SIKOTA WINA PRINCESS NAKATINDI WINA v THE PEOPLE (1996) S.J. (S.C.)

SUPREME COURT
NGULUBE,C.J.BWEUPE, D.C.J., SAKALA, CHIRWA AND MUZYAMBA, JJ.S.
9TH JULY AND 10TH SEPTEMBER, 1996.
S.C.Z. JUDGMENT NO. 8 OF 1996

Flynote
Criminal procedure - Re-trial - When to be ordered - Improper to order re-trial where evidence simply inadequate.

Headnote
The appellants appealed against an order of the High Court which had allowed an appeal by the Director of Public Prosecutions against the acquittal of the appellants by a subordinate court on a ruling of no case to answer. The charges against the appellants were that they had contravened s.29 and s.30(d) of Act 37 of 1993 in that they had refused to divulge information relating to an offence under the Act. It was alleged that the appellants had come into possession of a secret fax from the Drug Enforcement Commission (DEC) and the latter was determined to trace the source of the leakage and accordingly sought to question the appellants. When the appellants refused to supply the information they were duly charged.

Held:
(1) That on the evidence, the DEC was not investigating an offence under the Act but rather the leakage which had occurred: the information had to be reasonably required in connection with a drugs-related offence as such.
(2) That a re-trial could be ordered if the first trial was flawed on a technical defect of if there were good reasons for subjecting the accused to a second trial in the interests of justice: where, as here, the prosecution had adduced all the evidence it had, there would be no point to a re-trial.
Appeal allowed.

For the Appellants: Mr S.S. Zulu of Zulu and Company and Mr M F Sikatana of Veritas chambers
For the Respondents: Mr S.K. Munthali, Principal State Advocate and Mr W Wangwor, Principal State Advocate

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Judgment

NGULUBE, CJ.: delivered the judgment of the court.

This is an appeal against the order of retrial made by a High Court judge who allowed an appeal by the Director of Public Prosecutions against the acquittal of the appellants by a subordinate court on a ruling of no case to answer. The facts can be stated quite briefly: On 10th December, 1993, the Drug Enforcement Commission sent a facsimile message classified as top secret to their counterparts in the Republic of South Africa alerting them of a possible consignment of illicit drugs arriving in Namibia through Walvis Bay and suspected to involve the appellants, some South African based individuals and others. The message requested the South Africans to liaise with the relevant authorities in Namibia. Under cover of their letter dated 20th January,1994, the appellants revealed to the Commissioner, Drug Enforcement

Commission, that they were aware of the message sent to South Africa and indeed enclosed a transcribed copy of the "top secret" fax. Understandably, the Drug Enforcement Commission wished to learn how such a serious leakage had occurred. After interviewing the appellants and recording warn and caution statements, two charges were preferred under the Narcotic Drugs and Psychotropic Substances Act, 1993 (no. 37 of 1993); the first was under s.29 and the second under s.30(d).

Section 29 reads:

> ***"29. Any person who wilfully fails or refuses to disclose any information or produce any accounts, document or article to a drug enforcement officer or police officer on any investigation into any offence under this Act shall be guilty of an offence and shall be liable upon conviction to imprisonment for a term not exceeding ten years."***

Section 30(d) reads:

> ***"30. Any person who refuses or neglects to give any information which may reasonably be required of him and which he has power to give; shall be guilty of an offence and liable upon conviction to a fine of not less than five hundred thousand Kwacha or to imprisonment for a term not exceeding twelve months or to both."***

The first count alleged wilful refusal to disclose information to a drug enforcement officer contrary to Section 29 and the particulars were that the first appellant "Sikota Wina, on the 29th day of January 1994 at Lusaka District of the Lusaka Province of the Republic of Zambia, did wilfully refuse to disclose to G. L Kalunga, a Drug Enforcement Officer, the name of the person who typed a letter reference PERS/7 dated 20th January 1994 which letter was addressed to and handed over to the Commissioner by the said SIKOTA WINA."

