DIRECTOR OF PUBLIC PROSECUTIONS

v

SEREMAIA AMATO & OTHERS

[HIGH COURT, 1995 (Pathik J.) 10 February]

Appellate Jurisdiction

Crime-procedure-guilty plea-alternative counts-Criminal Procedure Code (Cap 21) Section 206.

Crime-defences-defilement-defence of reasonable belief-Penal Code (Cap 17) Section 156(1) proviso.

Having accepted guilty pleas the Magistrate acquitted the Respondents after forming his own view of the complainant's apparent age. On appeal against the acquittal: HELD: (1) If mitigation is offered which may amount to a defence a not guilty plea should be entered and the matter proceed to trial. (2) A defence of reasonable belief nullifies a guilty plea.

Per Curiam: Statutory defences should be drawn to the attention of unrepresented Accused by the Court; it is undesirable to accept as established by a guilty plea facts which may not be expected to be within the accused's knowledge.

Cases cited:

Adam v. Republic (Nairobi Court of Appeal 1973)
Akuila Kuboutawa v. Reginam (Lab. Cr. App. 2/75)
DPP v. Peni Raitevui (Lab. Cr. App. 14/78)
Peceli Viriki v. Reginam (Suva Cr. App. 79/92)
Penaia Erevonu v. Reginam (Lab. Cr. App. 5/75)

Appeal against acquittal in the Magistrates Court.

Miss L. Laveti for the Appellant
Respondents in person

Pathik J:

This is an appeal by the State against the acquittal of the Respondents by Moses Fernando Esq., the Resident Magistrate at Labasa, on the alternative count of defilement contrary to section 156 (1) of the Penal Code. In the charge the Respondents were charged in the First Count with the offence of rape contrary to sections 149 and 150 of Penal Code followed by, as stated an alternative count of defilement.

The alternative count states that the Respondent on 11 November 1994 at Nadavaci, Natewa in the Northern Division, had unlawful carnal knowledge of a girl namely Merewalesi Tikoiseqaseqa being about the age of 13 years but under the age of 16 years, namely 15 years 3 months 9 days.

The Respondents were acquitted by the learned Magistrate on 19 November 1994 on their plea of guilty.

The circumstances briefly were that they pleaded guilty to the alternative count of defilement and not guilty for rape. The facts were outlined by the prosecution which stated, inter alia, that on 11 November 1994 the Respondent defiled a girl namely Merewalesi Tikoiseqaseqa (hereafter referred to as the "victim") being about the age of 13 years but under the age of 16 years, namely 15 years 3 months 9 days.

Then the following note appears on the record: "The proviso to Section 156 (1) states that it is sufficient defence if it shall be made to appear to the court that the accused had reasonable cause to believe and had in fact believed that the girl was of or about the age of 16 years. In the circumstances I order the prosecution to produce the complainant before me in Savusavu Magistrate's Court on 28.11.94".

On 2 December 1994 the victim was taken before the learned Magistrate who recorded as follows (page 17 of the Record) :

> "This case is called today for sentencing. As the accused have told Court that they thought that the girl was above 17 years of age I requested the police to produce the victim before me to check whether she looked a girl over sixteen.
>
> The victim Merewalesi Tikoiseqaseqa is before me. She is a well-built girl and looks well over 16 years of age even for a Fijian girl who is generally well built.
>
> Even though all the s ix accused have pleaded guilty before me, as they are unrepresented I consider the defence and consequently I hold that they had reason to believe and in fact believed that the girl was over 16 years of age.
>
> In the circumstances I acquit all the six accused. All six accused acquitted."

Upon reading the record of the proceedings in the lower court and after hearing the learned State Counsel and upon hearing each of the Respondents I allow the appeal for the reasons hereafter appearing.

This Appeal is under s.308 (1) of the Criminal Procedure Code which provides:-

> "308 (1) Save as hereafter provided, any person who is dissatisfied with any judgment, sentence or order of a Magistrate's court in any criminal case or matter to which he is a party may appeal to the High Court against such judgment, sentence or order.
>
> Provided that no appeal shall be against an order of acquittal except by or with the sanction in writing of the Director of Public Prosecutions."

Under section 206 of the Criminal Procedure Code procedure is laid down to be followed when an accused person pleads guilty to the charge. It states :

> "(2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary."

The learned Magistrate failed to comply with the provisions of the said section. Subject to what I say hereafter on the reasonable belief that the girl was 16 years of age, the learned Magistrate ought to have, once the respondent admitted the charge of defilement, convicted and passed sentence on them as required by the said section.

The law did not empower the learned Magistrate to acquit the Respondents in the manner he did.

Even at the stage of mitigation, after the facts were outlined, when the Respondents raised the matter of their belief that they had reasonable belief that the victim was of the age of 16 years, the learned Magistrate was required to enter a plea of not guilty and proceed to hearing in the normal manner.

By virtue of the said section 206 (2) of the Criminal Procedure Code, there is an obligation on the Court to record, as nearly as possible, the words used by the accused when admitting the truth of the charge. In Adan v Republic, Court of Appeal, Nairobi 1973 Spry V.P. states clearly the procedure that should be followed in a situation such as the present; Spry V.P there was dealing with provision similar to our section 206. He stated :-

> "When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate

> should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. the magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add and relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course , be recorded."

