**D P P v Sezi and others**

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 18 March 1974

**Case Number:** 183/1973 (97/74)

**Before:** Manyindo J

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*[1] Criminal Practice and Procedure – Charge – Withdrawal – D.P.P. may withdraw without leave –*

*Magistrates’ Courts Act* 1970, *s*. 119 (*U*).

*[2] Criminal Practice and Procedure – Trial – State Attorney unable to proceed – Discharge proper.*

**JUDGMENT**

**Manyindo J:** This is an appeal by the Director of Public Prosecutions against the decision of a chief magistrate whereby the respondents were acquitted under the provisions of s. 125 of the Magistrates’ Courts Act 1970, of the offence of theft contrary to s. 252 of the Penal Code and also of the alternative charge of receiving or retaining stolen property contrary to s. 289 of the Penal Code. S. 125 of the Magistrates’ Courts Act 1970 provides for the acquittal of an accused person if at the close of the prosecution case it appears to the court that a *prima facie* case has not been made out sufficiently to require him to make his defence. The respondents first appeared in court on 21 February 1973 to answer the said charges. They were at first detained on remand but were later released on bail pending completion of police inquiries. On 16 May 1973 the police prosecutor applied for further adjournment on the ground that the inquiries were still going on. That application was granted despite objection by the counsel for the second respondent. The hearing was adjourned to 14 June 1973. When the case came up for hearing on 14 June 1973 the police prosecutor informed the court that the Director of Public Prosecutions had directed certain enquiries to be carried out which had been done and that the police file had been re-submitted to him for advice, adding “otherwise everything is ready. I apply for a short adjournment”. The defence did not object to that request but applied for the case to be fixed for hearing on 25 June 1973. They also requested that that be the last adjournment. The chief magistrate adjourned the hearing to that date very reluctantly as he said: “Last time the case came before me and the prosecution requested for adjournment. I said that it was wrong to keep the charges hanging on accused while investigations are being carried out. Justice delayed is justice denied and it is my hope that the prosecution will proceed with this case when it comes up for hearing or else withdraw. I am giving final adjournment.” On 25 June 1973, Mr. Lugayizi, a State Attorney, appeared for the State and applied for an adjournment on the ground that enquiries were incomplete. The application was strongly opposed by the defence lawyers. The chief magistrate refused the application. He thought that the prosecution had been given ample time and warning to complete their inquiries and have the matter determined by the court one way or the other. At that juncture the State Attorney rose and said: “I apply to withdraw the charge against the accused persons. I do not know what to do. I am stuck. In this case I may resort to the other alternative suggested by the D.P.P. and that is to withdraw.” That application was in turn opposed by the defence lawyers who submitted that the intention of the prosecution was to re-arrest the respondents immediately the charges were withdrawn. The defence also contended that since the State was applying for leave to withdraw the charges the court was free not to give its consent. It was then that the State Attorney stood up and said: “I have full instructions to withdraw from the D.P.P. I am a State Attorney. I have instructions to apply for adjournment and if it is refused to apply to withdraw.” Mr. Mulenga, for the first respondent then said “Rather than grant a withdrawal, my client would rather prefer adjournment. The consequences of withdrawal are obvious.” On appeal Mr. Mulenga claimed that he had at that very juncture told the court that the prosecuting counsel had threatened, before the court sat, to withdraw the charge and have the respondents re-arrested if an adjournment was refused. As the chief magistrate had not recorded this Mr. Mulenga wished to call him to testify to that effect on appeal. I declined to adopt that course but instead called for his report under s. 341 (7) of the Criminal Procedure Code. In his report the chief magistrate said: “I remember Mr. Mulenga saying, after he had said (“Rather than grant withdrawal, my client would rather prefer adjournment. The consequences of withdrawal are obvious”), that the prosecutor had said that the accused would be re-arrested if the case was withdrawn. Mr. Sempa, the prosecutor did not reply to this. I did not record that portion because in view of what had transpired before, it was obvious to me that if withdrawal was granted the accused would be re-arrested and charged again. It may have been an error on my part not to record this. But I thought it was not necessary to do so. I took Mr. Mulenga’s remark as an observation though he appeared earnest and serious in saying so.” At the hearing of the appeal I had before me two affidavits, one sworn by the Director of Public Prosecutions and the other by Mr. Lugayizi. In his affidavit the Director of Public Prosecutions stated that his instructions to Mr. Lugayizi were (*a*) to apply for the hearing of the case to be adjourned and if that was impossible, (*b*) to act under s. 119 (*a*) of the Magistrates’ Courts Act 1970 and withdraw the charges against the respondents. Mr. Lugayizi confirmed in his