

IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA MISCELLANEOUS CRIMINAL APPLICATION NO. 5 OF 2021

[Being High Court Of Malawi, Lilongwe Registry, Criminal Review Case Number 16 of 2021]

[Being Lilongwe Senior Resident Magistrate Criminal Case Number 949 of 2020]

BETWEEN

NORMAN PAULOSI CHISALE

AND

THE REPUBLIC

CORAM: HON. JUSTICE L P CHIKOPA SC JA

C Gondwe/F Maele of Counsel for the Applicant

Santhe/Maulidi State Advocates, for the State

Chintande[Mrs.]/Masiyano[Ms.], Clerks

RULING/ORDER

The Applicant is charged with three counts namely Personation of a Person Named in a Certificate contrary to section 391 as read with section 358 of the Penal Code[Cap 7:01 of the Laws of Malawi], Presenting False Information to a Person Employed in the Public Service contrary to section 122 of the Penal Code and Intimidation contrary to section 88 of the Penal Code before the Senior Magistrates Court[the Trial Court] in Lilongwe.

In the course of the trial the State applied to amend the charge sheet. The Applicant opposed the application. The court heard the application and, unsurprisingly really, granted the same.

In terms of section 151[4] and [5] of the Criminal Procedure and Evidence Code[CP&EC][Cap 8:01 of the Laws of Malawi] the amended charges were supposed to have been put to the Applicant anew. New pleas should have been recorded. The words used in the section are *inter alia* as follows:

'[4] Every such new or altered charge shall be read and explained to the accused;

[5] The Court shall thereupon call upon the accused to plead to the altered charge and to state whether he is ready to be tried on such new or altered charge'

The above was, for some reason, not done. Instead the proceedings proceeded until the State closed its case on April 12, 2021. The accused then filed written arguments against findings of cases to answer on April 26, 2021. The State filed theirs for cases to answer on April 30, 2021. The matter was then adjourned to allow the Trial Court deliver its ruling in compliance with section 254 of the CP&EC the relevant parts of which provide as follows:

'Procedure On Close Of Case For Prosecution

[1] if, upon taking all the evidence referred to in section 253 and any evidence which the court may decide to call at that stage of the trial under section 201, the court is of the opinion that no case is made out against the accused sufficiently to require him to make a defence, the court shall deliver a judgment in the manner provided for in sections 139 and 140 acquitting the accused.

[2] if, when the evidence referred to in subsection [1] has been taken, the court is of the opinion that a case is made out against the accused sufficiently to require him to make a defence in respect of the offence charged or some other offence which such court is

competent to try and in its opinion it ought to try, it shall consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, shall amend the same, subject to section 151'.

Before it could do so two things dawned on the Trial Court. First that it had not, as a matter of fact, recorded fresh pleas from the Applicant as by law demanded. And secondly that whereas the accused had premised his submissions above referred to on the original charges the State had done so on the basis of the amended charges.

The Trial Court then approached the parties asking them whether they had any objections to it 'complying'[i.e. by taking fresh pleas] with section 151[4] and [5] abovementioned at that stage, affording the accused a chance to recall State witnesses, if he so wished, for purposes of re-cross examination and then allowing the Court to proceed to deliver its ruling on whether there were cases to answer or not.

The State had no objection. The Applicant objected. The sum total of his view was that once the State closes its case the only legal way forward was for the Trial Court to deliver its ruling on whether or not there is a case for the applicant to answer. There can never be a reopening of the State's case. He therefore urged the Trial Court to do as section 254 provides namely to deliver a ruling on whether or not he had cases to answer and thereafter, depending on the nature of the ruling, either acquit him or ask him to enter his defence.

The Trial Court, in trying to resolve the matter, 'referred'[this word is used advisedly] the matter to the High Court under sections 25 and 26 of the Courts Act[Cap 3:03 of the Laws of Malawi].

Section 25 provides as follows:

'The High Court shall exercise powers of review in respect of criminal proceedings and matters in subordinate courts in

accordance with the law for the time being in force relating to criminal procedure'

Section 26 provides:

'[1] in addition to the powers conferred upon the High Court by this or any other Act, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts and may, in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested and any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court directions as to the further conduct of the same as justice may require'.

In the referral the Trial Court raised five[5] issues for the High Court's consideration and also sought directions on how it should further proceed with the matter.

