IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

Coram: Nyalali, C.J., Makame, J.A., and Kisanga, J.A.

ECONOMIC CRIME APPEAL NO. 64 OF 1986

BETWEEN

JOSEPH JOHN MAKUNE ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the
High Court of Tanzania at Morogoro
(Kazimoto, J) dated 18th July, 1986

in

Economic Crimes Case No. 2 of 1986

JUDGMENT OF THE COURT

KISANGA, J.A.

The appellant was convicted in a majority judgement under the Economic and Organised Crime Control Act for occasioning loss to a specified authority, and was sentenced to 3 years' imprisonment, with an order for compensation in respect of the loss caused to the specified authority. He has now appealed against both conviction and sentence.

Very briefly the facts as found by the Economic Crimes Court were that the appellant was a bank official who at the material time was a signatory to the encashment of cheques of over Shs. 10,000/=. He duly authorised the encashment of two cheques each worth Shs. 125,000/=. He authorised this at Mahenge where the drawer of the cheques, one Isaac Jacob @ Isaac Shinyanga had no bank account and when the cheques were later referred to Igunga where he had an account, there were no funds to meet the payment thereof. The prosecution, therefore, charged the appellant with occasioning loss to the National Bank of Commerce in that he was careless in not clearing the cheques with the Igunga branch before authorizing payment of them at Mahenge. The appellant's defence was that he did not clear the cheques because there was no telephone communication between Mahenge and Igunga branches of the Bank but that he, as branch Manager, used his discretion to authorize payment after satisfying himself that the drawer of the cheques was creditworthy. As intimated earlier the court was divided, the chairman and one lay member recording a [illegible] with the remaining lay member dissenting.

In this appeal the appellant is represented by Mr. S.A. Masati who had also acted for the defence at the trial. Before us the learned counsel filed seven grounds of appeal but at the hearing he abandoned ground three and argued the rest. For convenience the first three grounds may be taken together. He alleges before us, as indeed he had alleged before the Economic Crimes Court, that the charge was defective in as much as it charged his client with an offence which was committed in July, 1984 before the Economic and Organized Crime Control Act came into operation in September that year, and yet there was no provision in the Act for retrospective operation. It is apparent that the case falls within the provisons of section 65(4) of the Economic and Organized Crime Control Act which in the rest of this judgment will be referred to simply as the Act. That sub-section says that:

> "65(4). Where a case is pending with the police or before the Tribunal but it may not be heard by the Tribunal as a result of the operation of the preceding provision of this section, proceedings in respect of it shall be instituted before the Court, subject to this Act."

Mr. Masati conceded that when the Act came into operation the case was pending with the police, and it is clear that it could not be heard by the Tribunal because the appellant was never charged before that Tribunal. But consel contended that at the time of the commencement of the Act his client was then charged under thePenal Code with the offence of stealing by public servant. By this we understood him to say that the police should have continued the proceedings against his client under the Penal Code. We could see no basis for thatargument. We think that once the case was pending with the police at the commencement of the Act, there was nothing in law to prevent the police from altering the charge, originally under the Penal Code, and to proceed under the Act if they thought that the facts disclosed an offence under the Act. We are therefore satisfied that the case was properly made the subject of a charge under the Act and we can find no merit in the complaint.

As intimated earlier, this complaint had been the subject of a preliminary objection at the trial but the Court overruled it. Whereupon the learned counsel sought to appeal against such refusal but he was refused leave to do so. That refusal is now made a ground of complaint before us. Having regard to theview which we have just expressed on this matter, we are satisfied that the Economic Crimes Court was quite justified

The refusal to grant leave to appeal against that ruling, however, appears to present some difficulty. Mr. Masati stated that in seeking to appeal against the ruling he was relying on theprovisions of section 61 of the Act. That section provides that:

> "61. A person aggrieved by a decision of the Court may appeal to the Court of Appeal of the United Republic in accordance with established law in that behalf."

Under section 2 of the Act the word decision is defined to include

> "..... a judgment, finding, acquittal, conviction, sentence or ruling;"

In over-ruling the objection the trial Court stated, inter alia, that the right conferred under s.61 of the Act did not concern every decision of the Court during the trial, but that it applied only to decisions which are final and not interlocutory in nature. It is to be noted that the word "ruling" has not been defined under the Act. The Court, however, took the view that the word is to be given a restricted meaning to exclude rulings which are of an interlocutory nature. The Court gave no reasons for so restricting the meaning of the word, nor can we suggest any. Such a restricted meaning can cause prejudice or injustice to an accused person in some cases, for example where his objection is sustained on appeal resulting in his discharge or acquittal. In such cases the accused would have suffered unnecessarily the pain of being an accused person, with its attendant consequences, for the whole period between the time of such refusal and the time he is let off on appeal against the final decision. That would be undesirable, and we think Parliament cannot have intended it. As stated before we can find no justification for restricting the meaning of the word "ruling". We are increasingly of the view that the word should be given plain and ordinary meaning to include interlocutory ruling. The trial Court was therefore unjustified to refuse the appellant's leave to appeal, but we hasten to add that in this particular case such refusal did not prejudice the appellant because on the view we have taken of the matter, the intended appeal against the ruling would not have succeeded, anyway.

