PATRICK KUNDA AND ROBERTSON MULEBA CHISENGA v THE PEOPLE (1980) Z.R. 105 (S.C.)

SUPREME COURT
11TH SEPTEMBER, 1979 AND 15TH JULY, 1980
GARDNER, AG. D.C.J., BRUCE-LYLE, JS. AND CULLINAN, AG. J.S.
S.C.Z. JUDGMENT NO. 18 OF 1980

Flynote
Evidence - Trial within a trial - Inadequacy of ruling - Effect of.

Headnote
In a trial within a trial held to determine whether to admit statements allegedly made by the appellants, the learned commissioner ruled that he did not believe the appellants without setting out in detail the reasons for his ruling. He admitted the statements in evidence.

Held:
(i) The result of such brevity is that there is no judgment on the trial within the trial and the appellants are deprived of their opportunity to appeal against it.
(ii) It would be unsafe to allow the admission of statements to stand, the appeal would be dealt with on the basis that the statements have been excluded.

Case referred to :
(1) Banda (K.) v The People (1977) Z.R. 169.

For the appellants: G.M. Sheikh, Senior legal Aid Counsel.
For the respondent: R.E.M. Mwape, Senior State Advocate.

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

The appellants were convicted of murder and aggravated robbery, the particulars of the charges being that they, together with two others, on the 23rd January, 1978, at Ndola murdered Hansaben Raojibhai Patel, and stole household articles and cash to the value of K1,939.95.

Two other men were charged with the same offences at the same time and were acquitted.

The prosecution evidence was to the effect that on the 23rd January, 1978, at 14 Feira Street, Ndola, the owner of the house, PW1, left for work at 0700 hours, and, after hearing news of an attack on

his wife, returned to his house at 0900 hours where he found that his wife had been strangled and a number of household articles and K120 cash had been stolen. On the 24th January the first appellant, who was the first accused at the trial, together with the fourth accused were found by the Police at a house in Chipulukusu compound, and the third accused was found in another house nearby. In the house in which the first appellant was found there was a gin bottle under the table. The bottle contained paraffin and was identified by PW1 as being of a similar brand to one which had been stolen from his house and which he had kept in a bedside drawer. On the 26th January, 1978, the second appellant was found in a house near Kafubu dam, and when arrested he was found wearing a pair of shoes which PW1 purported to identify as having been stolen from his house. When questioned about these shoes the second appellant said they had been given to him by one John Kunda. The second accused was identified by PW1 as having been his house servant.

PW7 gave evidence that at 1300 hours on the 23rd January he found the second appellant and third accused in his house, and he identified the gin bottle with paraffin in it as having been brought to his house by the first appellant. When he said that he did not see anyone drinking from the bottle, application was made to treat him as a hostile witness. The application was granted and thereafter he was so treated. PW8 was also treated as a hostile witness, and he said that on the 23rd January the second appellant came with another person to his house in Zambia Compound and said that he wanted to stay with him for two days because he was on leave. He denied having told the Police that the second appellant stayed with him because an Indian woman had been killed by the second appellant's friends.

Apart from the police witnesses the only other witnesses to give direct evidence concerning the possible implication of the appellants were PW13 and the third and fourth accused. PW13, who was the girlfriend of the fourth accused, said that she was with the fourth accused, in a house which he shared with the first appellant, on the 23rd January, when the first and second appellants came to the house at approximately 1200 hours. They then started drinking gin and she shared in the drinking.
In her evidence she said:

> "The first appellant said he got the gin from an Indian. He further said he had killed an Indian. He did not elaborate."

This evidence was challenged in cross-examination and the witness repeated her assertions.

