

COSMAS BALA MAMBWE v THE PEOPLE (1987) Z.R. 11 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., CHOMBA AND GARDNER, JJ.S.
(S.C.Z. JUDGMENT) NO. 17 OF 1987

Flynote

Criminal Law and procedure - Section 250(b) of Penal Code - "any person" - Interpretation thereof.
Criminal Law and procedure - Conviction - Particulars - Substitution of by Supreme court.
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Headnote

The appellant who was a police officer appealed against both conviction and sentence for the offence of assault on a fellow police man in the due execution of his duties contrary to section 250(b) of the Penal Code. The grounds of appeal were that:

- (a) as a police officer himself he was not liable to be charged under Section 250(b) of the Penal Code but that the charge against him should have been one of a disciplinary nature under section 30 (i) (iv) of the Zambia Police Act, Cap. 133.
- (b) at the time of the assault, the complaint was not executing duties as a police officer.

Held:

- (i) The term "any person" in section 250(b) of the Penal Code does not include police officers.
- (ii) In accordance with the provisions of section 15(3) of the Supreme Court Act it is competent for the court to substitute a conviction under section 247 of the Penal Code in place of the conviction on the charge as originally framed.

Legislation referred to:

Penal Code, Cap. 146 ss. 247, 250 (b)

Criminal Procedure Code, Cap. 160 s. 181 (i)

Supreme Court Act, Cap. 52 s. 15 (3)

Zambia Police Act, Cap. 133 ss. 26 (i) (g), 30 (i) (b) (iv)

Interpretation and General Provisions Act, Cap. 2 s. 41 (i)

For the appellant: In person .

For the respondent: C.K. Chanda, Senior State Advocate

Judgment

CHOMBA, J.S.: delivered the judgment of the court.

The appellant in this case was convicted of the offence of assault on a police officer in the due execution of his duty, contrary to Section 250(b) Cap.146 of the Laws and was in consequence sentenced to a fine of K100.00 or, in default of paying such fine, to imprisonment for one hundred days. He appeals against both conviction and sentence. When he filed his grounds of appeal he raised a number of issues but when he appeared before us he relied on the following grounds:

- (1) That as a police officer himself he was not liable to be charged under Section 250(b) Cap. 146 but that the charge against him should have been one of a disciplinary nature under Section 30(1) (b) (iv) of the Zambia Police Act, Cap. 133.
- (2) That at the time of the assault, the complainant was not executing duties as a police officer.

Before dealing with the submissions made in support of the grounds of appeal, we shall set out, in summary, the evidence that was adduced at the appellant's trial. On 13th December, 1983 the appellant, a constable in the Zambia Police, was in a shift which was due to commence duty at 2400 hours and to knock off at 0800 hours of the following day. The practice was that constables on duty in that shift had to parade at 2340 hours so that an inspection could be undertaken before commencement of duty. On that date the appellant was one of three or four other constables who paraded as indicated. Inspector Julius Jason Banda,

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PW1 arrived before the time of commencement of the shift, and on noticing the appellant on the parade, the inspector asked him why he did not report for duty the previous day. The appellant's colleagues at the time, namely, Constable Alexander Makumba, PW2, and Constable Patson Siulapwa, PW3, said that in reply the appellant complained that Inspector Banda was being unfair by asking why the appellant did not report for duty. The appellant said that someone ought to have been sent to his home to wake him up so that he could report on duty as was the case when other constables failed to report on time. Makumba and Siulapwa said that in reply Inspector Banda stated that it was not his duty to do what the appellant was suggesting. Tempers flared and a quarrel ensued between the two. In the process the appellant became abusive, calling the complainant a wizard and stupid person. The complainant ordered the appellant to go back home there and then. The appellant left the parade but only lingered around contemptuously. Inspector Banda advanced towards the appellant and ordered him to disappear. Thereupon the appellant struck the inspector a blow on the left ear. The inspector did not hit back. A medical examination conducted later on the inspector showed that he had suffered a traumatic perforation of the membrane in that ear.

The appellant in arguing his appeal contended that as he was a police officer and was dressed in police uniform at the material time, he was not liable to be charged under Section 250(b) of the Penal Code, Cap. 146. He submitted that that section was intended for the protection of police officers against members of the public when the police officers are executing their duties as such. He referred the court to the provisions of Section 30(1) (b) (iv) of the Zambia Police Act, Cap. 133 and argued that his conduct related to a matter of discipline in the Zambia Police Force and, therefore, that he should have been made to appear before a disciplinary tribunal in accordance with that section. In so far as the second ground is concerned, the appellant's contention was that, as the shift was due to commence at 2400 hours, and, since the assault complained of took place before that hour, the complainant, Inspector Banda, was not at that time executing duties as a police officer.

