

CHANSA v THE PEOPLE (1975) ZR 136 (SC)

SUPREME COURT

BARON 35 DCJ, GARDNER and HUGHES JJS

16th SEPTEMBER 1975

Flynote

Expert evidence - Duty of court - Where photographs and other test material available - Failure to produce - Effect.

Headnote

The appellant was convicted of aggravated robbery. The circumstances 40 of the offence were that a robbery took place at a club in the course of which a firearm was used and a man was injured. Subsequently a used cartridge case was discovered at the scene of the robbery and was compared with a similar round fired from a gun with which quite certainly the appellant was connected.

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A ballistics expert gave evidence that the used round was in his opinion fired from that very gun. However he did not support his opinion by any test material or photographs.

Held:

- (i) When an expert gives evidence it is the duty of the court to 5 come to a finding and the expert's evidence is merely there to assist the court in coming to its conclusion.
- (ii) Where there are photographs and other test material available to be placed before the court the failure to produce that material is fatal, and then the opinion of the expert should not be accepted. 10

Case referred to:

(1) *Sithole v State Lotteries Board* (1975) ZR 106.

G M Sheikh, Senior Legal Aid Counsel, for the appellant.

S A Heron, Assistant Senior State Advocate, for the respondent.

Judgment

Baron DCJ: delivered the judgment of the court. 15

The appellant was convicted of aggravated robbery. The circumstances of the offence were that a robbery took place at a club in the course of which a firearm was used and a man was injured, subsequently a used cartridge case was discovered at the scene of the robbery and was compared with a similar round fired from a gun with which quite certainly the 20 appellant was connected. A ballistics expert gave evidence that the used round was in his opinion fired from that very gun, and if this evidence had been admissible then certainly the evidence against the appellant was overwhelming and the conviction entirely proper.

Unfortunately however the ballistics expert did not support his opinion by any test 25 material or photographs. In *Sithole v State Lotteries Board* [1] I said:

"... there may be circumstances in which an expert, by reason of the very nature of the subject on which he is giving his opinion, is unable to present any documentary or pictorial evidence to the court, and in such cases the court has nothing more on which to 30 rely to assist it in coming to a conclusion than the explanations and reasoning of the expert ... But ... where there is in fact documentary or pictorial evidence which formed the basis of the expert's opinion it is necessary for these documents to be properly proved and for the court to see for itself the various points on which the 35 expert bases his conclusions."

It is for the court to come to a finding and the expert's evidence is merely there to assist the court in coming to its conclusion. In the present case the evidence makes it clear that there were photographs and other test material available to be placed before the court, and the failure to produce 40 that material is fatal. The learned trial judge should not therefore have accepted the opinion of the expert. The only other evidence connecting the gun in question with the gun used in the course of the robbery was a letter which the learned judge accepted was either written by, or at the

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dictation of, the appellant. This letter does not in our view establish that the gun in question was used in the robbery; it establishes only that the appellant feared that the possession of the gun might be evidence against him.

Since there has been a serious misdirection in the acceptance by the trial court of the expert's evidence this conviction could stand only if we were able to apply the *proviso*. We are unable to say that had the learned trial judge not relied on the evidence of the ballistics expert he must inevitably have found that the letter to which we have referred was a **10** conclusive link between the appellant's gun and the gun used in the robbery. The appeal must therefore be allowed and the conviction and sentence set aside.

Mr Heron on behalf of the State asks that there be a retrial. This is a very serious case and the defect in the proceedings of the court below was **15** that evidence which the expert witness undoubtedly examined was not produced and placed before the court. We are of the opinion that this is a proper case in which to order a retrial, and we so order.

Appeal allowed

Retrial ordered **20**