

SIKOTA v THE PEOPLE (1968) ZR 42 (HC)

HIGH COURT

EVANS J

18th JUNE 1968

Flynote and Headnote

[1] **Criminal procedure - Witnesses - Accused's right to call a witness present in court.**

Trial magistrate's refusal to call a witness desired by accused and present in court was erroneous even though the witness had previously failed to comply with an order that all witnesses withdraw from the court room.

[2] **Criminal procedure - Witnesses - Right of accused to re-examine himself.**

Accused has a right to say anything further after cross - examination upon matters arising from such examination.

[3] **Evidence - Medical evidence - Necessity to call doctor as witness.**

Examining doctor has to be summoned to prove injuries of complainant; doctor's report on police form Z.P. Form 32 not admissible.

[4] **Criminal procedure - Witnesses - Order in which prosecution witness and accused to be examined when more than one.**

Prosecution witness is examined by the prosecutor, cross examined by each accused in turn in the order in which named in the charge - sheet, finally re-examined by prosecution. Accused who gives evidence to be examined in turn, cross - examined by their co - accused and then by the prosecutor, and finally re-examined.

[5] **Evidence - Burden of proof - Accused need not explain testimony adverse to him.**

There is no *onus* on accused to give reasons for the manner in which prosecution witnesses testify against him.

Cases cited:

(1) *Muliata and Emang v R* (1963) R & N 486.

(2) *Woolmington v DPP* 25 Cr. App. R 72.

Statute construed:

Criminal Procedure Code (1965, Cap.7), s. 191A.

Appellant in person.

Williams, State Advocate, for the respondent

Judgment

Evans J: The nineteen - year - old appellant and three other youths were tried and found guilty of a charge, contrary to section 220 of the Penal Code, of assaulting and occasioning actual bodily harm to Mundia Imboela at Livingstone on the 30th November, 1967. On the 22nd January, 1968, the appellant was sentenced to twelve months' I.H.L., and he now appeals against conviction and sentence.

This conviction cannot stand for the following reasons:

[1] The trial magistrate wrongly refused to permit the appellant to call a witness who was in court. A miscarriage of justice was thereby occasioned; the appellant being deprived of a fundamental right in a criminal trial. The fact that a witness is in court, even after the making of an order for all witnesses to withdraw, is no ground for depriving a prisoner of the witness and the court has no right to reject his testimony (*see Archbold, Criminal Pleading Evidence and Practice*, 36th ed., para.1372). The magistrate's error in this case was particularly serious because the appellant put forward the defence of alibi.

[2] It does not appear from the record (original or copies) that the appellant and his co - accused were given the opportunity of re-examining themselves - of saying anything further, after being cross - examined, upon matters arising from cross - examination.

[3] The "medical evidence" was inadmissible. In a criminal trial, the examining doctor should be called to prove a complainant's injuries, unless his evidence is admissible under section 177 (2) of the Criminal Procedure Code, and it is not sufficient for the prosecution

merely to put in the doctor's report on police form ZP Form 32 and prove his signature thereon.

[4] When a trial involves more than one accused, the correct procedure to be observed when a prosecution witness gives evidence is as follows. He is examined by the prosecutor, cross - examined by each accused (and their parents, if the accused are juveniles) in turn, in the order in which they are named in the charge sheet, and finally re-examined by the prosecutor. Likewise, accused who give evidence should in turn be examined, cross - examined by their co - accused and then by the prosecutor and finally re-examined. These procedures were not strictly observed by the magistrate in this case and, further, none of the accused was, according to the record, permitted to exercise his right to address the court at the conclusion of the defence evidence - section 191A, Criminal Procedure Code.

[5] Notwithstanding the magistrate's reference in his judgment to the *onus* of proof being upon the prosecution, towards the end of the judgment he said, after saying that he rejected the defences, "The accused could not give proper reasons why the prosecution witnesses lied against them, as they said." This was a most incorrect comment, because there is no *onus* whatsoever upon an accused to give or advance any reasons for the manner in which prosecution witnesses testify (*Muliata and Emang v R*) [1] following *Woolmington v D P P* [2].

This appeal is allowed, the finding and sentence are reversed and the appellant is acquitted.

Appeal allowed.