**MUWOWO v THE PEOPLE (1965) ZR 91 (CA)**

COURT OF APPEAL

BLAGDEN CJ, DENNISON AND CHARLES JJ

23rd July 1965

**Flynote and Headnote**

**[1] Criminal procedure - Appeal in general - finding of trial court that evidence immaterial to its judgment - power of Court of Appeal to review:**

Despite the trial judge's assertion that he would find the accused guilty without resort to certain confessions by the accused, the Court of Appeal can, if it finds the statements inadmissible, reverse the conviction on the basis that the trial judge might have reached a different result had he not considered the confessions.

**[2] Criminal procedure - Trial within a trial - when held - admissibility of confessions:**

If the accused objects to the admissibility of a statement or if it appears from the evidence that the statement might have been involuntary, a trial within a trial must be held.

**[3] Evidence - Burden of proof - confessions - prima facie case by prosecution -** caution of accused:

The prosecution initially discharges its burden of proof that a confession is 'voluntary' by showing that *prima facie* the statement was made voluntarily and that it was made after a caution.

**[4] Evidence - Burden of proof - confessions - prosecution's burden at trial within a trial defined:**

At the trial within a trial to determine the voluntariness of a confession, the prosecution must negative, beyond reasonable doubt, any form of inducement which might have caused the accused to make the statement.

**[5] Evidence - Burden of proof - confessions - voluntariness:**

The prosecution must prove beyond reasonable doubt that a confession was made voluntarily.

**[6] Evidence - Confessions - inadmissible if involuntary:**

Involuntary confessions cannot be admitted into evidence.

**[7] Evidence - Confessions - procedure - trial within a trial - when held:**

See [6] above.

**[8] Evidence - Confessions - series of confessions - necessity to introduce in chronological order at trial within a trial:**

At a trial within a trial, where the accused has made a series of statements, the prosecution must introduce the statements in chronological order.

**[9] Evidence - Confessions - series of confessions - necessity for prior inducement to be removed from mind of accused:**

When an inducement causes the accused to make a confession and the accused later makes a second statement, the second statement is admissible only if the inducement ceased to operate before the second statement was made.

**[10] Evidence - Confessions - voluntariness defined:**

A 'voluntary' confession is one made in the exercise of a free choice to speak or to be silent; it cannot be the product of violence, intimidation, persistent importunity or sustained or undue insistence or pressure or any other method by the authorities that overbears the will of the accused to remain silent.

**[11] Evidence - Corroboration - of confession - conviction without corroboration is unusual, although possible:**

A man may be convicted on his confession alone, although it is usual to look for corroborative evidence.

Cases cited:

(1) *Mutambo v The People* (ZCA /24/1965).

(2) *Sykes v R* (1913) 8 Cr. App. R 233.

(3) *R v Lee* (1950) 82 CLR 133.

(4) *Chalmers v H.M. Advocate* (1954 S.L.T. (Notes) 26).

(5) *R v Thompson* [1893] 2 QB 12.

(6) *Mulonda v R* (N.RC.A./82/1964).

(7) *Bater v Bater* [1950] 2 All ER 458; [1951] P. 35; 94 S.J. 533.

(8) *Mbopeleghe v R* 1960 R & N 508.

(9) *Sawala v R* (FSC Judgment No. 37/1961) (mimeograph).

*Gardner*, for the appellant
*Reilly, State Advocate,* for the respondent

**Judgment**

**Charles J:** The appellant was tried before the High Court at Ndola on a charge of murder contrary to section 177 of the Penal Code (Cap. 6), in that on the 24th July, 1964, at or near Chapaula Village, he murdered Samuel Chansa. He was convicted and sentenced to death, and he has appealed against conviction. The appeal has been allowed by setting aside the conviction and sentence and substituting for it a judgment of acquittal. We now give our conclusions on the appeal and the reasons therefor.

The evidence upon which the prosecution relied was to the following effect. On the 24th July, 1964, an armed police patrol under Inspector Smith went to Chapaula Village to investigate a chasing away of a kapasu and two Boma Messengers from the village on the previous day. The village was one which had been built, and was occupied, by members of a religious sect known as the Lumpa Church and was in process of being surrounded by a stockade. In the police party was Constable Samuel Chansa. As the police approached the village they saw a man in the bush. He ran away and was chased, but he escaped. At the spot where he was first seen were found weapons including a bicycle chain on a stick. Inspector Smith and a constable - Nkata, by name - entered the stockade in pursuit of a woman. In the village the inspector was stabbed in the back with a spear, a cry of 'Jericho' was raised, and a number of villagers armed with spears and axes immediately assembled whereupon the inspector and constable ran out of the village and the armed villagers pursued them. The armed villagers, after leaving the village, divided into two parties, one of which continued in pursuit of the inspector and came up with him, after he had fallen, and savagely attacked him, and the other party proceeded to attack other members of the police party. The police party opened fire upon the villagers when attacked, and eventually withdrew, leaving Inspector Smith's dead body on the ground. Later that day a police party found the body of Constable Chansa lying in the bush at a distance of six or seven hundred yards from the village. The body had extensive wounds upon it. In the opinion of a medical witness the wounds were caused by various kinds of spears, and death was due to an injury in the spinal cord of the neck. Six witnesses identified the accused as amongst the villagers who chased the inspector and the constable from the village, four of them deposing variously to him having been armed with a spear and an axe and with a number of spears. The appellant made four statements to the police, one of which was admitted without objection, another of which was admitted after objection had been withdrawn, and the other two of which were admitted after objection and trials within the trial. The first statement, a long incriminating statement, was made on the 21st September, 1964. The second statement was made on the same day after the appellant had been arrested and cautioned. It was:

' I admit that I was present at the crowd of those who killed Constable Chansa. I struck him with an axe.'

