



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEALS NOS 1596, 1597 & 1598 OF 1985 (CONSOLIDATED)
BETWEEN
IRAM SHAZAD & 2 OTHERS..... APPELLANT
AND
REPUBLIC.....RESPONDENT
JUDGMENT

April 17, 1986, **SK Sachdeva & JS Patel JJ** delivered the following Judgment.

We have consolidated these 3 appeals.

All the three appellants had been jointly charged before the learned Resident Magistrate at Nairobi with grievous harm contrary to section 234 of the Penal Code. They were convicted after trial, and each of them was sentenced to 2 1/2 years' imprisonment. They have all now appealed both against conviction and sentence.

Briefly, the prosecution case was that the complainant stayed in a room in a temple. The appellant Chansyam Pandit is his nephew. He had a dispute with the wife of Chansyam over rent which she was claiming from him at about 4.30 pm on 16.2.85. As a result of that quarrel Chansyam threw stones at home which he managed to avoid and then, protecting himself with the cover of a dust-bin, he challenged Chansyam to throw more stones at him. Chansyam threatened to come back with gangsters and drove off in his vehicle. While the complainant was talking with his mother about the alleged rent due by him, Chansyam returned with the other two appellants, one of whom is a "break-down businessman" and the other is a butcher. One of them was armed with a knife and the other with a pair of scissors. They told the complainant to accompany them to the Central Police Station, and thinking that that was where they were all going, he entered their vehicle.

However, he was taken into bushes off the Thika Road and beaten up thoroughly. After that they drove back into the City and dumped him behind Biashara Street. He managed to get a lift to the Central Police, where he reported the assault, and was told to go to hospital and come back to record his statement after he had recovered.

A gentleman named Panesar (PW 2) was told that an Asian was dying outside the Maharaja Restaurant where he (Panesar) was drinking. He came out and saw the complainant in a state of shock. He fetched him a glass of water. When cross-examined, he was of the opinion that the complainant was drunk and he did not see any physical injuries on him. The next witness was a waiter at the Snow Green Palace

opposite the Lilian Towers. He saw an Asian at about 9.00p.m with his face covered in blood, and who was limping. He claimed that he had been beaten up by “thugs” and his hand and leg were broken. A taxi was hired for him, and after 5 minutes, the Asian returned with the police whereupon the waiter explained to them what he had seen. A taxi driver (PW 5) was hired for Shs 40 at about 8.30 pm to take a “sick” Asian to the Kenyatta National Hospital.

A police surgeon Dr Obonyo (PW 6) examined the complainant on 18.3.85, and found that he had a fracture of the right knee and dislocation of the right arm. The injuries were about a month old and could have been caused by a blunt weapon and were classified as grievous harm. The complainant had been admitted at the Kenyatta National Hospital for 19 days. Dr Mutumba (PW 7) saw the complainant at Kenyatta Hospital on 18.2.85, where he had been admitted on 17.2.85 with history of assault. The complainant had injuries to his right shoulder and right knee, the latter requiring surgery. Under cross-examination he stated that the complainant could have sustained the injuries in a motor-accident or from a fall after being drunk.

The only police witness called by the prosecution was PC Paul (PW 4) who testified that, on 24.4.85, the complainant came to the police station and told him that he had earlier complained of having been assaulted by 3 men and had arranged to go and arrest those 3 men. PC Paul and two policemen then accompanied him and arrested two of the appellants at Ngara. The third was arrested on 26.4.85 when he himself came to the Central Police Station. Under cross-examination, he stated that he did not know the date on which the complainant had made a complaint. However, there was a report against him by the complainant’s mother on 9.2.83 at 11.00 pm that the complainant had assaulted her.

All the appellants gave evidence under oath. Iram Shazad stated that he heard some noise and he saw the complainant holding a stick wanting to beat Chanshyam’s mother. He separated them and then he and Mohamed Said whose evidence is to the like effect, drove away with Chansyam. They both denied having assaulted the complainant and could not say why the complainant had made false allegations against them. Chanshyam stated that he and his family were on bad terms with the complainant. On the evening of 17.2.85 the complainant wanted to beat up his mother, who is suffering from cancer, and all three of them – the appellants – went inside and separated them, and then they drove off. None of them threw any stones at the complainant or assaulted him.

The learned trial magistrate accepted the prosecution case, and then turning back to the defence of the appellants saw no substance in it and had no choice but to reject it.

However, with respect to the learned magistrate, there are a number of unsatisfactory features of the prosecution case to which he did not direct his mind. Had he done so, he might well have come to a very different conclusion, and would have even upheld the defence submission of “no case to answer”.

