PHIRI v THE PEOPLE (1968) ZR 44 (HC)

HIGH COURT
SCOTT AG J
28th JUNE 1968

Flynote and Headnote

[1] **Criminal law - Affray - Defences - Self-defence - Section 75 of Penal Code interpreted.**

The defence of self-defence is open to a person charged with an affray.

[2] Criminal procedure - Charges - Conviction of offence not charged - "Minor offence" defined - Section 168 of Criminal Procedure Code interpreted.

If a crime requires an additional element of proof not present in another crime, the former cannot be a "minor offence" to the latter for purposes of Criminal Procedure Code, section 168. Consequently, the accused cannot be convicted of the former when charged only with the latter.

Cases cited:

(1) *R v Sharp and Johnson* (1957), 41 Cr. App. R 86.

(2) *R v Mancinelli* (1957), 6 NRLR 19.

(3) *R v Justin* (1962) R & N 614.

Statutes construed:
Penal Code (1965, Cap. 6), ss. 220, 75.
Criminal Procedure Code (1965, Cap. 6), S. 168.
Daley, Director of Legal Aid, for the appellant
Chaane, State Advocate, for the respondent

Judgment

Scott Ag J: The appellant Willy Phiri was charged before the subordinate court of the second class, Choma, with having assaulted one Simasiku and thereby occasioned him actual bodily harm contrary to section 220 of the Penal Code. He pleaded not guilty.

Simasiku gave evidence that Phiri had, without any justification, struck him with his head causing him a black eye and bruised ear. Phiri on the other hand made an unsworn statement to the effect that Simasiku had first grabbed him by the shirt and, with four other men, had assaulted him with an iron bar. Phiri had managed to get out of Simasiku's hands and only struck him with his head. He called a defence witness.

Phiri now appeals against conviction and sentence, claiming that he was only defending himself and the magistrate failed to consider this defence in relation to the conviction for affray, contrary to section 75 of the Penal Code, which was the verdict brought in by the magistrate. The trial magistrate said in the course of his judgment: "I have studied the evidence available. There is no dispute that there was a fight. The question for me is whether the accused's action was unlawful or could be excused on the grounds of self-defence. Indeed, I find this to be a difficult question. But it will be remembered that fighting in a public place is an offence. I accordingly find the accused guilty of having taken part in an affray which is an offence under section 75 of the Penal Code, and I convict him for this offence."

[1] The magistrate clearly saw the difficulty, but instead of dealing with it he evidently acted on the assumption that self-defence had no significance in an affray. If one thinks for a moment, this is clearly wrong, because if two people are seen to be fighting, one might be defending himself and, if he was only defending himself and not attacking, that is not a fight and consequently not an affray. Of course a man may well defend himself and then pass to the attack but that depends on the facts. An accused is entitled to raise the point, and it is for the prosecution to prove that it was not so. The defence of self-defence is open to a person charged with affray, and it is a misdirection to say that no question of self-defence can arise or to simply ignore the possibility as was done in this case (*R v Sharp and Johnson* [1].)

[2] On this ground alone the appeal against conviction will be allowed, but I would also observe that it was not competent for the magistrate to bring in this verdict. He did not say on what authority he did so, but I presume he acted under section 168 (2) of the Criminal Procedure Code. Section 168 is in the following terms: "When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it." Subsection 2 reads: "When a person is charged with an offence and facts are proved which reduce it to a minor offence he may be convicted of the minor offence although he was not charged with it."
There is nowhere in the Criminal Procedure Code any definition of the term "minor offence", but in the case of *R v Mancinelli* [2] Chief Justice Bell, dealing with the meaning of "minor offence" under section 168 (2), said this:

"No offence can be a minor offence within the meaning of that subsection unless it carries a lesser penalty than the offence with which the accused person is originally charged and unless it is cognate to the offence originally charged, that is to say is of the same *genus* or species and comes within the ambit of section 168 (1) of the Criminal Procedure Code."

This case was followed in *R v Justin* [3]. It would not, for instance, permit a court on a charge of assault to find the person so charged guilty of riding a tricycle without a light. If you can look at the wording of the offence and take from it a few words or portion of the offence, then the person can be convicted of what is left though not charged with it. Under subsection (1) is envisaged a failure to prove certain additional particulars. Under subsection (2) is envisaged the proof of certain facts which reduce the offence. In the instant case, I cannot regard the offence of affray as cognate to that of assault occasioning actual bodily harm. It is true that it carried a lesser penalty, but it is not a reduction of the offence of assault. It is different from it and in this country requires the additional element of proof of having been committed in a public place - a factor which is outside the scope of the original offence.
This appeal is allowed, the finding and sentence are set aside, and the appellant is acquitted.
Appeal allowed.