SAMSON MBAVU AND OTHERS v THE PEOPLE (1963 - 1964) Z and NRLR 164 (CA)

1963 - 1964 Z and NRLR p164

COURT OF APPEAL

[Before the Honourable Mr. Justice BLAGDEN, the Honourable Mr. Justice CHARLES and the Honourable Mr. Justice PICKETT on the 5th December, 1964.]

Flynote

Questions of fact - approach to be adopted by an appellate court to an appeal on questions of fact.

Headnote

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Appeals allowed.

Cases cited:

(1) *Chiteta v R* 1960 R & N 199.

(2) *Coghlan v Cumberland* [1898] 1 Ch. 704.

(3) *Nkambula v R* 1961 R & N 589.

(4) *Benmax v Austin Motor Co. Ltd.* [1955] 1 All ER 326.

(5) *Felix v General Dental Council* [1960] 2 All ER 391.

(6) *Re St Edburga's, Abberton* [1961] 2 All ER 429.

(7) *Powell and Wife v Streatham Manor Nursing Home* [1935] AC 243.

(8) *The Julia* (1860) 14 Moo. PCC 210.

(9) *Yuill v Yuill* [1945] P. 15.

(10) *Watt v Thomas* [1947] AC 484.

(11) *Harrison v Harrison* (unreported) referred to in (1964) 235 LT 496.

(12) *R v Gokaldas Karji Karia and Another* (1949) 16 EACA 116.

(13) *Dinkerrai Ramkrishnan Pandya v R* [1957] EA 336.

J J O'Grady, Crown Counsel for the Crown

B T Gardner, F G Burke and H K Smallwood for the appellants

[*Editorial note*] This case is reported solely on the issue of the approach to be adopted by an appellate court to an appeal on questions of fact from a judge sitting without a jury. Thus only an

extract from the judgment of Blagden, JA, is reported, although there were other issues on the appeal, and both of the other members of the court delivered judgments.]

Judgment

Blagden JA: (*The learned judge of appeal recited the facts of the case, and dealt with the unsatisfactory way the issue of corroboration had been dealt with. He then went on to deal with the question of an appeal on questions of fact.*)

The approach which should be adopted by an appellate court when it is dealing with an appeal on questions of fact from the decision of a judge sitting without a jury, has been the subject of a number of decisions. It is, of course, governed primarily by the legislation which creates the appellate court and gives it its powers. Here, under the Federal Supreme

Court Act, 1955, section 13 (1), it is mandatory that the court of appeal " shall allow the appeal if it thinks that the judgment of the court before which the appellant was convicted should be set aside on the ground that it is unreasonable or is not justified, having regard to the evidence, or on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal . . ." That provision is subject to two *provisos* which, however, are not relevant to the circumstances here. The wording which I have just quoted differs from that in the equivalent section of the Criminal Appeal Act, 1907, in England - section 4 (1). In the latter the words " cannot be supported " appear in place of the words " is not justified ". This difference has been the subject of a judicial decision by the Federal Supreme Court. In *Chiteta v R* 1960 R & N. 199, at page 202, Tredgold, CJ, said: " The change of the wording is significant and it must be assumed that it was made of deliberation. The whole emphasis is shifted. ' Cannot be supported ' suggests that the original finding should be upheld unless no other conclusion is possible than that it is wrong. ' Is not justified ' seems to imply a more detached approach ". Later in his judgment (at page 204) Tredgold, CJ, said this:

"The approach to an appeal in a case other than an appeal from the verdict of a jury has, in my repectful opinion, never been better or more succinctly stated than in the well - known passage from the judgment of the Master of the Rolls in *Coghlan v Cumberland* [1898] 1 Ch. 704, which reads as follows:

' The case was not tried with a jury and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to re-hear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from

overruling it if on full consideration the court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross - examined before the judge, the court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the court of appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.' "

1963 - 1964 Z and NRLR p166

BLAGDEN JA

Clayden, F.J., giving judgment in the same case on page 209 also referred to the change in wording from that appearing in the Criminal Appeal Act, 1907, and stated that this was one of two reasons why in his view the Federal Supreme Court had a wider power in dealing with appeals in criminal cases, than had the English Court of Criminal Appeal.

In a later case - *Nkumbula v R* F.S.C. Judgment No. 23 of 1961 (part reported in 1961 R & N. 589) - Clayden, F.C.J., dealing with an appellate court's approach where the trial court has had to resolve a conflict of fact said:

"It is rare to find in a criminal case that there is not a conflict of evidence. If that conflict cannot be resolved in favour of the Crown there is an acquittal. But if that condict has been decided adversely to an accused, and the accused cannot show that the decision is wrong, the court of appeal is not entitled to find that there is still a conflict."

