JEFFREY GODFREY MUNALULA v THE PEOPLE (1982) Z.R. 58 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., CULLINAN, J.S. AND MUWO, AG. J.S.
17TH NOVEMBER, 1981 AND 21ST MAY, 1982
(S.C.Z. JUDGMENT NO. 15 OF 1982)
APPEAL NO. 94 OF 1981

Flynote
Evidence- Witnesses- Hostile witness - Plates applicable Evidential value - Whether any.

Headnote
The appellant was convicted of theft by public servant and was sentenced to seven years' imprisonment with hard labour. The High Court dismissed his appeal against conviction but substituted sentence of four years' imprisonment with hard labour. He appealed to the Supreme

Court against conviction, submitting *inter alia* that the learned magistrate erred in treating a prosecution witness as hostile and rejecting, his evidence, since that witness's alleged inconsistency had not been demonstrated.

Held:
(i) Where on an application to treat a witness as hostile, the court after sight of the inconsistent statement, decides to grant the application, it should then direct itself not to place any reliance on the contents of the statement and so record in the judgment.
(ii) Before, with leave of the court, adducing evidence to prove a witness's inconsistency, the previous statement and its circumstances must be mentioned to the witness so that he may say whether or not he has made such a statement.
(iii) It is in the court's discretion to determine a witness's hostility in that he does not, give his evidence fully and with desire to tell the truth; he is not hostile simply because his evidence contradicts his proof or is unfavourable to the party calling him. Much is dependent on the stature and extent of the contradiction; but, under common law file court may treat as hostile, even a witness who has not made a prior inconsistent statement, on the basis of his demeanour.
(iv) The inconsistent statement of a hostile witness is completely inadmissible as evidence of the truth of the facts stated therein.

Cases cited:
(1) Jackson v Thomason [1861] L.J. Q.B. 11
(2) R. v Manning [1968] Cr. L.R. 675.
(3) R. v Fraser & Warren 40 Cr. App. Rep. 160.
(4) R. v Thompson 64 Cr. App. Rep. 96.
(5) Clarke v Saffery 171 E.R. 966.
(6) Bastin v Carew 171 E.R. 966.
(7) R. v Golder & Ors 45 Cr. App. Rep. 5.
(8) R .v Harris 20 Cr. App. Rep. 144.
(9) R. v White 17 Cr. App. Rep. 59.
(10) Kenmuir v Hattingh (1974) Z.R. 162.

For the appellant: A. B. Munyama, Nkwazi Chambers.
For the respondent: N. Sivakumaran, State Advocate.

Judgment

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

[After dealing with matters not relevant to this report the learned trial judge continued.]

Further inconsistencies were revealed when Senior Assistant Commissioner Zulu was treated as a hostile witness and admitted, when cross-examined by the learned State Advocate Mr Sivakumaran, to having said the following, as part of a statement made to the investigating officer, Senior Superintendent Leonard Norman:

> "He (the appellant) introduced me to Mr Narawa. He then asked me to arrange to swop gear-boxes between two Toyota Land Cruisers; gear-boxes at his house which were 3 speed, with the ones in the two Land Cruisers being donated to Police Training School Lilayi which were 4 speed. The Japanese representatives were present at the time he was giving me these instructions. They didn't say anything about this exchange. I got the impression that they understood what Mr Munalula was saying to me and that he had obtained permission from them for this exchange."

Firstly, Senior Assistant Commissioner Zulu there claimed that the appellant introduced him to the JOCV officials, whereas the appellant testified otherwise. More importantly, and this is essentially why the statement was put to the witness, whereas his evidence is that of a verbal declaration of agreement (even though not precise in content) on the part of Mr Narawa, the witness's statement reveals no more than a silent acquiescence on the part of the JOCV officials, indicating perhaps that a statement of agreement had been made before his arrival on the scene. We do not see that we could possibly regard the witness's evidence on the point as a mere embellishment upon his statement. The extract from his statement concerns the most crucial issue in the trial and in it he quite categorically said that the JOCV officials "didn't say anything about this exchange." He confirmed this aspect in adding "I got the impression ... etc.", that is, confirming that none of the JOCV officials spoke. In his evidence he was able to specify the official who spoke, that is, Mr Narawa. The appellant in his statement to the investigating officer merely said that "one of them said, 'Yes, you can take it'." After Senior Assistant Commissioner Zulu had given his evidence, the appellant testified that it was the "leader of the two who said those words"; he could not recall their names at the time of the conversation as their names were difficult to remember, this despite his subordinate's statement that the appellant had introduced him to Mr Narawa. Then there is the aspect of the words spoken. The appellant's original version in his statement was, as we have said, "Yes, you can take it." Senior Assistant Commissioner Zulu in his evidence gave the following version "It's okay there is no problem", and "There is no problem it's okay." Thereafter the appellant testified that the words used were "It's okay, no problem, you can take the gear-box", which version in its similarity to those of Senior Assistant Commissioner Zulu, contrasts somewhat with the appellant's earlier version in his statement to the investigating officer..

