R. v. PHILIP FIKAUSE.

A CRIMINAL REVIEW CASE OF 1937.

Indecent assault—witness committed summarily by Court under section 54 of Subordinate Courts Ordinance for perjury during the trial—copy of proceedings to be sent to High Court—power of High Court to review all facts given in evidence at trial and to confirm, vary or quash not only committal for perjury but also any conviction or sentence passed at trial—same evidence required to support summary committal for perjury under above section as required to support conviction under Penal Code section 88—undesirability of Magistrate cross-examining witnesses—hearsay evidence.

In the course of a trial in a Subordinate Court for indecent assault, the presiding Magistrate dealt summarily with two witnesses for perjury under section 54 of the Subordinate Courts Ordinance, and in accordance with the provisions of the section forwarded the proceedings to the High Court for review.

The High Court having before it the whole of the proceedings in the trial for indecent assault reviewed the proceedings and set aside the conviction which had been entered in respect of the charge of indecent assault on the ground that the Subordinate Court had not directed itself properly and that injustice had been done.

With regard to the summary proceedings against the two witnesses for perjury the High Court held that the same evidence is necessary in dealing summarily with perjury as is required in a prosecution for perjury under the Penal Code section 88; having reviewed the evidence in the summary proceedings for perjury the High Court found the evidence against each of the two witnesses in question sufficient and confirmed in each instance the punishment ordered by the presiding Magistrate.

The High Court added observations disapproving of the manner in which the presiding Magistrate had cross-examined witnesses, and regarding the admission of certain hearsay evidence.

Francis, J.: The record in this case has been submitted in accordance with section 54 (2) of the Subordinate Courts Ordinance, 1933, for the reason that arising out of the hearing in that case, two witnesses were charged, and dealt with summarily for perjury. Consequently it has become necessary for this Court to review the proceedings as a whole.

In both its Appellate and Revisional Jurisdiction, it has been laid down that the High Court refrains as far as possible from setting itself up as a court of trial of fact, the proper tribunal for this purpose being always the court of original instance. Power, however, is conferred upon the Court to intervene in this respect, but intervention takes place only

where it is manifest that the court of trial has not directed itself properly, and injustice has been done. I consider this case to be one in which this Court must intervene.

The charge against the accused is indecent assault on a female, an offence which comes within the category of those in which corroboration of the evidence of a prosecutrix, although strictly speaking not necessary in law, is in practice almost invariably required. In its absence there must always be a careful direction upon the point. Corroboration must be directed to that part of the prosecutrix's story challenged by the accused.

The story of the complainant is that she was assaulted, her clothes were torn, she was thrown to the ground and her legs forced apart. She says she called out, and that when she did so Chakanga came and saw the accused beating her with a stick just after the indecent assault above referred to. The witness Nganda, she says, was ninety feet away and saw what was happening.

Neither Chakanga nor Nganda (alias Matches) confirms this. Chakanga admits that she saw the accused beating the complainant, but goes on to say that this was the result of a quarrel after his wife had found them lying together in intimacy in her (Chakanga's) house. She is supported in this statement by another prosecution witness, Marony, the woman referred to as the accused's wife. This coincides also with the story admitted by the accused. There seems, therefore, to be no direct corroboration. As to circumstances indirectly corroborative, the Magistrate accepted the fact of the complainant's complaint to Chakanga; but according to Chakanga it was a complaint made under conditions very different from those related by the complainant, and therefore the fact cannot be said to be corroboration of an indecent assault, but may go in support of an allegation of a common assault.

Nor is the evidence of down-trodden grass of any value in this respect. The state of the grass described by the police officer is consistent equally with the accused's story, that is to say that the parties were fighting.

Contrary to there being sufficient evidence in support of the case for the prosecution, in my view there is much to raise considerable doubt against it. The Magistrate refers to the complainant as " an unsavoury character and not to be believed *in toto* ". There is a history of previous secret intimacy between her and the accused, and this is referred to by the court below as a reason for a light sentence. The nature of that intimacy in my view subverts almost entirely the truth of the complainant's story.

The conviction cannot stand and is hereby quashed.

Now as to the charges of perjury against the complainant Chipepo and the witness Nganda. These were taken summarily under section 54 of the Subordinate Courts Ordinance, 1933, as for a contempt of court. In paragraph 22 of Hall's *Instructions to Magistrates* it is advised that the power therein conferred should be exercised with great caution and only in a very clear case. Sir Roger Hall goes on, " It has been held that the

same evidence is required to support a conviction under this section as would be required under an ordinary conviction for perjury; the evidence of two witnesses together with special circumstances or confession or admission". In addition to this exhortation, it is necessary to follow closely section 88 Penal Code, and an important element in any charge of perjury is that the false testimony must refer to some matter which is material to the question pending in the proceeding.

The perjury assigned against Chipepo is that she denied on two occasions during the trial that she had ever had intimate relations with the accused. She persisted in this denial when charged. This denial goes to the credit of the witness and is therefore material to the issue before the court, and in my view there is sufficient evidence of its falsity, both in weight and character, to justify a conviction.

For these reasons the conviction is upheld.

As to the case of Nganda. The perjury assigned against him is that he—

(*a*) denied that he had ever seen the prosecutrix before 2 p.m. on the day in question;

(*b*) denied that any one other than Fikansa's wife was with him when he returned from Roscoe's house;

(*c*) denied he saw anyone from the time he entered his hut, and also that he saw anyone on the road.

The witness was summoned as a prosecution witness, apparently because he was presumed to know something about the criminal assault or at least the trouble between the complainant and the accused. As it turned out he is shown to have been present and to have known something, how much it is not quite clear. He might very well have been treated as a hostile witness, and with the permission of the Court cross-examined by the public prosecutor. In such cross-examination questions such as those which have indeed been put, could very properly have been asked with a view to credit. The answers given he admitted subsequently to be untrue.

In my view these false statements constituted matter material to the charge of criminal assault, and the conviction is hereby upheld.

There are certain features about this trial which call for comment:

The Magistrate should not cross-examine witnesses. If he desires to elicit information beyond that adduced in examination-in-chief or cross-examination he should abstain from questioning until the witness has been cross-examined and re-examined. I notice that in connection with the evidence of Nganda, the Magistrate has intervened twice in a manner much to be criticised.

There is an amount of evidence (hearsay) which should not have been admitted.