SENIVALATI RATUBALAVU v STATE (AAU0023 of 2011)

COURT OF APPEAL — CRIMINAL JURISDICTION

CALANCHINI AP

24 September, 3 December 2012

Criminal law — sentencing — appeal against sentence — non-parole term — relevant legislation — lawful remission — whether question of law only — no jurisdiction — vexatious or frivolous — no merit to grounds — Court of Appeal Act ss 22, 26, 35(2) — Penal Code s 33 — Prisons Act s 63 — Sentencing and Penalties Decree ss 18, 19, 22, 61(2).

On an appeal, the High Court substituted the appellant's sentence of 12 years" imprisonment for one of six years" imprisonment with a non-parole term of five years. The appellant appealed the sentence. The first ground was that the non-parole term was imposed under the Sentencing and Penalties Decree which came into effect after his time of offending. The second ground related to the non-parole term of five years and any lawful remission under the Prisons Act Cap 86.

Held –

(1) The first ground of appeal raises questions of mixed law and fact, and so there is no jurisdiction to proceed on this ground. The second ground of appeal does involve a question of law only, however the issue does not fall under s 22(1A)(a) or (b) of the Court of Appeal Act and as a result there is no jurisdiction to consider the second ground.

(2) When a Court fixes a minimum period under s 33 of the Penal Code, the offender must serve that period, and the phrase "must serve" is mandatory and not merely directive. If a prisoner whose sentence is fixed qualifies for remission, he will be eligible for release only after serving the fixed period. In such a situation the remission has to be deducted from the period of imprisonment that was not fixed. The same applies to a non-parole term fixed under the Sentencing and Penalties Decree 2009.

Maturino Raogov State (unreported criminal appeal AAU 117 of 2007 delivered on 9 April 2010), applied.

Appeal dismissed.

Appellant in person.

M Korovou for the Respondent.

[1] Calanchini AP. On 11 November 2009 the Appellant pleaded guilty to one count of unlawful use of a motor vehicle and three counts of robbery with violence in the Magistrates Court. On 21 December 2009, after having considered written and oral submissions on mitigation, the learned Magistrate sentenced the Appellant to a term of 12 years imprisonment for each of the three robbery with violence offences to be served concurrently. In respect of the offence of unlawful use of a motor vehicle the Appellant was sentenced to a term of imprisonment of 6 months to be served concurrently with the sentences for robbery with violence.

Being dissatisfied with the sentence the Appellant appealed to the High Court on the grounds that (a) not enough discount was afforded to him for the guilty plea, (b) he was given no credit for time in remand, (c) the Magistrate exceeded his jurisdictional sentencing limit, (d) there is an obvious disparity in sentence when compared with sentence imposed on co-accused and (e) the sentence was harsh and excessive in the circumstances.

On 22 February 2011 the High Court allowed the appeal against sentence and quashed the sentences imposed by the learned Magistrate on 21 December 2009. The High Court substituted a term of imprisonment of six years for each of the three robbery with violence offences to be served concurrently. Since the sentence of six months for unlawful use of a motor vehicle was not challenged the learned Judge restored that sentence and ordered that it be served concurrently. The effect of the order of the High Court was that the Appellant was required to serve a term of six years imprisonment with effect from 21 December 2009 with a non-parole term of five years.

By notice dated 28 February 2011 the Appellant indicated his intention to appeal against sentence. The notice of appeal was received by the registry on 15 March 2011 and was filed within the time prescribed by s 26 of the Court of Appeal Act Cap 12. The thrust of the appeal is concerned with two grounds that arise from the non-parole term of five years. The first ground is that the non-parole term was imposed under the Sentencing and Penalties Decree 2009 which came into effect after his time of offending and was therefore applied retrospectively. The second ground relates to the non-parole term of 5 years and any lawful remission under the Prisons Act Cap 86.

The Appellant's appeal is against a decision of the High Court exercising its appellate jurisdiction. As a result the Appellant's appeal is to be determined under s 22 of the Court of Appeal Act. So far as is relevant that section provides:

> *'(1) Any party to an appeal from a magistrates court to the High Court may appeal, under this Part, against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only.*
>
> *(1A) No appeal under sub-section (1) lies in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground:*
>
> *(a) that the sentence was an unlawful one or was passed in consequence of any error of law, or*
>
> *(b) that the High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence.'*

Under s 22 of the Act the Appellant must first establish whether the grounds or any one of them involves a question of law only. If the answer to that question is in the affirmative, then the next step is to consider the two limbs raised by s 22(1A).

Does the first ground of appeal involve a question of law only? The Appellant alleges that the non-parole term was imposed under the Decree which had come into force after the offence was committed and was therefore applied retrospectively. In my judgment this ground raises questions of mixed law and fact. The facts involved include issues such as when (ie on what date or dates) did the Appellant offend and on what date did the Decree come into effect? In my judgment the answer to the legal issue is dependent upon the answers to factual questions. The ground does not involve a question of law only. There is no jurisdiction to proceed on this ground and as a result the appeal on this ground is bound to fail. This ground of appeal is dismissed under s 35(2) of the Court of Appeal Act.

