IN THE COURT OF APPEAL OF ZAMBIA **APPEAL No. 110,111/2018**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

B E T W E EN:

ZONDANI MTONGA **1ST APPELLANT**
NCHIMUNYA NG'ANDU **2NDAPPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM : Chishimba, Lengalenga and Siavwapa, JJA
On 20th November, 2018 and 22nd November, 2018

For the Appellant : Mr. C. Siatwiinda Legal Aid Counsel Legal Aid Board
For the Respondent: Mrs G. C. Mulenga Principle State Advocate -NPA

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. Muwowo Vs. The People (1965) ZR 91 (CA)
2. Muvuma Kambanja Situna Vs. The People (1982) ZR 115
3. Patrick Kunda and Robertson Muleba Chisenga Vs. The People (1980) ZR 105
4. Steven Mushoke Vs. The People SCZ Judgment No. 31/2014
5. Anayawa and Sinjambi v The People (Appeal No. 143.144/2011
6. Chigowe Vs. The People (1977) Z.R. 21 (S.C.)

LEGISLATION AND OTHER WORKS REFERRED TO:

1. The Penal Code, Chapter 87 of the Laws of Zambia

This is an appeal against conviction and sentence. The Appellants were charged and convicted of two counts of murder.

The particulars in count one were that the Appellants and two others, on 17th February, 2015 at Lusaka in the Lusaka District of the Lusaka province of the Republic of Zambia jointly and whilst acting together did murder one Nodzi Sibanda.

In Count 2 the particulars of offence alleged that the Appellants and two others on 5th April, 2015 at Lusaka in the Lusaka District of the Lusaka province of the Republic Zambia jointly and whilst acting together did murder Priscilla Felistus Mulinda.

We must point out from the outset that the Appellants were convicted for two separate murders that took place in different locations in Lusaka and on different dates. For reasons that will become apparent in the Judgment, we will not restate in depth the evidence by the witnesses in the lower Court. PW5, PW6, PW7 and PW8 testified with regard to the 1st deceased person. Nodzi Sibanda was murdered in Garden Compound. None of the witnesses saw the persons that murdered the first deceased. They had merely observed that Nodzi Sibanda had been stabbed with a screw driver in the back on the morning of 15th February, 2015.

PW1, PW2, PW3 and PW4 adduced evidence in respect of the 2nd deceased person, Felistus Mulinda. PW1 and the deceased were commercial sex workers. PW1 had been with the late Felistus Mulinda the night she was murdered. Upon receiving a call that her co-worker had been murdered, PW1 informed PW2, the deceased's sister. PW2 identified her sister's body at UTH. She further testified that she was summoned by the police at Emmasdale where she was asked if she knew any of the Appellants. PW2 identified the 1st Appellant a former boyfriend of her sister, who used to threaten the deceased after the relationship ended.

PW3's testimony was to the effect that he saw the Appellants when they were being brought to the scene where the 2nd deceased's body was discovered. According to him, the Appellants led the police and narrated to them how they murdered the 2nd deceased person.

PW4, the 2nd deceased person's brother, attended his sister's post-mortem examination and observed that the deceased had a deep cut and bruises on the neck.

PW8 was the arresting officer. He testified that between the year 2013 and 2015, Emmasdale police station had received several

reports of murder cases. He was assigned to investigate the murders of the deceased persons herein. The 1st deceased's body was recovered on 17th February, 2015 while that of the 2nd deceased's was recovered on 5th April, 2015. Following investigations and interrogations in connection with the two murders, PW8 testified that the Appellants freely and voluntarily admitted the charges.

The Appellants then objected to the admission of the warn and caution statements on account that they were not obtained voluntarily but due to torture. A trial within a trial was held by the Court.

The Appellants denied giving free and voluntary statements to the police admitting the offences. They both maintained that the alleged confessions were only given following severe beatings. Further, that they had been starved before they tendered their 'confessions'.

The trial Court held that the confession statements were given freely and voluntarily. The Court found that the Appellants' allegations/testimonies in relation to the beatings were inconsistent and not supported by any medical evidence. The Court stated that

the Appellants did not report any incidents of beatings to other police officers or the Magistrate when their matter came up for mention. In the ruling subject of the trial within a trial, the Court discounted all the allegations of torture , beatings, threats of death, denial of food and representation by relatives. The learned trial Judge found the evidence of the prosecution as more probable than not and concluded that the warn and caution statements given by the accused persons were free and voluntary and further admitted them into evidence.

