

**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**MISC. CRIMINAL APPLICATION NO. 173 OF 2001**

**BETWEEN:**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT**

**-and-**

**KAMPUNGA MWAFULIRWA.....RESPONDENT**

**CORAM: THE HON. MR JUSTICE F.E. KAPANDA**

**Mr Mpango, of Counsel for State the Applicant**

**Mr Bazuka Mhango, of Counsel for the Respondent**

**Mrs Kachimanga, Official Interpreter/Recording Officer**

**Date of hearing : 31st August 2001**

**Date of ruling : 11th December 2001**

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**Kapanda, J**

**RULING**

**Introduction**

In the motion before me, taken out on the 24th of August 2001, the Director of Public Prosecutions is applying for an order that a criminal case that was before the Chief Resident Magistrate's Court in Mzuzu, commenced against the Respondent, should be transferred to

the Lilongwe Chief Resident Magistrate's Court. The motion, though made ex parte, was heard inter-partes and it is opposed by the Respondent.

**Background**

Perhaps it is important to put a background to this motion so as to understand why this court is dealing with the application. On 2nd November 2000 the State commenced criminal proceedings against the Applicant, and two other accused persons registered in the Senior Resident Magistrate's Court sitting at Lilongwe as Criminal Case No. 162 of 2000. The Applicant was charged with two offences under the (Customs and Excise Act

(Cap. 42:01) of the Laws of Malawi and the offences were smuggling and being in charge of a conveyance used in smuggling goods.

It is to be observed that the Respondent, together with two other persons, had appeared before the Chief Resident Magistrate's Court at Mzuzu on apparently the same charges but had been discharged by the Mzuzu Magistrate's Court. The discharge was as a result of a discontinuance that had been entered by the State in terms of Section 77(1) of the Criminal Procedure and Evidence Code. In this regard the discharge was not to operate as a bar to subsequent proceedings being commenced against the Respondent on the same facts. Thus the State commenced fresh proceedings against the Applicant. Instead of commencing the proceedings in the Mzuzu Magistrate's Court, as it had done earlier, the State sought to bring the matter before the Senior Resident Magistrate's Court in Lilongwe. Counsel for the Respondent objected to the State's wish to commence the criminal proceedings in Lilongwe. The learned Magistrate allowed the objection raised and ordered that the case should be instituted in the Principal Resident Magistrate's Court in Mzuzu. It was the further order of the learned Magistrate, at the Lilongwe Magistrate's Court, that if the State was desirous of instituting the proceedings in Lilongwe then the State was to apply to the High Court for the matter

to be heard by the Chief Resident Magistrate's Court sitting at Lilongwe. It would appear that it is as a result of this order that the Applicant has brought this application.

#### The Motion

As indicated earlier, this Court, upon the motion of the Applicant, is being moved to order that pursuant to Section 75(3) of the Criminal Procedure and Evidence Code, the case of the State against Mr Kampunga Mwafulirwa (the Respondent), which was being prosecuted in the Chief Resident Magistrate's Court at Mzuzu, being Criminal Case No. 35 of 2000 be transferred to the Chief Resident Magistrate Court at Lilongwe.

I wish to observe that the grounds, upon which the application for the said transfer is being made, have not been indicated in the Notice of Motion. If anything the premise upon which the motion is made has appeared in the arguments of Mr Mpango of Counsel for the Applicant. The procedure adopted by learned Counsel for the Applicant is wrong. It is trite that the grounds upon which an application is made must always be indicated in the legal document that is used to bring an application. Where the grounds are not shown it may well be argued by a Respondent that he has been taken by surprise. Fortunately, learned Counsel for the Respondent did not take issue with this oversight by the Applicant's Counsel. I will, therefore, for the purposes of this Ruling, take it that the Respondent has not been taken by surprise. In this regard this court will consider it as common ground that the Respondent was fully aware of the basis upon which the motion was being made. Indeed, it is apparent that the ground upon which this application is premised was also advanced in the Lilongwe Magistrate's Court at the time that court was dealing with the objection raised by the Respondent regarding the institution of the proceedings in Lilongwe instead of Mzuzu.

