

THE PEOPLE v NELSON MBEWE (1980) Z.R. 246 (H.C.)

HIGH COURT
KAKAD, COMMISSIONER.
11TH JULY, 1980
HPR/250/80

Flynote

Criminal law and procedure - Insanity - Defence of - Procedure to be followed - Criminal procedure Code, Cap. 160, ss. 161 (2) (b) and 167.

Headnote

The accused was charged in the subordinate court with malicious damage to property. He pleaded insanity. The magistrate after hearing the evidence of both sides and determining that the accused was at the time suffering from a mental illness held that the evidence as it stood justified a conviction. He ordered the accused to be detained under the President's pleasure pursuant to s. 162 (2) (b) of Cap. 160 subject to confirmation by the High Court.

Held:

- (i) The proper findings should have been that on the evidence as it stood it would justify a special finding under s. 167 of the Criminal Procedure Code, Cap. 160.

Cases referred to:

(1) Mbaye v The People (1975) Z.R. 74.

Legislation referred to:

Criminal Procedure Code, Cap. 160 ss. 161, (2) (b) and 167.

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KAKAD

Commissioner

The accused Nelson Mbewe was charged, in the subordinate court of first class at Chipata, with malicious damage to property.

Judgment

KAKAD, COMMISSIONER:

On 21st April, 1980, the accused when before the court for plea pleaded:

"I understand the charge and I admit it I did damage one tape recorder for my young brother. I damaged it because of the troubles I usually have with the complainant and because of my mental illness and I did not realise what I was doing until when I was taken to the Police Station."

Thereupon the learned magistrate ordered the accused to be medically examined to ascertain his

mental condition and adjourned the case to 30th. April, 1980.

On 30th April, 1980, the accused was before the court. A medical report dated 23rd April, 1980, was produced. In the doctor's opinion the accused was suffering from chronic psychotic mental illness and therefore was unfit to stand trial. Consequently the learned magistrate found the accused incapable of making a defence, entered a plea of not guilty and proceeded to deal with the accused under the provisions of s. 161 (1) of the Criminal Procedure Code.

The learned magistrate after hearing the evidence for the prosecution and the evidence for the accused determined that the accused at the time was suffering from a mental illness and that he was so suffering at the time he damaged the tape recorder. The relevant part of the learned Magistrate's finding reads:

"From the foregoing evidence, I find as a fact that the accused did damage the exhibited tape recorder on 18th April, 1980, and that he did so by smashing it with a hoe. I also find as a fact that the accused suffers from a mental illness and that he was suffering from the illness at the time he damaged the tape recorder. I am satisfied that the evidence as it stands, would justify a conviction. In accordance with Section 162 (2) (b) of Cap. 160, I order that the accused be detained under the President's Pleasure, subject to confirmation by the High Court."

The learned magistrate's finding was that on the evidence before the court there was evidence to justify the accused's conviction. The case was submitted to me for confirmation of the order of detention during the President's pleasure as required to be confirmed under s. 162 (1) (a) of Cap. 160. On reading the evidence on record I consider that the learned magistrate's finding that the accused's conviction was justified, was not supported by the evidence and therefore erroneous. I set down the case for review in open court. In the opinion of the learned Senior State Advocate, the trial was a nullity because the magistrate had failed to adhere strictly to the provisions of s.161 of Cap. 160. These views were supported by the learned legal aid counsel for the accused.

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KAKAD Commissioner

At one stage I had entertained similar views as expressed by learned counsel. However after having carefully examined the provisions under ss. 160 and 161 of the Criminal Procedure Code, Cap. 160, and having perused the Supreme Court judgment in *Mbaye v The People* (1) at p. 77, I find that the procedure and the steps followed by the learned magistrate in this case were proper and in strict compliance with the above mentioned provisions of Cap. 160 and as recapitulated in *Mbaye's* case (*supra*).

From the evidence of the prosecution witnesses PW1 and PW2, it is evident that the accused at the time he damaged the tape recorder in question, was suffering from a mental illness which, it appears, had disabled him from knowing what he was doing was right or wrong. This fact was neither rebutted nor questioned by the prosecution.

In my view the learned magistrate, in order to arrive at a finding that on the evidence the accused's conviction was justified, was required to satisfy himself and find, beyond doubt, that on the

evidence produced there was no defence of any kind, either open or available to the accused.

That apparently was not the case. The defence of insanity at the time of the offence under s. 167 (1) of Cap. 160 was clearly pleaded by the accused and supported by the evidence. The defence of insanity was therefore obviously open to the accused.

Section 161 (2) (b) of the Criminal Procedure Code, Cap. 160, reads:

"(2) At the close of such evidence as is mentioned in sub-section (1) the Court, if it finds that the evidence as it stands -

(b) would, in the absence of further evidence to the contrary, justify a conviction, or a special finding under Section one hundred and sixty-seven, shall order the accused to be detained during the President's pleasure."

The above provisions of s. 161 (2) (b) clearly provides that where a court finds an accused incapable of making a proper defence and where the court conducts the trial under s. 161 (1) of Cap. 160, it would be open to the court to make a finding that the evidence justified a conviction or a special finding under s. 167 of Cap. 160, and thereafter to order the detention of the accused under s. 161 (2) (b) of Cap. 160.

The learned magistrate on the evidence had, I find, erred in finding that the evidence before the court justified the accused's conviction. The proper finding should have been that on the evidence as it stood it would justify a special finding under s. 167 of Cap. 160.

I therefore set aside the learned magistrate's finding that on the evidence as it stood it justified the accused's conviction, and substitute therefore a finding that the evidence as it stood would justify a special finding under s. 167 of the Criminal Procedure Code, Cap. 160. This finding in no way affects the accused's detention during the President's pleasure under s. 161 (2) (b) of Cap. 160.

In the result I confirm the order that the accused be detained during the President's pleasure.

Order accordingly