MAKETO AND 7 OTHERS v THE PEOPLE (1979) Z.R. 23 (S.C.)

1. DONALD MAKETO
2. DONALD KNIFE
3. WILLARD MOFYA
4. CLAUDIOUS MAVUKA
5. ROBERT CHILANGWA
6. TRYWELL CHISI
7. SIMON CHUNGWA
8. ANDREW SAMPONGO

SUPREME COURT
SILUNGWE, C.J., GARDNER AND BRUCE-LYLE, JJ. S.
13TH JUNE, 1978 AND 16TH JANUARY, 1979
S.C.Z. JUDGMENT NO. 5 OF 1979

Flynote
Evidence - Confession statement - Confession by accused incriminating other co-accused jointly charged with him - Effect of.
Evidence - Confession - Uncorroborated confession - Whether conviction could be based on confession alone.
Criminal law and procedure - Parties to offences - Aiding and abbeting - Presence during commission of crime - Whether constitutes encouragement.

Headnote
The eight appellants all, police detectives were convicted of manslaughter. It was alleged that all of them jointly caused the death of Sailota Manda.

The appellants had all participated in interrogating the deceased but it was proved that not all had been present throughout the interrogation. The deceased was assaulted while in police custody and medical evidence established that he died of injuries consistent with having been caused by a blunt linear object such as a stick, hose pipe or strap. Al made a confession statement admitting the use of a hose pipe and incriminating all the other appellants. However the other appellants made non-incriminating statements.

The trial judge found Al guilty of the offence and held that the other appellants had aided and abetted Al.

On appeal the court considered the following issues: (1) Whether the incriminating confession statement made by Al could be evidence against the other appellants jointly charged with him; (2) Whether a conviction could be based on the uncorroborated confession statements alone; (3) Whether on the facts the appellants were aiders and abettors in the crime.

Held:
(i) An extra-curial confession made by one accused person incriminating other co-accused is

evidence against himself and not the other persons unless those other persons or any of them adopt the confession and make it their own.

(ii) A conviction can be based on a well-proved uncorroborated confession; Hamainda v The People (4), disapproved.

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(iii) In order to establish aiding and abetting on the ground of encouragement, it must be proved that the appellants intended to encourage and wilfully encouraged the crime committed. Mere presence at the scene of crime even though non-accidental does not *per se* amount to encouragement.

Cases referred to:

(1) R. v Baldry (1852) 2 Den Cr. 430.
(2) Banda v The People, CAZ Judgment No. 15 of 1968.
(3) Amishi Banda and Anor v The People, S.C.Z. Judgment No. 41 of 1970.
(4) Hamainda v The People (1972) Z.R. 310.
(5) R. v David George Clackson and Ors (1971) 55 Cr. App. R. 445.
(6) R. v Coney (1882) Q.B.D. 534.

For the appellants: N.M. Liswaniso, Liswaniso & Co.
For the respondent: R.G. Patel, State Advocate

Judgment

SILUNGWE, C.J.: delivered the judgment of the court.

The eight appellants - all police detectives were each convicted on one count of manslaughter, contrary to s. 199 of the Penal Code. The particulars of offence were that on 20th March 1976, at Luanshya, all the appellants, jointly and whilst acting together, unlawfully caused the death of Sailota Manda. Hereinafter the appellants will be referred to as A1, A2, A3 et cetera, and Sailota Manda as the deceased.

In the afternoon of 19th March 1976, A1 sent a message to the deceased at the latter's place of work, in which the deceased, a suspect, was asked to call at the Roan Antelope Police Station for the purpose of being interviewed in connection with a double murder case that had occurred on or about 26th August 1975, at Luanshya. The deceased went to the police station during the same afternoon as requested. When A1 saw the deceased he said he would interview him on the following day as he was already engaged on other duties. He then alerted the other seven appellants to be ready for the interview at 0800 hours on the following day. The deceased was not allowed to return to his home, indeed he was lodged in a police cell at the Roan Antelope Police Station. At 0800 hours on the following day, March the 20th, the interrogation of the deceased commenced; A1 being the Criminal Investigation Officer was at the head of the interrogation team. The interrogation lasted for some thirty to forty-five minute. When A1 and his colleagues realised they were making little or no headway in their effort to obtain information from the deceased, A1 decided to adjourn the interrogation to the following day, March the 21st. He then instructed A3 to convey the deceased back to the police cell; A3 duly complied with the order. At about 1400 hours on that day, the deceased was found dead in his cell. His body was later conveyed to the hospital where the

death was confirmed. A post-mortem examination was conducted by Dr Howell who gave the cause of death as being peripheral vascular failure or shook due to multiple