The third statement, which was not objected to, was made on the 23rd September, 1964, when the appellant was charged and cautioned. It was really a reservation of making a statement until he appeared in court. The fourth statement, which was the subject of the withdrawn objection, was made on the 18th January, 1965, when the appellant was again arrested, for a reason which does not appear in the record. It was:

' I deny the charge. I did not kill a person at all but I was present at the fight. We were chasing policemen.'

The accused in evidence stated that on the 24th July, 1964, he was in the bush cutting poles for a house; that he heard shooting and then saw villagers running; that he returned to the village and saw that a woman had been injured; that he then saw the police throwing tear gas; that the police started to run and he thought the police wanted to shoot the villagers; and that he had an axe, but no spears, with him at the time but he did not use the axe upon anybody, and he did not go near any policeman lying on the ground. In cross - examination the appellant admitted that when he first saw the police they were outside the stockade, and running away, and he followed leaving his axe on the ground where he had put it while attending to the injured woman. He added that he did not run a long way, as he turned back because of the guns.

The learned trial judge found that Constable Chansa was killed in the course of an attack upon the police by members of Chapaula Village; that the villagers had acted in prosecution of a common purpose to attack the police; that the villagers had not acted under a reasonable belief that the police had come to attack them or to destroy their property; that the police had come to the village for a lawful purpose; that, accordingly, the attack upon the police was in prosecution of an unlawful purpose; that the killing of the constable was without provocation and in circumstances amounting to murder; that murder was a probable consequence of the unlawful attack on the police and of the prosecution of the unlawful common purpose which culminated in that attack; and that consequently all participants in that attack were guilty of murder by reason of section 22 of the Penal Code. The learned trial judge also found that the appellant was a participant in the unlawful attack and, therefore, was guilty of the murder of the constable.

In my judgment, the findings that the constable was murdered in the course of the prosecution of an unlawful common purpose by a number of Chapaula villagers, and that those villagers acted without any reasonable belief that they or their property was or was about to be the subject of an unlawful attack by the police, cannot be impugned successfully on this appeal. Recently this court had occasion to consider the law pertaining to common purpose and reasonable belief in relation to the death of Inspector Smith in the course of the same attack. (*See Mutambo and five others v The People* (Judgment No. 24 of 1965).) The record in this case does not show that the learned trial judge applied an erroneous view of the law on these matters. Further, the evidence in this case as to the purpose of the police in approaching the village is far clearer than it was in the earlier case and appears to have admitted of only those findings which the judge made upon it. Consequently, the validity of the conviction in this case depends entirely upon the validity of the finding that the accused participated in the prosecution of the common purpose of attacking the police while they were engaged in lawfully performing a duty.

In order to determine whether the last - mentioned finding must be accepted, it is necessary to look at the way in which it was made. The learned trial judge correctly stated that there was no eyewitness of the appellant's 'direct bodily participation in the infliction of injury to the constable personally'. He then stated that the learned State Advocate rested his case very much on the appellant's own statements and he quoted from *Sykes v Rex* (1913) 8 Cr. App. R 233, at p. 236; a passage of which the substance is that a voluntary confession, while it may be acted upon without it being corroborated usually is corroborated, and it is usual to look for corroboration and to judge the truth of the confession in the light of any other available evidence. The learned trial judge then referred in detail to the first statement made by the appellant and also quoted in full the second and third statements. He next examined the other evidence and found, rightly I think, that if it were true, it 'strongly supports the accused's statements to the police in its main essentials'. He next turned to the appellant's evidence and found two inconsistencies between it and his long first statement and also found a number of other unsatisfactory features. He then said 'Having heard the accused's evidence and observed his demeanour most closely, I am satisfied beyond doubt that his attempts to put any form of innocent complexion upon things are a pack of lies'. Finally, the learned trial judge said, after concluding that the attack on the police was in prosecution of an unlawful common purpose: 'On the evidence I have no doubt or hesitation in finding the accused guilty as charged and convicting him accordingly. I may add that I would be so satisfied without his statements, and in turn they in themselves are absolutely damning.'

The effect of the appellant's evidence was, in substance, that he had joined in the common purpose of pursuing the police without knowing the reason for the pursuit and had withdrawn from it before the murder of the constable. His fourth statement is consistent with that evidence. If that evidence were true, obviously the appellant had not been guilty of participating in the murder. The result is that the validity of the appellant's conviction depends upon whether the learned trial judge's finding that the appellant's evidence was false is valid. In my judgment the answer to the latter question depends upon a further question: Were the appellant's first and second statements to the police properly admitted into evidence? [1] Despite the trial Judge s reference to the demeanour of the appellant when giving his evidence and to being satisfied of the latter's guilt without resort to the statements, it seems to me that he would not have approached the question of the appellant's guilt by reference to the reliability of the statements if he did not regard them as most material to his determination and that he must have been influenced by them to a considerable extent, particularly in assessing the credibility of the appellant's evidence. As that extent is not known it is impossible to say that the learned trial judge would inevitably have arrived at the same conclusion without the statements notwithstanding that he has indicated in all sincerity that he would have done so.

I turn, therefore, to consider the trials within the trial relating to the appellant's first and second statement. It will be convenient first, however, to re-state the relevant law as I understand it.

