CHIMBO AND OTHERS v THE PEOPLE (1982) Z.R. 20 (S.C.)

SUPREME COURT

NGULUBE, D.C.J., GARDNER AND MUWO, J.J.S.

27TH JULY AND 24TH AUGUST, 1982

(S.C.Z. JUDGMENT NO. 23 OF 1982)

APPEAL NO.123 OF 1980

Flynote

Evidence - Accomplices - Danger of false implication - Whether one suspect witness can corroborate another.

Evidence - Confessions - Admissibility of - Proof of use of force through medical reports.

Evidence - Identification - Recognition - Whether need to rule out possibility of honest mistake.

Headnote

The appellants were convicted of murder. They were alleged to have taken the deceased and his wife from their home, severely beaten them up and left them in the bush, naked, tied up and gagged.

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The deceased was rendered unconscious and later died. The prosecution witnesses were the accused's wife, who identified the appellants as the culprits, and the driver of the truck which transported the appellants, a self confessed accomplice. The appeal was against the admissibility of confessions of the first and second appellants and the identification of the third.

**Held:**

(i) The evidence of suspect witness cannot be corroborated by another suspect witness unless the witnesses are suspect for different reasons.

(ii) The court must give proper consideration to all issues in deciding whether confession is voluntary, and may not disregard a medical report in the absence of expert medical evidence to justify a belief that a severe beating must produce more serious injuries since the degree of injury is irrelevant to whether a confession was obtained by force.

(iii) Although recognition is accepted to be more reliable than identification of a stranger, it is the duty of the court to warn itself of the need to exclude the possibility of an honest mistake.

(iv) For purposes of identification, a proper identification parade must be arranged.

**Cases referred to:**

(1) Nikutisha and Anor v The People (1979) Z.R. 261.
(2) Mushala and Ors v The People (1978) Z.R. 58.
(3) Mwasumbe v The People (1978) Z.R. 354.
(4) Choka v The People (1978) Z.R. 243.
(5) Musupi v The People (1978) Z.R. 271.

For the first appellant: P. C. Zulu, Zulu and Co.
For the second appellant: C. K. Banda, Lisulo and Co.
For the third appellant: L. J. A. Mwamasika, Legal Aid Counsel.
For the respondent: K.C. Chanda, State Advocate.

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Judgment

**NGULUBE, D.C.J.:** delivered the judgment of the court.

The appellants were convicted of murder. The evidence for the prosecution established that on the night of 20th August, 1978, the deceased and his wife, PW2, were collected from their house in George compound, Lusaka, by three men dressed in army uniform. They mere taken to an army truck in which the driver, PW4, was waiting. Two of the men and the deceased got into the cab of the truck while the third man and PW2 sat at the back. PW4 then drove the truck along the Kabwe Road eventually branching off into bush road leading to Kaluwe. All the while the two men who had got into the cab were beating the deceased while the third man was beating PW2, demanding to be told where the deceased kept his money. PW4 stopped the truck at some point on the bush road already referred to. The deceased and PW2 were

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taken out of the truck by the three men in question. They were stripped naked and then beaten up very severely indeed be those men who kept demanding to be told where the deceased kept his money. The trio then robbed the deceased and PW2 of various items before leaving them in the bush unconscious, naked, tied up, and gagged. The following morning PW2 regained consciousness and observed that her husband was still unconscious She walked naked and bound to the Kabwe Road where a passing motorist untied her and referred her to a farmhouse nearby. With the help of the owner of the farm and others the matter was reported to the police who collected the husband who was still unconscious and remained in that condition at the hospital where he was taken until he expired on the 29th August, 1978. According to PW4, a self-confessed accomplice, after the deceased and PW2 had been left in the bush he had driven the three men back to George compound where they collected a number of articles from the decease's house. They had also shared some money, and PW4 was given some. After dropping of the others near their residences he had decided to keep quiet about the whole incident. Investigations by the police led to the apprehension of a number of soldiers, including PW4 and the first and second appellants. The second appellant was released after questioning on 29th August, 1978, only to be re-taken into custody the next day. An identification parade was conducted and PW2 identified the first and second appellant as two of the men involved in the attack upon her and the deceased on the night of 20th August, 1978. Thereafter the police recorded confession statements from the first and second appellants which were admitted in evidence after trials within the trial, to which statements we shall revert in a moment.

