THE PEOPLE v JAPAU (1967) ZR 95 (HC)

HIGH COURT

EVANS J

1st AUGUST 1967

Flynote and Headnote

[1] **Criminal** 40 **procedure - Case to answer - When present**

There is a case to answer if the prosecution evidence is such that a reasonable tribunal might convict upon it if no explanation were offered by the defence.

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[2] **Criminal procedure - No case to answer - When applicable**

A submission of no case to answer may properly be upheld if an essential element of the alleged offence has not been proved, or when the prosecution evidence has been so discredited by cross - examination, 5 or is so manifestly unreliable, that no reasonable tribunal could safely convict on it.

[3] **Criminal procedure - Witnesses - Hostile - Leave to treat prosecution witness as hostile.**

When the material evidence of a prosecution witness at trial 10 varies substantially from his testimony at the preliminary inquiry, leave may be granted to the Director of Public Prosecutions to treat such witness as hostile.

[4] **Evidence - Weight - Unreliable and false evidence.**

Negligible weight can be given to evidence which is unreliable 15 and, in parts, patently false.

[5] **Evidence - Accomplice testimony - Corroboration.**

One accomplice cannot corroborate the evidence of another.

[6] **Evidence - Corroboration - Accomplice testimony.**

See [5] above. 20

Cases cited:

(1) *Bhatt v R* (1957) EA 332.

(2) *R v Harris* (1927) 20 Cr. App. R 144.

(3) *R v Baskerville* (1916) 12 Cr. App. R 81.

Chuula, Director of Public Prosecutions, for the People. 25

Houston Barnes, for the accused

Judgment

Evans J: I now have to rule upon the defence submission that the accused has no case to answer. The test to apply is well - known and was succinctly stated by Parker, L.C.J., in the *Practice Note* published in (1962) 1 All ER 448, and further assistance on the matter is to be found 30 in the judgment of the E.A. Court of Appeal in *Bhatt v R* [1]. [1] In short the test is: there is a case to answer if the prosecution evidence is such that a reasonable tribunal might convict upon it if no explanation were offered by the defence. [2] A submission of no case may properly be upheld:

(a) if an essential element of the alleged offence has not been 35 proved; and

(b) when the prosecution evidence has been so discredited by cross - examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

In my judgment, my ruling at this stage must largely turn upon my 40 view of the credibility of the principal State witnesses. It is not necessary to reiterate in detail the defence submissions and those of the learned Director of Public Prosecutions, because they are recorded in detail. Suffice it to say, that, having anxiously scrutinised the evidence and considered the submissions, I favour those of the defence. Rarely in a trial for

an ordinary criminal offence, let alone for one of such gravity as treason, have I experienced such unconvincing principal prosecution witnesses as in this trial, notwithstanding the patient and painstaking manner in which the learned Director of Public Prosecutions and his junior examined them. Indeed, I am indebted to all counsel for the able and thorough way in 5 which they have performed their duties. On the evidence so far, I am of the opinion that the principal witnesses, namely Amon Kashimata, Paul Mayani, Andrew (or Andleli) Kabola, Bowman Kayengo and Moses Kabungu, were all accomplices - *particeps criminis* (at the least, they may well have interests of their own to serve) - and the learned Director of 10 Public Prosecutions has assured the court that all of them except Andrew Kabola have been given indemnity by the State - to the effect that any self - incriminating evidence given by them would not lead to their prosecution - but it does appear, from their own evidence, that most of them have not understood such indemnity as they have been given. Further, I 15 have virtually no doubt that all of them were questioned at length while in police custody and subjected to violence by the investigating officer, whose assertions to the contrary I do not believe, in an endeavour (which was eventually successful) to force them to implicate the accused. I feel bound to observe that the conduct of that officer at Mwinilunga appears 20 to have been by no means above reproach, and his investigations may well have been rendered difficult and none too successful by premature detention of the principal witnesses. For these reasons, and because the witnesses have been under police care and control for months, I have approached their evidence with great caution.

