Malawi Judiciary

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CRIMINAL APPEAL NO. 6 OF 2015

MIKE BANDA

-and-

DAVIE ZEMBERE

-and –

CHARLES GEORGE ..... APPELLANT

- AND –

THE REPUBLIC ..... RESPONDENT

BEFORE: THE HON. A. K. C. NYIRENDA, SC, CJ
THE HON. JUSTICE L. P. CHIKOPA SC, JA
THE HON. JUSTICE A. D. KAMANGA SC, JA
Maele, Counsel for the Appellant
Absent, Counsel for the Respondent
Minikwa, Recording Officer
S.B. Mwafulirwa (Mrs.), Principal Personal Secretary

JUDGMENT

Nyirenda SC, CJ.

(With Justice L.P. Chiopa, SC, JA and Justice A. D. Kamanga, SC, JA concurring).

This matter is a consolidation of three cases at the order of the court on account of similarity of issues that are raised and

seek determination. At the centre of the issues is the interpretation and application of section 15 of the Criminal Procedure and Evidence Code (which we shall refer to as section 15) and other provisions of the Code that support the section as it relates to execution of sentences. The major issue, if we are able to capture it in one sentence, is whether upon failure by the High Court to review a sentence as required by section 15, prison authorities must release the convict at the expiry of the periods stipulated in section 15 as will relate to the respective sentences.

Alongside this broad issue, Mr. Maele's position is that section 15, read with its marginal note which states "certain sentences to be confirmed on review by High Court before being given effect", means that the sentences referred to in section 15 cannot take effect before the High Court has confirmed them. That in the event that such sentences have not been confirmed, they are not supposed to take effect at all until such time as the High Court shall have confirmed them.

A brief facts of each of the three cases is relevant and only to the extent that the facts relate to the issues under consideration.

Charles George was convicted by the Principal Resident Magistrate at Limbe on 29th November 2010 of robbery and being in illegal possession of a firearm. He was, on the same day, sentenced to 14 years imprisonment and 6 years imprisonment respectively and both sentences were with hard labour. The appellant filed a notice of appeal to the High Court but he was not able to file full grounds of appeal because it transpired that the record of the lower court proceedings could not be found. Because of that development the appellant approached the High Court in September 2014 with an application for stay of execution of sentence pending appeal and to be released from unlawful detention pursuant to section 15 and 355(1) of the Criminal Procedure and Evidence Code, his conviction and sentence not having been reviewed. Justice Kamwambe presiding determined as follows:-

> *"I need to spell it out though that the cited cases are different from this case in that files were not missing. However, the action by the prison authorities is mandatory requiring them to release the convict upon no advice of confirmation without asking the reasons for non-confirmation or whether the case*

file was missing or not. The prison authorities did not comply with section 15 of the Criminal Procedure and Evidence Code and may be they hardly do so and the Courts will experience many such applications for release reaching them when it could be avoided. Since it was mandatory for the prison authorities to release the convict after the expiry of 2 years and that detention after the 2 years is unlawful and that there is seemingly no prospect of finding the missing file, this Court should now consider the interest of justice. I should not restate the reasons it explored earlier when dealing with stay and release pending appeal, but suffice to say that they do apply to section 15 of the Procedure and Evidence Code. Where a case file is missing it is safer not to release the convict and in my view this would be in the interests of the public, the victim and principally in the interest of justice.

I decline to grant the application for stay of sentence and release on bail under section 355(1) of the Criminal Procedure Act for non-confirmation of the case file on the ground that the case file is missing. (sic)"

Davie Zembere was convicted by the First Grade Magistrate at Chileka after three separate trials on charges of robbery in 2009. He was sentenced to 10 years in Criminal Case Number 120 of 2009. In Criminal Case Number 133 of 2009 he was sentenced to 3 years. Then in Criminal Case Number 135 of 2009 he was sentenced to 7 years. All the sentences were with hard labour.

The appellant brought an application before the High Court in August 2014 seeking his release from custody pursuant to section 15 because his convictions and sentences had not been reviewed.

