KAMBARANGE MPUNDU KAUNDA v THE PEOPLE (1991) S.J. (S.C.)

SUPREME COURT
NGULUBE, D.C.J., SAKALA AND CHAILA, JJ.S.
ON 19TH FEBRUARY, 1991
S.C.Z. JUDGMENT NO. 12 OF 1991
APPLICATION NO. 4 OF 1991

Flynote
Criminal Procedure - Whether accused can appeal for interlocutory relief while criminal proceedings are pending in court - Section 12 of the Supreme Court of Zambia Act
Statutory Interpretation -Where there are two or more possible interepretations - Whether court will adopt all possible interpretations - Section 12 of the Supreme Court of Zambia Act

Headnote
The appellant brought an interlocutory appeal in a criminal matter during the course of a High Court trial which was still in process.The appeal was made before a single judge who held that the appellant had no right to make such an appeal.

Held:

(i) The court will not adopt one of two or more possible interpretations which will produce absurd results when another interpretation will in fact be more conformable to the purpose and the intentions of the law.

(ii) The Supreme Court has no jurisdiction to determine interlocutory appeals made by accused persons or the prosecution on rulings made in the course of pending criminal trials in the courts below

Cases cited:

(1) Sekele v The People S.C.Z. Judgment No. 4 of 1990
(2) Stanely Munga Githunguri v The Republic Misc App. 271 (1985)
(3) The People v Sikatana (1982) Z.R. 155 (S.C.)
(4) Miyanda v The High Court (1984) Z.R. 62
(5) Codron v Macintyre & Shaw (1960) R. & N. 418

For the appellantt: R. M Ngenda of Richard Ngenda and Associates
For the respondent: Mr. G. S Phiri, The Director of Public Prosecutions

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Judgment
NGULUBE, D.C.J.:

This is an application for an order to stay criminal proceedings pending in the High Court and for leave to appeal against a ruling by the learned High Court Judge on an objection raised against such proceedings. The applicant first moved this court before a single judge who held that there was no right on the part of the applicant to bring, and on the part of this court to entertain, an interlocutory appeal in a criminal matter during the course of a High Court trial which is still in process.

On behalf of the applicant, Mr. Ngenda has raised a number of arguments. His first contention

is that on a true construction of subsection 8 of Section 12 of the Supreme Court of Zambia Act, the learned Director of Public Prosecutions has a right to bring an interlocutory appeal in a criminal matter during the course of a High Court trial which still in process.

On behalf of the applicant, Mr. Ngenda has raised a number of argument. His first contention is that on a true construction of Sub-section 3 of Section 12 of the Supreme Court of Zambia Act, the learned Director of Public Prosecutions has a right to bring an interlocutory appeal on any judgment as defined under Section 2. On that argument it is his submission that an accused person similarly ought to have a similar right to appeal on an interlocutory issue. This proposition is supported, according to Mr. Ngenda's submission, by the fact that there is no express prohibition in Section 12 of the Act barring an accused person or indeed the learned Director from appealing on a point of the law before conviction has been recorded or, in the case of the Director before an acquittal or any other decision has been recorded. The facts giving rise to this application have not been stated and they are in point of fact not material to the decision which has to be made. What Mr. Ngenda has argued is that where preliminary issue has been raised at the trial which challenges the entire propriety of the criminal prosecution, an accused person should be at liberty to come to this court and to have that matter resolved, in the event that the trial judge has made an adverse decision as was the case here. It was Mr. Ngenda's submission, on the assumption at all times that Sub-section 3 of Section 12 could by a converse argument apply to an accused individual as well, that there would be adequate grounds in this particular case to read into the sub section words in which would enable an accused person to bring an interlocutory appeal. Mr. Ngenda has distinguished in his argument our decision in Sekele -v- The People (1) and has argued that the court in that case did not address itself to the question whether an accused person has a right of appeal in an interlocutory matter pursuant to the right of appeal Mr. Ngenda argues the Director of Public Prosecutions has under Sub section 2 of Section 12. The contention with regard to the case of Sekele was that that dealt with a bail application and it was obvious that having regard to the provisions of Section 22 of the Act as read with Section 12 the application could not be made unless there was an appeal pending on an application preliminary thereto pending before this court: To the extent that the distinction on the facts of the Sekele case is made on Mr. Ngenda, we agree that that may be so on the facts and on the merits of the particular case.

