THE PEOPLE v NEPHAT DIMENI (1980) Z.R. 234 (H.C.)

HIGH COURT
SAKALA, J.
2ND MAY, 1980
HP/18/80

Flynote
Criminal law and procedure - Juvenile offender - Confession statement - Desirability for Presence of parent, guardian or other person when taking statement.

Headnote
The juvenile was charged with murder and the prosecution sought to produce a statement recorded from him by a Police constable under warn and caution. The defence counsel objected to the production of the statement on the ground that it was not signed freely and voluntarily. The statement was recorded in the presence of two Police officers.

Held:
It is desirable to have the parent or guardian present when a statement is being taken from a juvenile and in cases where the juvenile has no parent or guardian, it would be desirable in the interest of justice to have some other person other than a Police officer.

1980 ZR p235
SAKALA J

Cases referred to :
(1) Tapisha v The People (1973) Z.R. 222.
(2) Chinyama and Ors v The People (1977) Z.R. 426.
(3) Banda (J) v The People (1978) Z.R. 233.
(4) Mbewe v The People (1976) Z.R. 317.

For the State: F. Bruce - Lyle Esq., State Advocate.
For the accused: W. Mwale Esq., Legal Aid Counsel.

Judgment
SAKALA, J.:

The juvenile, Nephat Dimeni, is charged with murder, contrary to s. 200 of the Penal Code, Cap. 146 of the Laws of Zambia.

At this stage in the trial the prosecution are seeking to produce a statement recorded from the juvenile offender by Constable Ignitious Mwikisa under warn and caution on the 31st January, 1979. The defence objects to the production of the statement. It is the contention of the counsel for the juvenile that the statement was not signed freely and voluntarily. The court ordered a trial-

within-a-trial to determine whether the juvenile signed the statement freely and voluntarily.

The prosecution called two witnesses in the trial-within-a-trial. PW7 told the court that when the statement was recorded from the juvenile offender Detective Chief Inspector Muyoma was present. He interviewed the juvenile in Ndebele. Thereafter he decided to record the warn and caution statement in Ndebele. He gave a free and voluntary reply. He denied using any force and threats. He said after recording the statement he read it back to the juvenile who later signed it. He denied inducing the juvenile to sign the statement. The witness signed it and Inspector Muyoma also signed. He said prior to the recording of the statement the juvenile was not beaten. He further told the court that the juvenile did not complain to have been beaten. When cross-examined he told the court that the juvenile first came into the hands of the Police on the 28th January, 1979. He was present when he was brought by Chief Inspector Muyoma who had told him that the juvenile had been brought from a Chinyunyu Camp. He recorded the statement from the juvenile on the 31st January, 1979, at Lusaka Central Prison. He said there was nothing that prevented him from recording the statement on the 28th January, 1979.

PW4 in the main trial also gave evidence in the trial-within-a-trial. He testified that he was present when the warn and caution statement was recorded from the juvenile. He said it was recorded in Ndebele language which the juvenile appeared to understand. He denied that the juvenile was beaten or threatened. He said the juvenile did not complain to him after the recording of the statement. The juvenile signed it. He also signed it. But the juvenile was not forced to sign it. He said when the juvenile was picked he was detained under the Preservation of Public Security Regulations pending inquiries. In cross-examination he said he first realised that the juvenile had been apprehended in connection with this offence between 28th and 29th January, 1979. He explained that

the juvenile was brought to the Central Police Station in company of twelve others on the 10th January, 1979. They were all Ndebele-speaking. He said he knew the juvenile's involvement in this case through the stories of the others.

In his defence the juvenile offender told the court that he was collected from Lusaka Central Prison to the Central Police Station on the With January, 1979. He was questioned about the property which was in possession of his colleague. He said he was not asked anything concerning this case. He stayed in Central Prison from 15th to 31st January, 1979. On He 29th and 30th January, 1979, the Police organised parades in which he took part. But on both of these parades nobody identified him. On the 31st January, the Police brought three papers and asked him to sign. At first he refused. They left; after an hour they returned again but when he asked what he was signing for they informed him that they were papers of which he would appear before court. He said on the strength of this he signed them. They told him that if he did not they will take him to the Police Station where he will sign them after torturing him. As a result he signed the papers. He said on the 15th January, he had been beaten at the Police station. In cross-examination he told the court that he did not give any statement to the Police.