Again the situation was that the appellant's records of the proceedings in the court below were all missing. The magistrate court clerk swore an affidavit stating that the files had been sent to the High Court. The High Court Principal Registry in turn said all the files had not been received. His Lordship Justice Kamwambe who was seized of the application determined:

"If the case files were available I would have followed my brother and sister Judges Potani and NyaKaunda Kamanga in ***Melvin Kalonga v The State*** *Miscellaneous Criminal Application No. 33 of 2013 and* ***Rodrick Kalanje v The Republic*** *Miscellaneous Application No. 20 of 2013 respectively. So as to capture the interest of justice, I would*

have readily ordered that the case files be confirmed within say, three months failing which the convict should be released. It is surprising in my view that all three case files pertaining to the convict should miss. As if that is not enough there is some drama in that the lower court has on oath deponed that it sent the files to the High Court for confirmation on the 7th October, 2009 whereas the Criminal Registry of the High Court, again on oath, deponed that such files were not sent to them for confirmation. The circumstances are very suspect. In this regard, I decline to release the convict for non confirmation of the case files, but this should not mean that I have no regard for the law particularly section 15(1) of the Criminal Procedure and Evidence Code which is good law and should be complied with. I have merely brought into consideration the interest of justice taking into account the circumstance that prevail which militate against release. I would not be bothered if the prison authorities released the convict following the law without intervention of the court. As soon as the matter lands into this court, the court must have an open mind and determine the matter judicially, which the prison authorities need not do."

Mike Banda was convicted by Blantyre Principal Resident Magistrate Court in Criminal Case Number 232 of 2010 of the offence of possession of an AK47 firearm contrary to Section 16(2) of the Firearms Act and was sentenced to 72 months imprisonment with hard labour with effect from 7th November 2010. He was also convicted by Blantyre Senior Resident Magistrate Court in Criminal Case Number 166 of 2011 of the offence of robbery contrary to Section 302 of the Penal Code. He was sentenced to 8 years imprisonment with hard labour with effect from 30th October 2010.

In January 2014 the applicant brought an application before Justice Kenyatta Nyirenda in the High Court seeking his release because his conviction and sentences had not been reviewed. Justice Nyirenda, unlike the other Judges of the High Court who dealt with the first two cases above, made an elaborate consideration of section 15 including a legislative history of the provision and a contextual review of the Criminal Procedure and Evidence Code that was carried out in 2010. His Lordship was unable to agree with the view that section 15 demands that convicts whose convictions and sentences have not been reviewed must be released from custody by prison

authorities upon the expiry of the periods stipulated in section 15(1).

His Lordship was guided by pronouncements in the cases of ***Melvin Kalonga v The Republic***, High Court Principal Registry, Miscellaneous Criminal Application Number 33 of 2013, ***Rodick Kalanje v The Republic***, High Court Miscellaneous Criminal Application Number 20 of 2013 and ***Frank Mhango Khoswe and others v. The Republic***, High Court Principal Registry, Bail Application Number 54 of 2013. His Lordship determined:

> *"Mr. Maele submitted that the **Kalonga's Case** and **Kalanje's Case** are for the proposition that under s.15(3) of the CP&EC, a prisoner's sentence imposed by a Resident Magistrate Court can only be executed for a period not exceeding two years in the absence of review or confirmation by the High Court. In contrast, in **Khoswe's Case** it was held that an officer in charge of a prison or a person authorized to carry out any sentence of imprisonment can only release a prisoner based on the periods stipulated by the lower court and only invoke periods in s. 15(3) of CP&EC where the lower court made a stipulation.*
>
> *I have perused the three cases and while their Lordship may in certain respects have approached legal questions concerning s. 15 of the CP&EC from different perspectives and/or jurisprudential positions, they were all agreed the effective remedy that needs to be provided where s. 15(3) of CP&EC has been breached is not automatic release of the prisoner. In **Kalonga's Case**, Potani, J. stated the point in these terms at page 5.*
>
> > *It is accordingly ordered that the Registrar of the High Court should within 30 days from the date of service of this order on him cause the review and confirmation of the sentence herein to be carried out failing which the applicant shall be released unconditionally and without further order of the court.*