The second count alleged a refusal to give information reasonably required by a drug enforcement officer contrary to Section 30(d) and the particulars were that both appellants "Sikota Wina and Princess Nakatindi Wina on the 29th day of January,1994, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together, did refuse to give the name of the person who intercepted a top secret liaison fax message from Drug Enforcement Commission Office in Lusaka to the Commissioner, South African Narcotics Bureau, which information was reasonably required from the said SIKOTA WINA AND PRINCESS WINA by a Drug Enforcement Officer and which information they have power to give."

There were seven witnesses for the prosecution and the burden of each one's evidence was as follows: PW1 was the officer who had prepared and caused to be sent the top secret fax message to South Africa. He was surprised and worried to learn that his message had been leaked to the appellants. PW2 was the typist who typed the fax message for PW1. PW3 was the Drug Enforcement Commission stenographer who actually sent the fax to South Africa and received acknowledgement. PW4 was a guard at the Drug Enforcement commission who described how the appellants came on 22 January 1994 to deliver a letter to the commissioner and insisted on giving it only to the Commissioner; he telephoned the Commissioner who came and was given the letter. PW5 was the Commissioner who received the letter from the appellants attaching an accurate transcript of the secret message sent to South Africa; he caused investigations to be launched and travelled to South Africa discuss the leakage with his counterparts. PW6 was the head of the South African Narcotics Bureau. He received the top secret fax message and requested his counterparts in Namibia to monitor the situation concerning the suspected consignment. He came to learn about the visit to Namibia of the

appellants and their associates. In February 1994 PW5 visited him and told him about the leakage to the appellants. PW7 was the Senior Assistant Commissioner at the Drug Enforcement Commission who testified that, acting on intelligence reports implicating the appellants and others in a possible shipment of illicit drugs through Namibia, PW1 was instructed to send a fax to the South Africans. He was shocked to learn from PW5 that the fax had been leaked to the appellants. PW7 investigated the leakage and interviewed the staff of the Drug Enforcement Commission who had played any role in preparing and sending the fax. He also interviewed the appellants and recorded warn and caution statements. The terms of the warn and caution which where identical need to be set out and warning given to the second appellant is given here by way of example. PW7 wrote:

> ***"You are warned that officers of the Commission are making enquiries into circumstance surrounding the alleged interception of the Commission mail namely a TOP SECRET LIAISON FAX MESSAGE REFERENCE NO. LF/1/22 dated 10th December, 1993 addressed to the Commissioner, SANAB, PRIVATE BAG x94, 00001 PRETORIA, REPUBLIC OF SOUTH AFRICA which was transmitted on 10th December, 1993. It is alleged that you whilst acting jointly together with your husband Hon Sikota Wina M.P. and other persons unknown within and outside Zambia on an unknown dated between 10th December, 1993 and 20th January, 1994 did intercept a TOP SECRET LIAISON FAX MESSAGE from Drug Enforcement Commission office in Lusaka to Commissioner, South Africa Narcotics Bureau in South Africa without lawful authority. You are therefore, in terms of section 29 and section 30(d) of the Narcotic Drugs and Psychotropic Substances Act No. 37 of 1993 requested to disclose the source of your information or copy of the Top Secret Liaison Fax Message which you attached to a letter reference No. PERS 7 of 20th January,1994, which you delivered to Mr. R. Mungole, Commissioner, Drug Enforcement Commission on the 22nd day of January, 1994, at his office. You are further warned that you are not obliged to say anything in answer to the allegations made against you unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence. You are also warned that I may ask you questions which you are not obliged to answer but should you choose to answer them such questions and answers will be taken down in writing and may be given in evidence."***

We quote the warn and caution because there was an issue raised with which we will deal later concerning the propriety of requiring a suspect to take when he has been advised that he is not obliged to do so if he so elects. In relations to count one, the first appellant declined to say who had typed the letter they gave to PW5. On the second count, the evidence of PW7 was that the appellants did not actually refuse to tell him who had intercepted the fax but that they said they did not know. He said:

> ***"They did not refuse to answer the question. They did so in the negative. They said they did not know. They did not refuse. They did not give me my intended answer."***

Quite apart from the submissions and what we will say later, the desire to obtain a particular answer underlines the wisdom of the rule against the admission of confessionary evidence which is not shown to have been given freely and voluntarily. Fortunately, no question of involuntariness arose in this case.