Apart from all those inconsistencies. the most marked disparity between the evidence of Senior Assistant Commissioner Zulu and that, of the appellant is in the nature of the alleged agreement in the corridor. The appellant, in his statement and in his evidence respectively, said that he had asked the JOCV officials "is it possible for me to take a gear-box", or "is it; possible for me to get a gear-box". He said that it was agreed that he could take a gear-box, the words used being, as we have said, "Yes, you can take it", or "It's okay, no problem. You can take the

gear-box". It was only after he had gone to his office, whence he summoned Senior Assistant Commissioner Zulu, and after the latter had informed him that the vehicles would be used "for demonstrating to learner drivers", that he decided to exchange one of his own gear-boxes for the Land Cruiser gear-box. It was Senior Assistant Commissioner Zulu's statement however, made two days before that made by the appellant that the appellant, in the corridor, in the presence of the JOCV officials, had,

> "asked me to arrange to swop gear-boxes between two Toyota Land Cruisers 'gear-boxes at his house which were 3 speed, with the ones in the two Land Cruisers being donated to Police Training School Lilaya, which were 4 speed".;

the JOCV officials had said nothing about "this exchange", the witness being under the impression that there had been an agreement as to "this exchange". In his evidence the witness testified that the appellant in the presence of the JOCV officials had instructed him "that I should arrange because the Japanese vehicles had 4 speed gear-boxes which he would like (to) exchange with his which were 3 speed gear-boxes"; further on he testified in-chief that he found the appellant speaking to the JOCV officials and that the appellant "told me to arrange for someone to go and remove the gear-boxes which were four geared in exchange for his which were three geared." In cross-examination he testified that before Mr Narawa had uttered the words of agreement "by that time he (the appellant) had already told me to make arrangements for the swopping of gear-boxes." Further on again he said, "All of us went into the Inspector - General's room, the exchange of the gear-box was discussed." Nowhere did Senior Assistant Commissioner Zulu say that the appellant subsequently gave him instructions to arrange for the exchange rather than the taking of a gear-box his statement and evidence was simply that Mr Narawa gave the appellant permission to exchange a gear-box Nowhere did the appellant however say that Mr Narawa had agreed to his exchanging a gear-box: it was his statement and evidence that he simply received a gift of a gear-box.

Furthermore, the statement and evidence of Senior Assistant Commissioner Zulu indicate that the agreement to exchange concerned not one, but two gear-boxes, that is, in both Land Cruisers. Indeed Assistant Superintendent Makayi testified that Senior Assistant Commissioner Zulu had requested him to remove two gear-boxes, that is, one from each Land Cruiser. In his evidence-in-chief the latter spoke of gear-boxes in the plural, but gradually, after repeated cross-examination, slipped into the singular when he spoke of the agreement to exchange. The appellant was suspended from duty on the basis of an original allegation that he had given instructions for the removal of two gear-boxes: presumably when the vehicles were donated, some Police authorities did not appreciate that the white Land Cruiser did not have a gear-box. The appellant himself did not extend the alleged agreement between himself and the JOCV officials to any more than the gift of one gear-box, and the statement and evidence of Senior Assistant Commissioner Zulu

on the point smacks of an attempt to concoct an agreement to meet the original allegation faced by the appellant.

If there was any doubt as to the unreliability of Senior Assistant Commissioner as a witness, his reaction to his previous inconsistent statement would in itself suffice to remove such doubt. Initially he agreed that two days before giving evidence he had again read his statement and had agreed that it was correct. He testified that the contents of the statement were true. When questioned by the learned trial magistrate at the close of his evidence however, he then said:

> "What I told Mr Norman was not accurate. The contents of the statement do not represent the correct state of affairs. To say that the Japanese said nothing is not true. I was telling Mr Norman the truth at the time. I discovered that the Japanese did actually say something after reading the statement two days ago. I did not tell Mr Norman this fact that I discovered the new truth. I did not tell him because I did not consider it important."

