

## **NKONDE AND ANOTHER v THE PEOPLE (1974) ZR 109 (SC)**

SUPREME COURT 15

BARON DCJ, GARDNER AND HUGHES JJS

21st MAY 1974

(Appeals Nos 4 and 5 of 1974)

### **Flynote**

**Criminal law - Evidence - Evidence of former wife as to events occurring during subsistence of marriage - Whether admissible.** 20

### **Headnote**

The appellants were convicted of aggravated robbery. Evidence was given by the former wife of the first appellant as to events which occurred during the subsistence of the marriage.

*Held:*

- (i) Even if the evidence of the first appellant's former wife had been 25 incorrectly admitted as against him the remainder of the evidence was overwhelming against both appellants and the trial judge must inevitably have convicted.
- (ii) The question left open whether the first appellant's former wife was a competent witness as to events taking place during the 30 subsistence of the marriage.

Case cited:

- (1) *R v Algar* [1953] 1 All ER 1381.

*Appellants in person.*

*R E M Mwape, State Advocate, for the respondent.*

### **Judgment**

**Baron DCJ:** delivered 35 the judgment of the court. The appellants were convicted of aggravated robbery. The complainant was a training officer on one of the mines and told the court that on his way to Ndola he gave a lift to two men; a short time after picking them up they asked him to turn off the main road to a farm where they 40 wanted to buy a chicken, and while on this side - road they assaulted him,

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stripped him and robbed him of a considerable sum of money. The complainant finally managed to untie the fibres with which he had been bound and make his way to the main road, where he was given assistance by passing motorists. Subsequently he picked out the two appellants at an identification parade.

One of the prosecution witnesses was a young woman who told the court that she had some little while previously been divorced from the first appellant. The first appellant now says that her evidence should not be accepted because she was biased against him. It would have been more 10 relevant to challenge the admissibility of the evidence of this witness, as against the first appellant, on the ground that she was not a competent witness against him because the events to which she deposed occurred during the subsistence of the marriage; *R v Algar* [1] is certainly authority for such a proposition, but this case has been strongly criticised (see (1959) 15 Crim. LR 685).

We leave open the question whether this court would be prepared to follow *R v Algar* [1]; it is unnecessary in the present case to decide the point, since the remainder of the evidence is in any event quite overwhelming against both appellants and, even if the evidence of the first 20 appellant's former wife had been incorrectly admitted as against him, we would be in no doubt that on the remainder of the evidence the trial judge must inevitably have arrived at the same conclusion. The appellants were identified by the complainant at a properly conducted identification parade. They made confessions to which no objection was taken save as 25 to the first statement of the first appellant; this was objected to on the basis that it had been extracted by the use of force, but was received in evidence by the learned trial judge after a trial - within - a - trial. As we have said, quite apart from the evidence of the first appellant's former wife the evidence was quite overwhelming, and there is no basis

upon which <sup>30</sup>this court can interfere with the findings of fact made by the learned trial Judge.

The appeals against conviction of both appellants are dismissed. The sentences were the statutory minima and no appeal lies.

*Appeals dismissed*

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