In ***Kalanje's Case***, nyaKaunda Kamanga, J. decided as follows, at page 5:

> *This court is of the considered view that the pre-requisites of a fair trial as provided in s. 42(2)(viii) of the Constitution would not have been complied with if this court were to release the prisoner without reviewing his case ... The matter is set down for review on Tuesday the 19 November 2013..."*

> *Mwaungulu, J. as he then was, concluded his judgment in* ***Khoswe's Case*** *by ordering "the Registrar, without undue delay, reclaim the record of the court below so that I review the conviction and sentence as soon as possible".*

His Lordship would have resolved the matter at that, but as we say earlier he went on to look at the historical perspective of the provision and even in that context he was not persuaded by the applicants' position. The learned Judge observed:

> *"It is noteworthy that although the Law Commission was very much alive to the fact that there was enshrined in the Constitution, in 1994, a new regime of human rights principles focusing on individual rights which called for new approach to criminal procedure and practice, neither the Law Commission nor Parliament suggested amendments to s. 15 of the CP&EC that would have the far reaching legal consequences as advanced by Mr. Maele."*

It is here that we should set out the full text of Section 15 of the Criminal Procedure and Evidence Code as revised in 2010; it states:

Where in any proceedings a subordinate court imposes:

(a) a fine exceeding "K1000";

(b) any sentence of imprisonment exceeding:

(i) in the case of a Resident Magistrate's court two years;

(ii) in the case of a court of a magistrate of the first or second grade, one year; or

(iii) In the case of a court of a magistrate of the third or fourth grade, six months;

(c) any sentence of imprisonment upon a first offender which is not suspended under section 340,

it shall immediately send the record of the proceedings to the High Court for the High Court to exercise powers of review under Part XIII.

(1) No person authorized by warrant or order to levy any fine falling within subsection (1) (b), and no person authorized by any warrant for imprisonment of any person in default of the payment of such fine, shall execute or carry out any such warrant or order until he has received notification from the High Court that it has in exercise of its powers of appeal or review confirmed the imposition of such fine.

(2) An officer in charge of a prison or other person authorized by a warrant of imprisonment to carry out any sentence of imprisonment falling within subsection (1)(b)(i).(ii) or (iii) shall treat such warrant as though it has been issued in respect of a period of two years, one year or six months respectively, as the case may be, until such time as he shall receive notification from the High Court that it has in exercise of its powers of appeal or review, confirmed that such sentence may be carried out as originally imposed.

(3) Nothing in this section shall affect or derogate from the powers of the High Court to reverse, set aside, alter or otherwise deal with any sentence of a subordinate court on review or appeal.

(4) When a subordinate court has passed a sentence or made an order falling within subsection (1) it shall endorse on the warrant or order that the sentence or order is one required to be submitted to the High Court for review and which part if any of the sentence or order may be treated as valid and effective pending such review."

Section 15 has been considered in a number of cases. We are indebted to counsel Maele who has referred us to some of the cases. We are also deeply thankful to Counsel because of his apparent interest and conviction in criminal litigation which has over the years helped and inspired shaping and developing jurisprudence in criminal law in our jurisdiction.

It is cardinal that since the 1994 Constitution a number of amendments and review has been undertaken in our criminal law as well as criminal procedure, taking into account the aspirations of the new regime predicated on human rights and civil liberties. The Court (Amendment) Bill, 2003 and the Memorandum thereto underscored the new approach to criminal justice. It is there stated:

"Thus, the reform of the country's criminal law is necessary to ensure conformity with the Constitution, to resolve contradictions between existing laws, to ensure that the law is appropriate for a modern pluralistic democracy and to provide a system of justice that is adequate and effective, speedy, proximate, understandable and affordable and which reflects the needs of special interests groups, as well as those of vulnerable groups of people, and which also reflects gender concerns and cultural norms and values."

We acknowledge that our criminal justice must champion human rights for all, the victim, the accused, as well as those of the society. It is for that reason that section 15 has been preserved as a necessary process in criminal proceedings. The section is a necessary check on the quantity and quality of justice.

