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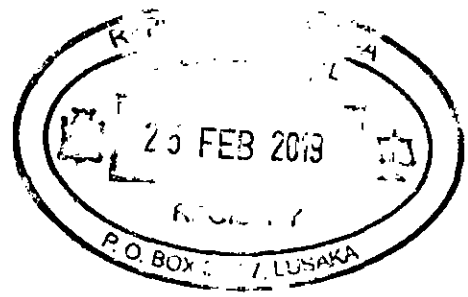
IN THE COURT OF APPEAL OF ZAMBIA **Appeal No.185/2017**
HOLDEN AT LUSAKA AND NDOLA
Criminal Jurisdiction)



B E T W E E N:

THE PEOPLE **APPELLANT**

AND

TAHER AMMAR MOHAMMEND KHALIL **RESPONDENT**

CORAM: Mchenga DJP, Mulongoti and Lengalenga, JJA

On 27th March 2018, 24th April 2018 and 25th February 2019

For the Appellant: B. Mosha, Mosha & Company
For the Respondent: C. Changano, D. Findlay and Associates

J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. **R v Heston-François [1984] 1 All ER 785**
2. **Connelly v The Director of Public Prosecutions [1964] A.C. 1254.**
3. **The People v Upton [1965] Z.R. 70**
4. **Lighton Simbeye v The People [2015] 2 Z.R. 124**

Legislation referred to:

1. **The Constitution, Chapter 1 of the Laws of Zambia**

2. **The Criminal Procedure Code, Chapter 88 of the laws of Zambia**
3. **The Penal Code, Chapter 87 of the Laws of Zambia**

Works referred to:

1. **Archbold, Criminal Pleading, Evidence and Practice, Forty-Third Edition, London Sweet & Maxwell.**

This is an appeal against a High Court judgment that upheld the Subordinate Courts' decision to dismiss a criminal case for being an abuse of the court process.

The history of the case is that the respondent was a party to a civil matter in the High Court. He deposed an affidavit in support of an interlocutory application that arose in the course of those proceedings. Before the application was heard, a criminal complaint was filed against him in the Subordinate Court, pursuant to the provisions of **section 90 of the Criminal Procedure Code**. It was alleged that the affidavit he had deposed in support of the interlocutory application contained false information.

The complaint was accepted and the magistrate instructed a public prosecutor to draw up the charge. A charge sheet, containing one count of offence of perjury, contrary to **section 106 of the Penal Code**, was drawn and summons were issued to the respondent.

The respondent duly attended court but raised an objection to the charge. He argued that the lodging of the complaint amounted to "forum shopping" as the Subordinate Court was being invited to determine an issue that was before the High Court. The trial magistrate agreed with the objection and dismissed the charge. He also acquitted the respondent and ordered that he be paid costs.

Dissatisfied with the dismissal of the charge, an appeal was launched to the High Court. The High Court found that the lodging of the complaint in the Subordinate Court did not amount forum shopping or result in a multiplicity of actions. However, the dismissal of the charge was upheld on the ground that there was an abuse of the court process. The court took

the view that the complaint was intended to frustrate the action in the High Court. The court also upheld the award of costs.

In this appeal, the dismissal of the charge on the ground that the lodging of the complaint was an abuse of the court process and the award of costs, have been challenged.

Mr. Mosha has argued that the court below erred when it held that the lodging of the complaint was intended to frustrate the High Court case because the law does not prescribe the time within which a complaint or charge of perjury can be preferred. The appellant was therefore at liberty to complain at the time that they did. He then submitted that having found that the lodging of the complaint did not lead to a multiplicity of actions, the High Court should have held that the Subordinate Court had the jurisdiction to hear the criminal charge.

Mr. Changano's response was that the High Court judge rightly found that lodging of the complaint was an abuse of the court process because the proceedings were intended to intimidate the respondent.

As Mr. Mosha correctly submitted, the law does not prescribe the period within which a person can be charged with the offence of perjury. Depending on the circumstances, a person who perjures himself can either be arraigned at the end of the proceedings in the court where the perjury was committed or as they are going on. This being the case, it was wrong to find that there was an abuse of the court process solely because the matter in the High Court was still pending.

Notwithstanding our view that there was no abuse of the court process when the complaint was lodged, after considering all the circumstances of this case, it is our view that it would have been unfair and oppressive on the respondent to be tried for perjury before the High Court had heard the interlocutory application on which the charge was premised. We do not see

how he would have freely and effectively presented his evidence in the High Court when he was being prosecuted in the Subordinate Court on the ground that that very evidence was false.

It is now settled, that the courts have the inherent power to intervene to prevent unfairness on an accused person; see **Archbold, Criminal Pleading Evidence and Practice,** paragraphs 4-38 to 4-39. In the case of **R v Heston-François**[1], commenting on the same issue, Watkins LJ, at Page 790, said the following:

> **"The problem posed to us involves the power of the court not only to control the procedure of the trial, but also to decide whether a trial shall take place at all. Lord Devlin said in *Connelly v DPP* [1964] 2 All ER 401 at 483, [1964] 1254 at 1347: '... a general power, taking various specific forms, to prevent unfairness to the accused person has always been a part of the English criminal law..."**

In the earlier case of **Connelly v The Director of Public Prosecutions**[2], the circumstances in which a charge could be dismissed before a trial were considered. Edmund Davis J, at page 1277, referred to the observation of Lord Goddard,

