DAVID SHAW v THE QUEEN (1963 - 1964) Z and NRLR 141

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[Before the Honourable Mr. Justice CHARLES on the 4th September, 1964.]

Flynote

Order of calling defence witnesses - whether accused required to give evidence before any defence witness is called - section 191 of the Criminal Procedure Code, Cap. 7.

Headnote

Shaw was charged with driving a motor vehicle whilst under the influence of intoxicating liquor or drugs. At his trial, his counsel asked the senior resident magistrate to allow him to call a doctor as a defence witness, before the accused gave his own evidence. The senior resident magistrate declined to permit this on the authority of *R v Phillipo Nkonde* 4 NRLR 245. The defence then called no evidence at all, and the accused was convicted. An appeal was lodged, alleging that the accused was deprived of his right to give evidence in the order he chose, thus causing a failure of natural justice.

Held:

(a) It is the normal rule of practice that the accused should be called and give evidence before any other witnesses for the defence.

(b) Section 191 of the Criminal Procedure Code must be construed as meaning that if an accused elects to give evidence and to call other witnesses, he should give evidence first.

(c) Even if section 191 permitted the accused to give evidence after his witnesses, there could not be said to have been a substantial miscarriage of justice in the senior resident magistrate's requiring a different order of witnesses.

Appeal dismissed.

Cases cited:

(1) *R v Phillipo Nkonde and others* 4 NRLR 245.

(2) *R v Morrison* 6 Cr. App. R 159.

(3) *R v Wheeler* [1917] 1 KB 283.

(4) *R v Olsen* (1898) 62 JP 777.

(5) *R v Richards* 1918 SALR 315: 14 E & E 319.

A B Mitchell - Heggs, Assistant Crown Counsel for the Crown

C J I Cunningham for the appellant

Judgment

Charles J: This is an appeal from the Subordinate Court (class I) of the Senior Resident Magistrate, Lusaka, against a conviction of driving a motor vehicle whilst under the influence of intoxicating liquor or drugs, contrary to section 209 (1) of the Roads and Road Traffic Ordinance (Cap. 173). The appellant was sentenced to a fine of £100, in default two months simple imprisonment, and imprisonment with hard labour for two months, suspended for two years on condition that he was

not convicted of certain specified offences during the period. His driving licence was also suspended for twelve months.

[*The learned judge recited the facts and continued -*]

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The prosecution did not call the doctor who had examined the appellant at the hospital but made him available to the defence. After the close of the case for the prosecution and an unsuccessful submission of no case to answer, Mr. Cunningham, who appeared for the appellant, asked to be allowed to call the doctor before the appellant. The learned senior resident magistrate held that the appellant would have to be called first, on the authority of *R v Phillipo Nkonde and others*, reported in the original, but not in the reprint, volume of 4 NRLR 254. Mr. Cunningham criticised the ruling in that case as being unfair and prejudicial to a fair trial, but admitted that the learned senior resident magistrate was bound by it, and he decided to call no evidence at all. The court then proceeded to judgment, and found the appellant guilty.

This appeal is on the ground that the ruling in *R v Phillipo Nkonde and others* was erroneous and caused the appellant to be deprived of his rights to give evidence in the order which he chose as best calculated properly to present his answer to the charge, and to a failure of natural justice. Another ground of appeal, that the prosecution failed to call the doctor, was abandoned at the hearing of the appeal, and rightly so. An appeal against sentence was also abandoned.

The report of *R v Phillipo Nkonde and others* is an extract from a minute by Cox, CJ, to the registrar with reference to a review case. The learned Chief Justice said, so far as is relevant here: " Further, I observe that in the case of the second accused which went to trial, the accused called a witness whose testimony was taken before that of the accused. I cannot say that that is illegal but it is not the proper practice to follow: the accused should give his evidence first and then his witness or witnesses be called ". It accords with the *dicta* of Lord Alverstone, C. J, in *R v Morrison* 6 Cr. App. R 159 at page 165. Those *dicta* were given in the course of argument. The learned Lord Chief Justice asked counsel how the witnesses came to be called before the accused, and on receiving the reply that counsel for the defence can call his witnesses in such order as he pleases as well as can counsel for the prosecution, said: " In all cases I consider it most important for the prisoner to be called before any of his witnesses. He ought to give his evidence before he has heard the evidence and cross - examination of any witness he is going to call. "

Mr. Cunningham's argument on behalf of the appellant was that the ruling and *dicta* of the two chief justices were wrong in law. The basis of that argument was that stated by counsel in *Morrison*'s case; that counsel for the accused has a legal right to call his witnesses in such order as he thinks fit. In support of that basis Mr. Cunningham pressed upon me *R v Wheeler* [1917] 1 KB 283 (CCA) as being conclusive upon the point.

That argument appears to me to be based on two fallacies. The first is that *R v Wheeler* is not an authority on the order in which an accused should give his evidence when he is calling witnesses in addition to himself, but an authority on an entirely different subject matter - the scope of the words " every stage of the proceedings " in the section of the Criminal Evidence Act, 1898, of which section 148 of the Penal Code is a reproduction. The second fallacy is that neither Lord Alverstone, CJ, nor

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Cox, CJ, in their respective *dicta* and ruling intended to state a proposition of law: what they were doing was stating the practice which should be followed when an accused is both intending to give evidence himself and to call witnesses. It is a practice, moreover, from which, so far as my own personal experience over thirty - two years extends, a departure has never been attempted until this case. Whatever may be the strict legal rights of an accused, defence counsel usually accepts the practice, if only because were he not to do so, he might attract suspicion to the credibility of the accused's evidence. I should add that the learned senior resident magistrate seems also to have erred as to the real purport of the ruling of Cox, CJ.

