**SAKALA v THE PEOPLE (1969) ZR 124 (HC)**

HIGH COURT

EVANS J

11th JULY 1969 5

**Flynote and Headnote**

[1]   **Criminal procedure - Minor offences - Procedure to follow when minor offence substituted.**

   When putting the accused to his defence on a substituted and "minor" charge, the magistrate should frame the new charge, put it to the accused, call upon him to plead, and allow him to recall 10 prosecution witnesses.

Case cited:

(1)   *R v Mancinelli* (1957), 6 NRLR 19.

*Coovadia,* for the appellant.

*Ngulube, State Advocate,* for the People. 15

**Judgment**

**Evans J:** The 24 year old appellant was charged with attempted rape, contrary to section 115 of the Penal Code. At the close of the prosecution case, the learned senior resident magistrate reduced the charge to one of indecent assault, contrary to section 118 (1) of the Penal Code, and, after hearing the appellant's evidence, he convicted him of unlawfully 20 and indecently assaulting a woman named Selina Kamanga on the 9th of February this year at Livingstone. On the 12th of March, the appellant was sentenced to thirty month's I.H.L. He now appeals against conviction.

By his filed grounds of appeal, he re-iterates some of the main props 25 of his defence, which was that he went to the prosecutrix's house by arrangement with her teenage daughter, to have sexual relations with her but mistakenly wakened up the prosecutrix instead of the daughter, and he contends that the daughter was not allowed to give evidence in the lower court. There is nothing on the record to support that last contention; 30 indeed, the appellant was represented by legal aid counsel, who made no application to call the daughter, although she was apparently outside the court. Counsel for the appellant has today filed additional grounds of appeal, and I deal with them in this judgment.

I conclude that the appellant's conviction, which the State does not 35 support, should not be allowed to stand, for the following reasons:

[The learned judge went on to continue discrepancies in the evidence and then continued as follows.]

[1] The learned senior resident magistrate did not follow the correct procedure when he found no case for the appellant to answer on the charge 40 of attempted rape and then charged him with indecent assault. His attention is invited to the case of *R v Mancinelli* [1] in which Bell, CJ, held that, when putting an accused upon his defence to a substituted and "minor" charge (within the meaning of section 168 (2) of the Criminal

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Procedure Code), the magistrate should frame the new charge, put it to the accused, call upon him to plead to it and give the opportunity of having any prosecution witnesses recalled to give their evidence afresh or to be further cross - examined. Here, and according to the record, the appellant was not required to plead to the substituted charge of indecent 5 assault nor given an opportunity of having any prosecution witnesses recalled as aforesaid, and certain further questions could well have been put to those witnesses upon the circumstances of indecency alleged by the prosecution.

In the circumstances, I do not consider that it would be safe to 10 sustain this conviction. The appeal is allowed, and the appellant is acquitted and is to be set at liberty.

*Appeal allowed*

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