[2] An incriminating statement made by an accused person to a person in authority is not admissible in evidence unless it is proved beyond reasonable doubt to have been made by him voluntarily [3] In that context the words 'made voluntarily' do not mean 'volunteered' but 'made in the exercise of a free choice to speak or to be silent'. *R v Lee* (1950) 82 CLR 133, at page 149, HC of Australia. A statement is not made in the exercise of such a choice if it is made as a result of the accused's will to remain silent having been overborne by a person in authority inducing him to break silence or to continue speaking or to change his story by the use of violence, intimidation, persistent importunity or sustained or undue insistence or pressure or any other means whereby hopes of material benefit or fears of material evil, immediate or ultimate, are roused. (*R v Lee* at 144.) Hence, though questioning of a suspect or accused by the police is not necessarily an inducement, it becomes so when conducted in a manner or to an extent which overbears his will to remain silent or not to answer as desired. No doubt the police have a duty to investigate thoroughly any crime or suspected crime which comes to their notice with the object of discovering the perpetrator, and they are at liberty, in the discharge of that duty, to question any person, whether suspected or not, who may be able to assist them, and to question him at length and by resort to such lawful means of obtaining answers as they think fit. But, subject to certain statutory exceptions which are not material here, such as the giving of name and address to a police officer on demand, a person is not under a duty to answer police questions and is at liberty not to answer them or to make such answers to them as he thinks fit. [4] As already indicated, if the police question a person to such an extent or in such a manner as to infringe that liberty of a person under interrogation by overbearing his will to remain silent or to adhere to the answers which he has already made, his subsequent answers, whether in the form of answers or of a statement, are involuntary and cannot be admitted in evidence though, of course, they may be used as a source of information as to the existence of evidence. (*See Chalmers v H.M. Advocate* (1954 S.L.T. (Notes) 26) noted in Volume XVII of the *Journal of Criminal Law* (July, 1954) pages 268 - 71.)

It follows that, when an incriminating statement by the accused to a person in authority is tendered in evidence, the prosecution has the burden of proving beyond reasonable doubt that it was not the result of the accused's mind having been influenced by any prior inducement of the kinds mentioned. That necessarily means that if there were a prior inducement, or if the reasonable possibility of there having been a prior inducement has not been negatived, the prosecution has to prove that the inducement or possible inducement either did not, or had ceased to, operate on the accused's mind when he made the statement in question. (*See R v Thompson* [1893] 2 Q.B 12 at page 17 *per* Cave, J

See also *Mulonda v R* (N.RC.A. 82/1964) where the law relating to evidence of incriminating statements and acts is considered *in extenso*)

While the prosecution has the burden of proving that any incriminating statement by an accused to a person in authority which it tenders was made voluntarily, that burden does not involve negativing the making of every possible form of inducement. That would be an impossible task. [5] As the burden is to prove a negative, and a negative of wide scope, the burden is initially discharged by adducing evidence sufficient to show that *prima facie* the statement was made voluntarily, such as that it was made after a caution. It is not discharged by the police officer concerned with the taking of the statement solemnly swearing that it was made voluntarily, as that is merely deposing to an opinion on the question which the court has to determine. [6] [7] If the accused objects to the admission of the statement or it appears from the evidence already adduced or from the statement itself that the statement might not have been made voluntarily, a trial within a trial is necessary. [8] The prosecution then has to adduce such evidence of the circumstances in which the statement was made as not only negatives the particular form of inducement alleged by the accused or suspected by the court but any other form which the circumstances suggest, as a reasonable possibility, may have been used. Thus, if the evidence adduced as to the circumstances of the making of a statement which the accused alleged was extracted from him by violence negatives the use of violence but shows that the accused had been subjected to prolonged police questioning, the burden of proof is not discharged unless the evidence also negatives the possibility that the questioning was in such manner or to such an extent as to overbear the accused's will to remain silent. It is to be observed that there is on presumption either of law or fact that police officers have not resorted to prolonged and overbearing questioning as an inducement. Of all forms of inducement that form is probably the most subtle, since whether questioning is over - bearing or not is so often a question of degree and the line can be a very fine one - and one easily over - stepped from excessive zeal - between questioning for information in aid of investigation and questioning for the purpose of inducing an accused to incriminate himself.

Here, the first statement was made by the appellant in the morning of the 21st September, 1964, and the second statement was made in the afternoon of the same day when the appellant was arrested obviously as a result of the first statement. For some reason as to which I can only speculate, the second statement was tendered and made the subject of a trial within the trial before the first statement. Further, the trial within the trial in respect of the second statement was allowed to proceed without any real inquiry as to how the first statement came to be made though such an inquiry was of necessity vital to determining the admissibility of the second statement. It may be noted that the other two statements were also tendered before the second statement.

The evidence which was adduced for the prosecution on the trial within the trial in respect of the second statement was to the following effect: The appellant had been questioned by the police on the 19th September while he was a patient in Ndola Hospital, suffering from an injured foot; on the morning of the 21st September, 1964, he was removed, with the consent of his doctor, to Western Division Police Headquarters, where he was questioned for an hour and forty minutes after which he made a statement under caution; at 12.30 p.m. he was taken back to the hospital for medical examination; sometime after 2 p.m. he was arrested and cautioned; and he then made the second statement, no threat, violence or promise having been offered to him. The accused made an unsworn statement on the trial within the trial. It was to the effect that he had made the second statement because he had been beaten and he was sick.

The learned trial judge was asked by counsel for the defence to reject the statement on the grounds that it had been extracted both by violence and under the influence of prolonged questioning which had preceded the earlier statement while the appellant was sick. He did not accede to that request, holding that the statement was admissible as the evidence was 'clear and cogent that no force, promise or threats were used'.

