GODFREY MIYANDA v ATTORNEY-GENERAL (1986) Z.R. 58 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., CHOMBA AND GARDNER, JJ.S.
24TH JUNE, 1986
(S.C.Z. JUDGMENT NO.15 OF 1986)

Flynote
Criminal Law and Procedure - Committal Proceedings - Raising of complaints by accused before committal - Right of accused.

Headnote

The appellant sought an order of mandamus, which was refused by the High Court, to compel the Subordinate court to allow him access to the DPP s fiat, certificate of summary trial and charge, obliging him to be tried before the High Court and not the Subordinate Court. It was his wish that he be tried before the lower court and claimed that it was constitutionally wrong to deny him the right to be heard during the committal proceedings.

Held:
Although an accused person has a right to raise complaints which do not relate to the validity of the charge against him this does not extend to the questioning his committal for summary trial in the High Court where the offence disclosed by the charge is covered under the schedule under s.11 of C.P.C., this limitation is not in conflict with Art. 20 (2) (d) of the Constitution as the right to be heard is available during trial.

Case Referred to:
(1) Attorney-General v Shamwana and Others (1981) Z.R. 12

Legislation referred to:
Constitution of Zambia, Cap. 1, Art. 20 (2) (d)
Criminal Procedure Code, Cap. 160. ss. 254, 255
State Security Act, Cap. 110, s. 6 (2)(a)
Statutory Instrument No. 137 of 1973

Foe the Appellant: In person
For the respondent: A.G. Kinariwala, Principal State Advocate.

Judgment
CHOMBA, J.S.: delivered the judgment of the court: This is an appeal from a ruling of the High Court upon the hearing of an application by the appellant for an order of mandamus which was prayed for the purpose of directing the Subordinate Court of the first class presided over by the senior resident magistrate at Lusaka to hear and determine objections and complaints the appellant might wish to raise before committal to the High Court for trial. The appeal is based on a number of grounds but at the outset of the hearing of the appeal before this court the appellant was asked to make clear what he really wished this court to do in relation to the matter at issue. The appellant then informed this court that he had wished to ask the trial magistrate to show him the flat from the

Director of Public

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Prosecutions, the certificate of summary trial and the charge that had been preferred against him. He has also stated that he had wished to submit to the magistrate that the charge that had been preferred against him was triable by the Subordinate Court.

For the purpose of clarity it should be stated that the charge that was before the senior resident magistrate was one of retaining official documents contrary to Section 6(2)(a) of the State Security Act, Cap. 110 of the Laws of Zambia.

In the course of arguing this appeal in this court the appellant has conceded that at the time when he appeared before the magistrate he was unaware of the existence of Statutory Instrument No. 137 of 1973. This Statutory Instrument had the effect of adding the schedule that appears on page 170 of the Criminal Procedure Code, listing a number of offences which are triable only by the High Court. Among the offences introduced by that Statutory Instrument was the offence created by Section 6 of the State Security Act. It is quite clear therefore that the particular submission that the appellant would have made if he had been allowed by the magistrate to do so could not have been helped him at all. In other words, it is quite clear that the offence that was charged and on which the appellant appeared before the court of the senior resident magistrate was not triable by the Subordinate Court. In the light of this the appellant cannot now persist in urging this court to grant the order of mandamus tat he wished to have since his appeal to the High Court.

The appellant also contends that the senior resident magistrate should have given him the opportunity to be heard and in particular an opportunity that he should request to examine the fiat, the certificate of summary trial and the charge sheet. We can see nothing objectionable in the Subordinate Court giving audience to the appellant for the purpose indicated. However, it would appear to us that in terms of the law such an audience, if given, could not allow or should not allow for a discussion as to the validity of the charge or indeed the validity of the certificate of summary trial and fiat. We say this because it is quite clear in terms of the language used in section 255 of the Criminal Procedures Code and this language is to the effect that once the Subordinate Court has been presented with the certificate of summary trial certified by the Director of Public Prosecutions, at that stage whether or not a preliminary inquiry has been commenced, if it is a case where a preliminary inquiry is necessary, the Subordinate Court shall forthwith commit the accused for trial before the High Court. In our view the erect of section 255 is to oust the jurisdiction of the Subordinate Court. To entertain a discussion of the substance of the charge is tantamount to assuming jurisdiction and is contrary to the provisions of section 255, Criminal Procedure Code. In our understanding, therefore, when learned Sakala, J., stated in the case of *the Attorney-General v Edward Jack Shamwana and Others* (1) that sections 254 and 255 of the Criminal Procedure Code did not prohibit a Subordinate Court from hearing any complaint by an accused person, he must be understood as meaning complaints other than those designed to discredit the validity of a charge. Such a complaint may be

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for example a complaint relating to any assault alleged to have been committed against him by the arresting authority.