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injuries. The injuries sustained by the deceased were concealed by the clothes that he was wearing. These injuries were mainly confined to the trunk of the body and consisted of linear abrasions to the chest, thighs and legs. In the doctor's opinion the injuries were consistent with having been caused by a blunt linear object such as a stick, a hose pipe or a strap. The doctor denied in cross-examination a suggestion that the deceased could have sustained these injuries as a result of a fall since fall could have caused circular injuries rather than linear ones, he also denied a suggestion that death could have been due to the deceased's heart condition on the ground that a microscopic examination of the heart had revealed nothing abnormal.

Shortly after the deceased's death senior police officers mounted investigations into the matter which resulted in the arrest of all the eight appellants. Under warn and caution all of them made statements to the police. A1's statement, a confession, was disputed by him at his trial on the ground that he had made it under duress and that it was therefore an involuntary confession. After a trial within a trial had been held the trial court ruled that the confession had been made freely and voluntarily and that it was therefore admissible. The statements by the other seven appellants not being confession statements were not disputed by them and were received in evidence. Apart from the confession statement of A1 there was nothing in the prosecution evidence that directly implicated the other seven appellants. We shall return to A1's statement.

After the deceased had been lodged in the cell on the 20th and before his death, he was seen alive on two occasions, the last of these being about 12 noon and on both occasions he is said to have made no complaints.

We find it convenient to deal first with the appeal by A1, the leader of the interrogation team. When he gave evidence in his own defence, he denied that any member of his team including himself, had subjected the deceased to any form of violence. Prior to this he had made a confession to his immediate superior, Superintendent Mweemba, the officer in charge of CID in Luanshya, in the presence of Assistant Commissioner Zimba. As previously stated the confession was challenged at the trial on the ground that it had been induced by duress and threats of dismissal if A1 did not confess. These allegations were levelled particularly against Assistant Commissioner Zimba. After holding a trial within the trial the learned judge found as a fact that A1 had not been subjected to any form of duress or threats as alleged by him. The question here was simply one of credibility; he accepted the evidence of the two police witnesses and rejected that of A1. He found that the confession had been made freely and voluntarily, and so admitted it in evidence. Learned counsel did not contend, and indeed there would be no basis for saying, that the trial court had erred in admitting that confession, there being no improprieties attaching to it. In A1's statement it was averred that the deceased had been a complainant in a robbery case that had occurred in August 1975. Following upon the robbery the deceased had apparently been rendered unconscious and taken to a hospital. On the day of the

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robbery a report was received pertaining to the death of a female and her child. A1 took charge of investigations into that double murder case. A brass ring belonging to the deceased was found at the scene of the murder, and it transpired that the dead female had been the deceased's girlfriend. When later the deceased recovered consciousness, A1 went back to the hospital in order to interview him, but the interview could not materialise as he was still in a state of confusion. Two further fruitless attempts were made thereafter.

A1's statement continued as follows:

> "On the 10th of March 1976, I issued a notice to employers asking Mr Sailota Manda to report at Roan Police Station on the 19th March 1976 and on the 19th March 1976 at about 1600 hours he reported. The reason why I had not called or seen Manda for some time was that all this time he seemed not to be normal, so this last time when I called him, he seemed to be normal so as to stand police interrogation. On this day when he reported he found that we were engaged on some other duties, and we could not question him, so I ordered his detention for further questioning on charges of murder.
> On the 20th March, 1976 at 0800 hours I got the suspect out of police cells and took him into CID offices for interrogation. I Think when this man was brought into the office we were about 4 or 5. We started questioning the suspect and meanwhile doing so some other CID officers were arriving at intervals until all eight of us were present. At the time of questioning him at times we used to slap him with open palms; at times we used a hose pipe small in size. During this interrogation he at times could admit that he had beaten the deceased woman because she had beaten him first, and when you questioned him for the second time, you find that he changes his story, denying having beaten the woman, then at this stage I decided to put him back into the cells."