Both accused Nos 3 and 4 gave evidence in their defence that on the day of the robbery at approximately noon the first and second appellants came to the house where they were with PW13 and produced a bottle of

gin which they shared in drinking. Neither of them heard the first appellant's statement to PW13 to the effect that he had stolen the gin from an Indian whom he had killed, but there was evidence that they were not all together in the same house at the same time. The bottle of gin was identified as being similar to the one found in the first appellant's room. The prosecution led evidence that each

of the appellants had made confession statements. The admission of the statements was objected to on the grounds that both appellants alleged that they had been beaten by the Police, and a trial within a trial was held. Both appellants gave evidence that they had been beaten, and the first appellant said that he had been buried in a hole in the ground with soil up to his neck. Both complained also that they had been starved, in that they had nothing to eat during the whole of the 25th January until their statements were taken; in the case of the first appellant at 0855 hours on the 26th January and in the case of the second appellant at 1200 hours on the 26th January. The two Police witnesses who gave evidence at the trial within the trial said that prisoners were normally fed, but they were unable to say personally whether or not the appellants had been fed. After the trial within the trial the learned trial commissioner gave a very short ruling in which he said that he was satisfied beyond reasonable doubt that the appellants made voluntary statements, and the reasons for his decision would appear later. In his judgment the learned commissioner said:

> "On the accused confessions I ruled that the accused spoke voluntarily. I do not believe the stories that day were beaten up and starved by the police. On the contrary I was impressed with the police evidence."

And later:

> "I have considered whether the confessions should be excluded in exercise of my discretion. However, I find there are no grounds upon which to exclude the confessions. I have ruled that the accused were not beaten up and there is no other impropriety against the police."

Mr Sheikh, on behalf of the appellants, has argued that the ruling on the admissibility of the statements was inadequate to deal with the question of duress, and that the delay between the 24th January and the 26th when the statements were taken, and the deprivation of food should have been taken into consideration by the learned trial Commissioner in considering the exercise of his discretion.

The learned Senior State Advocate Mr Mwape did not strongly oppose this argument, and the appeal was dealt with by both counsel on the basis that the statements should be excluded and the other evidence should be looked at to consider whether it was sufficient to support the conviction. We are bound to say that the learned trial commissioner did not deal with the detailed allegations which arose during the trial within the trial as fully as would have been desirable. In our view it was not sufficient for the learned commissioner to say that he did not believe the appellants, and his reasoning should have been set out in sufficient detail to enable this court to know what was in his mind when he made

his ruling. The result of such brevity is in effect that there is no judgment on the trial within the trial and the appellants are deprived of their opportunity to appeal against it. We find that it would be unsafe to allow the admission of the statements to stand, and this appeal must be dealt with on the basis than the statements have been excluded.

PW11, a police investigating officer, gave evidence that on the 26th January he went to a house in Chipulukusu Compound where he said he collected the first appellant and the fourth accused and PW13 and, after being directed to a house nearby, he collected the third accused.

On the 27th January he warned and cautioned the first appellant and, as a result of what the first appellant told him, he was led back to the first appellant's house. He went on to say:

> "He led me back to his home and he showed me a bottle of gin which he said he had stolen from house No. 14 Feira Road. The bottle was under the table in the house. He pointed out the bottle. This is the bottle ID. 1. The bottle contained paraffin.... the accused said: 'This is the bottle of beer we stole from house No. 14'."

(This court has noted that this is not the only occasion on which witnesses have referred to the contents of the gin bottle as having been "beer". It is apparent from the context and explanations given in other parts of the recorded evidence that the word "beer" was intended to relate to some form of alcohol. PW11 then gave evidence that he was led by the first appellant to the house where the robbery had been committed and was shown by the first appellant the different roads which had been used when going to the house. The evidence of this witness that the first appellant had pointed out the gin bottle and had indicated that it had been stolen from house No.14 Feira Road, and the evidence that the first appellant had led the witness to the house where the offence had been committed was not challenged in cross-examination, nor was the statement of PW11 that he had warned and cautioned the first appellant before the first appellant indicated the bottle of gin and the house where the offence was committed. However, in his evidence on oath when called upon to make his defence the first appellant denied that he had directed PW11 to the scene of the crime. He also maintained that the gin bottle had been in his possession since May, 1977, and he used it for keeping paraffin. In the trial within a trial the first appellant maintained that he had been arrested at his house on the 24th January, and it was then that the beating had started which eventually made him sign a confession statement which was not true. He maintained that on the 25th January he was again beaten and buried in a hole up to his neck, and after mid-day he was taken to his house where the gin bottle was found. Thereafter he was taken to the scene of the crime before being returned to the Police station where he spent the night in the cells prior to the taking of his statement after further beating on the 26th January.