The trial Court convicted the Appellants on the basis of the confession statements

Being dissatisfied with the Judgment of the Court, the Appellants now appeal against both conviction and sentence on the following grounds;

1. ***The Court below erred in both law and fact by concluding in its Ruling, after holding a trial within a trial, that the Appellants' warn and caution statements were made freely and voluntarily and therefore admissible, when a proper evaluation of the evidence on the record shows that the Appellants were subjected to severe torture.***
2. ***The trial Court misdirected itself in law and fact by not finding that the failure to subject the screwdriver, P1 for forensic examination was a dereliction of duty on the part of the police.***

The Appellants filed into court heads of arguments dated 12th November, 2018. In ground 1, the Learned Counsel for the Appellants submitted that the burden of proof in a trial within a trial is with the prosecution. Further, that the prosecution ought to prove beyond all reasonable doubt that the warn and caution statements were given freely and voluntarily beyond all reasonable doubt. To buttress this point the Appellants referred us to the case of ***Muwowo Vs. The People*** [1].

It was argued that the trial Court failed, in its ruling subject of a trial within a trial, to properly and fairly evaluate, analyse and assess all the evidence on record. This was contrary to the Supreme Court decision in respect of the contents of a judgment and considerations given to all relevant evidence in the decided case of ***Muvuma Kambanja Situna Vs. The People*** [2].

It was contended that there was sufficient evidence on record to indicate that the Appellants were subjected to beatings while in custody. Further, that the trial Court should not have expected the Appellants to produce medical reports or reported the matter to the Police Cells Custody Officer. It was further contended that the allegation that the Appellants were starved was not rebutted as

PW8 stated, in the trial within a trial, that the proper person who could speak to the allegation was the Police Cells Custody Officer who was not called during the trial within a trial.

It was submitted that, the burden of proof was placed on the Appellants as opposed to the burden being placed on the prosecution. Further, that the allegation made by the Appellants that their relatives were being turned away gives credence to the assertion that the Appellants were tortured therefore the relatives could not be allowed to see them in the state they were in. In addition, that the police officers ought to have called a Social Welfare Officer to be present during the interview considering the seriousness of the confessions made by the Appellants.

The Appellants concluded the arguments in ground one by stating that the prosecution had failed to discharge the burden of proof to the requisite standard in a trial within a trial. Further, that the confession statements were not obtained freely and voluntarily.

In ground 2, the Appellants argued that the trial Court ought to have found that the failure to subject the screwdriver to forensic examination was a dereliction of duty on the part of the police. We were referred to the case of ***Patrick Kunda and Robertson Muleba***

Chisenga Vs. The People [3] on the issue of failure to lift fingerprints would amount to dereliction of duty by the police.

The Appellant argued that the failure to subject the screwdriver to forensic examination was a dereliction of duty. Therefore, there was a presumption that the Appellants did not handle the screwdriver in question.

It was submitted that, there being no evidence linking the Appellants to the offence in question aside from the confessions, the Court ought to quash the conviction and sentence against the Appellants.

When the matter came up for hearing on 20th November, 2018 the Counsel for the Respondent, Mrs. Mulenga, made *viva voce* submissions. She conceded that the Appellant's convictions were entirely dependent on the warn and caution statements admitted into evidence. Further, that the Respondent does not support the convictions by the trial Court. It was submitted that it is trite law that during a trial within a trial, the prosecution bears the burden of negating any form of inducement to confess beyond all reasonable doubt. To support this position of the law we were referred to the cases of ***Muwowo Vs. The People*** [1] (supra) and ***Chongwe***

Vs. The People [6]. Mrs. Mulenga conceded further that the court below therefore erred in admitting the confession statements into evidence, when it was not proved beyond reasonable doubt that they were obtained freely and voluntarily.

Counsel made reference to the evidence of the two sets of beatings suffered by the Appellants at the hands of the police. Though there was some evidence brought to negative one set of beatings, the line of cross examination indicated that the Appellants did not only rely on the beatings allegedly suffered at their hands of the police at Emmasdale Police Station but also those that were suffered at the hands of Mr. Andaleki of Muzaleka Police station where the Appellants were detained before being taken to Emmasdale Police Station. No evidence was brought to negative the first set of beatings at Muzaleka Police. Therefore, the prosecution failed to prove that the confessions were obtained freely and voluntarily. Counsel for the Respondent submits that it is unsafe to rely on the confession statements that were produced in the trial Court.

We have considered the grounds of appeal, the written heads of arguments and the *viva voce* submissions by the Respondent. We have also considered the ruling subject of the trial within a trial in the court below.