Mr. Ngenda has also argued that having regard to Article 20 of the Constitution of Zambia which, among other things, enjoins that accused persons be afforded a fair hearing Sub section 3 of Section 12 should be construed as importing a right in an accused person to make an interlocutory appeal for the purpose of securing for himself such fair hearing. In this regard Mr. Ngenda has relied on the Kenyan case of Stanely Munga Githunguri -v- The Republican (High Court of Kenya at Nairobi Miscellaneous application No. 271 of 1985) (2). In relation to this case the learned Director has argued that it would be irrelevant and immaterial to the issue at hand. We have considered the Kenyan case and we note that in that particular case the proceeding in court was one for the prerogative Writ of prohibition. The facts were that in about 1976 the applicant in the Kenyan case was alleged to have committed some twenty offences against exchange control regulation. Those offences were investigated and sometime in 1990 the Attorney-General informed him that no prosecution would ensue and that the file and the investigations would be closed. Announcements were made by another Attorney-General to the National Assembly in 1981 to that effect. In 1984, after two Attorney-Generals had left office and another one had come in, the new Attorney-General resurrected four of the charges. The applicant challenged the prosecution and the High Court of Kenya, after considering the facts of case held as follows:-

"Two indefeasible reasons make it imperative that his application must

succeed first as a consequence of what transpired and also being led to believe that here would be no prosecution the applicant may well have destroyed or lost the evidence in his favour secondly, in the absence of any fresh evidence, the right to change the decision to prosecute had been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in Section 77 (1) of the Constitution, (i.e the Constitution of Kenya). This prosecution will, therefore, be an abuse of the process to the court, oppressive and vaxatious. Prohibition to issue."

It is apparent from the ratio decidendi which we have quoted that the court in that case went into the merits of the case. After a lapse of time and the announcements which were made, it was clear that the applicant in the Kenya case may have altered his position such as by destroying the evidence or destroying records which could have helped him so that a trial many years later would definitely have been unfair to the applicant who would no longer be in a position to adequately prosecute his own defence. The rationale in this case, in our considered opinion, can be likened to the position in a civil matter where, because of tardiness of the part of the Plaintiff who takes a long time, and inordinately long time to prosecute his claim, a defendant successfully applied to the court to dismiss the prosecution of the civil claim for want of prosecution. The major reason of allowing application by defendants in that is that after an inordinate length of time witnesses may have forgotten what the case was about or what were the facts; evidence my have become lost or destroyed; witnesses may have died and to allow a dilatory plaintiff to proceed with his prosecution in such a case would clearly make it impossible for the defendant to have a fair trial and it is to prevent abuses of process in this manner that in a situation like that the court would allow and application to dismiss the claim for want of prosecution. The important point to notice is that, both in the Githunguri case and the example we have given from a civil action, the decision must rest on the merits of the particular case. It is quite clear that in the case . The Kenyan case is, for that reason, of very little assistance in this court. We do not know in this case whether the exemption form prosecution which the applicant claims was based indemnity offered by the Director of Public Prosecution or it was base on pardon or autrefois acquit or autrefois convict or a general disclaimer that the court has any jurisdiction over him or on what other preliminary point such that we can not say, in the absence of the merits which any even do not arise at this stage, what the facts of this case are. The issue at hand is whether this court can entertain an appeal in an interlocutory matter.

