SITALI, SINYANGWE AND MWEWA v THE PEOPLE (1965) ZR 137 (CA)
COURT OF APPEAL
DENNISON Acting CJ, DOYLE JA, RAMSAY J
22nd October 1965
Flynote and Headnote
[1] Courts - Court of Appeal - jurisdiction - when no appeal against conviction to High Court:

The Court of Appeal lacks jurisdiction to consider an appeal against conviction when none has been made to the High Court.
[2] Courts - Court of Appeal - jurisdiction - powers when accused convicted of wrong offence by magistrate and High Court:
See [3].
[3] Criminal procedure - Sentencing - accused convicted of wrong offence by magistrate and High Court - procedure for Court of Appeal - section 14 (3) of Court of Appeal Ordinance construed:

The Court of Appeal possesses no power to pass a sentence for an offence of which the accused was never convicted nor to substitute a sentence for an offence for which accused was never sentenced; accordingly, the sentences must be quashed and the case remanded to the magistrate's court for sentencing.

Cases cited:
(1) *R v Emery* (1943) 29 Cr. App. R 47.

(2) *R v Johnson* [1909] 1 KB 439.

Statute construed:
Court of Appeal Ordinance (Cap. 12), s. 14 (3).
The appellants in person
Thistlethwaite, State Advocate, for the respondent

Judgment
Doyle JA: The appellants were charged on 24th April, 1965, before the subordinate court (Class I) of the resident magistrate at Ndola with the offence of housebreaking and theft contrary to sections 271 and 243 of the Penal Code (Cap. 6). The appellants pleaded not guilty to the offence as charged but pleaded guilty to the offence of entry and theft contrary to sections 272 and 243 of the Penal Code. The resident magistrate accordingly did not convict them of the offence charged but convicted them on their pleas of the offence of entry and theft. (It may be noted that both charges were of dual offences but in accordance with customary practice were dealt with as a charge of a single offence.) The resident magistrate then adjourned the case for sentence.
On 15th May, 1965, the appellants came before the subordinate court for sentence, the court being then constituted by a different resident magistrate. The latter overlooked the fact that the appellants had only been convicted of the offence of entry and theft and dealt with the matter as a conviction for the offence of housebreaking and theft. Having seen the records of the appellants, he considered that his powers of punishment were not adequate to deal with what he described as a bad offence of housebreaking and theft. Accordingly, under the provisions of section 197A (1) of the Criminal Procedure Code (Cap. 7), committed the appellants for sentence by the High Court.
When the case came before the High Court, the learned judge failed to notice the error made. Instead of declining jurisdiction in a matter which was clearly a nullity, he proceeded to sentence each of the appellants on the offence of housebreaking and theft.
The appellants appeal to this court against their sentences. The appellant Jubeck Sinyangwe in his grounds of appeal also introduced matters which were only relevant to an appeal against conviction. [1] As, however, no appeal against conviction has been made

to the High Court, this court cannot deal with the latter matters. It is only concerned with the appeals against sentence.
Section 197A (1) of the Criminal Procedure Code reads as follows:

> 'Where on the trial by a subordinate court of an offence a person who is not less than the apparent age of seventeen years is convicted of the offence then, if the court is of opinion that greater punishment should be inflicted for the offence than the court has power to inflict, the court may, for reasons to be recorded in writing on the record of the case, instead of dealing with him in any other manner commit him in custody to the High Court for sentence.'

In this case the learned resident magistrate did not apply his mind to the offence of which the appellants had been convicted. It may be that if he had applied his mind to the correct offence, he would have followed the same course of committal for sentence although the offence was less serious. That, however, is conjecture and this court only has before it the committal and sentence for an offence of which the appellants have not been convicted.
Clearly the sentence cannot stand. Subsection (3) of section 14 of the Court of Appeal for Zambia Ordinance (Cap. 12) reads as follows:

> 'On an appeal against sentence the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal.'

On first sight the subsection appears to present difficulties in a case such as this. [2] [3] It is self - evident that this court cannot pass another sentence for an offence of which the appellants have not been convicted. There is indeed authority showing that, despite the wording of the section, this is not necessary. *R v Emery* (1943) 29 Cr. App. R 47, a case which has remarkable similarities to the present case, and *R v Johnson* [1909] 1 KB 439 so decided in relation to the almost identical provisions of section 4 (3) of the Criminal Appeal Act, 1907.
It is also impossible for this court to substitute a sentence in respect of a different offence of which the appellants have been convicted but for which they have neither been sentenced nor committed for sentence.
The order of this court is therefore that the sentences be quashed.
The appellants remain convicted of the offence of entry and theft. It still remains for the subordinate court to deal with the matter of sentence for this offence. The appellants will be remanded in custody for that purpose.
Sentences quashed.