DIRECTOR OF PUBLIC PROSECUTIONS v GODWELL BILLY SIWALE (1981) Z.R. 71 (S.C.)

SUPREME COURT
BRUCE-LYLE, AG. D.C.J., MUWO, AG. J.S. AND CULLINAN, AG. J.S.
21ST OCTOBER AND 18TH DECEMBER, 1980
(S.C.Z. JUDGMENT NO. 28 OF 1980)

Flynote
Criminal law and procedure - Adjournment - Grounds to take into account.
Criminal law and procedure - Trial - Verdict - Failure to enter before passing order of conviction or acquittal - Whether renders trial a nullity.
Criminal law and procedure - Plea - Plea of not guilty - Procedure after accused has pleaded not guilty - Criminal Procedure Code, s. 276.

Headnote
This was an appeal by the DPP against an order of acquittal by a High Court judge in the criminal sessions in Livingstone. During the proceedings the State was not represented of the ground that the State Advocate who was expected from Ndola could not for lack of transport, attend court. The judge rejected an application for adjournment, recorded a plea of not guilty from the respondent and made an order of acquittal on the ground that the State was not interested prosecuting the case.

On appeal it was argued by the DPP that the learned Judge erred in law in acquitting the respondent when he knew that the State Advocate could not reach court due to circumstances beyond his control. Secondly that the judge erred when he took it for granted in absence of a State Advocate, that the State did not worst to offer any evidence against the respondent.

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Held:
(i) In granting adjournment the court should consider the circumstances of the case in question.
(ii) Since the respondent was arraigned he should have been put upon his trial and the judge had no option where no evidence had been laid against him but to return a finding of not guilty and acquit the accused.
(iii) Before a conviction or an acquittal, there must be a verdict which must be returned by the jury, or where there is no jury, by the trial court. Failure to take a verdict would render the trial a nullity.
(iv) In the instant case the judge should have entered a verdict of not guilty before making the order of an acquittal. Failure to enter a verdict rendered the trial a nullity.

Cases referred to:
1. DPP v Whitehead (1977) Z.R. 181.
2. R. v Hancock (1931) 23 Cr. App. Rep. 16.
3. R. v Heyes [1951] 1 K.B.29.

Legislation referred to:
Criminal Procedure Code, Cap. 160, s. 276.

For the appellant: R. Balachandran, State Advocate.
For the respondent: M.F. Sikatana, Veritas Chambers.

Judgment

BRUCE-LYLE, AG. D.C.J.: delivered the judgment of the court.

This is an appeal by the Director of Public Prosecutions (hereinafter referred to as the DPP) against an order of acquittal by a High Court judge in the criminal sessions in Livingstone.

The respondent was charged with the offence of murder alleged to have been committed on the 2nd November, 1979. He appeared before the Livingstone criminal sessions on the 9th June, 1980, when a plea was not taken because the State was unrepresented, and the court was informed by the Police Divisional Prosecutions Officer that the State Advocate was expected from Ndola, and that because the flight from Ndola was cancelled he was unable to active at Lusaka, and, also that he was unable to get on the flight from Lusaka to Livingstone. On the 10th June, 1980, the State was still not represented but a plea was taken and one of not guilty was entered; on that date the trial judge intimated that if the State was still not represented the following day, which was the adjourned due, he would be obliged to dispose of the case and all other cases in which the State was to be represented.

On the 11th June, 1980, the State was still not represented and the learned judge then proceeded to make an order, the pertinent portion of which reads as follows:

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> "An accused person is not guilty until he is proved guilty by the State, the accused person has been in custody since 6th November, 1979. The failure for the State Advocate to be here cannot be accepted on grounds of transport. As I said, it only shows that the State is not interested in prosecuting the cases. I take it that the State has offered no evidence against the accused and I therefore acquit the accused. If the Director of Public Prosecutions is not satisfied, he can appeal to the Supreme Court."

