FRASER v THE PEOPLE (1968) ZR 93 (HC)

HIGH COURT
EVANS J
18th SEPTEMBER 1968

Flynote and Headnote

[1] **Criminal law - Libel - Intentional insulting of the President (Penal Code, section 58E) - Mens rea.**

In a charge of intentionally ridiculing the President under Penal Code, section 58E, the intention is an essential element of the charge to be proved by the prosecution beyond a reasonable doubt.

[2] **Criminal law - Intoxication - Defence to charge of intentionally ridiculing the President.**

The accused's intoxication is relevant to whether he could and did form the requisite *mens rea* under Penal Code, section 58E (intentional ridicule of the President).

[3] **Criminal procedure - Witnesses - Immunity for member of the Intelligence Service.**

A member of the Intelligence Service enjoys no immunity from being called as a witness in a charge of violation of Penal Code, section 58E (intentionally insulting the President) in which the member is the principal witness (and the only witness connected with the police) to the illegal insult.

[4] **Criminal procedure - Prosecution's case - Discretion in calling witnesses.**

In a criminal trial the prosecution has a discretion in whether to call certain witnesses, but that discretion must he exercised in manner calculated to further the interests of justice and to be fair to the defence.

[5] **Criminal procedure - Witnesses - Trial court's power to intrude on prosecution's discretion as to which witnesses to call.**

If the prosecution exercises its discretion in calling witnesses improperly, the court may itself call the witnesses.

[6] **Criminal procedure - Discovery by accused - Pre-trial statements by prosecution witness.**

The prosecution, where it possesses a witness's statement which differs materially from his evidence at trial, must make that statement available to the defence regardless of whether the accused calls for it.

Cases cited:

(1) *Adel Mohammed El Dabbah v A-G, Palestine* [1944] AC 156; [1944] 2 All ER 139.

(2) *R v Bryant and Dickson* (1946) 31 Cr. App. R 146.

(3) *R v Khoche* (1956) R & N 635

(4) *R v Mwendabai* (1961) R & N 724.

(5) *R v Oliva* [1965] 3 All ER 116; 49 Cr. App. R 298.

(6) *Mpofu v The People,* Court of Appeal for Zambia, Case No.72, 1965 (unreported)

Statute construed:

Penal Code (1965, Cap.6), s. 58E.

Mitchley, for the appellant
Chigaga, State Advocate, for the respondent

Judgment

Evans J: The appellant was convicted of a charge of insulting the President, contrary to section 58E of the Penal Code. The particulars alleged that, on 23rd October, 1967, at the Abercorn Club, Mbala, with intent to bring the President into ridicule he pointed at a picture of the President and published by word of mouth the following words:

"You Africans here in Zambia; are only lucky because of this bloody goat."

On the 12th January, 1968, the appellant was sentenced to four months' I.H L. and immediately released on bail, pending appeal. He now appeals against conviction and sentence.

Having closely perused the trial record and considered the submissions of both counsel, I have come to the conclusion that this appeal should be allowed because of the cumulative effect of the following points:

(1) Although the trial magistrate wrote a careful judgment, he misdirected himself in law when he said: "The defence raised under section 14 (4), Cap. 6, fails." [1] The intention to ridicule the President was an essential element of the charge, and it was a vital issue because the appellant's defence was, in brief, that he was drunk and tired at the material time - about 2 a.m. on the 23rd of October, at the end of the Independence Ball held at the Abercorn Club - and that he did not recollect saying the words charged and that, if he did say them, he did not intend to ridicule the President. There was apparently unchallenged evidence from a defence witness that the appellant and a Mr Nkonde had a senseless and drunken argument in the bar of the said club, that all the people present, including the appellant, had had a lot to drink, that Nkonde was the most drunk, and that the appellant was not sober. The appellant did not state in terms in his evidence that he was drunk, although he said that he drank steadily throughout the evening from about 5 p.m., but, in the statement which he made under caution to the police when first approached by them about the matter on the morning of the 25th of October, he said that he had had too much to drink and that, if he said anything against the President, it must have been said in his drunken and tired state. In the circumstances and having regard to defence counsel's submissions and references during the trial to section 14 (4) of the Penal Code, I think it likely that the appellant's omission to state in evidence that he was drunk was a slip - an instance of losing sight of the wood for the trees. The magistrate accepted the evidence of two prosecution witnesses to the effect that the appellant appeared to be sober, but serious doubt was cast upon that evidence by the said unchallenged evidence of the defence witness, and the magistrate inferred from the fact that the appellant drove himself home after the incident that "he had all his senses functioning". But that is not the test: [2] many a can almost automatically drive himself home (as witness the present prevalence in this country of the offence of drunken driving), but he can be so affected by alcohol as to be incapable of forming any specific intention other than to get himself home. Upon all the evidence concerning the appellant's condition, there was, in my view, considerable doubt about his alleged intention to ridicule the President during the drunken quarrel with Nkonde, [1] and the magistrate's said misdirection, which implied that there was some *onus* on the appellant to prove that he had not the necessary intent, might well have led him to decide this issue wrongly. It was, of course, for the State to prove the intent, and to prove it beyond reasonable doubt.

