

UGANDA / JUDGMENT

Searle v Queen (Criminal Appeal No. 480 of 1954) [1955] EACA 252 (1 January 1955)

[1955] EACA 252

COURT

East African Court of Appeal

BEFORE

Bourke J, De Lestang J

CASE / FILE NUMBER

Criminal Appeal No. 480 of 1954

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APPELLATE CRIMINAL

Before BOURKE and DE LESTANG, JJ.

DEREK LAWRENCE SEARLE, Appellant

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THE QUEEN, Respondent

Criminal Appeal No. 480 of 1954

Criminal Law-Accused waiving rights to be tried as a European and pleading guilty—Subsequent application to magistrate for leave to withdraw plea-Refusal-Criminal Procedure Code, section 348 (1)-Whether appeal lies against alleged misdirection—Whether appeal confined to extent and legality of sentence-Perjury during trial for a capital offence-Whether sentence excessive.

The facts appear fully in the judgment.

Held (21-1-55).—(1) Under section 348 (1) of the Criminal Procedure Code, where a person pleaded guilty, the Court had no jurisdiction to entertain an appeal against conviction entered upon such plea; no appeal lay except as to the extent or legality of the sentence.

- (2) The appellant having pleaded guilty, could not appeal against his conviction on the ground that what he sought to impugn was the exercise of discretion in refusing to allow such plea to be withdrawn.

Sentence reduced to 18 months' imprisonment with hard labour.

(Editor's Note: Second appeal to the Court of Appeal for Eastern Africa was dismissed on \$4-4-55\$.)

Cases cited: Pope and Sciarra v. Rex, 18 E. A. C. A. 134; R. v. Hewitt, 9 Cr. App. R. 192; R. v. McNally, (1954) 2 A. E. R. 372; R. v. Plummer, (1902) 2 K. B. 339; Joseph Mugole s/o Pudha v. R., (1953) 20 E. A. C. A. 171 (1951) Cr. App. No. 745; Rex v. Forde, (1923) 2 K. B. 400 C. A.; R. v. Durham Quarter Sessions, Ex parte Virgo, (1952) 1

A. E. R. 466; R. v. West Kent Quarter Sessions Appeal Committee, Ex parte Files, (1951) 2 A. E. R. 728; Ogalo s/o Owoura v. R.,

Authorities cited: Archbold Criminal Procedure and Practice, 33rd edn., p. 348.

Compared: Criminal Justice Act, 1948, section 36 (1).

Salter, Q. C. and Parry for appellant.

Templeton, Ag. Deputy Public Prosecutor, for the Crown.

JUDGMENT.—The appellant was convicted on his plea of the offence of perjury, contrary to section 104 (1) of the Penal Code, by a subordinate court of the first class, at Nairobi, presided over by a resident magistrate, and was sentenced to four years' imprisonment with hard labour. He now appeals against the conviction and sentence on the grounds—

- (1) that the learned magistrate misdirected himself in law and/or exercised his discretion wrongly in refusing to allow the appellant to withdraw his plea of guilty and to substitute therefor a plea of not guilty;
- (2) that the said sentence was excessive.

It is prayed in the petition of appeal that the conviction be quashed and the sentence set aside and that such order be made for the disposal of the case as may be just. In the alternative it is prayed that the sentence may be reduced.

On 19th November, 1954, the appellant was arrested and charged and was brought before the lower court for trial, a formal charge having been presented and admitted under section 89 of the Criminal Procedure Code. The Crown was represented, and has been throughout the proceedings, by Mr. Templeton, the Acting Deputy Public Prosecutor. The appellant at that stage was not represented by an advocate. He is an educated man, and is a geologist attached to the Government Department of Lands and Geology. He became an officer in the Kenya Police Reserve in May, 1953, and in June, 1954, he was promoted a district commandant of that Force. He took no exception to the haste with which he was arraigned before the Court and did not seek an adjournment to consider his position or obtain legal advice and assistance. The impression we get from the record is that he was agreeable to having the matter dealt with there and then, and indeed no suggestion has been made to the contrary. The appellant was either already aware of, or was duly informed of, his rights of trial as a European by a jury under Part VII of the Criminal Procedure Code, because, at the outset of the proceedings, so far from claiming to be tried as a

European, he was heard expressly to state that he wished "to waive his right as a European" (see *Pope and Sciarra v. Rex*. 18 E. A. C. A. 134).