Analyzed carefully the Trial Court was essentially asking whether it should, in the circumstances of this case, proceed with taking fresh pleas the fact that the State had closed its case notwithstanding and secondly whether the inadvertent omission to take fresh pleas could be cured under section 3 of the CP&EC which section provides that:

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

The High Court upon receipt of the 'referral' decided to hear the parties rather than do a papers only review. By now it had condensed the issues raised by the Trial Court into one and set it out as follows in paragraph 9 of its Order of August 10, 2021:

*'9. ... by this referral the Court below is requesting this Court to issue directions on how it should proceed in the conduct of the proceedings, having omitted to administer fresh plea to the Defendant, but the State having closed its case and the parties having filed their submissions on whether or not the Defendant has a case to answer'***[Sic]**.

In hearing the parties however the High Court invited addresses on two issues namely *'whether the circumstances of this matter could be reconciled with section 151[5] above mentioned'* and secondly *'whether the inadvertent omission to take fresh pleas is a technicality that can be cured by resorting to section 3 of the CP&EC abovementioned'***[Sic]**.

The Applicant raised preliminary objections against the referral. He raised three issues. Of immediate relevance is the first which contends that a Magistrate's Court does not have power to refer a matter to the High Court for review under sections 25 and 26 abovementioned. Contending in other words, and as we understand him, that there was, in point of fact and due to the above incapacity, never a referral before the High Court from the Trial Court.

The High Court dismissed the preliminary objections. In its view a magistrate's court can refer a matter to the High Court for review under sections 25 and 26 of the Courts Act. It specifically held that the words *'any party'* or *'person interested'* used in section 26[1] of the Courts Act must be read to include the magistrate's court/the magistrate itself. That in this case there was a competent referral from the Trial Court to the High Court.

And while the High Court accepted that the provisions of sections 151[4] and 251 of the CP&EC are mandatory it was also of the view that any failure to comply with them is a technicality that is curable under section 3 of the CP&EC.

The High Court therefore remitted the matter back to the Trial Court with directions that it complies with section 151[4] to [8] inclusive as

appropriate and thereafter proceeds to rule, in compliance with section 254 on whether or not the accused has, on the evidence before it, cases to answer.

The Applicant is dissatisfied with the High Court's conclusions. He wants the decision of the High Court subjected to further scrutiny by the Supreme Court of Appeal[SCA] by way of Appeal. In that regard he applied for leave to appeal in the Court below. The said Court rebuffed him. In its view the review under consideration was brought under sections 25 and 26 of the Courts Act. It is not subject to appeal. The Courts Act does not in fact, according to the High Court, provide for one. The High Court cannot therefore by itself create the right to appeal against such reviews.

Further and having in mind section 11[2] of the Supreme Court of Appeal Act[Cap 3:01 of the Laws of Malawi] the said Court believes that appeals are only provided for reviews which the High Court undertakes under Part XIII of the CP&EC. That because the review herein was not in its view brought under that part or under the CP&EC, the question of an appeal does not even arise. And because it does not neither therefore should that of leave to appeal.

The High Court also concluded that the application for leave was incompetent for not having been accompanied with the grounds on the basis of which the appeal would be argued.

The request for a stay of the proceedings pending appeal was also dismissed. There was, according to the High Court, no pending appeal. A stay pending appeal is therefore inconceivable.

The Applicant is now before this Court asking for leave to appeal against the decision[s] of the High Court set out above and secondly for a stay of proceedings in the Trial Court pending the determination of the said appeal.

The arguments before us are in some ways not a huge departure from those in the Court below. On whether the High Court's powers under

sections 25 and 26 can be the subject of an appeal the Applicant's answer is in the positive. In his opinion the powers in section 25 are exercised in accordance with the law relating to criminal procedure. That law in his further view can only be that found in the CP&EC specifically in Part XIII thereof. When section 11[2] of the Supreme Court of Appeal Act[SCA] talks of powers conferred under Part XIII of the CP&EC it includes those powers conferred by sections 25 and 26 of the Courts Act. The High Court therefore erred, in his view, when it concluded that its exercise of powers of review herein could not be appealed against because it did not flow from Part XIII of the CP&EC because it does.

Responding to the argument from the State that there cannot be an appeal herein because there is no final decision in this matter the Applicant contends that section 11 above mentioned makes a distinction between an appeal on a final decision and one about a review. The appeal being sought in this matter is against a decision on review. It can be appealed against in terms of section 11[2] of the SCA as long as the set conditions are met.

