

R. v. NGUNDUZA AND DIXON.

HIGH COURT CRIMINAL CASE NO. 26 OF 1939.

Murder—two accused—one counsel appearing for both accused—one accused removed from court—unfair trial.

The facts and the law appear from the judgment hereunder.

Robinson, A.C.J.: Ngunduza and Dixon were charged with the murder of one Ndeki. The case was remitted for trial before the learned Provincial Commissioner at Fort Jameson. He found both prisoners guilty and sent the record to the High Court for confirmation, section 8 (6) Criminal Procedure Code.

Ngunduza in the lower Court and at his trial denied the charge; Dixon in the lower Court and at his trial admitted the charge and gave an eye witness account of how the murder had been accomplished in his presence by Ngunduza. The defence was undertaken on behalf of both prisoners by one counsel. Whilst Ngunduza was giving his evidence, Dixon was removed from the Court, at the request, it appears, of counsel for the defence.

That procedure seemed to me to be so irregular that I asked for the case to be argued and accordingly it was argued before me at the Mazabuka Sessions on 23rd March, 1939, Mr. Barry Warner appearing for the two prisoners and Mr. Dickinson, Crown Counsel, for the Crown.

Mr. Warner took three points:

- (1) That the trial could not have been a fair one when only one counsel appeared for both prisoners. Their stories were diametrically opposite and it was impossible for him to do justice to both his clients. It was impossible for him to exercise his right of cross-examination of the one prisoner on behalf of the other without being antagonistic to one of his clients.
- (2) There was no power in the Court to order the removal of one of the prisoners, even at the request of counsel for the defence. Section 177 Criminal Procedure Code to be read in conjunction with section 92 Criminal Procedure Code. Murder is a felony.
- (3) The Court should not have been satisfied that Ndeki is indeed dead. Halsbury, Vol. 9, sections 768 and *R. v. Dadabuta*, Vol. 14 *Emp. Digest*, p. 433—*A South African case cited in the footnote.*

If this last point succeeded, then the convictions would have to be quashed.

Mr. Dickinson, in his argument, cited, on the *corpus delicti* point, *Rex v. Davidson* 25 *Cr. App. R.*, 21. I do not wish to go further into that now except to say that my present opinion is that the learned Magistrate was probably right in his ruling. He also argued on the other points, but, on behalf of the Crown, he admitted to great difficulty in feeling satisfied that the trial was a fair one when both prisoners, each with a different story to tell, were represented by one counsel.

I do not wish to go into all the points raised but will rest my judgment on one only and that is that the trial was not a fair one, under the circumstances of this case, because the prisoners were not separately represented. I am not saying that it is always necessary when two or more prisoners are jointly charged with an offence that they should each be separately represented. It depends on the facts of each case. If necessary I would also hold that to remove an accused person, unless specifically provided for by law, during any part of his trial is also an irregularity which would justify a new trial.

In these circumstances, by virtue of section 309 Criminal Procedure Code read with section 300 (a) I order that the convictions and sentences be quashed and the two prisoners be retried by a Court of competent jurisdiction.