R. v. KALASA MVULA.

A Criminal Review Case of 1935.

Charge of defilement of girl under twelve years of age (Penal Code section 119 (1)—further charge of defilement of female idiot (Penal Code section 120) —misjoinder of charges (Criminal Procedure Code section 127 (c)).

Where a person is charged with defilement of a girl and it is alleged that (*a*) the girl is under twelve years of age, (*b*) whether under the age of twelve years or not, she is an idiot, the two charges must be tried separately.

The facts necessary to support a conviction for (*a*) defilement of a girl under twelve years of age (Penal Code section 119 (1)) and (*b*) defilement of an idiot (Penal Code section 120) are not the same and joinder of the two charges under the Criminal Procedure Code section 127 (*c*) is not permissible.

The facts necessary to prove the first charge are (i) defilement, (ii) age of the girl under twelve years, whereas to prove the second charge it is necessary to show (i) defilement, (ii) idiocy of the female, quite apart from the question of age.

For further cases on the subject of proof of age in a charge of defilement see *R.* v. *Sondas Mawa Chundaponde* 2 N.R.L.R. 106; *R.* v. *Marko Mulefu* 4 N.R.L.R. 240; *Diamond Kapwepwe* v. *The Queen* 5 N.R.L.R. 168 (in which the observation in the present case at p. 85 that " the question of age in a charge of this description is of the greatest importance, and must be proved, and moreover, proved beyond reasonable doubt " was approved and followed); *R.* v. *Samson Manuwa* 5 N.R.L.R. 176; *R.* v. *Jovan Phiri* 5 N.R.L.R. 324.

Section 127 of the Criminal Procedure Code was repealed and replaced by Ordinance No. 28 of 1940. The relevant section is now section 127A.

Francis, J.: With reference to Case No. 1/1935, Class II Court, Petauke.

This case having been referred for confirmation of sentence, I have found it necessary to intervene. As a result of my examination I have written the judgment in draft hereto annexed.

I should be glad if you will transmit this to the Attorney-General with a view to giving him the opportunity, should he desire, of supporting the conviction or, in the alternative, of making any other submission which he considers expedient.

As I am aware that at present both the Law Officers are heavily engaged, I have written my judgment without, in the first place, inviting the Solicitor-General's assistance by way of appearance.

This case has presented difficulties which have given trouble.

The first difficulty is experienced in deciding whether the age of the child Kachere has been proved in accordance with the law.

The evidence given by her mother in this respect is as follows:

> "Kachere was born when we reaped the ground-nut crop after the year of the bad famine when Bwana Thornicroft had left Petauke."

This is all; however, following the mother's (Pando) testimony, is a note by the Magistrate as follows:

> "It is within the knowledge of the Court that there was a bad famine in the Petauke District in the year 1922; that one has not been experienced since that date and that Mr. Thornicroft retired from the post of Assistant Magistrate at the end of 1920. The age of Kachere is therefore given as eleven years and ten months and this age is in accordance with her appearance."

In his judgment the Magistrate notes that it is difficult to ascertain the ages of natives as no record is kept; he repeats that the famine of 1922 and the retirement of Mr. Thornicroft from this Court are both events within his knowledge, and in consequence holds that the date of the child's birth is therefore established.

The Courts are permitted to take judicial notice of certain matters, which, in any text book on the law of evidence, are fairly well and sufficiently detailed. For instance (Taylor on Evidence, sections 17 and 18): The course of nature and of time; territorial divisions of the country; the heads of Government departments; the days of special fasts; the date and place of the sitting of the Legislature and of its Acts; and (Powell on Evidence, 9th Ed., p. 146), "Certain facts so well known that the Court takes judicial knowledge of them without proof". But such must be "public events universally known or within the common knowledge of the great majority". The law of evidence is, in this country, the same as in England, and I am afraid judicial notice may not be carried to the extent proposed in this case.

The facts (*a*) that there was a famine in Petauke in 1922 (or that it happened two years after Mr. Thornicroft's retirement), and (*b*) that Mr. Thornicroft retired in 1920, are incidents which do not come within the rule above referred to, and must therefore be proved. I do not think I would be wrong in saying that in the preparation of the case against the accused these facts were capable of proof. To allow the Petauke Court to extend the rule of law in this manner would be to permit on some subsequent occasion in another Court "judicial knowledge" of (say) the departure of the Southern Express to Cape Town. The question of age in a charge of this description is of the greatest importance, and must be proved, and moreover, proved beyond reasonable doubt. In my opinion it has not been so proved. It is not sufficient to note as an excuse for a deficiency in the case for the prosecution, that "it is difficult to ascertain the ages of natives, etc." The requirements of the law are to be strictly

observed, and if it be impossible to adduce the standard of proof required to secure a conviction, then the authority moving in the matter should consider his position *vis-à-vis* the penal law of the country.

