earlier stage in the proceedings."

Looking at the totality of the proceedings before the learned Senior Resident Magistrate, if the prosecution was against the corporate entity, the same prosecution witnesses would give evidence and the Company would be found guilty, leading to the Appellant being found liable resulting in serving sentence of imprisonment. In my view there would be nothing material to change the landscape of the case just because the company has been charged directly. Whatever route one employs, the end result would be the same. So, why fret about who is prosecuted. It is an insignificant fact as far as I am concerned. Further, counsel for the Appellant has not explained how such error, if it is an error at all,

occasioned any failure of justice. If the company was directly prosecuted, would he have secured an acquittal? I do not think so. I do not see how. This is where sections 3 and 5 of the Criminal Procedure and Evidence Code should apply to cure the defect. Consequently, this ground of appeal fails.

The second ground of appeal is that the lower court erred in law in convicting the Appellant of the offence of money laundering when the alleged act of laundering was an element of the predicate offence. The predicate offence here is theft. It is argued by the Appellant that the particulars of the charges do not address different aspects of criminality at all because the particulars of the charge of money laundering aver that the laundering was in the form of "possession" of the property that the Appellant was alleged to have stolen; and that when a person has stolen something he must possess it, so, to charge him with theft and money laundering by possession is tantamount to charging the accused person twice for the same criminal conduct.

Counsel for the Appellant cited the case of **Thorn v R** (2010) 198 A Crim R 135, [2009] NSWCCA 294 where Hawie J likened the practice of charging the predicate offence and money laundering offence to a robber being sentenced for both the robbery and being in possession of the stolen goods. Counsel is of the view that the case of **Maxwell Namata was not properly** adjudicated in the High Court. He provided this court with the Supreme Court judgment where Namata appealed and was eventually acquitted (MSCA Criminal Appeal No. 13 of 2015). I read the case with kin interest. I have observed that the facts of the Namata Case are not on four walls with the present case.

Let me say that on the issue of duplicity which is the first ground of appeal in this case which was also first ground of appeal in the Namata case, the Supreme Court supported the view that it was

good practice to charge the Appellant with both the theft and the money laundering offences. They were of the view that money laundering was a standalone offence and therefore it is not true that what you prove in theft is what you prove in money laundering even if it is on same facts. At page 9 the Supreme Court said as follows:

> *"The Appellant clearly has a misapprehension of duplicity. Duplicity does not come about because an accused has been charged with two counts on the same facts. Only because particulars of the offence she is charged with disclose more than one offence. In so far as therefore he contends that the charge [and therefore the convictions] are bad for duplicity because they emanate from the same set of facts his argument has no leg to stand on."*

On the other hand the Supreme Court observed that the particulars of the offence of money laundering was bad for duplicity in that the words 'knowing' or 'having reason to believe that the said property were proceeds of crime' should rather have been in the alternative instead of both being lumped together in the same particulars. Note that the conjunction used to join them is 'or' and, further, note that in this case the article used is 'and'. Does this make any remarkable difference? I would say that even if you used the conjunction 'and' it would be bad for duplicity. The Supreme Court concluded by saying that:

> *"We have herein discussed sections 3 and 5 of the CP&EC. In relation to the instant duplicity we have no doubt that the appellant did not suffer injustice. He was at all material times aware of exactly what the money laundering charge was all about namely that he was in possession of a specified sum of money in circumstances in which he was aware or should have been aware* that the same were proceeds of crime. The defect is therefore cured by the *application of section 5 of the*

CP&EC. To conclude otherwise would be equal to paying undue regard to technicalities".

I share the views of the Supreme Court above entirely.

Mwale J in **Republic v Savala** Criminal Case No. 28 of 2013 commented as follows:-

> *"Whilst it may be considered bad practice to charge the accused with stealing the same money he or she is then charged in laundering in New South Wales, the same is not the case in other jurisdictions.....Therefore money laundering prosecution practices differ across jurisdictions. While our own jurisdiction is in the process of establishing its own jurisprudence on money laundering, it is important to justify why any particular practice should be preferred over another."*

Money laundering is a distinct offence from theft in Malawi. This ground of appeal also fails.

The third ground of appeal is that the lower court erred in law in convicting the Appellant of the offence of money laundering by possession of stolen money when the account in which the money was held belonged to a body corporate. The Appellant argues that the evidence before the court was that the cheque was deposited in the business account of Business Advertising Agency. It is surprising and puzzling that the State preferred the charge of money laundering by "possession" of proceeds that were allegedly in an account held by a separate legal personality and the State was attributing the possession to the Appellant herein. He further argues that the Appellant being a different legal personality to the company herein, it cannot be said that the Appellant was capable of personally possessing the money which was in the business account of Business Advertising Agency.

