**ALECK LUKERE v THE QUEEN (1963 - 1964) Z and NRLR 57**

**1963 - 1964 Z and NRLR p57**

[Before the Honourable the Chief Justice, Sir DIARMAID CONROY on the 10th March, 1964.]

**Flynote**

**Voluntary statements of accused persons - denial by accused that statement made at all - necessity for a trial within a trial.**

**Headnote**

The appellant was charged with joining with others in the riotous demolition of buildings contrary to section 69 of the Penal Code. When the prosecutor at the trial sought to introduce in evidence a statement alleged to have been made by the accused, the accused denied making the statement at all. The magistrate ruled that as this was not a question of the voluntariness of the statement, but a question of whether the statement had been made at all, there was no necessity for a trial within a trial, and admitted the statement in evidence.

*Held:*

(a) There should have been a trial within a trial before the magistrate decided whether the statement should be admitted or not.

(b) The decision of Somerhough, J, in *Eliyoti Chilenga v The Queen* (1959) S.J.N.R 94 should not be followed.

On this (and other grounds) appeal allowed, and appellant discharged.

Cases cited:

(1) *Eliyoti Chilenga v The Queen* (1959) SJNR 94.

(2) *R v Mambilina* 1962 R & N. 507.

(3) *R v Kelipi Nsalamu* H.P.1/1964 (unreported).

(4) *Marjorjo v Reginam* Federal Supreme Court judgment No. 76 of 1963 (unreported).

*J J O'Grady, Crown Counsel* for the Crown

*J H Jearey* for the appellant

**Judgment**

**Conroy CJ:** The appellant was charged before the Senior Resident Magistrate at Fort Jameson with riotously demolishing buildings contrary to section 69 of the Penal Code. The particulars of the offence were that he, with fifty other accused, on 7th May, 1963, at Ntembwe in the Lundazi District being riotously assembled together, and with persons unknown, did unlawfully destroy a number of specified buildings.

The Crown case was that about four hundred U.N.I.P. supporters on 7th May, 1963, carried out a planned attack upon a courthouse at Ntembwe. The attack lasted from 7.30 in the morning until 4.30 in the afternoon, it was executed with some military skill, showed a concerted plan, and some tactical planning. The courthouse was defended by a handful of Northern Rhodesia Police, protecting a number of civilians therein. Although there is no doubt that in law such an attack constitutes a riot, in ordinary language it could more aptly be described as a siege, in the course of which the defenders shot five of the attackers and



expended nearly fifty rounds of ammunition, the majority .303 S.A.A. It is not inconceivable that the appellants might have been charged with waging war on Government forces, which is, of course, treason, and carries the death penalty.

The appellant was convicted of riotous assembly and was sentenced to five years imprisonment with hard labour. He now appeals on a number of grounds, but only two of these grounds have any substance in them, and I shall not deal with the others.

The first is that the magistrate was wrong in admitting the confession alleged to have been made by the appellant without first satisfying himself that the appellant had been properly cautioned and that the prosecution had proved the making of the statement beyond a reasonable doubt.

The Crown called, as prosecution witness No. 9, Detective Head Constable Kashiba, a CID officer of the Northern Rhodesia Police. In his evidence - in - chief he said that during May he was at Lundazi when a hundred and thirty - one suspects were brought in. A number of these were identified by Crown witnesses, and as each was identified, Kashiba, charged him with riotously demolishing buildings, cautioned him, and recorded in his notebook any reply he made. Each arrested person signed or thumbprinted the notebook. He produced his notebook in evidence. The magistrate thereupon adopted the following course. Kashiba read, in the vernacular, what each accused was alleged to have said. Before any statement was translated each accused was asked whether he had any comment to make. Where an accused alleged that the confession was not voluntarily made, e.g. " I was beaten ", the statement was not translated. Where no such objection was made, it was translated to the court by the interpreter. When Kashiba read, in the vernacular, what the appellant had said to him and the court called upon the appellant to make any comment he wished, the appellant said " I did not say so. It is all lies ". Whereupon the magistrate ordered the statement to be translated and the court interpreter said, " I admit the charge. I was throwing stones together with others ".

At the close of the Crown case the rights of the accused were explained to them, and, in due course, the appellant elected not to give evidence on his own behalf, but to make an unsworn statement. In the course of that statement he denied that he had gone to Mwase that day; the police found him there when they came to collect him; they took him away without saying the reason; they beat him and when he asked why, they said he was there, which he denied.

