RAMADHANI ABDALLAH v. REPUBLIC

COURT OF APPEAL OF TANZANIA AT MWANZA

(Makame, Kisanga and Lugakingira, JJ.A.)

CRIMINAL APPEAL No. 209 OF 1994

(Appeal from the Conviction of the High Court of Tanzania at Mwanza, Masanche, J. dated 6 May 1994 in Criminal Appeal No.339 of 1992).

Criminal Procedure – Substituted change – Right of accused – Caused be informed.

Criminal Procedure – Substituted Change – Right of accused to cross examine the witness in new charge.

The appellant was found guilty of robbery and was sentenced to a term of fifteen years imprisonment, by the District Court of Musoma. He appealed to the High Court and lost. The appellant then appealed to this Court. The evidence on record shows that at the trial in the Court of first instance, the original charge of house breaking and stealing was substituted with that of robbery. The appellant, after substitution of the charge, was not informed about his right to recall the already testified witnesses for cross-examination under section 234 the Criminal Procedure Act 1985.

Held: (i) The appellant should have been informed of his rights under section 234 Civil Procedure Code of 1985.

(ii) If the evidence before the substitution of the charge is ignored there would remain only the testimony of the police investigator which would not have grounded the conviction.

Appeal allowed

Statutory provision referred to:

1. Criminal Procedure Act 1985, sections 234 and 234(2)

A *Mr Magongo,* for the Appellants

Mr Kabonda, for the Respondents

JUDGMENT

B

(Date 12 June 2000)

Makame, J.A.: The appellant Ramadhani Abdallah was found guilty C of robbery, convicted and sentenced to a term of fifteen years in prison, consequent upon his trial in the District Court of Musoma. He appealed to the High Court, Mwanza, where Masanche, J. dismissed the appeal. Mr Rutaisire, learned State Attorney then, did not on D that first appeal seek to support the decision of the Trial Court.

Before us Mr Magongo, learned advocate, decided to drop one of the two grounds he had filed and assailed the High Court decision on only the other ground – that when the original charge of house- E breaking and stealing was substituted with that of robbery the appellant was not informed about his right to recalled the prosecution witnesses have who had up to that stage already testified so as he might further cross-examine them in the light of the new allegation, or even demand F that they give evidence afresh.

Mr Kabonde, learned Senior State Attorney who appeared on behalf of the respondent Republic, declined to support the High Court decision. He agreed with Mr Magongo that the relevant provision in section G 234 of the Criminal Procedure Act 1985 had been offended and that, as such, the conduct of the case after the alteration of the charge prejudiced the appellant and caused him injustice.

After the appellant was charged with the offence of housebreaking H and stealing and four prosecution witnesses had testified, a charge of robbery was substituted. The appellant was quite properly asked to plead to the new charge and he pleaded not guilty. Thereafter, without ado, another witness, the fifth and last, Det. Cpl. Benson,

I

gave evidence. The appellant elected to remain silent. He was found guilty of robbery as aforesaid, and got imprisoned for fifteen years.

We think it is a pity that Mr Magongo, learned advocate who represented the appellant in the first appeal, failed to raise the issue relating to section 234(2) of the Criminal Procedure Act which is loud and clear that:

> Subject to subsection (1), where a charge is altered as aforesaid:
>
> (a) the court, shall thereupon call upon the accused person to plead to the altered charge; and
>
> (b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination.

It is unfortunate that this provision escaped the attention of the learned High Court Judge. The appellant, who did not have the guidance of counsel at his trial, should have been told of his rights under the said section 234. He was not, and we agree with both learned counsel that the conviction for robbery cannot be sustained. We wish to say that the rationale for section 234(2) is easy to discern. A new charge is introduced after some witnesses have already testified. The new offence charged may, as was the case here, consist of new ingredients and or may attract different consequences, as was also the position in this case. In such a situation it is only fair and just that an accused person should be given the said right and opportunity. In the instant case, if the evidence before the substitution is ignored, there would remain only the testimony of the police investigator, which would not have grounded the conviction.

To the extent explained, the trial was improperly conducted, and so the decisions of the two Courts cannot be sustained. We quash the conviction and set aside the sentence imposed.

A We sympathise with Mr Magongo's request that a retrial should not be ordered as the appellant has been incarcerated for over seven years now. We shall not order a retrial. If the appellant is not otherwise lawfully held he should forthwith be set free.

B

C

REPUBLIC *v.* XC - 7535 PC VENANCE MBUTA

HIGH COURT OF TANZANIA
AT SONGEA

D (Mackanja, J.)

CRIMINAL SESSIONS CASE No. 87 OF 1998

E *Criminal Practice and Procedure – Identification parade – Conditions to be observed in conducting an Identification parade – Photograph of the parade – Whether officer in charge of the case participated in the conduct of the parade – Police general orders*

F *Evidence – Identification – Proof of identification by single witness – Surrounding circumstances – Credibility of witness*

The accused was charged with the offence of murder on two counts. It was alleged that he shot dead two people. During the night of 3 September 1997, a watchman of
G a bar at which the incident took place, was on duty. At about midnight, two people, one of whom was armed with a gun and the other armed with a stick, came from a barbeque "banda" which was not lit. The two men walked into the bar and ordered all there to lie down. Then the watchman of the bar (PW1), who was outside the bar,
H and the only eye-witnes, heard a loud burst of a gun. He then jumped over the fence, in the course of which he got injured, but he managed to report the incident at the police station. According to this witness, he saw the bandits from a distance of about ten metres. He observed them for one or two minutes and that the man who had the
I gun was wearing a hat that almost covered his face. In cross-examination, the witness