Notwithstanding Mr. Cunningham's second fallacy, I think that basically he was right that counsel for the defence in a criminal trial has a legal right to call his witnesses, including the accused, in such order as he thinks fit, unless a statute has provided otherwise. That arises as a result of the application of the ordinary common law rule, that a party is entitled to call his witnesses in such order as he thinks fit, to the situation created by legislation which first rendered parties to civil suits competent witnesses, and then rendered accused persons competent witnesses in criminal cases, without prescribing the order in which they should or must give evidence. (As to the right of an accused to be called with his other witnesses in such order as he or his counsel think fit, see Phipson, Evidence 10th edition, paragraph 129, citing *R v Olsen* (1898) 62 JP 777; and *R v Richards* 1918 S.A.L.R 315; 14 E & E. 319 (1748), per Buchanan, J) Whether the rule of practice, whereby the accused should be called first, which has been superimposed in the interests of justice upon the accused's legal right, can be insisted upon by a court against defence counsel's insistence on his client's legal right, is a question which I do not find it necessary to answer.

To my mind there are two obvious alternative answers to this appeal.

The first is that section 191 of the Criminal Procedure Code directs that, if the accused elects to give evidence and to call other witnesses, he should give his evidence first. The section does not say that in those actual words but it must be construed, in my judgment, as having that effect, as its apparent object is to define the rights of an accused in respect of his addressing the court and to regulate the conduct of the defence, where he elects to give evidence and call other witnesses. It is, however, directory only, and not mandatory, since it is not apparent that the legislature intended that departure from its requirements should have the grave consequence of nullifying a criminal trial and the resultant judgment in it. But while the court may, in its discretion, depart from the statutory requirement, it is not bound in any case to consider whether it should or should not adhere to it, but it is entitled to comply with the requirement as of course. Consequently, defence counsel has no right either to insist on being allowed to call the accused after other defence witnesses or to insist that his application so to call the accused be considered as a matter of discretion, and if, after rejection of such an application, he chooses not to call any evidence, he has no valid ground of appeal, since the refusal of his application has not resulted in a departure from the form of trial prescribed by law. In this case, the learned senior resident magistrate did actually act in accordance with the law

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in refusing counsel's application to call the doctor before the accused and, therefore, the refusal of the application cannot afford a ground of appeal.

The second alternative answer is this: If, contrary to my opinion, section 191 of the Criminal Procedure Code leaves an accused with a right to call his witnesses, including himself, in such order as he thinks fit and the ruling of the learned senior resident magistrate deprived the appellant of that right, it has not been established that that deprivation in fact occasioned a substantial miscarriage of justice so as to take the case out of section 323 of the same ordinance. Disregard of a rule of law, or of a rule of practice which has been adopted as an aid to a rule of law, causes a substantial miscarriage of justice in fact if it has deprived an accused of an opportunity of acquittal which would otherwise have been reasonably open to him had the rule been observed. It may well be here that the appellant did lose an opportunity of acquittal by not calling witnesses. As far as this court is concerned, however, that is a matter for conjecture only. If he did lose the opportunity it was not occasioned by the learned senior resident magistrate's disregard of any rule of law, but by his own or his learned counsel's decision for the purpose merely of maintaining a situation which one or the other or both had conceived to exist as affording a tactical advantage to the defence - a tactical advantage which, it should be added, would have left the door open to perjury.

The appellant's course was presumably adopted on the advice of his counsel. It is clear that counsel can quite properly, and is bound to, avail himself of those fields within which the law allows of tactical manoeuvring. But it is also clear that the court is not concerned with tactical manoeuvring. Its role in a criminal trial, strange as it may seem to some, is not to give a verdict to that party which has been the more astute, clever or skilful in the course thereof, as if it were an umpire at a tennis match, but to ensure so far as possible that those whose guilt has been proved according to law are convicted and those whose guilt has not so been proved are acquitted. In short, the courts exist for the practical purpose of administering justice according to law and not for the purpose of affording to counsel an opportunity to argue, with varying degrees of perspicuity, academic points of law - interesting though such an exercise may often be.

In making these comments, I have not lost sight of a criminal trial admitting, from its very nature, a departure from the rule that counsel is the *alter ego* of the party whom he represents and that that party is bound by his counsel's conduct of his case. The departure, however, is of limited scope, being confined in its application to counsel wrongly consenting, or failing to object, to the admission of that which is not evidence, or failing to make submissions as to law or fact which were open to him on the evidence. An instance of the former is where counsel does not object to the admission of hearsay. An instance of the latter is where the evidence before the court on a charge of murder admits of an alternative verdict of guilty of murder, guilty of manslaughter by reason of provocation, or not guilty by reason of self-defence, and counsel has elected to direct his case towards obtaining the third of those verdicts. This case does not come within that limited scope, obviously. The learned senior resident magistrate did not act contrary to that rule of natural

justice which is enshrined in the law by not affording to the appellant full opportunity to place his evidence before the court. On the contrary, the appellant, by or through his counsel, elected not to avail himself of the opportunity and to leave the court with no alternative to adjudging the case on the evidence before it. The validity of the resultant judgment, it must be stressed, has not been challenged in this appeal.

It seems to me, having regard to the foregoing that, if this appeal were to succeed, as involving a substantial miscarriage of justice, the decision would deserve to be regarded as something out of

either that authoritative work of Sir Alan Herbert on Uncommon Law or out of those classics relating to the girl called " Alice ". The appeal will be dismissed.