KABWIKI AND OTHERS v THE PEOPLE (1974) ZR 78 (SC)

SUPREME COURT

BARON DCJ, GARDNER AND HUGHES JJS

7th MAY 1974

(Appeals Nos 154, 171 and 153 of 1973)

Flynote

Criminal law - Evidence - Confession - Admissibility - Proper test of.

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Headnote

The appellants were convicted of aggravated assault with intent to steal contrary to s. 295 of the Penal Code. In convicting the second and third appellants the trial court relied heavily on confessions which the Supreme Court felt were probably true, but as to the making of which the evidence of voluntariness was highly unsatisfactory.

Held:

(i) The condition of admissibility of an incriminating statement is not truth but voluntariness.

(ii) The basis upon which evidence of an incriminating statement is excluded in the absence of proof of voluntariness is not that the law presumes the statement to be untrue in the absence of such proof, but because of the danger which induced confessions or admissions present to the innocent and the due administration of justice.

Cases referred to:

(1) *Zondo and Others v R,* 1964 SJNR 102.

(2) *The People v Nelson Habwacha,* 1971 SJZ 17.

Legislation referred to:

Penal Code, Cap. 146, s. 295.

Appellants in person.

V K C Kamalanathan, State Advocate, for the respondent.

Judgment

Baron DCJ: delivered the judgment of the court: The appellants were charged, together with a fourth man, with aggravated robbery. The fourth man was acquitted and the appellants were convicted of aggravated assault with intent to steal contrary to section 295 of the Penal Code, the learned trial judge not being satisfied that anything was actually stolen. The charge arose out of an incident which took place at a grocery on the outskirts of Lusaka. A lorry belonging to a baker drew up at the grocery for the purpose of making a delivery of bread, and it was alleged that the appellants and the fourth man immediately put into effect a prearranged plan to rob the driver of the lorry and his two assistants of the money which they had collected in the course of their duties.

It is unnecessary to deal in any great detail with the facts, but certain salient features are relevant to this judgment. The first appellant was apprehended in the course of the incident and was in fact quite severely beaten up by bystanders; he was found by the police handcuffed to a tree and was removed to hospital. He later made a statement which was objected to but admitted in evidence by the learned trial judge as having been freely and voluntarily made, and in his case the evidence as to the circumstances in which the statement was made was entirely satisfactory; there is no basis which would justify this court in holding

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that the statement was wrongly admitted. In any event there was ample eye - witness evidence as to the aggravated assault during the course of which the first appellant was apprehended. The evidence against this appellant was overwhelming and his appeal is dismissed. The sentence is the statutory minimum and no appeal lies.

The other two appellants and the fourth accused were in a different category. The second and third appellants were alleged to have made warned and cautioned statements in which they gave detailed accounts of the aggravated assault, and the fourth accused made a

statement to a different police officer denying the charge. In the case of all three there was the evidence of a young man who said that he had worked for the second appellant for two weeks before the assault, that the first and third appellants and the fourth accused had come to the second appellant's house during the morning, that all four had driven off in the second appellant's car, and that the second appellant had returned about an hour later. The statements of the second and third appellants were recorded by a detective constable who, when the statements were objected to on the grounds that the appellants had been beaten and forced to sign them, said during the course of the ensuing trial - within - a - trial that three other police officers had been present during the making and recording of the statements. One of them, a detective inspector who was the investigating officer in the case and who had been present when the statements of the first and fourth accused were recorded by a different police officer, told the court that he could not remember being present during the recording of these statements. The prosecution then asked for an adjournment for the purpose of calling the two other police officers mentioned by the witness. The case was adjourned for a week and on the resumption the prosecutor informed the court that the two witnesses he had proposed to call were not there and that he would not therefore call any further evidence on the trial - within - a - trial.

The two appellants then gave evidence on oath on the issue of the voluntariness of their statements. They both gave similar evidence but not identical; they both said that they had complained to the magistrate about being beaten and this evidence was not challenged, and the third appellant said he had been attended by a doctor. Both appellants said that they did not know what they were signing and would not have signed anything had they not been beaten.

