

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: Mustafa, J.A., Mwakasendo, J.A. and Makame, J.A.)

CRIMINAL APPEAL NO. 69 OF 1979

B E T W E E N

1. SGT. LAWRENCE MZAVA)
2. CPL. CHRISTOPHER ALFRED) APPELLANTS
3. SGT. JUMA SHAME)

A N D

THE REPUBLIC RESPONDENT

(Appeal from the Judgment and Order of the
High Court of Tanzania at Dar es Salaam)
(Biron, J.) dated the 3rd day of October, 1978,

in

Criminal Appeal No. 87 of 1977

JUDGMENT OF THE COURT

MUSTAFA, J.A.:

The three appellants, together with another accused, were originally charged at a District Court on two counts:

(1) Stealing by Public Servant of forty pistols and fourteen rounds of ammunition - contrary to sections 265 and 270 of the Penal Code; and (2) Being in unlawful possession of offensive weapons - contrary to section 8(1) of the National Security Act. 1970. The trial magistrate held that the three appellants had no case to answer in respect of the two counts, but that their co-accused had a case to answer in respect of the second count. The Republic appealed against the acquittal of the three appellants to the High Court which set aside the order of acquittal and held that the appellants had a case to answer in respect of both the counts and returned the proceedings to the District Court with an order that the trial was to proceed from the stage when it was terminated. The appellants are now appealing from the judge's order.

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In the first appeal the judge recalled five prosecution witnesses to give further evidence and called three new court witnesses because, as the judge said in his judgment, and in reference to section 151 of the Criminal Procedure Code:

"..... I had to recall witnesses who had given evidence and call witnesses who had not, as will hereinafter appear, in order to perform the duties of the trial court, which the magistrate so miserably failed to perform."

The judge purported to exercise his powers of recall of witnesses and the calling of new ones in terms of section 322(1) of the Criminal Procedure Code.

The appeal was argued on two main grounds. It was submitted that the magistrate was right in holding that there was no case to answer as no prima facie against the three appellants had been established, and that the judge was wrong in recalling or calling new witnesses to fill the gaps in the prosecution case.

The trial magistrate had held that because of the non-production of the book or register in which the numbers of the pistols have been recorded, evidence of ownership of the pistols was not established and no case against the appellants was made out of the first count. As regards the second count only the appellants' co-accused was found in possession of the pistols, not the appellants.

Like the first appellate judge, we are disconcerted at the magistrate's reason for holding that the appellants had no case to answer. The magistrate was clearly construing far too narrowly the evidence necessary to establish ownership in defiance of equity and a sense of reality. There was evidence that forty pistols were missing from the T.P.D.F., and two army officers identified the pistols as T.P.D.F. property. Pistols are in a special category, not ordinary common place objects.

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In answer to the magistrate P.W.9, Joseph, an army Commander, said that he could not remember where the book or register was or if it could be found, but that the book was in the custody of one of the appellants - Accused 4 at the trial. The magistrate did not proceed with his enquiry and used the evidence given by P.W.9 on this matter as the basis for his finding that the book or register was not produced in court and therefore no evidence of ownership of the pistols was established. In our view it was the duty of the magistrate at that stage, in view of the provisions of section 151 of the Criminal Procedure Code which reads:

"Section 151 - Any court may, at any stage of a trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case",

to have proceeded to discover who has the book and in the words of the first appellate judge "if it was not available why it is not, and if lost consequently who is responsible for such loss.".

The first appellate judge decided to recall five witnesses and call three new ones, in order, as he said, "to perform the duties of the trial court which the trial magistrate so miserably failed to perform.". Since the main thrust of the appeal is against this action we shall examine it.

The first appellate judge acted in terms of section 322(1) of the Criminal Procedure Code which reads:

"Section 322(1) - In dealing with an appeal from a subordinate court the High Court if it thinks additional evidence is necessary, shall record its reasons and may either take such evidence itself or direct it to be taken by a subordinate court.".

Before the appeal commenced, the first appellate judge said:

"Before I start hearing the appeal I want recalling Abdul Nguzo (P.W.6) and I also want the production of the armoury book or if lost who is responsible.".

The provisions in section 151 and section 322(1) in our Criminal Procedure Code are clearly derived from section 540 and section 428 of the Indian Code of Criminal Procedure , and are in pari materia with them. In India it has been held by the Supreme Court (See A.I.R. Commentaries on the Code of Criminal Procedure, Chitaley and Rao, 6th Edition p. 2871) that these powers are to be exercised in suitable cases and shall not be misused for a re-trial or to change the nature of the case against an accused. But once the action is justified there is no restriction to the kind of evidence which may be received. We find ourselves in agreement with this view. On a perusal of the record of the trial, we find ineptness on the part of the trial magistrate and incompetence on the part of the prosecution. It was eminently an occasion when a first appellate court was justified in invoking the provisions of section 151 and section 322(1) of the Criminal Procedure Code and re-call and call witnesses in order to arrive at a just decision of the case. That the additional evidence required was available was apparent from the record, and such evidence was not for filling up gaps in the prosecution case or for making a new case against the accused but was for the just decision of the case.

It is clear that the appellants have a case to answer on both the counts. The appeal is without merit and is hereby dismissed.

DATED at DAR ES SALAAM this 6th day of March, 1981.

A. MUSTAFA
JUSTICE OF APPEAL

Y.M.M. MWAKASENDO
JUSTICE OF APPEAL

L. M. MAKAME
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


(G. A. - RWELENGERA)

DEPUTY REGISTRAR