The charge was read to the appellant, who was in possession of a copy, and the nature of the offence was explained to him by the learned magistrate. The appellant stated that he understood the charge and he pleaded to it in the following words: "It is true. I was sworn as a witness. I knowingly gave false evidence. In a matter which the court did consider, I wish to plead guilty". On that plea of guilty a conviction was entered. A senior police officer was then heard to character; and Mr. Templeton informed the court that the matter the subject of the charge was part of a chain of evidence, as in fact it was, identifying an African accused, who was sentenced to death on a capital charge alleging the unlawful possession of ammunition. The appellant was then heard in extenuation to say: "Owing to the nature of my work as being operational serving with K. P. R., I have not had an opportunity of studying points of law of chains of evidence like a regular policeman. I am not well acquainted with points of law and was acting at this time in a manner I thought at the time would assist the C. I. D. in undertaking the investigation of this particular case. The idea of giving false evidence was not intentional although I knew at the time I was giving false evidence. Otherwise I thought or assumed the case might be prejudiced. That is all".

The magistrate postponed sentence. On 29th November, 1954, the appellant appeared before the court and was represented by an advocate, Mr. Parry. He was allowed to be examined under oath by his advocate and he admitted that on the previous hearing he had pleaded guilty to the charge of perjury. He asked to be allowed to withdraw that plea and to enter a plea of not guilty. He gave his reasons for the application, one of which was that he did not realize the nature of the charge and was under the impression that the penalty to be exacted would be a small fine. Some discussion ensued between the advocates concerned and the magistrate, the case finally being adjourned to 10th December.

On 7th December, the matter came again before the court, when Mr. Parry stated that the appellant "has never lent himself to the suggestion that he was intimidated or that the case had been fixed". On 10th December, Mr. Parry renewed the application to alter the plea to one of not guilty. He explained that the appellant in pleading guilty "thought it was the best thing to do in the interest

of speed, lack of embarrassment to all concerned and lack of publicity". The magistrate had earlier said at this hearing that, in explaining the charge to the appellant, he had informed him that the evidence complained of "would be material if the court (i.e. the court of trial of the capital charge) would have to consider it in arriving at its finding". (See *R. v. Hewitt*, 9 Cr. App. Rep. 192, 195.) Asked by the magistrate if he agreed that the appellant had wished to plead guilty and that his, the magistrate's explanation of what was material was in the nature of "translation" rather than persuasion, Mr. Parry stated that he did agree. The magistrate then proceeded in the exercise of his discretion to give a "ruling", recording his reasons, refusing to allow the appellant to withdraw his plea. Address was thereupon made in mitigation and evidence led to character and antecedents before the court passed to sentence.

The real difficulties in the way of a successful attack upon the exercise of the magistrate's discretion are apparent from a perusal of the record and consideration of such authorities as *R. v. McNally*, (1954) 2 A. E. R. 372; *R. v. Plummer*, (1920) 2 K. B. 339 at 349; *Joseph Mugole s/o Pudha v. Regina*, (1953) 20 E. A. C. A. 171; and Archbold, *Criminal Procedure and Practice*, 33rd edn. page 348.