It is not for an appellate court to upset a trial judge's decision on a trial within the trial any more than it is for it to upset his decision on the trial itself unless the decision is

unsupported by the evidence, is based on an error of law, or is the result of a manifestly wrong or unreliable approach to the evidence.
Here, with all respect to the learned trial judge, his ruling appears to me to have been based on a misconception of the law in that it seems to have been based on the common fallacy that an incriminating statement is admissible if it has been induced otherwise than by violence, threats or promises, and it ignored both the possibility that the first statement had been induced by police questioning of an overbearing kind and [9] the necessity for the effect of any such prior inducement having ceased to operate at the time of the second statement for it to be admissible. Further, in my judgment the evidence adduced on the trial within the trial was insufficient to negative the reasonable possibility which it raised namely that the first statement had been induced by oppressive questioning, and it was also insufficient to show that the effect of any such possible inducement had ceased to operate upon the appellant's mind when he made the second statement. As to the insufficiency on the first point, the evidence did not extend to showing what was the nature of the questioning which preceded the first statement - questioning which occurred on two separate days - and the manner in which the questioning was conducted. Neither did it show the duration of the questioning on the first day. As to the insufficiency on the second point, the evidence did not show the extent to which the appellant had incriminated himself in the first statement, as presumably he had since he was arrested almost immediately after it, but merely showed that he had been cautioned when arrested. If an accused has been induced to make a gravely incriminating statement, he is unlikely to have been freed from the effect of that inducement by administering to him a couple of hours later a caution, even if the caution were administered with unusual solemnity. It is true that the appellant did not suggest that he had been induced otherwise than by violence inflicted upon him while he was sick. But, as I have said before in this court, when the accused is an ignorant villager the prosecution can derive little assistance in establishing the voluntariness of a statement from the fact that the accused had falsely alleged that he made it as a result of violence. An ignorant villager may realise that he has been induced in some way but lie as to the form of inducement in the belief that it is only inducement by violence which vitiates an incriminating statement, and from an inherent tendency 'to gild the lily'. Moreover, the prosecution can derive no assistance at all from such a false allegation when, as here, its evidence on the trial within the trial was insufficient to establish a case for the accused to answer. It follows, in my judgment, that the second statement should have been held to be inadmissible after the trial within the trial relating to it.
The evidence given by the two witnesses who were called for the prosecution in the trial within the trial relating to the first statement was more detailed than that given in the earlier trial within the trial. As to some of the details, the two witnesses differed and the more reliable account appears to have been given by the European inspector who was in charge of the investigation. In substance, his evidence in chief was as follows: He first interviewed the appellant on the 6th August. At that time the appellant was apparently a patient in the Ndola Hospital with an injured leg. The inspector questioned the appellant for about two minutes after which he formed the opinion that the appellant was too ill for further questioning. On the 19th September, 1964, the appellant was taken from the hospital to Western Division Police Headquarters where he was questioned for about three hours with the object of seeing if he could help in the investigations into the death of Inspector Smith and Constable Chansa. After the questioning the appellant was taken back to hospital. On the 21st September the appellant was again taken to police headquarters and questioned from about 9 a.m. to 10.30 a.m. when the appellant volunteered to make a statement. The statement was made through an interpreter, and was recorded in English. A stage was reached when the Inspector directed a caution to be administered, after which the statement was recorded in Bemba. No threat, violence or promise was directed to the appellant and his physical disabilities did not appear to affect his making of the statement. In cross - examination, the inspector said: That on the 19th September, he questioned the appellant as to his whereabouts on the 24th July, 1964, and was told that he had not been at Chapaula Village on that day but he had been shot there by the police on the following day; that the inspector continued questioning the appellant because

he was not satisfied with his story and he was hoping that the appellant might say that he was at the village on the 24th July; that the inspector probably said 'I know you were there': that the appellant made contradictory answers which led the inspector to believe that he was not telling the truth as to his whereabouts; that the inspector thought that the first thing he said to the appellant on the 21st September was to ask him whether he wished to tell the truth or to stick to his story after having had the weekend to think about it, and that he received the reply that the appellant was sticking to his story; that later the inspector 'managed to break his (the appellant's) alibi', and he convinced the appellant that he had, whereupon the appellant agreed to tell the truth; that he had had reason to believe that the appellant had been telling 'a load of lies' and he, the inspector, was trying to get to the truth; that it was only by argument that the appellant was persuaded to change his mind; that the alibi was broken when the inspector asked the police at Chinsali to find out from the appellant's father the movements of the appellant; that the inspector thought that when the appellant's alibi was broken he would invent a new one; that the inspector then asked the appellant if he wished to make a statement but it would only be a waste of time if it were not the truth; that the appellant said he wished to make a statement; and that, to the surprise of the inspector, the appellant seemed quite happy when he said that.

In an unsworn statement the appellant alleged that on the 19th September he was beaten by two detectives but he continued to deny the charge; that on the following day he was not feeling well; that on the 21st September the police started asking him such questions as 'Why should you deny this? Why should you deny striking him with an axe?'; the European officer then slapped his face twice; and that he made an admission because he was troubled by pain in his legs as a result of the metal in one leg having become bent, and because he was troubled by the deaths which had taken place in Chapaula Village.

The learned trial judge admitted the first statement into evidence because he did not believe the appellant's story of events and he had no doubt that 'the statement was taken and given without force, threats, pressure or promises and not merely to secure deliverance from an ordeal by prolonged cross - examination'.

In my judgment, the first statement was also wrongly admitted into evidence as the learned trial judge's decision in the trial within the trial relating to it is unsupported by the evidence and cannot be accepted. Not only was the evidence insufficient to establish beyond reasonable doubt that the appellant was not induced by prolonged questioning of an overbearing kind to make a statement but it points strongly to the conclusion that he was so induced.