I will now, without much ado, proceed to make my findings on the Application before me. In so far as it may be necessary to put it here, the Applicant, through Counsel, told this court that he wants the trial of the criminal case against the Respondent transferred to the Chief Resident Magistrate's Court at Lilongwe on the ground that the matter can not be inquired into with impartiality at the Chief Resident Magistrate's Court in Mzuzu.

#### Issue for Determination

As I understand it, there is only one issue that has arisen and requires determination. The said issue is whether or not the trial of the criminal case against the Respondent, and two other persons, should be transferred to, and be inquired into by, the Chief Magistrate's Court sitting at Lilongwe. I wish to observe that there will also be some auxiliary issues that will arise when answering the main question before me. It is my intention to deal with these other auxiliary issues if, and when, they arise.

#### Law and Findings

What was the effect of discharge?

It is trite law that a discharge of an accused person does not operate as a bar to subsequent proceedings being commenced against the said accused person on account of the same facts. The State discontinued the case against the Respondent in terms of Section 77(1) of the Criminal Procedure and Evidence Code. This is clear when one reads the letter of the Senior Resident Magistrate of 20th September 2000 reference No. CRM/CC No. 35/2000. The Respondent was advised of his discharge from the case under Section 77(1) of the said Criminal Procedure and Evidence Code.

It is therefore my finding that there is nothing wrong in instituting fresh proceedings against the Respondent and the other two persons. In view of the provisions of the said S. 77(1) of the Criminal Procedure and Evidence Code the Applicant can not be stopped from instituting such fresh proceedings.

Should this court make the order of transfer of the criminal inquiry into the case of the Respondent?

In answering the above question it must be remembered that, in deciding where the venue of a criminal trial should be, the following must always be considered: the convenience of the defence, the prosecution and the witnesses. I would tend to think that this observation can be discerned from the stipulation in Section 69(b) of the Criminal Procedure and Evidence Code which provides that:

“Subject to Section 67 and to the powers of transfer conferred by Sections 74 and 75 every offence shall ordinarily--- be inquired into or tried by the subordinate court nearest to the place at which the offence took place or where the accused was apprehended in answer to a summons (lawfully issued charging the offence---” (emphasis supplied by me)

From the above, it would appear that, except where there are exceptional circumstances, a criminal trial must invariably be inquired into by a subordinate court nearest the place at which the offence occurred or where the accused was arrested. Further, it is my view that

a criminal trial would only be inquired into by a subordinate court other than the one nearest to the place of the occurrence of offence, or where a suspect was arrested, if the High Court has ordered, through an application by a party to the proceedings, to that effect. The provisions of Section 74 and 75 of the Criminal Procedure and Evidence Code are pertinent on the observation that I have just made.

As noted earlier, it is pursuant to S.75(3), of the said Criminal Procedure and Evidence Code, that the Applicant is moving this court to make an order of transfer of the criminal trial, to be commenced afresh against the Respondent, to the Lilongwe Magistrate's Court. Although it has not been specifically spelled out the premise upon which the application is made would appear to be on the stipulations in Section 75(1)(a)(ii) of the said Criminal Procedure and Evidence Code. Subsection (1)(a)(ii) of Section 75 provides that:-

“Whenever it is made to appear to the High Court - that a fair and impartial inquiry or trial can not be had in any criminal court subordinate thereto-- it may order that any particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other such criminal court of equal or superior jurisdiction.”

And Section 75(3) of the Criminal Procedure and Evidence Code is in the following terms:-

“Every application for the exercise of the power conferred by this Section shall be made by motion, which shall, except when the applicant is the [Director of Public Prosecution], be supported by affidavit.”

