R. v. JOSEPH TEMBO.

A CRIMINAL REVIEW CASE OF 1936.

Charge of theft—plea "not guilty"—at close of case for prosecution no evidence sufficient to support charge—accused nevertheless called to make his defence—admissions by accused in course of his defence leading to conviction—conviction quashed.

When at the close of the case for the prosecution the evidence is not sufficient to justify conviction for the offence charged, the accused person should not be called upon to make his defence; it is quite irregular for the case to proceed and to convict the accused person upon evidence given by him in making his defence.

See also *R.* v. *Muchuma* 4 N.R.L.R. p. 64 on the impropriety of putting an accused person on his defence at the close of the Crown case when there is insufficient evidence to support this step.

Compare the present case with that of *R.* v. *Patel* 4 N.R.L.R. p. 16.

There is a clear distinction between mistakenly putting an accused on his defence and deliberately so doing when the prosecution evidence discloses no case to answer. As to the distinction between the degree of evidence necessary to warrant an accused being called on for his defence and the degree of evidence necessary to prove a case beyond reasonable doubt see *Henry* v. *Reg.* 1958 R. & N. p. 393 and *Day* v. *Reg.* 1958 R. & N. p. 731.

Francis, J.: The accused pleaded not guilty to this charge and it is the bounden duty of the prosecution to prove its case.

When the case for the prosecution was closed there was no evidence before the Court that the articles alleged in the charge were found in the possession of the accused or that otherwise he had anything to do with them.

This being so the Court should have held at that stage that there was no case to answer. What in fact ensued was that the accused quite irregularly was called upon for his defence, and by certain admissions has to an extent supplied the missing evidence.

I am afraid the conviction must be quashed and the accused released.

R. v. SHIMUNZA.

A Criminal Review Case of 1936.

Offence under the District Messengers Ordinance (Cap. 70)—use of this Ordinance for maintaining discipline among District Messengers on Government stations—severity of sentence—corporal punishment and heavy fine not justified in the circumstances of the case under review.

While the District Messengers Ordinance (Cap. 70) deals with offences committed by District Messengers and provides punishment therefor the High Court looks with disfavour upon undue use of this Ordinance for the purpose of maintaining discipline on Government stations and punishments for such offences should not be immoderate.

Francis, J.: I have had reason on several occasions to comment unfavourably on convictions under the District Messengers Ordinance.

Aside from this, the Law Officers of the Crown are well aware of my opinion regarding the use of the Subordinate Courts for the purpose of maintaining departmental discipline among district messengers on Government stations, and it is unnecessary for me to say anything more about the matter.

Apprehending that I have full power to review this conviction, despite the plea, it would serve no useful purpose for me to do so in this case. In any event I would not intervene unless opportunity of argument were afforded the Crown Law Department. At the same time had the plea been different and an appeal been lodged the conviction founded in the circumstances related would, I think, have afforded ground for argument.

I am impelled, however, to interfere in the matter of the sentence. I consider the imposition of a fine of £2—an amount possibly equal to, if not more than, two months' pay of the average messenger, with added corporal punishment, to be far beyond the requirements of the justice of this case. The sentence is altered to one of a fine of 5*s*. or seven days imprisonment with hard labour. The excess over 5*s*. must be returned to the accused.

I observe from the return that the corporal punishment has already been imposed. I am afraid that this cannot now be helped, but I should like here to observe that for obvious reasons the imposition of this kind of punishment is unwarrantable for offences coming under the Ordinance referred to. In my view, if a district messenger's conduct deserves such drastic correction, then he is not fit to hold office and should be dismissed.