On the first day's interrogation the appellant made a statement as to his whereabouts which the police did not believe. He adhered to the statement right up to the end of the interrogation. Obviously, he was under pressure by questioning to depart from that statement but his will to adhere to it remained firm. The second interrogation started with a clear manifestation that the police regarded his story as untrue and he was asked if he intended to adhere to it or to tell the truth. He stated that he intended to adhere to his story, thereby manifesting that his will was as it was on the previous interrogation. The appellant was then further questioned, and 'argumentatively' persuaded; and told that his story would be checked with his father, whereupon the police succeeded in 'managing to break the alibi', and the appellant agreed to make a statement. Obviously the breaking of the alibi had been preceded by the police breaking or overbearing the appellant's long sustained will to adhere to the alibi. That being so, it passes my comprehension how the first statement could be held to have been made voluntarily, particularly as not even the pretence of a caution preceded its commencement. In actual fact, as shown by the statement itself, it was not until the appellant had actually incriminated himself that a caution was administered; a stage when it was very unlikely to remove the effect of the inspector's impression that the appellant seemed 'quite happy' when he said that he would make a statement; it may be that it was a look of relief rather than happiness at the ending of an ordeal by mental onslaught upon his will.

Having reached the conclusions that both the first and second statements were wrongly admitted in evidence and that the conviction was not supported by evidence, it followed, in my judgment, that the appeal should be allowed.

BLAGDEN CJ

**Judgment**

**Blagden CJ:** I have also come to the conclusion that this appeal should be allowed - albeit not without some hesitation.

The evidence which implicated the appellant as one of the participants in the prosecution of the unlawful purpose, which resulted in the death of Police Constable Chansa, really falls into two categories:

(1) the evidence of eyewitnesses as to what the appellant did; and

(2) the statements made by the appellant himself to the police as to what he did.

The eyewitness evidence clearly puts the appellant on the scene, but in my view, standing by itself it was not conclusive of his participation in the unlawful enterprise. The learned trial judge concluded a careful and reasoned judgment with these words:

' On the evidence, I have no doubt or hesitation in finding the accused guilty as charged and convict him accordingly. I may add that I would be so satisfied without his statements and in turn they in themselves are absolutely damning.'

Despite the very positive expression in which this finding is framed, I am doubtful whether the judge really assessed the weight and significance of the eyewitness evidence on its own without any thought at all of the statements. My doubt arises from the fact that the whole tenor of his judgment points to his regard of the appellant's own statements as the primary and main evidence against him. There was some reason for this. As the judge observed, there was no eyewitness evidence of the appellant's direct participation in the infliction of any injury to the deceased personally. [10] Having made that observation the judge went straight on to consider the appellant's statements, prefacing his findings on these with a reference to the case of *Sykes v R* (1913) 8 Cr. App. 31. 233 as authority for the proposition - which I readily accept - that a man may be convicted on his own confession alone, but that it is usual to look for some corroborative evidence of it.

The judge adopted this process. He had admitted the statements and he looked for and found corroboration of parts of those statements in the eyewitness evidence. I agree that the cumulative effect of the statements and the eyewitness evidence taken together was damning. But if the eyewitness evidence is examined in isolation, I do not see that it can be said that without reasonable doubt it establishes the appellant's participation in the unlawful enterprise which culminated in Constable Chansa's death.

It follows in my view, that if the statements had not been admitted in evidence the appellant would, or should have been, acquitted.

This is the crux of the appeal: should the appellant's statements have been admitted in evidence or not?

BLAGDEN CJ

The rule is simple: a statement made by an accused person to a person in authority is admissible in evidence provided it was made by him freely and voluntarily. [2] The burden of proving that it was so made lies on the prosecution; and the standard of proof which the prosecution has to attain is the criminal standard of proof beyond reasonable doubt. In *Bater v Bater* [1950] 2 All ER 458, Denning LJ, used words regarding the standard of proof in both civil and criminal cases, which have been expressly approved in subsequent cases. He said at page 459: 'It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.'I would say, without hesitation, that proof of the voluntariness of a confession of murder requires a very high degree of proof.

I would also like to stress this: what has to be proved to this very high standard is not something negative; it is not simply the absence of any form of coercion or inducement. [8] What has to be proved is the positive fact that the statement sought to be admitted

was made freely and voluntarily. Naturally proof of the absence of coercion or inducement will go a long way to establishing that fact. But depending on the circumstances of each case, it may not go the whole way.
There were four statements made by the appellant here, the first was a long statement and was made on the 21st September, 1964. That statement was not prefaced by any form of caution to the appellant, but in the course of it the appellant stated that his intention was to kill the police as there was a fight between them. He was then immediately cautioned, but the appellant elected to proceed with his statement and not unnaturally what followed amounted to a somewhat detailed confession.
The second statement was made on the same day, not long after the first when the appellant had been arrested and cautioned. It too amounted to a confession. The admissibility of both these statements was objected to on the grounds that they were not made voluntarily. A trial within the trial was held in respect of each and in each case the judge decided that the statement had been made voluntarily and was therefore admissible in evidence.
The third statement was made two days after the first two. Its admission in evidence was not objected to. It consisted of only one sentence: 'I will go and say it in court when I will see my friends'.
The fourth statement was made very much later on the 18th January, 1965. Apparently the appellant was re-arrested on that day and re-charged. The reason for this peculiar procedure is not clear from the record. The appellant was also cautioned and he made in reply the fourth statement. The admission of this last statement was at first objected to on the grounds that it had been induced by physical violence and threats, but after a trial within the trial had been started to determine this issue, Counsel for the appellant announced that his instructions were not to contest it. The statement consisted of the words: 'I deny the charge. I did not kill a person at all, but I was present at the fight. We were chasing policemen.' Except for the last observation, which is undoubtedly damaging, this statement is clearly exculpatory.
[11] The admission in evidence of the first two of these statements was a vital matter in the trial. In justice to the defence and to put the whole matter in its correct perspective, I would have thought it essential for the prosecution to introduce these statements in the strict chronological order in which they were made, even if this necessitated the recall of a witness who had already given evidence about other matters. Instead, however, the four statements were introduced to the court in the order three, four, two, one. I consider this procedure was prejudicial to the defence and confusing to the court. I trust it will not be adopted on any future occasion. If the correct order had been followed, I think it unlikely that the initial objection to the fourth statement would have been withdrawn.
The vital statement was, of course, the first one. [9] If there were any inducements which brought about the making of that statement they would most likely have retained their influence on the appellant when the time came shortly afterwards for him to make his second statement, and the two statements would stand or fall together.
In the judgment which has just been delivered, Charles, J, has gone carefully into the evidence which was adduced in the two trials which were held within the trial to determine the admissibility of the first two statements. I have no quarrel to find with the learned trial judge's conclusions that the appellant's allegations of being beaten to force him to make these statements were unfounded. The fact that the appellant lied about this when he made his unsworn statements during these trials within the trial doubtless had an adverse effect on the learned trial judge's assessment of his credibility, but, as Charles, J, has pointed out, the appellant is a simple villager who would be quite likely to think that the only type of inducement which would carry any real weight with the court was inducement by physical violence.
[3] But in any case the exercise of violence is not the only way in which a statement can be rendered involuntary. If an accused person's will to remain silent, or to say no more than he has already said, is overborne by any means, however considerately carried out, and he makes a statement in consequence, I fail to see how that statement can be regarded as truly voluntary.