In keeping with the provisions of the said Section 75(3), of the Criminal Procedure and Evidence Code, the Applicant did not file an affidavit in support of this application. Be that as it may be, it is worth noting that it would appear that the arguments of Mr Mpango in support of this application are based on the contents of a Memo dated 29th August 2000, from an officer of the Malawi Revenue Authority (MRA) to the Board Secretary and Chief Counsel of the MRA. The said Memo was put on record and I will quote the relevant parts of the said Memo which are as follows:-

“Refer to our discussion on 21/08/00 at 11.30 am with the undersigned and Mr Chimtande. Concerns of security came alight due to an experience we had on plea appearance. This was the time when the case had not been taken up by the journalists. The court was surrounded by supporters of the accused and these were barred from entering the court through an arrangement set up by the court. We were lucky to have not been affected as we were early to leave the court when the accused was inside to sign for bail. Mr Kapile is aware of all this.

I would nevertheless have wished that the case was moved to Lilongwe in order to settle for some distance. I was again written by the Officer in Charge of Songwe on the question of security for our only witness from there. I wrote back a note to him to say he should be allowed to use the official vehicle to Mzuzu as opposed to the bus he has been using and since then the court has not sat.

It ought to be noted that this case is being politicised since the accused is a political figure. The case is again being aggravated by the supporters who follow him to the court.

It now remains that security for the staff involved be looked into as soon as possible.

Submitted for your action.”

It is obvious, from the contents of this Memo, that the said supporters of the Respondent did not, as a matter of fact, interfere with the proceedings at Mzuzu.

Upon a careful consideration of the statutory provisions regarding the ordinary venue of a criminal trial, and the circumstances under which the High Court shall exercise powers of transfer, it is my finding and conclusion that an order of transfer would not be in compliance with the Respondent’s constitutional right to a fair trial. In as much as the Applicant is of the view that an impartial trial can not be had in Mzuzu I find that that opinion has not been borne by circumstances of this case. As noted earlier the alleged supporters of the Respondent did not interfere with the proceedings. In my judgment the solution to the perceived threat, as mentioned in the Memo of 29th August 2000, is to ask the police to provide security to prosecuting Counsel and the witnesses. Indeed, if there is any intimidation of the witnesses, or Counsel for the State, the solution lies in bringing criminal charges against those who are and/or will be involved in acts of intimidation or threats.

At the same time I can do no better than repeat the advice that the learned Magistrate, in the court below, gave to the Respondent that he is better advised that it will not be in his interest, and in the interest of justice, if he does not desist from interfering with the course of justice by ferrying his supporters to the court. If the Respondent does not take heed of this advice the Applicant will be at liberty to make another application of this nature. Should there be any interference with the criminal proceedings, or if the prosecution and its witnesses are intimidated, this court will not hesitate to order a transfer of the case in order to meet the interests of justice.

The long and short of it is that the application herein has not been successful. It will not be convenient, and therefore not in the interest of justice, to grant the order prayed for by the Applicant. If such an order were to be made it will inconvenience both the Respondent and the witnesses who will have to travel a very long distance, and suffer accommodation expenses, to attend the trial of the criminal action to be recommenced against the Respondent. In reaching this conclusion, the court is acutely aware of the wishes of the Applicant to have the case tried in Lilongwe but it will be a hardship for the Respondent, and the Co-accused, to travel to Lilongwe from Karonga and/or Mzuzu. The interests of the Accused persons in being able to attend this trial, at minimum cost and expense, have outweighed those of the prosecution. The perceived threat to their security can easily be taken care of by provision of security by the police. In the premises the inquiry into the matter must be brought before the Mzuzu Magistrate’s Court. Upon the

foregoing, it is ORDERED that the criminal proceedings to be instituted against the Respondent, and the Co-accused persons, shall be so recommenced at the Mzuzu Magistrate's Court.

Made in Chambers this 11th day of December 2001 at the Principal Registry, Blantyre.

**F.E. Kapanda**

**JUDGE**