CHARLES OGBONNIA NWUME v THE PEOPLE (1980) Z.R. 189 (S.C.)

SUPREME COURT
GARDNER, AG.D.C.J., BRUCE-LYLE, J.S. AND MUWO, AG. J.S.
25TH MARCH AND 22ND APRIL, 1980
S.C.Z. JUDGMENT NO. 9 OF 1980

Flynote
Evidence - Handwriting - Appeal court - Consideration of evidence by.
Evidence - Appeal - Questions inferred from facts - Duty of appellate court.

Headnote
The appellant was convicted on two counts of conspiracy to steal certain sums of money. The only document having any bearing on the issue was exhibit P23. The Supreme Court indicated their view as to the dissimilarity in the handwriting with that of the appellant.

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Held:
(i) Where a question is purely one of inference from facts about which there is clearly no dispute (such as the documents in this case) this court has both the right and the duty to substitute its own views for those of the trial judge.
(ii) Accordingly the members of this court have examined the two specimens of handwriting and are of the view that it is impossible to say beyond reasonable doubt that both specimen were written by the same hand.

Cases referred to :
(1) D. P. P. v Kilbourne,[1973] 1 All E.R. 440.
(2) Wasa-munu v The People (1978) Z.R. 143.

For the appellant: M. A. A. Yousuf, Yousuf & Yousuf.
For the respondent: S. Ponnambalam, Senior State Advocate.

Judgment
GARDNER, AG.D.C.J.: delivered the judgment of the court.

The appellant with a co-accused was charged before the Resident Magistrate of Lusaka on two counts of conspiracy to commit a felony. The particulars of the counts were respectively that in January and February, 1977 and in June, 1977, the appellant and his co-accused conspired to steal the sums of K116,858 and K121,768 from the National Milling Company. At the same time the co-accused was charged on two further counts of theft by an officer of the company of the amounts referred to. The trial magistrate in his judgment decided that the defendants could not be changed in

the same indictment with the offence of conspiracy end with the actual offence to which the conspiracy related. He therefore acquitted both defendants of the conspiracy charges, and amended the charges of theft by public officers to include the name of the appellant together with his co-accused and convicted them both on those counts.

Both defendants appealed to the High Court which was presided over by two judges. The High Court held that in view of the fact that the third and fourth counts relating to theft were not defective they could not be amended to include the appellant as one of the accused. Accordingly the appellate judges allowed the appeal of the appellant against his conviction on the third and fourth counts relating to theft. At the same appeal the Director of Public Prosecutions appealed against the acquittals of the defendants on counts one and two relating to conspiracy, and the appellate judges allowed the appeal by the Director of Public Prosecutions and convicted both defendants on those counts.

One of the principal witnesses against the defendants was PW4, an accountant named Mohammed Came who, quite clearly, took an active part in stealing the money from the company, and the magistrate properly warned himself that this witness was an accomplice whose evidence required corroboration. The appellate judges went further and said:

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> "After careful scrutiny of Came's evidence both in chief and cross-examination we find that his evidence has been thoroughly discredited and he emerges as a most unsatisfactory and disreputable witness."

And later -

> "Thus for the foregoing reasons we would hold that Came was not a credible witness. In the circumstances it would be most unsafe to rely on his evidence insofar as it incriminates the appellants. In the result we feel that in the exercise of our discretion it would be highly unsafe to accept the evidence of Mohammed Ceario Came as a witness of truth in the absence of any corroborative evidence."

It was for this reason that the appellate judges acquitted the co-accused on counts three and four relating to theft.

Earlier in their judgment the learned appellate judges referred to the case of *D.P.P. v Kilbourne* (1), and quoted the following words of Lord Hailsham in that case at p. 452:

> "Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible a witness's testimony should be rejected and the accused acquitted even if there could be evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony fails of its own inanition the question of his needing or being capable of giving corroboration does not arise."

For this reason the learned appellate judges decided that the evidence of PW4 was incapable of corroboration, and looked for completely independent evidence to support the conviction of the appellant on the conspiracy charges. They relied on the evidence of PW1, an officer of the Milling Company who said he had been asked by the appellant to enquire into a complaint that certain moneys which were the subjet of the second count of conspiracy had not been paid to the company of which PW4 was an accountant, and later made an enquiry as to whether the money had in fact been paid. As was pointed out by Mr Yousuf on behalf of the appellant, this witness in cross-examination specifically said:

> "I do not seek clarification because these things came through accused 2 (the appellant), the Group Accountant. I asked him to approve the payments but he feared. I did not ask accused 2 why he never approved the payments because accused 2 never puts anything in writing."

Reliance was also found in the evidence of PW2, another officer of the company, who said that PW1 had informed him that the appellant and his co-accused had authorised the payments. As was rightly pointed out by Mr Yousuf, this evidence was hearsay and should not have been admitted. Further reliance was allegedly found in the evidence of PW3, another officer of the company, but his evidence amounted to no more than that payments had been made, and did not implicate the appellant at all. The learned appellate judges relied on the evidence of PW5, an

employee of another company, who referred to a collection of K7,000 which could have been related to the offences. It was suggested that his evidence indicated that the appellant collected this money, but an examination of the evidence indicates that this witness could say no more than that he had seen the appellant in the office of his company. He was unable to testify that the appellant collected the money. The learned appellate judges also relied on the evidence of PWs11 and 12 who gave evidence of preparing cheques and making payments but their evidence did not in any way implicate the appellant. We have no hesitation in finding that none of this evidence could be relied upon to support a conviction of the appellant on the charges of conspiracy.

