**SILUNGWE v THE PEOPLE (1974) ZR 130 (HC)**

HIGH COURT 15

CARE J

6th MAY 1974

(HNA 86/1974)

**Flynote**

**Roads**20**and Road Traffic Act - Arrest of a person driving a vehicle under the influence of drink - Requirements of effecting arrest.**

**Criminal law - Evidence - Whether prosecution obliged to produce every possible witness.**

**Headnote**

The appellant was convicted of driving a motor vehicle under the 25 influence of drink, contrary to s. 198 (1) of the Roads and Road Traffic Act, Cap. 766. The appellant appealed against his conviction and his grounds of appeal, *inter alia*, were as follows: *(a)* the expert medical evidence led was inadmissible as the appellant had not been arrested for the offence before being subjected to a medical examination, which is 30 contrary to s. 3 of Act No. 42 of 1971 which amended the Roads and Road Traffic Act, Cap. 766; *(b)* in the absence of medical evidence, the testimony of P.W.3 is insufficient to prove the guilt of the appellant beyond reasonable doubt as it is unsupported and *(c)* the prosecution did not produce available evidence to corroborate the testimony of P.W.3, 35 which was available to the prosecution, and it must therefore be assumed that such evidence was in fact favourable to the appellant.

*Held,* dismissing the appeal:

   (i)   That the elements of arrest were physical restraint and a sufficiently stated reason for such restraint and there was 40 nothing to prevent a person arrested from being re-arrested.

   (ii)   That there was no set formula to use on arrest and the purpose behind the elements of a valid arrest is to ensure that a person arrested without a warrant, and therefore deprived of his freedom of movement, must know why he is being so deprived.

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   (iii)   That the evidence of a non-medical witness is admissible to show whether the appellant had or had not taken alcohol and how, or in what manner, he drove or conducted himself at the material time, but not as to whether in the witness's opinion he was fit to drive; and that it is for the court to draw an 5 inference as to whether an accused person was fit to drive from that evidence and, accordingly, in the absence of medical evidence, a court could properly come to the conclusion that an accused person had consumed alcohol to such an extent as being incapable of having proper control of his vehicle. 10

   (iv)   That although there was no obligation on the part of the prosecution to produce every possible witness at a trial, it was of paramount importance that the conduct of a trial must in all circumstances be fair, and, if evidence was not available due to insufficient investigation, or a statement has not been taken 15 from a vital witness who subsequently becomes unavailable, then these were matters which might cause serious doubt upon the fairness of the trial to such an extent that it would be unsafe to convict.

Cases cited:

   (1)   *R v Weir* [1972] 3 All ER 906. 20

   (2)   *R v Davies* [1964] 46 Cr. App. R 292.

   (3)   *The People v Chrison Mwambao*, 1971 SJ 135.

   (4)   *R v Oliva,* 49 Cr. App. R 298.

   (5)   *R v Guerin,* 22 Cr. App. R 39. 25

   (6)   *R v Bryant & Dickson* [1946] Cr. App. R 146.

Legislation referred to:

Roads and Road Traffic Act, Cap. 766, s. 198 (1).

*N R  Fernando, Lloyd James & Co*., for the appellant.

*S C  Heron, Assistant Senior State Advocate*, for The People. 30

**Judgment**

**Care J:** The appellant was convicted by the magistrate, Class 2, at Kitwe on 8th January, 1974, of driving a motor vehicle under the influence of drink, contrary to section 198 (1) of the Roads and Road Traffic Act, Cap. 766, and was sentenced to ten months' imprisonment with hard labour. 35

The appellant appealed against his conviction and sentence on grounds of appeal, which were finally the subject of argument before this court - as follows:

   (1)   That the arrest of the appellant was unlawful in that it did not comply with section 2 of the Roads and Road Traffic 40 Amendment Act, No. 42/1971, that is, at the time of the arrest the appellant was not committing or reasonably suspected of committing an offence under the Act.

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   (2)   That the appellant could not have been regarded in fact and in law as "driving" the vehicle in question, or attempting to drive, as meant by the statute in a moving traffic offence of this nature, at the time of his arrest.

     (3)   The 5 expert medical evidence led was inadmissible, as the appellant had not been arrested for the offence before being subjected to a medical examination, which is contrary to section 3 of the Roads and Road Traffic Amendment Act, No. 42/1971.