The Applicant also contends that an appeal is necessary in this matter. There are questions that need to be clarified before this case can proceed to conclusion in the Trial Court. Chief amongst them is whether a magistrate can refer a matter to the High Court in terms of section 26 of the Courts Act. In his view the answer has to be in the negative. The section talks of '*any party or person interested*'. None of those terms could have been meant to refer to the court itself i.e. the magistrate or the magistrate's court. The referral to the High Court was, in so far as it was made by the magistrate, without legal backing, ineffectual and the High Court's exercise of powers of review in relation to this case an exercise in futility.

Second is whether it is indeed true that a review under sections 25 and 26 of the Courts Act cannot be appealed against.

The third question according to the Applicant concerns the application of section 254 of the CP&EC post closure of a prosecution's case. Can or should, as the Trial Court, the High Court and the State believe, a case that the prosecution has closed be reopened in order to allow the Applicant plead afresh?

In relation to the stay the Applicant thinks it makes sense to stay the proceedings while the questions posed above are answered by the SCA. Such a review or stay will not, according to him, cause needless delays. More importantly it will ensure that the proceedings in the lower court proceed on a sure footing and without the possibility of them turning into a charade if, as he thinks it will, the SCA ends up agreeing with him.

The Applicant therefore prays that he be granted leave to appeal and a stay of proceedings so that the SCA can resolve the above issues/questions once and for all. This is not only for his benefit but also those that might, in future, be similarly positioned.

The State adopted a diametrically opposite position. It thinks the operation of section 11[1] and [2] abovementioned as read with sections 25 and 26 of the Courts Act means there cannot be an appeal. Firstly because none is provided for. Secondly because appeals are reserved to reviews under Part XIII of the CP&EC only and finally because there is no final decision in this matter as envisaged in section 11 of the SCA. A final decision being, in the view of the State, a decision about the guilt/innocence of the Applicant.

On the suggestion that a magistrate's court has no authority to refer a matter to the High Court under sections 25 and/or 26 of the Courts Act the State is of one mind with the High Court. The phrases '*any party*' or '*person interested*' as used in section 26 of the Courts Act must be read to include the court itself i.e. the Magistrate's Court or the magistrate. There is therefore no merit, according to the State, in the argument that the lower court's referral of this matter to the High Court was ineffectual and

without legal backing. Or that the ensuing review by the High Court was an exercise in futility.

The State therefore prays that this application be dismissed and the matter in the Trial Court allowed to proceed to conclusion without hindrance. If the Applicant is still dissatisfied with the High Court's decisions/conclusions he can at the conclusion of the proceedings in the Trial Court appeal to the High Court and thereafter to the SCA.

THE COURT'S CONSIDERATION OF THE ISSUES

Proceeding on the basis of the arguments and law before us we must first affirm the fact that we are not at this stage answering the questions that the Applicant wants to put before the SCA. Sitting as a single member of the SCA we have no power to do so. We are also not deciding on his guilt/innocence in relation to the cases he is answering in the Trial Court. That is for the said Court to decide.

Secondly we must confirm that there are two major issues before us namely whether, on the one hand, the Applicant should be allowed i.e. granted leave, to appeal to the SCA or not and on the other whether, if we are minded to grant leave to appeal, the proceedings in the Trial Court should be stayed pending the hearing and determination of the resultant appeal.

Whether Or Not to Grant Leave to appeal

As a general rule this is dependent upon the judicious exercise of its discretion by the court seised with the application. In this case it depends firstly on whether one can appeal against a decision from a review premised on sections 25 and 26 of the Courts Act and secondly whether there are questions requiring consideration by the SCA via an appeal. If the answer to both or any one of the above questions is in the negative leave will be a nonissue. It will not even come up for consideration. It will not be granted and this application will most likely be dismissed in its entirety. If however the answer to both questions is in the positive it will

then be up to this Court, in due exercise of its discretion, whether or not to grant leave to appeal.

Can One Appeal against the High Court's Exercise of Its Powers of Review under Sections 25 and 26 of the Courts Act?

It is possible to answer the above question from a generalized perspective. It is also possible to do so with specific reference to this case.

We have above quoted sections 25 and 26 of the Courts Act. We think we should also quote section 11[2] of the SCA. It provides as follows:

'[2] any person aggrieved by a decision of the High Court in its criminal appellate jurisdiction or in the exercise of the powers of review conferred upon the High Court by Part XIII of the Criminal Procedure & Evidence Code may appeal to the Court on a matter of law but such decision shall be final as to matters of fact and as to severity of sentence'[emphasis supplied].

In our considered opinion sections 25 and 26 should be viewed primarily from a 'what' and 'how' perspective. 'What' powers do the two sections grant to the High Court in relation to reviews? 'How' should these powers be exercised?