It is abundantly clear from the record that the learned Magistrate completely misunderstood the effect of the proviso to section 156 (1) of the Penal Code which is in the following terms :-

> "Provided that it shall be sufficient defence, to any charge under paragraph (a) if it shall be made to appear to the court before whom the charge shall be brought that the person charged had reasonable cause to believe and did in fact believe that the girl was of or about the age of sixteen (16) years."

The procedure adopted by the learned Magistrate (as stated above on page 17 of the Record), before proceeding to acquit the Respondents once the defence of "reasonable belief" was raised by them, was irregular as well as unlawful for once this defence is raised: "it nullifies any purported plea of guilty and the court must thereupon formally enter a plea of not guilty on behalf of the accused and hear the evidence so as to decide on the evidence whether the person charged had reasonable cause to believe and did believe that the girl was sixteen years of age or over." (Grant Atg.Chief Justice in Peceli Viriki v. Reginam Criminal Appeal No:79/92). In Peceli (supra), Grant ACJ said that "by no stretch of the imagination can the appellants purported plea of guilty be treated as unequivocal and the conviction on each count is accordingly quashed with the sentence set aside." (underlining mine for emphasis)

In another case, namely 1. Penaia Erevonu, 2. Dick Steiner v. Reginam (Labasa Criminal Appeal No.5 of 1975) where on a charge of rape the plea was unequivocal and Grant CJ set aside the conviction and remitted it to the Magistrate's Court with direction to proceed to enter a plea of not guilty to be formally entered and the case set down for hearing.

Similarly, in this case the purported plea of guilty was nullified. It was nullified in the circumstances of this case (Peceli supra) particularly when the learned Magistrate made up his own mind on his own observation of the victim and

formed his own impression of the victim's age and proceeded to immediately acquit the Respondents without further ado. Consequently the proceedings in the Magistrate's Court became an absolute nullity. A

I might mention at this stage for future guidance, in the words of Grant CJ in Akuila Kuboutawa and Reginam (Labasa Criminal Appeal No.2 of 1975) which was a case of defilement:

> "..... that in the case of an unrepresented accused any statutory defence should be brought to his attention. For instance, in a charge of this nature, the accused should be informed that he is charged with unlawful carnal knowledge of a particular girl of a specific age and that he had a reasonable cause to believe that she was of or about the age of sixteen years; and the record should disclose that the charge was explained accordingly." B C

I would also observe at this stage, as Grant ACJ said in Peceli Viriki (supra) that:

> "It is an undesirable practice to accept as established by a plea of guilty facts which constitute an essential ingredient of the charge of which an accused may have no personal knowledge, such as the precise age of the girl in question, and for this reason a birth certificate or other satisfactory proof of the girl's age should be furnished ....." D

This becomes all the more desirable in this case in view of the Respondents' belief as to the victim's age and because of the learned Magistrate's own personal view of the victim when she was presented to him in Court. E

Because there is a charge in the alternative to avoid any pitfalls in view of the order which I propose to make, it would be wise to bear in mind the following procedure where there is an alternative count as contained in the Chief Magistrate's Circular No.7 of 1976:

> "Where the prosecution charge an accused on more than one count in the alternative and a conviction is recorded on one, no verdict or finding should be entered on the other. F
>
> 2. For example if the accused pleads guilty to one of the counts and the plea is accepted by the prosecution and the accused convicted thereon, the alternative count should simply remain on the file. G
>
> 3. Similarly if the charge proceeds to a hearing and the accused is found guilty on one count and convicted thereon, no finding should be made in respect of the alternative count but the record

should simply shew to the effect "As count 2 is in the alternative to Count 1, I make no finding thereon".

A 4. Where an accused has been convicted on one of alternative counts he should not be acquitted on the other, as this ties the hands of an appellate court."

In this above aspect of "alternative count" I also refer to Grant CJ's judgment in The Director of Public Prosecutions v. Peni Raitevui (Labasa Criminal Appeal
B No:14 of 1978). There be made reference to the above circular which he says correctly sets out the practice.

In relation to appeals from Magistrates' Court s.319 of the Criminal Procedure Code sets out the powers of High Court as follows :-

"319. - (1) At the hearing of an appeal, the High Court shall
C hear the appellant or his barrister and solicitor, if he appears, and the respondent or his barrister and solicitor, if he appears, and the Director of Public Prosecutions or his representative, if he appears, and the High Court may thereupon confirm, reverse or vary the decision of the magistrate's court, or may remit the matter with the opinion of the High Court thereon to
D the magistrate's court, or may order a new trial, or may order trial by a court of competent jurisdiction, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the magistrate's court might have exercised:

E Provided that -

(a) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial
F miscarriage of justice has actually occurred :

(b) the High Court shall not order a new trial in any appeal against an order or acquittal."

In this case, as I have stated earlier, the learned Magistrate was not empowered to acquit the Respondents. It was an unlawful act on his part. The acquittal itself
G was a nullity. Therefore proviso (b) hereabove in s.319 did not apply to an unlawful order of acquittal. In my view, the proviso is applicable only to a valid order of acquittal made in accordance with the law.

For the above reason I remit the case to the Magistrate's Court at Labasa under

the provisions of section 319 (1) of the Criminal Procedure Code for fresh plea on the charges and re-hearing before a different Magistrate. Accordingly, the order of acquittal is set aside.

(Appeal allowed; retrial ordered.)