JACK MAULLA AND ASUKILE MWAPUKI v THE PEOPLE (1980) Z.R. 119 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., BRUCE-LYLE, J.S. AND MUWO, AG. J.S.
9TH OCTOBER, 1979 AND 5TH FEBRUARY, 1980
S.C.Z. JUDGMENT NO.3 OF 1980

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Flynote
Evidence - Witness - circumstances where more than one person witnessed Event - Whether necessary to call more than one witness.
Evidence - Discovery - Evidence discovered in consequence of involuntary confession or statement not under warn and caution - Whether admissible.
Criminal law and procedure - Scene of crime - Photographing of - Whether necessary.

Headnote
The appellants were jointly with others charged with aggravate robbery and were convicted and the others were acquitted. During the robbery these two men had stolen two cash boxes containing about K39,000 in cash. There was no evidence of identification but the evidence which connected the appellants with the offence was given by two police officers, PWs10 and 12. PW10 stated that as a result of an interview the appellant led him and three other police officers into a bush where they pointed out cash boxes. Apart from PW10 only one other police officer was called to give evidence relating to the finding of the boxes.

The appellants denied having led police officers into the bush and further denied having pointed out the cash boxes to PW10. They contended that it was a dereliction of duty by the police in failing to take photographs of the scene of discovery. They contended further that the evidence of PW10 having been disbelieved and rejected by the trial judge in a trial within a trial, the evidence that the appellants led him to the cash boxes should have been rejected, that the other police officers who were alleged to have been with PW10 when the boxes were found should have been called and finally that failure by PW10 to take a warn and caution statement from the appellants immediately before or after the discovery of the cash boxes rendered the evidence of PW10 suspect.

Held:

(i) There is no rule in the low that the evidence of more than one witness is required to prove a particular fact. However in any given set of circumstances where there is evidence that more than one person witnessed a particular event, and in particular the finding of an incriminating object in the possession of an accused, if the happening of the event is disputed when first deposed to and the prosecution chooses not to call any of the other persons alleged to have been present, this may be a matter for comment and a circumstance which the court will no doubt take into account in the decision as to whether the onus on the

prosecution has been discharged. *Nelson Banda v The People* (2) followed.

(ii) The need for the calling of other witnesses arises when doubt is cast upon the evidence of a witness to the extent that further evidence is required to corroborate that witness and thus remove the doubt. If there is no doubt about a witness, there is no need for supporting evidence nor is there any need for comment by the trial court on the absence of such evidence.

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(iii) Evidence discovered in consequence of an involuntary confession is admissible and also evidence discovered as a result of a statement not under warn and caution is admissible.

(iv) There is no hard and fast rule that the police should always have the scene of crime and incriminating objects photographed although such photographs can at times be of immense help to a trial court.

Cases referred to:

(1) Chanyama v The People (1977) Z.R. 426.
(2) Banda (N.) v The People (1978) Z.R. 300. **10**
(3) Green Nikutisha & Anor v The People, S.C.Z. Judgment No. 16 of 1979.
(4) The People v Chanda (1972) Z.R. 116.

Appellants: In person.
For the respondent: R. Balachandran, State Advocate.

Judgment

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

The appellants were charged jointly with two others with the offence of aggravated robbery and they were convicted and the other two persons were acquitted. Each appellant appealed against the conviction and sentence.

On the 10th July, 1977, at about 2330 hours four masked men entered the building of the Supa Baking Company; two of the men rushed into the office of the cashier and pushed the cashier under a table and one of the men then fired a shot at the roof. When the two men failed to open the safe in the office, they forced the cashier at gun point, to open the safe and the men removed two cash boxes containing about K39,000 in cash and ran away with the cash boxes.

There was no evidence of identification and the evidence which connected the appellants with the offence was given by two police officers, PWs 10 and 12. PW10 said that as a result of an interview the appellants led him and three other police officers into a bush on the outskirts of the Refined Oil Products buildings off Mumbwa Road, where the appellants pointed out two cash boxes, one with the inscription "S.P." on it and the other with the word 'Securicor" on it; that there were documents, most of which were marked Supa Balking Company, also scattered in the area. PW10 further stated that these were well hidden in the tall grass and had been exposed to the sun and dew; that these cash boxes were later identified as belonging to the safe in the cashier's office at the time of

robbery. Apart from PW10 only one other police officer was called to give evidence relating to the finding of the boxes. PW12, the driver of a police vehicle, stated that he accompanied PW10, two other police officers and the two appellants into the bush but that he immediately left to go and get petrol for the police vehicle and that on his return he found PW10 walking along the road with the appellants and that at the time, he saw the appellants holding the two cash boxes.