It is banal that an extra-curial confession made by one accused person which also incriminates other persons, whether jointly charged with him or not, is evidence only against himself and not the other persons unless those other persons (or any of them) adopt the confession and so make it their own. In the present case none of A1's co-accused ever adopted the confession; in point of fact they made their own non-incriminating statements.

From the confession statement of A1 it emerges that not only was the deceased slapped but he was also hit with a small hose pipe. The use of a hose pipe is consistent with the medical evidence as to the cause of the linear injuries sustained by the deceased on that fatal day. A1 made a clean breast of his part in the matter.

Discussing the effect of a confession statement Erie, J., said in *R. v Baldry*(1):

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> "I am of the opinion that when a confession is well proved, it is the best evidance that can be produced."

This view was confirmed by this court in *Banda v The People* (2), and more recently in *Amish*

Banda and Anor v The People (3).

In Banda v The People (2), we had occasion to observe that:

"It is possible and proper in a proper case to convict on an uncorroborated confession."

In the light of this we are bound to say that *Hamainda v The People* (4), a High Court decision, was wrongly decided.

Having considered what weight, if any, there was to be placed on A1's confession, the learned trial judge came to the conclusion that it was trustworthy. We are unable to say that the learned judge erred by arriving at such a conclusion.

It was submitted by learned counsel for the appellants that after the interrogation the deceased was seen by two prosecution witnesses when he was brought back to the cells and he appeared to look a little tired but other than that there seemed to be nothing wrong with him. Furthermore, counsel pointed out that when the same two police officers made routine visits to the cell at approximately 1000 hours and later 1200 hours they observed that, in their words, the deceased was "alright" and he made no complaints to them about his state of health; that during the period from approximately 0930 hours until 1200 hours three other police officers had access to the deceased, two of whom were the witnesses who said he appeared to be "alright" whilst he was in the cell, and one of whom was not even called as a witness by the prosecution.

There was also an absence of evidence from the doctor as to whether it was medically possible for a person to be beaten at 0800 hours in the morning and to appear to be all right for the next four hours ultimately to die from the beating at 1400 hours.

For these reasons it was argued that, between the time of the interrogation and the death, any one of the three police officers could have been responsible for inflicting the injuries which in fact caused the death.

The learned trial judge dealt with the first part of this argument by pointing out that no one other than the appellants had an interest in interrogating the deceased, and we would agree that, from the inception of the case months before, A1 was the one man who persistently made endeavours to interrogate the deceased, and there is no evidence that anyone else other than he and his interrogating team would have reason to intervene at some later stage and inflict further wounds which would have caused the death. It is of course possible for the three police officers in the inquiry office to have assaulted the deceased but, as we have pointed out, they had no motive for so doing and had they done so they also would have, had to act in concert in order to cover up each other's behaviour. The medical evidence in this case confirmed that the injuries from which the deceased died were consistent with his having been hit

with a blunt linear object such as a stick, a hose pipe or a strap. Al's confession statement confirmed that during the interrogation the decease was beaten with a hose pipe. If there were to be any

suggestion that it was impossible for the deceased to appear to be all right for four hours after the initial beating and to die later without some fresh assault, it was for the defence to raise this in cross-examination of the expert witness. The evidence led before the court was that the deceased died from injuries consistent with the assault admitted by A1. In the face of this evidence it would be unrealistic to consider other possibilities about which there is no evidence. As regards A1, therefore, the learned trial judge properly returned the verdict of guilt.

It now remains for us to consider the appeals by A2 to A8. The success or otherwise of these appeals very much depends upon whether each one of the appellants cannot, or can, be said to be caught by the provisions of s. 21 (1) of the Penal Code, which read as follows:

> "21. (1) When an offence is committed, each of the following persons is deemed to have taken part in communising the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
> (c) every person who aids or abets another person in committing the offence;
> (d) any person who counsels or procures any other person to commit the offence."