For this reason alone, the conviction and sentence on the charge under Penal Code section 119 (1) must be quashed. There are other objections in connection with the trial, on which it is unnecessary to dwell.

There now remains the second charge " carnal knowledge of an idiot ", contrary to Penal Code section 120.

There are three points on which decisions are required:

(*a*) Is the offence of carnal knowledge of an idiot (section 120) a distinct offence from that of carnal knowledge of a female under 12 years of age ?

(*b*) Should this offence have been separately charged (this refers to the first part of section 127 Criminal Procedure Code); and if so—

(*c*) Should it have been separately tried or, is its joinder with the offence charged under section 119 saved by any of the exceptions to section 127 Criminal Procedure Code; and finally—

What is the effect of a trespass against the decisions as to points (*a*), (*b*) and (*c*) above ?

Section 127 derives its origin from sections 233, 234 (1), and 235 (1), 236 and 239 of the Indian C.C. Procedure, and consequently Sohoni's Code of Criminal Procedure can quite conveniently, and I think authoritatively, be referred to in elucidation of the law of joinder and misjoinder under the Northern Rhodesia Law.

At p. 546 in Sohoni (12 Ed.) there is to be found a very fair indication of the meaning of the expression " distinct offence ", reading as follows:

> " I understand when two offences have been committed and each of these two offences has no connection with each other they are distinct offences."—Per SHARFUDDIN, J. (19 C.W.N. 972).

Under the notes to section 233 several illustrations are given of what are, and are not, distinct offences. In my view the answer to the question para. 9 (*a*) is that the offence is a distinct offence, and should have been charged and tried separately unless covered by exception (*c*), the only exception which apparently can be applied.

Now under the notes to section 236 I.P.P.C. (corresponding with N.R. C.P.C. section 127 (*c*)) it is distinctly stated that that section does not apply to " distinct offences ", but to offences of the same kind which differ only in degree; the difference and degree depending upon some added circumstances of aggravation. Moreover the section applies only where the application of the law to the proved facts is doubtful (cf., the words in the second line of section 127 (*c*), " It is doubtful which of several offences," etc.), and not where the facts are doubtful. In other

words section 127 (*c*) N.R. C.P.C. applies to cases in which the law applicable to a certain set of facts is doubtful by reason of the nature of the single act done, and in which it is charged that the act constitutes one or more offences, the doubt being on a matter of law only. To explain this, had the accused been charged with (*a*) Carnal knowledge of a girl under 12 years; or in the alternative with (*b*) Indecent assault, this would have been a proper joinder under the exception.

In this case I see no room for doubt as to the facts sought to be proved. The case against the accused was that he had had carnal knowledge of a girl charged to be under 12 years of age who incidentally, it was further alleged, was an idiot. The circumstances being thus I must hold that there has been misjoinder, an irregularity which is not cured by the application of Criminal Procedure Code section 323, and in consequence the conviction and sentence on the second charge is likewise quashed.

Apart from the danger of misjoinder (the point is referred to on p. 5 Judicial Circular 1/34), I cannot see the necessity of lumping charges like this against an accused person. Before launching proceedings, the prosecutor representing the Crown, must have been aware of the liability of the accused, on conviction of the substantive offence, to heavy punishment, and the Court in accepting a double charge must have realised that no extra punishment could lawfully have been imposed on that charge. In the circumstances, therefore, the addition savours much of "loading" the case against the accused; it is a proceeding frowned against by this and any other High Court and when it results in two convictions each accompanied by punishment, there is a trespass against Cap. 1, section 12.

It has not been necessary to go into other phases of this case. Were it so, there would have been certain difficulties to be discussed with regard to (*a*) hearsay evidence—the record is full of it—and how far such evidence weighed with the Magistrate; (*b*) the proof of imbecility of the child; and (*c*) whether there is sufficient proof that the accused knew of that imbecility.

In my view there is sufficient case against the accused to stand his trial again, and accordingly I order a retrial on the second charge.

I express the hope that on such occasion the Magistrate will apply himself to the question of "sufficiency of proof".

While yet in draft my judgment was transmitted to the Attorney-General to afford him the opportunity of making any representation he might have deemed expedient. I have received an intimation that he has no comments to offer.