All of this caused the learned trial magistrate to completely reject the witness's evidence. Mr Munyama submits that he erred in doing so and in particular in treating him as a hostile witness. When the witness had related, for the second time, what had transpired in the corridor, Mr Sivakumaran made application to the court to be allowed to treat the witness as hostile, on the basis that he had made a previous statement and "what he says now is different from what he told the investigating officer". Mr Munyama in effect objected to the application on the ground that the alleged inconsistency had not been demonstrated. The record thereafter reads:

> "*Court*: I do not agree with this view. How can we determine whether or not what this witness is saying is at cross-purposes with what he told the arresting officer when we do

> not know the contents of that statement. Application is allowed.
> *Order:* The witness is declared hostile."

Section 3 of the Criminal Procedure Act, 1865; provides that:

> "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character: but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove thy he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

The learned authors of *Phipson on Evidence*, 12th edn. (p. 645) observe that :

> "A witness is considered adverse only when the opinion of the judge he bears a hostile animus to the party calling him and so

> does not give his evidence fairly and with a desire to tell the truth to the court (Stephen, Digest of the Law of Evidence 12th Ed. Art. 147); he is not adverse in the statutory sense when his testimony merely contradicts his proof or because it is unfavourable to the party calling him."

As we see it, much will depend on the nature and extent of the contradiction involved. It was held in *Jackson v Thomason* (1) that to be inconsistent within the meaning of s. 3, the statement need not be directly or absolutely at variance. Again, the statement might be completely at variance with the witness's evidence but the court might refuse the application, if for example convinced that the witness was genuinely confused or forgetful (*see the case of R. v Manning* (2)). As against that, in the case of *R. v Fraser & Warren* (3) during the cross- examination of a prosecution witness the trial judge learnt, that the complainant, who had already given evidence, had made a prior inconsistent statement to the police. The judge called for the statement and, counsel for the prosecution not having asked for leave to treat the complainant as hostile, proceeded himself to cross-examine the complainant thereon and convicted the appellants thereafter. The applications for leave to appeal were refused. In delivering the judgment of the Court of Criminal Appeal Lord Goddard, CJ, observed (at p. 163) that the learned trial judge was "abundantly justified in sending for the statement and in asking the questions he asked." The judgment in part reads (at p. 162):

> "If counsel had in his possession that statement to which I have referred, it was his duty at once to show the statement to the Judge and ask the judge's leave to cross-examine the witness whom he had called as hostile to the prosecution, as of course he was when, after identifying the persons who attacked him once describing what they did, he went into the witness-box and told what appeared to be a pack of lies with regard to identification."

The learned authors of *Phipson* (at p. 646) observe that the Court of Criminal Appeal was there having regard to the particular facts of the case. The following passage from the judgment (at p. 63) nonetheless appears to lay down a general rule:

> "If the prosecution have information in their possession which shows that the evidence which a witness called for the prosecution has given is in flat contradiction of a previous statement which he has made and so entitles the prosecution to cross-examine, they should apply for leave to cross-examine and not leave it to the judge to do so, because it is counsel's duty to cross-examine in such circumstances."

It must be borne in mind that, apart frown the provisions of s. 3 of the Act of 1865, there is also the discretion vested in a court under the common law to treat a witness as hostile, even where he has not made a prior inconsistent statement. In the case of *R. v Thompson* (4), a witness having been sworn refused to give other than preliminary evidence.

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The trial judge gave permission to counsel for the prosecution to treat her as a hostile witness and to cross-examine her on a prior statement in which she had incriminated the appellant. It was submitted on appeal that no contradiction arose as the witness had not in effect given any testimony prior to being treated as a hostile witness and s. 3 did not therefore apply. The appeal against conviction was dismissed. Lord Widgery, C.J., in delivering the judgment of the Court of Appeal (at p 99 quoted the, following dictum of Best C.J., in the case of *Clarke v Saffery* (5):

> "There is no fixed rule which binds the counsel calling a witness to a particular mode of examining him. If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the judge to allow cross-examination . . "

and also the following dictum of Lord Abbot, C.J., in the case of *Batten v Carew* (6) at p. 967 ;

> "But in each particular case there must be some discretion in the presiding judge as to the mode in which the examination should be conducted, in order best to answer the purposes of justice."