(2) Nkonde was not called as a witness because he was an officer of the Intelligence Service, and yet he was the principal person (and the only police officer) concerned with the appellant when he allegedly uttered the words charged, when they were drunkenly quarrelling, and he reported the matter to his police colleagues - in what terms we do not know (and counsel could not cross - examine about them - and I observe that at no time before trial did the police tell the appellant what he was alleged to have said about the President. In fact, Mr Mitchley had to inquire what the alleged words were after he had been instructed. [3] A member of the Intelligence Service enjoys no immunity from being called as a witness in a case of this nature, but the magistrate erroneously took the view that he did and therefore did not insist upon his being called or call him himself In my view, he most certainly should have been the State's principal witness in court, and his absence might well have deprived the appellant of the opportunity to cross - examine and discredit him, particularly if, as the defence witness testified, he was the most drunk of all the people concerned. [4] In a criminal trial, the prosecutor has a discretion whether or not to call or tender certain witnesses. There are a number of cases on this point, mainly dealing with the calling at trial of witness who gave evidence at a preliminary inquiry, but in my opinion the principles are the same in a summary trial. Notable cases are: *Adel Muhammed, El Dabbah v A.G., Palestine* [1]; *R v Bryant and Dickson* [2]; *R v Khoche* [3], *R v Mwendabai,* [4]; and (most recently, so far as I am aware) *R v Oliva* [5]; in which it

was held that the prosecutor's discretion must be exercised in a manner calculated to further the interests of justice and at the same time be fair to the defence, and that, [5] if the prosecutor appears to be exercising that discretion improperly, it is open to the court to interfere and invite the prosecutor to call the witness and that, if the prosecutor refuses to do so, the court itself may call the witness. In the instant case, I do not suggest that the prosecutor acted improperly, but he did not exercise his discretion at all, and it seems that his omission to call Nkonde arose out of his mistaken opinion (which the magistrate shared) of Nkonde's position and competence as a witness, who, as I have said, should have been the principal witness for the State. To a lesser extent, these observations apply to the prosecutor's not having called or tendered a Mr Mitchell, who was present during the material incident and whom Mr Mitchley (for the appellant) had apparently been led to believe was to attend as a witness.

(3) The prosecutor refused (and was upheld in his refusal by the trial magistrate) to produce to Mr Mitchley for inspection and cross - examination purposes a statement made by a material witness, Mr Kappie, to the police before the trial, and this statement was inconsistent in at least one respect with his evidence in court, in that he admitted that his statement alleged that the appellant had referred to the President as a "goat", whereas he used the expression "bloody goat" (the words charged) in his evidence. [6] Since 1966, it has been settled practice in Zambia (if not in England) that it is incumbent upon the prosecution, where they possess a witness's statement which differs materially from his evidence at trial, and whether or not such statement has been called for, to make it available to the defence (*Mpofu v The People* [6]) in which the subject was discussed in detail and all the relevant authorities considered. The whole of Kappie's previous statement should have been shown to Mr Mitchley; Kappie's admission of the inconsistency did not cure it or deprive the appellant of his right to make use of the statement to destroy the witness's credit, and the appellant's defence may have been prejudiced by the prosecutor's failure to produce it. When cross - examining another witness, Mr Sikazwe, Mr Mitchley sought to put to him his previous statement to the police, but, according to the trial record, the magistrate did not allow Mr Mitchley to do so because the prosecutor said that counsel had already seen the statement. That was no proper ground for the magistrate's refusal, and Mr Mitchley has told this court that he has no recollection of having seen the statement. There is nothing to show that Sikazwe's previous statement was inconsistent with his testimony, but in my view the magistrate in the circumstances should have called for and perused the statement and, if it differed materially from Sikwaze's evidence, he should have ordered the prosecutor to hand it to Mr Mitchley for the purposes of cross - examination. *Mpofu*'s case concerns the practice when it is known that a witness's previous statement is inconsistent with his evidence, when the prosecutor should disclose the fact and produce the statement. The practice is based upon the prosecutor's integrity as an office of the court and upon his knowledge of his duty in this respect, but in this case it is clear that the prosecutor was unaware of such duty, and I therefore do not know whether or not Sikazwe's statement and evidence differed materially.

Having regard to the above - mentioned matters, and bearing in mind all the circumstances of this case in which the appellant and most of the people concerned were probably in varying degrees of intoxication in the early hours of the morning at the end of a dance, I do not consider that it would be safe to sustain this conviction. This appeal is allowed, the finding and sentence are reversed and the appellant is acquitted.

Appeal Allowed.