

LIYONGILE MUZWANOLO v THE PEOPLE (1986) Z.R. 46 (S.C.)

SUPREME COURT
CHOMBA, AG. C.J., GARDNER, J.S., AND CHAILA, AG. J.S.
20TH MAY, 1986
(S.C.Z. JUDGMENT NO.11 OF 1986)

Flynote
Criminal law and procedure - Fiat (consent) of D.P.P.
Where required by statute - Failure to obtain - Effect of.

Headnote
The appellant was convicted of official corruption contrary to section 94(a) of the Penal Code. Consent of the DPP was not obtained for the prosecution as required by section 43 of the Corrupt Practices Act.

Held:

Where consent by the DPP before any prosecution is a statutory requirement and the matter goes to jurisdiction without such consent the trial is a nullity.

Cases referred to:

- (1) Clarke v The People (1973) Z.R. 179
(2) R. v Bates 6 Cr. App. R 153

Legislation referred to:

Corrupt Practices Act, No. 14: of 1980, s. 43

For the appellant: M.W. Mwisya, Mwisya and Co.
For the respondent: A.B. Munthali, State Advocate.

Judgment
GARDNER, J.S.: Delivered the judgment of the court.

The appellant was convicted of official corruption contrary to section 94 (a) of the Penal Code; the particulars of the offence being that on the 2nd day of May, 1983, at Sesheke, being a person employed in the Public Service, namely in the Department of National Parks and Wildlife as a hunter scout, by virtue of being such a hunter scout corruptly received one cow for himself from one Siulu on account of a prosecution pending against the said Siulu who was alleged to have committed the offence of using snares for hunting game animals.

This offence was committed after the Corrupt Practices Act 1980 came into force on the 14th December, 1982. In consequence the provisions of section 64(2) of that Act apply. These provisions are as follows:

"Notwithstanding the repeal of the said sections of the Penal Code any offence relating to corrupt practices committed by any person under any of the repealed provisions or of any written law shall be deemed to be an offence committed under this Act."

Section 94 of the Penal Code is one of the repealed provisions, consequently this prosecution should have been prosecuted under the Corrupt Practices Act, and section 43 of that Act applies.
Section 43

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provides that no prosecution for an offence under Part IV of the Act shall be instituted except by or with the written consent of the Director of Public Prosecutions. The offence under section 25, which corresponds to section 94(a) of the Penal Code, refers to corrupt practices by public officers and comes within Part IV of the Act. Therefore, as Mr Mwisya has pointed out and as Mr Munthali on behalf of the State has very properly conceded, there should have been a fiat from the Director of Prosecutions before this prosecution could be instituted. There was no such fiat in this case.

In the case of *Clarke v The People* (1), this court held that, for the purpose of Section 14 of the State Security Act which requires the consent of the Director of Prosecutions before a prosecution, the obtaining of such consent is mandatory and the matter goes to jurisdiction. We referred in that case to the case of *R v Bates* (2) in which the Lord Chief Justice said:

"We are of opinion that the absence of the consent of the Attorney-General takes away the jurisdiction of the court."

We confirm that view and, although our comments in the *Clarke* case were obiter dicta, because, in that case, the Director of Public Prosecutions had implied his consent by signing the charge sheet, we agree that in the absence of the consent of the Director of Public Prosecutions, where it is a statutory requirement before any prosecution, the matter goes to jurisdiction and if there is no such consent the trial is a nullity; as it was in this case.

The appeal is allowed, the conviction is quashed and the sentence is set aside. In view of the fact that the appellant has already served two years imprisonment with hard labour under the sentence imposed upon him, we do not consider that this is an appropriate case for us to order a retrial.

Appeal allowed.