In adopting those dicta Lord Widgery, C.J., in turn observed:

> "There is no reason to suppose that the subsequent statutory intervention into this subject has in any way destroyed or removed the basic common law right of the judge in his discretion to allow cross-examination when a witness proves to be hostile."

The question of the inconsistency of prior statement, sufficient to display hostility, is a matter of degree. Obviously a mere embellishment will not suffice as a basis for treating a witness as hostile. The inconsistency must be material to the question of the guilt of the accused to the extent that an animus against the party by whom called and an unwillingness to tell the truth is displayed. If counsel for either party in a criminal case is in doubt in the matter then we consider that, in the interests of justice, the application for leave to treat as a hostile witness should be made and the prior statement shown to the court, so that the court can judge whether the inconsistency is material and whether in the exercise of its discretion, the application should be granted.

We appreciate that the dicta of Lord Goddard, C.J., in *Fraser* (3) 3 apply to a judge sitting with a jury and that if the judge after sight of the inconsistent statement decides not to grant the application, the minds of the jurors are not then affected by sight of an inadmissible statement. It is different in the case of a judge or magistrate sitting alone. It is a matter of judgment however as to whether a previous statement is inconsistent to the extent of displaying hostility on the part of the witness, and that is a matter which ultimately must be left to the court and not counsel. We consider therefore that in the overall interests of justice our courts should in future follow the dicta in *Fraser* (3). Where however the court on sight of a statement decides not to grant the application, it should then take care to direct itself not to place any reliance on the contents of the statement, which are of course in such

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circumstances completely inadmissible in evidence, and to record in its judgment that it has done so.

In the present case the learned trial magistrate granted the application without sight of the statement. Up to that point it could not be said that the witness by his demeanour had displayed hostility, as for instance a witness might do where he proves completely evasive in answering the simplest of questions. There was no basis then for the exercise of the court's common law powers are illustrated in *Thompson* (4). We must say therefore that granting the application the learned trial magistrate did not fully consider the exercise of his discretion in the matter. *In Manning* (2) the Court of Appeal observed that it "rarely interfered with the exercise of the discretion of the trial judge who sees the witness and is better able to assess him". In the present case we are satisfied that in view of the nature of the inconsistency between the evidence and the statement of the witness, that had the learned trial magistrate studied the contents of the statement he would

inevitably have granted the application. In any event, the subsequent cross-examination of the witness clearly showed that he was hostile, to the extent indeed that even counsel for the defence challenged his credibility, and we cannot see that any miscarriage of justice arose in treating the witness accordingly.

As to the evidential value of his testimony the following passages from the judgment of the Court of Criminal Appeal delivered by Lord Parker, C.J., in the case of *R. v Golder & Ors* (7) at pp. 9/10 are in point:

> "A long line of authority has laid down the principle that while previous statements may be put to an adverse witness to destroy his credit and thus to render his evidence given at the trial negligible, they are not admissible evidence of the truth of the facts stated therein. It is unnecessary to refer to the cases in detail; the following extract from the judgment of this court in *Harris* (8), at pp. 147-148 is a sufficient statement of the principle: 'It was permissible to cross-examine this girl upon the assertions she had previously made, not for the purpose of substituting those unsworn assertions for her sworn testimony, but for the purpose of showing that her sworn testimony, in the light of those unsworn assertions, could not be regarded as being of importance It is upon that matter that confusion has sometimes arisen. It has undoubtedly sometimes been thought that where a witness is cross-examined upon a previous unsworn statement and admits that the statement was made, but says that the statement was untrue, that unsworn statement may sometimes be treated as if it could be accepted by the jury in preference to the sworn statement in the witness-box . . .' That, of course, is all wrong, as has been pointed out on various occasions by this court, and not least in the case of *White* (9)",

and again, at p. 11;

> "In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by

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> that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable, they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act."

The learned trial magistrate in the present case in fact quoted the latter passage in his judgment, and on the basis thereof decided to reject Senior Assistant Commissioner Zulu's evidence. In all the circumstances we consider that he was completely justified in doing so.

Appeal against conviction dismissed; Sentence dismissed