

R. v. CHANGALA AND TWO OTHERS.

CRIMINAL REVIEW CASE No. 50 OF 1938.

Preliminary inquiry—Subordinate Court (Class III)—murder—Criminal Procedure Code, Part VII—statements of three accused persons taken in respect of charge of murder under section 206—charges summarily adjudicated by Court under section 210 and all three accused convicted of manslaughter—Subordinate Court of third class jurisdiction in charges of murder—proceedings a nullity—new trial ordered.

At the time of this case a Court of the third class had jurisdiction to try a charge of manslaughter. Now no Subordinate Court has such jurisdiction.

The Magistrate, after hearing the evidence for the prosecution and the statements of the accused at a preliminary inquiry, came to the conclusion that a charge of murder could not be substantiated and then, purporting to act under section 210 of the Criminal Procedure Code, summarily found the accused guilty of manslaughter. He did not comply with the proviso to section 210 of the Criminal Procedure Code and in effect tried a case of murder finding the accused guilty of manslaughter.

The proceedings were declared a nullity.

See also *R. v. Kasonde* p. 14 *ante* and *R. v. Kafungwa* p. 60 *post*.

Francis, C.J.: This is a case submitted by the Magistrate of the Provincial Commissioner's Court, Central Province, to whom it was sent under Criminal Procedure Code section 8 (5) for confirmation of sentence.

The case commenced on the 14th March as an inquest before the Subordinate Court III, Broken Hill, touching the death of one Chileki. The Magistrate having satisfied himself that an offence had been committed, ordered the proceedings to commence *de novo* as a Preliminary Inquiry, Part VII, of the Criminal Procedure Code.

Thereupon three accused persons, Changala, Chipale and Pensulu, all of Broken Hill, were charged with the murder of the deceased Chileki under section 177 of the Penal Code. First among eleven witnesses to give evidence was Chief Inspector Maxwell of the Northern Rhodesia Police. It is not recorded that any public prosecutor appeared in the case, but since the Chief Inspector seems to have investigated the case, it may be assumed that he was in charge of the prosecution.

The evidence of the witnesses for the prosecution having been completed, a note "case for prosecution" is recorded. Thereupon each accused person under the statutory warning made a statement, and named witnesses whom he wished called at his trial.

Apparently at this stage there was an adjournment, although the fact is not recorded. On resumption of the proceedings the next day, the Magistrate proceeded to record his finding, in the course of which he expressed the opinion that there was not sufficient evidence to sustain a charge of murder as the facts disclosed "a drunken brawl which ended in fatal consequences". The Magistrate ends off his judgment with the two paragraphs hereunder set out:

"The evidence seems to show that Shabungwa was the most violent assailant of Tawelo, but the others must bear their share in the responsibility. Had they not assisted it is possible that Tawelo would have been able to hold his own. And in this connection I do not consider Kaswaka William Tubongo or James Yakobo Tobongo should get off scot free; of Mulaishayo's complicity there may be a little doubt.

It accordingly appears to this Court that this offence is of such a nature that it may suitably be dealt with under the powers possessed by this Court in accordance with section 210 of the Criminal Procedure Code, and determined forthwith, subject to immediate review by the Provincial Commissioner.

All three accused are accordingly found guilty of *Manslaughter* Con. sections 176 and 179 of the Penal Code."

The Magistrate thereupon sentenced the three accused as follows: Shabungwa to twelve months, and Chipalo and Pensulo each to six months I.H.L.

In reporting the case to this Court, the Provincial Commissioner found himself in obvious difficulty, and I sympathise with him. He pointed out that as the third class Court had, in fact, tried a case of murder, that Court acted in excess of jurisdiction, notwithstanding that in the result the accused had been found guilty of manslaughter. The Provincial Commissioner not being certain of the powers exercisable by him in these circumstances, pursued a correct course by referring the matter to this Court.

Section 7 (2) of the Criminal Procedure Code specifically prohibits the trial of a charge of murder by a Subordinate Court III, and if any example were required of the danger sought to be averted by this enactment of the Legislature, this case may be accepted as one.

In consequence of this excess of jurisdiction, the proceedings in this trial must be declared null and void and the convictions and sentences are hereby quashed. It is further ordered that the three accused shall be retried before a Court of competent jurisdiction.

The Provincial Commissioner in his report invited attention to the record of another case (156 A/1938), which seems to have been dealt with by the same Court the next day (the 18th March). In this case two accused persons, James Yakobo (aged 18) and Kaswaka William (aged 22), who are referred to in the penultimate paragraph of the Magistrate's finding in the previous case, were charged with assault committed on the deceased Chileki. To this charge both accused pleaded "guilty", and

from their pleas "I only kicked him once", "I only hit him with my fist", and "All our friends were doing the same", it is very apparent that this assault was part of the transaction which resulted in the death of the deceased. The Magistrate convicted the two accused and passed a sentence of six strokes with a cane on the first accused (James); and imposed fourteen days I.H.L. on Kaswaka William.

Now it is obvious that if it can be proved against a person that he took part with others in an assault which resulted in a charge of homicide being preferred against one or more of the party, such person should very properly be charged with the same offence. In these circumstances it is very difficult to understand how any magistrate or police officer could disregard his duty in such a matter, and proceed to deal with these two accused on the basis of a charge of common assault.

In my view a failure of justice has occurred, but unless there is some move formally on the part of Crown, I do not see my way to intervene at this stage.

In the course of my examination of the proceedings of the Preliminary Inquiry, there appear certain omissions and irregularities which indicate a persistent disregard of the law of practice and procedure. If further proceedings are taken on the basis of this Preliminary Inquiry, no doubt the Attorney-General will give consideration to the matter.