PATEL v THE PEOPLE (1967) ZR 75 (HC)

HIGH COURT

BLAGDEN J

2nd JUNE 1967

Flynote and Headnote

[1] Criminal procedure - Revision - Effect of High Court decision

High 25 Court's decision does not become the subordinate court's decision on High Court's revision of lower court's decision.

[2] Criminal procedure - Subordinate court decision revised - Appeal.

The right to appeal from a decision of a subordinate court is not 30 prejudiced by the exercise of the High Court's revisional jurisdiction.

[3] Criminal procedure - High Court revisional jurisdiction - Application for Appeal out of time.

The right to make application for an appeal out of time may not necessarily be prejudiced by High Court's revision. 35

[4] Criminal procedure - Revision - Direction to subordinate court - Sentencing.

When the High Court directs a subordinate court to impose a sentence, the ultimate sentence is that of the subordinate court and not the High Court's. 40

[5] **Criminal procedure - Revision - Substitution of sentence by High Court.**

See [1] above.

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Cases referred to:

(1) *R v Sirongo* (1918), 7 EALR 148.

(2) *Suleman Ahmed v R* (1922), 9 EALR 19.

(3) *Matekenya v R* 1959 (2) R & N 521. 5

(4) *Michael s/o Mashaka v R* (1962) EA 81.

Statutes construed:

Criminal Procedure Code (1965, Cap. 7), s. 309, as amended.

Criminal Procedure Code (Amendment) Ord. (No. 16 of 1959), s. 309 (3), (4). 10

Criminal Procedure Code (Amendment) Ord. (No. 11 of 1963), s. 309 (1) (a) (iv).

A O R Mitchley, for the appellant

Thistlewaite, State Advocate, for the respondent

Judgment

Blagden CJ: This case comes before me as an application for an 15 extension of time within which to lodge an appeal to the High Court.

The history of the matter is as follows. On the 16th March, 1967, the applicant was convicted on his own pleas before the magistrate Class II at Broken Hill on three counts of receiving stolen property.

Subsequently, those sentences were quashed on review by the High Court and sentences aggregating two years' imprisonment with hard labour (subject to suspension orders in regard to half of each sentence) substituted. 20

The review was carried out after the time for appealing from the magistrate's decision had expired. The applicant was given the opportunity to put forward representations as to why the sentences should not 25 be enhanced. Written representations were in fact submitted to the High Court by counsel on his behalf.

The applicant here is not aggrieved by the decision or orders of the subordinate court. He is aggrieved by the enhanced sentences passed on him by the High Court.

Section 30 13 of the Court of Appeal for Zambia Ordinance provides for an appeal by leave to the Court of Appeal against the orders of the High Court made in the exercise of its revisional jurisdiction.

The applicant is seeking to appeal against the High Court's orders made in exercise of its revisional jurisdiction, not, however, to the Court 35 of Appeal but to the High Court itself; and as I have, perhaps, indicated during the course of argument, I need a lot of persuasion to be satisfied that the High Court has jurisdiction to entertain appeals against itself.

The cases cited by Mr Mitchley do not, as he very properly concedes, support such a proposition. They deal mainly with the question of the 40 High Court having jurisdiction to entertain an appeal from a subordinate court after the High Court has already confirmed the decision of the subordinate court, or has revised it. That is not the situation here.

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[1] It is part of Mr Mitchley's case that the High Court's decision on review becomes the subordinate court's decision. That proposition was propounded in the case of *R v Sirongo* [1], but it was doubted a short time later in the case of *Suleman Ahmed v R* [2]; it was disagreed with by Evans, J, here in the case of *Matekenya v R* [3]; and it received its final 5 death knell in the case of *Michael s/o Mashaka v R* [4].

In the course of his argument, Mr Mitchley has put forward two submissions, which I would like to deal with specifically. They relate to the provisions of section 309 of the Criminal Procedure Code. The first 10 concerns the effect of subsection (4) of that section. Section 309 deals generally with the powers of the High Court on revision, and subsection (4) enacts that nothing in this section shall be to the prejudice of the exercise of any right to appeal given under the Criminal Procedure Code or under any other law. In other words, whatever is done by way of 15 revision is not to prejudice a right of appeal which is given by the Code or by any other law.

