DENIS SIMON SALIMA BWALYA v THE PEOPLE (1979) Z.R. 1 (S.C.)

SUPREME COURT
GARDNER, AND BRUCE-LYLE, JJ.S. AND CULLINAN, A.J.S.
9TH AND 23RD JANUARY, 1979
S.C.Z. JUDGMENT NO. 6 OF 1979

Flynote
Criminal law and procedure -Trial - Magistrate holding private consultation with State Advocate and prosecution witness in absence of accused.
Impropriety of.

Headnote
The appellant was convicted of forgery and theft by public servant. Counsel for the appellant argued that the magistrate had acted unfairly in that he had answered certain questions put forward in a list by the appellant after holding private consultations with the State Advocate and the principal police witness in the absence of the appellant.

Held:
(i) It was improper for the magistrate to make the consultations in the absence of the appellant. In view of the fact that justice was not seen to be done, it could not be said that miscarriage of justice occurred, and the conviction would be quashed.

Cases referred to:
(1) Myburgh v R. (1960) R.&N. 148
(2) R. v Bodmin Justices, [1947] 1 All E.R. 109

For the appellant: C.D.M. Mabutwe, Shamwana & Co.
For the respondent: A.H. Odora Obote, State Advocate.

Judgment

GARDNER, J.S.: delivered the judgment of the Court.

The appellant was convicted of eight counts of forgery and nine counts of theft by public servant, involving a sum of nearly K23,000. The particulars of the offences were that, whilst employed as a sub-accountant by the Government of the Republic of Zambia, he forged bank deposit slips and stole the money in respect thereof and, on the last count, that he directly stole money which came into his hands by virtue of his employment. Mr Mabutwe, on behalf of the appellant, argued amongst other grounds of appeal, that at one stage of the trial the magistrate acted unfairly in that he indicated that he had answered certain questions, which had been put forward in a list by the appellant in conjunction with the State Advocate and the principal police prosecution witness. The facts giving rise to this complaint were these: PW1 who was an internal auditor employed by the Ministry of Finance gave evidence that he had investigated deposits which should have been made

by the appellant and had discovered that a number of such deposits were accounted for on what appeared to him to be forged deposit slips and the money in respect thereof had not been received by the bank. After this witness had been cross-examined and re-examined, the court was informed that PW1 was leaving Government service and was shortly to depart from the country. The learned resident magistrate therefore adjourned the case for mention in four days' time so that the

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appellant could consider the evidence and submit further questions in cross-examination of PW1 prior to the latter's departure abroad. The learned resident magistrate made the following note on the record:

> "Court: Stresses every effort and consideration is being given to accused as he is unrepresented to ensure the ultimate absence of PW1. Both agree to be available at 9 a.m. 8/4/74 to ensure the accused has had every opportunity."

On the 8th of April 1974, PW1 was recalled for further cross-examination and thereafter the learned resident magistrate noted on the record "PW1 accused by consent of accused". On the 25th of April, 1974, the learned resident magistrate's note on the record reads as follows:

> "Court: Firstly and despite all efforts the accused has filed some questions. He filed these when appearing before me on mention 22/4//74. The questions however could be answered by the Court and the State Advocate. The questions and answers are therefore attached to the record. I shall now read these questions and answers annexed hereto . . ."

The questions and answers take the form of questions in the handwriting of the appellant with answers in the handwriting of the learned resident magistrate. The nature of the questions do not concern us but the answers are written as follows: "P1 A Yes. P2 A Yes." In certain cases the answers are "No" and in others the answers appear as follows: "P1 and P2. Other witness will ellaborate", and "P1 and P2 No. other witness will elaborate." It is quite apparent that, when the magistrate, in the answers referred to "P1 and P2", he was referring to PW1 and PW2. Two irregularities therefore appear. In the first place the learned resident magistrate said "The questions however could be answered by the Court and the State Advocate", which means that in order to answer the questions he must have been in private consultation with the State Advocate and, secondly, the reference to P2 is to a Senior Superintendent, the investigating police officer in the case, and, in order to record his answers, that witness must have been present in a private consultation with the magistrate in the absence of the appellant. In the case of *Myburgh v R.* (1), Patterson, C.J., in commenting on the impropriety of a public prosecutor having an interview with the magistrate during an adjournment, referred to the case of R v Bodmin Justices (2), in which Lord Goddard C.J., said at p. 150:

> "The applicant was a soldier and this matter arose out of a disturbance in a barrack room. An officer of the applicant's unit was present in court and was asked to give the man a character. He gave him a character - not a bad character and added that there was a lot more that he could say but he would not say it . . . The justices then retired to consider their sentence, and during their retirement, they sent for the officer and interviewed him in their room. Whether

> the officer stayed in the room for one minute or whether he stayed there for five minutes does not matter. The justices were interviewing a person who had been in court in connection with the case and had given the justices information in connection with the case, and they were interviewing him in

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> their room in the absence of the accused or his advisers. That is a matter which cannot possibly be justified. I am not suggesting for one moment that the justices had any sinister or improper motive in doing it. It may be that they sent for the officer in the interests of the accused. It may be that the information which the officer gave was in the interests of the accused. That does not matter. Time and again this court has said that justice must not only be done but must manifestly be seen to be done and, if justices interview a witness in the absence of the accused, justice is not seen to be done, because the accused does not and cannot know what was said. The consequence of this unfortunate incident is that this conviction must be quashed."

In our view, both cases are in point in this case. It was improper in the first instance for the learned resident magistrate to consult with the State Advocate in the absence of the appellant, and it could have been seriously prejudicial to consult with the principal police witness in the same circumstances. It might be argued that the appellant, when he heard the answers read out, was made aware of the fact that PW2 had been alone with the magistrate in consultation and that thereafter the appellant had an opportunity to cross-examine that witness; but the appellant, and indeed the public, will never be aware of all that was said at the consultation, and the appellant, being unrepresented, was in no position to complain about the procedure.

In new of the fact that justice was not seen to be done, this court cannot say that no miscarriage of justice occurred and, in the circumstances, although, as in the case of the Bodmin Justices (2), we do not suggest that the learned resident magistrate had any sinister or improper motive, we have no alternative but to quash this conviction.

We have considered whether this is an appropriate case in which to order a retrial; but, having regard to the fact that the appellant has already served approximately five years' imprisonment with hard labour of an effective six years and eight months' term of imprisonment, and having regard to the fact that the prosecution witnesses are no longer available in this country, we do not propose to make such an order. The appeal is allowed, the conviction is quashed and the sentence is set aside.

Appeal allowed