The most vital evidence which could possibly support a conviction of the appellant was contained in a piece of paper (exhibit P23) on which were written some handwritten notes in pencil giving details of the payments which were the subject of one of the counts of conspiracy. It was alleged that this piece of paper had been found in the office of PW4, the discredited witness, by an investigating officer during the course of the trial three months after the offices of PW4 had been originally searched and a number of other documents taken from them. PW8, a former secretary of the appellant, gave evidence that she was familiar with the handwriting of the appellant, and, in evidence in chief, she said that the handwriting on the pencil written note (exhibit P23) was that of the appellant, and she was quite sure about this. In cross-examination she amended this evidence to say that the handwriting was similar to that of the appellant and she wished to withdraw the word "certain" from her evidence in chief. In further cross-examination she said she was not prepared to swear that the handwriting was that of the appellant, and at one stage she said:

> "I was told that I should come to court to testify that this is accused 2's handwriting."

PW16, a handwriting expert, gave evidence that he had compared the writing on exhibit P23 with that of the appellant which appeared at the head of a document which was a statement given to the Police by the appellant. He had prepared enlarged photographic specimens to indicate to the court that there were nine points of similarity in the handwriting. In cross-examination it transpired that he had first been called upon to examine the handwriting on the morning of the day on which he gave evidence and certain dissimilarities in the handwriting were pointed out to him. He maintained that such dissimilarities did not affect his opinion. He said that in his opinion the handwriting on both documents were written by the same person. The trial magistrate properly advised himself that it was his duty to consider the comparison of the handwriting in the light of the evidence of the handwriting expert, and he found as a fact that exhibit P23 had been written by the appellant.

Mr Ponnambalam, Senior State Advocate on behalf of the State, indicated, in accordance with the principles to which Baron, D.C.J., referred in the case of *Wasa-munu v The People* (2), that where a question

is purely one of inference from facts about which there is clearly no dispute (such as the documents in this case) this court has both the right and the duty to substitute its own news for those of the trial judge. Accordingly the members of this court have examined the two specimens of handwriting and are of the view that it is impossible to say beyond reasonable doubt that both specimens were written by the same hand. We also agree with Mr Yousuf's submission that the evidence of PW8, the former secretary of the appellant, should at least have raised a doubt in the mind of the trial court, and it was unsafe to rely on her evidence.

A further ground of appeal raised on behalf of the appellant was that when ten documents were produced at the trial, including the disputed exhibit P23, the defence applied for an adjournment which application was refused by the trial magistrate. It was argued that this resulted in an unfair trial. On appeal to the High Court the learned appellate judges had this to say about this ground of appeal:

> "We find that there was justification for the complaints by counsel for the appellants but we are of the view that the complaints were more directed to the specific offences in counts 3 and 4. Had we not reached the view as we did about those counts we would have upheld this ground of appeal in relation to counts 3 and 4 as well since we are of the view that the applications were reasonable and their refusal prejudicial to the appellants. However, the validity of these complaints do not apply to the conspiracy counts 1 and 2. "

The only document having any bearing on the issue before this court is exhibit P23 which was itself used by the learned appellate judges to support the conviction of the appellant on the conspiracy counts one and two. We cannot agree therefore with the last sentence of the quotation we have just cited that what were found to be valid complaints on behalf of the defence did not apply to the conspiracy counts in respect of which the appellant is now appealing.

Mr Ponnambalam, on behalf of the State, argued that the evidence of PW1 supported the evidence of PW4, but we have already pointed out that, in cross-examination, PW1 specifically said that the appellant did not approve the payments which are the subject of the charges. He also argued that if exhibit P23, which was found in the possession of PW4, was in the handwriting of the appellant it supports the charge of the conspiracy. We have already indicated our own view as to the dissimilarity in the handwriting. In any event we would hesitate to accept that the document in itself could be sufficient proof of a conspiracy between the appellant and his co-accused. Finally Mr Ponnambalam argued that the production of documents in criminal cases does not entitle the defence to an adjournment to examine them and that the funding by the appellate judges that the failure to grant an adjournment was unfair could not be supported. We agree that the production of documents does not give an automatic entitlement to an adjournment; but each case must be viewed on its own merits. This case was one of some complexity and we see no reason to interfere with the finding of

the learned appellate judges that in the circumstances of this case the failure to grant an adjournment was prejudicial to the defendants.

We are satisfied that the evidence of the witnesses referred to by the learned appellate judges is insufficient to support a conviction of the appellant and we agree that the conduct of the trial magistrate in failing to grant an adjournment was prejudicial to the defence. We disagree with the finding that the prejudice did not affect the conspiracy charges. For these reasons it would be unsafe to allow this connviction to stand.

The appeal is allowed, the conviction is quashed, and the sentence set aside.
Appeal allowed
