ABEL BANDA v THE PEOPLE (1986) Z.R. 105 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., CHOMBA AND GARDNER, JJ.S.
4TH NOVEMBER, 1986 AND 28TH JANUARY, 1987.
(S.C.Z. JUDGMENT NO. 25 OF 1986)

Flynote

Courts - stare Decisis - Power of Supreme Court to overrule itself Considerations.
Evidence - Confession - Administration of warn and caution - Person in authority - Village headmen - whether included.
Evidence - Witness - Duty of prosecutor with knowledge of evidence favourable to the defence.

Headnote

The appellant was convicted of murder by administering a pesticide contained in a drink of Kachasu. The Prosecution evidence included, inter alia, an interrogation conducted without administering a warn and caution by the village headman.

Held:

(i) In order to have certainty in the law, the Supreme Court should

p106

stand by its past decisions even if they are erroneous unless there is a sufficiently strong reason requiring that such decisions should be overruled. Chibozu and Anor v The People overruled.

(ii) A village headman is not a person in authority for purposes of administering a warn and caution before interrogating a suspect, since his normal duties do not pertain to investigating crime.

(iii) A prosecutor is under no duty to place before the court all the evidence known to him, however where he knows of a credible witness whose evidence supports the accused's innocence, he should inform the defence about him .

Cases referred to:

(1) Callis v Gunn [1963] 3 All E.R. 677
(2) Chinyama and Ors v The People (1977) Z.R 426
(3) Dallison v Caffery [1964] 2 All E.R. 610
(4) Chibozu and Another v The People (1981) Z.R. 2
(5) Kasote v The People (1977) Z.R. 75
(6) Musongo v The People (1978) Z.R. 266

Legislation referred to:

Penal Code, Cap. 146 ss. 14 (1), 12.16, 200, 204

For respondent: Ngenda, Ngenda and Co.
For respondent: A.B. Munthali, State Advocate.

Judgment

CHOMBA, J.S.: delivered the judgment of the court. The appellant in this case was convicted of murder to Section 200 of the Penal Code, it having been alleged that on the 16th August, 1983, he murdered one Andereya Mwanza. This was at Chadiza in the Eastern Province of the Republic of Zambia. The capital sentence was imposed on him. He now appeals against conviction. In this court he was represented by Mr. Ngenda of Ngenda and Company while the State was represented by Mr Munthali, a State Advocate.

The short parts of the case as presented by the prosecution were that in the night of the 16th August, 1983 the appellant visited the deceased a personal friend of his, and woke him out of sleep. When the appellant entered the deceased's house, the deceased's wife, namely Enelesi Phiri, who was the first prosecution witness noticed that the appellant was carrying a bottle of kachasu liquor and a cup. When he settled down the appellant poured out some kachasu into the cup he had and offered it to the deceased. The latter accepted and drank from the cup. The appellant did not partake of the liquor that night. Thereafter he told the deceased to keep the remaining kachasu in the bottle until the following morning. At the time of his departure from the deceased's house that night, the appellant took with him the cup. Later that night the deceased was taken ill. He complained of "a paining" throat. Early the following

morning the appellant returned and after exchanging pleasantries with the deceased's wife, the deceased's wife told the appellant that her husband was not feeling well. She did not explain. The appellant settled down and drunk the remaining contents of the bottle. That day the 17th August, 1983 the condition of the deceased worsened. He was complaining that the pain in the throat was getting worse. The deceased's wife reported the matter to Dofilo Sakala the village headman. Eventually when the village headman arrived at the deceased's home the deceased was found dead.

Acting, on the information he had evidently received from the deceased's wife, the headman interviewed the appellant. The following passages sum up the headman's evidence. In examination in chief he stated, inter alia:

> "In the process people brought Abel. I asked Abel whether he was the one who poisoned PW1's husband. He said he was. After interviewing the accused (Abel Banda) I reported to the police."

And under cross examination he said, inter alia:

> "The accused when questioned did not deny killing the deceased. The accused was asked for the second ktime and still admitted. He was asked for the second time to confirm. He never denied."

