**THE PEOPLE v NJOVU (1974) ZR 60 (HC)**

HIGH COURT 25

SCOTT J

20th MARCH 1974

(Revision Case No. 299 of 1973)

**Flynote**

**Criminal procedure - Assault - Trial of accused who is deaf and dumb -**30 **Procedure for.**

**Headnote**

The accused, a deaf mute, was tried on two charges of assault but, due to his condition, no reliable communication took place between the court and the accused during the trial. The trial court convicted the accused on the strength of the prosecution evidence and ordered that the 35 accused be detained during the President's pleasure.

Held on review by the High Court:

   (i)   When an accused is a deaf mute, steps should be taken to ensure that he is legally represented so that the prosecution witnesses can be cross - examined.

   (ii)   Even 40 if the accused is unable to conduct his own defence and unable to give evidence the court must inquire for evidence which, though not material to his defence, might be of value in mitigation.

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SCOTT J

   (iii)   As no such inquiry was made the trial magistrate's order could not be confirmed.

Legislation referred to:

Criminal Procedure Code, Cap. 7, ss. 160, 161 (1).

**Judgment**

**Scott J:** Jeremiah Njovu appeared before the subordinate court 5 of the first class for the Lusaka district charged on two counts. On the first he was charged with assaulting Bibiyana Tembo and occasioning her actual bodily harm, while on the second count he was charged with doing grievous harm to Alphonso Mwanza.

The trial court experienced some difficulty in dealing with this prisoner 10 because he could only be communicated with by means of signs as he appeared to be deaf and dumb. A plea of not guilty was entered on both counts and an attempt was made at a later stage to conduct the proceedings with the use of an interpreter but it soon transpired that there was no realistic or reliable communication being made between him and 15 the prisoner. The magistrate continued to hear the prosecution evidence and at the close of it decided that there appeared to be a case of assault occasioning actual bodily harm on both the counts and he ordered the prisoner to be detained during His Excellency's pleasure. The case has come to me for confirmation. I called for some additional evidence, from 20 which I am satisfied that the prisoner has been deaf and dumb since his birth but has otherwise managed to lead a reasonably normal life, being married, having two children and looking after his home, wife and children quite well. He is not a person suffering from any mental disease but is under this physical disability. 25

This is a disability which falls within section 160 of the Criminal Procedure Code and it was unfortunate that the trial court took so long in deciding how to proceed. I have no doubt that if the magistrate had asked he could have received the information which I have subsequently obtained. It seems to me that in the rare case when a deaf mute 30 appears before a court it is only right and just that steps should be taken to have him legally represented in order that the prosecution witnesses' evidence can be tested by cross - examination which could not be done in this case because there was nobody to do so. Secondly, section 161 (1) of the Criminal Procedure Code provides that the court shall hear 35 any evidence which there might be for the defence. Even although the prisoner may be unable to conduct his own defence, and unable to give evidence, this does not necessarily mean that there might not be evidence which should be put before the court by way of defence which, if not successful in this, may nonetheless be of value in mitigation. 40Understandably enough, the magistrate did not call for any defence in view of the condition of the prisoner. At the very least, however, he should have inquired and placed on record that he had asked whether anybody was present who wished to speak in the defence of the prisoner.

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SCOTT J

Had the prisoner been represented by counsel some evidence in the prisoner's favour might possibly have been forthcoming. For those reasons I do not consider it would be right for me to confirm the magistrate's order on the evidence recorded. It does not appear that the assaults 5 were very serious although injuries were sustained. Had medical evidence been adduced both the lower court and this court would have obtained a better idea of the harm done, but at this stage I am not inclined to order a retrial with the attendant delays which this would involve. As the prisoner has been in detention since the 18th September, 1973, the magistrate's 10 order is therefore not confirmed. The proceedings are set aside and the prisoner should be released.

*Order accordingly*

**1974 ZR p63**