DOUBLE MWALE v THE PEOPLE (1984) Z.R. 76 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, J.J.S.
18TH JANUARY AND 15TH FEBRUARY, 1983
(S.C.Z. JUDGMENT NO. 4 OF 1983.)

(Editor's note: Through inadvertence we omitted this case in our 1983 reports hence its inclusion in this report).

Flynote
Evidence - Witnesses - Court's Power to call - Discretion - Exercise of.

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Headnote
When making his defence at his trial for murder, the accused told the court that in the course of the fight with the deceased, the deceased had struck him on the mouth with a panga thereby knocking out two of his teeth, and that it was after this that he retaliated with a log thereby causing the death of the deceased. The accused mentioned the name of a person who allegedly took the alleged panga from the scene. Had the trial court accepted this story, the defence of provocation would have been available to the accused; however, without making any effort to call the person named by the accused, the trial court rejected the accused's story and convicted him of murder. The accused appealed.

Held:
(i) When an issue which has arisen is essential to the just decision of the case, it is mandatory for the trial court to call or recall the appropriate witness under s. 149. C.P.C.
(ii) In exercising, its power to call witnesses a court must have regard to the traditional considerations for the exercise of a judicial discretion in criminal matters; and the section could not legitimately be used for purposes such as supplying evidence to remedy defects which have arisen in the prosecution case or where the result would merely be to discredit a witness.
(iii) Unless a vital point has arisen ex improviso which it is essential to clarify, the court should not normally exercise its discretion of its own motion when the result may be simply to make accused's position worse than it already is.

Cases cited:
(1) Liyumbi v The People, (1978) Z.R. 25.
(2) Chibangu v The People, (1978) Z.R. 37.
(3) Whiteson Chilufya v. The People, C.A. No. 53 of 1970, S.J.Z. No. 35 of 1970.
(4) Zakeyu v R. [1963] R. & N. 434.
(5) Sullivan v R. [1921-22] Cr. App. Rep. Vol. XVI 121.

(6) The King v Dora Harris, [1927] 2 K.B. 587.

Legislation referred to:
Criminal Procedure Code, Cap. 160, s. 149.

For the appellant: N.L.Patel, Acting Director of Legal Aid.
For the respondent: N. Sivakumaran, Assistant Senior Stale Advocate.

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

The appellant was convicted of murder. The salient facts as found by the learned trial judge were these: On 20th July, 1979, at about 1900 hours the deceased arrived at a house where PWs. 1 and 2 and the appellant were eating nshima prepared by P.W5, the appellants sister. It

was common ground that when the deceased arrived, he put his hand into the plate containing some relish without first washing his hands, as is customary. This annoyed the appellant. Insults were traded and a fight ensued between the appellant and the deceased. The fight was stopped. Immediately thereafter, the appellant went to pick up a sizeable log which was nearby and upon his return struck the deceased with it, once only, on the head. The deceased fell to the ground and died instantly. The learned trial judge considered the defence of provocation. He very fairly accepted that the appellant was provoked and that, in using the log which was at hand, there had been no time for passion to cool. The defence nonetheless failed on the ground that the provocation was found to have been trivial and that, consequently, the appellant had acted with gross and savage violence which was out of all proportion to the provocation offered. The provocation, which was found to be trivial, consisted of the touching of the relish without washing hands, the insults, and the fight which was stopped.

Mr Patel has submitted, on behalf of the appellant, that having regard to the combined effect of all these factors, the learned trial judge erred ill holding that the provocation was trivial. We are of the view that insofar as the learned trial judge's finding rested solely on the facts and circumstances to which we have already referred and which he had accepted, this submission cannot stand. Authorities to which the learned trial judge had made reference and indeed the previous decisions of this court (see for example *Liyumbi v The People* (1) and *Chibangu v The People* (2)) all support the view that the provocation would be regarded as trivial and the reaction disproportionate on facts and circumstances such as those we have just referred to.