We have the greatest difficulty in accepting that the investigating officer in this case, a detective inspector, and particularly in so important a matter as a charge of aggravated robbery in which a firearm was alleged to have been used, could forget that he had been present during the recording of confessions by two of the suspects; the detective inspector had already given evidence in the case and all the circumstances thereof, including the arrests of the four accused persons, had been recalled to his mind. The probabilities are therefore strong that he was not in fact present when the two disputed statements were recorded. The probabilities are also strong that the other two police officers named by the witness

did not in fact support the witness's allegation that they had been present; for the prosecution simply to say of these two police officers, "They are not here", is hardly satisfactory. Had they been summoned and failed to appear the prosecution should have so informed the court, and if their evidence was regarded as assisting the prosecution's case a further adjournment should have been sought. This court is bound to conclude that the three police officers whom the witness alleged were present during the recording of the statements were not in fact present.

There is another unsatisfactory feature of this witness's evidence. He was unable to recall precisely when the two appellants were located and brought to the police station, but he said that it was some time in the morning. He said that he was with both appellants from that time until their statements were taken at 1520 and 1710 hours, respectively, and he explained why it took so long before these statements were recorded by saying that the other two suspects were not located at that time. However, the evidence of the investigating officer discloses that the other suspects had already been located, and that the fourth accused was at the same police station and the first appellant was in hospital.

The learned trial judge in ruling on this issue said of the second appellant:

> "It is peculiarly within his own knowledge what injuries he sustained, if any, and to whom in authority he complained about the matter or to whom he was sent for treatment."

Both appellants in fact complained to the magistrate; in the absence of any attempt to refute this evidence we must accept it as true. The second appellant did not say that he was treated by anyone but the third appellant said that he was seen by a doctor. One would not expect him as an inmate of a remand prison to have ascertained the name of the doctor.

It would have been very simple for the prosecution to do so. The learned judge then continued:

"Both these accused are quite strong looking men and I do not believe they would be easily overawed . . . There is absolutely no support for their contentions which I do not find to be credible."

We view with alarm an approach which comes very close to suggesting that it is for an accused person in circumstances such as these to satisfy the court that force or some other inducement was used. Be that as it may, the learned judge's description of the evidence of the police constable on this issue as being "simple and straightforward" is unacceptable; it is in our opinion a view of the evidence which cannot reasonably be entertained. We regard the evidence of this witness with great suspicion and we are of the opinion that no reasonable tribunal could have failed to be in doubt as to whether the three police officers named by the witness were in fact present when the statements were recorded. In our judgment these statements should not have been admitted in evidence.

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When considering the evidence against the fourth accused the learned judge said:

"It would be dangerous to rely solely on the testimony of the prosecution witnesses in the absence of any corroboration from a different source and in the absence of there having been any identification parade."

There are certain differences between the positions of the second and third appellants and that of the fourth accused. These differences, however, are not such that we can say that the learned judge, had he not relied on the confessions, must inevitably have convicted in any event. On the contrary, it seems to us that he relied heavily on the statements, and had he not done so and had he applied to the second and third appellants reasoning similar to that which he applied to the fourth accused he would presumably have acquitted them also. We therefore have no alternative but to allow the appeals of the second and third appellants; their convictions and sentences are set aside.

We have come to this conclusion not with any hesitation but with considerable regret. The probabilities are that the confessions of the second and third appellants were the truth. But the issue is not truth but voluntariness. Our law is clear, and the cases are legion, that even though the court may be satisfied that what an accused person has said in a statement to the police is in fact true, that statement is inadmissible as evidence unless the prosecution prove that it was freely and voluntarily made. Thus in *Zondo and Others* v *R* [1] Charles, J, said at page 113:

"The basis upon which evidence of an incriminating statement is excluded in the absence of proof of the condition of admissibility is not that the law presumes the statement to be untrue in the absence of such proof, but because of the danger which induced confessions or admissions present to the innocent and the due administration of justice. That danger has been aptly pointed out by the American authority on evidence, Professor Wigmore (Evidence, Vol. 4, section 2250) in the following passage:

' The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources . . . ultimately the innocent are jeopardised by the encroachment of a bad system.' "

We quote also a passage from my judgment in *The People* v *Nelson Habwacha* [2] at page 26:

"I am only too well aware that the police force is seriously under staffed, and operates under considerable difficulties. But the courts cannot on a basis of expediency such as this admit confessions which may have been induced; on the contrary, the

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obvious temptation to 'cut corners' because of those difficulties should make the courts even more vigilant, lest our whole system of law enforcement degenerate and our whole structure of administration of justice - indeed, of society itself - be imperilled."

It is a fundamental principle of the criminal law that it is better that ten guilty men go free than that one innocent man be convicted. We fear that the second and third appellants in this case are probably two of the ten; but the law is clear and it is our duty to apply it.

Appeal of first appellant dismissed

Appeals of second and third appellants allowed