GOBA v THE PEOPLE (1966) ZR 113 (CA)

COURT OF APPEAL

BLAGDEN CJ, DOYLE JA, RAMSAY J

15th NOVEMBER 1966

Flynote and Headnote

[1] Evidence - Juvenile's testimony - Procedure for admission - Section 120 of Juveniles Ordinance construed.

When a child 'of tender years' is brought forward as a witness, the court must conduct a *voire dire* to determine whether the child understands the nature of an oath, and, if not, whether the child (1) is of sufficient intelligence to justify the reception of his evidence; and (2) understands the duty of speaking the truth. Failure to carry out this procedure will result in the appellate court's discounting entirely the child's evidence.

Case cited:

(1) *Makhanganya v R* 1963 R & N 698.

Statute construed:

Juveniles Ordinance (1956, Cap. 8), s. 120.

McLellan - Shields, for the appellant

Shoniwa, State Advocate for the respondent

Judgment

By the court: The appellant was convicted of the murder of his wife Agata Phiri on the 11th March, 1966, at or near Msiafumbe Village in the Feira District of the Central Province and sentenced to death.

There was no dispute that the appellant's wife died shortly after being struck a number of blows by the appellant. Dr Gore, who conducted a post - mortem on the deceased's body, gave the cause of death as shock following multiple injuries, fractures of the rib and haemothorax, and the presence of blood in the right thoracic cavity. He emphasised that considerable force would be required to cause some of the injuries.

[1] The principal witness for the prosecution was a young girl, Zefa Goba, who was the appellant's and the deceased's daughter. She was aged approximately ten years. Section 120 of the Juveniles Ordinance, Chapter 8 of the Laws, prescribes that when in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received though not on oath if in the opinion of the court he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth. It follows from this provision that where

a court of trial has before it a child of tender years, as was the case here, it is incumbent upon the court to conduct what is technically known as a *voire dire* that is to say an inquiry, to find out first whether the witness does or does not understand the nature of an oath, and if in the opinion of the court the witness does not understand the nature of an oath, then a further inquiry to see whether

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BY THE COURT

the witness is of sufficient intelligence to justify the reception of his evidence, and, most important, that in addition he understands the duty of speaking the truth. The record before us does not indicate that the learned trial judge here went through this procedure. We therefore sent for the transcription of the belt recording in the proceedings, which confirmed that although the judge did ask the witness certain questions about herself, he did not inquire into the matters which he should have inquired into in accordance with the provisions of s. 120 (1) of the Juveniles Ordinance. In the case of *Makhanganya v R* [1], the court had a somewhat similar situation before it, and procedure which a court of trial should follow in similar circumstances was very clearly and concisely set out by Forbes, F.J. at 702, where he says:

' In my view the duty of a court when faced with a child witness is (a) to inquire as to the age of the child and if necessary assess its age; (b) to investigate, by questioning the child, whether the child understands the meaning of an oath; and (c) if the answer to (b) is negative, to investigate whether the child understands the difference between truth and falsehood, and the need to speak the truth. The record should show these inquiries (which, depending on the circumstances, need not be lengthy) and the conclusion reached by the judge. Unless a *voire dire* is carried out as I have indicated, a trial court cannot be satisfied that a child is fit to be sworn, or even to give evidence unsworn; and unless the *voire dire* is recorded an appellate court cannot be satisfied that the trial court has appreciated and carried out its duty.'

We are quite satisfied here that no proper *voire dire* was carried out and the effect of that is that we have to discount the evidence of the witness Zefa Goba entirely. The judge placed great reliance on her evidence, but there was in fact other evidence. There was the evidence of the witness Petrol Tizola who went to see the deceased together with Zefa Goba not long after the deceased had been injured and was still alive. After he had seen her he returned to the village to report to the village headman, and later that day he saw and indeed apprehended the appellant. He asked the appellant what he had done, the appellant first of all said that he had done nothing. Then he was taxed with beating his wife, and he said, 'I slapped her once'. The witness then tied up the appellant assisted by others, and explained to him that he was doing so because he had killed his wife at the garden. To this the appellant made no reply.

This evidence does not carry the case much further, but subsequently the appellant made a statement to the police which was admitted in evidence after a trial within the trial had been held to determine its admissibility. In that statement the appellant said, 'I admit the charge that I killed my wife with a handle of an axe with an axe fixed to it. Firstly I hit her with a clay pot and I then took a handle of an axe with an axe fixed to it, and hit her on the head. I hit her again, and she

fell to the ground, and I hit her again, lastly I hit her on her ribs. I killed her because we had been troubling each other.'

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In addition to that there was the evidence of the appellant himself at the trial. In substance his story was that he had been away from home selling fish for some time, and he had just returned. When he handed the proceeds of his sale to his wife she became annoyed and threw the money into the bush. She then accused the appellant of having had sexual intercourse with other women. The quarrel then developed into a fight which the appellant said his wife started by striking him in the face. He struck back, his wife fell to the ground, and the appellant then left.

Under cross - examination the appellant gave more details of this fight. There were many contradictions in his evidence, but there emerged from it the admission that he had struck her three blows some of which were on the head; that he had punched her in the ribs, and that he had used as weapons a stick and a clay pot. In effect the appellant was saying that he had been grossly provoked by his wife, and indeed attacked by her. It is clear, on his own admission, that his means of retaliation were grossly out of proportion to any provocation or attack he may have received.

We have considered whether in this case we should allow the appeal, and send the appellant back for re-trial. Undoubtedly on the evidence which I have related leaving out the testimony of Zefa Goba, the appellant could have been convicted of murder, but we cannot say he would inevitably have been convicted of murder. We can, however, say beyond peradventure that he would inevitably be convicted of manslaughter. We think that in all the circumstances of this case justice will be met here by allowing the appellant's appeal and quashing his conviction and sentence.

We substitute a conviction for manslaughter.

As regards sentence this was a savage and murderous attack on a completely defenceless woman. The sentence we pass is one of twelve years' imprisonment with hard labour, which will run with effect from 11th March, 1966.

Appeal allowed and, sentence of manslaughter substituted