In my view the passage from the judgment of Lindley, M.R, in the civil case of *Coghlan v Cumberland* which Tredgold, CJ, cited in *Chiteta's case*, correctly defines the approach which we should adopt under the Federal Supreme Court Act in criminal appeals from decisions of a judge of the High Court sitting alone at first instance.

There have been several other decisions and pronouncements on the same subject. Thus in *Benmax v Austin Motor Co. Ltd.* [1955] 1 All ER 326, which was a civil case, the headnote reads:

"An appellate court on an appeal from a case tried before a judge alone should not lightly differ from a finding of the trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the facts as the trial judge and should form its own independent opinion though it will give weight to the opinion of the trial judge."

The reasoning in *Benmax*'s case has been applied in more recent cases - see for instance *Felix v General Dental Council* [1960] 2 All ER 391 and *Re St. Edburga's Abberton* [1961] 2 All ER 429.

In another civil case, *Powell and Wife v Streatham Manor Nursing Home* [1935] A.C. 243, Lord Wright, adopting a dictum of Lord Kingsdown's in *The Julia* (1860) 14 Moo. P.C.C. 210, said at page 265:

". . . it is clear that in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the court of appeal must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong ."

This is a strong pronouncement and I think it should be read in the light of a more recent and more detailed analysis of the problem. This occurs in the judgment of Lord Greene, M.R, in the case of *Yuill v Yuill* [1945] P. 15, a divorce action, at pages 19 and 20, where he said:

1963 - 1964 Z and NRLR p167

BLAGDEN JA

"We were reminded of certain well - known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever liar, or led to form an unfavourable opinion of an honest witness, and may express his view that his demeanour was excellent or bad as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge.

I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value."

Two years after this decision, the House of Lords had before it the case of *Watt v Thomas* [1947] A.C. 484. This was a divorce action and came before the House on appeal from the Second Division of the Court of Session in Scotland. The main question in the appeal was whether there was sufficient justification for the Second Division of the Court of Session reversing the conclusions of fact reached by the Lord Ordinary who had refused the respondent his divorce in

the trial at first instance. Lord Thankerton commenced his judgment at page 487 with these words:

"My Lords, I am of opinion that Lord Mackay, whose opinion formed the judgment of the Second Division, has misconceived or disregarded the duty of an appellate court in regard to the decision of a judge sitting without a jury on a question of fact (when there is no misdirection) which has so repeatedly been laid down in your Lordships' House in cases from England and Scotland alike."

Lord Thankerton then went on to state the principles in these terms:

"I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:

I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied

1963 - 1964 Z and NRLR p168

BLAGDEN JA

that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;

II. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence;

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

As an extreme example of a case where an appellate court refused to upset the findings of fact of the court below, although those findings were based on a most unlikely story told by a party to the action without verification from any other source, I would refer to the unreported decision of *Harrison v Harrison* which was an appeal heard by the Divorce Divisional Court from a decision of a magistrate's court on 22nd October, 1963, and is referred to in an article in 1964 235 L.T. at pages 496, 497. Cairns, J, in his judgment in that case is reported as saying: "The question the justices had to consider was a pure question of fact. They had to consider it on the basis that the evidence was of the one witness that was called before them and they had to consider it on the basis that the story was inherently improbable . . ." Cairns, J, mentioned specific improbabilities and then continued: " I see no reason to doubt that the justices, who obviously devoted great care and attention to this matter, failed to take these points into consideration. But in the end the question was simply this: do we, the justices, who have seen and heard the witness, believe her or not ?"

In East Africa there have been a number of decisions relating to appeals on questions of fact where there has been no jury and in most of these reliance has been placed on one or other of the *English* cases to which I have just referred. See, for example, *R v Gokaldas Karji Karia and Another* (1949) 16 EACA. 116, and *Dinkerrai Ramkrishnan Pandya v R* [1957] E.A. 336.

From all these decisions, it is fairly clear what considerations the appellate court has to bear in mind, but it is less easy to determine the relative weight which should be given to each of them. What emerges indisputably is that the appellate court must exercise caution before it reverses the trial judge sitting without a jury on fact; but it will not hesitate in the exercise of its own independent judgment to do so, if, on the materials available to it, and to the extent that it is in as good a position as the trial court to evaluate the evidence, it comes to the conclusion that the conviction was wrong.