The DPP now appeals against this order on the following grounds:

"1. The learned judge erred in law in acquitting the respondent while he knew that the State Advocate could not reach the court due to the circumstances beyond his control.
2. The learned judge misdirected himself in law when he took it for granted, in the absence of a State Advocate, that the State does not want to offer any evidence against the respondent."

In support of the first ground the learned State Advocate, Mr Balachandran, has argued that the circumstances surrounding the failure of the State Advocate to be present in court being well known to the learned judge, he erred in law in the exercise of his discretion by failing to adjourn the case. He has relied on the case of the *DPP v Whitehead* (1). In that case the State applied for an adjournment in the middle of the prosecution to enable two principal witnesses who were then not

in court, to be called. The application was refused and the State was then obliged to close its case. Although that case is not on all fours with the present appeal, certain principles were enunciated in that case as guidelines to trial courts when faced with applications for adjournment. The principles are:

"(i) The exercise of this particular judicial discretion depends very much on the circumstances of the case in question; the decision will be affected, inter alia, by whether or not the accused is in custody, how long he has been in custody, the seriousness of the ounce with which he is charged and the probable sentence if he should prove to be guilty, whether or not the application is the first of its kind or whether there had been previous adjournments, and the reasons why the witnesses are not in court.
(ii) The overriding principle must always be whether the interests of justice demand that an adjournment be granted, but the courts must not lose sight of the fact that justice must be done to the society as well as to the individual.
(iii) It is in the interests of justice that persons who have committed offences be convicted of those offences, subject always to the qualification that there should be no unnecessary delays or harassment of accused persons."

In the present appeal there is no doubt that the learned judge considered the period the respondent had been in custody, the seriousness of the charge the respondent was facing, that is murder, and the penalty for such an offence. The learned Judge considered the other circumstances

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which in his view amounted to disrespect to the Bench. Calendars for High Court sessions are always published in the Government Gazette and arrangements for the attendance of State Advocates at sessions must be made well in advance. Justice to the society as well as to the individual and, in this particular case to the respondent, was also considered by the learned Judge, and there was also in fact an unnecessary delay. Having regard to all these circumstances we have no hesitation whatsoever in concluding that the learned Judge rightly exercised his discretion in not granting an adjournment.

We consider however that further difficulties were created in this case by the fact that the learned Judge, no doubt in his anxiety to expedite the conduct of the sessions, had the respondent arraigned in the absence of the State Advocate. Had the learned Judge not taken the plea in this case and having in the exercise of his discretion refused an adjournment, the only course open to him would have been to discharge the respondent. Having taken the plea the respondent then put himself upon his trial - see section 276 of the Criminal Procedure Code. We do not necessarily agree that the learned Judge was entitled to infer from the absence of the State Advocate that the State wished to offer no evidence in the matter. The point was that the respondent had entered upon his trial and was at peril on the charge and no evidence had been laid against him. In those circumstances we feel that the learned Judge had no option but to return a finding of not guilty and acquit the accused. As we have said however his situation could have been avoided had the respondent not been arraigned.

Before a conviction or an acquittal however there must be a verdict. The verdict must be returned

by the jury or, where there is no jury, by the trial court. Once a defendant has been given in charge to the jury, or to the court sitting without a jury as in this country, the verdict of the jury must be taken or the verdict must be entered by the court. In the case of *R. v Hancock* (2) where, in the course of the proceedings, the prisoner confessed, the conviction was set aside because there was no verdict of the jury. Failure also to take a verdict of the jury would render the trial a nullity (see *R. v Heyes* (3)).

In the present appeal the charge against the respondent was that of murder, and the respondent, after his plea of not guilty, had been given in charge to the court. Under the circumstances, when the learned judge held rightly or wrongly, that the prosecution was offering no evidence against the respondent, he should have entered a verdict of not guilty before making the order of an acquittal. In his order there is no indication whatsoever that a verdict of not guilty was entered. We therefore find on the authorities that his failure to enter a verdict rendered the trial a nullity.

In the result we find the trial a nullity, allow the appeal, and set aside the order of acquittal. We also order that the respondent be re-tried.

Retrial ordered
