

UGANDA / JUDGMENT

Mundekesye v Rex (Criminal Appeal No. 235 of 1951) [1951] EACA 309 (1 January 1951)

[1951] EACA 309

COURT

East African Court of Appeal

BEFORE

Hearne CJ, Nihill P, Worley VP

CASE / FILE NUMBER

Criminal Appeal No. 235 of 1951

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR BARCLAY NIHILL, President, SIR NEWNHAM WORLEY, Vice-President, and SIR HECTOR HEARNE, C. J. (Kenya)

LIGHTON alias MOGEGE s/o MUNDEKESYE, Appellant (Original Accused)**REX. Respondent (Original Prosecutor)****Criminal Appeal No. 235 of 1951**

(Appeal from decision of H. M. High Court of Tanganyika—Abernethy, Ag. J.)

Tanganyika Criminal Procedure Code section 317 (1) (b)—Appeal on grounds other than against sentence or against the weight of evidence—Summary rejection—Innuendo of bad character—Section 54 Indian Evidence Ordinance.

The appellant having been convicted by a Magistrate of stealing a bicycle appealed to the Tanganyika High Court on grounds, (a) that the evidence against him was wholly circumstantial, and (b) that he was convicted only on account of his previous criminal history. His appeal was summarily rejected.

Held (12-12-51).—There was no jurisdiction under section 317 (1) (b) of the Tanganyika Criminal Procedure Code to deal with the appeal summarily, since the appeal was brought not only on the ground that the conviction was against the weight of evidence.

On the second ground of appeal that the Police Inspector gave evidence constituting an innuendo of bad character:-

Held.—Such evidence was irrelevant under section 54 of the Indian Evidence Act. Appeal allowed.

Sir James Henry, Acting Solicitor General (Tanganyika), for Crown.

Appellant absent, unrepresented.

JUDGMENT.—This is a second appeal from the High Court of Tanganyika. We have heard this appeal, although it was filed out of time, because we have accepted the appellant's statement in his affidavit that the reason for the delay was due to the fact that he did not receive a copy of the Order of the High Court dismissing his appeal until about a month after it had been made.

As regards the merits of the appeal itself, the appellant raises two material points in his Memorandum of Appeal: firstly, that the evidence suggesting that he was the person who stole the bicycle the subject matter of the charge against him was far too circumstantial in character to support the conviction, and secondly, that he was convicted only on account of his previous criminal history.

With regard to the first point, it is true that the evidence implicating the appellant was wholly circumstantial in character, but we should hesitate to say that the Magistrate who convicted him could not reasonably draw the inference that he did.

The appellant's second point, however, is, we think, a good one. Although it is badly expressed in his Memorandum of Appeal, it must have reference to the fact that in the evidence of the sub-inspector of police appeared passages which indicate the appellant's bad character.

Before discussing the effect of the admission of this evidence on the mind of the Magistrate, we note that the appellant made precisely the same submission in his Memorandum of Appeal to the Court below. This being the case, the learned Judge of the High Court of Tanganyika had strictly no jurisdiction to deal with the appeal summarily, since the appeal was brought not only on the ground that the conviction was against the weight of evidence (section 317 (1) \$(b)\$ Criminal Procedure Code).

Furthermore, it would appear that in perusing the record the learned Judge must have overlooked this evidence, because he makes no reference to it in his order dismissing the appeal.

We now come to the question as to whether the admission of this evidence has in fact caused prejudice to the appellant. We are clearly of the opinion that what the sub-inspector said in evidence did at least constitute an innuendo of bad character so as to amount, in effect, to evidence of bad character. Such evidence is irrelevant under section 54 of the Indian Evidence Act, unless evidence has been given that the accused has a good character. To quote from Woodroffe's commentary on the section (9th edition, at page 474): "By the provisions of section 54 evidence of bad character, except in reply is inadmissible, for a man's guilt is to be established by proof of the facts and not by proof of his character. Such evidence might create a prejudice but

not lead a step towards substantiation of guilt".

We reach, then, this position in the present case: on evidence which was wholly circumstantial the trial Magistrate had to decide whether an inference of guilt was the only possible one. In his consideration of that question he also had before him the knowledge that persons were afraid of giving evidence against the appellant because he was known to be a person of aggressive ways and that from time to time he had been charged with unspecified offences.

Had the Magistrate referred to this evidence in his judgment and had recorded that he had put it entirely out of his mind in his consideration of the case, we might have been disposed not to intervene. As it is, we cannot but be left with a feeling of uncertainty as to whether the Magistrate's mind may not have been affected by evidence which should never have been before him, and that but for this evidence it is possible that he might have come to a different conclusion as to the appellant's guilt. This being the case, we feel that we have no option save to quash the conviction entered against the appellant and to set aside the sentence imposed, as well as the Magistrate's order of police supervision.

The appellant will be set at liberty forthwith.

The above order covers also the fine of Sh. 500 and the sentence of imprisonment in default of payment. If this fine has already been paid, it must be repaid to the appellant.

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