

ELLIOT KALUMBA (1982) Z.R. 119 (H.C.)

HIGH COURT
MOODLEY,
28TH
(HNA/235/81)

JANUARY,

J.
1982

Flynote

Criminal law and procedure - Appeal - Signing and filing notice of - Delegation of powers of Director of Public Prosecutions to Senior State Advocate - Whether possible

Headnote

A notice of appeal against the acquittal of the respondent in the Subordinate Court of failing without lawful excuse to produce documents contrary to ss.37 (1) (i) and 9 (3) (b) of the Zambia National Provident Fund Act was signed and filed in court by the Senior State Advocate in the name of the Director of Public Prosecutions. At the hearing of the appeal a preliminary issue was raised by the respondent as to the right of the Senior State Advocate to file the appeal.

Held:

(i) The powers of delegation as provided for by s.82 of the Criminal Procedure Code relate to criminal proceedings and not to appeals, but the exercise of a power must be distinguished from the exercise of a right.

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(ii) The Senior State Advocate may exercise a right to appeal on behalf of the Director of Public Prosecutions, in his capacity as a legal practitioner representing him, without specific delegated authority enabling him to do so being required.

Legislation

referred

to:

Constitution of Zambia, Cap.1, Art. 58 (3).

Criminal Procedure Code, Cap.160, s.321A (1).

For the appellant: C. Kafunda, State Advocate.

For the respondent: L. Nyembele, Cave Malik and Co.

Judgment

MOODLEY, J.:

The respondent Elliot Kalumba had been acquitted by a magistrate of the second class at Ndola of failing without lawful excuse to produce documents contrary to ss.37 (1) (i) and 9 (3) (b) of the Zambia National Provident Fund Act, Cap.513 of the Laws of Zambia as amended by Act 29 of 1975. The Director of Public Prosecutions on the 21st April 1981, filed a notice of appeal against the acquittal of the respondent by the learned trial magistrate.

The appeal was listed for argument before this court on the 20th November, 1981. Where the appeal was called on, Mr Nyembele for the respondent took a preliminary objection to the appeal. Mr

Nyembele submits that the notice of appeal was signed by the Senior State Advocate. He contends that in terms of s.321A (1) of the Criminal Procedure Code, Cap. 160, only the Director of Public Prosecutions could appeal against any judgment of the Subordinate Court.

Section 321A (1) provides:

"If the Director of Public Prosecutions is dissatisfied with a judgment of a Subordinate Court as being erroneous in point of Law, or as being in excess of jurisdiction, he may appeal against any such judgment to the High Court within fourteen days of the decision of the Subordinate Court."

Mr Nyembele contends that this subsection specifically ensures that only the Director of Public Prosecutions could lodge an appeal against a judgment of the Subordinate Court and that there was no provision for this power to be delegated to a Senior State Advocate.

Section 82 of the Criminal Procedure Code reads:

"The Director of Public Prosecutions may order in writing that all or any of the powers vested in him by the last preceding section, by section eighty-eight and by Parts VIII, may be exercised also by the Solicitor - General, the Parliamentary Draftsmen and State Advocates and the exercise of these powers by the Solicitor - General, the Parliamentary Draftsmen and State Advocates shall then operate as if they had been exercised by the Director of Public Prosecutions:

Provided that the Director of Public Prosecutions may in writing revoke any order made by him under this section."

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Mr Nyembele argues that there was no statutory requirement providing for specific delegation of powers exercised by the Director of Public Prosecutions in respect of appeals against judgments of the subordinate court and in those circumstances this court should dismiss the appeal on the grounds that the notice and grounds of appeal were unlawfully lodged by the Senior State Advocate, whereas the statutory requirements were that such appeals could only be lodged by the Director of Public Prosecutions.

Mrs Kafunda for the appellant submits that if one scrutinised the notice of the appeal this case one observes that the appellant is described as the Director of Public Prosecutions. The notice of appeal then went on to state that the legal practitioner who was acting for the Director of Public Prosecutions was the Senior State Advocate. Thus the appellant was in fact the Director of Public Prosecutions and the Senior State Advocate was merely carrying out the duties of a legal practitioner in lodging the appeal on behalf of the appellant who in this case was the Director of Public Prosecutions. Mrs Kafunda submits that the Senior State Advocate in Ndola was retained by the Director of Public Prosecutors as his advocate to file the notice and grounds of appeal. In those circumstances, no specific delegation of authority by the Director of Public Prosecutions is required to enable the Senior State Advocate to file a notice of appeal against a judgment of the

subordinate court. Accordingly Mrs Kafunda asks this court to reject the preliminary objection.

There is no doubt that Mr Nyembele has raised an interesting point of law. I have considered the arguments for and against his preliminary objection. Article 58 (3) of the Constitution of Zambia reads:

"The powers of the Director of Public Prosecutions under Clause (2) may be exercised by him in person or by such public officers or class of public officers as may be specified by him acting in accordance with his general or special instructions:

Provided that nothing in this Clause shall preclude the representation of the Director of Public Prosecutions before any court by a legal practitioner."

I am satisfied that the powers or delegation as provided for by s. 82 of the Criminal Procedure Court relate to criminal proceedings and not to appeals. However, the question of lodging an appeal or for that matter arguing an appeal against a judgment of the subordinate court is not in fact an exercise of a "power", as for example when the Director of Public Prosecutions in the case of criminal proceedings decides to enter a *Nolle Prosequi* in respect of a criminal information. Section 321 (A) (1) of the Criminal Procedure Code merely provides the Director of Public Prosecutions with the right of appeal to the High Court against a judgment of the subordinate court. Therefore, the power to enter a *Nolle Prosequi* should not be equated with the right to appeal against a judgment of the subordinate court. The powers exercised by the Director of Public Prosecutions in criminal proceedings such as entering *Nolle Prosequi* have been delegated to specified officers. On the other hand, there appears

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to be no reason why the Director of Public Prosecutions' right to appeal should not be exercised on his behalf by a legal practitioner who in this case is the Senior State Advocate with a right of audience in any court in this Republic.

Mrs Kafunda rightly pointed out that the notice of appeal specifically names the appellant as the Director of Public Prosecutions. The notice goes on to state:

"The following legal practitioner is acting for me:

The Senior State Advocate, Security House, P.O.Box 72144, Ndola."

Article 58 (3) of the Constitution of Zambia provides that the Director of Public Prosecutions may be represented before any court by a legal practitioner. The Senior State Advocate in the Ministry of Legal Affairs is for the purposes of these proceedings a legal practitioner representing the Director of Public Prosecutions at his request. It seems to be absurd logic to suggest that the Director of Public Prosecutions could engage the services of a legal practitioner to file and argue an appeal on his behalf whereas a Senior State Advocate or a State Advocate is precluded from doing so. Once again, I must emphasise the dissection between the exercise of a "power" as opposed to the exercise of a "right". In this case the Senior State Advocate on behalf of the appellant Director of

Public Prosecutions in exercising a right to appeal in his capacity as a legal practitioner representing the Director of Public Prosecutions and in those circumstances no specific delegated authority by the Director of Public Prosecutions is required to enable the Senior State Advocate to exercise that right. I therefore hold that it is lawful for the Senior State Advocate to file the notice and grounds of appeal and for that matter to argue the appeal on behalf of the Director of Public Prosecutions. Accordingly Mr Nyembele's preliminary objection fails.

Preliminary objection overruled
