THE DIRECTOR OF PUBLIC PROSECUTIONS v DERRICK MUHAU SIKATEMA & 5 OTHERS (1987) Z.R. 90 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA, JJ.S.
20TH OCTOBER ,1987.
(S.C.Z. JUDGMENT NO. 27 OF 1987)

Flynote
Criminal Law and Procedure - Adjournment - Application by Prosecution - Factors to be taken into account in exercise of court's discretion.

p91

Criminal Law and procedure - Trial - Verdict - Failure to enter before passing order of conviction or acquittal - Whether a nullity.

Headnote
The respondents were charged with aggravated robbery. After the State had called a number of witnesses and had only two witnesses remaining, the High Court commissioner acquitted the respondents because the state advocate prosecuting the case did not attend at the continued hearing. The D.P.P. appealed.

Held:
(i) Before a conviction or an acquittal can be recorded there must be a verdict which must be returned by the trial court. Therefore, an acquittal in the absence of such a verdict is a nullity. (D.P.P. v Siwale followed).
(ii) The discretion which the courts enjoy in matters of granting or refusing to grant adjournments must be exercised in such a way that the broader interests of justice are served. (D.P.P. v Whitehead followed).

Cases cited:
(1) D.P.P. v Siwale (1981) Z.R. 71
(2) D.P.P. v Whitehead (1977) Z.R. 181

For the appellant: N. Sivakumaran, Assistant Senior State Advocate,
For the respondents: C. P. Sakala, Acting Director of Legal Aid.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court.

This is an appeal brought by the Director of Public Prosecutions in terms of section 12(3) of Cap. 52. The Director has appealed following upon the decision by a High Court commissioner when, after the State had called a number of witnesses and had only two witnesses remaining, the respondents were acquitted because the State advocate prosecuting the case did not attend at the

continued hearing. The history of the case shows that the respondents were charged on a count of aggravated robbery. The particulars of which alleged that on 24th February, 1985, at Lusaka, jointly and whilst acting together and whilst armed with an offensive weapon, they did steal a motor vehicle from the complainant named in the charge. The trial commenced before the High Court commissioner and it was adjourned on various occasions for various reasons either at the instance of the prosecutor or at the instance of the court itself. It also so happened that meanwhile, the learned High Court commissioner was posted to Kitwe and had to make special arrangements to travel to Lusaka to complete the hearing of the various cases which were pending before him while he was at Lusaka. In this particular case, the trial was on a previous occasion not adjourned to any particular day and when the court was able to travel to Lusaka a notice of hearing was dispatched to the parties for the trial to resume on the 14th of September, 1987. The learned state advocate who was seized of the matter then wrote a letter to the court in which he sought an adjournment on the grounds that on that day he would be away in Livingstone to attend to other court work. On the day appointed for the resumption of the trial, a different state advocate attended and applied for an adjournment on behalf of the state advocate who had gone to Livingstone. It transpired also that the State Advocate in Livingstone was appearing before a Subordinate court. Quite clearly, the learned trial commissioner took offence at the apparent discourtesy shown to his court which was a superior court in relation to the subordinate court and, after

expressing his displeasure against the conduct of the state advocate who had gone to Livingstone, he considered that the state was not prepared to prosecute the case and thereupon dismissed the charge and acquitted the six respondents.

On behalf of the Director of Public Prosecutions, Mr Sivakumaran has argued basically two grounds of appeal. Under the first ground, it was submitted that the conduct of the state advocate who had absented himself had been misunderstood and that no discourtesy, let alone contempt of court, was intended. It was also pointed out that the learned trial commissioner could have adopted several other alternative courses instead of the one which is complained. The second ground of appeal, which was the substantial one, was to the effect that the acquittal registered in this case must be regarded as a nullity since no verdict was entered on the evidence as it then stood in the trial. The learned Assistant Senior State Advocate relies on the case of *D.P.P. v Siwale* (1).

On behalf of the respondents, Mr Sakala handed in some written representations which the respondents have made to the effect that the acquittal registered should be accorded finality and that they should not be imperilled again by going through another trial. In answer to the last point raised by the respondents, we wish to point out that Article 20(5) of the Constitution on which they rely specifically permits a superior court, such as this one, to interfere with an order of acquittal and to order that an accused person be tried again. The learned acting Director of Legal Aid has quite properly indicated that he is unable to resist the argument based on *Siwale* (1) but urges that rather than ordering a retrial, as was done in *Siwale* (1) this court should direct that the trial continue before the learned trial commissioner.

We have given very careful consideration to the issues raised in this appeal and in particular, without repeating ourselves, we wish to draw attention to the guidelines which we gave on the

question of the grant or refusal of adjournments in criminal cases in the case of *D.P.P. v Whitehead* (2). In this particular case, we appreciate what prompted the learned trial commissioner to take offence when counsel chose to proceed to Livingstone instead of giving preference to the superior court. We sympathise with the learned trial commissioner more especially that he had to travel specially from Kitwe to Lusaka to attend to this case. However, we do have to agree that the discretion which the courts enjoy in matters of granting or refusing to grant adjournments must be exercised in such away that the broader interests of justice are served. We agree with the observation by Mr. Sivakumaran that there were a number of other ways in which the learned trial commissioner could have proceeded with the matter. For example, he could have transferred the matter to Kitwe for continued trial there; or he could have insisted that the state advocate who had attended take up the conduct of the prosecution and complete the trial. The important point in this case, however, is that the acquittals were recorded in the absence of any verdict. We repeat what we said in the *Siwale* case that before a conviction or an acquittal can be recorded there must be a verdict which must be returned by the trial court. We repeat what we said in that case that an acquittal in the absence of such a verdict, (which would have been based on the evidence adduced by the prosecution and on the assumption that the prosecution were tendering no further evidence), can only be regarded as a nullity.

We wish to take this opportunity to rephrase what we had said in *Siwale,* when we said that the acquittal in the absence of a verdict rendered the trial a nullity, to say that

the better expression would be that the acquittal itself, rather than the trial, is a nullity. We find that in this particular case the acquittal of the respondents was a nullity and being the case, we allow the Director's appeal, we set aside the order of acquittal and direct that the trial shall continue before the same learned High Court Commissioner and that the prosecution will be allowed to call their remaining witnesses and the trial finalised in the normal manner.

Appeal allowed
