

IVOR NDAKALA v THE PEOPLE (1980) Z.R. 180 (H.C.)

HIGH COURT
CULLINAN, J.
25TH JANUARY, 1980
HPA/4/1980

Flynote

Evidence - Corroboration - Uncorroborated evidence of accused against co-accused - Need for warning before conviction

Evidence - Admissibility- Accused's evidence against co-accused - When admissible Evidence - Confession - Procedure before introduction into evidence

Headnote

The appellant and a co-accused were convicted of attempted store breaking. They were found by the police, seated on an iron bar, near the store, in the early hours of the morning. According to the respondent, policeman, the lock of the store had disappeared and the two accused had confessed to attempted store breaking, but according to the two, they were on their way to the city when they were apprehended by armed plain clothes policemen.

It was pointed out, during the appeal, that the evidence of the police officer and complainant were conflicting as to whether or not the lock on that store had been removed, neither were the appellant and the co-accused found breaking into the premises. Further the magistrate had permitted evidence of confessions of the two accused without their consent.

Held:

- (i) When an accused person gives evidence against his co-accused it is desirable that the court should, where such evidence is uncorroborated, warn itself of the danger of convicting thereon.
- (ii) When an accused makes an extra-judicial statement in the absence of a co-accused, it cannot be regarded as evidence against the latter accused; but when the accused goes into the

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witness box at the trial and gives evidence which incriminates his co-accused, that evidence is admissible against the latter accused, and it may be regarded as evidence for the prosecution against him.

- (iii) Evidence of confessions of an accused person or co-accused cannot be introduced in court without their consent.

Cases cited:

- (1) Njovu v The People HPA/42/73 (Unreported).
- (2) R. v Russel Cr. App. R. 52.
- (3) R. v Prater (1966) 44 Cr. App. R. 83 [1960] 2 Q.B. 464.
- (4) Chisokola v The People (197 3) Z.R. 46.

For the appellant: P. Mwikisa, Esq., Legal Aid Counsel.
For the respondent: F. Bruce - Lyle, Esq., State Advocate.

Judgment
CULLINAN, J.:

The appellant and a co-accused were convicted of attempted store-breaking. The learned State Advocate, Mr Bruce - Lyle, has indicated that the State does not support the conviction. It was the evidence of a police officer that he and other police officers, who did not give evidence, heard noise coming from a store in the early hours of the morning and on investigation found that the lock on the door of the store had disappeared. The police approached the scene and found the appellant and his co-accused seated nearby, each of them sitting on an iron bar. The appellant's co-accused possessed a candle and matches in his pocket. The police officer testified that the appellant and his co-accused confessed to attempted store-breaking. The appellant and his co-accused in their sworn evidence testified that they were on their way into the city early in the morning, where the co-accused was employed as a shoe cleaner. When passing by the store they were apprehended by armed plain-clothes policemen, who accused them of having attempted to break open the store, and subsequently produced iron bars. The learned trial magistrate accepted the evidence of the Police officer. In assessing the evidence of the appellant and his co-accused, he observed:

"They are accomplices. I must warn myself that the evidence of an accomplice to support the other requires corroboration and indeed here the testimony may be complied with by the court but this is in the discretion of the court."

The trial magistrate was no doubt there referring to the general rule that fellow accomplices (in the one transaction) cannot corroborate each other. A co-accused may well have been an accomplice in the actual commission of the crime, but different considerations arise upon trial. When an accused makes an extra-judicial statement, in the absence of co-accused, it cannot be regarded as evidence against the latter accused; when however an accused goes into the witness box at the trial and gives

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evidence which incriminates his co-accused, that evidence is of course admissible against the latter accused: indeed it may well be regarded as evidence for the prosecution against him. Nonetheless, there is no rule of law as such that a co-accused in such circumstances is to be treated as an accomplice, whose evidence requires corroboration. This aspect was considered by the court in the case of *Njovu v The People* (1) where the following passage from the judgment of the Court of Appeal (Criminal Division) per Diplock, L.J., in the case of *R.v Russell* (2) at pp. 149/150 was quoted:

"but it is said that there is a rule of law or a rule of practice that the jury must be warned in terms of the need for corroborative evidence. In the view of this Court, where a co-defendant gives evidence there is no rule of law to that effect. The correct position is set out in the case of *Prater* (3), in which this Court (at p. 86 and 466 of the respective reports) said: "It is desirable . . ." - and I emphasise the word "desirable" - ". . . in cases where a person

may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given."

When an accused gives evidence against his co-accused it is desirable that the court should, where such evidence is uncorroborated, warn itself of the danger of convicting thereon. In the present case, however, neither the appellant nor his co-accused gave evidence incriminating the other: indeed their evidence was mutually supporting. To say that their evidence required corroboration was then a misdirection.

Further, the learned State Advocate Mr Bruce - Lyle has pointed out that the evidence of the Police officer and indeed the complainant was conflicting as to whether or not the lock on the particular door had been removed. He submits also that in view of the fact that the appellant and his co-accused were not found breaking into the premises, it was a dereliction of duty on the part of the police not to have finger-printed the door surfaces. I agree with this submission. Again, the Police officer was allowed to introduce evidence of confessions made by both the appellant and his co-accused without the trial magistrate ever having asked the unrepresented appellant and his co-accused as to whether they had any objections to the introduction of such confessions. Indeed, the Police officer was allowed to give verbal evidence of such confessions without producing written statements recorded on the appropriate Police form; *see Chisokola v The People* (4).

The issue was one of credibility. I am not satisfied that had the learned trial magistrate directed his mind to the above aspects that he would inevitably have convicted the appellant. The appeal is allowed. The finding and sentence of the court below are set aside and the appellant is acquitted. In the exercise of my revisionary jurisdiction I also set aside the finding and sentence in respect of the appellant's co-accused, namely Cassim Sakala who is accordingly acquitted.

Delivered in Open Court at Lusaka this 25th day of January, 1980