The provision also ensures a number of other attributes. It ensures appropriate supervision among the players in the criminal justice sector. It also fosters accountability in the sector by ensuring that convicts are not forgotten in the large numbers that pass through the system. At an appropriate level it should also provide statistical trend in sentencing patterns of our criminal justice system. The provision is also a critical safeguard against abuse of judicial authority and judicial discretion. It is for these and other considerations that among the rights of an arrested or an accused person is the right to have recourse to appeal or review to a higher court. Section 42(2)(f)(viii) of the Constitution provides:

> *"Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right to have recourse, by way of appeal or review to a higher court than the court of first instance."*

Thus far it has been to look at the wider implications which Counsel Maele has also dwelt on as he refers to a constitutional perspective. We do not think there should be any misunderstanding about the constitutional and human rights perspective and considerations on the subject.

The real issue that Counsel Maele seeks to be resolved is about the implications of sections 15 where a matter has not been reviewed within the time that is stipulated in section 15(1). Should the prison authorities release a convict upon the expiry of the stipulated terms and not to continue keeping them in custody for the rest of the term of imprisonment as imposed by a magistrate where the term is longer.

Fortunately for us this question has arisen in numerous cases some of which we have referred to earlier. Opinion is divergent; but we think the resolution of the issue is more to a

close reading of the provision and its interpretation. It will be necessary though that we consider the provision around other statutory provisions that complement it.

Section 15(1) basically sets out sentences imposed on convicted persons by magistrate courts that should be reviewed by the High Court. The critical part is subsection 3 which states:

> *"An officer in charge of a prison or other person authorised by a warrant of imprisonment to carry out any sentence of imprisonment falling within subsection 1 (b)(i)(ii) or (iii) shall treat such warrant as though it had been issued in respect of a period of two years, one year or six months respectively, as the case may be, until such time as he shall receive notification from the High Court that it has in exercise of its powers of appeal or review, confirmed that such sentence may be carried out as originally imposed."*

We should start with an apparent misconception and illogical argument that has been advanced with regard to the marginal note read together or in aid of the substantive provision. It is the suggestion that "sentences that are subject to confirmation are not supposed to take effect at all until such a time as the High Court shall have confirmed them." Obviously this interpretation is absurd in suggesting that when a court imposes a sentence, the convict should not immediately be imprisoned. He should be at large until such time as the sentence shall have been confirmed. We know of no penal justice system that could operate in that manner and operate effectively. This simply speaks to the danger of a literal reading of marginal notes much as we acknowledge that marginal notes guide the understanding of a provision. Marginal notes must remain "notes" which shall make concrete sense when read in the context of the entire provision which they introduce.

What is true is that section 15(3) carries with it and imposes obligation that must be carried out at stages in a criminal case but before we consider the specific obligations it is necessary that we look at section 15(5) that complements the provision.

Section 15(5) requires a subordinate court that has passed a sentence or made an order falling within section 15(1) to endorse on the warrant committing the convict to prison that the

sentence or order be reviewed and which part if any may be treated as valid and effective pending review.

What section 15(5) says to us is that even at the stage of imposing sentence or making an order, it is within a subordinate court to determine which part of the sentence or order shall be served while awaiting review. There is seemingly a contradiction in terms between section 15(1) and 15(5) but what it says to us already, section 15(5), coming later as it obviously does to section 15(1), is that the time periods set out in section 15(1) are not cast in stone. Even the subordinate court seized of a matter at first instance can determine which part of the sentence is valid and effective, pending review.

It is significant that section 15(5) does not say the determination by the magistrate must be no longer than the period set out in section 15(1). It is reasonably arguable on that analogy that if subordinate courts followed the requirement of section 15(5), then section 15(1) could virtually be rendered of no consequence; except to the extent that the matter must still be reviewed by the High Court.

