MUFAYA MUMBUNA v THE PEOPLE (1984) Z.R. 66 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, AND MUWO, J.J.S.
7TH AUGUST AND 7TH SEPTEMBER, 1984.
(S.C.Z. JUDGMENT NO. 11 OF 1984.)

Flynote
Criminal Law and Procedure - Case stated procedure - Whether available before end of trial.
Criminal Law and Procedure - Reference of case to the High Court for determination

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under Article 29 of the Constitution - Wrong procedure adopted - Effect of.
Criminal Law and Procedure - Corrupt Practices Act - Minister - Official corruption- liability to prosecution for.
Supreme Court - Rehearsing - Proper case for - Power of Supreme Court to deal with such case itself.

Headnote
Before plea was taken, the defence raised a number of preliminary objections to the charge. After the magistrate delivered his ruling dismissing the objections, the defence requested the magistrate to refer the case to the High Court for opinion. The magistrate granted the application. However, in referring the case to the High Court, the magistrate referred to the process as stating the ease in accordance with section 345 of the Criminal Procedure Code.

When the ease was brought before the High Court judge to set a date when counsel could be heard, the judge dismissed the application summarily on the ground that prior to the enactment of the Corrupt Practices Act a Minister was included within the class of persons who could be prosecuted for official corruption under section 94 of the Penal Code, and section 26 (1) of the Corrupt Practices Act which relates to the corrupt use of official pointers, does not create a new offence as envisaged by Article 20 (4) of the Constitution.

Held:
(i) A subordinate court can only state a case under Section 345 C.P.C. after the trial is completed.
(ii) In default of any specific procedure being laid down in the Constitution or any rules thereunder, the bringing of the reference for determination to the notice of the High Court properly brought the Ratter before that court.
(iii) Although this was a proper case to send back to the lower court fit for rehearing the Supreme Court had power to deal with it itself.
(iv) Prior to the enactment of the Corrupt Practices Act a Minister was included within the class of persons who could be prosecuted for official corruption under section 94 of the Penal

Code, and s. 26 (1) of the Corrupt Practices Act which relates to the corrupt use of official powers, does not create a new offence as envisaged by Article 20 (4) of the Constitution.

Legislation referred to:

(1) Constitution of Zambia, Cap. 1, Arts. 20 (4), 29 (3), 138.
(2) Corrupt Practices Act, No. 14 of 1980, ss. 24, 26 (1), 35, 64 (2).
(3) Criminal Procedure Code, Cap. 160, s. 345.

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(4) Penal Code, Cap. 146, ss. 4, 103A (enacted by A, 29/76).

For the appellant: M.M.Mwisiya, Mwisiya and Company.
For the respondent: J. A. Simuziya, Director of Public Prosecutions, with him N. Sivakumaran Assistant Senior State Advocate.

Judgment

GARDNER, J.S., delivered the judgment of the court.

This is an appeal from an order of a High Court judge in chambers dismissing a reference from a subordinate court to the High Court on the grounds that the correct procedure had not been followed.

The appellant stands charged before the subordinate court with the offence of corrupt use of official powers contrary to section 26(1) of the Corrupt Practices Act, No. 14 of 1980 as read with sections 64(2) and 35 of the same Act. The particulars of the offence are that, between October, 1979 and August, 1980 (that is, before the coming into effect of that Act), the appellant, being a public officer, namely Minister of Mines and Vice - Chairman of the Prescribed Minerals and Materials Commission, and, being concerned with a, transaction falling within his duties namely the negotiation and signing of an agreement between the Prescribed Minerals and Materials Commission and Saarberg Interplan GmbH for the grant of licences for prescribed minerals in Zambia, corruptly solicited, accepted and obtained for himself gratification namely a Mercedes Benz 240D Sedan motor vehicle valued at K12,808.00 from Saarberg Interplan GmbH in relation to the said transaction. Before a plea was taken in the subordinate court counsel on behalf of the appellant raised a preliminary objection to the charge, namely that section 64(2) of the Corrupt Practices Act No. 14 of 1980 is in conflict with the provisions of the Constitution insofar as it purports to give authority for the prosecution of offences before it became law. In support of this objection counsel referred to Article 20(4) of the Constitution which reads:

> "(4) No person shall be held to be guilty of a criminal cadence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed."

Section 64(2) of the Corrupt Practices Act reads as follows:

> "(2) Notwithstanding the repeal of the said sections of the Penal Code, "(which include section 4)", any offence relating to corrupt practices committed by any person under any of the repealed sections of the Penal Code or under any relevant provision of any other written law shall be deemed to be an offence committed under this Act, and shall be investigated or prosecuted, as the case may be, under this Act."

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Section 94 of the Penal Code provides *inter alia* that:

> 4. "Any person who-
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> (a) being employed in the public service and being charged with the performance of any duty by virtue of such employment, corruptly asks, receives or obtains...any property... on account of anything already done or omitted to be done or afterwards done of omitted to be done by him in the discharge of the duties of his of flee is guilty of a felony and is liable to imprisonment for 15 years."

The Corrupt Practices Act Section 26(1) reads as follows:

> "26 (1) Any public officer who being concerned with any matter or transaction falling within, or connected with, his jurisdiction powers, duties or functions, corruptly solicits, accepts or obtains, or agrees to accept or attempts to receive or obtain for himself or for any other person any gratification in relation to such matter or transaction, shall be guilty of an offence."