It is settled law that the burden of proof in a trial within a trial to prove the voluntariness of alleged confession statements lies with the prosecution. The prosecution must prove beyond all reasonable doubt that the confession statements were freely and voluntarily given. In the case of ***Steven Mushoke Vs. The People*** [5] the Supreme Court, in relation to the burden of proof in a trial within a trial, stated that:

> ***"The burden of proof rests entirely on the prosecution and the standard of proof required is beyond reasonable doubt. In other words, the prosecution must prove the voluntariness of the alleged confession beyond reasonable doubt. At the close of the trial-within-trial, submissions may be made by both sides and the Court is obliged to deliver its ruling."***

In the case of ***Anayawa and Sinjambi Vs. The People*** [6] the Supreme Court stated that;

> ***"quite obviously the burden of proving the voluntariness of the confession beyond reasonable doubt lay on the prosecution and this is the position of the law ...."***

In dismissing a confession statement on appeal, Ngulube CJ, as he then was, noted that;

"We could not allow the statement to stand when the ruling given following a trial within the trial was so brief that the appellant was effectively deprived of the opportunity to challenge its corrections on appeal. In addition, the brief reasons given indicated that the burden of showing voluntariness was misplaced when the learned trial judge dealt only with the inconsistencies in the appellant's account and found he was not to be believed because he had exaggerated the beatings and had not adduced medical evidence. It was for the prosecution to satisfy the Court that the statement was free and voluntary rather than that the appellant failed to establish the involuntariness."

We have perused the Ruling of the trial Court following the trial within a trial. For the sake of clarity we will reproduce excerpts from the Ruling of the trial Judge. At page R18 of the Ruling the trial Judge stated as follows;

"on the foregoing factors and upon analysis, evaluation and assessment of the credibility of the witnesses of the prosecution and the defence, I have reached upon a very firm view that the evidence of the prosecution was credible and unshaken. On the other hand, that of the defence was incoherent in many aspects as to the sequence of events, it was contradictory in certain material aspects..."[Court's emphasis]

The trial Judge further stated that:

"I therefore prefer the evidence of the prosecution as more probable than not and to be the more likely version of the circumstances surrounding the making of the warn and caution statements..." (Court's emphasis)

The trial Court then proceeded to conclude that the warn and caution statements given by the accused were free and voluntary. It

was on the basis of these confession statements that the trial Judge convicted the Appellants.

We are of the view that the issues to be determined are;

a) ***Whether the prosecution had proved beyond reasonable doubt that the confession statements were free and voluntary by the Appellants.***
b) ***Whether the burden of proof lay the accused persons.***

We must point out the glaring contradiction in the trial Court's Ruling following the trial within a trial. In one breath the trial Court stated that;

> ***"I have reached upon a very firm view that the evidence of the prosecution was credible and unshaken".***

In addition the trial Court in respect of the burden of proof stated that;

> ***"I therefore prefer the evidence of the prosecution as more probable than not and to be the more likely version..."***.

As earlier stated the burden of proof in a trial within a trial remains with the prosecution. The prosecution must prove beyond reasonable doubt that the confessions were freely and voluntarily given.

We have carefully reviewed the testimony of the witnesses in the trial within a trial. The prosecution's evidence was tendered by

two police officers who took part in interviewing the Appellants. One officer was present to witness the interview while the other recorded the statements from the Appellants. The summary of the prosecution's case in the trial within a trial was that the statements were given freely and voluntarily by the Appellants. The environment was conducive and no threats were issued to induce the statements. The prosecution witnesses denied torturing or starving the Appellants before receiving their testimonies.

The Appellants gave evidence in their own behalf. The sum total of their testimony was that they were severely beaten with metal rods before they 'confessed'. The 1st Appellant testified that he was beaten to a point where his leg was almost dislocated. The 2nd Appellant stated that he fainted while he was being tortured. He added that the beatings prompted his confession.

We have noted above that the burden of proof in a trial within a trial lies with the prosecution. We have perused the record of appeal and specifically the proceedings in the trial within a trial. Aside from stating that the confessions were freely and voluntarily made by the Appellants, the prosecution did not disprove, to the required standard, the allegations made by the Appellants.

We are of the firm view that the prosecution did not discharge the burden of proof beyond reasonable doubt placed upon it in the trial within a trial, that is, to prove that the confessions were freely and voluntarily given by the Appellants.

For the foregoing reasons, we hereby set aside the convictions and sentence by the lower Court and accordingly acquit the Appellants forthwith.

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F. M Chishimba
COURT OF APPEAL JUDGE

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F.M. Lengalenga
COURT OF APPEAL JUDGE

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M. J. Siavwapa
COURT OF APPEAL JUDGE