The learned trial magistrate heard defence submissions of no case to answer, together with the submissions of the prosecution. She upheld the submissions that the charges were not cognisable and arrest without warrant had been unlawful; that the facts in support of the first

count did not establish the relevant ingredients required to be proved and that an investigation into the circumstances leading to the leakage of the fax was not an investigation into any offence prescribed under any section of the Act; that there was no wilful refusal on the second count when the appellants said they did not know who had sent them the copy of the fax and that it was simply a question of PW7 not liking their answer and looking for his "intended answer"; and that the reference to "any person" in S.30(d) did not apply to an accused person who is responding to a warn and caution. The learned trial magistrate also made some remarks doubting the constitutionality of the charges. However, she acknowledged that at her level she was not empowered to pronounce upon the constitutionality of laws. The appellants were acquitted and the Director of Public Prosecutions appealed.

The appeal by the state was based on several grounds. One ground alleged error of law in addressing the issue of constitutionality and the learned appellate judge below duly upheld the ground, holding that a magistrate could not decide on the constitutionality of the sections under which the appellants were charged. In fairness to the magistrate, we must immediately observe that she did not in fact pronounce upon the constitutionality of the sections; her remarks were clearly intended to be obiter and gratuitous. Another ground alleged a misdirection in the remarks made by the magistrate that she found the evidence adduced to have been relevant to the charges. The third ground alleged error in the finding that the arrest without warrant was unlawful and void and that the charges were defective. The fourth ground was in fact no ground at all, it simply alleging that the ruling of no case to answer was against the weight of evidence.

The learned appellate High Court judge dwelt at length on the question of voluntariness and the admissibility of warn and caution statements. We consider such exercise to have been unnecessary in this case where there was no objection to the admission of the warn and caution statements. The point made by the appellants, which Mr. Sikatana repeated before us, related to the presumption of innocence and the rule against self-crimination. What was under attack was the law which compels a suspect to furnish information to the investigations.

In this appeal, Mr. Zulu argued the factual grounds. It was submitted that the learned appellant judge was wrong to order a retrial when the prosecution evidence had failed to establish the necessary ingredients of the offences. It was pointed out that, on the evidence, the D.E.C. was investigating, not any offence under the Act, but the leakage which had occurred; that there had been no wilful refusal to disclose the identity of the person who sent the copy of the fax; and that the information requested had to be reasonably required in connection with investiogations into a drugs-related offence as such. These were cogent arguments which were fortified by the form and content of the warning and caution given by the investigating officer. Mr. Wangwor's spirited attempt to relate the charges to the investigations into the suspected consignment passing through Namibia cannot be upheld. If what he argued had been the case, it would have been the easiest think for PW7 to have warned that he was investigating that particular allegation and to have warned that wilful refusal to furnish information was itself an offence. This, he did not do. It would be unthinkable in any, let alone a serious criminal case to assume against an accused that his mind had been accurately, adequately and suitably directed to the charge being investigated if he is told that the officer is investigating a leakage of information but the court should assume he was aware the investigation related to the substantive drugs-related case which was arguably compromised by the leakage. Clarity and precision are required in a criminal case where the accused is entitled, under the constitution, to be informed in a language that he understands and in detail of "the nature of the offence charged" (see Article 18(2)(b) of the Constitution).