What happened here has already been described by Charles, J. Shortly it amounted to this: the appellant was first interviewed on the 6th of August, 1964, but he was then a patient in the Ndola Hospital and it was appreciated that he was not well enough for questioning. On the 19th September, 1964, when he was still undergoing treatment at the hospital, he was questioned for about three hours. There is a surprising conflict in the evidence as to whether this interview took place at the hospital or at Western Division Headquarters, but I do not think it is necessary to try and resolve it. On the 21st of September, he was taken to police headquarters and again questioned. There is a further conflict as to how long this questioning lasted. One officer said thirty minutes, but he was not sure; another officer said that the appellant intimated that he was wishing to make a statement soon after he came into the office; Inspector Horlock said the appellant was questioned for one hour and forty minutes. This confusion of recollection however, is understandable. There must have been many witnesses to interview and much investigation to complete. Suffice it to say that at that interview the appellant made the first statement in the course of which, as I have already related, a caution was rather belatedly administered.

The important evidence touching on the voluntariness of the first statement was that relating to the two interrogations on the 19th and 21st of September. That evidence which Charles J, has analysed in some detail points to the fact that the appellant was interrogated and, I would say - although Inspector Horlock denied this - cross - examined for some time, and that in the course of those interrogations some initial alibi which he had put forward was broken down, and he changed his story.

What attention did the learned trial judge pay to these particular circumstances - remembering that he had to be satisfied beyond reasonable doubt that whatever was done did not operate on the appellant as an inducement to make any statement? At the end of the second trial within the trial which determined the admissibility of the first statement, the learned trial judge said, *inter alia*, that he would feel constrained to reject that statement if he felt that it had been obtained in the circumstances described at paragraph 800 of *Phipson on Evidence* (10th Edition). That paragraph relates to statements obtained as a result of questioning and states that questioning will not as such render a confession in answer inadmissible; but that prolonged cross - examination would exclude confessions made in order to bring the ordeal to an end. The learned trial judge rejected the appellant's story of events and found that Inspector Horlock, who had given evidence in both trials within the trial, was clearly a witness of truth. The judge stated that he had no doubt that the first statement was taken and given 'without force, threats, pressure or promise, and not merely to secure deliverance from an ordeal'. But in the circumstances I do not think this finding goes quite far enough. It excludes certain elements of coercion and inducement, but it does not grapple with the all important question of whether the tactics employed by Inspector Horlock in the interrogation which resulted in the appellant's alibi being broken down and in his changing his mind and consequently his story, had had the effect of overbearing his will to remain silent or to stick to his story. In the light of this omission I do not think it can be said that the prosecution properly proved that the statements of the appellant were made freely and voluntarily and in consequence they should have been excluded.

I would interpose here to say that I do not intend by these observations to imply any criticism of the police methods employed in this case - I can see nothing wrong with them at all. The police are entitled to interrogate those whom they wish when they are investigating the commission of a crime and they would be expected to pursue their investigations with thoroughness. But when it comes to the admission in evidence of statements from accused persons obtained in consequence of interrogation or otherwise, the trial court is bound by certain rules which must be scrupulously adhered to.

As I have already indicated, with the exclusion of the statements the conviction cannot be supported for lack of other evidence. [1] But there is another aspect of the matter which I think I should point out. If these statements had not been before the learned trial judge, he would not have been able to detect the inconsistencies which he did detect - and comment upon - between what the appellant said in his statements and what he said in evidence before the court. Without those inconsistencies before him, the learned trial

judge might not have formed such an adverse view of the appellant's credibility; he might even have thought that there was a possibility of some truth in the story he told the court. If that story were true, it is doubtful if the appellant really joined in the prosecution of the common purpose to cause grievous harm to Constable Chansa; even if he did it would seem that it was at least a possibility that he dissociated himself from it when he heard the sounds of gun fire; and that was before the common purpose had achieved its object. For all these reasons I agree that this appeal should be allowed.

**Judgment**

**Dennison J:** I discern in this matter a need to dissent from the conclusions which have just been expressed.

It seems clear, as my brother Charles has put it, that the validity of the conviction depends on the validity of the finding that the appellant participated in the prosecution of the common purpose of attacking the police representatives and killing or doing grievous harm to Constable Samuel Chansa. That, in turn, depends upon the admissibility in evidence of the two statements made by the appellant on the 21st September, within which limits my dissent is confined.