In 1959, in a case to which I have already referred, that of *Matekenya v R* [3], Evans, J, made it clear, though his observations on the subject may be regarded as *obiter*, that in his view, when the High Court had exercised its powers of revision there could no longer be any right of 20 appeal from the decision of the subordinate court which had been revised. That same year, and possibly because of that particular decision, there was introduced into section 309 of the Criminal Procedure Code, an amendment by the Criminal Procedure Code (Amendment) Ordinance No. 16 of 1959, by which there was added a subsection (3) and the 25 subsection (4) which we are considering. [2] It seems to me, on the plain reading of subsection (4), that it was introduced at that time to make it clear - particularly in any cases where the High Court had exercised its revisional jurisdiction while the time for appeal was still running - that that exercise would not prejudice or affect the accused's right of appeal 30 from the decision of the subordinate court which had been revised. [3] It may well be that the exercise of powers of revision would not prejudice either the accused's right to make application for leave to appeal out of time where the revision had not been made until after the time for appeal had run out. I make no pronouncement about that further than to say 35 that it may well be that a further effect of subsection (4) is to preserve the right to make application for leave to appeal out of time notwithstanding that there has been a revision.

But in this particular case this provision is of no assistance to Mr Mitchley because what he is seeking to do is to appeal against the decision 40 of the High Court and not against the decision of the subordinate court.

That circumstance brings me to Mr Mitchley's second submission which is, in effect, that by this process of revision the High Court has made an order which has merged into and so become the order of the Court below. Now, I have already dealt substantially with this point 45 earlier in my judgment when I referred to the cases which are against it. But, Mr Mitchley prays in aid sub-paragraph (iv) of paragraph (a) of subsection (1) of section 309 of the Criminal Procedure Code, and it is

only fair to point out that this provision was introduced into the Criminal Procedure Code by an enactment which was passed after the decisions to which I have referred, namely, the Criminal Procedure Code (Amendment) Ordinance No. 11 of 1963. 5

Section 309 (1), as amended, sets out the powers which the High Court can exercise on revision. Paragraph (a) deals with what can be done in the case of a conviction. Sub-paragraph (i) relates to the order of conviction itself. Sub-paragraph (ii) deals with sentence. It enacts that if the High Court thinks that a different sentence should have been passed, it 10 may quash the sentence passed by the subordinate court and pass such other sentence warranted in law in substitution therefor as it thinks ought to have been passed. Sub-paragraph (iii) empowers the taking of additional evidence where necessary. Finally, sub-paragraph (iv) gives the High Court the power to "direct the subordinate court to impose such 15 sentence or make such order as may be specified.

[4] [5] I entertain no doubt that when Ramsay, J, revised this case, quashed the sentences passed by the subordinate court and passed other sentences in substitution, he was exercising the High Court's powers under the provisions of sub-paragraph (ii) and not those under sub-paragraph 20 (iv). In my view, sub-paragraph (iv) was included by the Legislature in paragraph (a) to cater for those special cases where it was more appropriate that an order should be made by the subordinate court rather than by the High Court itself. It could well be conceived as better, in certain circumstances, that the actual sentence should be assessed by the 25 subordinate court, which has had the advantage of seeing the appellant and hearing his evidence and all the other evidence dealing with the case. Where the High Court has chosen to proceed in this way I can well see that there is force in the argument that the sentence which ultimately results is the sentence, not of the High Court, but of the subordinate 30 court.

But, in the case before me, as I have already indicated, I entertain no doubt whatever that the High Court was not exercising any of its powers under sub-paragraph (iv). There was no direction here to the subordinate court to do anything. What the High Court did was purely 35 in the exercise of its powers under section 309 (1) (a) (ii). It quashed the sentences passed by the subordinate court and substituted others in their places.

I hold that the High Court has no jurisdiction to entertain any appeal from Ramsay, J's, decision here. It follows that this application for an 40 extension of time in which to bring such an appeal must be dismissed.

Application dismissed