We now have to consider the arguments put forward by Mr Sheikh that the remainder of the evidence is insufficient to support the conviction. Our attention has been drawn the fact that there was no evidence that any tests were made for fingerprints, and in this respect there was evidence

that the bottle of gin had been taken from a bedside drawer, in which event there is at least the possibility that the surface would have been receptive of fingerprints. In this connection we would refer to the case of *Banda (K) v The People* (1), in which we said that, where there is a dereliction of duty by the Police in failing to test for fingerprints, there is a presumption, which can be displaced, that the accused did not handle the article in question. This proposition however depends upon whether the Police were in dereliction of their duty. If the surface of the article is one which is

smooth and obviously receptive of fingerprint traces, there is quite clearly a duty on the part of the Police to test such a surface, but, if the surface is rough or has been affected in some way, for instance by the elements, to the extent that fingerprints would not be expected, there would be no dereliction of duty. In this case there was no cross-examination of the Police as to the surface of the bedside drawer, and in fact there was no cross-examination as to whether they looked for fingerprints and found none which was helpful to the prosecution case. In the result there was no evidence of dereliction of duty on the part of the Police, and the presumption in favour of the appellants does not arise. In any event, the second appellant having been a house servant in the house, the presence of his prints would have proved nothing relating to him either way. The next argument put forward on behalf of the appellants was that the only evidence against the appellants was their recent possession of allegedly stolen articles, that is the bottle of gin and a pair of shoes. In this connection Mr Sheikh argued that in respect of the third accused, who was also seen drinking from the bottle of gin, the trial court found that there was insufficient evidence to convict him because it was impossible to prove that the bottle was identical to the one stolen from PW1's house. The only bottle found on the day after the murder was found to contain some paraffin, and this was insufficient to connect the first appellant with the murder. The only damaging evidence against the first appellant, it was argued, was the report by PW13 that the first appellant had said that he had killed an Indian. Mr Sheikh pointed out that this witness had been arrested and kept in custody for two days, and that she herself therefore had an interest of her own to serve, about which the learned commissioner had given himself no warning at all. With regard to the second appellant, who was found with a pair of shoes which were purportedly identified by PW1 as belonging to his son, it was pointed out that the identification of the shoes was most unsatisfactory, in that PW1 when giving his evidence in chief said:

> "I remember the wear marks on the shoes and the left shoe was very unusually worn out and a week before I told my child that he needed another pair of shoes because they were worn out. I see the buckles but I cannot remember whether my son's shoes had buckles."

In cross-examination the witness said:

> "The shoes have buckles and that makes them unusual. I did not mention the buckles when I was describing the shoes. I now remember the shoes had buckles and I remembered so when I saw them in court. I am not mistaken about the identity of the shoes."

When the second appellant was first asked about the shoes he said he had been given them by a man called John Kunda. In dealing with the recent possession of the shoes the learned trial commissioner, in his judgment, said:

> "I am satisfied that PW1 properly identified the shoes. He is the one who bought them and had been seeing them almost daily as they were being used by his son. Although he did not mention in examination in chief that they had buckles nevertheless I am satisfied that he was not mistaken as to the shoes' identity. In any event the accused has not said anything about the shoes except that he told Constable Bweupe that the shoes were given him by John

Kunda. If this was so he would have repeated this to the court."

The learned commissioner omitted to recall PW1's first comment in evidence -

"I see the buckles but I cannot remember whether my son's shoes had buckles."