affidavit that he had received the above instructions from the Director of Public Prosecutions and that after failing to secure an adjournment he had informed the court that he was withdrawing the charges against the respondents. In cross-examination he denied that he had told Mr. Mulenga or any other person for that matter that if adjournment was not granted he would withdraw the charges and cause the respondents to be re-arrested and charged again with the same offences. This young man gave me the vivid impression that he was simply sticking to his guns in order to save his face. I have no hesitation in accepting the report of the chief magistrate as being correct. In dismissing the application to withdraw, the chief magistrate was of the view that it was improper for the prosecution to seek to withdraw after failing to secure an adjournment, because this would allow them an opportunity to re-arrest and charge the respondents under s. 119 (*a*) of the Magistrates’ Courts Act 1970. He thought the prosecution unduly failed to complete the enquiries and that the prosecution would be “getting what they failed to achieve by applying for adjournment”. He also held that the Director of Public Prosecutions had not instructed the prosecuting counsel but merely advised him to withdraw the charges if the application for adjournment failed, in which case such a withdrawal must be with the leave of court. It seems clear to me that the hearing date was fixed when the file was still with the Director of Public Prosecutions “for advice”. Since the latter had not given his final advice on the case I think, with respect, the chief magistrate was wrong to fix the hearing date. In my opinion the Director of Public Prosecutions was free to order further investigations. In other words where a case has been referred to the Director of Public Prosecutions for advice that case is not ready until he says so. This is not meant to encourage the director to sit on cases because the courts can always dismiss such a case unheard. In this appeal there are two main issues to be resolved. The first one, which was raised by the counsel for the respondents, is whether this appeal is properly before the court. They argued that it is not because under s. 216 (5) of the Magistrates’ Courts Act 1970 the Director of Public Prosecutions can only appeal to this court against acquittals on a point of law. He cannot, they submitted, appeal against refusal to adjourn the hearing of a case or a refusal to grant leave to withdraw the charges against an accused person. S.216 (5) reads: “216 (5) W here an accused person has been acquitted by a Magistrate’s Court, the Director of Public Prosecutions may appeal (or sanction an appeal in such manner as may be prescribed by the Minister by Statutory instrument) on the ground that such acquittal is erroneous in law, (*a*) to the High Court, where the accused person has been acquitted by a Court presided over by a Chief Magistrate or a Magistrate Grade 1.” The submission that this appeal is misconceived is, with respect, without substance. It is true that the chief magistrate refused to adjourn the hearing and refused to grant leave to the prosecutor to withdraw. It is also true that those would not in themselves be good grounds for appeal as far as the Director of Public Prosecutions is concerned. But the chief magistrate did more than that. He in fact acquitted the respondents saying: “The prosecution has not therefore (by refusing to proceed with the case) established a *prima facie* case. The accused are accordingly acquitted.” In his notice of appeal the Director of Public Prosecutions stated, *inter alia*: “The appeal is against these acquittals”, and in his first ground of appeal he stated that the chief magistrate “erred in law in acquitting the respondents under s. 125 of the Magistrates’ Courts Act 1970 when no evidence had been adduced by the prosecution owing to the fact that the prosecution was not ready to proceed as the Police were still going on with their inquiries.” It seems clear to me that the question whether a provision in the law has or has not been rightly applied is one of law. I am satisfied that this appeal is properly before the court. The second question is whether the chief magistrate deprived the Director of Public Prosecutions of his powers to withdraw from the proceedings. According to Article 71 of the Constitution of Uganda he can at any stage before judgment is delivered, discontinue any criminal proceedings instituted or undertaken by himself or any other person or authority. The constitution does not, however, prescribe the manner in which the Director of Public Prosecutions may discontinue such proceedings. As far as magistrate’s courts are concerned s. 119 of the Magistrates’ Courts Act 1970 is, I believe, to the point. It provides as under: “119. In any proceeding before a Magistrate’s Court, the prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person and upon such withdrawal: ( *a*) i f it is made before the accused person is called upon to make his defence, he shall be discharged, but such discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts; ( *b*) i f it is made after the accused person is called upon to make his defence, he shall be acquitted.” The form that the instructions of the Director of Public Prosecutions should take is again not prescribed. In practice the courts have always acted on the word of the prosecuting counsel or public prosecutor. In the instant case I accept the assertion in the Director of Public Prosecutions’ affidavit