Again for convenience we take together grounds five and six the gist of which is that the prosecution did not prove the case beyong a reasonable doubt having regard to the appellant's defence. Essentially the evidence

learnt that the drawer's account had no funds to meet them. But the prosecution adduced no evidence as to the state of the account as at the date of authorising the cheques. Counsel for the appellant submitted that it is possible that the account had sufficient funds on the date the cheques were authorized but that if the funds were run down only subsequently, then the appellant could not be to blame for it. There was one matter here which was not quite clear from the evidence. That is the meaning of "clearring the cheques" with the Igunga Branch. We could not be sure whether this merely meant to ascertain whether the drawer's account at Igunga had sufficient funds, or whether it also meant debiting the account at the same time to the extent of the value of the two cheques or, if not so, to take any precautions against any withdrawals from the account until presentation and payment at a later date of the two cheques. If it meant the former then counsel's submission has merit because, as he says, there might have been enough funds in the account on the material day, but if the funds are depleted only subsequently the appellant could not be to blame for it as there is no evidence as to what precautions, if any, he was required to take against any withdrawals from the account pending presentation and payment of the two cheques. In the absence of a clarification on this point, we think that the charge cannot safely be said to have been proved sufficiently.

In dealing with the appellant's defence the learned judge and the lay member who recorded the conviction and whom we shall continue to refer to simply as the two members of the Court, rejected that part of the defence where the appellant claimed that at the material time he was the branch manager, and that in that capacity he exercised his discretion and authorized payment of the cheques in the circumstances. A lot of argument centered around this point. The appellant had asserted that he was posted from Morogoro to Mahenge as a branch manager, adding that the letter of his his posting was at Mahenge while the copy thereof remained at Morogoro, and that if the prosecution so wished they could call the manager at Morogoro branch to produce it. The two members of the Court rejected that claim and preferred the prosecution evidence which was to theeffect that at the material time there was no substantive manager, that P.W.4, the accountant, was in accordance with the banking practice, the acting manager while the appellant was posted there simply as his number two. In rejecting that part of the defence, the two members of the Court took the view that "..... where an accused person relies on any defence it is his duty to prove, on a balance of probability that defence." And consistent with

that view the two members of the Court contended that the duty to produce the letter of posting him as manager was on the appellant and not on the prosecution. With due respect, this was a serious misdirection in law. The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on a balance of probabilities. But the present case did not involve any defence which fell within the known exceptions so as to require the appellant to prove it. Nor could it be said that the letter was a matter which was specially within the appellant's knowledge so as to place on him, in terms of section 114(1) of the Evidence Act, the duty to prove or produce it. Therefore in holding that the duty was on the appellant and not on the prosecution to produce the letter the two members of the Court shifted the burden to the accused person and to that extent they were in error. The duty was clearly on the prosecution. More so especially after the appellant had expressly mentioned the places where the letter and its copy could be found. Had the letter been produced, we cannot say for certain that it would have necessarily supported the Court's finding that the appellant was not the manager at the material time.

In rejecting that part of the defence where the appellant claimed that he, in his capacity as manager exercised his discretion to authorize payment of the cheques, the two members of the Court took theview that even assuming that the appellant was the manager, there was no proof that he was vested with any such discretion. The appellant had said in his defence that his discretion was contained in what he described as Volume 2 of the Bank Handbook at paragraph 6/21. The provision, he said, conferred on him the authority to decide such matters. There is no indication that the said Handbook was ever produced or put in evidence. The two members of the Court rejected this part of the defence because the appellant did not show or spell out the extent of his discretion. This is what they said:

> "..... The accused talked of his discretion under the banking procedures but he did not say what was the limit of his discretion. This would have helped the court to decide whether the discretion he used was reasonable in allowing the encashment of the Shs. 250,000/= by defaulting the procedure".

