SIMON MALAMBO CHOKA v THE PEOPLE (1978) ZR 243 (SC)

SUPREME COURT
BARON DCJ, GARDNER JS AND CULLINAN AJS
13TH JULY AND 10TH OCTOBER 1978
SCZ Judgment No. 37 of 1978

Flynote

Evidence - Witness - Witness with a possible interest - Necessity for corroboration or support - Whether one suspect witness can corroborate another suspect witness. Evidence - Corroboration - Whether one suspect witness can corroborate another suspect witness.

Headnote

The appellant was convicted of stock theft. The trial magistrate warned himself that the principal prosecution witness had a possible interest of his own to serve, and that his brother who supported his evidence might equally have an interest or be a witness with a possible bias. Having warned himself of the danger of convicting on the uncorroborated evidence of these witnesses the magistrate proceeded to hold that they were telling the truth although there was in fact no corroboration or support.

Held:

(i) A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanour and the plausibility of his evidence. That "something more" must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness.

Phiri & Others v The People (3) applied.

(ii) In the circumstances of this case the evidence of the one suspect witness could not be corroborated by the evidence of the other suspect witness.

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Cases cited:

(1) *Machobane v The People*(1972) ZR 101.

(2) *Mwambona v The People*(1973) ZR 28.

(3) *Phiri (E) v The People* SCZ Judgment No. 1 of 1978.

Mrs FM Mumba, Acting Director of Legal Aid, for the appellant.
AHO Oder, State Advocate, for the respondent.

Judgment

Gardner JS: delivered the judgment of the court.

The appellant was convicted of stock theft, the particulars of the charge being that on a date unknown between the 16th and 17th March, 1976, at Mazabuka, he stole an ox valued at K80, the property of Phillip Hamilenga. At the hearing of the appeal the learned state advocate indicated that the State did not support the conviction and we allowed the appeal, quashed the conviction and set aside the sentence. We indicated that we would give our reasons later and we now give those reasons.

The prosecution evidence was to the effect that PW1, a cattle owner, secured his cattle in his kraal on the 16th of March, 1976, and the following morning he found one ox missing. Subsequently, on the 28th October, 1976, he found the ox in the possession of PW2, Davison Hangandu with a new brand mark on it. The ox was properly identified as belonging to the complainant and PW2 admitted to him that he had branded it with a new mark. PW2 said that he had purchased the ox from PW3, Messford Makunyuna, on the 5th of May, 1976, for K40.00.

PW3 said that in January, 1976, he had lent K50 to the appellant and, at the beginning of May, when he had asked for the return of the loan, the appellant had suggested that he should take instead an ox which had been given to him by his mother. He had accepted the ox in repayment of the loan and had sold it three days later to PW3 for K40. The witness said that when the ox was brought to him by the appellant he was staying with a friend, Benson Himalumba, PW4.

PW4 gave evidence that PW3 was his young brother who was staying with him. He said that the appellant came to his village in May, 1976, and talked to PW3 in his house. Then PW3 and the appellant went towards the witness's kraal and there the appellant showed them an ox which he said he had brought for PW3 because he had no money to pay him what he owed him. The witness identified the ox as having similar markings to the one stolen from the complainant.

The appellant gave evidence on oath and denied any knowledge of the ox and said he had no transaction involving either money or the ox with PW3.

The magistrate warned himself of the danger of convicting on the evidence of PW3 as being a witness with an interest of his own to serve, and also warned himself of the danger of convicting on the evidence of PW4, pointing out that he was the elder brother of PW3 and was likely

to have an interest of his own to serve or was likely to be a witness with some bias. The magistrate's finding in relation to these two witnesses was entirely correct. Having regard to the fact that PW3 was a witness who had in his possession the stolen ox before selling it to PW2, he was a witness with a possible interest of his own to serve within the meaning of *Machobane v The People* (1). So far as PW4 was concerned, because of his relationship to PW3, he was a witness with a possible bias whose evidence should be treated with caution and suspicion in accordance with *Mwambone v The People* (2) and, in addition, he had a possible interest of his own to serve because the alleged transaction between the appellant and PW3 took place at the witness's own home and the stolen ox was in his possession when it was kept on his property for three days. After warning himself about the dangers of convicting on the evidence of these two witnesses, the magistrate said:

"All I can say is that each witness was speaking what exactly happened, more so PW4 who was likely to be a witness with some bias. On looking at his evidence in total, I find that at the time accused went to his place he saw him and at the time accused had brought along with him an ox. I have no reason to disbelieve him and I find that his evidence in this case has not been in anyway bias [*sic*] and as such he too could not be said to be a witness with an interest to serve."

The magistrate then dealt with the evidence of PW3 again and said that he was a key witness and if he was a clear accomplice it was dangerous to convict on his uncorroborated evidence. Finally, the magistrate said of this witness:

"In reviewing this witness's evidence as a whole I find that he cannot be an accomplice at all."

The magistrate was right to warn himself that PW3 was a witness with a possible interest of his own to serve and therefore his evidence required corroboration, but thereafter he misdirected himself by failing to apply the proper test that should be applied after such a warning. A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or, as we put it in the case of *Phiri and Others v The People* (3), there must be something more than a belief in the truth of his evidence based simply on his demeanour and the plausibility of his evidence, and that "something more" must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness. In this case the only possible supporting evidence was that of PW4, about whom the magistrate also warned himself by saying that he was likely to be a witness with an interest of his own to serve or to be a witness with some bias and, in the circumstances of this case, the evidence of the one suspect witness could not be corroborated by the evidence of the other suspect witness.

The reasons for the magistrate's finding that PW3 and PW4 were not accomplices or witnesses with an interest of their own to serve are

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completely insupportable and contradict his earlier proper finding in this respect. In the circumstances there was a misdirection and this court could only uphold the conviction if there were evidence of such weight that any court would certainly have held that it excluded the dangers of 5 relying on the evidence of those two prosecution witnesses. There is no such evidence at all and the conviction cannot stand.

Conviction quashed