LUMANGWE WAKILABA v THE PEOPLE (1979) Z.R. 74 (S.C.)

SUPREME COURT
BARON, D.C.J., GARDNER AND BRUCE-LYLE, JJ.S.
28TH NOVEMBER, 1978 AND 9TH JANUARY, 1979
S.C.Z. JUDMENT NO. 4 OF 1979

Flynote

Evidence - Confession statement - Duty of court to inquire as to objection.

Evidence - Confession statement - Voluntariness to be determined by conducting trial within a trial notwithstanding that issue raised after close of prosecution case.

Headnote

The appellant was convicted of theft of a motor vehicle. The prosecution in its evidence tendered two confession statements and neither the appellant nor his counsel made any objection. The prosecution then closed its case. When giving evidence the appellant alleged that the statements were made involuntarily. The trial magistrate refused to conduct a trial within a trial on the ground that it was not possible since the prosecution had already closed its case. In convicting the appellant the trial magistrate relied on these statements and there was no other evidence to connect, the appellant with the offence.

Held:

(i) It is the duty of a court to inquire, where a point is reached at which a witness is about to depose as to the contents of a statement, whether the defence has any objection to that evidence being led;
Hamfuti, v The People (1), followed.

(ii) It was mandatory for the trial magistrate after the issue of voluntariness had been raised to conduct a trial within a trial notwithstanding that the prosecution had already closed its case.

Cases referred to:

(1) Hamfuti v The People (1972) Z.R. 240
(2) Kasuba v The People (1975) Z.R. 274.
(3) Tapisha v The People (1973) Z.R. 222.

For the appellant: In person.
For the respondents: Mrs M. Makhubalo, State Advocate.

Judgment

BRUCE-LYLE, J.S.: delivered the judgment of the court.

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The appellant was convicted of them of motor vehicle and he appealed against the conviction and sentence. On the 18th November,1978, we allowed the appeal against the conviction and ordered a re-trial and we now give our reasons for so doing.

Appellant was suspected of having been involved in the theft of a motor vehicle on the 15th December,1976, and was picked up by the police on the 19th April, 1977. Under warn and caution, the appellant admitted having stolen the vehicle with other friends. When that statement was tendered at the trial, the appellant did not object and it was admitted in evidence. When he was formally charged, warned and cautioned, he again admitted the offence and this statement was read at the trial without the learned trial magistrate ascertaining from the appellant whether or not he had any objection to the statement being read. When the appellant was put on his defence he made an unsworn statement from the dock in which he stated that he was beaten up and forced to admit the offence. Apart from the two confession statements, there was no other evidence connecting the appellant with the offence and the learned trial magistrate relied on these statements in convicting the appellant.

On the record it is shown that the appellant did not object to the first statement being tendered in evidence but there is nothing to show that it was explained to him as to why he was being asked whether or not he had any objection. In *Hamfuti v The People*(1), this court laid down the principle that whether or not an accused person is represented, a trial court should always, when the point is reached at which a witness is about to depose as to the contents of a statement, ask whether the defence has any objection to that evidence being led. The same principle was followed in *Kasuba v The People* (2). When an accused person is represented, his counsel would no doubt be aware of the implications involved in the question from the bench as to whether or not he has any objection to a statement being tendered in advance. When an accused person is not represented at his trial it is not sufficient simply to ask him whether or not he has any objection to a confession or an incriminating statement being tendered in evidence, but he should be asked in a language which he appears to understand if the statement was made freely and voluntarily and without threats or promises. By his subsequent unsworn statement from the dock, the appellant obviously had in mind to inform the court that he had been beaten into confessing to the offence, and no doubt if the necessary explanation had been made to him by the court he would have intimated the circumstances under which he made the alleged confession statements

Appellant in his unsworn statement from the dock stated that he was beaten up and forced to admit the charge. No trial within a trial was ordered and the learned trial magistrate gave the following reasons:

> "When the accused denied that he had made the statement to the police freely and voluntarily after the prosecution had closed its case, it was therefore not possible to have a trial within a trial."

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In the case of *Tapisha v The People* (3), we stated:

> "Where any question arises as to the voluntariness of a statement or any part of it, including the signature, then because voluntariness is, as a matter of law, a condition precedent to the admissibility of the statement, this issue must be decided as a preliminary one by means of a trial within a trial."

It was therefore mandatory that, a preliminary issue of voluntariness having been raised by the appellant, the learned trial magistrate should have conducted a trial within a trial notwithstanding that the issue was raised after the close of the prosecution case. A trial within a trial not having been conducted and the issue of voluntariness not having been resolved, the learned trial magistrate misdirected himself in having relied on the confession statements to convict.

There being no other evidence connecting the appellant with the offence we found the conviction unsafe, but we considered this a proper case in which to order a re-trial.

Re-trial ordered

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