There have been suggestions that the endorsement by a subordinate court of the part of the sentence or order that may be treated as valid and effective pending review must be made in consideration of the periods set out in section 15(1). We do not see this requirement in section 15(5). This might seem paradoxical as we pointed out earlier but perhaps not. The authority to sentence to imprisonment vests in the judge or magistrate by whom any person shall be sentenced. Section 329(1) of the Criminal procedure and Evidence Code provides:

> *"A warrant signed by a judge or magistrate by whom any person shall be sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Malawi, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of such prison and to all other persons for carrying into effect the sentence described in such warrant not being a sentence of death."*

Sentencing is a judicial process that requires judicial discretion. That is why mandatory terms are slowly becoming circumspect. We are not surprised therefore that it was found appropriate to include section 15(5) following the schedules set out in section 15(1).

It is not without significance that under Section 339 of the Criminal Procedure and Evidence Code, when a person is convicted of any offence the court may pass sentence of imprisonment but order the operation thereof to be suspended for a period. This provision is manifest of court discretion to imprison and immediately to allow the convicted person his or her liberty, be it with conditionality.

It is also quite possible, in the context of section 15(5), for a court to prescribe a shorter period for review than that provided in Section 15(1). This might happen, for instance, when a magistrate does not feel confident about the considerations that he or she has made in determining sentence. He or she might seek early review of the matter to abate irreversible consequences that might be caused by longer imprisonment of the convict. Obviously in such a case upon lapse of the period prescribed by the judicial officer and without review, the prison authorities must release the prisoner without more. The prisoner will have been released by order of the court and not that of the prison authorities.

The side of the matter that still requires consideration is in instances where a magistrate has not determined the validity period of a sentence that is longer than the period stipulated in section 15(1) and the High Court has not reviewed the sentence within the stipulated period. What becomes of the sentence and can the prison authorities release the prisoner on their own authority.

The first part of section 15(3) might be read to suggest that once the periods set out in section 15(1) is reached, the warrant expires. Arguably if a warrant has expired then the prisoner should on that basis be released. On a full reading of section 15(3) however it becomes apparent that this was not the intention of parliament. Indeed that could never have been the intention in the scheme of judicial authority and executive authority as earlier advanced.

The second part of section 15(3) compels the office in charge of a prison to carry out the sentence of imprisonment "until" such time as he shall received notification from the High Court that it has in exercise of its power of appeal or review confirmed that such sentence may be carried out as originally imposed.

While in the High Court, Justice Mwaungulu, in the case of ***Khoswe and Others v The Republic***, Bail Application No. 54 of 2013 presented the position thus:

> *"Reading and re-reading Section 15(3) of the Criminal Procedure and Evidence Code, I do not think that the section provides that where there is no confirmation by the High Court the officer in charge of the prison must treat the sentence as two years, one year or six months. The section says that the officer in charge must treat the sentence as such 'until' there is confirmation by the High Court. The section does not suggest that the officer in charge must treat the sentence as two years, one year or six months "if" there is no confirmation by the High Court; rather the officer in charge must treat the sentence as two years 'until' there is confirmation by the High Court."*

We would uphold this analysis of section 15(3) coupled with Section 329(1) of the Criminal Procedure and Evidence Code where a warrant signed by a judge or magistrate shall be full authority to the officer in charge of a prison to carry into effect the sentence described in the warrant.

What is more is that under Section 112(2) of the Prisons Act the officer in charge of a prison can only discharge a prisoner in accordance with the terms of an order, warrant or instruction issued in writing under the hand of a person authorised to do so under an enactment or in due course of law.

Section 15(1), among other purposes, as discussed earlier, is intended to be a safeguard against abuse and mistakes in the execution of criminal justice. Reviews and appeals of criminal cases will ensure that appropriate criminal justice measures are meted out. Criminal justice will often entails restraint of liberty and consequently a deprivation of other related rights which a retrained person would not be able to exercise. The right to liberty remains pivotal in every person's daily undertaking; as such it must be jealously safeguarded. It is for that reason that the Constitution, in Section 42 details the rights of every person arrested for, detained or accused of, the alleged commission of an offence.

While the wisdom and role of section 15(1) in criminal justice should never be under estimated, the section was not intended to take away the authority of a judge or magistrate and vest it in the officer in charge of a prison. We would, therefore,