

TANZANIA / JUDGMENT

19770802 TZHC Dodoma 1

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11% IN THE HIGH COURT OF TANZANIA KT DODOIYLA APELLL.TE JTJRISDIC TION HIGH COURT IMINAL APPiAL No. 105. OF 1977 CF CRIMINAL APPEAL No. 106 OF 1 977 ORIGINAL CRIMINL CASE No. 136 OF 1976 OF TI DISTRICT. COURT OF.KONG1,11i.DISTRICT AT KONGWA BEFORE: A.L SANGA DISTRICT M.GISTTE P4TRICK 5/0 MALOLE) 'P'LL NTS 2.1VIBA.TYANI /QBOILITI.)• . . . , rsus

- THE REIYBLIC '!. .. * RESPOND]T CHt.RGE Utteing coui;erfeit not 0 c/s 360(l)-of.the Penal Code. JUDMEN iIPET'. 9 J The two appellants, Patrick Mel9le and. Mbat.yani : BPleti r were each charged with and convicted of an offence cited in -the charge shEet as t'Utterin, counterfeit note c/s 360(1) of the Penal Code," and were each, sentenced to two yea's.:• im.prisoirnent. They now appeal, and their appeals are herby consolidated. . . . Before I pbceed tO deal with the merit s of the appeal I would like :to dispose of two procedural-ouestions, In the first place, the manner •in which the charges were .ramed left much to be desired. The charge sheet reads as follows: •. STATEPNT OF OFFENCE: Uttering cbunterfeit iote c/s 360(1) of the Penal Code.
- . PARTitJLiR5 OF OFFENCE 1st accused: That IvTbatyani Boleti •. . . is charged on the 1st day:'bf Decembr, •. . . 1976, at about 22 hours at Kowa Pcis shop Kongwa Sub-District, Npwapwa
- . District, Dodoma Region, was found in posession of one countèrfëit (note) of shs. 100/- numbered L 303223 knowing the same to be counterfit. PARTICUtt.S OF OFFENCE 2nd accused : That Patrick Malo1 i chared on the let day of December, 1976, at about 21 hours at Kongwa PcnTe shop Kongwa Sub-District, Mpwa-pwa District, Dodoma Region was found in possession of one counterfeit note of shs, 100/- numbered L 303215 knowing the same to be. counterfeit." Td start with, scction,360 of the Penal Code does not create the. offence of "uttering a counterfeit note." That section creates the offence of uttering counterfeit co Besides, sectiOn 360 of the P.nal Code does not have a sub- section.. From the partiulars of the charges, the Oharges ought to have been laid under section 348 . o the Penal Code which creates the offence, inter alia, of being in unlawful possession of forced bank note or currency note. •It is apparct:t. from the particulars of the charges, that the lead trial igistrate and The public prosecutor had section 348 of the Penal Code in mind. * .2. 2 - Inasmuch as the charge cited the wrong section of the law, the charge was defective. What, then, is the

effect of such defect? Section 346 of the Criminal Procedure Code provides that: no finding, sentence or order made or passed by a court of competent jurisdiction shall be reversed, altered on an appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, etc. unless the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice. The question, therefore, is whether this defect in this case in fact occasioned a failure of justice. In my view, where a charge has cited a wrong section of the law, but the particulars of the charge clearly refer to actual offence committed, and if the accused cannot be said to have been under any misapprehension as to the offence with which he stood charged then such defect is curable under the provisions of section 346 of the Criminal Procedure Code. In the instant case there were two defects: the first was that a wrong section of the law was cited; the second was that it alleged uttering counterfeit notes. The particulars of the charges, however, leave no doubt that the charges alleged against the appellants were those of being in possession of a forged bank note or currency note, which is an offence under section 348 of the Penal Code. In my view, therefore, the fact that a wrong section of the law was cited is a curable defect under the provisions of section 346 of the Criminal Procedure Code. The use of the words "uttering counterfeit" were similarly unfortunate. The phrase "uttered"

- ought to have been used was "being in possession of forged". But be that as it may, in my opinion the language used cannot have so misled the appellants as to have occasioned any failure of justice. The particulars of the charges, as I have said could have left no doubt in the mind of any of the appellants. Indeed - I would go so far as to say that a bank — note "is" the fact a counterfeit bank—note, in that "to counterfeit a bank—note" means the same thing as to forge it. On these grounds, therefore, I hold that those two defects are not fatal to the convictions as they are curable under the provisions of section 346 of the Criminal Procedure Code. The second procedural irregularity in the charge sheet is that the charge sheet cites as one count what were really two separate counts - one against each appellant. This was wrong. It has been pointed out on more occasions than one that where more than one count is charged in one charge or information, the counts must be set out separately and each count must contain the statement of offence and the particulars thereof because each count constitutes a distinct offence (Maitie v. R. (1961) E.A. 470). However, this irregularity did not occasion any failure of justice, and so cannot vitiate the convictions. Having dealt with the procedural aspects of the matter, I will now turn to the merits of the appeal. The prosecution evidence was that the appellants went to Konga pombe shop together, and on arrival there, the second appellant, Mbatyani Boleti, asked the complainant (Pw1) to give them shs. 9/- worth of pombe, which Pw1 did. The second appellant then gave the complainant what looked like a genuine shs. 100/- bank—note, and Pw1 gave him shs. 300/-
- 3 - Later, the first appellant, Patrick Nalole also asked the complainant to give them shs. 9/- worth of pombe, which the complainant did. The first appellant in turn gave her another note which looked like a genuine shs. 100/- bank—note. When the complainant said that she had no change, the first appellant told her to keep the money and give her change the

next day. These two notes were later found to be forged. Each of the appellants denied having given the notes to the complainant. The learned trial district magistrate accepted the evidence of the complainant which was supported by that of Pw.2, and Pw.3. Having perused the entire record, and bearing in mind that the learned magistrate had the advantage of seeing and hearing the witnesses, I am far from persuaded that his findings of fact ought to be impugned. In my view, the findings are fully supported by the evidence. There was further ample expert evidence to the effect that the two notes, fairly clever forgeries, were not genuine bank—notes, and the appellants gave no explanation as to how they came to possess the same; let alone evidence to discharge the burden that lay on them by statute that they were in lawful possession of the forged notes. In the circumstances, the convictions under section 348 of the Penal Code were inevitable. However, in order to keep the record straight, section 360(1) of the Penal Code shown in the charge; is substituted with section 348 of the Penal Code. On the question of sentence, I note that an offence under section 348 of the Penal Code attracts, as correctly pointed out by the learned magistrate, a maximum sentence of seven years imprisonment. The art of forgery that went into the making of the forged note had been developed to near perfection. Although the appellants were first offenders, the circumstances clearly called for deterrent sentences. Besides, there is the duty on everyone to protect our national currency. For these reasons I do not propose to interfere with the sentences. They are to stand. As the same require confirmation by this court, they are hereby confirmed. In the result, save as indicated herein, the appeals are hereby dismissed. 4. / B.D. CHIPPTIL. JUDGE Delivered in Court this 2nd day of August, 1977. 4Y I 7. B.D. OHIPETL. JUDGE

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