On fact and on merit, therefore, it seems to us that the case against the appellants had collapsed of its own inanition. The question of retrial was considered by this court in Nachitumbi and Another v The People (1975) ZR 285. A retrial can be considered if the first

was flawed on a technical defect or if there are good reasons for subjecting the accused to a second trial in the interests of justice. Where, as here, the prosecution has adduced all the evidence it had, what would be the point of a retrial? Indeed it would be improper to order a retrial when the evidence was simply inadequate and it would be a case of giving the prosecution a second bite at the cherry. In our considered view, to have been sufficient for a retrial the point of law or mixed law and fact raised by the Director of Public Prosecutions in this case would have required to satisfy the court that, on the evidence as it stood, the appellants were as a matter of law guilty of the charges against them. Messrs Munthali and Wangwor who appeared for the state were not prepared to make such a submission. A retrial would, accordingly, serve no useful purpose and it would not be in the interests of justice to subject the appellants to a second trial.

Mr Sikatana argued the grounds of appeal raising legal and constitutional matters. In the view that we take and especially in light of our conclusion on the evidence and merits, it is only necessary to dispel the notion that there is anything unconstitutional or unlawful about a law which requires persons to furnish information, such as the sections under discussion. In this regard, we have visited chapter 20 of the 14th Edition of Phipson on Evidence where the learned authors dealt with the rule against self-incrimination. They have observed that there are exceptions to the rule under certain statutes. Towards the end of paragraph 20-51, they write:

> ***"While the Exchange Control Act 1947 was in force, the Treasury had power in the course of their general investigations to compel people to furnish information, and it was held (in D.P.P. v Ellis (1973) 1WLR 722) that this power overrode the privilege against self-incrimination, but also that the privilege revived once such a person was charged with an offence and cautioned." (so held A. v H.M. TREASURY (1979) 1 W.L.R. 1056).***

In our view, such a dual principle provides the answer to the submissions here. We can also draw an analogy from, say, the drunken driving cases where a suspect can be required to provide a specimen and wilful refusal or failure to provide one is itself an offence. The statute in that case has clearly overridden the privilege against self-crimination. Mr. Sikatana contended that this type of arrangement must be unconstitutional, without specifying which provision of the constitution was infringed. We cannot speculate.

Before concluding our judgment in this appeal we wish to make certain pertinent observations on the facts not in dispute. The facts not in dispute as earlier briefly stated are that on 10th December, 1993, the Drug Enforcement Commission sent a facsimile message classified as Top Secret to their counterparts in the Republic of South Africa alerting them of a possible consignment of illicit drugs arriving in Namibia through Walvis Bay and suspected to involve the appellants, some South African based individuals and others.

It was common knowledge that by letter dated 20th January, 1994, the appellants, in person, revealed to the Commissioner of the Drug Enforcement Commission that they were aware of a message sent to South Africa and indeed enclosed a transcribed copy of the "Top Secret Fax". We are satisfied that the Top Secret Message was not supposed to be in possession of the appellants for very obvious reasons.

The facts in our view established a very serious leakage in the work of the Drug Enforcement Commission in their operations with their South African counterparts. The facts further revealed that the investigations had been compromised. In addition the facts of the case disclosed a very alarming situation where it is obvious that an important investigative wing or wings such as the Drug Enforcement Commission or their South African counterparts have been infiltrated by people with interests in illicit drug trafficking. In these circumstances the

Drug Enforcement Commission was in our view duty bound to investigate this serious leakage. They were therefore entitled to interview the two appellants.

While the investigations of the leakage might not have been of a drugs related offence per se and that on that ground alone this appeal must succeed, we take note that the information that leaked and that was in the possession of the appellants was of a drugs-related nature. It was therefore too much of a coincidence that the two appellants should have been in possession of a drugs-related Top Secret document of which they were also the subject of the investigations. What all this finally discloses is that the Drug Enforcement Commission or their South African counterparts have been infiltrated by a mole. If this is the case then their work of fighting illicit drug trafficking will become more difficult. For our part, we wish to express our deep disapproval of any body hampering investigations intended to curb illicit drug trafficking. In this regard we urge the public to give every co-operation to the Drug Enforcement Commission in their fight against illicit drug trafficking.

These observations however do not change the outcome of this appeal which has succeeded on fact and merits.

We are satisfied that the learned appellate judge should not have ordered a retrial. The appeal is allowed and the order of retrial quashed.

Appeal allowed.