CRISPIN SOONDO v THE PEOPLE (1981) Z.R. 302 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., CULLINAN, J.S., AND MUWO, AG. J.S.
18TH NOVEMBER, 1981
(S.C.Z. JUDGMENT NO. 25 OF 1981)

Flynote

Evidence - Alibi - False alibi - Whether conclusive against accused.
Evidence - Witnesses - Wife or husband of defendant - Whether competent witness against co-defendant.
Evidence - Witnesses - Competent and compellable witnesses - Wife of defendant - Whether competent witness against co-defendant.

Headnote

The applicant was convicted of stock theft. The applicant was not found possession of any part of the stolen and slaughtered animal but the co-accused with whom he was tried, was so found. Nonetheless, the

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learned trial magistrate found that the co-accused had no case to answer and acquitted him. The Supreme Court was however of the view that the co-accused should have been put on his defence. The applicant appealed on the basis of an *alibi*, and on the ground that the learned trial magistrate erred in admitting the evidence of PW2, who was the wife of the second accused. The State did not support the connection.

Held:

(i) Even if an alibi was a deliberate lie on the part of the appellant the inference cannot be drawn that he did it because he had been involved in the offence. A man charged with an offence may well seek to exculpate himself on a dishonest basis even though he was not involved in the offence. Bwalya v The People (1) followed,
(ii) Where two or more persons are indicted jointly, the wife or husband of any such defendant is not a competent witness against any co-defendant.

Cases referred to:

(1) Bwalya v The People (1975) Z.R. 227.
(2) R. v Mount & Metcalfe, (1934) 24 C.A.R. 135.
(3) R. v Thompson (1872) L.R. 1 C.C.R. 377. 20

For the applicant: G.F. Kambiti, Acting Director of Legal Aid.
For the respondent: N. Sivakumaran, State Advocate.

Judgment

CULLINAN, J.S.: delivered the judgment of the court.

The applicant was convicted of stock theft.

The learned State Advocate, Mr Sivakumaran has indicated that the State does not support the conviction. The applicant was tried with a co-accused. The applicant was not found in possession of any part of the stolen and slaughtered animal, but the co-accused was so found: nonetheless the learned trial magistrate found that the co-accused had no case to answer and acquitted him. We consider that the co-accused should have been put on his defence.

The applicant's alibi was apparently false, but as Baron, D.C.J., observed in the case of *Bwalya v The People* (1), at p. 232:

> ". . . even if this was a deliberate lie on the part of the appellant, as we have no doubt it was, the inference cannot be drawn that he told it because he had been involved in the (offence); a man charged with an offence may well seek to exculpate himself on a dishonest basis even though he was not involved in the offences."

The applicant's false *alibi* was in no way conclusive against him, neither, do we consider that such aspect supports the evidence of the material prosecution witness, whose evidence in fact did require support. The learned trial magistrate observed:

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> "I also thought of considering the evidence of Biemba PW5 and that of an accomplice. However, I have dismissed this because according to the evidence Biemba acted as a helper."

We fail to observe how, on that evidence, PW5 could be regarded as other than an accomplice. There was a further reason for treating PW5 as a witness with a possible interest to serve. The learned trial magistrate observed:

> "Again there is a possibility that Biemba PW5 and his mother PW2 may have given evidence favourable to the second accused because they are of one family. If this is the case then their evidence is suspected and the court cannot act on it without any form of corroboration."

PW5 was in fact the second accused's son. The learned trial magistrate found corroboration in the evidence of two other prosecution witnesses who in fact were fellow accomplices: they were each found in possession of part of the stolen and slaughtered animal. To make matters worse, the learned trial magistrate failed to observe that the evidence of PW2 was inadmissible: she was the wife of the second accused. In the case of *R v Mount & Metcalfe* (2) the wife of a co-accused gave evidence for the prosecution against her husband and the two appellants. Charles, J., observed at p. 136:

> "All that evidence was absolutely inadmissible. It has long been held that at common law a wife is not only a compellable, but not even a competent, witness against her husband. That principle was enunciated with regard to a case where prisoners are charged jointly in *Thompson* (3), where it was made quite clear that, where two or more persons are indicted jointly, the wife or husband of any such defendant is not an available witness against any co-defendant."

The offence under consideration does not fall within the exceptions, statutory or otherwise, to the above rule. PW2 was therefore not a competent witness for the prosecution and her evidence was completely inadmissible.

The conviction cannot stand. The application is allowed and will be treated as the hearing on appeal. This appeal is allowed, the conviction is quashed and the sentence set aside.

Appeal allowed
