TITO MANYIKA TEPULA v THE PEOPLE (1981) Z.R. 304 (S.C.)

SUPREME COURT
SILINGWE, C.J., BRUCE-LYLE, J.S., AND CULLINAN, AG. J.S.
7TH AUGUST, 1979, 10TH APRIL, 1980 AND 19TH DECEMBER, 1980
(S.C.Z. JUDGMENT NO. 32 OF 1980)

Flynote

Criminal law and procedure - Plea - Retraction - When accused can retract plea.

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Headnote

The appellant pleaded guilty to a charge of stock theft. He accepted as correct a statement of facts as read out by the public prosecutor and was convicted as charged. The case was adjourned to another date for production of a record of previous convictions, if any and for sentence. On the adjourned date, the appellant expressed a wish to change his plea. The court refused to allow him to change his plea and sentenced him. His appeal to the High Court against sentence only was also dismissed. He appealed to the Supreme Court against Conviction.

Held:

(i) A trial judge has a discretion to allow an accused person to retract his plea of guilty at any time before sentence is passed on him.

(ii) The discretion can only be exercised on good and font growth.

Legislation referred to:

Supreme Court Act, ss. 14, 15 (1).

Cases referred to:

(1) Banda (C.K.) v The People (1973) Z.R. 339.
(2) Mulwanda v The People (1974) S.J.Z. 119.
(3) Mulwanda v The People (1976) Z.R. 133.
(4) R. v McNally (1954) Cr. App. R. 90.
(5) R. v Plummer (1902) 2 K.B. 339.
(6) McDonald v R (1959) R. & N. 157.
(7) The People v Zulu (1965) Z.R. 75.
(8) R. v Sell 9 C. & P. 348.
(9) Nalishwa v The People (1972) Z.R. 26.

For the appellant: Mrs F.N. Mumba, Director of Legal Aid.
For the respondent: R. Balachandran, State Advocate.

Judgment

SILUNGWE, C.J.: delivered the judgment of the court.

On August 25th, 1978, the appellant appeared before a resident magistrate charged with stock theft. He pleaded guilty and was, after he accepted as correct a statement of facts read out by the public prosecutor, convicted as charged. The case was then adjourned to October 10th, 1978 for production of a record of previous convictions, if any, and for sentence.

On the adjourned date the appellant asked the court to have the charge re-read, and when this was done he said: "I understand the charge, I deny it", whereupon the public prosecutor drew attention to the fact that the appellant had already been convicted. The appellant, he continued, had expressed a wish to change his plea after the court had been informed that he bad a previous conviction (for a similar offence which made him liable to a statutory minimum sentence of imprisonment for seven years). He then pointed out that if the appellant so wished he could appeal (against conviction). The learned resident magistrate agreed with

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the public prosecutor saying that she had thought that a statement of facts was to be presented on that day. The court refused to allow the appellant to change his plea, and as he had a previous conviction for stock theft, he received the statutory minimum sentence. He appealed to the High Court against sentence only but the appeal was dismissed no appeal lies against a statutory minimum sentence. He now appeals to this court against conviction.

Two issues arise in this case. The first is whether an appellant who has not appealed to the High Court against conviction but only against sentence may appeal against conviction to the Supreme Court; and the second is whether it is competent for trial court to refuse to allow an accused person leave to retract his plea of guilty before sentence is passed on him.

The first issue was not even alluded to when the appeal was initially argued before this court - it was recognised for the first time during the course of delivering a judgment that turned solely on the second issue. The result of this was immediately to defer the delivery of the judgment and to adjourn the case so as to give an opportunity to counsel on both sides to argue the question of jurisdiction that had just arisen. The provisions 20 of s. 14 of the Supreme Court Act, and the cases of *Banda (C.K.) v The People*, (1) and *Mulwanda v The People*, (2) and (3) were drawn to the attention of counsel. Further argument was duly received in open court.

It would be appropriate to consider the decisions in the above cases if we were dealing with an appeal on the facts. We observe however that, as will be seen, the conviction is a nullity: the sentence based thereon is also a nullity. We entertain jurisdiction, therefore, to deal with the matter.

Mrs Mumba, the learned Director of Legal Aid, submitted that the learned magistrate erred in law by her refusal to allow the appellant to change his plea, or at least to afford him an opportunity to explain why he wished to change that plea before sentence was passed on him, whereas the public prosecutor was permitted to express resistance to the appellant's obvious intention to change the plea. She cited *R. v McNally* (4) in support of her submission. The learned State Advocate, Mr Balachandran, did not support the conviction adding that the trial court had not exercised its proper

discretion in the matter.

It is trite law that a judge may, in his discretion, allow an accused person to retract his plea of guilty at any time before sentence is passed on him.

