

SAKAFUNYA v THE PEOPLE (1968) ZR 86 (HC)

HIGH COURT

WHELAN J

30th AUGUST 1968

Flynote and Headnote

[1] Criminal procedure - Prosecutor, selection of - Police officer who investigates case.

A police officer may conduct the prosecution of a criminal case which he has investigated if he is not himself to give evidence for the prosecution.

Cases referred to:

- (1) *Njekwa v R* (1958) R & N 770.
- (2) *Mukombo v R* (1961) R & N 109.

Gani, Legal Aid Counsel, for the appellant.

Chaila, State Advocate, for the respondent.

Judgment

Whelan J: On the 16th February, 1968, before the subordinate court of the second class for the Solwezi District the appellant was convicted of the theft by public servant of £1,877 9s. 3d., and was sentenced to two years' imprisonment with hard labour. He appeals to this court against conviction and sentence. The particulars of the offence contained an error in that the dates between which it was alleged the offence was committed were incorrectly stated as the 2nd and 9th October, 1967, instead of the 2nd and 9th November, 1967. The error went unnoticed until drawn to my attention by the State advocate on the hearing of this appeal, and the appellant was not misled by it.

The case against the appellant was that as a public servant in the Agricultural Rural Marketing Board he received from a bank, on the instructions of a superior officer named Endaenda, the sum of £3,000, of which sum he was to hand over to Endaenda the amount of £1,877 9s. 3d and that this he failed to do but instead converted this amount to his own use. At his trial the accused said that he had handed over the money to Endaenda. Endaenda said that he had not. The question before the magistrate resolved itself into one of credibility, and in the event he believed Endaenda and not the appellant.

Counsel on behalf of the appellant has drawn this court's attention to certain discrepancies in the prosecution evidence, but I do not consider that they are of any substance and indeed are of such a minor nature as to have had no effect on the magistrate's findings of fact. Much has been said of a finding by the magistrate that two men - named Moyo and Ibanza - had said that they were with Endaenda at the time when the appellant says he handed the money to Endaenda, when in fact Ibanza had said in cross - examination that Endaenda had left them to go to the toilet. It is apparent from the magistrate's judgment that he was considering whether Endaenda had left his companions for a period of time sufficient to enable him to go to the appellant's house and collect the money, and I do not take the view that he was wrong in not considering a visit to the toilet as being of a substantial period of time to preclude him from making the finding that he did.

[1] It has also been submitted that the trial magistrate should have upheld an objection made by the appellant at the outset of his trial to the prosecutor. The submission amounts to this: that a police officer who has investigated a case resulting in a criminal prosecution should not be the prosecutor, even though he is not proposing to give evidence, as he might be a potential witness for the defence. In support of this submission reference has been made to *Njekwa v R* [1] and *Mukombo v R* [2]. Those cases, of course, laid down that a prosecution should not be conducted [*sic.*] by a person who is to be a witness for the prosecution, *a fortiori* if he is the main prosecution witness or is personally involved, and it is obvious that this should be so, but I do not consider that there can be any prejudice suffered by an accused if an investigating officer conducts a prosecution if he is not himself to give evidence for the prosecution. I see no reason to interfere with this

conviction, and the appeal against it is dismissed, but the dates between which the appellant committed the offence are amended to read the 2nd and 9th November, 1967. For the theft of an amount of over £1,800 I consider that a sentence of two years' imprisonment is quite appropriate, and the appellant's appeal against it is dismissed.

Appeal dismissed.