The foregoing is the evidence in this trial-within-a-trial. The learned State Advocate has urged the court to admit the statement as it was freely and voluntarily signed by the juvenile offender. On the other hand, counsel for the defence submitted that the fact that the juvenile was in custody for sixteen days is a clear indication that the circumstances under which the statement was signed were unfair to him. The juvenile has denied making a statement to the Police and the trial-within-a-trial in this case from the cross-examination proceeded on the basis that he did not make a statement but was compelled to sign a statement which he did not make. It is nevertheless settled law that a trial-within-a-trial is called for even where the only issue is whether an accused signed the statement freely and voluntarily (see *Tapisha v The People* (1)).

The undisputed facts in this trial-within-a-trial are that the deceased died on the 2nd January, 1979, from the gunshot wounds inflicted on her while she was a passenger in a vehicle along the Great East Road. The juvenile offender was living at a freedom fighters' camp around Rufunsa area. He is aged seventeen years, thus in terms of Cap. 217 he is a juvenile. He was apprehended on the 10th January, 1979, together with others. Between 10th to 31st January, the date of the warn and caution statement the juvenile was detained under the Preservation of Public Security Regulations. On the 31st January the recording of the warn and caution statement was witnessed by Detective Chief Inspector Muyoma.

The Foregoing are the circumstances that culminated in the signing of a document which the juvenile understood to he the basis on which he was to be taken to court. The objection is that the juvenile was forced

and threatened to sign the papers whose contents he did not make to the Police. In his detailed evidence in chief the juvenile only gave one general statement about the beatings and said he made no statement. On consideration of the totality of the evidence I am satisfied that the juvenile made the statement to the Police and signed it freely and voluntarily. In practice the matter should end here. But in *Chinyama and Ors v The People* (2), the Supreme Court observed as follows:

> "In practice, when dealing with an objection to the admission of an alleged confession the trial court will first satisfy itself that it was freely and voluntarily made; if so satisfied, the court in a proper case must then consider whether the confession should in the exercise of its discretion be excluded, notwithstanding that it was voluntary and therefore strictly speaking admissible, because in all the circumstances the strict application of the rules as to admissibility would operate unfairly against the accused."

Is this then "a proper cave" in which I must consider my discretion whether to exclude the confession? I have no doubt that when the juvenile was brought to the Police station on the 10th January, 1979, it was in connection with this offence. Thus his detention under the Preservation of Public Security Regulations from 10th to 31st January was for the purposes of investigations. In *Joyce Banda v The People* (3) the Supreme Court criticized the use of the Preservation of Public Security Regulations for purposes of investigations of a criminal offence unrelated to the public security. I am not sure whether the murder case the Police were investigating in the instant case was

related to public security. Again for reasons not explained the recording of the warn and caution statement was done at the Central Prison. While there is no rule as to where a warn and caution statement should be recorded from, it is common knowledge that Police stations are the common places where suspects are questioned. In the instant case I have also accepted that the offender is aged seventeen years and thus a juvenile. In the case of *Mbewe v The People* (4) at pp. 319 to 320 the Supreme Court said:

> "Mr Osakwe further drew the attention of the court to the absence of a parent or guardian of the appellant at the police station when the statement of the appellant was recorded and has asked this court to lay down a general rule for the guidance of the police in the taking of statements from juveniles. We feel reluctant to lay down any Judges' rule in this regard. Section 217 of the Juveniles Act (Cap. 217) stresses the importance which the legislature attaches to the attendance whenever possible, during all stages of the proceedings in court, of a parent or guardian of a juvenile but there is no such provision in the Act for the attendance of a parent or guardian at a police station during the taking down of a statement of a juvenile. We would however urge that it is desirable in the interests of both the police and the juvenile to have a parent or guardian whenever possible to be present at the police station when a statement is being taken from a juvenile and no doubt the legislature would view the importance

> of such a procedural provision in the Act in the same light as obtains in section 217 of the Juveniles Act."

In the case before me although the juvenile has no parents in Zambia (as per his evidence) in the absence also of a guardian it would have been desirable in the interest of justice to have some other person not a police officer, to have been present when recording the statement. Although the Supreme Court has accepted the desirability to have a parent or guardian at the police station when a statement is being taken from a juvenile it is perhaps unfortunate that Zambia still operates under the pre-1964 English Judges Rules (*see Chinyama* case). The pre- 1964 Judges Rules have no provisions for the presence of a parent or guardian at the Police station during the interrogation of children and young persons which is specifically provided for in the revised English Judges Rules (see Rule 4 p. 763, para. 1391a of *Archbold*, 39th edn).

For reasons outlined above, I am satisfied that this is "a proper case" in which I should exercise my discretion to exclude the confession, notwithstanding that it was voluntary and therefore strictly admissible, because in all the circumstances, the strict application of the rules as to admissibility would operate unfairly against the juvenile offender. Accordingly I refuse to accept the introduction of the confession into the evidence.

Confession excluded