In his judgment the magistrate said that some of the accused alleged that their statements had been obtained from them by force, and the question as to whether they were voluntary therefore fell to be dealt with by a trial within a trial. In the event, the procedure was not followed because the public prosecutor elected not to press for inclusion of these statements, whilst strongly denying that any force was used. In all the other cases, the magistrate said, in which the accused were alleged to



have made an admission, they alleged not that they had been forced to make a confession, but that they had never made any such statement at all. The magistrate went on:

> The question of this fell to be decided not by " trial within a trial " but on the basis that " this is a straightforward traverse of the prosecution witnesses' story, and must be dealt with like any other traverse when the defence opens ". (Dictum of Somerhough, J, in *Eliyoti Chile v The Queen* (1959) S.J.N.R 94.)

This decision conflicts with other decisions given in this court, in particular with *R v Mambilina* 1962 R & N. 507, in which Blagden, J, decided, relying upon a number of authorities in the East African Court of Appeal, that where an accused objects to the admission of a confession on the grounds that he never made it, this is an issue going to the admissibility of such confession, and, like any such issue, must be determined by a trial within a trial. More recently Charles, J, in *R v Delhi Nsalamu* H.P.1/1964 (not reported) reached the same conclusion as Blagden, J

In *Marjonjo v R* FSC 76/1963 the Federal Supreme Court reached the same conclusion as that reached by Somerhough, J, in *Eliyoti Chilenga*'s case, and Clayden, FCJ., said that he considered *Mambilina*'s case (and the East African cases on which it was based) were incorrect.

Without full argument I do not wish to express any view as to how binding the Federal Supreme Court judgments are on this court, now that the Federation has been dissolved. *Marjorjo*'s case was an appeal from the High Court of Southern Rhodesia, and by section 8 of the Federal Supreme Court Act, 1955, the Federal Supreme Court was applying Southern Rhodesia law when considering the matter in issue there, which turned partly on section 280 of the Criminal Procedure and Evidence Act of Southern Rhodesia. I therefore consider that it is not binding on me and is, at best, of only persuasive authority.

My own view of the matter is as follows. The admissibility of a confession is different from the admissibility of other kinds of evidence, and falls within a peculiar category of its own. Therefore the test laid down by Somerhough, J, that a repudiated confession " is a straightforward traverse of the prosecution witnesses' story, and must be dealt with like any other traverse when the defence opens ", is an incorrect statement of law. In order that a confession should be admissible, it is necessary for the Crown to establish two things -

(a) that the accused made the confession; and

(b) that he made it voluntarily.

The prejudicial nature of a confession is so great that the court is jealous to guard against injustice to the accused by its unfair admission. Therefore the custom has grown up over the years, and now constitutes a well - settled practice, that where the admissibility of a confession is challenged, the court should hold a trial within a trial. This practice grew up in England and other parts of the commonwealth where trial by jury is normal. There trials within trials are held by the judge in the absence of the jury, because the question of admissibility is one of law for the judge and not of fact for the jury. Where, as in this country, the judge is both



judge of law and judge of fact, I regard trials within trials as not wholly apt for our conditions; nevertheless they are so firmly established in our procedure that it is too late in the day to raise any objection to them in principle. The issue to be tried in a trial within a trial is a question of law, i.e. admissibility. The admissibility of a confession depends upon the two factors I have mentioned above. If, therefore, an accused challenges a confession on the ground that he did not make it, then it is for the Crown to establish that it was so made, and for the court to try that issue in a trial within a trial. Therefore, trials within trials are the proper means of establishing the issue of whether a statement was made and whether it was made voluntarily. I wish to make it clear that I am not now dealing with a retracted confession as opposed to a repudiated one; in respect of retracted confessions different considerations arise.

In the circumstances, therefore, I think the magistrate was wrong and that he was misled by the decision in *Eliyoti Chilenga's case,* which can no longer be regarded as good law.

[*The learned Chief Justice then dealt with the second ground of appeal, which turned upon fact and, not law. It is not, therefore, of any general interest and is omitted.*]

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Editorial Note This case has now been overruled by the Court of Appeal in *Mwiya v The People* 1968 ZLR