Although the witness said in cross-examination that he now remembered the shoes had buckles, his earlier remark must have weakened his identification of the shoes. In considering the question of the recent possession of the shoes the learned commissioner had a duty to consider whether or not the explanation given by the appellant could reasonably be true. His dismissal of the possibility of truth, by saying that, if the appellant had obtained the shoes from John Kunda, he would have repeated this in court completely ignores the fact that the second appellant elected to remain silent and said nothing in court. In our view, even had this not been so, the learned commissioner failed to approach the question of recent possession correctly and his rejection of the appellant's explanation was a misdirection. Without the confession statement there is no evidence upon which this court could exercise the proviso to s. 15 (1) of the Supreme Court Act.

The appeal of the second appellant is allowed, the conviction is quashed, and the sentence is set aside.

The evidence against the first appellant is his possession of a bottle of gin similar to the one stolen from the scene of the crime; his pointing out to the Police investigating officer a bottle of gin found under a table in his house with an explanation that this was the bottle stolen from the scene of the crime; his leading of the same Police officer to the scene of the crime; and his statement to PW13 that he had stolen the gin from an Indian whom he had killed. As we have indicated the confession statement should be excluded on the grounds that the ruling by the learned trial commissioner was inadequate. It is well established law that if evidence is found as a result of an inadmissible statement the evidence as to the finding thereof is itself not inadmissible. However, in this case the Police investigating officer, who gave evidence that the first appellant made damaging admissions by indicating the gin bottle and saying that it was

stolen and by leading the investigating officer to the scene of the crime, said that these admissions were made on the 26th January. In the trial within a trial the first appellant said that in fact he was arrested on the 24th January when he was beaten, and that the gin bottle was found on the 25th January after he had been further beaten and buried up to his neck in the ground, and that the Police themselves had led him to the scene of the crime. There is therefore a conflict of evidence between the first appellant and PW11, the investigating officer. At no time in his Judgment did the learned trial commissioner resolve this conflict of evidence, and, as we have already said, the ruling on the trial within the trial, which gave rise to part of such conflict, was inadequate. The evidence of leading the Police to the scene of the crime was not "real" evidence in the sense that it was physical evidence which would not be before the court had it not been discovered as a result of the appellant's pointing it out to the Police. The words alleged to have been used by the appellant on each occasion were as suspect as the confession statement, and evidence of those words should be excluded for the same reason. The physical production of a commonplace gin bottle containing

paraffin is not "real" evidence once the words alleged to have been used by the appellant at the time of the discovery of the bottle are excluded. The only evidence, which might have assisted the trial court in deciding the credibility of the witnesses, related to the possession of a bottle containing gin on the 24th January. The evidence in this respect was that of PW13 and the third and fourth accused. As Mr Sheikh pointed out, PW13 was herself detained in cells for two days and she was living with the fourth accused.It was argued that in these circumstances all three were witnesses with possible interests of their own to serve, and the learned trial commissioner did not make a finding as to this possible interest, nor was there any support for their evidence. We agree with Mr Sheikh that the learned trial commissioner should have directed his mind to the question of whether PW13 and the third and fourth accused had possible interests of their own to serve, and on the facts of this case we are of the view that he should have found that they had such possible interests. In the result therefore we find that the learned commissioner misdirected himself and we have to consider whether there was such overwhelming evidence in support of the suspect evidence that any court :must have convicted in any event. The learned trial commissioner found that there was overwhelming evidence that the bottle found in the first appellant's possession had recently contained gin. This evidence was, however, the evidence of the suspect persons themselves and therefore cannot be regarded as supporting their own and each other's evidence. Having regard to the fact that the conflict between the evidence of the first appellant and that of PW11has not been satisfactorily resolved by the learned trial commissioner, we are unable to say that any reasonable court must have convicted in any event. The appeal of the first appellant is allowed, the conviction is quashed, and the sentence is set aside.

Appeals allowed