CJ, in the case of **Reg v London (County) Quarter Sessions, Ex parte Downes**, where he said the following:

> **"once an indictment is before the court, the accused must be arraigned and tried thereon unless (a) on motion to quash or demurrer pleaded it be held defective in substance or form and not amended; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) a nolle prosequi is entered by the Attorney General, indictment is found; or (d) if the indictment disclosed an offence which a particular court has no jurisdiction to try"**

Since the Subordinate Court had the jurisdiction to try the respondent for the offence of perjury; the charge was properly drawn; and there was no plea in bar, going by the decision in **Connelly v The Director of Public Prosecutions**[2], there was no basis for dismissing the charge. However, given the unfairness that would have been occasioned on the respondent if the criminal trial had gone ahead at the time of the objection, the Subordinate Court should have stayed the proceedings before it until after the hearing of the interlocutory application by the High Court.

Consequently, we set aside the order dismissing the charge. In its place, we stay the proceedings until after the interlocutory application has been heard by the High Court. After the application has been heard, the respondent can take his plea and the trial can proceed, if it is still necessary.

Coming to the question of costs, having found that the charge was wrongly dismissed, the order that the appellant pays costs is set aside. Notwithstanding, we have found it necessary to pronounce ourselves on some pertinent issues that were raised on the payment of costs.

Mr. Mosha submitted that the appellant should not have been ordered to pay costs because he was not represented by counsel when he lodged the complaint. He also argued that since the case was being handled by the State, costs should have been ordered against the State.

In response, Mr. Changano submitted that the appellant was rightly ordered to pay costs because the matter was a private prosecution, instituted under **section 90 of the Criminal Procedure Code.**

Provision for the payment of costs on the termination of a criminal trial is made in **section 172 of the Criminal Procedure Code.** The relevant parts of that provision read ss follows:

> **(1)** .....
> **(2) It shall be lawful for a Judge or a magistrate who acquits or discharges a person accused of an offence to order that such reasonable costs, as to such Judge or magistrate may seem fit, be paid to such person and such costs shall be paid, where the prosecution was in the charge of a public prosecutor, from the general revenues of the Republic, and in any other case by the person by or on behalf of whom the prosecution was instituted:**
>
> **Provided that no such order shall be made if the Judge or magistrate shall consider that there were reasonable grounds for making the complaint.**
> **(3)** .....

The provision clearly indicates that costs, where ordered, are payable by the person who was in charge of the prosecution. In this case, the prosecution was instituted

through **section 90 of the Criminal Procedure Code** and the relevant parts of the section read as follows:

> **(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.**
> **(2)** .....
> **(3)** .....
> **(4) The magistrate, upon receiving any such complaint, shall-**
>
> **(a) himself draw up and sign; or**
>
> **(b) direct that a public prosecutor or legal practitioner representing the complainant shall draw up and sign; or**
>
> **(c) permit the complainant to draw up and sign;**
>
> **a formal charge containing a statement of the offence with which the accused is charged, and until such charge has been drawn up and signed no summons or warrant shall issue and no further step shall be taken in the proceedings.**
> **(5)** .....
> **(6)** .....
> **(7)** .....

Examination of the record indicates that the respondent was summoned after the appellant swore the complaint. At that time, the appellant was not represented and the magistrate instructed a public prosecutor to draw up the charge. Other than drawing up the charge, the public prosecutor played no part in the prosecution of the matter.

Section 90(4) of the Criminal Procedure Code allows a magistrate to instruct a public prosecutor to draw up the charge, even in cases where a complaint has been lodged by a private person or complainant. It follows, that the mere fact that a public prosecutor drew up and signed the charge, does not mean that the case was under the charge of such a prosecutor.

A prosecution will be taken to have been under the charge of a public prosecutor in cases where a public prosecutor lodged the complaint and prosecuted the case. A complaint lodged by a private individual but taken over by the Director of Public Prosecutions through the invocation of her powers in **Article 180 (4)(b) of the Constitution**, can be considered to have been a prosecution under the charge of a public prosecutor. Neither was the case in this matter.

We agree with Mr. Changano that since the appellant instituted this prosecution in his private capacity and given that the Director of Public Prosecutions did not take over the mater,

this was a private prosecution. That being the case, if there were any costs payable under **section 172(2) of the Criminal Procedure Code**, such costs should have been paid by the appellant and not the State.

Further, where a trial judge or trial magistrate orders the payment of costs under **section 172(2) of the Criminal Procedure Code**, such judge or magistrate must determine the actual amount payable. We endorse the decisions in the case of **The People v Upton**[3] and **Lighton Simbeye v The People**[4], in which the High Court held that were a party to a criminal trial claims costs, the trial judge or trial magistrate must award a specified amount as costs.

Prior to such an award, the claimant must present a bill of costs and the complainant or public prosecutor must be heard on it. Thereafter, the judge or magistrate must vet the amount claimed and come up with the amount considered to be reasonable costs. Under **section 172 of the Criminal Procedure Code**, the vetting or assessing of costs that have been claimed

cannot be delegated to the Registrar or any other court official.

All in all, this appeal succeeds, the order dismissing the charge for being an abuse of the court process is set aside. The case is remitted back to the Subordinate court for trial. Such trial will only commence after the High Court has heard the interlocutory application on which the complaint was premised.

C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

J.Z. Mulongoti
COURT OF APPEAL JUDGE

F.M. Lengalenga
COURT OF APPEAL JUDGE