SIPALO CIBOZU AND CHIBOZU v THE PEOPLE (1981) Z.R. 28 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., CULLINAN, J.S., AND MUWO, AG. J.S.
(S.C.Z. JUDGMENT NO. 2 OF 1981)

Flynote

Evidence -Statement by accused - Incriminating statement - Duty of court to investigate and if necessary hear evidence.

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Evidence - Statement by accused - Statements made to a person in authority - Need for "warn and caution" to be administered.
Evidence - Statement by accused - Voluntariness - When challenged - Need for trial within a trial to be carried out.
Evidence - Medical evidence - Desirability for person who carried out examination and prepared medical report to give verbal evidence.
Sentence - Assault - Assessment of Sentence - Necessity to obtain medical evidence as to severity of injuries sustained by victim.

Headnote

The appellants, father and son respectively were convicted of the murder of the deceased, the first appellant's sister and the second appellant's aunt. The only evidence against them was that of two incriminating statements made by both appellants to a village headman. However the statements were extracted from the appellants without any "warn and caution" having been administered and admitted in evidence without the appellants being asked whether they had any objection to their admission. The second statements, made to the sole police investigating officer a detective, sergeant, were admitted by the learned trial judge after a trial within a trial in which the appellants contested the voluntariness of the statements. A post-mortem report under the hand of a Government Medical Officer who was not called as a witness, was produced in evidence under the provisions of s. 191A of the Criminal Procedure Code. On appeal;

Held:

(i) The village headman is in law a person in authority; therefore a "warn and caution" was supposed to be administered before extracting the statements from the appellants.
(ii) The appellants were supposed to have been asked whether they had any objective to their admission, and if so, a trial within trial be instituted to determine the voluntariness of their admission.
(iii) An inference of the first appellant's guilt cannot safely be drawn simply from an allegation made in his presence in the absence of material particular.
(iv) The failure by the learned trial judge to observe the inconsistency in the prosecution evidence constitutes a serious misdirections

(v) The failure by the learned judge to notice or explore the discrepancy in the second appellant's statement lends force to the appellant's contention that they were forced to sign already prepared statements.

(vi) Medical reports usually require explanation not only of the terms 40 used but also of the conclusions to be drawn from the facts and opinions stated in the report. It is therefore highly desirable for the person who carried out the examination in question and prepared the report to give verbal evidence.

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(vii) Information relating to the severity of injuries sustained by the victim is essential to a proper consideration of the question of sentence and may in some cases be essential on the question of verdict.

Legislation referred to:
Criminal Procedure Code, Cap. 160, s. 191 A.

Cases referred to:
(1) Mwanza and Ors v The People (1977) Z.R. 221.
(2) Kasungani v The People (1978) Z.R. 260.

For the appellant: N.L. Patel; Senior Legal Aid Counsel.
For the respondent: R . Balachandran; State Advocate.

Judgment

CULLINAN, J.S.: delivered the judgment of the court. The appellants, father and son respectively, were convicted of the murder of the deceased, the firm appellant's sister and the second appellant's aunt. On 6th January, 1981, we allowed both appeals, stating that we would give our reasons for doing so at a later stage. We now give those reasons.

The learned State Advocate Mr Balachandran indicated that the State did not support the convictions. He very properly pointed to the fact that the only evidence against the two appellants was that of two incriminating statements, made by both appellants. The first statements were made to the first prosecution witness, a village headman. Mr Balachandran submits, and we agree, that the latter was a person in authority and that the statements were extracted from the appellants without any warn and caution having been administered. We further observe that the statements were admitted in evidence without the appellants having been asked whether they had any objection to their admission.

Again, we observe that the learned trial judge placed reliance on the second appellant's statement as being incriminatory of the first appellant, inasmuch as it was made in the latter's presence, who, the judge observed, made no attempt to deny it. The learned trial judge was prepared to draw an inference of guilty from the first appellant's emotion as he according to the first prosecution witness, offered the latter a head of cattle as an inducement "to be his witness". It is not clear from the record as to when this alleged inducement was offered, whether before or after the second appellant's incriminating statement. More importantly, the record does not reveal as to whether the first prosecution witness was specifically asked as to what was the reaction of the first appellant to

the second appellant's statement. In the absence of such particulars we do not see that an inference of the first appellant's guilt can safely be drawn simply from an allegation made in his presence.

