

TICKY v THE PEOPLE (1968) ZR 21 (HC)

HIGH COURT
SCOTT AG J
3rd MAY 1969

Flynote and Headnote

- [1] **Criminal procedure - Burden of proof - Magistrate's duty - Judgment.**

The magistrate must remind himself in his judgment of the burden and degree of proof.

- [2] **Criminal procedure - Judgment - Magistrate must remind himself of burden of proof.**

See [1] above.

- [3] **Criminal procedure - Judgment - Defence - Magistrate's duty to consider in his judgment each defence made.**

The magistrate must consider the accused's defence, and it must be evident from his judgment that he did so.

- [4] **Evidence - Accomplice testimony - Corroboration of accomplice testimony lacking - Magistrate's duty.**

In his judgment the magistrate must warn himself of the dangers of convicting on an uncorroborated accomplice testimony.

Cases cited:

- (1) *Julias v R* (1957) 6 NRLR 24.
- (2) *Muliata and Emang v R* 1963 R & N 486.
- (3) *R v Mukonge* (1940) 2 NRLR 82
- (4) *R v Chanda* (1940) 2 NRLR 82.

Daley, Director of Legal Aid, for the appellant
Williams, State Advocate, for the respondent

Judgment

Scott Ag J: This appellant, Robert Ticky, was charged before the subordinate court of the first class Lusaka with the offence of house breaking and theft contrary to section 271 (1) and 243 of the Penal Code, the particulars being that on 28th December, 1967, at Lusaka, he jointly and together with Limbikani Lungu broke and entered the dwelling - house of Sophia Mutinta with intent to steal therein and did steal various articles specified in the charge. He pleaded not guilty but was tried, found guilty, and sentenced to eighteen months' hard labour.

He now appeals to this court on a number of grounds, of which those additionally filed by his legal aid counsel are the most important. These are:

1. The learned resident magistrate failed to direct himself on the burden of proof in a criminal case and to evaluate the evidence on this basis.
2. The learned resident magistrate failed to consider and dispose of the case for the defence as put forward by the appellant, who gave evidence on oath.
3. The learned resident magistrate failed to assess and determine the credibility of the witnesses.

Very briefly, the facts of this case are that Sophia Mutinta's house was broken into and property stolen therefrom, and the prosecution have sought to implicate the accused by calling Limbikani Lungu to say that the accused was with him on the occasion of this housebreaking and also calling a former house - servant of the complainant called Abraham Banda to say that he had left the keys of his employer's house at the house of the accused some time previously. In addition, evidence was called of the recovery of some of the property from witnesses, one of whom said the accused was alone, but others said that he was in the company of another person who did the selling to them.

[1] [2] As regards the first ground of appeal, a perusal of the learned magistrate's judgment does indeed reveal that he at no point reminded himself that the burden of proof

lay on the prosecution nor the degree of that proof. It is necessary that a trial magistrate should do so to make it quite clear that he has approached the case on the proper basis. See the case of *Julius v R* [1] where Somerhough, J, said: "The Magistrate might occasionally remind himself in his judgment, as invariably do the judges of the High Court, where the burden of proof in a criminal case lies." And in the case of *Muliata and Emang v R* [2] Pickett, J, held that it was not sufficient for a magistrate to go through the motions of writing down his judgment and warning himself of the burden of proof unless there was some indication in his judgment that he had followed this warning. [3] As regards the second ground of appeal, namely that the magistrate failed to consider the defence, a reading of his judgment undoubtedly leads one to this conclusion. The appellant did make a defence. He gave evidence on oath denying the most material points of the prosecution case, but I can find absolutely no consideration of this in the learned magistrate's judgment. He said the evidence against the accused was beyond suspicion and evaluating that evidence he was left with no alternative but to find him guilty, which he proceeded to do without any consideration of what the accused had said.

[4] Coming to the third ground of appeal, that the magistrate failed to assess and determine the credibility of the witnesses, he certainly did discuss the evidence of the various prosecution witnesses, but he failed to even mention that Lungu was a self - confessed accomplice, and he made no reference to the fact that, although the uncorroborated evidence of an accomplice is admissible in law where he gives evidence for the prosecution, it is the duty of the magistrate to warn himself that, although he *may* convict on this evidence, it is dangerous to do so unless it is corroborated. This rule although a rule of practice, has now the force of a rule of law and where the magistrate fails to warn himself in accordance with this rule the conviction is likely to be quashed. In the case of *R v Mukonge* [3] and *R v Chanda* [4] Chief Justice Law said: "In my opinion the magistrate did not direct his mind to the question of accomplice evidence. It is true he realised that convicts were giving evidence, but that is not going far enough. He should have realised that the witnesses were accomplices and dealt with their evidence accordingly as required by law." All that the magistrate did in this case was to say that he guardedly accepted Lungu's evidence in view of the fact that he was in prison and would gladly see his friend suffer the same fate. This is not the same thing. He also went on to say: "I still feel that there is a bit of truth in Lungu's evidence." I need hardly remark that a prosecution case cannot stand on such an evaluation of evidence. The magistrate also relied on the witness Abraham Banda, but of him he said that he "stole these keys from the complainant and when he left his employment handed these keys to the accused so that the accused could commit this offence when Abraham Banda was out of sight. Abraham Banda gave a show of innocence in order not to be implicated in this crime as the accused suggested." But the learned magistrate seems to have given no consideration to the fact that Banda is only aged 16 and had to be arrested and brought to the court in custody before his evidence could be taken, and when it was taken he made no admission that he was a thief and had stolen those keys. Which was in effect the evidence of his employer, nor did the learned magistrate ask himself to what extent he could rely on the evidence of a witness who admitted that he had received beatings which were very painful because the police wanted him to tell the truth. Again there was the evidence of the accused's wife, but she had to be treated by the prosecution as a hostile witness, and I note that the public prosecutor suggested in his submission that the evidence of Lungu could be corroborated by the contents of the statement made by the accused's wife to the police. This of course cannot possibly be so, but the magistrate in no way indicated that he disabused himself of such misapprehension. Finally, I would also observe that it has been quite impossible to determine from the record which specific articles, as now exhibited, were claimed by which of the various witnesses as having been sold to them. I have already in another case indicated the necessity of witnesses referring to specific individual articles and their identification number being entered on the record, so that it can be quite clear who is claiming which and, of course, as counsel has pointed out, the complainant has claimed as hers two "bras", whereas she said only one was stolen and two jackets, whereas again she said only one was stolen.

For the foregoing reasons I consider that there is much substance in these grounds of appeal and the accused has not received a proper and fair trial. This appeal is allowed, the finding and sentence are reversed, and the accused ordered to be acquitted.
Appeal allowed.