STATE

A **v.**

KELEMEDI LAGI &
APOLOSA NAVUNISARAVI

[HIGH COURT, 1996 (Pathik J) 17 May]

B Appellate Jurisdiction

Crime: procedure- failure of complainant to appear on date of trial- whether proper to acquit the accused when an adjournment is refused. Criminal Procedure Code (Cap. 21) Sections 198 (1), 210 and 211 (2).

C After several adjournments the complainant failed to appear on the date fixed for trial of charges of robbery with violence. The trial magistrate refused a further adjournment and acquitted the accused. On appeal the High Court HELD: in these circumstance the relevant provisions of the CPC only allow the Court to dismiss a charge, not to acquit the accused.

Case cited:

D *Uganda v. Milenge and Another* [1970] EALR 269

Appeal by the prosecution following acquittal in the Magistrates' Court.

S. Karavaki for the Appellant
No appearance by the Respondents

E **Pathik J:**

This is an appeal by the Director of Public Prosecutions against the acquittal in the Suva Magistrates' Court of the respondents in case No. 1633 of 1995 on a charge of robbery with violence contrary to section 293(1)(b) of the Penal code.

F The Respondents although served with the notice of hearing of this appeal were not present.

On 15 August 1995 the learned Magistrate acquitted them under section 210 of the Criminal Procedure Code of the charge before any evidence had been led in support.

G The Appellant appeals against the acquittal on the following grounds:

(a) the learned Magistrate erred in fact and in law by acquitting the Respondents under section 210 Criminal Procedure Code of the charge.

(b) the learned Magistrate erred in law by failing to consider the provisions of section 198 of the Criminal Procedure Code

applying in the circumstances where the complainant had been served with a summons to appear before the Court but failed to do so.

(c) that the learned Magistrate erred in law in failing to exercise his discretion in the interest of justice when he refused to allow an application for adjournment by the Prosecution.

The facts briefly stated are that on 4 July 1995 the two accused pleaded not guilty and were remanded in custody until 18 July. On 1 August they were granted bail and the hearing was set for 15 August. The following minutes on page 5 of the Record led the learned Magistrate to acquit the accused persons:

> Prosecution not ready to proceed. Witnesses have been summoned. Ask for an adjournment.
>
> All other witnesses, except the complainant, is not there.
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> Complainant was summoned on 11/8/95.
>
> Prosecution said he cannot prove his case with the witnesses present.
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> Prosecution said complainant is in the Western side on a business trip.
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> Both accused are ready to proceed.

The learned State counsel submitted that although other witnesses were present, the complainant was absent despite being served with Summons to Witness. Hence the prosecution was unable to proceed with the case and sought an adjournment which was refused for the reasons given by the learned Magistrate in his Ruling on page 6 of the Record.

Mr. Karavaki argued that the learned Magistrate erred in fact and in law in acquitting the accused persons on such a serious charge. In support of his arguments he referred the Court to sections 198(1), 130, 210 and 211(2) of the Criminal Procedure Code which provide respectively as follows:

> "S198. - (1) If, in any case which a magistrates' court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear by himself or by his barrister and solicitor, the court shall dismiss the charge, unless for some reason it shall think it proper to adjourn the hearing of the case until some other date, upon such terms as it shall think fit, in

which event it may, pending such adjourned hearing, either admit the accused to bail or remand him to prison, or take such security for his appearance as the court shall think fit."

A

"S130. If, without sufficient excuse, a witness does not appear in obedience to the summons, the court, on proof of the proper service of the summons a reasonable time before, may issue a warrant to bring him before the court at such time and place as shall be therein specified."

B

"S210. If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit the accused."

C

"S211(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of such witnesses."

D

It is clear that the prosecution was refused an adjournment for the reason given. Thereupon the learned Magistrate went ahead and acquitted the two accused of the charge under s.210 of the Penal Code. In doing so he said (p7 of record): "There been no evidence to support the charge, both accused are acquitted of the charge under s.210 Criminal Procedure Code."

E

The State in a nutshell is contending that the decision to refuse an adjournment had not been made judicially and that the respondents should have been discharged and not acquitted.

I find that section 210 is not applicable here. That section deals with acquittal of accused person where there is no case to answer. No evidence was adduced here at all in the circumstances stated above.

