

Director of Public Prosecutions v. Clement Tom

High Court
Ward C.J.
7 December 1988

Section 189(2) Criminal Procedure Code—withdrawal of charges—exercise of discretion by magistrate—circumstances in which to order discharge or acquittal.

The accused was charged with using abusive words in public and pleaded guilty on his first appearance in court. During the outline of facts by the police prosecutor, the magistrate intervened to ask if the place where the offence was alleged to have been committed was a public place. Being of the opinion that it was not a public place, the magistrate invited the prosecutor to withdraw the charge, and made an order under section 189(2)(b)(i) of the Criminal Procedure Code acquitting the accused, despite the fact that the prosecutor asked for an order discharging the accused under section 189(2)(b)(ii). The Director of Public Prosecutions appealed against the order of acquittal.

HELD:

- (1) Whenever a prosecutor seeks to withdraw a charge under section 189 he requires the consent of the Court. The Court is bound to enquire as to the reasons for the withdrawal and, if there is any doubt as to the propriety of the application, should refuse and require the prosecution to proceed.
- (2) Where the magistrate is satisfied there should be withdrawal and it is before the accused has been called upon to make his defence, he must decide the appropriate order under subsection (2)(b). Where there is no evidence or the wrong charge has been laid or the wrong person charged, the order should be one of acquittal. In all other cases, the appropriate order is one of discharge under subsection (2)(b)(ii).

In the present case, the magistrate invited the prosecution to withdraw on a partial outline of the prosecution case, having formed a view that the prosecution might not be able to prove the case. In these circumstances he should have discharged the accused so that the prosecutor could, if he checked and found the charge to be proper, recharge the accused and proceed. The order of acquittal would be quashed but, as the charge was minor and stale, the accused would be absolutely discharged without conviction.

Counsel:

F. Mwanesalua, Director of Public Prosecutions, for the appellant
I. Harris for the respondent

WARD C.J.**Judgment:**

40 This is an appeal by the Director of Public Prosecutions against an acquittal by the Principal Magistrate (Western) of the respondent on a charge of using insulting words in a public place.

The accused had been arrested on 19 October 1987 and pleaded guilty in court the next day. When the prosecution was outlining the facts, the magistrate interrupted with a query as to whether the facts disclosed the offence occurred in a public place.

The record continues:

Court: This is not a public place. Where in the rest house?

Prosecution: In his [the defendant's] own room.

50 Court: Do you want to withdraw the charge?

Prosecution: Yes.

Court: Dismissed, section 189(2)(b)(i), after directing Not Guilty plea.

At the appeal, the Director of Public Prosecutions explained that the police prosecutor, on being asked if he wished to withdraw the charge, agreed because he wished to take legal advice. He asked to withdraw the charge under section 189(2)(b)(ii), but the magistrate acquitted the accused under section 189(2)(b)(i) of the Criminal Procedure Code.

Section 189 reads:

60 189. (1) the prosecution may with the consent of the court at any time before a final order is passed in any case under this Part withdraw the complaint.

(2) On any withdrawal as aforesaid:

(a) where the withdrawal is made after the accused person is called upon to make his defence, the court shall acquit the accused;

(b) where the withdrawal is made before the accused person is called upon to make his defence the court shall subject to the provisions of section 196 in its discretion make one or other of the following orders:

(i) an order acquitting the accused;

(ii) an order discharging the accused.

70 (3) An order discharging the accused under paragraph (b)(ii) of subsection (2) shall not operate as a bar to subsequent proceedings against the accused person on account of the same facts.

This is an important provision, and the magistrate should always ensure that it is properly used.

Whenever a prosecutor seeks to withdraw a charge under section 189, he requires the consent of the Court. Normally that will be given, but only after enquiry by the Court as to the reasons for the withdrawal. If there is any doubt about the propriety of the application, the Court should refuse and require the prosecution to proceed. If necessary, the Court can require evidence of the reasons.

80 Where the magistrate is satisfied there should be a withdrawal, and it is before the accused has been called upon to make his defence, the magistrate must decide the appropriate order under subsection (2)(b). Where there is no evidence or the wrong charge has been laid or the wrong person charged, the order should be one of

acquittal. In all other cases, the appropriate order is one of discharge under (2)(b)(ii).

The Director of Public Prosecutions submits to this Court that, as he is the authority who appoints public prosecutors and as all police prosecutors are subject to his express directions, he is the only person who can seek withdrawal under section 189.

90 That is putting the matter too high. It may be that, if he wished, he could give express directions to all prosecutors to that effect, but, without such express directions, the law does not prevent police officers seeking to withdraw under section 189.

I would suggest it might be unfortunate if he did issue such an instruction. It is inevitable that sometimes an accused man is wrongly before the Court. It can happen in many ways, and normally is not the fault of the prosecutor, but, once it is realized, the important thing is to stop the proceedings as quickly as possible. If the Director of Public Prosecutions was to issue a direction that all potential applications under section 189 were to be referred to him, considerable delays would occur during which the accused would still be facing the charge. That is clearly 100 undesirable. One reason for the provision under section 189(2)(b)(ii) is to allow the prosecutor, in any case of difficulty or doubt, to release the accused man from the charge whilst he seeks advice.

In this case, the magistrate invited the prosecution to withdraw. He did so because he felt the prosecution might not be able to prove the offence occurred in a public place. He is entitled to do so, but he is not entitled to decide the issue on a partial, and interrupted, outline of the prosecution case and acquit the accused on the strength of it. Having pressed the prosecution into seeking a withdrawal, he should have discharged the accused so that the prosecutor could, if he checked and found 110 the charge to be proper, recharge the accused and proceed.

The appeal is allowed. The order of acquittal is quashed.

At the hearing of the appeal, I stated that, as the charge was minor and stale, whatever the result of the appeal I should not change the position of the accused.

Thus I order that he be absolutely discharged without conviction.

Reported by M.L.