A post mortem examination on the deceased's body was conducted by Dr. Kashana Yinadabathule, the fifth prosecution witness. The significant findings were as follows, quoting from his evidence:

"Internal examination revealed that the throat was empty. The lungs were congested, the intestines were congested. The urinary bladder was empty. The left side of the scrotum was big. The cause of death could have been poisoning him because I suspected poisoning. I took complete stomach, complete kidney a piece of liver, piece of spleen and a piece of lung. I also took 5cc of blood. They were all preserved in 15% chloride which is a preservative. I completed forms which I handed to police officer to be taken to Lusaka to a Public Analyst for chemical analysis."

The relevant evidence of the Chief Analytical Chemist and Public Analyst was to the following effect:

On the 29th August, 1983, he received from Det/Const. Mulilo of Chadiza Police Station specimens from the body of Andereya Mwanza. On examination of these specimens he discovered that an organo phosphorous pesticide known as dimethoate or usually known as rogor was identified in all the specimens.

In the meantime while in police custody the appellant made a warn and caution statement, as quoted below:

"I went to buy the kachasu beer and Stephen and I we drunk some of it until there was only half a bottle remaining in it when very late in the evening Stephen told me not to finish the kachasu but that I should take the remaining beer to Mr Andereya

p108

Mwanza's house, so that he can take part in drinking. So I stood up and before I could walk away Stephen told me to wait, he put his hands in a trousers pocket and drew from it a plastic paper on which he had wrapped some powdered substance which was whitish in colour, he put the powdered stuff in cup and he said to me get this stuff in a cup and go to Andereya Mwanza's house and on your arrival there you will apply in this kachasu beer which you must give to him to drink, I want him to die. Because he has given my father a lot of problems and that he wants us to leave this village, so I got what I was given and did what I was told by Stephen Mwale and Mwanza actually drunk the beer which I had mixed with some stuff, after which I left for my house, where my friend was. I told him that I had given Mwanza the beer and that he had taken it. So we slept. The following morning at dawn I went back to Mwanza's house to finish the remainder of the beer which I had left in the bottle. I enquired as to how he was feeling he said he was feeling that the throat was dry and had some body pains. I left for my house and informed Stephen who later in the morning of the day left for Chipata. Some hours later on August 17th, 1983, Andereya Mwanza passed away."

In arguing the appeal Mr Ngenda raised a number of points. Firstly, he argued that the totality of the evidence adduced by the prosecution in support of the charge of murder was insufficient to sustain the conviction. To this end he quoted a passage from the judgment of the trial judge. This passage is as follows, quoting from the judgment on page 24 of the appeal record:

"At the outset I must point out that Mr, Lungu's submissions have been well taken and have great force in them, but the greatest hurdle for the defence is the warn and caution statement admitted in evidence after a trial-within-a trial."

The reference by the trial judge to the submissions of Mr Lungu, who was then the defence lawyer, is a reference to the following position which is reflected in the judgement. I quote again from the judgement at page 23:

"At the close of the defence case, Mr Lungu on behalf of the accused, made brief submissions. Counsel submitted that on the prosecution evidence there are a lot of doubts as to whether it is the accused who caused the death of the deceased or not. Counsel pointed out that PW1, the widow, testified that at the place they visited with the deceased they had nshima but did not clarify whether the meal was taken jointly or separately. Mr. Lungu submitted that this creates a doubt which must be resolved in favour of the accused. Mr. Lungu further pointed out that the evidence of PW1 discloses that the accused also drank some of the beer from the same bottle next morning. This raises the doubt whether the beer was poisonous or not. Mr. Lungu farther argued that the evidence of the Public Analyst does not state what food was poisonous in the stomach. Counsel also argued that the cups,

p109

part of the specimen were not linked with the offence, they were not produced and nobody knows where they were collected from. Counsel submitted that in the light of all the foregoing doubts, it will be in the best interest of justice for the court to exercise its discretion in favour of the accused by even at this moment excluding the statement made under caution."

We must agree with the counter submission by Mr. Munthali that the appellant's counsel misconstrued the elect of the trial judge's statement in regard to the submissions made by Mr, Lungu in the appellant's behalf. The correct interpretation was that the judge, while conceding that the matters raised by Mr. Lungu raised doubts, was satisfied that the damning evidence against the appellant was his own warn and caution statement. We have in fact ourselves perused the evidence on the appeal record and cannot find anything to support the submission in this regard from the appellant's counsel. That submission does not find favour with us.