Mr. Templeton has, however, taken a point to the jurisdiction. He argues that since there is a clear plea of guilty upon which the conviction was entered, this court cannot under its statutory powers entertain the appeal against conviction, and is confined in law to determining the appeal against sentence. He relies upon section 348 (1) of the Criminal Procedure Code and *R. v. Forde*, (1923) 2 K. B. 400 C. A.; *R. v. Durham Quarter Sessions, ex parte Virgo*, (1952) 1 A. E. R. 466; and *R. v. West Kent Quarter Sessions, Ex parte Files*, (1951) 2 A. E. R. 728.

Mr. Salter, for the appellant, submits that the appeal, despite the terms of the petition of appeal, is only indirectly an appeal against conviction; what is brought up for review by this Court as an appellate tribunal is the refusal to permit withdrawal of the plea of guilty on grounds of alleged wrongful exercise of his discretion by the learned magistrate: in the cases referred to by Mr. Templeton it was not a matter of querying an alleged wrong exercise of the discretion by a magistrate.

The rights of appeal to this Court granted by the legislature are contained in sections 347 and 348 of the Criminal Procedure Code. Section 347 (1) provides: -

"Save as hereinafter provided, any person convicted on a trial held by any subordinate court may appeal to the Supreme Court, and shall be so informed by the magistrate at the time when sentence is passed."

By section 348 (1) it is provided: \$-\$

"No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court, except as to the extent or legality of the sentence."

These provisions are very similar to the law controlling appeals to quarter sessions in England, as contained in section 36 (1) of the Criminal Justice Act, 1948, which provides: \$\\rightarrow\$

"A person convicted by a court of summary jurisdiction shall have a" right of appeal— \$(a)\$ if he pleaded guilty or admitted the truth of the information, against his sentence: \$(b)\$ in any other case against conviction or sentence..."

Where, as in the Durham Quarter Sessions case (*supra*), the question is whether or not the plea put in by the prisoner at the hearing before the court of summary trial amounted to a plea of guilty or not guilty, that is a matter which this Court can entertain. In circumstances revealing that an accused person in pleading to a charge did not unequivocally and freely admit all the elements of the offence. this Court is empowered to set aside a conviction based upon such plea and to pronounce the trial a nullity, for the obvious reason that there never really was a plea of

guilty at all, and so an appeal against conviction would lie under section 347 (1). But where an accused person has pleaded guilty in clear and unequivocal terms then, under section 348 (1), there can be no appeal against a conviction entered on such plea; appeal lies in such case only as to the extent or legality of the sentence.

In the West Kent Quarter Sessions case (*supra*), the accused pleaded guilty before the court of summary jurisdiction and he appealed against the conviction to West Kent Quarter Sessions on the ground "that he pleaded guilty to the said" offence". owing to a mistake as he did not understand the nature or gravity of the offence". It was held that the accused had deliberately pleaded guilty before the lower court; but whether he did it deliberately or not was quite immaterial. He pleaded guilty, and, therefore, the court of quarter sessions had no jurisdiction. We quote from the judgment of Lord Goddard, C. J.:-

"We are not concerned with what happens in the Court of Criminal Appeal, because the powers of the Court of Criminal Appeal and the right of appeal to it are entirely different from the powers given to quarter sessions and the right of appeal to it. It is true that Avory, J., said in *R v. Forde*, (1923) 2 K. B. 403:

'The first question that arises is whether this court can entertain the appeal. A plea of guilty having been recorded, this court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (2) that upon the admitted facts he could not in law have been convicted of the offence charged.'

That may be perfectly true with regard to the Court of Criminal Appeal, but with regard to quarter sessions it is entirely different. If the defendant has once pleaded guilty, the statute gives him no right to appeal, and there is no question here that there was a plea of guilty."

The learned Lord Chief Justice went on to say: -

"Whether or not there is any remedy if a man pleads guilty under some genuine misapprehension, does not fall for decision, but I am inclined to think that the remedy, if any, is **certiorari**, but it would certainly take a very strong case to give rise to it."