True it is that in Company law, a company has a separate legal personality from the shareholders and directors, but the same Company law in the face of a criminal offence being committed by the company, has established the principle of lifting the veil permitting the director as a natural person to be sued or punished instead of or in place of the company. What was possessed by the company was for all intent and purposes possessed by the director and it is just a fanciful idea that the two are different for purposes of conviction and punishment. Reality will dictate otherwise. A company as a separate legal entity cannot create itself but by natural persons, and it has no sense of knowing that the property so acquired or possessed were proceeds of crime or part of it, except through natural persons. In fact, even if the company were sued for money laundering, the ultimate person to be liable for punishment would be the Appellant. No injustice would thus have been occasioned by applying sections 3 and 5 of the CP&EC.

This ground of appeal must also fail.

The fourth ground of appeal is that the lower court erred in law in accepting hearsay evidence from the prosecution. The evidence referred to are Exhibits 3, 8, 9, and 10. The first one was obtained from the office of the Registrar General and was tendered by the police investigator together with the others. They represented a Certificate of incorporation, Articles of association, Particulars of directors and Certificate of Incorporation respectively. The Appellant cited the case of **Christopher James and Another v R** Criminal Appeal No. 14 of 2013 (unreported) where Kenyatta Nyirenda J said that a call log from TNM which was tendered by the investigator in the case was inadmissible because the investigator not being the one who had produced the call log could not tender it.

I find that even if these documents were made inadmissible, the fact that the Company existed was not in contention, nor is it in contention that the Appellant was a director of the company

On pages 13 and 14 PW3 the police investigator, tendered exhibit P3, a certificate of incorporation, obtained from the office of the Registrar General, so too Exhibits 8, 9 and 10 being Articles of Association, Particulars of Directors and Certificate of incorporation. The question rests on the competence of PW3 to tender these documents in court, and not the producer from the Department of the Registrar General.

I would however wish to distinguish the TNM call log and exhibited documents from The Department of the Registrar General in that the latter are public documents and therefore the receiver that is the investigator is entitled to tender them not to show the veracity of the same but that they were made and that they exist. However, all these exhibits in issue now were not in contention and I wish not to think that the Appellant is trying to say that there is no proof that the Appellant was a director in the company and so, should not be punished for the wrongs of the company. In his arguments he does not say so, as such, let me not introduce what was not intended by the Appellant. ***Bolt J*** in **Rep v Kaipsya** 1966-68 ALR Mal. 271 at 299 said to the effect that it is not sufficient that an official record is produced by the person who has custody of it; the only person who may produce such a record in evidence is the person who actually made the entries and can testify that he did so from his own personal knowledge of the facts recorded. The only exceptions to this rule are public records, which are prima facie evidence of the facts contained in them. In my view, it is therefore not improper that the investigator tendered public documents acquired from the Registrar General's office. This ground of appeal also fails.

The fifth ground of appeal is that the lower court erred in law in accepting secondary evidence of bank documents tendered by PW 3 when the prosecution did not comply with sections 4 and 5 of the Banker's Books Evidence Act. The exhibits in issue are as follows:

1. Exhibit P1 Malawi Government Cheque No.016143

2. Exhibit P2 Bank statement of Business Advertising Agency

3. Exhibit P4 Deposit slip dated 8th August, 2013 for a/c no. 0025407932

4. Exhibit P7 Document showing signatories, and

5. Exhibit P11 Copy of cheque no. 0000879 drawn on BAA to Explorations.

Let us now look at section 4 of the Banker's Books Evidence Act which provides as follows:

> *"A copy of an entry in the banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank."*

From the reading the above cited section 4, in my view, it requires that an official of the bank do testify as dictated therein so that we are in no doubt of the origin and authentiety of the book. It would be awkward that such person came from outside the bank. However, we cannot rule out the possibility of an investigator in the course of duty, working alongside a bank official.

Section 5 of the Banker's Book Evidence Act states:

1. *"A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original and is correct.*
2. *Such proof shall be given by some person who has examined the copy with the original entry, and*

may be given either orally or by an affidavit sworn before any commissioner for oaths, or person authorised to take affidavits."

Most relevant to us is section 5 which does not in any way specify that the person to tender evidence in court shall be a bank official, but merely states that the person must be the one who examined the copy with the original. This attracts the question whether a police investigator working together with a bank official who examine the documents as required by law, would or would not be competent to tender the document/s in issue. In my view, in such scenario, nothing would bar him to tender the evidence. For the sake of clarification, section 5 requires that the person examined the copy and the original, and not that he produced them.

