

THE PEOPLE v MAILOSI SIAMWABA (1979) Z.R 61 (H.C.)

HIGH
SAKALA,
28TH
HPR/416/78

COURT

DECEMBER,

1978

J.

Flynote

Legal aid - legal aid certificate - Right to refuse or dispense with it by accused - Legal Aid Act, s. 24A - Duty on court to explain to accused this right.

Headnote

The accused was granted a legal aid certificate by the court under s. 9 of the Legal Aid Act. The legal aid defence counsel could not attend and the case was adjourned fifteen times over a period of seven months. The accused then applied to court for leave to defend himself which was granted. The court however explained to the accused the seriousness of the offence and the need to be represented. The accused said he was tired of waiting for counsel. He pleaded guilty and was sentenced to thirty months' imprisonment. On review:

Held:

- (i) In cases where a legal aid defence certificate has been granted in terms of s. 9 of the Legal Aid Act and counsel does not attend court after several adjournments, the alternative is for the court to dispense with legal aid representation pursuant to s. 24A 1 (2) of the Act.
- (ii) Under s. 24A an accused may refuse or dispense with legal aid representation and it is the court's duty when granting a certificate under s. 9 of the Act to explain to the accused this right.
- (iii) The course taken by the accused in the instant case was in order.

Case referred to:

(1) Tembo v The People (1974) ZR 286.

Legislation

referred

to:

Legal Aid Act, Cap. 546, ss. 9, 24A

Judgment

SAKALA, J.: On the 4th November 1977, the accused appeared before the Subordinate Court of the First Class for the Kalomo District charged with the offence of arson, contrary to s. 328 (a) of the Penal Code.

p62

The allegation against him was that on the 25th day of October 1977, at Kalomo in the Kalomo District of the Southern Province of the Republic of Zambia wilfully and unlawfully set fire to a grain barn valued at K61.00 the property of Saliya Siamwaba.

On that day, the plea was not taken. The accused was granted a legal aid defence certificate. The case was adjourned to the 14th November 1977, for plea before Kabamba Esq., and the accused was remanded in custody. For reasons not stated on record, the accused appeared in court on the 18th November 1977, before Mr Choongo who adjourned the case for plea to the 28th November 1977, before the senior resident magistrate, Mr Kabamba. The accused was remanded in custody.

For reasons again not stated on record, the accused appeared before Mr Choongo on the 1st December 1977. No plea was taken. The case was adjourned to the 5th December 1977, for plea and to enable a defence counsel from Legal Aid Department to attend. The accused was again remanded in custody. Thereafter, according to the record, the case was adjourned for about fourteen times on account of the defence counsel from Legal Aid Department being unable to attend court. Finally on the 4th May 1978, after a period of about seven months, from the date of the accused's arrest and after numerous appearances in court, the accused is recorded to have said:

"I have stayed long in remand prison since 30th October 1977 up to now a period of seven months without seeing my so called legal aid counsel. I just want to defend myself."

Thereafter, the court explained to the accused the seriousness of the offence of arson and the Government's desire to have accused persons in such offences represented by defence counsel. The record shows that the accused said:

"I have heard all the explanation your worship. I have good and sufficient evidence to defend myself. And I am tired of waiting for the legal aid counsel."

The court allowed the accused's application to defend himself and proceeded to take the plea.

According to the record, the accused pleaded guilty to the charge. The facts were read out in open court and admitted to be correct. The accused was sentenced to thirty months' imprisonment with hard labour with effect from 30th October 1977, the date of his arrest. The sentence was made subject to confirmation by the High Court.

The case record is before me for review. It will be observed that although the case took seven months to dispose of, the record is a very short one. Yet, it took the Subordinate Court concerned a period of over seven months to forward the record to the High Court for confirmation of sentence. (See covering minute dated 7th December, 1978). It is perhaps fortunate that the court imposed a substantial sentence otherwise the accused would have already served his sentence before the same was

p63

confirmed. Be that as it may, I find that the adjournment in this particular case exceeded the interest of justice. The record does not indicate what efforts were actually made to contact the Legal Aid Department to secure the attendance of counsel after the court issued the legal aid defence certificate. In my view, to adjourn the case for fifteen times over a period of seven months because counsel for unspecified reasons could not attend is to say the least justice denied.