The appellants denied having led police officers into the bush and further denied having pointed out the cash boxes to PW10. Each appellant cross-examined PW10 on his failure to take fingerprints on the cash boxes and to take photographs of the scene of discovery. PW10 explained that the boxes having been hidden for a considerable time, were covered with dew and that he attempted to lift fingerprints without success; he further explained that when they went into the bush the police photographer was not available and the equipment office was then closed. PW10 in answer to another line of cross-examination stated that during the interview each appellant was verbally warned and cautioned although the warn and caution statements were not recorded.

The learned trial judge ignored the evidence of PW12 and believed the evidence of PW10 and found as a fact that the appellants had led PW10 into the bush and pointed out the cash boxes to him and he further found that the possession of the cash boxes by the appellants irresistibly connected them with the robbery and convicted each appellant.

It was strongly contended by each appellant that the learned trial judge erred in accepting the evidence of the police officer, PW10. The grounds for the contention were:

"(1) That the evidence of PW10 having been disbelieved and rejected by the learned trial judge in a trial within a trial, the evidence that the appellants led PW10 to the cash boxes should have been rejected.
(2) That the additional evidence of PW12 relating to the cash boxes should not have been admitted; that the circumstances under which the additional evidence was adduced were sufficient to render the evidence of PW10 suspect.
(3) That the learned trial judge misdirected himself by not taking into account the failure of the prosecution to call other police officers who were alleged to have been with PW10 when the cash boxes were found.
(4) Failure by PW10 to take a warn and caution statement from the appellants immediately before or immediately after the discovery of the cash boxes rendered the evidence of PW10 suspect.
(5) That PW10 not being a fingerprints expert, his reasons for not being successful in lifting fingerprints from the cash boxes should have been rejected by the learned trial judge and that failure to take the fingerprints amounted to dereliction of duty.
(6) That failure by the police to take photographs of the scene where the cash boxes were found amounted to dereliction of duty."

The reasons of the learned trial judge's exclusion of the statement of the first appellant (the second accused at the trial) in a trial within a trial are in the following passage:

"Under normal circumstances the accused should have appeared in court within a day or two after his arrest.As it is he was detained

under the Public Security Regulations while further investigations were being carried out. Even if the powers conferred by these Regulations should not have been used on this occasion, that does not, per se, render the statement inadmissible; but the detention of the accused for a period considerably longer than is permitted in normal circumstances, coupled with the only evidence before the court as to the conditions under which he was kept during the greater part of the detention and his allegation of repeated and lengthy questioning, must raise in the mind of the court, as was said in the Supreme Court in *Chinyama v The People* (1) at p. 10:

> ' . . . had it not been for the unfair conduct or impropriety the accused might not have made the statement or might not have provided the answers to questions which subsequently formed the basis of the statement'.

This is the test that is to be applied by the court in considering whether it should exercise its discretion to exclude a statement. On the only evidence before the court and on a balance of probabilities I find that, but for the matters already referred to, the accused might not have made the statement in question and I accordingly exercise my discretion in the accused's favour and rule that it be excluded from the evidence in these proceedings."

In the trial within a trial PW10 never denied the period within which the first appellant was detained until the warn and caution statement was taken from him. It is evident from the passage in the judgment above, that the learned trial judge did not make any finding as to the credibility of PW10, neither did he reject any aspect of PW10's evidence. In our view therefore, there is nothing in the ruling in the trial within a trial which should empower this court to reject the subsequent evidence of PW10 that the appellants led him to the bush and pointed the cash boxes to him. The learned trial judge was right in considering the subsequent evidence of PW10. PW12 at the trial was about to give evidence as to the part he played in the finding of the cash boxes in the bush when an objection was raised by counsel that the evidence would be an additional one and as there was nothing about that aspect of the evidence in the statement of the witness upon which a summary committal was ordered, the witness could not give that evidence until the provisions of s.258 of the Criminal Procedure Code were complied with. This objection was upheld and the provisions of the section having been subsequently complied with, PW12 continued his evidence and stated that he was the driver of the police vehicle which took the appellants, PW10 and the other police officers to the bush. He however, said that he had left the bush to get petrol for his vehicle and that he was not present when the appellants pointed out the cash boxes to PW10; that on his return he found PW10 and the appellants on the road and that the appellants carried the cash boxes and that he then drove them back to the police station. It is the contention of the appellants that this additional evidence should not have been admitted on the ground

that if PW12 in fact took the part as in his evidence, he should have included it in his statement and that the additional evidence could be the result of collusion between PW10 and PW12 and also that the circumstances under which PW12 gave the additional evidence made the evidence of PW10 suspect. The learned trial judge in his judgment did not advert his mind to the evidence of PW12 but considered the evidence of PW10 in relation to the finding of the cash boxes, as standing alone and without corroboration. He however, accepted the evidence of PW10 and we find that he was entitled to do so.