Under the Corrupt Practices Act, Section 3, "public officer" is defined as "any person who is a member of, or holds office in, or is employed in the service of, a public body, whether such membership, office or employment is permanent or temporary, whole or part-time, paid or unpaid, and "public office" shall be construed accordingly and "public body" is defined as "the Party or the Government, and includes any Ministry or Department of the Government, a local authority, parastatal body, or any board, council, authority, commission or other body appointed by the Party or the Government, or established by or under any written law." Section 4 of the Penal Code defines "person employed in the public service" as "any person holding any of the following offices or performing the duty thereof whether as deputy or otherwise namely . . . (a) "any public office." There then follows a number of other offices which are irrelevant to the question before this court.

Mr Mwisiya argued before the subordinate court that the appellant, being a Minister at the time of the alleged offence, could not be prosecuted under section 26 (1) and section 24 of the Corrupt Practices Act because the sections had the effect of making a person retrospectively liable for actions which were not offences at the time they were committed. With reference to the question of whether or not Ministers could be prosecuted for corruption, Mr Mwisiya argued that the former definition of a person employed in the public service in the Penal Code did not include politicians that a Minister is a politician and consequently a Minister could not be prosecuted for corruption. He argued that, although the definition of public officers in the Corrupt Practices Act would now include Ministers, to prosecute the appellant would be contrary to the provisions of Article 20(4)

because, at the time the alleged offence was committed, Ministers were not included in the definition of public officers.

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Mr Mwisiya also argued that the provisions of Article 138 of the Constitution define "public office" as excluding Ministers and therefore definitions in any Act which contradict the definition in the Constitution must be ultra-vires.

The senior resident magistrate ruled on the preliminary objection that a prosecution under section 26 (1) as read with section 64 of the Corrupt Practices Act was not in respect of a new criminal offence, in that section 94 of the Penal Code, which was in force before, created the same offence. He held therefore that a prosecution of the appellant would not be in contravention of Article 20 (4) of the Constitution. The senior resident magistrate also held that a Minister is within the definition of a holder of public office in the Penal Code.

After the ruling was delivered in the Subordinate Court counsel for the appellant indicated that he wished to take advantage of the provisions of Article 29 of the Constitution to bring the matter before the High Court and the senior resident magistrate granted an adjournment for this purpose. Unfortunately when the adjournment was granted the magistrate said that he was stating a case under section 345 of the Criminal Procedure Code. This of course could not be done in that a full hearing before the Subordinate Court had not been determined but, despite this, a reference for determination by the High Court was lodged with the Subordinate Court and forwarded to the High Court. Both the learned Director and counsel for the appellant agree that at this stage, in default of any specific procedure being laid down in the Constitution or any rules thereunder, the reference for determination was properly before the High Court.

The learned High Court judge to whom the matter was referred noted that the magistrate had said that he was stating a case under section 345 of the Criminal Procedure Code and also quite accurately noted that the procedure outlined under that section had not been adhered to. He thereupon gave a ruling in Chambers, without calling upon counsel for either party to attend, and dismissed what he considered to be an application for a case stated. As has been indicated, the misconstruction of the nature of the matter before the learned judge arose out of the original error by the magistrate in referring to section 345 of the Criminal Procedure Code.

Both the learned Director and counsel for the appellant agree that the failure to hear counsel was an error by the judge and it would be proper either to remit the reference for hearing by the High Court or for this court to deal with the matter on its benefits. In the event, in order to avoid any further delay in this matter, it was decided that this court would hear arguments and deal with the reference itself.

The circumstances giving rise to a reference under Article 29 (3) are set out in that article as follows:

> "29 (3) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of

> Article 13 to 27 (inclusive), the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

Mr Mwisiya has sought to bring this reference within the terms of Article 29 (3) by arguing that there is a contravention of Article 20 (4). In this connection he has said that under the definition section of the Penal Code, Ministers were not liable to prosecution for corruption and the new definition in the Corrupt Practices Act cannot be used against the appellant. We have considered the definition in section of the Penal Code and the reference to public office and are of the opinion that that definition probably includes Ministers. However, that opinion is immaterial because section 103A of the Penal Code which was enacted by Act 29 of 1976 provides as follows:

> "103A 'public service' means service of the Party, the Government or a local authority, or of a statutory board or body including an institution of higher learning, corporation or company in which the Government has majority . . . interest or control."

There is no doubt that this section must be construed as including a Minister as a person in the service of the Government. It follows thank prior to the enactment of the Corrupt Practices Act, a Minister was included within the class of persons who could be prosecuted for official corruption under section 94 of the Penal Code, and section 26 (1) of the Corrupt Practices Act, which relates to the corrupt use of official powers, does not create a new offence as envisaged by Article 20 (4).

Our attention has been drawn to the fact that so far as penalties are concerned the penalty laid down under the new Act provides for imprisonment for a minimum term of five years and a maximum term of twelve years, whereas under the Penal Code the penalty was fifteen years imprisonment. The maximum term is therefore less under the new legislation, but, for the first time in connection with this type of offence, a minimum sentence has been imposed. The question of whether or not a minimum sentence can be imposed having regard to Article 20 (4) may be arguable but it does not of course arise at this stage, and does not affect the question of whether there can be a conviction for the new offence.

Mr Mwisiya was desirous of putting forward the merits of his argument that the Constitution definition of public office excludes any contradictory definitions in other Acts, but such a point cannot be referred under the provisions of Article 29 (3) because that question of construction cannot be said to be a question which arises as to the contravention of any of the provisions of Article 13 to 27 of the Constitution.

The finding of this court is, therefore, that the prosecution of the appellant does not contravene Article 20 (4) of the Constitution. This case is sent back to the senior resident magistrate Lusaka for plea and continued trial.

Order accordingly