In the judgment of Wright, J., in *R v Plummer* (5) the following passage appears at page 347:

> "Another point is raised in this case, namely, whether the court had power to allow the appellant to withdraw his plea of guilty. There cannot be any doubt that the court had such power at any time before, though not after, judgment."

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This was approved by Lord Goddard, C.J., in *McNally* (4) where he said it was entirely a matter of discretion for a judge to allow an accused to withdraw his plot before judgment on grounds which he considers to be sufficient. *McNally* (4) was a case in which the appellant had been convicted along with four others, only one of whom - Stubbs - pleaded not guilty. The appellant's plea was unequivocal and so he was convicted together with two other co-accused but the question of sentence was deferred pending the trial of Stubbs. Following Stubbs' trial and conviction, all four accused were then brought up for sentence. At that stage of the proceedings, the appellant expressed a wish to change his plea but gave no reasons for that change of mind nor was he asked by the judge on what grounds he wanted to do so. The judge refused to allow the plea to be withdrawn and said that the appellant was only trying to make a nuisance of himself: he had been caught red-headed in a factory by the police; he did not even pretend he had the defence. The appellant appealed to the Court of Appeal but met with no success there. Lord Goddard, C.J., delivering the judgment of the court, said at page 94:

> "It is perfectly obvious that finding heavier sentences were being given than he expected, he wanted, as the learned judge said, to cause trouble, but we cannot say here that the learned judge did not exercise his discretion. He heard the whole of the facts before him and he could see that there was no ground for withdrawing the plea.The court desires to say this: The question whether a plea is to be withdrawn or not is entirely a matter for the learned judge. The judge is not bound to allow it to be withdrawn. If he came to the conclusion that there was a question of mistake or misunderstanding or that it would be desirable on any ground that the prisoner should be allowed to join issue, no doubt be would allow him to do it."

McNally (4) was followed in this country by Windham and Dennison, JJ., in *MacDonald v R.* (6) and The *People v Zulu* (7), respectively. In, *MacDonald* (6), Windham, J., said that the magistrate had a discretion to allow the accused to withdraw his plea of guilty at any time before passing sentence, and that judgment had not been concluded without passing sentence within section 158 (2) of the Criminal Procedure Code (which is now section 169 (2) of the Code). The subsection reads as follows:

> "(2) In the case of a conviction, the judgment shall specify the offence of which and the section of the Penal Code or other written law under which the accused person is convicted,

and the punishment to which he is sentenced."

R. v Sell (8) is an English authority for saying that once sentence has been pronounced there is no power in the court to allow a plea to be withdrawn. The law is the same in this country.

On the authorities cited the law may be summarised as follows: a trial judge has a discretion to allow an accused person to retract his plea of guilty any time before sentence is passed on him. But the discretion

can only be exercised on good and sufficient grounds as, for instance, where it subsequently transpires that a plea of guilty is equivocal; where an unequivocal plea of guilty has properly been entered but a statement of facts is disputed in a material particular; where there has been a mistake or misapprehension on the part of the accused; or where it would be desirable on any other good and sufficient grounds to allow the plea to be retracted. Before exercising the discretion, it is desirable to ask the accused why, or on what grounds, he wishes to withdraw his plea.

In McNally (4), as in the present case, the appellant had not been asked on what grounds he wanted to withdraw his plea. *McNally* (4) is, however, to be distinguished in that there, the exercise of the court's discretion appears to have been present in the judge's mind and it was exercised judicially. In the instant case, however, it cannot conceivably be said, or at least be implied, that the magistrate did address her attention to the exercise of her discretion in the matter. She simply was under the mistaken view that the appellant had not yet been convicted but she was made to appreciate that conviction had in fact already been recorded, she resigned herself to perform the function for which the case had previously been adjourned, namely, to hear a record of previous convictions, if any, and to ultimately pass sentence. Her failure to permit the appellant to say why, or on what grounds, he wished to change his plea after the public prosecutor had made his submission resisting the appellant's change of plea, was improper. The fatal impropriety, however, was the magistrate's failure to exercise her discretion. We wish to stress what we said in *Nalishuwa v The People* (9), viz., that a court's failure to consider the matter of its discretion constitutes a serious misdirection. Since it is not possible to say in whose favour the magistrate may have exercised her discretion in the matter, we cannot apply the proviso to section 15 (1) of the Supreme Court Act.

The appeal is allowed. The conviction is quashed and the sentence set aside. As a charge of the kind, in the circumstances, attracts the minimum sentence of seven years' imprisonment, we are of the view that justice will be done in this case by ordering a re-trial before a court of competent jurisdiction, and we so order.

Re-trial ordered