     (4)   In 10 the absence of the medical evidence, the testimony of P.W.3 s insufficient to prove the guilt of the appellant beyond reasonable doubt, as it is uncorroborated.

   (5)   That the prosecution did not produce available evidence to corroborate the testimony of P.W.3, which was available to 15 the prosecution, and it must therefore be assumed that such evidence was in fact favourable to the appellant.

I propose to deal with the third ground of appeal first. Mr Fernando, for the appellant, argued that, as the appellant had not been arrested before he was required to undergo a medical examination the medical 20 examination was unlawful and, therefore, inadmissible as evidence under section 3 of the Roads and Road Traffic Amendment Act, No. 42/1971. He went on to argue that once the medical evidence was excluded there was insufficient evidence of any other nature upon which the magistrate could have convicted.

The 25 first point that arises, therefore, is whether or not the appellant was arrested before the medical examination. P.W.4, Assistant Inspector Ndhlovu, testified that he asked the appellant to go to the hospital for medical examination and he agreed. After he had received the results of the examination from Dr Khare, he then arrested the appellant and 30 warned and cautioned him.

P.W.3, Tresford Kampembwa, who is a special constable, gave evidence that at some time between 1930 and 2030 hours he followed the accused, who was driving a Renault car (whilst he was a passenger in another car travelling along the Chingola road) and coming from 35 Chingola. He said the Renault car switched lanes from left to right and he saw two or three cars pull off the lane to let the Renault go through. He stopped the Renault car and found the appellant in the driver's seat alone. At first he told him that he was driving dangerously and asked him to go to the police station. The appellant resisted. The appellant 40 then said that he was not drunk and P.W.3 went on to state that there was strong smell of liquor like a beer hall. When he put his head in the car the appellant's breath smelt of alcohol. When the appellant resisted he warned him that he was committing another offence by resisting to go with him.

Finally, 45 he got the appellant out of the car and drove him to Mindolo police station, where he reported the matter to the police and handed the appellant over to them.

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The State argued that this amounted to an arrest by P.W.3. The elements of arrest, as are well summarised in *R v Weir* [1] are:

   firstly, physical restraint; and

   secondly, a stated reason for the arrest.

Whilst I agree that neither does P.W.3 state specifically, "I arrested 5 the appellant", nor does he say, specifically, "I told him I was arresting him on a suspicion of driving under the influence of alcohol or drugs to such an extent as to be incapable of having full control of his car", I think I must look at what actually took place to see whether what did happen satisfied these ingredients of a valid arrest. 10

There is no set formula to use on arrest of an appellant and the purpose that lies behind these ingredients is to ensure that a person arrested without a warrant and therefore deprived of his freedom of movement must know that he is being so deprived.

Although the magistrate certainly did not rely on the evidence of 15 P.W.3 for evidence of arrest (preferring to base his judgment on the specific evidence of arrest by P.W.4), in my opinion what P.W.3 did amounted to:

*(a)* physical restraint; and

*(b)* a sufficiently stated reason for such restraint. 20

And that being so, I find that the appellant was in fact lawfully arrested by P.W.3 and, thus, no question arises whether arrest is a prerequisite to a medical examination in all cases, whether the accused has voluntarily agreed to undergo one or whether he is to be compelled so to do on pain of punishment. The results of the examination were, therefore, properly 25 admitted in evidence. I would add that on the authority of *R v Weir* there is nothing to prevent a person already arrested from being arrested again. In this case, I think it was merely unnecessary duplication.

Supposing for a moment, however, that I am wrong in my view that the medical evidence was admissible, was there sufficient evidence upon 30 which the magistrate could have convicted without it? The evidence of P.W.3, in addition to that which I have already stated, went further: he said he was almost whispering. He had no power to shout. When he walked he was staggering, and under cross - examination he indicated that he saw the appellant driving on the wrong side of the road and that if 35 the cars which he said had pulled off the road had insisted on remaining on the road there would have been an accident. He said that he followed the appellant for almost a quarter of a mile and stopped him where it was safe to do so. He said that when the appellant did park, he parked right in the middle of the road and that not only was he staggering, but 40 he was talking too much and at the police station he was forced to sit on the accused's bench (whatever that meant). In addition, P.W.4 said that he observed the appellant's movement was slow and unsteady. He spoke very slowly; he smelt strongly of alcohol and was not very co-operative. 45