With due respect, once again, this was a misdirection. The Court could

information he had given was enough. Indeed on glancing through his cross-examination, there is no indication that he was asked anything as to the limits of his discretion in the matter. In any event if the Court felt that it was necessary to have further information to enable it to decide on the precise extent of the appellant's discretion, then it was open to the Court to call for the said Bank Handbook and to refer to the actual text. It could have done so by requiring an official of the bank to produce the book in evidence for the purpose. As things stand now, it cannot be said that this part of the appellant's defence was given adequate consideration and refused on sufficient grounds. Had the Bank Handbook been produced, it might well have supported the appellant's contention that it conferred on him the necessary powers and discretion to act as he did, in which case the two members of the Court might have come to a different conclusion on the matter.

The two members of the Court in considering the defence further, found that the appellant in authorizing the cheques acted unreasonably by relying on bank documents which were in possession of Isaac, his client, and which were sixteen months old. The said documents included counterfoils of cheque books, bank statements and bank paying-in-slips which showed that Isaac's bank operation was good. But with due respect it seems that the Court was here picking and choosing from the defence only what was convenient for the purpose of its decision. Because the appellant said that in exercising the discretion to authorize the cheques, he took into consideration other factors in addition to those documents. He said that he had known Isaac for a long time as a good customer of the bank. Isaac was a transporter and he owned a tractor. He was also a cattle dealer and he owned houses including one he had bought at Shinyanga. On the material day, the appellant went on, Isaac showed him Shs. 600,000/= in hard cash and told him that he was seeking to withdraw an

which was selling at Shs. 800,000/-. In holding that the appellant failed to exercise reasonable care the two members of the Court did not take into account these additional factors. To the extent of such omission they erred. They ought to have considered the defence in whole, not only in part, and to see whether it created any reasonable doubt in their minds. The appellant claimed that upon considering all these factors he was convinced that his client was creditworthy and accordingly he authorized the cheques honestly believing that they would be honoured upon presentation for payment at Igunga. We are of the view that had the two members of the Court considered the appellant's defence in whole they might have found that at least it was sufficient to cast a reasonable doubt as to his guilt. This is so especially as there was no attempt to contradict the appellant's assertion that Isaac, the said customer, owned various properties including the house at Shinyanga. Indeed P.W.5, a police officer, testified that he visited Isaac's residence at Shinyanga although he did not find him there. This would tend to support the appellant's assertion that he believed that his client was a person who had property.

In an attempt to prove lack of care or negligence on the part of the appellant, the prosecution had sought to rely on a circular letter allegedly issued by the Bank's headquarters instructing its branches at Nyerere Road Mwanza, Tabora, Igunga and Shinyanga to close the accounts operated by Isaac and to leave only one. This circular was referred to and the contents of it were actually read out in court by P.W.4. But for some reasons which are not immediately apparent, it was not tendered in evidence as exhibit. However, that circular was rightly not taken into account in considering the appellant's guilt because, among other things, the authorship of it was not proved and there was no evidence that its contents had been communicated, or were known, to the appellant.

In the fourth ground of appeal Mr. Masati rightly complained that in the absence of one lay member, and the other lay member dissenting, the learned judge proceeded to deliver the majority decision and further proceeded alone to sentence the appellant. This matter was governed by the provisions of section 16 of the Act, the relevant part of which provides that:-

> "16. All questions to be decided by the Court, including the decision whether it finds the accused person guilty or not guilty, shall be decided by agreement of the majority of the members....."

It is quite apparent from this provision that the issue of sentence is one to be decided by majority of the members of the Court. The learned judge, therefore erred in proceeding alone to determine that issue. His order of sentence was therefore invalid, and had we been minded to uphold the conviction we would be bound to interfere with that order.

Before we conclude the appeal we wish to observe although very briefly that the handling of this case was not at all satisfactory. The treatment of some of the issues involved was at times too casual and left a lot to be desired. The investigation of it was most superficial, and the presentation of it in court was only half-hearted leaving too many loose ends. The number of misdirections on the part of the Court only served to aggravate that situation. We hope that all those concerned will make the necessary efforts to overcome such situations in future.

In the last analysis we are of the view that the evidence adduced in support of the charge was not at all strong, and the appellant's defence, properly considered, raises serious doubts as to his guilt. In the circumstances we are satisfied that there is merit in this appeal which ought to succeed. Mr. Shio, the learned advocate who appeared for the respondent Republic at first sought to support the conviction, but on second thoughts

conceded to this view. In the result we allow the appeal, quash the conviction and set aside the sentence with an order for the immediate release of the appellant unless he is otherwise lawfully held in custody.

Having quashed the conviction, we find it not necessary now to consider the last ground of appeal which raises, in the alternative, the issue of excessiveness of the sentence and severity of the compensation order.

DATED at DAR ES SALAAM this 4th day of July, 1987.

F. L. NYALALI
CHIEF JUSTICE

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(J. H. MSOFFE)
DEPUTY REGISTRAR.