Section 25 grants power to do criminal reviews. But not how such power should be exercised. That is left to the law now in force relating to criminal procedure. That law is that which is in the CP&EC. Part XIII thereof to be specific. And one such provision is section 360 of the CP&EC which provides:

'the High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of reviewing the proceedings and satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court'.

The High Court is granted more supervisory and revisionary powers in section 26. The powers relate to both civil and criminal matters and can be triggered either by the High Court's own motion or by *any party* or *person interested*.

At least two questions arise. Firstly 'are reviews under sections 25 and 26 excluded from appeal by section 11(2) of the SCA for not being conducted under Part XIII of the CP&EC?' We think not. There is a cross-reference in section 25 of the Courts Act to Part XIII of the CP&EC. Reviews under section 25 are therefore also done pursuant to powers conferred in Part XIII of the CP&EC. They therefore can be appealed against. Why because they are in reality Part XIII[of the CP&EC] reviews.

The immediately above applies with equal force to criminal reviews under section 26. To begin with the powers in section 26 are in addition, not detracting, to other revisionary and supervisory powers that the High Court has[including those in section 25 which are exercisable in accordance with Part XIII of the CP&EC]. Section 26 does not take away the cross-reference to Part XIII. All it does is to say that these powers can be triggered by the High Court itself, '*any party*' to or '*person interested*' in the proceedings.

Coming back to the instant reference it is obvious that the High Court read/applied sections 25 and 26 in tandem with Part XIII of the CP&EC when dealing with it. As it should. It thus formulated its own issues/questions, heard the parties, arrived at its own conclusions and thereafter gave directions as to how the Trial Court should proceed. This was all clearly in accordance with Part XIII of the CP&EC.

The second question might read a tad convoluted but was there, if truth be spoken, a referral from the Trial Court to the High Court? Do the words '*any party*' or '*person interested*' as used in section 26 of the Courts Act include the Magistrate's Court or the magistrate? Can a magistrate or the Magistrate's Court lawfully refer a matter to the High Court in terms of sections 25 or 26 abovementioned?

We are not at this stage answering the questions that the Applicant seeks to put before the SCA. It is obvious though that answering the second question is capable of disposing the appeal that the Applicant seeks to lodge with the SCA. To that extent we believe it is a question that should be placed before a full bench of the SCA. On appeal.

Accordingly it is our considered view, that the High Court's conclusions/decisions herein even though made within a review premised on sections 25 and 26 of the Courts Act are appealable. The said review was by cross-reference made pursuant to powers conferred upon the High Court by Part XIII of the CP&EC. Further the matters raised in the intended appeal are clearly ones of law.

Are There Questions To Be Answered By The SCA On Appeal?

In the Court below there were issues around amendments and the procedure to be followed once an amendment has been effected. The Trial Court thought them fit to be referred to the High Court for directions on the way forward. With respect we do not think that there is any serious doubt[s] about whether or not the State can amend a charge sheet. Indeed about the procedure to be followed once such an amendment has been effected. The State, the Applicant, the lower Court indeed the Court below were and are all aware of what happens in those circumstances. See section 151[4] and [5] of the CP&EC.

But and without in any way going so far as to say that talking about whether failure to take fresh pleas was a technical matter or an inadvertent omission that can be cured by resorting to section 3 of the CP&EC was inconsequential we are of the view that the High Court, the Trial Court and the parties skirted around the main issue herein namely whether, as a matter of general principle, a magistrate's court can reopen a prosecution's case once it is closed in order to permit compliance with section 151[4] and [5] of the CP&EC. And depending on the answer in what circumstances this can be permitted indeed whether, in the instant case, the State should be allowed to reopen its case just so that the

Applicant can, in compliance with section 151[4] and [5] of the CP&EC, enter fresh pleas to the amended charges.

There are, as we have of course alluded to above, other questions. There is one about whether a failure to take fresh pleas *vide* section 151[4] and [5] of the CP&EC is a technical omission/failure, whether section 3 of the CP&EC can, in the circumstances of this case, retrieve the failure to comply with sections 151[4] and [5] abovementioned. Another is whether section 11(2) of the Supreme Court of Appeal Act excludes, as the State claims, appeals to the SCA arising from the application of sections 25 and 26. Yet another is whether a want of formal grounds of appeals is, in criminal matters, fatal to an application for leave to appeal.

In our view all of the above are serious questions. Their answers will have an impact on how well and expediently the instant case is managed and resolved. More importantly the answers will positively impact on how other cases of a similar nature, and we know there are many, will be equally well managed and resolved. It is for that reason that we are of the firm opinion that these questions warrant a further consideration beyond the High Court. That an appeal should therefore be had in the instant case.