The next aspect argued by Mr Ngenda related to the warn and caution statement. He noted that the admissibility or the warn and caution statement was objected to on the ground that duress had been used to induce the appellant to make a confession. He however regretted that the appellant did not give evidence at the stage of the trial within the trial which was directed at determining the voluntariness of the making of the statement. This not-withstanding Mr. Ngenda argued that as the appellant had alleged that the police had assaulted him as a result of which he had lost two teeth the judge ought in his discretion, to have excluded the statement. Counsel contended further that the fact that two police witnesses, namely Det/Sgt Bernard Malata Phiri and Det/Const. Timothy Dambuzi had contradicted each other in regard to the place where the warn and caution statement was taken and as to the number of persons present at the time of the taking of the statement raised a

question as to the manner in which the statement was taken. For these two reasons the appellant's counsel argued that the trial judge should have exercised his discretion so as to exclude the statement even though it, was taken in compliance with the judge's rules.

In the instant case the statement was objected to at the trial on the ground that duress had been used to induce the appellant to make it. Further, as the learned trial judge observed, none of the police witness who gave evidence as to the voluntariness of the statement was cross examined as to the alleged duress during the trial within a trial. It is no wonder therefore that the trial judge came to the conclusion that the statement was freely and voluntarily made.

It is settled law that a warn and caution statement which is taken in compliance with the Judges' Rules can only be excluded, in the exercise of the trial judge's discretion, if its admission would operate unfairly against the accused. It has been held that the admission would operate unfairly against the accused if the statement was obtained in an oppressive manner, or against the wishes of the accused . (see *Callis v Gunn* (1) at page 680. In the present case the only circumstances which

p110

are relied on as forming the basis on which the trial judge should have exercised his discretion to exclude the warn and caution statement are twofold namely, firstly that there was discrepancy between the two police witnesses as to the place at which the statement was taken because while one officer said that it was taken in the inquiry office at Chadiza Police Station, the other said it was not taken in that office, secondly that the same witnesses differed in their evidence as to the number of persons present at the time of the taking of the statement since one of them said that there were two officers present while the other said that there were three officers. The trial judge considered both these discrepancies and found that they did not strike at the root of the case. He also considered the question of exercising his discretion to exclude the statement and came to the view that there was nothing to justify taking such a step. We uphold his reasoning as the circumstances relied on for the reposition that the discretion should have been exercised do not suggest that the statement was taken in an oppressive manner, nor indeed do they suggest any other impropriety on the part of the police officers present at the time of the taking of the statement. As this court succinctly put it in *Chinyama and Others v The People* (2) at page 434

> "the discretion should be exercised where the court is satisfied that notwithstanding that the statement was made voluntarily in the sense that there were no inducements, etc. had it not been for the unfair conduct or impropriety the accused might not have made the statement or might have provided answers to questions which subsequently formed the basis of the statement."

In the current case no occasion arose to necessitate the exercise of the discretion. This ground therefore fails also.

The next point counsel took up on behalf of the appellant was that the confession statement was exculpatory. We are at a loss to appreciate this reasoning because in their plain every day meaning the words used by the appellant in the warn and caution statement amount to the confession that the third person named gave the appellant a powder which was said would cause the death of the

deceased should the deceased take it after it had been introduced into the Kachasu which the appellant was to offer to, the deceased. The appellant said in the statement that he religiously followed the instructions the third person had given him. The result was that the deceased died.

It is trite law that an agent who commits an act on behalf of principal knowing fully its criminal consequences, is as guilty of the resultant crime as the principal himself. A person can only escape criminal liability if through mental incapacity he is incapable of appreciating and understanding the nature of the act he is sent to perform on behalf of his principal or appreciating the probable consequences of the act. A ready example would be a child of tender age, namely one under the age of eight years (See Section 14 (1) of Cap 146) who is sent to take property of another person in circumstances which could constitute the offence of theft if the taker was a person of full age and mental capacity. In that

p111

case the child would be regarded as an innocent agent. One would equally be criminally blameless if he commits a criminal act under compulsion where there was a present threat to endanger his life. (See Section 16 Cap 146). The same would be the case if the agent was suffering from insanity as envisaged by Section 12 of Cap 146.