We think that the reasoning employed in the case under reference applies when one considers the limitation put upon the right of appeal by section 348 (1) of the Criminal Procedure Code, which, as has been seen, is identical in effect with the corresponding provision limiting the right of appeal to quarter sessions. in that, under both enactments, where there is a plea of guilty there can only be an appeal against sentence.

Two questions now arise in the present appeal— (1) Is the appellant appealing against conviction? and (2) Did he plead guilty before the lower court? It is quite apparent that the answer to both questions must be in the affirmative. He appeals in terms against the conviction and prays that it may be quashed. As to the plea, not only is it put forward by the appellant as a plea of guilty deliberately made, and affirmed again and again as such, but it is, in itself, as clear,

absolute and unequivocal a plea of guilty as could possibly be imagined. It is not contended for the appellant that there is any question to be resolved as to whether he had

pleaded guilty or not; on the contrary, it is affirmed that he did plead guilty and it is argued that he should have been allowed to withdraw that plea of guilty. It was on that plea that the conviction was entered which he now seeks on this appeal to have quashed, despite the restrictive effect of section 348 (1) of the Criminal Procedure Code.

List true that in the cases referred to by Mr. Templeton there was no application to withdraw a plea of guilty; and no authority has been brought to our notice in which an appeal has been held to lie where such an application has been refused and where the appellate court is restricted in its powers by provisions such as are contained in section 36 (1) of the Criminal Justice Act, 1948, and section 348 (1) of the Criminal Procedure Code. In *Joseph Mugole s/o Pudha v. Regina*, Criminal Appeal No. 745 of 1951, this Court did entertain and decide an appeal against conviction and sentence in which the appellant alleged that the magistrate had wrongly exercised his discretion in refusing to allow a plea of guilty to be withdrawn. The appellant in that case did not succeed and failed again before the Court of Appeal for Eastern Africa ((1953) 20 E. A. C. 171). But in that case the question of jurisdiction, as raised in the present appeal, was neither argued nor considered.

We are of opinion that Mr. Templeton's argument to the jurisdiction is sound and must succeed. Since there was a plea of guilty this Court cannot, in view of section 348 (1) of the Criminal Procedure Code, entertain the appeal except as to the extent or legality of the sentence. The appeal against conviction must, therefore, be dismissed.

Turning to the appeal against sentence, we are guided by the principles reaffirmed by the Court of Appeal for Eastern Africa in *Ogalo s/o Owoura v. R.* (1954) 21 E. A. C. A. 270. We quote the relevant passage from the judgment: —

"The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in *James v. R.*, (1951) 18 E. A. C. A. 147, 'it is evident that the judge has acted upon some wrong principle or overlooked some material factor'. To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R. v. Shershewski*, (1912) 28 T. L. R. 364, C. C. A.'

There can be no question as to the gravity of the offence of which the appellant was convicted. It cannot be condoned for a moment. If people get the impression that they can flout with impunity their solemn obligation to testify to the truth when under oath in the witness box, it is an end to the safe administration of justice. When the perjury is committed, as it was by the appellant, in a serious case in which a person is on trial for his life, it deserves the severest stricture and condemnation, and cannot in justice and in duty to the community be visited by a light penalty.

On the other hand the appellant has borne a most exemplary character in the past and it is his first offence. He has rendered valuable service to the public, involving, no doubt, personal danger, during the present Emergency. He is a young man, married and with children. In enumerating the factors which he has taken into account in assessing the sentence of four years' imprisonment with hard labour, the magistrate referred to the appellant's previous good character and public service and loss of his position in the Government service. He appears to have overlooked the fact that the appellant, when he came before the Court, made a clean breast of the matter in admitting his guilt. Such a factor ought properly to be taken into consideration, R. v. Malakwen arap Kago, 15 K. L. R. 115. But we have anyway come to the conclusion that the sentence is too severe and is manifestly excessive in all the circumstances of the case.

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The sentence will be reduced to 18 months' imprisonment with hard labour. $\mathbb{R}_{\geq 2}$

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