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The evidence of witnesses such as P.W.3 and P.W.4 is admissible to show whether the appellant had or had not taken alcohol and how or in what manner he drove or conducted himself at the material time, but not as to whether in the witness's opinion he was fit to drive (see *R v*5 *Davies* [2])*.* It is then for the court to draw its conclusions as to whether the accused was fit to drive from that evidence. I think that even without the medical evidence the magistrate could properly have drawn the conclusions that the appellant had consumed alcohol to such an extent as being incapable of having proper control of his vehicle. That being so 10 it is unnecessary for me to deal further with grounds of appeals one and two. This leaves me on ground five.

Mr Fernando argued that the prosecution should have produced the person who was driving the car in which P.W.3 was at the time in question. I think it might well have been desirable, I do not know, because 15 I do not know what he would have said. There is no obligation in my view on the prosecution to produce every possible witness at a trial. Mr Fernando prayed in aid the decision of Baron, J, as he then was, in The *People v Chrison Mwambao* [3] and he argued that since the evidence was available it should have been called, and since it was not called it 20 must be assumed to have been favourable to the accused.

The statement of the principle involved as set out in Mwambao is clear enough, but it is not so clear as to what the learned judge meant by "available". The learned judge did not cite any authorities for this proposition, contenting himself with justifying it as "trite". I am not so 25 sure, with respect, that stated as widely as that and taken out of the context of that case, it is so "trite".

The principle, in my view, is one that is to be culled from such cases as *R v Oliva* [4], *R v Guerin* [5], *R v Bryant & Dickson* [6] and other cases referred to in *Scoble on Evidence*, page 191, and I think it may be 30 stated thus:

   "If the prosecution have in their possession evidence which is available and which they do not intend to call, and which may be helpful to the accused, they should, in the interest of a fair trial, at least inform the defence so that they can, if they wish to call 35 it themselves. It would be better if such evidence were preferred to the court before the close of the case for the prosecution, if only for cross - examination, but I doubt whether this could be made into a rule without interfering too far into the discretion of the prosecution (subject to being fair) to conduct the case in the 40 manner [it] sees fit.

On the other hand, what is "trite" is that the conduct of the case must be fair. If evidence is not available through, for example, sloppy investigation, a statement not having been obtained from a witness who then was available and who might clearly have been able to give vital 45 testimony, which witness subsequently becomes unavailable, this as an example may well be a matter which the court should consider and may well cast serious doubt upon the fairness of the trial to such an extent that it would be unsafe to convict.

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To extend this example of a basic principle into a rule that the prosecution must obtain statements from every possible witness in every case, on pain of an almost certain acquittal, to my mind is carrying the matter too far, and I am sure that the learned judge did not mean his words to be so interpreted. 5

On the basis of what I have said I do not think it can be said that the evidence of the driver of P.W.3's car was available in the sense meant by the judge. Certainly not in the same way as arose in the case of *Mwambao*. Neither do I think that it indicates that the investigation of the case was so casual and slip - shod as to cast doubt on the prosecution's 10 case or on the *bona fide* of the prosecution. In the event, therefore, it is my view that the conviction was proper and the appeal against conviction is dismissed.

Turning to sentence, the appellant was sentenced to ten months' imprisonment with hard labour and he has served two weeks in gaol. He 15 has been driving for twenty years and he is a first offender. He is in employment. Act No. 42/1971 permits weekend imprisonment as an alternative to a fully custodial sentence. The purpose being to try and keep people, particularly first offenders who are in employment, out of prison and yet at the same time to deter them sufficiently from committing 20 the offence again.

I think that this is a suitable case in which to try weekend imprisonment and is ideally suited for a family man who is educated and with no record.

Since the appellant has indicated that he is willing to accept weekend 25 imprisonment, I therefore quash the sentence of imprisonment imposed by the magistrate and substitute weekend imprisonment. Taking into account the time he has spent in prison, I impose a sentence of imprisonment to be served during thirty - seven consecutive weekends. I also impose a fine of K100, three months' simple imprisonment with hard labour in 30 default, and I also order that his driving licence be suspended for the period of twelve months from the date hereof and that it be endorsed.

*Order accordingly*

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