The 25 most vital State witness is Paul Mayani, who was as glib and plausible a witness under examination - in - chief as one could observe, but he was in general quite unconvincing and often evasive under cross - examination. On his own evidence, he lied to the police when he told them that he had been sent to Angola by one Paul Muvumbu, much of his 30 evidence in cross - examination is inconsistent and palpably unreliable, e.g. when he testified that he agreed to go to Angola because he thought the accused had arranged it with the Government, and his evidence that, on the 10th October, 1966, the accused in the Mwinilunga District sent him to Angola is in direct conflict with that of another prosecution witness, 35 namely Peter Salad (accused's driver), who testified clearly in cross examination and in re-examination that accused was in Lusaka in October, 1966, and did not go to the Mwinilunga District in 1966 until November. I gained the firm impression that Mayani is trying to ingratiate himself with the State, and on his own evidence he is plainly an accomplice of the 40 accused - an accomplice whose testimony is uncorroborated, unreliable, and contradicted materially by another prosecution witness, Peter Salad.

[3] As for Amon Kashimata, the learned Director of Public Prosecutions was obliged to seek leave, which was granted, to treat him as a hostile witness, because his material evidence here was so contrary to his 45 testimony at the preliminary inquiry. [4] His whole evidence was unreliable and in parts patently false, and negligible weight can be given to it - *R v Harris* [2] and Archbold on *Criminal Pleading, Evidence and Practice,* 36th ed., at paragraphs 1352 and 1380 (1966).

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The young men, Andrew Kabola and Bowman Kayengo gave, subject to certain discrepancies, fairly convincing evidence in chief, but they were unconvincing under cross - examination, both were (according to them) beaten by the police, and Bowman in effect testified here that he lied at 5 the preliminary inquiry when he said that the accused had opened the briefcase and put in it a letter he had written. [5] [6] These young men should, in my judgment, be regarded as accomplices, having regard to their evidence and to the provisions of section 44 of the Penal Code, and I am not prepared to accept their evidence in the absence of corroboration 10 and, of course, one accomplice cannot corroborate another - *R, v Baskerville* [3].

Moses Kabungu's evidence was unconvincing from beginning to end and often evasive and, throughout it, his long pauses before answering simple questions impressed me unfavourably - pauses which were much 15 longer than were necessary to afford him time to think of truthful replies. Here, he testified that he saw, among Amon's blankets, a mere 6 inches of the briefcase, but he agreed that, at the preliminary inquiry, he said that he saw the whole of it: that, he said here, is the truth, so he has confessed to lying at the preliminary inquiry, so his evidence becomes even more 20 suspect, and it is not corroborated.

In any event, even assuming that the evidence of Andrew, Bowman and Moses about what the accused said to them, having led them to the Nyidi Plain, is true, it is very doubtful, in my view, that what the accused said constituted an overt act manifesting the treasonable

intention 25 charged. At best, what the accused said, according to those witnesses, were words to this effect: " We're not going to kill cattle, but are going to the Portuguese - for military training in Angola." The purpose of the training was not mentioned, nor whether the men were to return to Zambia after it, and the accused seems immediately to have accepted their refusal to 30 go and turned back, making no attempt to use any persuasion on them.

Upon the whole of the evidence, I find that of the principal State witnesses to be generally manifestly unreliable, suspect and uncorroborated, and I am convinced that it would be unsafe to convict the accused of treason, or of any lesser offence, were he to remain silent if he were 35 called on for his defence. I do not consider that a reasonable tribunal even might convict on this evidence, the poor quality of which and the defects in which are not cured by any consideration, however unfavourable to the accused, of the various documents alleged to have been written by him or found in his possession, in particular Ex. "P7", which must have been 40 written by the accused prior to the creation of the Republic of Zambia in October, 1964, and which does not in terms advocate military training or the use of force.

The State's case fails at this stage for lack of reliable evidence, and this is perhaps understandable in a case of this nature. I am left with a 45 suspicion that the accused and/or others have been engaged in activities prejudicial to the State, and perhaps the investigation of this case has merely touched the fringe of such activities.

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I find that the State has not made out a case sufficient for the accused to answer, and he is accordingly acquitted and is to be set at liberty.

Accused acquitted