

LUNDA v THE PEOPLE (1966) ZR 34 (HC)

HIGH COURT

WHELAN J

25th MARCH 1966

Flynote and Headnote

[1] Criminal procedure - Admission of guilt - Payment of fine.

The payment of a fine on conviction is not a tacit admission of guilt.

[2] Criminal procedure - Local court - Conviction for lesser offence than offence charged.

The provisions of the Criminal Procedure Code are not generally applicable to the Native Courts, and conviction for lesser offence than offence charged will depend on the existence of such provision at customary law.

[3] Criminal procedure - Local court - Interested party.

An interested party within the meaning of s. 35 of the Native Courts Ordinance includes the complainant.

[4] Criminal procedure - Local Court - Inspection and revision - Powers of authorised officer.

Authorised officer may question interested parties to clarify or remove ambiguities but no further.

[5] Criminal procedure - Local Court - Appeal - Enhancement of sentence.

In case of appeal by complainant, where there is no appeal against conviction or sentence, enhancement of sentence would not be in accord with substantial justice.

Statutes construed:

Criminal Procedure Code (1965, Cap. 7), ss. 168, 3 (2).

Native Courts Ordinance (1961, Cap. 158), ss. 16, 35, 38, 40 (1) (e), 44.

NOTE: The Native Courts Ordinance, 1961, Cap. 158, was repealed by the Local Courts Act, 1966, No. 20 of 1966.

Foster, for the appellant

Reilly, for the respondent

Judgment

Whelan J: On the 17th November, 1965, the appellant, Billy Lunda, appeared before the Ndola Local Native Court charged with entering and theft contrary to African customary law. It was alleged that he had stolen certain property belonging to one James Mulenga.

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The Court found the accused guilty of being in possession of stolen property - presumably the property he was alleged to have stolen - and fined him £10, ordering that he suffer two months' simple imprisonment in default. James Mulenga having appealed to the Western Province Appellate Native Court on the grounds that he had not been awarded compensation the Appellate Court found the accused guilty of the theft of the property, set aside the sentence of the Local Native Court and substituted therefor a sentence of six months' imprisonment with hard labour.

On the 10th February, 1966, the Senior Local Courts Officer Kitwe, affirmed the conviction and sentence of the Western Province Appellate Native Court. The appellant appeals to this Court against his conviction and sentence by the Western Province Appellate Native Court.

[1] The People do not support that conviction, and indeed it cannot stand because there was insufficient evidence to show that the appellant stole Mulenga's property which was found in his shop. Indeed, the local court had appreciated this which is why it had convicted the appellant of being in possession of stolen property. It does not, however, appear that the local court considered the question of whether the appellant was knowingly in possession of stolen property. I do not know whether it is an offence under African law to be in possession of stolen property *simpliciter*, or whether one has also to have knowledge that it is stolen. The Local Courts Officer, in affirming the conviction of the Appellate Native Court, observed that the appellant's 'tacit admission of guilt by paying a fine of £10 is sufficient to confirm the conviction'. For a convict to pay a fine is not a tacit admission of guilt. The appellant had no option but to pay it if he wished to stay out of prison.

The appeal is allowed, and the conviction and sentence of the Appellate Native Court are set aside.

Counsel on behalf of The People has asked for clarification of four points which he has raised in the form of questions.

[2] The first question is, can a Native Court when hearing a criminal case convict of a lesser offence than that charged? It is submitted that by virtue of s. 168 of the Criminal Procedure Code it can, and that s. 168 of the Criminal Procedure Code is applicable to trials before a Native Court in view of the provisions of s. 3 (2) of the Criminal Procedure Code. I do not consider that the provisions of the Criminal Procedure Code can be applied to proceedings before a Native Court constituted under the Native Courts Ordinance. Section 3 (2) of the Criminal Procedure Code states that all offences under any law other than under the Penal Code shall be inquired into, tried, and otherwise dealt with according to the provisions of the Criminal Procedure Code subject, however, to any enactment for the time being in force regulating the manner or place of inquiring

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into, trying, or otherwise dealing with such offences. Section 16 of the Native Courts Ordinance is as follows:

' Subject to the provisions of this Ordinance and of any rules made thereunder and to the provisions of any other law which is expressly applicable to Native Courts (and I would here observe that the provisions of the Criminal Procedure Code have not been expressly applied to Native Courts) the practice and procedure of Native Courts and the taking of evidence therein shall be regulated in accordance with Native Customary Law insofar as such law is not repugnant to natural justice and morality.'

In the absence of evidence as to native customary legal procedure I cannot say whether it is permissible to convict of a criminal offence other than that charged. If such provision exists it would have to be consistent with, or not repugnant to, natural justice or morality and to this extent I would say that, in my view, the lesser offence would have to be cognate to and carrying a lesser penalty than the offence actually charged.

[3] The second question is whether a complainant in a criminal case is an 'interested party' within the meaning attributed to that term in s.35 of the Native Courts Ordinance, to which the answer is yes.

[4] The third question is, to what extent may an authorised officer, when exercising his powers under s. 38 of the Native Courts Ordinance, question the interested parties, to which the answer is that he may question them only to the extent of seeking clarification or removing ambiguities in the submissions made by such interested parties. If questioning extended beyond this limit the situation might occur in which a convict is compelled to give evidence, whilst at his trial he would have been under no such obligation.

[5] The final question is whether an Appellate Native Court is entitled to increase a convict's sentence on the hearing of an appeal by a complainant. Whilst s. 40 (1) (e) of the Native Courts Ordinance empowers an Appellate Native Court, when exercising appellate jurisdiction, to enhance a sentence of a lower court, s. 44 of the Native Courts Ordinance provides that an Appellate Court shall decide all matters according to substantial justice. If, as in the present case, there is no appeal against conviction or sentence, but merely an appeal by a complainant, I do not consider that for an appellate court to increase a convict's sentence could be said to be according to substantial justice.

Appeal allowed