We notice that in the same case of *the Attorney-General v Shamwana,* headnote (iv) states that the indictment (meaning an indictment in respect of which it is sought to commit an accused person to the High Court for trial summarily) must disclose an offence. Before headnote (iv) we notice that the report in the *Shamwana* case states that in that case the Subordinate Court had held that the accused persons should be given the opportunity to examine the indictment and raise any preliminary issue, if any, before committal to the High Court for summary trial and indeed at page 22 of that report the learned judge did state that the indictment must disclose an offence. It is our respectful view that in making that dictum the learned trial judge misconstrued the law as it stands in section 255 of the Criminal Procedure Code as read with section 254 of the same Code. In our view the best that the Subordinate Court can do, if, upon giving an opportunity to an accused person to address it, the accused raises an objection as to the validity of such charge is merely to record such objection and nothing more. The court should thereafter commit the accused to the High Court. If on the other hand the objection raised is for example that the accused in the dock is different from the accused named on the charge then a different situation altogether arises. In that case it would be quite proper for the Subordinate Court to release the man in the dock as a wrong person different from the one named in the charge. In short this court is saying that the Sub-ordinate Court finding itself in a situation such as the one under discussion should not appear to muzzle an accused person, but that it should only deal with the complaints raised within the limits that have been mentioned in clarifying the law as it stands.

The appellant in this case has also addressed us on the question of what he considers to be a contradiction between the provisions of section 255 of the Criminal Procedure Code as it relates to summary trial and those of Article 20 of the Constitution of Zambia, in particular clause 2 (d) of that article. That is the clause which provides that when a person is charged with a criminal offence he must be given an opportunity to defend himself either in person or by legal counsel. In his view the provisions of that article should be extended to the person appearing before a court of committal. In his view, to the extent that the said section 255 of the Criminal Procedure Code provides for summary trial it thereby violates the rights of a person charged before a criminal court in that such person on summary committal proceedings is not allowed to defend himself at the time of committal. The function of courts of law is to interpret the law and not to make it in the manner that the legislature makes laws. The court must follow therefore what the legislature in its wisdom enacts as laws to govern proceedings in courts of law. The courts would be over-stretching their powers if they were to translate laws in a manner contrary to the intention of the legislature. But this is not to say that we uphold the contention that the provisions of the Criminal Procedure Code and those of Article 20 Clause 2(b) of the Constitution of

Zambia are in conflict. We are satisfied that when a man is committed for summary trial he has still the right to defend himself at the trial. Similarly any question of discrediting the charge can be raised at the trial. In our view there is no inherent prejudice occasioned to an accused person who is committed for summary trial.

One other point made by the appellant in his submissions was that the reason he wished to examine the fiat and the certificate of the summary trial was to satisfy himself that those documents were properly signed by the Director of Public Prosecutions. He had been under the impression, after examining copies of the fiat and the certificate of summary trial, that the Director of Public Prosecutions had not in fact signed those documents.

At the hearing in this court the original case record before the senior resident magistrate has been produced and we have satisfied ourselves that in fact those documents were duly signed by the Director of Public Prosecutions.

After listening to the appellant we do not feel that it was necessary to call upon the respondent's counsel to address us. This is so because it is quite clear, after examining all the submissions of the appellant that the appeal lacks merit. In the result we dismiss it.

We have also considered the considered the question of costs and in all fairness we think that although the appeal did not stand a chance to succeed the appellant has made his point when he has said that the Subordinate Court should have given him audience. That being so, we feel that the proper order in this case should be that each parts should bear its owe costs and we order accordingly.

Appeal dismissed.