In the appeal of *Mbopeleghe* (1960 R & N 508, at page 512) Clayden, F.J., as he then was, considered the authorities and referred to the 'rule of law that a confession must be proved beyond reasonable doubt to have been made voluntarily'.

The voluntary quality of the two statements now in question has been examined and assessed in a number of ways. I take such a view of the facts apparent in the evidence as to conclude that the statements were made voluntarily, that the will of the appellant was not overborne, and that the statements were properly admitted.

As I see it, merely from the face of the record, and I was glad to hear the learned President speak of it so strongly, it would have been a far better procedure at the trial to have tested first the admissibility of the earliest, long statement made on the morning of the 21st September, before the appellant was arrested. That would have led on, in a more logical sequence, to an examination of whether or not the statement made in the afternoon, after arrest, was tainted by any irregularities apparent in the evidence relating to the long statement made in the morning.

The circumstances surrounding the taking of each of these statements should, in my view, be examined together now in assessing their admissibility and the weight to be given to them and the relevant sets of evidence should not be shut apart in separate compartments to be examined separately. Certainly in the appeal of Jordan Sawala to the Federal Supreme Court that Court made a comprehensive review of the circumstances affecting the making of each of three statements in order to examine their inter - relation (*Sawala v R* F.S.C. Judgment No. 37/1961); (mimeograph).

This appellant had been in hospital in Ndola at least from the 6th August, 1964, suffering from a wound received as described in the evidence. On that date an Inspector Horlock thought that he was too ill to be interrogated. That Inspector, the investigating officer here, did not see him again until he was interviewed on Saturday, the 19th September, 1964, while still a resident in that hospital. I find it unfortunate that the evidence at the trial has been left in such a state that there now remains conflicting evidence as to where that interview took place. All witnesses on that point were speaking at the trial of events which had taken place some four months before. Making due allowance for their difficulty in that respect, at the end of the day there lay in the record the evidence of a Detective Assistant Inspector Chifita indicating that on the 19th September the appellant had been interviewed at the hospital for some three hours while 'He was lying on the bed with an injured leg'. This conflicted with the evidence of Inspector Horlock indicating that the interview of the 19th September took place, over some three hours, at the police headquarters in Ndola, to which place the appellant had been removed from the hospital with the authority of the hospital staff. Inspector Chifita had acted as interpreter for both interviews.

Horlock was pressed on this early in his cross - examination and remained unshaken as to the place of the interview on the 19th September. The point was not taken on behalf of the appellant on this appeal and one accepts that Horlock's memory of the place was the

better. There has certainly been no suggestion on behalf of the appellant that he had been interviewed on the 19th on two separate occasions, each for a period of three hours.
There followed a further interview on Monday, the 21st September, at police headquarters, again with the permission of the hospital authorities.
According to Horlock, questioning began at about 9 a.m. and the appellant volunteered to make a statement at about 10 or 10.30 a.m. at a stage when that witness had not decided to charge him with any offence. According to Horlock he had not been in custody prior to his subsequent arrest that afternoon.
He may well have been in the unhappy state of twilight between true custody and what prosecution witnesses sometimes refer to as being 'detained for questioning', a completely unlawful and improper procedure. Witness the view put forward in evidence here by a Sub Inspector when he said:

' He was being kept by the police even when at hospital. He was not then under arrest. There is a difference between custody and arrest. In custody he has not been cautioned or warned.'

*See* in this respect the helpful articles on police interrogations in (1960) *Criminal Law Review*, especially between pages 313 and 317 and between pages 328 and 334. However, on this trial and on this appeal, no question has been raised on behalf of the appellant as to questions being asked of him after his arrest or after Horlock, the investigating officer, had cautioned him. The more familiar complaints as to breach of the Judges' Rules do not therefore arise and for my own part I see no breach of them here.
Undoubtedly, he was subjected to some three hours of interrogation on Saturday, 19th September, and to some keen, persistent and argumentative questioning on the morning of Monday, 21st September.
His main complaint was of physical violence on the part of police officers, which complaint was rightly rejected on the evidence, and most certainly so with regard to the taking of the statement made after arrest at the hospital in the afternoon when the police officers concerned were interviewing the appellant in the open air in the quadrangle of the hospital in the view of about fifty people. There is no question here on the evidence of harsh treatment or physical violence.
The Judges' Rules to be observed in this country are those presently to be found in paragraph 1118 of the 35th edition of *Archbold* and not the Rules which were re-stated by the judges in England in January, 1964, and which have not been adopted as administrative directions for observance by the police authorities in this country. In terms of rule 1 of the earlier Rules there set out:

' When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.'

Here Inspector Horlock would appear to have been doing just that. He carried it out over some three hours on Saturday the 19th and some hour or an hour and half on Monday, the 21st September. One knows of much longer interrogations in the United Kingdom, for example, with resulting confessions being held admissible. Police officers conduct these interrogations at the risk that any resulting statement may be ruled as inadmissible because of the circumstances in which it was taken being held to be unfair or detracting from its voluntary quality. The courts have not been hesitant in ruling against statements made in circumstances unfair to the prisoner.