In the current case there is nothing to suggest that the appellant is or that he was at the material time a person suffering from a deficient mental capacity or that he acted under compulsion. He was quite free to disassociate himself from the expressed evil intention of the other person, who the appellant says, sent him to administer the noxious powder to the deceased. As we see it this is a classic case of aiding and abetting. In the result the appellant cannot be allowed, after he has done the evil deed, to disclaim responsibility for that deed. The submission on this point therefore fails.

Mr Ngenda, in his next submission, accused the prosecution of dereliction of duty in failing to call Stephen Mwale, that is to say the man who was initially jointly charged with the appellant with the murder under review. That man was discharged after the State entered a nolle prosequi in his case. It should be clarified that that is the same Stephen Mwale who features in the appellant's warn and caution statement as the man who had sent him to administer the poisonous powder.

The law relating to the prosecution's duty to call witnesses was lucidly stated in *Dallison v Caffery* (3) at page 618 where Lord Denning, MR said:

> "The duty of a prosecution counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of credible witness, but a witness who he does not accept as credible, he should tell the defence about him so that they can call him if they wish."

Lord Justice Diplock in the same case called as errorneous the contention that a prosecutor had a duty to call all evidence known to him. The Lord Justice said at page 622:

"This contention seems to me to be based on the erroneous proposition that it is the duty of the prosecutor to place before the court all the evidence known to him; whether or not it is probative of the guilt of the accused person. A prosecutor is under no such duty. His duty is to prosecute, not to defend. If he happens to have information from a credible witness which is inconsistent with the guilt of the accused, or although not inconsistent with his guilt is helpful to the accused, the prosecutor should make such witness available to the defence."

p112

In this case the prosecution entered a nolle prosequi in the case, of Stephen Mwale and he was then discharged because the only evidence if one call it evidence which the prosecution had against him was that contained in the extra-judicial statement given by the appellant. That statement implicated Mwale as an aider and abettor to the commission of the murder. It cannot therefore be said that the prosecution had any evidence of a credible witness which tended to show the appellant to be innocent. We accordingly dismiss this contention also as lacking in merit.

Mr. Ngenda then attacked the evidence of the Public Analyst and stated that although it concluded that rogor was present in the specimens removed from the deceased's stomach, it fell short of proving that rogor could kill. Therefore the aspect of causation between the appellant's act of administering the powder and the death of the deceased had not been established, he argued. However, as Mr Munthali said in reacting to that argument, the cumulative effect of the prosecution evidence established causation quite clearly. The appellant himself said that the third man who gave him the powder told him to introduce it into kachasu which the appellant was to offer to the deceased, the reason for introducing that powder into the kachasu was that the third man wanted the deceased to die and that the appellant did as directed. The deceased's widow said in her evidence that earlier in the day of 16th August 1983 the deceased worked around his home and in the afternoon visited some friends' home with her. However, in the night, after taking the doctored kachasu, he was taken ill, complaining of a dry and painful throat. His condition progressively deteriorated until he died the following day. The Pathologist who did the autopsy on the deceased's body came to the conclusion that the cause of death was poisoning. This conclusion was buttressed by the determination of the Public Analyst that the specimens from the deceased's stomach contained rogor, a pesticide. This court takes judicial notice that a pesticide is harmful to man's health. Therefore on the basis of the post mortem finding that the cause of death was poisoning, it is irresistible to conclude that that poisoning was from the pesticide, the rogor. It follows that the powder which the appellant introduced into the deceased's drink had caused the death as designed by the man from whom it was collected, and that powder was the rogor. The linkage is thus quite clear.

It follows from the foregoing assessment of the grounds of appeal and the submissions in support of them that we uphold the finding of the trial judge that the appellant was guilty of killing Andereya Mwanza with malice afore thought, in short murder, as charged. We are not persuaded by the contention of Mr. Ngenda that the evidence adduced by prosecution did not prove mens rea and therefore that even if we find that the act committed by the appellant and which in consequence caused the death was unlawful, we should find him guilty of the lesser offence of man slaughter.

By Section 204 (b) Cap 146, malice afore thought shall be deemed to be established by evidence proving inter alia,

p113

> "Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not , be caused."

