

PENIAS TEMBO v THE PEOPLE (1980) Z.R. 218 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., BRUCE-LYLE, J.S. AND MUWO AG. J.S.
19TH AUGUST, 1980
S.C.Z. JUDGMENT NO. 19 OF 1980

Flynote

Evidence - Child - Necessity to corroborate evidence given by child.
Criminal law and procedure - No case to answer - Necessity for court to acquit at close of prosecution case - Effect of evidence given thereafter.

Headnote

The applicant was convicted of burglary and theft. A child of twelve years of age evidence and although the magistrate found that he was capable of giving evidence on oath, he did not consider him as a witness who required corroboration. Apart from that the evidence of this child was led after the close of the prosecution case.

Held:

- (i) The evidence of all children who give evidence in court must be corroborated, *Chisha v The People* (1) followed.
- (ii) It is mandatory for a court to acquit an accused at the close of the prosecution case if the facts do not support the case against him, and no evidence that is led thereafter can remedy the deficiency in the prosecution evidence.

Cases referred to:

- (1) *Chisha v The People* S.C.Z. Judgment No. 4 of 1980.
- (2) *Hahuti v The People* (1974) Z.R. 154.

For the applicant: In person.
For the respondent: N. Sivakumaran, State Advocate.

Judgment

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

The applicant was convicted of burglary and theft, the particulars of the charge being that he broke and entered a dwelling house and stole personal property to the value of K293.00. The learned State Advocate, Mr Sivakumaran, does not support this conviction.

The evidence against the applicant was that he had stolen the property concerned and had handed some of it to a relative who was PW3 and her children. The property was found in the possession of PW3, who was quite obviously a witness with a possible interest of her own to serve. Some of the property was also found in the possession of the

child, PW4, who was also a witness with a possible interest of her own to serve. Furthermore the child who was only twelve years of age, although found properly by the magistrate to be capable of giving evidence on oath, was not considered by the magistrate as a witness who required corroboration.

The evidence of all children who give evidence in court must be corroborated, in accordance with the judgment of Silungwe, C.J., in the case of *Chisha v The People* (1). The evidence at the close of the prosecution case could not possibly have supported the conviction had the magistrate properly advised himself. However, when called upon to make his defence, the applicant called another young child as a defence witness; that defence witness gave evidence that the applicant had in fact been in possession of the stolen property. Apart from the fact that a great deal of suspicion attaches to the child, who was under the influence of PW3, this evidence was led after the close of the prosecution case, and, before it was led, the magistrate should have found that there was no case for the applicant to answer. Doyle, C.J., pointed out in the case of *Haiti v The People* (2), that it is mandatory for a court to acquit an accused at the close of the prosecution case if the facts do not support the case against him and no evidence that is led thereafter can remedy the deficiency in the prosecution evidence.

For that reason we grant this application, which will be treated as the appeal. We allow the appeal. The conviction is quashed, and the sentence is set aside.

Application granted