

THE PEOPLE v MWIYA LUBASI (1981) Z.R. 310 (H.C.)

HIGH
SAKALA,
5TH FEBRUARY, 1982
(HPR/419/81)

COURT

J.

Flynote

Criminal law and Procedure - Revision - Powers of - Whether can be exercised in a matter where there has been an acquittal.

Criminal law and procedure - Acquittal - Whether lawful to take administrative action against accused person

Headnote

The accused was charged with two counts of theft by public servant. He appeared for trial before the subordinate court of the second class for the Mongu District.

At the end of the trial, the learned trial magistrate ruled that the accused had no case to answer on both counts on account that the court did not have the money which the accused had used to replace the money which was alleged to have been converted to his use. He was accordingly acquitted. However, the learned trial magistrate directed that the accused be dealt with by his Permanent Secretary. The accused by a letter dated 24th September, 1981, requested the learned magistrate to draw the attention of the Registrar of the High Court with a view to have his case reviewed. His complaint was the learned magistrate's decision to refer him to the Permanent Secretary to deal with him.

The most important issue raised in this case was whether this court has powers of revision in a matter where there has been an acquittal.

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Held:

- (i) The fact that a public servant has been acquitted by a court of law does not bar the authorities from taking any administrative measures which they deem fit to deal with a public servant.
- (ii) It is clear from s. 338 of the Criminal Procedure Code that the High Court can make a number of orders on revision in the case of any proceedings before a subordinate court where there has been a conviction *but* not where there has been an acquittal.

Legislation referred to:

Penal Code, Cap. 146 ss. 272, 277 (as amended by Act No. 29 of 1974).
Criminal Procedure Code, Cap. 160, s. 338.

Judgment

SAKALA, J.: The accused was charged on two counts of theft by public servant contrary to ss. 272

and 277 of the Penal Code, Cap. 146 of the laws of Zambia as amended by Act No. 29 of 1974. He appeared for trial before the subordinate court of the second class for the Mongu District.

At the end of the trial, the learned trial magistrate ruled that the accused had no case to answer on both counts on account that the court did not have the money which the accused had used to replace the money which was alleged to have been converted to his use. He was accordingly acquitted.

The record is before me on account of a letter written by the accused after his acquittal, addressed to the senior resident magistrate dated 24th September, 1981. The letter reads as follows:

"The Senior Resident Magistrate,
MONGU
Attention of Mr J.M. Phiri Esq.
Dear Sir,

I have received the copy of the ruling by magistrate in the case of the people *versus* myself. Reading the ruling of the magistrate very carefully, one draws the following conclusions:

- (a) There are contradictions in the ruling, paragraph one and paragraph two of the ruling contradict each other. If, according to paragraph one, the police established that the accused converted the money for his own use, how come that the same magistrate in paragraph two admits that the police had failed to produce the money the accused converted to his own use?

The logical fact here is if the trial magistrate has found that the police have established a case for the accused to answer,

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as stated in paragraph one, he cannot at the same time state in paragraph two that the same police have failed to establish a case against the accused. The fact that the police failed to produce the money the accused intended to replace is a *prima facie* fact that the police proved nothing.

The fact that the magistrate found the accused with no case to answer is leading fact that the police proved nothing commendable. It is not fair to commend someone who has proved nothing and has made the accused to be found with no case to answer. What job well done have the police done other than failing to prove their case ?

- (b) There is another misdirection in the ruling. Where the accused has been found with no case to answer and is acquitted, to subject him to the Permanent Secretary to deal with him is very unjust. The fact is, I was found with no case to answer I was not put on my own defence, the whole case was thrown away by the trial magistrate. Why should I again be referred to the Permanent Secretary to deal with me?

The trial magistrate found me with no case to answer, why should I answer the same case again before the Permanent Secretary? The Provincial Accountant has nothing to answer in this case, he was merely a prosecution witness.

In view of the foregoing, I most respectfully request you to draw the attention of the Registrar of the High Court with a view to have this ruling put straight by a High Court Judge so that it is meaningful and logical.

Yours very sincerely,
(sgd)

E.

M.

LUBASI

The ruling that led to the above letter reads:

"On the evidence as adduced by the prosecution, I am satisfied that the prosecution has established that the accused had received the money subject of this offence by virtue of his employment but have they also established that the accused converted the money for his own use? My answer here is that he did convert the money for his own use. The important ingredient as required by section 265 (2) (e) is that one takes the money and intends afterwards to pay it, he is said to steal it. But there is an important law requirement here in case of money. It must be established that the accused had taken the money and replaced it with another money. In this case the prosecution failed to produce the money that the accused had used to replace the money he had used or converted. In cross-examination by the accused the police failed to show the court the actual money that he had replaced with the one he converted in both counts.

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I commend the police for a job well done within their powers. I am however, very disappointed at the manner the Provincial Accountant acted. He had a meeting with the accused and at that meeting the accused admitted having the money but took no action to collect the money the accused had thereby making impossible for the accused to replace the money as he did. I feel so strongly about it that I shall forward a copy of the whole case record to the Permanent Secretary, Western Province to deal with the accused and the Accountant administratively. I rule therefore that the accused has no case to answer on both counts since the court did not have the money the accused had used to replace the one he had converted for his use".

At the outset, I would like to say that the accused must consider himself lucky to have been acquitted. He must also consider himself very lucky that the State did not appeal against the acquittal. In my view there was ample evidence supporting *prima facie* case against the accused. However, that is not the issue before me particularly that there is no appeal by the State. But I must emphasise that the magistrate misdirected himself on the evidence that was before him too much in favour of the accused. I wish, however, to observe that the fact that a public servant has been acquitted by a court of law does not bar the authorities from taking any administrative measures which they deem fit to deal with public servant.

The most important issue raised in this case is whether this court has powers of revision in matter where there has been an acquittal. The High Court powers of revision are contained in section 338 (1) of Cap. 160 which reads:

"338 (1) In the case of any proceedings in a subordinate court, the record of which has been

called for, or which otherwise come to its knowledge, the High Court may -

(a) in the case of a conviction -

(i) confirm, vary or reverse the decision of the subordinate court, or order that the person convicted be retried by subordinate court of competent jurisdiction or by the High Court, or make such other order in the matter as to it may seem just, and may by such order exercise any power which the subordinate court might have exercised;

(ii) if it thinks a different sentence should have been passed, quash the sentence passed by the subordinate court and pass such other sentence warranted in law, whether more or less severe, in substitution whether as it thinks ought to have been passed;

(iii) if it thinks additional evidence is necessary, either take such additional evidence itself or direct that be taken by the subordinate court;

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(iv) direct the subordinate court to impose such sentence or make such order as may be specified.

(b) in the case of any other order other than an order of acquittal, alter or reverse such order."

From section 338 of Cap. 160, it is clear that the High Court can make a number of orders or revision in the case of any proceedings before a subordinate court where there has been a conviction *but* not where there has been an acquittal.

Basically the complainant in this present case is against the trial court's sending of the record to the Permanent Secretary to deal with the complainant administratively, as I have already observed there is nothing unlawful for a Permanent Secretary to take administrative action against an officer who has been acquitted on theft charge. In the instant case, however, I have no jurisdiction to exercise powers of revision because there was an acquittal.
