THE PEOPLE v MWENDACHABE (1965) ZR 148 (HC)

HIGH COURT
RAMSAY J
4th November 1965

Flynote and Headnote

[1] Courts - Magistrates' courts - jurisdiction - offences against native customary law:

Magistrates' courts have no power to try cases under customary law (semble).

[2] Criminal procedure - Transfer of proceedings - committing accused from local court to magistrate's court for sentencing not allowed:

The 'authorised officer' has no power to commit an accused from a local court to magistrate's court for sentencing.

Cases cited:

(1) *Mbowela v R* 1962 R & N 112.

(2) *Mukume v R* 1959 II R & N 248.

Statutes construed:
Native Courts Ordinance (1964, Cap. 158), ss. 28 (4), 38, 40.
[*Editor* - The Local Courts Act (No. 20 of 1966) replaced the Native Courts Ordinance. The sections in the Local Courts Act similar to sections 28 (4), 38 and 40 of the Native Courts Ordinance are, respectively, sections 41 (1), 54 and 57.]

Judgment

Ramsay J: According to the heading of the court record, the accused, Narson Mwendachabe, was brought before the Lusaka Local Court (Class B) on 30th August, 1965. I understand that this court is actually the Lusaka Urban Native Court (Class B), and that it has jurisdiction under the Native Courts Ordinance (Cap. 158), which I shall refer to herein as 'the Ordinance'.

The charge against the accused was of housebreaking and theft contrary to native customary laws of Zambia. He pleaded guilty; on 1st September, 1965, the court pronounced a verdict of guilty on his admission and it adjourned the case to 10th September. On that date the accused admitted that he had sixteen previous convictions, and the court sentenced him to six months' imprisonment with hard labour without the option of a fine, and to receive eight strokes of the cane.

In accordance with the provisions of rule 9 (2) of the Native Courts Rules (Cap. 158) the accused was sent to an authorised officer together with the court's record of the case and the warrant of commitment to undergo the sentence. This authorised officer was a magistrate appointed to hold a subordinate court of the second class, and on 13th September, 1965, he wrote on the record the following order:

' On Review. The Court's decision set aside. As the accused is such a hardened criminal, with sixteen previous convictions, the term of imprisonment as ordered by the local court is too lenient as he needs a tougher sentence than this one. The police are asked to open this case before the Senior Resident Magistrate's Court.'

The authorised officer's reasons in more detail are also attached to the record. They conclude with the following words:

' I therefore order that the police should arrange for the accused to appear before the Senior Resident Magistrate's Court.'

The papers have come before me because doubts were expressed as to the validity of this order. I directed that the accused should be brought before me, and I have had the benefit of hearing in open court argument by learned State Counsel as an *amicus curiae*.

Section 38 (3) of the Ordinance in the circumstances described permits an authorised officer, in his capacity as the holder of a subordinate court, to exercise *mutatis*

mutandis the powers conferred upon appellate courts by subsection (1) of section 40 of the Ordinance, with the exception of the power to grant leave to appeal out of time.
Section 28 (4) of the Ordinance is as follows:

' Where, on the trial by a native court of an offence, any person is convicted of such offence and such court is of opinion that greater punishment should be inflicted on such person for such offence than such court has power to inflict, the court may, for reasons to be recorded in writing on the record of the case and instead of dealing with the offender in any other manner, commit him in custody to a native court of a higher grade, or to a subordinate court, of competent jurisdiction for sentence.'

It was apparently thought that the authorised officer was purporting to make an order in terms of this subsection.
This is not so. Section 40 of the Ordinance does not on the face of it authorise an appellate court to commit a convict to itself or to another court for sentence. [1] In addition, it is likely that a subordinate court constituted under the Subordinate Courts Ordinance (Cap. 4) has no jurisdiction to deal with offences against native customary law (*Mbowela v R* 1962 R & N 112), and therefore the subordinate court presided over by the senior resident magistrate would not be a court of competent jurisdiction. Even if it were a court of competent jurisdiction, in order to assess the sentence properly, it would be faced with the necessity of obtaining evidence as to the ingredients of the offence of housebreaking and theft under native customary law and as to the punishments which can be imposed under such law.
[2] Section 40 (1) *(f)* of the Ordinance authorises an appellate court 'to quash or annul the verdict, order or sentence of the lower court or any part thereof, with or without substitution of another verdict, order or sentence within the powers held by such lower court'.
In my opinion, when the authorised officer made the order that the court's decision be set aside, he was acting under this subsection, and he quashed the verdict and sentence of the court without substituting another verdict and sentence. He had of course no power to order the police to arrange for the prisoner to appear before the senior resident magistrate's court, but the order written on the record is merely that the police are asked to open the case before the senior resident magistrate's court. This request is quite proper and the police may act on it or ignore it, as they please.
In *Mukume v R* 1959 (II) R & N 248, Somerhough, J, decided that native courts had no jurisdiction to try offences contrary to the Penal Code except as authorised by their warrants, and in *R v Kangwa* (HNR/31/1959); (unreported) he decided that a subordinate court could not, in terms of section 13A of the Subordinate Courts Ordinance, transfer proceedings to a native court if the charge was one of theft contrary to section 243 of the Penal Code, and that the proper procedure was for the public prosecutor to withdraw under section 81 *(a)* of the Criminal Procedure Code (Cap. 7) so that new proceedings could be commenced.
It would now seem that similar reasoning should be applied to proceedings which have begun in native courts for offences contrary to native customs and which it is desired should continue before a subordinate court.
The authorised officer's order was entirely appropriate in the circumstances. He considered that the sentence which the local court had imposed was inadequate; he therefore quashed the verdict and sentence and he left it to the police to decide whether or not to bring the accused before a court with greater powers. There is no reason why I should interfere with this decision, and I need not investigate what powers I have of doing so. I make no order, in revision or otherwise.
I should mention though that I do not understand how it is that the accused is still in prison. The warrant of imprisonment signed by a member of the local court was not certified as being confirmed by the authorised officer in terms of rule 9 (2) of the Native Courts Rules, and in any event the decision of the local court was set aside by the authorised officer. I therefore recommend to the Superintendent of the Prison where the accused is lying that he examine the warrant under which he holds the accused to ascertain whether or not he has any right to do so, and he is to report to the Registrar what action, if any, he has taken.