Further investigations led to the apprehension of the third appellant who consistently denied the charge. The third appellant was made to sit on bench at the police station with the first and second appellants and a fourth man. PW2 was then specifically asked by the police to identify from among them the third assailant who, she was told, had not previously been on the identification parade, and she duly recognised the third appellant as such third man. We must say that this was a most undesirable procedure to adopt when a proper identification parade could easily have been arranged. We agree with the submission made by Mr Mwamasika that identification obtained in this manner should generally he viewed as unsatisfactory, if not worthless. The learned trial judge took the view that this situation was similar to the one that arose in *Nikutisha & Anor v The People* (1), and that therefore while proper parade would have been

preferable, PW2 had nevertheless recognised a person she had seen on two different occasions prior to the date of the incident and as the third assailant who was with her at the back of the truck driven by PW4. In *Nikutisha* (1) the police did not deliberately invite the witness to identify. There, it was by sheer chance or accident that a witness was allowed to be in a position where he was able to see the suspects arriving at the police station, and before the event could be stopped, the witness identified one of the suspects

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who he had already described. It seems to us that no legitimate parallel can be drawn between the situation in *Nikutisha* (1) and the one in this case.

The matter, however, goes much further than this. The learned trial judge was satisfied that in respect of the third appellant identification by PW2 had been by way of recognition and was, therefore, reliable. While recognition has been accepted to be more reliable than identification of a stranger, the trial judge should nevertheless remind himself that mistakes in recognition even of close relatives or friends are sometimes made, and hence the need to exclude the possibility of an honest mistake. If PW2's opportunity for observation on the night in question was no better in relation to the third appellant than it was in relation to the co-appellants, it follows that, even if the case fell to be considered as one of recognition., it was the duty of the trial judge to warn himself of the need to exclude the possibility of an honest mistake. The learned trial judge did not so warn himself, and his failure to do so was a misdirection. There is a string of authorities to this effect, such as *Mushala & Ors v The People* (2), *Mwasumbe v The People* (3), and other cases therein referred to. It follows from this conclusion that the conviction of the third appellant can only stand if, in relation to him, we can apply the proviso. Since consideration of this aspect raises issues common to all three appellants, we propose to revert to it after we have dealt with those grounds of appeal of the first and second appellant as did not affect the third appellant.

Both the first and second appellants have argued that their confession statements were wrongly admitted. The first appellant had challenged his warn and caution statement on the ground that the police had assaulted him in order to compel him to confess. His allegation that the beatings had lasted several days was disbelieved. The learned trial judge believed the police officers who denied the allegations of torture and assault. The first appellant had attended a clinic for three weeks and produced a medical report in which findings consistent with his allegation were recorded. He had also exhibited to the court a scar alleged to have been caused by the police, and another old scar on which he alleged the police had struck him causing it to give him trouble. In his ruling the learned trial judge argued that had the first appellant been assaulted as severely as he alleged he should have sustained more injuries than the medical report disclosed. He also clearly misapprehended the first appellant's evidence concerning the old scar when he made a finding that the first appellant had falsely claimed that it, too, had been caused by the police. No finding was made in relation to the more recent scar nor was any consideration given to the substance and effect of the uncontroverted medical report which was produced. Counsel for the first appellant has submitted that these circumstances the confession statement should not have been admitted. Since similar considerations arise in the case of the second appellant we shall return to this submission in a moment.

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The second appellant also alleged that he had been beaten in order to confess. He, too, produced a medical report which supported his allegations and which set out the injuries he had sustained. He had even complained to the magistrates. The learned trial judge disbelieved the second appellant for the reason that had he been assaulted as severely as he alleged, the medical card should have

listed more injuries than it did, and that the injuries should have been more serious. Mr Banda has submitted that the issue before the court was an allegation of beating and to dismiss such allegation on consideration of the seriousness or degree of injury was to beg the question. He pointed out also that this was a man who had been questioned and released the day prior to the recording of the confession, and it was argued that the trial judge should have questioned why he should confess when he had not done so the previous day. As in the case of the first appellant no consideration was given to the substance and effect of the medical report. The complaint to the magistrate and the failure to confess on the first occasion received no mention in the learned trial judge's ruling. Counsel submits that in these circumstances the second appellant's confession statement was wrongly admitted.