From the various Reviews of Subordinate Court cases done by this court, it has been observed that delays in disposing of cases where legal aid defence certificates have been granted are becoming a frequent feature, in particular, in subordinate courts in rural areas. In most cases, the cause of the delay has been the non-availability of the counsel from Legal Aid Department. I make this observation not with a view of putting the Legal Aid Department in the dock. The problems they face are too well known that it is unnecessary to mention them here. On the other hand to adjourn a case, as it happened to the case under review for fifteen times over a period of seven months when the accused is in custody, simply because a legal aid counsel could not attend on each occasion is not only justice delayed and denied but also defeats the very best intentions of the Legal Aid Act, namely, a fair and speedy trial. The question which most subordinate courts are faced with appears to be one of an alternative to these adjournments in cases where a legal aid defence certificate has been granted in terms of s. 9 of the Legal Aid Act, Cap. 546, when counsel does not attend court after several adjournments. In my view, the alternative is certainly not an indefinite number of adjournments.

In the case of *Tembo v The People* at p. 287 no legal aid certificate was granted. The court pointed out that the provisions of s. 9 of the Legal Aid Act are mandatory. The court also observed that circumstances may exist in which legal aid representation may be dispensed with notwithstanding that a certificate in terms of the Act has been issued. Section 24A (1) (2) of the Legal Aid Act reads as follows:

"Notwithstanding anything to the contrary contained in this act -

- (a) an accused person may (should he so decide) refuse legal aid which would otherwise be granted to him in furtherance of a legal aid certificate issued or to be issued under Part III;
- (b) a court may, on the application of a legally aided person -
 - (i) cancel any legal aid certificate which has been issued in respect of that person;
 - (ii) cancel any recommendation made under subsection (2) of section nine;
 - (iii) permit him to conduct his own case or by a practitioner of his choice without legal representation which has been arranged by the Director.

p64

(2)Where an accused per Arson refuses legal aid or makes application under paragraph (b) of subsection (1), the court shall record reasons put forward by the accused person for the refusal or the application, as the case may be."

Quite clearly, an accused may decline legal aid representation despite a certificate having been issued. This appears to have been the course taken here although after a long period. It is perhaps fortunate in the instant case that the accused pleaded guilty and was convicted accordingly. A greater amount of injustice would have been caused had the result been different. In the interest of justice, therefore it would appear to me that while the provisions of s. 9 of the Legal Aid Act are mandatory, when a court after certain inquiry grants a legal aid defence certificate, the trial court granting the certificate should also explain to the accused the provisions of s. 24A. In so doing, the

accused will have been afforded an opportunity of electing for further adjournments or conducting the case on his own. Care however must be exercised to avoid evading compliance with s. 9 by indiscriminate resort to s. 24A. Section 24A should be resorted to on good grounds in the interest of justice. The courts should accept the accused's applications only when there are good reasons, inordinate delay being a good example. By so doing in my view a situation of unwarranted number of adjournments as has happened in this case would be avoided.

Turning to the instant case, it would appear from the record that the learned trial magistrate hesitatingly allowed the accused's application to conduct the case on his own. The hesitation in my view, was unnecessary. I am satisfied that the course taken by the accused was in order. Accordingly, the conviction is confirmed. Turning to sentence, I agree with the learned trial magistrate that the offence of arson is a serious one. However, the facts of this case which clearly suggest that it was committed, in circumstances arising out of a domestic dispute were more in favour of the accused person. Furthermore, the property destroyed was only valued at K61.00. Although the accused had a previous conviction of an offence involving violence namely, assault occasioning actual bodily harm, I nevertheless consider that in the circumstances of this case, a sentence of thirty months' imprisonment with hard labour was on the severe side. Consequently, I set aside the sentence imposed by the learned trial magistrate. In its place, I impose a sentence of fifteen months' imprisonment with hard labour with effect from the date of arrest which is the 30th October, 1977.

Conviction confirmed
Order for substituted sentence