Should Leave To Appeal Be Granted?

Our answer is in the positive. The questions raised above are as stated above sufficiently serious. And important. Answers thereto will benefit not just the instant case but many others.

Should A Stay Be Granted?

The law specifically provides for an automatic stay when the High Court is reviewing a matter from the Magistrate Court under the Courts Act. Section 26[2] of the Courts Act provides in that regard as follows:

'upon the High Court calling for any record under subsection [1], the matter or proceeding in question shall be stayed in the subordinate court pending further order of the High Court'

We think the position should be the same when the matter/proceeding is escalated into the SCA. We discussed this position in **Aboo v R** MSCA Miscellaneous Criminal Application Number 3 of 2021[unreported]. We decided in that case that a stay should also be granted where the review is taken to the SCA. We maintain that position. To proceed otherwise would be discriminatory and constitutionally untenable in our humble opinion.

We are of course aware that the State thinks a further review and stay will only serve to delay the proceedings. Maybe. But just in case the State has forgotten the genesis of the current situation has very little, most likely nothing, to do with the Applicant. This matter would not be where it now is if those that sought the amendment and those that granted it had the presence of mind to fully comply with the law i.e. with section 151[4] and [5] of the CP&EC. The Applicant should not be blamed for seeking to take the review to its logical conclusion, namely to the SCA. Our Constitution provides for a fair trial regime which in section 42[2][f][viii] includes the right to have recourse, by way of appeal or review, to a higher court than the court of first instance.

It should also be noted that when the error/omission was discovered and this matter stayed and referred to the High Court the State never spoke of delay. In our view it looks less than fair for the State to speak of delay now that the Applicant, through no fault of his, finds himself in a situation where he has to resort to the full extent of the law in order to protect his interests. We do not want to accuse the State of blowing hot and cold. Or of playing double standards. Of not minding delay when it appears to benefit them but crying foul when it appears not to. Just to let it know that others might. And for good reason.

But perhaps more than that we think delay should be considered in a proper context. Delay should in our judgment only become an issue when there is as a matter of fact delay, when such delay is unnecessary/unjustifiable and thirdly when the delay occasions injustice or is generally not in the interests of justice. The question being whether

there will upon a stay of the proceedings in the lower court, not just be delay but one that is unnecessary/unjustifiable, causes injustice or is generally not in the interests of justice.

While there is no denying the fact that the review, and now the appeal, taken by themselves or together will make the proceedings in the Trial Court last longer than they would otherwise have done we do not think that the delay thereby occasioned will be undue, unnecessary, or unjustified. Or, when all is considered and done, that it will occasion injustice indeed be one that is not in the interests of justice. As said above the issues on which the SCA's opinion is sought are already well defined. It should not take too much time to have the SCA give its opinion thereon and the matter remitted to the Trial Court for continuation of trial. We actually feel that there is not be much difference, whichever way one looks at it, in turnaround times between proceeding as the State suggests and as the Applicant does.

The long and short of it all is that yes the stay and the resultant appeal might result in delay but the delay is not such as can be considered undue, unnecessary, unjustified, such as to occasion injustice, or in the circumstances of this case not in the interests of justice.

DETERMINATION/CONCLUSION

Leave to appeal is therefore granted. A stay is also granted the same to last until the appeal herein is heard and determined.

Because there is an obvious need for speed we order that the Applicant, now Appellant, lodges his grounds of appeal within 14 days from this date. Within a further 21 days thereafter the parties shall appear before the Registrar of this Court to do a roadmap, complete with timelines, towards the expedient disposal of the appeal.

In passing we feel obliged to make three observations. Firstly that reviews seem to be on the increase. It might be that the legislation relating to reviews is not fit for purpose. It could also be that it is being misapplied.

Either way it is time, in our humble view, that we took another look at our reviews regime.

Secondly there also seems to be issues around the speed at which we litigate. Speed is a good thing. But it must never be an excuse for those involved in the practice of the law take a cavalier/casual approach towards the law and its practice. The quest for speed should never be at the expense of giving litigants an adequate opportunity to be heard.

Thirdly that there is such a concept as hurried justice. It is not a good thing. There is therefore always the need to strike a balance between delayed and hurried justice. To accept that hurried justice equals denied justice in much the same way that justice delayed equals justice denied.

Dated at Blantyre this 17th day of December, 2021.

L P CHIKOPA SC
JUSTICE OF APPEAL