The second ground of appeal is essentially concerned with the question whether remission under the Prisons Act can be deducted from a non-parole term fixed by the sentencing judge. In my judgment this does involve a question of law only. However, the issue does not fall under either limb (a) or limb (b) of s 22

(1A) of the Act and as a result there is no jurisdiction to consider the second ground. The ground also must be dismissed under s 35 (2) of the Act as it is bound to fail.

However, in the event that I am wrong and the two grounds of appeal fall within s 22 (1) and (1A) of the Act, then leave is not required and as a result I have no jurisdiction as a single judge of the Court of Appeal to proceed any further.

However there is the residual jurisdiction given to a single Judge of the Court, if he determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal, to dismiss the appeal under s 35 (2) of the Act.

In the context of s 35 (2) it is necessary for me to consider the two grounds of appeal. In relation to the first ground the Sentencing and Penalties Decree came into effect on 1 February 2010. The Decree was in force when the learned Judge heard the Appellant's appeal in February 2011. As a result the position is governed by s 61 (2) of the Decree which states:

> *'(2) On the hearing of any appeal against a sentence imposed by a court prior to the commencement of this Decree, the court hearing the appeal may -*
>
> *(a) _ _ _*
>
> *(b) vary the original sentence and impose any sentence in accordance with this Decree.'*

The High Court in exercising its appellate jurisdiction varied, in accordance with the Decree, a sentence that had been imposed by the Magistrates Court prior to 1 February 2010 (namely 21 December 2009) and therefore prior to the commencement of the Decree.

The High Court judge had imposed a non-parole period in accordance with the requirements of sections 18 and 19 of the Decree which he was obliged to do. There is no merit to this ground of appeal which is vexatious and bound to fail. The ground is dismissed under s 35 (2) of the Act.

In relation to the second ground the Appellant has raised the issue of whether any remission earned can take effect before the expiry of the term fixed by the learned Judge as the non-parole term.

As previously noted the jurisdiction of the Court to fix a non-parole term is set out in sections 18 and 19 of the Decree. However, prior to the coming into force of the Decree, there was previously (since 2003) under s 33 of the now repealed Penal Code Cap 17 a discretion vested in any Court to fix a minimum term of imprisonment when a sentence of 10 years or more had been imposed. Prior to 2003 there was a discretion given to the Court to recommend a minimum term of imprisonment whenever a sentence of imprisonment for life had been imposed. The point is that however the discretion is worded, there has been in existence for many years a power given to a court to fix a minimum sentence which must be served. Alongside that discretion there has existed a conditional entitlement to a one third remission under s 63 of the Prisons Act Cap 86. The issue can be stated as being whether earned remission can be deducted from the minimum term specified under s 33 of the Penal Code or (since repeal of the Penal Code) under s 18 and 19 of the Sentencing and Penalties Decree. The issue was considered by this Court in *Maturino Raogo v The State* (unreported criminal appeal AAU 117 of 2007 delivered on 9 April 2010). In paragraph 10 the Court stated:

'*While we accept that remissions under the Prisons Act are entitlement of the prisoners upon qualification, we cannot ignore the clear legislative intent in providing the courts with the discretion to fix terms of imprisonment before prisoners are eligible for release from prison.'*

In paragraph 13 the Court of Appeal stated its conclusion:

'_ _ _. When a court fixes a minimum period, the offender must serve that period. In our view, the phrase 'must serve' is mandatory and not merely directive. We are of the opinion that a prisoner whose sentence is fixed by a court cannot be released until the fixed period is served. But if a prisoner whose sentence is fixed qualifies for remission, he will be eligible for release only after serving the fixed period. In such a situation the remission has to be deducted from the period of imprisonment that was not fixed.'

In my judgment the conclusion stated by the Court of Appeal applies in the same manner to a non-parole term fixed under the Decree as it did to minimum terms fixed under s 33 of the Penal Code. I can see no merit whatsoever in this ground of appeal which is vexatious and has no chance of success. This ground is dismissed under s 35(2) of the Court of Appeal Act.

However that is not the end of the matter. Although not raised in his appeal notice, the Appellant in his submission raised the issue of whether the sentences imposed by the learned Judge in the High Court in its appellate jurisdiction should run from 21 December 2009 or should be served consecutively after any pre-existing sentence. Section 22(1) of the Decree states:

'(1) Subjection to sub-section (2), every term of imprisonment must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.'

Unless one of the circumstances set out in sub-section (2) of s 22 is established, the sentence imposed by the learned judge exercising the High Court's appellate jurisdiction on 22 February 2011 runs from 21 December 2009 concurrently with the sentence that was then being served by the Appellant. There is no material on the record to indicate that any of the circumstances set out in s 22 (2) applies in the present case and as a result all sentences are to run concurrently.

The result is that the appeal challenging the fixing of a non-parole period and claiming remission during the non-parole period are dismissed under s 35 (2). There is no jurisdiction to make any order in respect of the issue concerning the pre-existing sentence being served concurrently with the sentences imposed by the High Court in its appellate jurisdiction.

Appeal dismissed.