THE PEOPLE v CHANDA (1967) ZR 68 (HC)

HIGH COURT

BLAGDEN CJ

13th MAY 1967

Flynote and Headnote

[1] Criminal 25 **procedure - Local court practice and procedure - Regulated by Chief Justice's rules - Absence of rule.**

Local courts are regulated by rules made by Chief Justice and, in the absence of a rule, procedure in the local courts should be that observed in subordinate courts.

[2] Civil procedure - Local court practice and procedure - Regulated by 30 **Chief Justice's rules - Absence of rule.**

See [1] above.

[3] Evidence - Local court - Mode of receiving evidence - Rules.

Chief Justice has been empowered to make rules with regard to 35 evidence in the local courts, but no such rules have yet been made.

[4] Evidence - Local court - Mode of receiving evidence - Legislation.

Legislation does not provide for procedure in receiving evidence in local courts.

[5] Evidence - Local court - Mode of receiving evidence - Absence of rules 40 **and legislation - Oath.**

In absence of rules or legislation prescribing method of receiving evidence in the local courts, the practice of receiving evidence not under oath is proper.

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[6] Criminal procedure - Local court practice and procedure - Receiving evidence - Oath.

See [5] above.

[7] Civil procedure - Local court practice and procedure - Receiving evidence 5 **- Oath.**

See [5] above.

Statutes and rules construed:

Native Courts Ordinance (1960, Cap. 158) (repealed), ss. 21, 28, 39.

Barotse Courts Ordinance (1960, Cap.160) (repealed), s. 21.

Local Courts Act, 1966 (No. 20 of 1966), ss. 14, 67. 10

Local Courts Rules, 1966, r. 2.

Judgment

Blagden CJ: Under section 307 of the Criminal Procedure Code the High Court may call for and examine the record of any criminal proceedings before any subordinate court:

"for the purpose of satisfying itself as to the correctness, legality 15 or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court".

The criminal proceedings in this case relate to an appeal from the Manyika Local Court, which convicted the appellant on the 15th February, 1967, 20 of the offence of assault occasioning actual bodily harm contrary to section 220 of the Penal Code.

The appeal came before the Senior Resident Magistrate Lusaka on the 3rd March, 1967, and he allowed the appeal as the local court had no jurisdiction to try an offence contrary to section 220 of the Penal Code. 25 No question turns on the correctness of this decision, which was clearly right. But in the course of his judgment the learned Senior Resident Magistrate drew attention to a number of other irregularities in the proceedings and it is in respect of one of these that the record has been called for. It was expressed by the learned Senior Resident Magistrate in 30 these terms:

"There is nothing to show that any evidence on oath was taken vide the Local Courts Rules Statutory Instrument 293/66 Section 2."

The learned Senior Resident Magistrate has clearly interpreted the 35 provisions of rule 2 of the Local Courts Rules, 1966, as meaning that evidence before local courts must be taken on oath. If he is right in this interpretation then it would mean that this rule has abrogated the previous customary practice in regard to the taking of evidence in the former native courts which was not to take it on oath. This would constitute an 40 important - indeed a fundamental - change.

It is accepted that prior to the coming into force of the Local Courts Act, 1966, there was no requirement for evidence received in the former native courts to be taken on oath. Further that there is not, and never

has been, any requirement under African law that evidence should be received only on oath. The Native Courts Ordinance, Cap. 158 clearly recognised that evidence could be received either on oath or not on oath. Thus, section 28 punished a person who: 5

"in any proceeding before a native court gives evidence, whether upon oath or otherwise, which he knows to be false, or believes to be false, or does not believe to be true . . .".

There is no reference in Cap. 158 nor, for that matter, in the Barotse Native Courts Ordinance, Cap. 160, to the mode of reception of evidence 10 and in so far as the reception of evidence is to be regarded as a procedural matter, it would have fallen under the provisions of section 21, which prescribed that:

"Subject to such rules as may be made under Section 39 the practice and procedure of native courts shall be regulated in accordance 15 with native law and custom."

Various rules were made under this section but none dealt with the reception of evidence.

The Local Courts Act, 1966, came into force on the 1st October, 1966. The provision corresponding to section 21 of the Native Courts 20 Ordinance, and dealing with practice and procedure, is section 14, and it is framed in somewhat different terms, namely:

"The practice and procedure of local courts shall be regulated in accordance with such rules as may be made in that behalf by the Chief Justice under Section 67."

The 25 reference to practice and procedure being regulated in accordance with native, now African, law and custom has been omitted; and the section does not make provision for the procedure to be followed where there is default of provision in the rules made under section 67.

The rule making power in the Local Courts Act contained in section 30 67 is vested in the Chief Justice and this section specifically provides for the making of rules which may:

"(a) regulate the practice and procedure of the local courts and the taking of evidence therein...".

The only rules which have been made under this section are the Local Courts Rules, 1966. Rule 2 reads:

"The practice and procedure of local courts shall be regulated in accordance with these Rules and in default thereof, in substantial conformity with the law and practice for the time being observed in a Subordinate Court."

It 40 will immediately be observed that a default of prescribed procedure provision - not to be found in section 14 of the Act - has been specifically put into this rule. Further, that the default procedure which the court is to adopt is not procedure in accordance with African law and custom, but procedure in accordance with that for the time being observed in a 45 subordinate court. [1] [2] In the instant case the learned Senior Resident

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Magistrate has regarded the mode of receiving evidence - whether sworn or unsworn - as a matter of procedure. The Local Courts Rules do not make any specific provision for the mode of receiving evidence, although, as I have already indicated, the power to do so is specifically conferred on the Chief Justice by paragraph (a) of section 67 (1). This power was 5 not specifically included in the rule making provisions of section 39 of the Native Courts Ordinance,

Cap. 158. It would seem, from its special inclusion in the Local Courts Act, that the legislature intended that the Chief Justice should have the power to make rules altering or supplementing the existing practice in regard to the reception of evidence in local courts. 10 This was a sensible provision as, bearing in mind the policy of the integration of local courts with the subordinate courts, modifications might well be required in the practice regarding the reception of evidence. As I have already indicated, it is difficult to conceive of a more fundamental change in the practice regarding the reception of evidence, than the substitution 15 for the existing practice of receiving unsworn or sworn evidence at the discretion of the court, of a mandatory requirement that all evidence received should be on oath; and it would be reasonable to expect such a fundamental change to be introduced by legislation or the introduction of rules in the clearest possible terms. There is no such legislation and no 20 such rule appears in the Local Courts Rules, 1966, or elsewhere. [3] [4] I am satisfied that, in the absence of such specific provision, neither the legislature nor the Chief Justice can have intended such a fundamental change. [5] [6] [7] I think, therefore, that although the learned Senior Resident Magistrate's reasoning was sound as far as it went, he erred in 25 concluding from it that the effect of the provisions of rule 2 of the Local Courts Rules was to abrogate the old practice of the former Native Courts, whereby evidence was received unsworn; and I would hold that it was and is perfectly proper for a local court to receive evidence unsworn.

Order accordingly 30