1963 - 1964 Z and NRLR p169

BLAGDEN JA

Applying these principles to this appeal, I take immediate note that the resolution of the facts here depended in very large measure on the learned trial judge's assessment of the witnesses before him, their general demeanour, the manner In which they answered the questions put to them in chief, and their reaction to cross - examination. There is no doubt that the learned trial judge had ample opportunity to make such assessment. The witnesses were before him for long periods of time and the cross - examination to which they were subjected was fourfold and prolonged.

The record is eloquent of the fact that the judge was most meticulous in ensuring that each witness properly understood the questions which were put to him. Moreover, he repeatedly reminded himself in his judgment that the eye - witnesses were persons who might have purposes of their own to serve. In the final result he accepted, substantially, the evidence of the witnesses Evans Mumbi, Mattias Kunda and Fidelis Mwamba, and he accepted in part the evidence of Wilfred Besa.

Summarising the effect of the *dicta* which I have cited from the various cases bearing on this issue, in my opinion, the learned trial judge's decision here to accept the evidence of these eye - witnesses cannot be upset unless at least it is positively shown that -

(1) by reason of some non-direction or mis-direction or otherwise, the judge erred in accepting their evidence; or,

(2) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or,

(3) in so far as the judge has relied on manner and demeanour, that there are other circumstances which indicate that their evidence is not credible, as, for instance, if they have on some collateral matter deliberately given an untrue answer.

I have already held that the judge erred in accepting the evidence of Fidelis Mwamba and Wilfred Besa. Counsel for the appellants press the second and third of these lines of argument; and they have drawn our attention to a number of passages in the record of evidence and in the judgment, in support of their contentions. Many of the matters ventilated are of little substance and I do not propose to refer to them. As has been pointed out time and time again, where witnesses are recounting events after a certain distance of time, particularly events of tumult and turmoil where passions have been roused and confusion has reigned, there are bound to be discrepancies, wrong impressions and mistakes. I would refer only to those criticisms of the evidence of the two witnesses that now matter - Evans Mumbi and Mattias Kunda - which I would regard as of some substance.

Each of them denied that they had ever discussed the events which they had witnessed with each other at any time. This, in all the circumstances, seems quite unbelievable: so in regard to this not unimportant matter, each of them would appear to have lied upon his oath.

1963 - 1964 Z and NRLR p170

BLAGDEN JA

Evans Mumbi's evidence came in for a lot of criticism. Although he was one of those pointed out to the police by the third appellant and collected by the police from school together with his other companions who had seen the attack on the deceased, he maintained that he had no idea why he had been brought to the police station. This is hardly credible. He also said that the police did not collect him until about one month after the event whereas, in fact, it was a matter of only six days. Then, the reason which he gave for not going and reporting what he had seen to the police - " It was in my mind . . . but unfortunately the same day as I wanted to go and report that was the day we were collected from the school by the police " - scarcely carried conviction. In his judgment, the learned trial judge noted of Evans Mumbi that he had changed his evidence when describing how the first appellant held the deceased at a certain stage of the events and, to use the judge's own words, " changed it drastically later in the course of cross - examination ".

Mattias Kunda admitted that when he was first questioned by the police, he had denied being present at the attack on the deceased. In fact, he said: " We all denied it ". He was thus guilty of an untruth at that stage. But he admitted to this untruth when he was giving sworn evidence. Further, Mattias Kunda, who had known the first appellant before these events, and who said in his evidence that he had seen him kick the deceased outside the lavatory, failed to pick out the first appellant on an identification parade. His explanation that he did not have enough time whilst on the parade to do so, does not agree with the evidence of Inspector Parrish who was present at the parade throughout and stated that every witness called to it had full opportunity of examining every person on the parade.

These are the more substantial criticisms which were levied against these two witnesses in this case, and there is one disquieting feature of their evidence which is common to both, namely the unsatisfactory nature of part of their evidence as it affects the first appellant. Evans Mumbi changed his evidence " drastically " in regard to certain alleged actions of the first appellant; Mattias Kunda failed to pick him out on an identification parade. I do not think the learned trial

judge at the end of what was undoubtedly a long and arduous trial fully appreciated the significance of this. The two witnesses must at least have been in some doubt or confusion about what the first appellant did; and it must not be forgotten that the other two witnesses, Fidelis Mwamba and Wilfred Besa did not see him at the scene at all.

I do not think the first appellant's conviction can be supported on such evidence. And if the evidence of Evans Mumbi and Mattias Kunda is unreliable as regards the first appellant, I do not see how it could be safe to rely on it as regards any other appellant. These two boys were aged fourteen and ten respectively. They revere witnesses of a horrible crime in the early stages of which it seems quite possible that they were themselves involved. I think the learned trial judge should have felt a doubt about their evidence, and I would allow all these appeals.