The learned trial judge having ignored the evidence of PW12, the evidence that the appellants were those who pointed out the cash boxes to the police was that of PW10 and it was the contention of the appellants that the learned trial judge misdirected himself by not taking into account the failure of the prosecution to call other police officers who were alleged to have been with PW10 at the time. The learned trial judge did not comment on the failure of the prosecution to call the other police officers and he believed the evidence of PW10 upon which he convicted the appellants. This court had this to say in the case of *Nelson Banda v The People* (2):

> "There is no rule in our law that the evidence of more than one witness is required to prove a particular fact. Of course, any given set of circumstances where there is evidence that more than one person witnessed a particular even, and in particular the finding of an incriminating object in the possession of an accused, if the happening of the event is disputed when first deposed to and the prosecution chooses not to call any of the other persons alleged to have been present, this may be a matter for comment and a circumstance which the court will no doubt take into account in the decision as to whether the onus on the prosecutions has been discharged."

In the instant appeal, there is evidence that more than one person witnessed the finding of the incriminating cash boxes and this event was disputed by the appellants when deposed to and the prosecutions chose not to call the other police officers who witnessed the event. The duty of the trial judge in the circumstances was to find out whether the onus on the prosecution had been discharged. In the case of *Green Nikutisha & Anor v The People* (3), this court considered the above principle laid down in *Nelson Banda's* case (2), and further stated:

> "The need for the calling of other witnesses arises when doubt is cast upon the evidence of a witness to the extent that further evidence is required to corroborate that witness and thus remove the doubt. If there is no doubt about a witness, (and that is what the learned trial judge found in relation to PW6), there is no need for supporting evidence, nor is there any need for comment by the trial court on the absence of such evidence."

We find that there is nothing in the evidence of PW10 which can give rise to any doubt and the learned trial judge was therefore fully entitled to convict on that evidence alone.

The appellants contended that the failure of PW10 to take warn and caution statements from them immediately before or immediately after the discovery of the cash boxes rendered the evidence of PW10 suspect.

There was the evidence by PW10 that he warned and cautioned the appellants after they had volunteered to take him out and show him where the cash boxes were, but failed to record anything in writing. In the case of *The People v Chanda*, (4), it was held that evidence discovered in consequence of an involuntary confession is admissible. We agree with this proposition of the law. It follows that a discovery of evidence as a result of a statement not under warn and caution is also admissible. The evidential value of the finding of such evidence is not affected by the question of voluntariness. The learned trial judge was entitled to believe the evidence of PW10 as to the discovery of the cash boxes.

When PW10 was cross-examined about his failure to take finger prints on the cash boxes he gave an explanation that the "slipperiness" of the surface of the boxes made it impossible for the surface to retain fingerprints after the cash boxes had been exposed to the hazardous conditions of wind and sun for a long time. He further stated that he attempted to look for fingerprints but it was not possible to lift any. It was the contention of the appellants that PW10 not being a fingerprints expert, his reasons should have been rejected by the learned trial judge and that failure to lift fingerprints amounted to dereliction of duty. An attempt by PW10 to lift the fingerprints in our view, raised the rebuttable presumption that he had been trained in the art of lifting fingerprints. This presumption was not rebutted and there was no dereliction of duty.

When PW10 was cross-examined as to why he did not have photo graphs taken of the cash boxes, he explained that at the time the photography office was locked and it was not possible to find a photographer. On this issue, it was contended by the appellants that the failure to take photographs of the cash boxes amounted to a dereliction of duty. There is no hard and fast rule that police should always have the scene of crime and incriminating objects photographed although such photographs can at times be of immense help to a trial court. In this particular case, the failure of PW10 to have the cash boxes photographed did not constitute a dereliction of duty. In the result we find nothing on record to justify this court interfering with the learned trial judge's finding of fact on the issue of the discovery of the cash boxes. We find the conviction supported by the evidence and the appeals against conviction are therefore dismissed.

Each appellant, a first offender, was sentenced to eighteen years' imprisonment with hard labour. Having regard to the particular circumstances of this case, this sentence does not come to us with any sense of shock as being excessive or being wrong in principle. The appeals against sentence are also dismissed.

Appeals against conviction and sentence dismissed