Quite clearly, although the section of the Supreme court of Zambia Act under discussion may arguably be thought to be capable of meaning that the learned Director of Public Prosecutions could bring an interlocutory appeal, it is equally capable of being understood as permitting appeals only after the conclusion of proceedings below. The question which arises is what ought to be the correct Interpretation of that section. It is a cardinal rule interpretation that the court will not adopt one of two or more possible interpretations which will produce absurd results when another interpretation will in fact be more conformable to the purpose and the intentions of the law. The provisions under discussion are concerned with adjective and procedural matters and they must be construed, in our opinion, so as to accord with the practice and procedure of the court which is clearly manifest in the Act and the Rules as a whole. With regard to Sub section 3 of Section 12, for example this was an amendment to the Section in 1975 inorder to allow the state right of appeal in criminal matters which they otherwise did not have. Individual accused persons already had such a right enshrined in subsection 1 and 2 of Section 12. The question contended for by Mr. Ngenda is whether in fact the Director of Public Prosecutions could not appeal in midstream during a criminal trial and, if has such a right, whether such a right ought not in fairness to be extended to an

accused person so as to afford him a fair hearing in terms of Article 20 of the Constitution. In our considered opinion, it would be absurd to construe subsection 3 of section 12 as giving the Director of Public Prosecutions the right to an interlocutory appeal which is not available to other litigants. It would be absurd in our opinion to permit that criminal trials can be halted while interlocutory appeals are made on all manner of objection and rulings which during criminal trial the question which arises is where would it all start and where would the line be drawn. The whole of the criminal process would come to a standstill if the state or the accused persons were at liberty to lodge interlocutory criminal appeals. That this was not the intention of the Legislature clearly appears with reference, by way of analogy, to Section 277 of the Criminal Procedure Code. That section provides to the effect that where on the failure of a special plea in bar the court has ruled that the preliminary objection taken Is not sustained, the trial must proceed. In other words, if on the usual and regular special pleas in bar, such as pardon, or autrefois convict, or autrefois acquit, the trial court rules against the accused, it is the specific provision of Section 277 of the Criminal Procedure Code that the trial must proceed. That cannot, of course, prevent the accused from raising the issue on an appeal if he is convicted and in which he will allege that the ruling on his preliminary objection was wrong. Indeed this is what has been happening in many criminal appeals where rulings by the trial courts have been held to have been wrong by this court and, depending on what the issue was, acquittals or other suitable acknowledgement have been made in the judgment of this court. But in fact it is quite obvious that the tupe of reference that this application seeks to bring about was one which could have been grounded on Section 20 of the Supreme Court of Zambia Act. Section 20 of that Act reads as follows:-

Section 20 (1)

> ''If in the exercised of power conferred upon the High Court it thinks fit to reserve for the consideration and determination by the court any question decided by the High Court on any exception or objection taken to the information preferred against any person on trial before the High Court for any offence the High Court shall state the question reserved and direct that the question so stated be transmitted to the Master for consideration and determination by the Court.''

That section in our opinion could have been the only other way in which an accused person aggrieved by a ruling on a preliminary objection taken to the information against him could come before this court. However, that section has been considered and dealt with by this court and already and for the reasons discussed in the case of Sikatana , (3) who had pleaded unsuccessfully that he had been pardoned against prosecution for treason, that an application could also not be made under that section because the legislation as it stands at the moment has a lacuna whereby the High Court has no corresponding power to make such a reference. This was the decision, as we said, in the case of Sikatana (3). Indeed that was a case referred to by the learned single judge to underline the fact that this court has not entertained any interlocutory appeals to a criminal matter.

When we discuss the application now before us and when this court declines to assume jurisdiction to hear an interlocutory matter, we should perhaps make it clear that we are drawing a distinction between jurisdiction as a matter of substantive law and jurisdiction as a matter of procedural law. As we said in the case of Miyanda -v- the High Court (4) , quoting from the case of Gordon -v- Macintyre & Shaw (5) and quoting from the remarks of the learned Chief Justice Tredgold:-

> **"It is important to bear in mind the distinction between the right to relief and procedure by which such relief is obtained. The former is a matter subtantive**

law, the latter of adjective or procedural law."

In the Miyanda case we also pointed out that this court as an appellate Court draws its jurisdiction from the Statute and can claim no jurisdiction of a procedural nature which is not in the statute. It is quite clear, without going into merits of this matter - which would still be viable on a case properly brought before the court - that this court in fact has no jurisdiction and the accused persons together with the prosecution have no right to bring interlocutory appeals against rulings made in the course of pending criminal trials in the courts below. For the reasons which we have adumbrated, this application is refused.

Application refused

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