The alleged fight took place in a temple near a busy street at about 4.30 p.m yet no independent person seems to have witnessed it. The evidence of Panesar who saw the “dying Asian” and who recognized him as the complainant was of vital significance, yet it was totally ignored. It was to the effect that the complainant could have been drunk and he did not see any physical injuries on the complainant. Unfortunately, he does not appear to have been asked to specify the time at which he saw the complainant. But the fact remains that his testimony, called by the prosecution in support of its case, is wholly contradictory of the complainant’s long story.

Let us examine the evidence of the waiter and the taxi driver. The Asian (whom he did not appear to have identified) told him that he had been beaten by thugs. If that Asian was in fact the complainant and he had in fact been beaten up by his own nephew and two of the latter’s friends, he would be expected to have told that to the waiter and others who came to assist him. The complainant says that he was taken by taxi to the Central Police Station where he was told to go to hospital and come back to record his statement after he had recovered. This is contradicted by the taxi driver who says that he went and collected the “sick” Asian inside the Ice Cream shop and took him to the Kenyatta Hospital for which job he was paid Shs 40. In any event, it would be strange attitude, to say the least, on part of the police if they would treat such badly injured person who claimed to have been grievously assaulted by 3 known men in such a

brutal manner. There is absolutely no evidence of any report to the police, and it was not until more than 2 months later that the first police officer featured in the incident. A report to the police, as soon as possible after the incident, would tend to show the consistency of a witness's evidence. It has been held in *Tekerali Korongozi & others v Re* (1952) 19 EACA 259 that evidence of first complaints to persons in authority are important as they often provide a good test by which the truth and accuracy of subsequent statements may be gauged and provide a safeguard against later embellishment or a made-up case. Reference may also be made to *R v Mohamed bin Allui* (1942) 9 EACA 72, *R v Leonard bin Ngimbwa* (1943) 10 EACA 113 and *R v Hilarius s/o Shebrunza* [1949] 16 EACA 124.

There was obviously no love lost between the complainant on the one side and Chanshyam and his family on the other, and in the circumstances of this case, the likelihood of embellishment or a made-up story cannot be ruled out; the complainant could have sustained his injuries in a nasty fall when drunk, and he does not deny his partiality to liquor, or he could have got injured in a motor-accident. It follows from all the above that these appeals must be allowed.

However, there are a couple of serious irregularities on legal matters to which, we feel we must not allude. On 20.9.85 the then defence counsel for the appellants applied for issue of witness summons to 3 defence witnesses. The magistrate ordered accordingly. On 31.10.85 those witnesses were not present, not having been served, and the defence counsel sought an adjournment informing the court that it was his first time to apply for an adjournment. Yet the magistrate rejected the application ruling that it was the fault of the defence counsel "not to apply for witness summons." That was clearly wrong. Mr. Gathaara concedes it but submits that a retrial should be ordered. We fail to understand that, even if the prosecution had a strong case otherwise, why the appellants should be put to double jeopardy and the expense and delay of another trial through no fault of their own. In *Musa & others v R* [1967] E.A 573, Platt Ag JA (who was then a judge in Tanzania) went even further and held that a trial may be vitiated if the magistrate fails to record whether an accused person wishes to call defence witnesses and, in the event of such witnesses being called for, he should call them or else record his reason for refusing the application. The refusal to allow defence to call witnesses, for whom it had already applied for summonses, does not make the trial merely defective or illegal. It is the denial of a fundamental right of an accused person enshrined in 77(2) (e) of the Constitution which provides:

"(2) Every person who is charged with a criminal offence

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses alleged by the prosecution..."

The principles stated in *Hassan Abdi Rehman v R* [1978] Kenya L.R 126, following the decision of the Court of Appeal in *Merali v R* [1971] E.A 221, are eminently applicable in the instant case, and it is manifest that prejudice will be caused to the appellants if a retrial is ordered.

The other justifiable criticism of the learned magistrate's judgment is that he considered an accepted the prosecution case in isolation thus having no choice, in his own words, but to reject the appellant's defence. As Mr. Lakha argues, he made final findings of fact before considering the defence, and, in effect, placed the onus on the defence of displacing those findings. And, it was as though he was treating the prosecution and defence on basis of equality, preferring one evidence against the other. That such an approach is wholly erroneous has been laid down in authorities like *Zaverchand Dhanji Shah v R* 23 EACA 40, *Okethi Okale & others v R* [1965] EA 555, *Said Mwakawango v Re* [1963] EA 6 and numerous other decisions. The defence submissions, quite properly, are not directed only towards the refusal of the learned magistrate to allow its witnesses to be called.

While we appreciate the learned magistrate's intention to expedite the disposal of cases, that must not be done at the expense of fairness to accused persons and expedience cannot form the basis of justice.

We allow these consolidated appeals, quash the conviction of all the appellants and set aside the sentences

passed upon them.

April 17, 1986.

SK SACHDEVA & JS PATEL JJ