ZACHARIA v THE PEOPLE (1968) ZR 16 (HC)

HIGH COURT

EVANS J

26th APRIL 1968

Flynote and Headnote

[1] **Criminal procedure - Conviction - Relevant section of statute repealed.**

Where a section of a statute which creates an offence has been repealed and transferred to another statute there cannot be conviction for that offence under the previous statute.

[2] **Criminal procedure - Particulars of offence - Actual words used must be proved in charge of insulting national flag**

The particulars of offence for a charge of insulting the national flag must contain the actual words used, in the language they were spoken in, and those words must be proved.

[3] **Criminal law - Insulting the national flag - Particulars of offence - Actual words spoken must be proved.**

See [2] above.

[4] **Criminal procedure - Cross - examination of accused by magistrate - Improper.**

Cross - examination of the accused by the magistrate in the absence of the prosecutor is "highly improper".

Case construed:

(1) *Chakulya v R* 1960 R & N 123.

Statute construed:

National Flag and Armorial Ensigns Act, 1965 (No. 23 of 1965), s. 4.

Platt, for the appellant

Williams, State advocate, for the respondent.

Judgment

Evans J: The forty - three - year - old appellant, who is a member of the Watchtower sect, was tried and convicted of a charge of insulting the national flag, contrary to section 58 C (1) (which no longer exists) of the Penal Code. The particulars alleged that, on or about 5th November, 1967, at Kabwe, with intent to bring into contempt the official national flag he uttered by word of mouth the following words: "I cannot stand for flag, and I cannot allow my children to stand or to sing the national anthem because is useless. This is just a cloth, and it can get torn, and they can place another one." On 30th January, he was fined K90, in default of payment six months' simple imprisonment. He was committed to prison on the same day. He appealed against conviction and sentence, and I allowed his appeal and acquitted him when I heard his appeal earlier today, and I intimated that I would send out a written judgment in due course.

[1] This conviction could not be sustained, and the learned State advocate did not support it, for the following reasons:

(1) Section 58C of the Penal Code was repealed on the 4th June, 1965, by section 8 (1) of the National Flag and Armorial Ensigns Act, 1965 (Act 23 of 1965), section 4 of which replaced, in substantially similar terms, the said section 58C. The appellant was therefore charged under a non-existent section.

[2] [3] (2) The *ipsissima verba* alleged to have been used by the appellant were set out in the particulars of offence in English. They were, however, alleged to have been said in the Lenje language. In my view, they should have been given in the particulars in CiLenje, and a translation pleaded, and there should have been a finding that the CiLenje words were used, particularly in view of the conflicting evidence about what the appellant actually said. This has to be done in cases of criminal libel (see, for example *Chakulya v R* 1960 R & N 123 at 125), and I consider that the same applies in a charge under section 4 of the said Act of 1965, which is in the nature of defamation of the national flag, so that misinterpretations may be avoided and the charge can fairly be put to an accused.

(3) As I have said, the words alleged to have been uttered were (according to the police translation in the charge sheet):

"I cannot stand for flag, and I cannot allow my children to stand or sing the National Anthem because it is useless. This is just a cloth, and it can get torn, and they can place another one."

Now, according to Amos Ndyomba (P.W.1, an assistant district secretary), the appellant said: "Can we respect this cloth with a bird on it? It is useless. It is just a cloth." District messenger Tumelo (P.W.2) testified that he said: "I cannot allow my child to stand and respect this useless cloth. It can be torn. I can also make, and the bird on it is useless." Headman Chibamba (P.W.3) said that the appellant's words were: "This flag should not be respected. This is a cloth." It will be seen that these three accounts (of what the appellant said) differ and that none of them proves the exact words specified in the charge, which includes no mention of a bird or of not respecting the flag. The only words in the charge alleged by *all* those three witnesses to have been said were that the flag was a cloth, and, therefore, the trial magistrate misdirected himself when he said in his judgment that Ndyomba's evidence was corroborated by that of P.W.2 and P.W.3 and when he said later that those witnesses "exactly repeated" the words which Ndyomba said the appellant uttered.

(4) More serious misdirections, however, came later in his judgment when he said.

"The questions in issue are:

(i) Did the accused utter the words: 'This is just a cloth. It is useless, and that the bird on it is an image'?

(ii) Do these words amount to an insult, i.e. do the words bring the flag into contempt or ridicule?"

As to issue (i) above, the charge did not, of course, allege the words "and that the bird on it is an image", which the magistrate took partly from the evidence of Ndyomba and which, in the form stated in the judgment, were not alleged by Ndyomba or by any of the other prosecution witnesses to have been uttered.

As to issue (ii) above, that was not a question in issue: the real question was, did the appellant utter *words with intent to bring into contempt* the National Flag? That essential ingredient of the offence was correctly alleged in the charge, but the magistrate erred in law when he merely considered whether the words were capable of bringing the flag into contempt and failed to consider or make any finding in regard to the appellant's *intent.*

(5) At the conclusion of P.W.4's evidence, the particulars of offence were amended, concerning the date of the offence, upon the application of the public prosecutor, but the mandatory provisions of the two *provisos* to section 192 of the Criminal Procedure Code were not complied with by the lower court, although, in the event, I cannot say that the non compliance *per se* occasioned a miscarriage of justice, because the date of the alleged offence was not in dispute.

For the reasons stated in (1), (2), (3) and (4) above, this conviction could not stand. The appeal was allowed, the conviction and sentence reversed, and the appellant acquitted. If he has paid any part of his fine it is to be refunded to him.

Finally, I wish strongly to comment on two aspects of this case.

(i) The principal prosecution witness was Amos Ndyomba. When, on the 5th November, he heard what the appellant is alleged to have said, he instructed Manuel Tumelo (a district messenger) to arrest the appellant, who was then arrested and handcuffed, and one prosecution witness testified that Ndyomba told the messenger: "You handcuff him and make the handcuffs tie him very hard." He was taken in custody to a police station. What transpired there - whether he was detained or bailed - is not revealed on the record. Details of whether or when he was arrested or summoned or bailed are all wrongly omitted from the charge sheet. Sub-Inspector Myoyo testified that Ndyomba made a complaint to him on 12th December (a week after the arrest), and a summons was issued on that day and served the next day, and the appellant appeared in court on 22nd December. No one, not even a police officer, has any power to arrest, without a warrant, a person for an offence under section 4 of the said Act of 1965 (and there was no such power under section 58C (1) of the Penal Code). Therefore, Ndyomba (and the police, if they detained the appellant at all when he was taken to the police station) committed a serious breach of the appellant's fundamental rights under the Constitution and, possibly, of the provisions of section 29 of the Criminal Procedure Code. Further, the handcuffing of the appellant was quite unjustified when Ndyomba had five messengers with him.

[4] (ii) According to the record (original and copies), when the trial was resumed on 14th January, 1968 (having been adjourned from the 16th) the prosecutor was absent - the record states: "No prosecutor in court" - and yet the appellant was cross - examined. The record does not reveal who conducted the cross - examination; apparently it was the magistrate and, if he did, it was highly improper. Further, the record does not show that the appellant was re-examined (permitted to say anything further) after being cross - examined.
Appeal allowed.