

TANZANIA / JUDGMENT

19770706 TZHC Mwanza 1

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TZHCDECIDED
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IN THE HIGH COURT OF TANZANIA — 'LNZI PP.: .';T:JTIR13DICT1ON HIGH Cijt. C I PPTA NO. 66 OF 1977. (Original Criminal Case 10. "Alof 1976 of the District Court of Mwanza District at Mwaiza - Before J. M. M;eyunge, isq.; District Magistrate) M .ANGJ I<JDJU... . 0000 - e. LPP..LL_NT versus T Hi, ii!PUBLIC. o • . • a, .. a JUi)GIvLINT LUGAKiNG1, J.: My brother who a.irnit..... is appeal to h ring was minded to dismiss it summarily but 'er f:ne technical irregularity. . The appellant was first charged on three counts., one., each of uttering a false document, attempting to obtain goods by false pretences and destroying. evidence, c/as 342 and 337, 302 1 and. 109.? respectively, of the Penal Code. The trial commenced on 12 July, 1976 when four prosecution witnesses gave evidence, it was adjourned to 13 and again to 16 July, 1976 when . . a new charge sheet was substituted, The new charge sheet included the above three counts and one more count of assault occasioning actual bodily harm c/s 241 of the Penal Code. Although new, pleas were taken the applicant was not allowed to recall the District Magistrate for cross-examination. The trial proceeded and the applicant was subsequently convicted on all four counts as charged. The applicant was thereafter admitted to consider the effect of the irregularity on the proceedings. Briefly, on 16 June, 1976 he appellant presented a Local Purchase Order (LPO) at the Regional Depot at Mwanza South purported to come from the Water Department, Lujariza, for 9000 litres of super petrol worth Shs. 22,000/=. The Department had not purchased petrol from that Depot before. Suspensions were therefore issued and the Department Manager (P42), to whom the LPO was started to question the applicant a little more closely. Presently, to appellant grabbed the LPO, tore it up and started chewing it while shouting away. He was chased and apprehended and later handed to the police with pieces of the LPO. At the Police Station he snatched the pieces of the LPO from P/c Yotha (P15) and again stuffed them into his mouth. It was alleged that in an effort to retrieve them P/c Yotha assaulted and wounded by the appellant. It is on these facts that the four counts were based. I will go back to consider the question posed in the first paragraph before I go into the merits of the appeal, . Whenever it is sought to alter a charge in the course of a trial the provisions of s.209 of the Penal Code become relevant. It provides, inter alia, for the accused to plead to the new charge and provides further that the accused may deny the recall of the witnesses or any of them to 'stify afresh or to be allowed to cross-examine. As a matter of fact, established practice is upon the court to draw the attention of the accused to this right. The idea being, in a nutshell, -is that the accused should not be put to a disadvantage by any alteration in the charge. But in the instant case it is doubtful whether the applicant was...., put to any disadvantage. The

alteration that was affected was the addition, of a new count. The previous ones were not altered materially. They were simply rearranged and the value of the patrol was stated but this was apparent even before the alteration. In other words, as regards the first three counts, the charge rejected, denied the same and did not require new evidence from either side. With regard to the additional count, the evidence had been adduced prior to the alteration. The only evidence there came from PW5 after the alteration in the Appellant's cross-examination of the witness. In these circumstances I am unwilling to say that the appellant was prejudiced in any way. I held view that when an alteration in the charge does not necessitate different evidence the omission to advise the accused of the right to have the witnesses recalled is a procedural irregularity on appeal. In this case, therefore, the irregularity was not fatal to the proceedings. /2. —:

- 2' - Leaving that aside, what happened in this case calls to attention another important aspect of s4209. In this situation on alteration the form of an indictment by substitution or the addition of a new charge. What seems to be constantly overlooked is that the charge must appear to the court to be defective in substance or form before the citation can be made. If defect, the suit one is infected. It is an indictment and therefore a defect in to, the Croatian relates to the offence on a legal basis. This may include a failure to disclose, any, of course or the, every day misreading of the wrong provisions. A defect in form, on the other hand, includes the inadequacy of the charge, even if perfect in substance. Hence, if it becomes apparent in evidence that the accused was charged with a lesser offence once in the circumstances warranted or was not charged with another offence with which he could additionally be charged, that would be a jurisdictional defect. From this we can argue that whenever the defect be one of substance or form the alteration to be effected, whether by amendment, substitution or addition, must be an alteration which cures some defect in the indictment, it cannot include the substitution or addition of a charge which is altogether strange to the available evidence. If it is intended to do the latter I think the best way is for the prosecutor to withdraw the old charge under 406(a) of the Criminal Procedure Code, and to substitute a fresh charge incorporating whatever additional counts he may contemplate. The obligation is upon the court, not the prosecutor, to satisfy itself about the defectiveness of the charge. In doing so it must refrain from entertaining alterations that are not directed at the defect. In the instant case there was, to my mind, no defect in the first charge. The existing counts were perfectly laid and described. On the other hand, the evidence adduced did not in any way suggest that the appellant assaulted anyone in the course of committing the offences charged. I would then think that the alteration to the fourth count was not available under s.209 of the Code. It is an unjust alteration and should have been refused. The appeal as such is substantially without merits. The appellant went to the Depot in broad daylight, presented the LPO in broad daylight and tore it up and chewed it in broad daylight. I have no reason to disbelieve the witnesses on this matter for that was an issue for the trial court. The appellant's argument is that the pieces of a document were not proved to have been an LPO or that it came from the appropriate department. That begs the question, if one of these could be proved because he turned the LPO into food. In any case there were eye-witnesses to the document before its destruction. I have already said that I have no reason to doubt that, sir

credibility. And were the ilocumeot of a different or innocen.ta nature the appeilant woaidoept have risked eating it. In the enant, 'I have no doubt about the appellant's guilt on the first three counts. I will sustain his convictions an... the sentences thereon. It is noted, in the fourth count, that PC 'c±dam .(P45) 'sustaiei a sprain in the me'ia.Oerpal joint:ofthe left thumb. Ho alleged that ha was assaulted by the appellant while,trying to regain piecca of the LPO from him. I cm inclinOd 'to think: that the role of the .appeldeht on tnis.occasion was exaggerated.a.s w.as'the charge. 1 should think th' 't the appeHnt gave a more pausibie 'account when he said that t e ask:ari. got injured when he forced his fngurs into the appellant's molith to retrieve the pieces of paper. It would have been naive to:expect the appeila.:t to submit to such an operation. The injury was obviously concomitant to the askari's efforts. in view of this and what I soil ealier about the injstioe of the alteration of the charge, I allow the appal on the ±'..rth count. The ccinvection.and sentainceare accordingly set aside. . The final position'is"lnat thisappal has failed in is entirety on thefirs't, second and third cuents. It has been allowl en'tia'ely on the fourth count. In view of ada mode of sentencing these resiltis do not effect the aggregate punishment irnpoead on the 'app!,lcnt. M1iNZi. K.S K LdhLKINCIR 6TH JULY, 1977 JUIG

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