

CHARLES NALUMINO v THE PEOPLE (1986) Z.R. 102 (S.C.)

SUPREME COURT
SILUNGWE, C.J., NGULUBE, D.C.J., AND GARDNER, J.S.
9TH JULY, [1985] AND 24TH DECEMBER, 1986
(S.C.Z. JUDGMENT NO. 24 OF 1986)

Flynote

Evidence - Confession - Admissibility - Duress - Lack of external evidence of injuries from beatings - Effect of Evidence - Confession - Admissibility - Duty of court to enquire into objection.

Headnote

The appellant was convicted of communicating classified matters to unauthorised persons contrary to s. 15 (1) of the State Security Act. The conviction was based solely on the evidence of a disputed confession about which no enquiry as to objection was made to counsel for the defence. Furthermore the trial judge did not believe the defence evidence of beatings because there were no external injuries.

Held:

- (i) It is immaterial whether or not an accused is represented by counsel, the court must in all cases ask the defence whether they wish to object to the admission in evidence of a confession.
- (ii) It is not in all cases that an assault will be followed by manifestations of external injuries. Lack of such injuries is not a ground for disregarding medical evidence supportive of an appellant's allegation of assault.

Case cited:

(1) Chimbo and Others v The People (1982) Z.R. 20

Legislation referred to:
State Security Act Cap. 110 S 5 (1)

For the appellant: T.C. Chalanshi and Co.
For the respondent: A.B. Munthali State Advocate

Judgment

SILUNGWE, C.J., delivered the judgment of the court: The accused was tried in the High Court on a charge of communicating classified matters to unauthorised persons, contrary to Section 5 (1) of the State Security Act. Cap. 110. The particulars of the offence were that, on a date unknown but between July 28, and August 2, 1982, at Lusaka the

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appellant, being a person employed in the public service as a clerical officer in the Office of the

President, communicated to Mrs Miriam Mbololwa Wina a top secret document headed "Subversion" when it was not in the interests of the Republic so to do. He was convicted as charged and appeal is against conviction only.

At the appellant's trial, the evidence against him rested on a disputed confession. The learned trial judge conducted a trial-within-a-trial and thereafter came to the conclusion that the confession had been made freely and voluntarily, the confession was then admitted in evidence and subsequently resulted in the appellant's conviction. It is the admission of that confession that constitutes the main ground of this appeal.

The prosecution's case was that the appellant's sister had been married to Mr Wina's late brother and that the sister's children of that marriage were being looked after by Mrs Wina. The first prosecution witness Mr. Nkhoma, then Deputy Director of the Zambia Security Intelligence Services (hereinafter referred to as the Z.S.I.S.), acting on information received, had detailed the appellant in February and May, 1982, to verify reports about an alleged illegal importation of vehicles from South Africa, and about trafficking in ivory, by Mr. and Mrs Sikota Wina (hereinafter referred to as the Winas), and that, in compliance with instructions received, the appellant had visited the residence of the Winas at their farm in Mimosa, Lusaka. On July 30, 1982, Mr. Nkhoma received certain information as a result of which he instituted investigations against, and interrogated, the appellant concerning an allegation that, on the appellant's instructions, the second prosecution witness, Mr. Michael Mubanga - ten a machine operator in the Z.S.I.S. had made photostat copies of a Top Secret Report No. TS/CV/70/1/11, dated July 26, 1982, on the alleged importation by the Winas of motor vehicles to which reference has already been made, and that he had communicated the said report to Mrs. Wina who was an unauthorised person. When the interrogation resumed on the 31st of July the appellant allegedly admitted having seen in the Registry a file on the Winas but denied having caused its contents to be photocopied. However, when Mr. Nkhoma stated that he had information to the effect that the appellant had obtained photostat copies of the report on the Winas, the appellant is said to have broken down and admitted to have obtained photostat copies of the report and to have delivered them to Mrs Wina at the Winas farm for which she had given him K150. Further, the appellant is said to have revealed that the Winas had specifically arranged with him to communicate to them any Z.S.I.S intelligence reports on them and that he had been promised financial reward and a car for playing his part. Mr. Nkhoma then handed the appellant over to the police at the Lusaka Central Police Station for further investigations. On August 3rd, 1982, Detective Inspector Emos Phiri recorded a warn and caution statement the disputed statement - from the appellant which as we know later became the subject of a trial-within-a-trial.