that he did instruct Mr. Lugayizi in terms I have quoted above. But looking at the record of proceedings I cannot say that those instructions were conveyed to the court in that form. The court can only act on what it is presented with. From the statements made by the prosecuting counsel which I have quoted, I am satisfied that he was in fact applying for permission to withdraw. He seems to have been very clear about his instructions when he said: “I have full instructions to withdraw from the Director of Public Prosecutions. I am a State Attorney. I have instructions to apply for adjournment and if it is refused to apply to withdraw.” It was argued on behalf of the respondents that the Director of Public Prosecutions could not have given his instructions in the alternative and that in any case those he gave in this case, if he did, were conflicting. I do not see any conflict in the two instructions, to apply for adjournment failing which to withdraw. Again I see nothing wrong in the Director of Public Prosecutions giving his instructions in the alternative if he so wishes. He should be free to invoke his constitutional and statutory powers as a last resort in some cases. In view of the foregoing I am satisfied that the chief magistrate was justified in holding that the Director of Public Prosecutions was applying for leave to withdraw. The court therefore had to exercise its discretion in the matter. The last point that falls for decision in my view is whether the court exercised that discretion correctly. On appeal the Senior State Attorney who appeared for the State attacked the decision of the magistrate on the ground that he had been influenced by speculations as to what might happen to the respondents if the charges were withdrawn against them. This is hard to comprehend. The magistrate did not speculate. He was in fact alive to the law on this point. This is what he said: “No doubt the law is clear. A person discharged under s. 119 (*a*) of the Magistrates’ Courts Act can be re-arrested again and charged.” He did observe, as he was entitled to do in my opinion, that the legislature could not have intended that an application to withdraw should be resorted to in circumstances such as these where an application for an adjournment had been refused. His quarrel with the prosecution seems to have been that they had failed to have the case tried. It should also be remembered that on 14 June 1973 the chief magistrate had advised the prosecutor on that 25 June 1973 the prosecution should proceed with the case “or else withdraw”. That advice was not followed. Was the magistrate right in holding that by failing to proceed with the case the prosecution had failed to establish a *prima facie* case within the meaning of s. 125 of the Magistrates’ Courts Act 1970? Counsel for the respondents answered this question in the affirmative, relying on the celebrated case of *Uganda v. Milenge*, [1970] E.A. 269. The ratio decidendi of that case, as I understand it, is that where the prosecution refuses to proceed with his case when the witnesses are present then that must be regarded as the close of the case for the prosecution. The court would then be free to hold, as in this case, that the prosecution has not established a *prima facie* case to require the accused to be called upon to make his defence. The position is quite different in the instant case. Here there is nothing on record to show that the witnesses had been summoned. The court had all along been told that the enquiries were incomplete and the application for adjournment had been made by the prosecution on the sole ground that enquiries were still going on. With respect I think the magistrate was hard on the prosecution in calling upon the prosecutor to proceed with the case when enquiries were incomplete. I should like to think that the investigation of a case should precede its hearing. Even the magistrate expressed a similar view in his ruling when he said; “. . . it is wrong to charge an accused person and then proceed to carry out inquiries.” I agree with him entirely and may be permitted to add that it is also wrong to proceed to try a case which is still under investigation. In my view the chief magistrate was wrong in proceeding to try the case and acquit the respondents in the circumstances of this case. It seems to me that the better course to be followed in a case like this is that which was adopted in the cases of *Arvi Ratital Ganji*, 6 U.L.R. 237 and *Uganda v. Okot*, H.Cr.A. 83/73 (unreported). These two cases cover the situation where the prosecution witnesses, though warned to attend, fail to turn up on the day of trial. It was held in both cases that in those circumstances the trial court should dismiss the case unheard and discharge the accused person. In the instant case there is another good reason why the chief magistrate should not have acted as he did. It was not known whether witnesses were in existence and that they could be brought to court. All that was known was that the police were still investigating the case. In my view the proper course in those circumstances would have been for the court to dismiss the case and discharge the respondents and not to acquit them. I hold that the acquittal of the respondents was erroneous in law. It occasioned a miscarriage of justice. I set it aside and substitute the proper order dismissing the case and accordingly discharging the respondents. It is so ordered and to that extent this appeal succeeds. *Order accordingly.*

For the appellant:

*G Orioh*

For the respondent:

*EF Sempebwa*