Mr C. K. Chanda, appearing for the State, intimated that he did not support the conviction because he conceded the appellant's submission that at the material time the complainant was not on duty. He further conceded that Section 250(b) of the Penal Code was intended for the protection of police officers against members of the public so that a police officer who assaults another, even though

that other police officer is executing his duty, is not liable to be charged under that section. Mr. Chanda submitted that he would have supported the conviction if the charge was either one of assault or unlawful wounding. He said he did not agree with the appellant's contention that, because Cap. 133 contained a provision dealing with disciplinary matters among police officers, that meant that all other penal laws were ousted when a police officer committed an assault against another police officer.

When given the right of reply after Mr Chanda's submissions, the appellant stated that if the court was minded to convict him of the reduced charge of common assault, he would submit that the court was incompetent to so convict him as he was not alerted at the time of his trial of the possibility of such alternative conviction. Because of that he did not adduce evidence which might have been a defence to such alternative charge.

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In the light of the submissions made on both sides, it is necessary to reproduce the provisions of Section 30(1) (b) (iv) of Cap. 133 and Section 250(b) of Cap. 146. The former states "Any police officer below the rank of Assistant Superintendent commits an offence against discipline if he is guilty of insubordination or oppressive conduct, that is to say, if he assaults any other police officer. " The latter provides "Any person who assaults, resists or wilfully obstructs any police officer in the due execution of his duty, or any person acting in aid of such officer is guilty of a misdemeanour and is liable to imprisonment for five years."

It is interesting to note that the Zambia Police Act, Cap. 133, has a provision somewhat similar to that of Section 250 (b) of Cap. 146. Section 26 (1) (g) states "Any police officer who strikes or offers violence to his superior, such officer being in the execution of duty, shall be guilty of an offence and shall be liable on conviction before a court of criminal jurisdiction to imprisonment for one year." It appears to us that if the expression "Any person" in Section 250 (b) of Cap. 146 was intended by the legislature to include police officers, there would have been no need to make a similar provision under Cap. 133 to deal with a police officer who assaults another police officer when the latter officer is executing duty. The fact that there is this provision in Cap. 133 to cater for cases of police officers assaulting other police officers who are executing duties tends to support the contention of the appellant that Section 250 (b) of the Penal Code was designed to protect police officers against members of the public. We accept this contention and, therefore, find that the term "Any person" in Section 250 (b) Cap. 146 does not include police officers. We, therefore, accept the appellant's contention that since he was at the material time a police officer, just as the complainant was, The appellant was not liable to be prosecuted under Section 250(b) of the Penal Code. We consequently hold that it was not competent for the learned trial magistrate to convict the appellant as charged. We quash that conviction and set the sentence aside.

In regard to the contention by the appellant that, as a person subject to the provisions of the Zambia Police Act Cap. 133 in reference to the offence reviewed, he was not liable to be charged under any other statute, we hold that that view is unacceptable. Section 41(i) of the Interpretation and General Provisions Act, Cap. 2 of the Laws of Zambia, provides: "Where an act or omission constitutes an offence against any two or more statutory enactments or both under a statutory enactment and the Common Law or any customary law, the offender shall be liable to be prosecuted

and punished under either or any such statutory enactment or any Common Law or under customary law, but shall not be liable to be punished twice for the same offence." The act of the appellant giving rise to this case was clearly an assault. The appellant, in making his submission before us did not make any attempt to deny that he assaulted the complainant. He, however, sought to plead self-defence, but that plea was made feebly. The defence of self-defence is used, where it is applicable, to justify conduct which would otherwise be an offence. In this case the evidence against the appellant was overwhelming. It consists of not only the complainant's assertions, but also those of Constables Makumba and Siulapwa, PW2 and PW3 respectively. That evidence clearly showed the appellant as the aggressor. The purported defence of self-defence sought to be put forward at the belated stage, namely, when the appellant was making submissions before us, cannot be sustained.

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The question is whether it is competent for this court to substitute a conviction for common assault in place of one for which we have acquitted the appellant. Section 15(3) of the Supreme Court of Zambia Act, Cap. 52, provides as follows: "On any appeal whether against conviction or sentence, the court may substitute a judgment of guilty of such other offence as the trial court could have entered, and, in the case of an appeal from a judgment of the High Court in its appellate jurisdiction, the court shall in addition have power to restore the conviction of the trial court."

By the provisions of Section 181(i) of the Criminal Procedure Code, Cap. 160, it was competent for the trial court in this case to have convicted the appellant of the offence of common assault, contrary to Section 247 of the Penal Code. Section 181(i) states "When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it."

In the instant case, the facts relating to common assault were clearly proved, but as we have determined earlier in this judgment that police officers are not included in the term "any person" occurring in Section 250(b) of Cap. 146, there was a failure to prove that aspect of the offence charged. Therefore, in accordance with the provisions of Section 15(3) of Cap. 52 it is competent for this court to substitute a conviction under Section 247 of Cap. 146 in place of the conviction on the charge as originally framed. We, accordingly, substitute that conviction.

In the light of this outcome it becomes a matter only of academic interest to discuss the ground relating to the question whether or not the complainant, namely Inspector Banda, was at the material time in due execution of his duty. As regards the sentence we are of the view that a proper sentence in this case is one of K50 fine or in default one month simple imprisonment.

Appeal allowed
Conviction Substituted