DENNISON J
I would borrow from an article by Christopher Williams, again to be found in the *Criminal Law Review* for 1960, this time at page 352. He wrote at page 354 of conditions in England at that date, which conditions may fairly be said to prevail in this country also:

' It is a question that a crime - beset society such as ours will have to face for itself before long, and answer. For, despite what may be said to the contrary by the academics and the theorists, the law exists for the benefit of the community. It is not an elaborate game of chequers, governed by rules of absolute ethical validity, so much as a means, admittedly imperfect, by which society can protect itself from the socially inconvenient consequences

of such prohibited acts of self - indulgence as murder, rape, theft, disorder, and so on. It must, therefore, be drafted in terms of human nature and, if you like, of human weaknesses. The procedures it contemplates for determining whether a particular person has, or has not, committed a particular crime must be capable of operation by the agencies employed by society for that purpose.

Police officers may therefore find some reassurance in the reflection that, though the high winds of academic controversy and complaint may be noisily ruffling the branches above their heads, they stand in relative quiet below, with their feet on the ground, surrounded by the strong trunks of judicial understanding. For it is to the courts that the police must look for control and guidance in their difficult duties. The judges, and the Bar from which the judges come, are practical men, and know well that the police have a job to do, and that if they are prevented from doing it reasonably effectively, it is society which must pay the price.

This is not to say that the police can safely try their best to secure convictions by outmanoeuvring the guidance the judges have given them in the form of the Judges' Rules. They must continue to act fairly and justly within the general terms of their duty to keep crime within reasonable limits. This they have done in the past, and no evidence whatsoever has been adduced to suggest that mistakes by the police in this field are increasing.'

In the instant case, and each case must be decided on its own facts, the appellant must have been familiar, unhappily for him, with the hospital surroundings in which he had to live for over four months prior to his confession. He was there, in familiar surroundings, from the questioning on the Saturday to the interview on the Monday morning. I do not see from the evidence why he should not have returned refreshed on the Monday morning as a man of firm resolution to decide as he pleased.

On the Monday, the course of the interrogation would have shown him that certain parts of his earlier story were known by the police to be untrue and it is not apparent in the evidence that he was tricked, bullied or forced in any way into confessing. The interrogation was argumentative at times but I am not impressed by the appearance of some of the colourful phrases appearing in the record, which was not a verbatim transcript but was maintained in narrative form by the learned trial judge from the questions and answers heard by him.

Inspector Horlock and other police officers were subjected to the close and very competent cross - examination which one has come to expect of the learned counsel who appeared for the appellant. No doubt many of what are recorded as the answers of witnesses originated in the form of questions, which received a monosyllabic reply or little more.

This may well apply to the colourful replies of Inspector Horlock as recorded on page 35 of the appeal record, such as:

' I managed to break his alibi',

or

' I succeeded in getting him to change his mind.'

It would certainly be unusual to hear from the lips of a police officer what appears on page 31 of the record as the evidence of Inspector Chifita, who is recorded as saying:

' We were at him for three hours.'

Despite the periods of interrogation involved here and the method of argument shown in the evidence I cannot, with respect, go so far as to agree with the view of my brother Charles when he referred to Inspector Horlock's efforts *vis-a-vis* the appellant as '. . . an ordeal by mental onslaught upon his will'.

I see them, instead, as a keen, somewhat prolonged process of inquiry on a man who was not in custody, had not been charged and was interviewed in the first place in a general way, as someone who 'might have been a very good State witness', as Horlock put it.

There are also recorded as his answers in cross - examination as to the Monday morning:

' Between 9 and 10.30 I went through what happened to the weapons. We had nothing then at trial stage and it was important to trace how these weapons got from where they had been to Chapaula Village. I managed to break his alibi. I convinced him and he agreed that he had not been at this village and said he would then tell us the truth.'

If an accused person knows the truth and chooses to tell it to the police then, *prima facie* and subject always to the rules and principles governing such a matter, the police would be entitled to put it before the court.

I see no reason here for any great surprise, as was mentioned in the evidence, that the appellant should have appeared happy to speak at that stage, when he had, so to speak, decided to get it off his chest.
I will not read it all in detail but would refer to Professor Glanville Williams at page 334 of the same 1960 volume of the *Criminal Law Review:*

' The police are remarkably successful in obtaining incriminating statements by means of interrogation, and this very success naturally awakens dark suspicions. But it is certainly not necessary to suppose that unfair methods have been used. When an offender has been caught in incriminating circumstances, he often judges it better to confess and plead guilty, hoping thereby to get a lighter sentence. Moreover (and this is a fact too little understood by those who express alarm when confessions are made to the police), a guilty person who finds himself detected often wishes to confess in order to obtain relief from the feeling of guilt. The point cannot be better expressed than in words of Wigmore [in *Evidence*, 3rd ed., iii, para. 851].

"The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction. At that moment, he will tell all, and tell it truly. To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature."

Here, the confession flowed on freely and fully. The appellant was cautioned once he began to incriminate himself and went on to the mention of the deceased police officer being attacked as he lay on the ground and to say: 'I myself hit him with the axe which I carried. I don't know where I hit him but I think it might have been on the head.' There has not been raised at any stage any question of his words being inaccurately recorded or of anyone recording what he did not say. Nor has any complaint been made as to questions by police officers in the course of the making of the statement.
I would have found here a very strong rebuttal beyond any reasonable doubt of the view that the will of the appellant to remain silent or to say what he wanted to say was overborne unfairly to the extent that his statement of the morning should have been held inadmissible.
From that, I would not find any continuing or associated complaint against the admissibility of his short confession made after being arrested and charged early in the afternoon when he said: 'I admit that I was present at the crowd of those who killed Constable Chansa. I struck him with an axe.' He said that in the view of about fifty people in the quadrangle at the hospital, Dr Imkamp having examined him at 12.30 p.m. after the interrogation of the morning and, presumably, noting at least no signs of physical ill - treatment.
There was evidence to corroborate these two statements and with those two statements in evidence his association with the common purpose was proved.
I would, therefore, have dismissed this appeal.
*Appeal allowed*