All the appellants, including A1, admitted in their evidence and in their written statements that they had participated in the interrogation of the deceased on the morning of 20th March, 1976, by suggesting questions or whispering the same to A1.

It is common ground that not all the seven appellants (A2 to A8) were present throughout the period of some thirty to forty-five minutes during which the deceased was being interrogated; the appellants not so present were A2, A4, A7 and A8.

A2's evidence was that when he arrived at the CID office, he found the deceased lying on the door crying and pleading' saying "please leave me; I am not the one who killed the person". He saw no one beat the deceased in the office. For a while he left the once to go and buy newspapers, and on his return to the office the interrogation was halted so that the officers could read the papers. At the point of his return he found the deceased sitting on a bench looking tired and sad.

Like A2, A4 was not present during the whole of the time during which the deceased was interrogated.

A7 who had entered the office when the interrogation was already in progress found the deceased seated on the floor appearing to be weak. He did not know why the deceased looked weak.

A8 said he had accompanied A7 to the CID office and found the deceased seated on the floor and looking weak. Like A7, he too did not know why the deceased was in that state.

As A2, A4, A7 and A8 were not present throughout the interrogation of the deceased it would not be competent to draw an inference that they were present when the deceased was hit with the hose pipe since this would not be the only inference reasonably possible. The prosecution, therefore, failed to prove beyond reasonable doubt the case against any of these appellants. Their appeals against conviction would succeed on this ground alone.

We must now turn to the appeals by A3, A5 and A6 who were present during the whole of the period that the deceased was interrogated.

Learned counsel submitted on behalf of A2 to A8 that the learned trial judge had misdirected himself when he found that these appellants had aided and abetted A1. He argued that for the appellants to be convicted on the basis of aiding and abetting they must have been found to have gathered for a common purpose, namely, to assault the deceased but that there was no such evidence. In any event, he contended, apart from these officers being junior to A1, there was no evidence to prove that they had in any way encouraged A1 to assault the deceased, as mere presence was not enough.

We agree that no evidence existed as against A2-A8 to prove that theirs were not mere presence at the scene of the crime; it would be difficult to argue, on the facts, (ignoring for this purpose, A1's confession as one ought to) that there was physical participation or even verbal encouragement on the part of these appellants. It cannot be said that mere presence unexplained is evidence of encouragement and so of guilt. In *R. v David George Clackson and Ors* (5) the Court - Martial Appeal Court in England held that in order to establish aiding and abetting on the ground of encouragement it must be proved that the deceased intended to encourage, and wilfully encouraged the crime committed. Mere continued voluntary presence at the scene of the commission of a crime, even though non-accidental, does not per se amount to encouragement.

And in *R v Coney* (6) Hawkins, J., said at p. 557:

> "In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the

> latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power to do so, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not."

It can hardly be said that A2 to A8 were voluntarily present witnessing the commission of the crime on the basis that their presence had flown from a lawful order issued to them by A1, their superior.

On a review of authorities, for which we are indebted to learned counsel for the appellants, this court has to decide whether there was any evidence on which it could properly be said that there was a unity of purpose and action on the part of all the appellants, including A1, to subject the deceased to violence. We are satisfied that there was no cogent evidence on which a court would properly convict A2 to A8. The appeals by A3, 5 and 6 as well as those by A2, 4, 7 and 8 are allowed. The conviction of each one of them is quashed and the sentence set aside.

It follows therefore that A1's appeal against conviction is dismissed.

As to sentence, the appellant was sentenced to twelve months' imprisonment with hard labour suspended for three years plus K200 fine. This is an effective sentence of a fine only, and we must say at once that in a case of manslaughter of this nature, where citizens of the Republic are assaulted whilst interrogated by the police, the imposition of a fine is totally inadequate. However, after the lapse of time which has expired since his sentence it would be unfair to the appellant to impose the effective prison sentence which he so obviously deserves. For this reason only we do not intend to increase the sentence and the sentence imposed by the learned trial judge will stand.

Appeal of A1 dismissed
Appeals of A2-A8 allowed
