BANDA v THE PEOPLE (1967) ZR 91 (HC)

HIGH COURT 30

DOYLE AG CJ

21st JULY 1967

Flynote and Headnote

[1] **Criminal procedure - Appeal from local court - Evidence before appellate court - Limits on further evidence - Section 57 of Local Courts Act** 35 **construed.**

On an appeal from a local court, the appellate court, with respect to the prosecution, is limited to rehearing the witnesses called in the court below unless for reasons to be recorded, it allows further evidence to be called. 40

[2] **Criminal procedure - Charges - Substitution of - Appeal from local court - More serious charge substituted by Appellate court.**

On an appeal from a local court, the appellate court lacks power to substitute a more serious charge than that upon which the accused was tried in the lower court. 45

1967 ZR p92

DOYLE AG CJ

Case cited:

(1) *R v Hall* (1866) 1 QBD 632.

Statute construed:

Local Courts Act (1966), s. 57 (1), 57 (2). 5

Appellant in person.

Zulu, State Advocate, for the respondent

Judgment

Doyle AG CJ: On 23rd December, 1966, the appellant was tried by the local court, Lusaka District, on a charge of conduct likely to cause a breach of the peace contrary to section 157A of the Penal Code, an 10 offence punishable by imprisonment for three months or a fine not exceeding £15 or by both such imprisonment and fine.

One prosecution witness, Grace Selemani, was called. She gave evidence of having been accosted by the appellant, held by the shoulder and asked to commit adultery or be killed. She was frightened and called out. 15 A police officer arrived and arrested the appellant.

The appellant's story was that he found the complainant having trouble with some children and that he stopped to give her advice, where upon she angrily caught hold of him. A scuffle ensued, and a policeman came up and arrested him although he was only a peacemaker.

The 20 local court believed the complainant and disbelieved the appellant. He was convicted and sentenced to a fine of £10 or four months' simple imprisonment.

He appealed, and his appeal was heard on 5th May, 1967. In the meantime he had served the alternative sentence for non-payment of the fine. The learned appellate magistrate heard the evidence of the complainant which, though more detailed, was substantially to the same effect as her evidence in the local court. He considered that the evidence disclosed more serious offences. Relying on the fact that the appeal was by way of rehearing under section 57 (2) of the Local Courts Act, 1966, he substituted 30 charges of common assault contrary to section 219 of the Penal Code and threatening violence contrary to section 77 (1) of the Penal Code. The first of these offences is punishable by imprisonment for up to one year and the second by imprisonment up to five years. The appellant pleaded not guilty to these charges and was given an opportunity to re-cross-examine the complainant. A further prosecution witness was called, the arresting 35 constable, who gave evidence that he found the appellant holding the complainant and trying to undress her.

The appellant made an unsworn statement in which he said that he found the complainant with two other women assaulting a fourth woman. 40 He intervened to assist the fourth woman and stop the fight. A policeman came up and arrested him, innocent as he was. This story differed considerably from that told in the local court. The learned magistrate convicted him. He considered that the correct penalty was nine months'

imprisonment with hard labour but, taking into account that he had already served four, he sentenced the appellant to concurrent sentences of five months' imprisonment with hard labour.

The appellant, surprised at finding himself back in gaol convicted of two more serious offences, appealed to this court, *inter alia*, for this reason. 5

At first sight it seems strange that a person appealing against a conviction for a minor offence can find himself eventually convicted of two more serious offences. If, however, the magistrate's view that the appeal by way of rehearing is an entirely new trial is correct, this result may follow.

A 10 rehearing is not necessarily a new trial. The interchange between counsel and the court in *R v Hall* [1] illustrates this. That case dealt with the question whether on an appeal to quarter sessions evidence additional to that given before the justices could be used. Counsel submitted that an appeal to quarter sessions was not only a retrial but was in the nature 15 of a new trial. Blackburn, J, stated that there could be no doubt that such an appeal was in the nature of a new trial and that fresh evidence was admissible. The judgment of the court later supported this opinion.

Appeal is a creature of statute, and the nature of an appeal is determined by the words of the statute creating the right. Section 57 (2) of the 20 Local Courts Act, 1966, upon which the learned appellate magistrate relied, reads as follows:

"57 (2) An appeal from a local court shall be dealt with by way of rehearing unless the appellate court, in its discretion, shall see fit to dispense with all, or part, of such rehearing." 25

The subsection does not merely say that the appeal shall be by way of re-trial but adds that this shall be so unless the appellate court in its discretion sees fit to dispense with all or part of such rehearing. It is plain therefore, that the appellate court can, if it sees fit, rely on whatever record of the evidence may have been kept by the local court. Further 30 light on the nature of the appeal is to be found in subsection (1) of section 57, which deals with the powers of an appellate court. Paragraph (b) of that subsection allows the appellate court to take or cause to be taken additional evidence *for reasons to be recorded.* If an appeal were a new trial in the fullest sense, this provision would be unnecessary. 35

[1] The learned magistrate did allow further evidence to be called namely, that of the arresting constable. He did not record any reasons for so doing. This in itself would be sufficient reason for allowing this appeal, but I also consider that the magistrate was mistaken on the wider issue. Reading section 57 (2) with subsection (1) I consider that its meaning is 40 that the appellate court is, in respect of the prosecution, limited to rehearing the witnesses called in the court below unless, for reasons to be recorded, it allows further evidence to be called. [2] This procedure is not the equivalent of a new trial and it does not seem to me, therefore, that the appellate magistrate was entitled to rely on powers of substitution of 45 charges which he could have exercised if the case were an original trial by

him. No specific powers are given in section 57 to enable substitution of charges. It may be, though it is not necessary in this case to decide the point, that an appellate court under section 57 of the Local Courts Act' 1966, has power to substitute a lesser offence which is contained in the 5 offence on appeal, but I do not consider that the court has power to retry the appellant on different and more serious charges than that upon which he has been tried in the court below. I am happy to arrive at this conclusion, which seems to me to accord with the ordinary principles involved in an appeal. I allow the appeal.

As 10 there has been a mistrial of the appeal, I could order a further trial by the appellate magistrate. In the circumstances I do not consider that it would be reasonable in this case to do so. I quash the conviction in the appellate court and the sentences imposed thereupon.

Appeal allowed 15