There is great force in the submissions made on behalf of the first and second appellants. It is apparent from the record that no or inadequate consideration was given to a number of important issues raised. We do not see how, in the absence of expert medical evidence, any court can disregard a medical report and justify a bare belief on its part that a severe beating must produce more serious injuries. We do not see that such an argument is even relevant to an inquiry concerned with an allegation that confession was extracted by force. The issues which we have already referred to were material and called for consideration if proper determination of the question of voluntariness were to be made. An approach which fails to deal with all the issues raised and which gives little or no consideration to those aspects of the evidence favourable to an accused person is unsatisfactory. We are, in the circumstances, quite unable to say that had proper consideration been given to all such issues the learned trial judge would inevitably have found that the prosecution had proved beyond all reasonable doubt that the confessions were voluntary. It follows from this conclusion that we consider the confessions to have been wrongly admitted and that their admission was misdirection. The convictions can only stand if we can apply the proviso, and to this end we now proceed to examine whether the rest of the evidence was such that had the trial judge not misdirected himself he must inevitably still have convicted.

The only evidence connecting the appellants with the commission of his offence came from PWs 2 and 4. PW4 was clearly an accomplice and the learned trial judge quite properly found him to be such. The greatest danger to be guarded against in the case of true accomplice is the danger of false implication, and it is therefore on the question of the identity of his companions that greatest care is called for to ensure that that danger has been excluded. The learned trial judge found that



PW4's evidence on identity was corroborated by that of PW2. Counsel have argued that this could not be so. It was pointed out that in relation to PW2 the learned trial judge made two important findings; the first being a finding that she was a suspect witness for the reason that she may have had motive to falsely implicate the appellants, and the second being the finding that her evidence on identification was unreliable on the ground that the circumstances surrounding the events that night did not provide an opportunity to make reliable observations. The effect of the first finding was to place PW2 in the same category as PW4 to the extent that the approach to their evidence would be similar since the danger to be guarded against was exactly the same. The learned State Advocate attacks the first finding on the ground that there was no evidence to support it, and that it would appear from a reading of the relevant passage in the judgment that PW2 attracted this fairly unfavourable classification simply because she was the wife of the deceased. It is the duty of trial judge, if the circumstances so dictate, to make a finding regarding the status of any particular witness, and while different witnesses can be suspect for different reasons, it obviously does not follow that witness must be regarded as suspect merely because she happens to be the wife of the victim. We do not apprehend from the judgment below that PW2 was found to have motive to falsely implicate solely for being a wife. The learned trial judge had the advantage of

seeing and hearing the witness at first hand and, as a result, he concluded that PW2 may have had such a motive. We must assume, unless the contrary is too obvious, that trial judge sitting alone as a trier of fact evaluates the evidence and the demeanour of the witnesses as reasonably as would joy properly directed and acting reasonably. At any rate, unless it appears quite plainly that finding is perverse or one which no tribunal acting reasonably could have come to, it is not open to this court to substitute findings. It has not been shown to us that the learned trial judge had made a finding attracting those criticisms as would justify reversal by this court and, accordingly, we must now proceed to examine the submission made that PWs 2 and 4 could not, in the circumstances, corroborate each other.

This submission is entirely valid. There are circumstances when the evidence of one suspect witness could be corroborated by the evidence of another suspect witness provided of course that not only is the suspicion for different reasons but the one supplying corroboration or both of them must be what one might call, for lack of a better expression, an innocent suspect witness. An illustration of this distinction would be where one witness is a true accomplice and the other an innocent bystander whose evidence of identification is not free from the danger of an honest mistake and is for that reason only a suspect witness. Where however, as in this case both witnesses may have the same dangerous motive of false implication, the witnesses could not in these circumstances corroborate each other, and each would require corroboration or support from some independent witness or other circumstance amounting to something more. The case of *Choka v The People* (4) which counsel cited is in point. However, we must point out that the principle that one

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suspect witness could not support the evidence of another suspect witness was related specifically to the circumstances of that case where the witnesses were suspect for the same reason; that is, they both had possible interests of their own to serve. That case and indeed several others (*see* for example, *Musupi v The People* (5)) underline the principle that in every such case the danger of false implication must be excluded before a conviction can be held to be safe. In the circumstances of this case the approach to the evidence of PWs 2 and 4 must be the same. There being no other evidence of such weight that any court would certainly have held that if excluded the dangers of relying on their evidence, there can be no question of applying the proviso. The convictions cannot stand. The appeals are allowed.

Appeals allowed

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