Mr Balachandran submits that in any event the credibility of the first prosecution witness is suspect, as he testified that the second appellant had run away to hide himself in banana plantations: the second pro-

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secution witness, on the other hand, testified that the other village headman had sent him and the second appellant to report the matter to the District Governor; in the latter's absence they both made a report to a local councillor and also the nearby courts and then returned home. The learned trial judge did not observe this inconsistency in the prosecution evidence.

The second statements, made to the sole police investigating officer, a detective sergeant, were admitted by the learned trial judge after a trial within a trial in which the appellants contested the voluntariness of the statements, maintaining that they had been forced by the investigating officer to sign the statements, the seventy-four year-old first appellant in particular maintaining that he had been beaten by the latter. Mr Balachandran points to the fact that the first appellant's statement is recorded as having been taken by the investigating officer on 7th June, 1979, between 0916 and 1005 hours. The second appellant's statement however is recorded as having been taken on the same date by the same officer from 1000 hours onwards. This discrepancy was never noticed or explored in the court below. It does lend force to the appellant's contention that they were forced to sign already prepared statements. Suffice it to say that we are not satisfied that had the learned trial judge directed his mind to this matter he would inevitably have admitted the statements.

Finally, the cause of death was not in our view satisfactorily established. A post-mortem report under the hand of a Government medical officer was produced in evidence by the investigating officer under the provisions of s. 191A of the Criminal Procedure Code. The medical officer was not called as a witness as he was far removed on duties within the Province. The post-mortem report indicates that the deceased met her death through being `"burnt to death" and contains the following:

> "The body was lying in the ash of a small burnt house, on the right body side in contracted position: the body was totally burnt the person could have been about 80 years of age."

The second and third pages of the report form (Coroner's Form No. 3) bear no entry whatsoever, indicating that the usual full examination of the body was not carried out, presumably because of the burnt condition of the body. The report as it stands must therefore be regarded as inconclusive. Section 119A of the Criminal Procedure Code in part reads as follows:

> "191A (1) The contents of any document purporting to be a report under the hand of a medical officer employed in any criminal proceedings shall be admitted in evidence in such proceedings to prove the matters stated therein:
>
> Provided that -
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> (i) the court in which any such report is adduced in evidence may, in its discretion,

cause the medical officer to be summoned to give oral evidence in such proceedings or may cause written interrogatories approved by the court to be submitted to him for reply, and such interrogatories and any reply thereto

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purporting to be a reply from such person shall likewise be admissible in evidence in such proceedings;

(ii) at the request of the accused, made not less than seven days before the trial, such witness shall be summoned to give oral evidence."

All that the above provisions say is that the report of a medical officer employed in the public service shall be admitted in evidence "to prove" the contents thereof. The section does not say that the report shall necessarily be admitted as proof conclusive of its contents. No doubt the legislature has specifically provided for the summoning of the medical officer, when either party or indeed the court may summon him as a witness in any event, in the face of an inconclusive as much as an involved or vague report. Usually indeed the contents of the medical report will in the least require elucidation, a point which is stressed in the following passage from the judgment of this court per Baron, D.C.J., in *Mwanza and Others v The People* (1) at p. 222:

> "Neither the trial court nor this court could say from this statement of facts (containing a paraphrase of a post-mortem report) precisely what was the nature or the severity of the injuries inflicted on the deceased. We point out to those responsible for prosecutions that this information is essential to a proper consideration of the question of sentence, and may in some cases be essential on the question of verdict. There may be cases in which the medical report will be sufficient to supply this information without it being necessary to call the doctor, but our experience is that medical reports usually require explanation not only of the terms used but also of the conclusions to be drawn from the facts and options stated in the report. It is therefore highly desirable, save perhaps in the simplest of cases, for the person who carried out the examination in question and prepared the report to give verbal evidence in court; certainly the doctor should have been called in the present case."

That passage was repeated in the judgment of this court in *Kasungani v The People* (2) at p. 262. In those two cases the court was concerned with the quantum of sentence to be imposed in respect of a conviction for manslaughter. As the passage frown Mwanza (1) supra indicates, the observations therein apply a fortiori where the court is concerned with verdict. It must only be in "the simplest of cases" that a judge in the exercise of his discretion under s. 191A would decide not to call the medical officer. Quite clearly the present case cannot be said to fall within that category. In view of the failure to call the medical officer we do not see that it was proved beyond reasonable doubt that the aged deceased had not died from natural causes before her house, whether accidentally or otherwise, took fire.

For the above reasons we consider it was unsafe to allow the convictions to stand and we allowed both appeals, quashed the conviction and set aside the sentences.

Appeals allowed