The problem that surfaces here is that neither the prosecution nor the defence inquired as to whether the investigator examined the copy with the original or what role he played in complying with section 5 of the Banker's Book Evidence Act. In the absence of any information/evidence to that effect, it is not known whether the Act was complied with. When dealing with bank documents in the manner herein, prosecutors should give due diligence that sections 4 and 5 are complied with and a statement to that effect is on court record or in evidence. It should not be left to assumption or speculation. It ought to be established that the investigator compared the documents and is therefore competent to tender them. Courts too should always be wary of these provisions so that they do not admit such bank documents without following the right procedure. They would assist a lot in the management of court proceedings if they nibed the error at the bud.

This ground of appeal says that the prosecution did not comply with sections 4 and 5 of the Banker's Book Evidence Act.

We should ask, how? What went amiss according to the Appellant? In his arguments which I prefer to bring out verbatim he says in paragraphs 3.5.4 to 3.5.7 as follows:

> *"3.5.4 In the case of* ***R v Kalonga and Angella Katengeza Criminal Case No. 26 of 2013 (LL DR)*** *in the ruling of objection to the tendering of secondary evidence by the State Mwale J dealt with the issue on how to tender bank documents. In that case the defence objected to the tendering of photocopies of cheques by the police investigations.*
>
> *3.5.5 In that case it was heard that the cheques could only be tendered if the State complied with section 4 and 5 of the Banker's Book Evidence Act. i.e.*
>
> *a) The State was supposed to provide evidence either oral or affidavit form of a partner or an officer of the bank where records of the document were sourced, proving that at the time the documents were entered into the records of the bank and the entry was made in the ordinary course of business and that the book is in the custody or control of the bank.*
> *b) The documents to be tendered are verified as true copies of the original by the person who took the copies. The person must give evidence oral or by affidavit form before a commissioner for oaths that the documents are in fact true copies of their original entity in the banker's books*
>
> *3.5.6 In this Kalonga Case the court ordered that the objected cheques could not be tendered in evidence unless these statutory requirements were complied with. It would follow from that case that failure to comply with these statutory requirements would render the cheques and any other bank documents inadmissible.*

3.5.7 In this case we see that PW 3 tendered several cheques, a deposit slip, and a bank statement. The record shows that there was no compliance with section 4 and 5 of the Banker's Books Evidence Act. There was no evidence before the court that these documents were entered into the records of the bank concerned and they were made in the ordinary books of the bank and that the entries in the books were in the custody or control of the bank."

Without much ado, as I have stated above, and what has been stated by Mwale J, PW3 does not say that he complied with sections 4 and 5 and there is no evidence of compliance anyway. The prosecution must always ensure that the mandatory provisions of sections 4 and 5 are complied with and proof of compliance supplied to court. Exhibits from the bank are, in the circumstances, not admissible evidence, consequently this ground of appeal succeeds.

The question that follows is what is the effect of inadmissibility of the bank documents? Does it amount to absolving the Appellant from liability? I do not have the views of the State because the state did not, in its arguments, cover appeal grounds 4 and 5 and I have no clue why. At some time I was tempted to ask them to send arguments on the same, but later I decided against such move as they had enough time to consider all grounds of appeal. I thought probably they chose to argue on grounds of appeal they were comfortable with and which they thought were more important. In my view they should have considered questions of admissibility as they could have the effect of changing the outcome of the case on appeal.

The main documents in issue are a cheque to BAA of MK11, 260, 450.00, a bank statement of BAA and a deposit slip. The

cheque proves what government money went out to BAA. In its absence, oral evidence alone would not be sufficient to secure a conviction. The cheque is the subject matter of theft as the medium used and it happens to be very crucial to the case of theft especially, and later to money laundering charge. A bank statement will show that indeed the money was credited to the account of BAA which was owned at the material time by the Appellant. In its absence, there would be no evidence of such credit and this weakens the prosecution's case. Finally, the deposit slip would show that the cheque was deposited in the account of BAA, hence the credit. This would also go a long way to demonstrating the strength of the prosecution's case. In its absence, nothing remains for which the State can take someone for prosecution. The way things are evidentially, it would be unsafe to convict the Appellant on inadmissible bank documents as these documents are very key to securing proof of a case beyond reasonable doubt.

The only thing I can comment on sentence is that the developing Malawi jurisprudence favours sentences of theft and money laundering to run consecutively. I support this move so as to deter would be offenders *inter alia*.

In the light of the fore going, I acquit the Appellant.

PRONOUNCED in Open Court this 7th day of May, 2018 at Chichiri, Blantyre.

M L Kamwambe
JUDGE