

19771003 TZHC Mwanza

COURT
TZHC

DECIDED
3 October 1977

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IN THE HIGH COURT OF TANGANYIKA AT Mwanza APPELLATE JURISDICTION
CRIMINAL Appeal No. 197 of 1977. (Original Criminal Case No. 160 of 1977 of the District Court of Ngudu District at Ngudu - Before J. S. Kagame, Esq.; District Magistrate) vs. The Republic

The appellant was charged with eleven counts involving forgery and stealing by public servant and was convicted on ten of them. He was variously sentenced, the sentences aggregating to 3 years' imprisonment. The determination of this appeal turns on the procedure adopted by the trial court. The record indicates that the appellant was charged on 23 July, 1975. On 15 August, 1975, before any evidence was adduced, the charges were withdrawn and fresh charges were substituted. The hearing then commenced and six witnesses were called by the prosecution. On 3 January, 1977; however, the new charges were similarly withdrawn and fresh charges were substituted. The appellant was invited to plead thereto and hearing continued with the 7th to 11th witnesses when the prosecution closed its case. There is no indication of any kind that the appellant was advised of his right to recall the witness, who testified for further cross-examination or, if he elected not to exercise that right. This procedure violated the provision of s.209 (1) of the Criminal Procedure Code and I am not certain that the appellant was not prejudiced thereby. My uncertainty is accentuated by the fact that the charge sheet which was withdrawn on 3 January, 1977 cannot be traced on the record. As I have indicated there should have been three charge sheets: the one which was withdrawn on 15 August, 1975; the one which was withdrawn on 3 January 1977; and the one which was substituted on the latter date. I have traced the first and the last but not the second. It is therefore difficult for this court to know whether the charges withdrawn on 3 January, 1977 were defective in substance or form as to make substitution necessary. Characteristically, the trial did not comment on this aspect but merely accepted them; nevertheless, charges as if it was bound to do so. Section 209 (1) makes it clear that it must appear to the court that a charge is defective in substance or form before it can order an alteration. It is not bound to accept any alteration, and may refuse to entertain one, if it is not so satisfied. By reason of these irregularities it is impossible to tell the extent to which the appellant was prejudiced and I hold that the trial was a nullity. I therefore allow this appeal, quash the convictions and set aside the sentences imposed. I have given serious consideration to the question of retrial as suggested by the

I, ~arn~d State Attorney but I have been unable to resolve the battle in my conscience. The appellant is a victim of recurrent mental disorders. There is correspo~dc~cG on the file from doctors and officials of the Ministry of National Edu :~tion, his former employers, ~,ich speak loudly on this issueo I do ?:1ot consider such a person fit to undergo another ord~al in th,~ c ,-1.rts but I consider that law should be temp,cred with humanity,. The appellant should therefore be set free unL::ss further lawfully held. A,1rn,o,,;£: -· ~ '1 ,,,J.:,'V\,•.. ' MWANZA. =KO s7::~ :·tw:ii\ .IN RA 3/10/77 0 JUDGE.

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