

## R. v. McLENNAN KUMWEMBE.

CRIMINAL REVIEW CASE NO. 31 OF 1941.

*Award of compensation against Crown—Crown can be complainant.*

The effect of this decision is that the Crown can be a complainant in a criminal case and that if the charge against the accused is dismissed and it was frivolous or vexatious and the Crown is the complainant then compensation can be awarded against the Crown.

Law, C.J., and Robinson, J.: This case comes before the Court on a point of law submitted by the Magistrate of the Subordinate Court (Class II), Livingstone, under section 196 Criminal Procedure Code. The facts briefly are as follows:

The accused was an orderly employed in the Medical Department. He was capable of giving injections without supervision. In July, 1940, he gave injections for syphilis to another native, not at the hospital, but privately at his quarters during the lunch hour. The native elected to have treatment at the hands of the accused rather than at the hospital because if it had become known that he was suffering from venereal disease he would have lost his employment which was washboy at the hospital. He therefore preferred to be treated by the accused and he agreed to pay him for the treatment and he did pay him 5s. and a sports coat.

In September the accused was charged with theft of the vaccine and was convicted. However, in the beginning of November the High Court quashed the conviction as it was apparent that the theft had not been proved.

In January, 1940, Assistant Inspector Wright brought a complaint under section 83 (2) Criminal Procedure Code stating that the accused being a Government medical orderly had administered two injections for syphilis and had charged payment for his services.

This complaint was signed by Mr. Wright as complainant and it was also signed by the Magistrate. A charge was thereupon drawn up (section 83 (4) Criminal Procedure Code) charging the accused with the offence of extortion by a public officer *contra* section 80 Penal Code. The Magistrate really is responsible for drawing up the charge. He has to sign it. But in this case the police officer signed the charge and the Magistrate did not. This irregularity cannot invalidate the proceedings (section 323 Criminal Procedure Code). A summons was thereupon issued.

The case was heard by the Magistrate on the 22nd January. He came to the conclusion, quite rightly on the evidence, that the crime of extortion had not been made out, the principal element in the misdemeanour that the accused received money for the performance of his duty as such officer being absent. It is suggested that it must have been obvious from the very first that the prosecution must fail and Mr. Barry Warner, who appeared for the accused, wanted compensation from the

Crown. He could not ask for costs. The Magistrate reserved the point as to compensation for the High Court, and whether or not the Crown can be considered a "complainant" within the meaning of section 162 Criminal Procedure Code which reads as follows:

"If, on the dismissal of any case, any court shall be of opinion that the charge was frivolous or vexatious, such court may order the complainant to pay to the accused person a reasonable sum, as compensation for the trouble and expense to which such person may have been put by reason of such charge, in addition to his costs."

The learned Solicitor-General admitted, if any admission was necessary, that the Crown was the complainant. It is clear, too, that the Crown case was conducted by a Public Prosecutor. "Public Prosecutor" is defined in section 160 (4) Criminal Procedure Code as being any person prosecuting for or on behalf of the Crown or for or on behalf of a Public authority. Section 79 (3) Criminal Procedure Code states that every public prosecutor shall be subject to the express directions of the Attorney-General. "Public Prosecutor" in section 2 Criminal Procedure Code is defined as being any person appointed under section 79 and includes "... any person acting under the directions of the Attorney-General". It could be argued, therefore, that, if there is no definite evidence to the contrary, every prosecution brought by a Public Prosecutor is brought under the wing of the Attorney-General and the facts would have to be very strong to support the view that such a charge was frivolous or vexatious. But here the record shows that the public prosecutor was given definite instructions to prosecute the charge by his superior officer who in turn had been instructed by the Commissioner of Police who again, in turn, had been instructed by a high executive officer of the Government but who was not the Attorney-General nor in the Legal Department. The Public Prosecutor protested that it would be impossible to obtain a conviction but nevertheless he was told to obey orders. It is true that the learned Solicitor-General informed the Court verbally that his department had been asked to advise. Nevertheless the definite orders to prosecute did not emanate from the Legal Department. In view of the fact that the charge for stealing had been quashed, that the accused had been dismissed from Government service, that the public prosecutor had protested against having to bring what he felt was a hopeless case, we consider it was open to the Magistrate to come to the conclusion that it was vexatious to persist in it.

But that by no means disposes of the case. The question has to be answered as to whether the Crown is ever liable to pay compensation.

It is said first that no Ordinance shall in any manner whatsoever affect the rights of the Crown, unless it is therein expressly stated, or unless it appears by necessary implication that the Crown is bound thereby (section 35 Cap. 1). An obvious example of that principle is that the Crown is not fettered in its rights to recover a debt by the Statute of Limitations. But under section 160 Criminal Procedure Code the Crown is not given the right to bring prosecutions without liability for costs. The result amounts to something very similar in that the Court has only

power to award costs against a private prosecutor in a case. But when it comes to section 162 (*vide supra*) the law on the question of compensation is only concerned with the complainant and not with the public or a private prosecutor. It is admitted that in this case the Crown was the complainant. There are no rights of the complainant involved but only a liability to pay compensation. On the matter of costs, the Crown deliberately by implication under section 160 absolved itself from any liability. On the question of compensation under section 162, it has kept silent and we think by necessary implication the Crown as complainant is bound thereby, unless there is something in the section to make such a construction impossible. It is said that the words at the end of section 162 Criminal Procedure Code "in addition to his costs" must mean that compensation can only be awarded in a case where costs can be awarded, and, as costs can only be awarded against a private prosecutor, so only can an order for compensation be made against a private complainant. We do not think so. A private prosecutor and the complainant must be one and the same person, but a public prosecutor and the complainant need not be the same person.

The mere fact that a complainant has persuaded a public prosecutor to take up a frivolous or vexatious prosecution should not absolve him from the liability, to pay compensation. The words "in addition to his costs" are added to the "compensation" section, even as they were added to the "costs" section. The costs awarded under this section may be awarded in addition to any compensation. The effect is to keep costs and compensation distinct. If the Legislature had meant to restrict compensation to a private complainant it would have said so, and the words "in addition to his costs" alone cannot restrict compensation to a private complainant only.

We say "in addition to his costs" means costs and compensation can both be awarded. It is made perfectly clear that those two things are separate. It might well be that an accused person had been put to no expense in costs in successfully defending himself, but he may have suffered loss or injury meriting compensation—or again, he may not have suffered loss or injury but have been put to expense in defending himself by instructing a solicitor or otherwise. The sections make it quite clear that costs and compensation are independent of each other. In this case, it is possible the Magistrate might say that the accused was ordinarily entitled to both costs and compensation but costs cannot be awarded because of section 160 Criminal Procedure Code and so all that is left is compensation under section 162 Criminal Procedure Code.

We therefore answer the question put to us by saying that the Crown can be, and was in this case, a complainant within the meaning of section 162 and that compensation can be awarded against the Crown under the terms of that section.

In conclusion we desire to remark that this case illustrates the desirability for the true complainant to sign the complaint. This matter was commented on by this Court in the cases of *Rex v. Jali Kachimpili*, *Rex v. Smith* and *Rex v. Kempton*, reported at pages 90, 146 and 148, Law Reports for Northern Rhodesia, 1931-1937.