On examination of the confession statement it is clear that the words used by the man who instructed the appellant to administer the rogor did impart knowledge to the appellant that the act he was being requested to commit would probably cause the death of Andereya Mwanza. The relevant portion of the confession statement states,

> "he said to me get this stuff in this cup and go to Andereya Mwanza's house and on your arrival there you will apply in this cup kachasu beer which you must give him to drink, I want him to die because he has given me a lot of problems."

This case therefore falls squarely in the purview of Section 204 (b) Cap. 146 as regards the proof of mens rea.

In supporting the conviction one of the pieces of evidence Mr. Munthali relied on was the confession which the appellant gave to the village headman Dofilo Sakala, the second prosecution witness. In this court that confession did not engender any controversy as the appellant's counsel said almost nothing about it. Despite this we feel we must say something about that confession. In the case of *Chibozu and Another v The People* (4) this court held that a village headman was a person in authority and therefore that he had to administer a warn and caution before taking a confession from an accused person. The court in effect ruled that that confession was inadmissible because it was taken in contravention of the Judges' Rules. As that confession was the only evidence relied on by the prosecution in support of the conviction at the trial, the advocate who appeared for the State at the ensuing appeal, Mr. R Balachandran, declined to support the conviction. His intimation was accepted by the court an the conviction was quashed and the appeal allowed.

On examination of the Judges' Rules it is clear that those rules were designed to guide police officers in dealing with suspects and prisoners in the course of investigating crime. This court takes judicial notice that the training of police officers includes instructions in administering the warn and caution. There is no suggestion that these rules are intended to apply to persons other than those whose normal duties pertain to investigating crime. We are unaware of any law or convention which constitutes a village headman as an officer charged with responsibility of investigating crime. In practice when a person suspected of committing a crime is reported to a village headman this is essentially for the purpose that the headman should use his good office to cause the suspect to be conveyed to the authority of the police, he is the intermediary between the inhabitants of his village and the police, sometimes through his chief, a typical headman therefore is a man who would not know, nor should he be expected to know, what creature the warn and caution is. On a

careful review of the position we are satisfied

p114

that the Judges' Rules do not contemplate, as persons who should administer the warn and caution to suspects, persons like village headmen because it is not their normal responsibility to investigate criminal cases. In the event we are of the view that our decision in *Chibozu v The People* (4) was wrong. Moreover it will be noted that our decision in, Chibozu is in flat contradiction with our earlier decision in *George Musongo v The People* (6) where we held that whereas failure on the part of the police officer to administer a caution constitutes an impropriety in respect of which a trial court may exercise a discretion in, favour of the accused, similar failure on the part of any other person in authority (or indeed anybody else) does not necessarily amount to an impropriety as it cannot reasonably be expected that a person other than a police officer, should of necessity appreciate the niceties of what should and should not, be done in such circumstances.

The problem before us therefore is that we have made case law which we have now realised is indefensible. The principle of stare decisis requires that a court should abide by its *ratio decidendi* in past cases.

Put simplistically in order to have certainty in the law decisions of courts should be consistent and should not be so readily changeable as to make it uncertain at any given time what the law is on a given issue. In order to uphold this principle therefore past decisions should not be exploded for the sole reason that they are wrong. Courts should stand by their decisions even if they are erroneous unless there be a sufficiently strong reason requiring that such decisions should be overruled. As this Court held in *Kasote v The People* (5)

> "The Supreme Court being the final court in Zambia adopts the practice of the House of Lords in England concerning previous decisions of its own and will decide first whether in its view the previous case was wrongly decided and secondly if so whether there is a sufficiently good reason to decline to follow it."

We have already pointed out that Chibozu was wrongly decided and the next question for us to consider is whether there is sufficiently strong reasons for us to decline to follow the decision in that case, it is our considered view that justice was not served in *Chibozu* because the symbolic scales of justice was mean that just as an accused person should not be convicted unless there is sufficient and cogent evidence proving his guilt beyond reasonable doubt, the State also should not be made to lose a case unless the evidence it adduces cannot, in law, support a conviction; that way the scales are balance. On this basis we come to the conclusion that sufficiently strong reason does exist to warrant the overruling of *Chibozu* on the basis that it is a non sequitur. We therefore hold that *Chibozu* is no longer good law to the extent considered in this judgement and it is therefore overruled.

Reverting the appeal in this case, we have already held that the conviction is sustainable. It is consequently upheld and the appeal dismissed.

Appeal dismissed