F

The prosecution applied for adjournment. The Magistrate refused adjournment mainly because the complainant, in his own words "has by deed shown that he has put his business interest in priority to the interest of this Court". He went on to say that the complainant "has by action shown contempt to this court, by not attending today's final hearing, although he was duly summoned to attend today". The accused were not asked and they did not say anything regarding application for adjournment; but instead the learned Magistrate "hit the roof" so to say at the first indication of complainant "attending to his own business".

G

The prosecution was prepared to offer evidence as witnesses were present except that the complainant was not there. The prosecutor did not say that he is not

calling any witness and hence it did not amount to "close of the evidence in support of the charge" (in the words of s.210). On these facts the learned Magistrate was wrong in law and in fact in acquitting the respondents under s.210.

The appellant therefore succeeds on ground (a) of this Appeal.

As for grounds (b) and (c), which I will deal together, the learned Magistrate failed to consider the provisions of s.198 which provides for dismissal of the charge with a discretion to adjourn on such terms as he shall think fit. He has certain discretionary powers which he should exercise judicially. He should not forget that the alleged offence is committed against the State and not against the individual although there is the complainant in this case who failed to turn up. If the procedure adopted in this case by the learned Magistrate was accepted then complainants will fail to appear for reasons best known to themselves and the accused persons will go free without any punishment. Here there was no 'warrant' issued against the complainant to explain his absence for which provision is made under s.130(supra).

There is force in counsel's argument that just as under s.211(2) (supra) a right is given to compel a witness to attend who can give material evidence the Court should also consider compelling witness to attend as provided for under s.130(supra).

At this juncture it is pertinent to note the following paragraphs in this context on the issue before me, from the judgment of the High Court of Uganda sitting in appeal in the case of Arvi Ratilal Ganji, 6 U.L.R. 23 (quoting from Uganda v. Milenge and Another [1970] EALR p.269 at 274):

> "The case was fixed for hearing and on the hearing day an Inspector of Police appeared for the prosecution. The main prosecution witness, although warned to attend, failed to appear in time at the trial and the Magistrate after calling upon the prosecution to prove their case which they could not do, proceeded to acquit the accused. The two judges on appeal held that the magistrate's proper course was either to have adjourned the case or to have dismissed the charge under the provisions of s.197 of the then Criminal Procedure Code. Section 197 is similar to s.202 in the present Criminal Procedure Code. In their judgment the court state:
>
> > 'We think that the proper course for a Magistrate where the Crown case cannot be heard by reason of a total absence of witnesses is either to adjourn the hearing, or if that is for some reason impossible to dismiss the charge unheard. We are aware that the Criminal Procedure Code does not precisely cover the present facts. But we think the position is analogous to that envisaged by s.197 of the Criminal Procedure Code.

> that is the position which arises when the 'complainant' is absent. That section by the word 'complainant' probably means a private person who has made a complaint to the Court. In the absence of this person clearly there can be no 'trial' and no true joinder of issue. The Court under these circumstances either adjourns or dismisses the charges.
>
> "It seems to us that the position is substantially the same where the Magistrate has before him merely a public prosecutor, whose function is simply to conduct the case and to examine the persons who are the true informants. If the latter are absent, and yet it is known that they are in existence and that their attendance can be secured, it seems to us little short of farcical to embark on a trial of the case and to acquit the accused, the complaint against him being wholly unheard."

I am of the view that the learned Magistrate ought to have done as in Ganji, namely, either to adjourn or dismiss the charge, but not to acquit. For this there is ample provision under s.198. This section covers a case where a complainant does not appear as is the case here. I can do no better than to recite from the judgment in Ganji (supra) which states the position lucidly:

> "If the learned magistrate had rightly assessed his powers and duty we think that he would have refused to proceed to what the respondent asks me to regard as a trial, and would have dismissed the charge unheard and have discharged the accused. What was done was done owing to a misconception by the learned magistrate of his powers and duty. We think that we cannot permit the present position to stand because of that misconception..."

With respect, I agree with this comment and am of the opinion that the acquittal of the respondents in these circumstances was wrong in law.

For the above reasons the appellant succeeds on grounds (b) and (c). The magistrate's discretion I find was not properly exercised and that the charge should have been dismissed.

In the outcome, I hold that as the acquittal should not have occurred I think it right to set aside that acquittal and to substitute therefor the order which should have been made earlier in the case, that is, an order dismissing the charge with the consequent discharge of the accused. I do so order with liberty to the prosecution to lay fresh charges against the two accused.

(Appeal allowed; acquittal set aside; dismissal substituted.)