Contrary to the evidence of Mr. Nkhoma and Mr. Chalanshi's submission to us Mr. Mubanga's testimony was neutral in that,

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although he had allegedly seen the appellant come into a machine room holding a file and a book and had, at the appellant's request, made two photostat copies of a seven-page document from the file, he neither knew what the document was all about nor could he remember the file number. He could, therefore, hardly be described as an accomplice or as a witness with a possible interest of his

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to

serve.

On the issue of the alleged confession, the appellant's evidence reveals that he had been a victim of assaults and duress at the hands of the security forces during the period July 28th and August 2th, 1982. His witness, a Medical assistant known as Mathew Mbao, gave corroborative evidence of assault. However, both were disbelieved by the learned trial judge.

Before we can discuss the issue of the alleged confession, it seems to us proper that what we regard as the side issue of interrogations should be disposed of, for what the appellant allegedly said has the trappings of a confession. Besides the allegation of assaults, it is clear from the case record that no warn and caution was ever administered to the appellant during interrogations. This was an obvious breach of the Judges Rules. We would like to point out that suspects ought to be warned and cautioned prior to their being interrogated.

Further, the defence at the trial were never asked if they wished to object at the time when Mr. Nkhoma gave evidence of the appellant's apparent confession during interrogations. Mr. Chalanshi's reaction to this omission was that a court has a duty to ask an unrepresented accused if he wishes to raise an objection to the admission of a confession, but that where an accused is represented by counsel, it must be presumed that counsel has no objection to raise. We wish to reiterate what we said to Mr Chalanshi then that it is immaterial whether or not an accused is legally represented and that, in all cases, the court must ask the defence - represented or unrepresented whether they wish to object to the admission in evidence of a confession. In this case, the learned trial judge's omission was, therefore, a misdirection.

As a result of the misdirections referred to above, Mr Nkhoma's evidence of the appellant's purported confession must completely be disregarded.

As regards the warn and caution confession attributed to the appellant, his stand was that, from the time interrogations commenced until August 2th, 1982, he had been starved and repeatedly beaten by security personnel; and that, on the 3rd of August, he had been presented with a pre-recorded statement and forced to sign and that he signed it on account of fear for his life. The appellant's evidence was that he had sustained a swollen right leg and sore right thigh and hip; and that, on the 6th of August, he had been taken to Kamwala Health Centre where he was examined and treated by Mr. Mathew Mbao, a medical assistant who later testified on his behalf. According to Mr. Mbao's testimony, the appellant complained to him of pain in the right thigh. On examination, Mr. Mbao found that the appellant's right thigh was

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inflamed, swollen and tender. In his opinion, the inflammation was due to an inflammation of muscle fibres which could have been caused by beating.

In rejecting the appellant's evidence and that of Mr Mbao, the learned trial judge made the following observation:

"Looking at the evidence concerning the manner in which the accused is alleged to have

been beaten between 28th July and 2nd August, 1982, it is difficult to believe that the accused would have gone free without some visible external injuries. I cannot see how a person assaulted with a broom-handle persistently for 3 days would have escaped visible external injuries."

In our judgement, the trial court's approach was erroneous because it is not in all cases that an assault will be followed by manifestations of external injuries. As medical evidence was supportive of the appellant's allegations of assault, it was a misdirection to disregard it.

On the authority of *Chimbo and Others v the People* (1), whose facts are similar to those of the present case, we are satisfied that the alleged confession ought not to have been admitted in evidence on the ground of involuntariness; its admission in evidence was, therefore, a serious misdirection. In the absence of any other evidence - direct or circumstantial - to link the appellant with the commission of the offence charged, the appeal must succeed. The conviction is quashed and the sentence is set aside.

Appeal allowed.
