DIRECTOR OF PUBLIC PROSECUTIONS v JACK LWENGA (1983) Z.R. 37
(H.C.)

HIGH COURT
MUMBA ,J.
2ND FEBRUARY, 1983
(HNA. 97/1982)

Flynote
Civil Procedure - Appeal - Abandoned appeal - Restoration of.
Civil Procedure - Appeal - Abandoned appeal - Fundamental mistake - what amounts to.

Headnote
The D.P.P. had originally appealed against a decision of a subordinate court, awarding costs against the state, after finding the accused without a case to answer on a criminal charge. The state advocate in attendance made an application to abandon the appeal on the grounds that there was no evidence proving that the accused committed the offence in question. Five months later the state applied to restore the appeal.

Held:
(i) An appeal abandoned under a fundamental mistake may be restored if sufficient facts are brought before the court to show that the abandonment was a nullity.
(ii) The abandonment of the appeal against the award of costs was made under a fundamental mistake that the appeal was against acquittal as opposed to an award of costs, and it was only just, that the appeal be restored.

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Cases cited:
(1) The People v Sikatana (1982) Z.R. 155.
(2) R .v Munisony [1975], 1 All E.R 910.
(3) R. v Medway [1976], 1 All E.R 527.

Legislation referred to:
Supreme Court Rules, Cap. 52, r. 33 (1)

For this appellant: J. M. Mwiinga, Senior State Advocate,
For the respondent: No appearance,

Judgment
MUMBA, J.,

The accused was taken before Subordinate Court of the First Class at Chingola presided over by

Resident Magistrate. He was charged with being in possession of property reasonably suspected to have been stolen or unlawfully obtained contrary to section 319 (a) of the Penal Code. The accused pleaded not guilty. The case was set down for trial and prosecution witnesses were called. At the close of the prosecutions case, the court Fund and ruled that the accused had no case to answer and the court acquitted him. I have no quarrel with that decision because, as found by the learned Resident Magistrate, there was no evidence upon which the accused would be called upon to defend himself.

After that acquittal, the learned Resident Magistrate made observations on how the Police behaved and in the end concluded by saying:

> "This is a fit case in my view to invoke s. 172 (2) Cap. 160. I order costs against the State. In all fairness and considering that I am ordering exh. P1 and 2 back to accused s. 355 (3) Cap.160 accused be awarded K200 out of Public Revenue."

The Director of Public Prosecutions appealed against that decision of awarding costs against the State. The appeal came before me on June 18, 1982 but because the Respondent was absent, I adjourned the appeal to the next Appeal Sessions which appeal, came on August 18, 1982.

On June 18, 1982, the Senior State Advocate was to argue the Appeal.

On August 18, 1982, a State Advocate attended to this appeal. On August 28, the court marshal informed the court, that he had received a note from Messrs Cave Malik and Co. representing the respondent in which they were asking for an adjournment to another date.

On hearing this the State Advocate said:

> "In any case the State was making an application to abandon the appeal."

The State Advocate gave reasons for the stand he took and said that there was no evidence proving that the accused committed that offence.

On the State's application to abandon the appeal, I then said:

> "The State has given its reason for abandoning this appeal, the appeal is therefore abandoned and the appeal is dismissed."

Five months later, the State came back to this court with an ex-parte summons to restore the appeal. The application was argued by the learned

Senior State Advocate. His main contention was that the abandonment of the appeal by the State Advocate was wrong because the abandonment of the appeal related to the acquittal of the accused on the whole evidence and not an appeal against order for costs against the State. I indeed heard the argument advanced by the Learned Senior State Advocate. But my difficulty in this appeal was compounded by the fact that in coming to make the order, I used the word "*dismissed.*" I told the

learned Senior State Advocate that by the use of the word 'dismissed' I excluded myself from reopening the appeal because I was now functus officio. Knowing fully well that the appeal by the State if argued would succeed with the abundance of authorities against the decision made by the learned Resident Magistrate, I referred the matter to the Supreme Court to undo my decision. I had in so doing in fact overlooked the importance of that Court's decision in *The People v Sikatana,* (1). The case record was sent back to me and the Supreme Court advised me to determine the application as presented to me. The problem presented by the application by the State is made much more difficult because in the High Court Rules, there is no relevant rule dealing with abandoned appeals. In the Supreme Court, such a provision is there, Rule thirty-three of the Supreme Court Rules, Cap. 52 says:

> "An appellant at any time after he has lodged notice of intention to appeal or notice of application for leave to appeal or for an extension of time within which such notice shall be given, may abandon his appeal or application by giving notice thereof to the Master substantially in Form CRIM/5 of the Third Schedule and upon such notice being given, the appeal or application shall without further order be deemed to have been dismissed or refused by the court."

In the Supreme Court, it is set out in clear terms that once an appeal, (as was the case here) is abandoned the appeal will be considered dismissed.When I dismissed the appeal by the State, I did not refer myself to any provisions of the law under the High Court Rules because as we have seen there is no such a provision. It therefore follows that I used the inherent powers that a court has when it dismisses any action or matter. That dismissal in fact brings the matter to an end. The axiom is "res judicata proveritate accipitur." In the case of *R v Munisamu* (2) it was said:

> "An appellant, cannot, in the strict sense ,withdraw a notice of abandonment of an appeal against conviction or sentence, what he can do is to put before the court sufficient facts to satisfy the court that the abandonment was a nullity. Where the appellant has been given bad legal advice the court will only treat his notice of abandonment asa nullity if it is satisfied that, in consequence of the advice, the appellant was acting under a fundamental mistake when he purported to give the notice."

See also *R .v Medway* (3)

The learned Senior State Advocate argued that the State Advocate who gave notice of abandonment of the appeal against the order for costs

mistook the appeal to be one against the acquittal of the accused on the evidence that was led before the learned Resident Magistrate. According to the cited cases, if I am satisfied that the State Advocate acted under a fundamental mistake, I can nonetheless restore the abandoned appeal.

I have browsed in nearly every law report in our Zambian reports, and I have found no decision on this point. It is a unique situation, I find myself in. It is common knowledge that English decisions are not binding on me but are of greater persuasion. I have talked of my being functus officio and

the axiom res judicata pro veritate accipitur at the same time, I should also borrow the wise words from the 1976 Criminal Law Review:

> "The interests of justice are not always necessarily synonymous with the interests of the accused person. A judge's task is to hold the scales of justice impartially and to see that justice is done evenly and impartially between the State and the accused person."

It therefore behoves me to say that although I dismissed this appeal the abandonment of the appeal against the award of costs was made under fundamental mistake that the appeal was against acquittal as opposed to an award of costs, justice will be seen to be done to both parties if I restored the appeal. The appeal is hereby restored.

Appeal restored

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