NGOMA v THE PEOPLE (1974) ZR 194 (SC)
SUPREME COURT
DOYLE CJ, BARON DCJ AND GARDNER JS
17th SEPTEMBER 1974
SCZ Judgment No. 30 of 1974

Flynote

Criminal Procedure - Application to withdraw without good reason - Whether magistrate should allow - Easy giving of withdrawals and adjournments - Undesirability.

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Headnote

The appellant was originally charged with rape. Having gone through most of the evidence the prosecution decided that they did not have enough evidence and that two of their witnesses were not present. The prosecutor then applied to withdraw the case.
Held:

(i) An application by a prosecutor to withdraw a case must not be allowed by a magistrate without good and sufficient reason. The easy giving of withdrawals and adjournments adds to the expense of trials, the time they take and clutters up the courts.

P T Banda, Shamwana and Co., for the appellant.
S C Heron, Assistant Senior State Advocate, for the respondent.

Judgment

Doyle CJ: delivered the Judgment of the court: The appellant was charged with the offence of indecent assault and the evidence given was that a woman was accosted by the accused while she was walking near the railway yards and pushed to the ground and in fact raped. During the course of the struggle the appellant is alleged to have stood on her leg and unfortunately broke it. She also had certain scratches. The appellant's defence was not that he did not have intercourse but that it was by consent. If it was by consent, the injuries would not have occurred unless they could plausibly be said to have occurred in some other manner. Clearly as a matter of pure theory injuries of this nature could occur in probably half a dozen different ways. They would certainly occur by a fall, as the doctor said; they could possibly occur from stepping out of a moving motor car. One could think of a lot of ways. But what was in issue in this case was: did she receive these injuries in some manner after the appellant had left her intact. Now if that had happened one would have expected that she would have been properly dressed because according to the appellant nothing untoward had happened after the intercourse except a dispute about payment. In fact she was not properly dressed. Her pants were left on the ground and she had pulled on her trousers without them. She says that she did not fall, and the evidence to our mind, and to the magistrate's mind, which is the important point, supports that. He correctly tried the issue, considered the question, properly considered it, and held that her evidence was true and that there was corroboration. In all of this he was right and in our view there is no way in which this appeal against conviction can be allowed.

I would, however, deal with one other point raised which was by counsel for the appellant, that is that the appellant was originally charged with rape, the offence which should have been charged at all times in this case. Having gone through most of the evidence, the prosecution for some reason best known to themselves decided that they did not have enough evidence and that two of their witnesses were not present. The prosecutor asked to withdraw and in our own view the learned magistrate wrongly exercised his discretion in allowing him to withdraw. He should have told him he must ask for one of two things, either an adjournment or to stand

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on the evidence he had. In fact the evidence he had then was the same as appeared in the second case. However, the magistrate allowed him to withdraw. The prosecution then laid

this other charge of indecent assault why, we do not understand. But what we do wish to point out is that this easy giving of withdrawals and adjournments is adding to the expense of trials, the time they take and is cluttering up the courts. This was a clear case in which the matter should have been decided on the day that it came before the magistrate in the first place. We entirely agree that it was an abuse of process for the prosecution to withdraw in this manner, but it was not one which went to the justice of the case and for that reason we cannot interfere. The appeal against conviction is dismissed.

In fact, counsel has not continued his appeal against sentence. The sentence is in effect; one year's imprisonment and we see nothing wrong with it.

Appeal dismissed