Before dealing with Mr Patel's further and major submission, it is necessary to set out the circumstances in which it has arisen. When the appellant was put on his defence he made an unsworn statement. In it, he repeated more or less what the eyewitnesses for the prosecution had stated save that he introduced a factor which, if believed, would have drastically altered the seriousness of the provocation, making it no longer a trivial matter. The appellant had stated that, in the course of the fight, the deceased had struck him on the mouth with a panga, knocking out two of his teeth (which he produced as exhibits) and that it was after this that he had picked up the log with

which he had struck the deceased. He had then gone to show the injury he sustained to his aunt, and that PW.4 (as the latter confirmed) had apprehended him at her house. The appellant had alleged that it was PW.4 who had carried away the panga from the scene. The appellant's allegation concerning a panga was rejected as an afterthought on the ground that counsel acting for him at the time had not cross-examined any of the prosecution witnesses on the point. The trial court regarded it as most probable that the appellant had lost his teeth at the hands of the villagers when the appellant was apprehended and tied up.

Mr Patel has argued that, despite the failure by counsel to cross-examine the prosecution witnesses concerning the panga, the appellant was

entitled to put forward his story even at that stage in his unsworn statement. He argues that it was imperative for the proper determination of the seriousness or otherwise of the provocation that the learned trial judge should have investigated this essential point and not speculate as to how the appellant came to lose his teeth. In the circumstances, Mr Patel submits that the learned trial judge had misdirected himself in two respects; firstly, in failing to consider at all the provisions of section 149 of the Criminal Procedure Code, Cap. 160 and secondly, in failing to find that evidence regarding the appellant's loss of teeth was essential to the just decision of the case. In order to appreciate this submission, it is necessary that we set out the provisions of the section referred to, which reads:

> "149. Any court may, at any stage of an inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:
>
> Provided that the prosecutor or the advocate for the prosecution or the accused person or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable such cross-examination to be adequately prepared if, In its opinion, either party may be prejudiced by the calling of such person as a witness."

This section has been cited by Mr Patel in support of his argument to the effect that the learned trial judge should have appreciated the importance of the allegation made by the appellant and should have exercised his powers under that section to recall the prosecution witnesses for the purpose of ascertaining the truth or otherwise of the allegation which, if true, would obviously have altered the result. As we see it, the power conferred upon the trial court by this section is designed to ensure that justice is done, not only to the accused but to society as well. But, the power so conferred should only be exercised in a proper case and for that reason must be regarded as discretionary. It is our opinion that, before the trial court can exercise the power conferred by the section, regard must be had to the traditional considerations for the exercise of a judicial discretion in a criminal matter. Thus, though the terms of the section are wide and the discretion conferred considerable, the section

could not legitimately be used for purposes such as supplying evidence to remedy defects which have arisen in the prosecution case or where the result would merely be to discredit a witness *(see* for instance *Whiteson Chilufya v The People* (3)). We are in general agreement with the Federal Supreme Court's observations in *Zakeyu v R* (4). (an appeal from the High Court of Southern Rhodesia but dealing with a similar provision) to the effect that, though the terms of the section go so far as to impose a duty to call a witness essential to the just decision of the

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case, the duty cannot extend to calling a witness simply to rebut or confirm what another witness has said on a collateral issue which is neither crucial nor vital to such just decision. We are of the view that, unless a vital point has arisen ex improviso which it is essential to clarify, the court should not normally exercise its discretion of its own motion when the result may be simply to make an accused's position worse than it already is. In this particular case, however, we do not see how the appellant's position would have been made any the worse had the trial judge recalled the witnesses on the point which, both Mr Patel and Mr Sivakumaran suggest, had arisen ex improviso. At this stage we would like to comment on a suggestion made by the Acting Director of Legal Aid to the effect that, where an issue which has arisen "is essential to the just decision of the case", it is mandatory for the trial court to call or recall the appropriate witness. We agree with the learned Acting Director's proposition, and in this regard we are guided by the decision of the Federal Supreme Court in *Zakeyu* (4) to the effect that the sections in that event, goes so far as to impose a duty on the trial court to call or recall appropriate witnesses.

Assuming for the sake of argument that both counsel are right in suggesting that the appellant had raised, for the first time in his statement, the allegation that the deceased had knocked out his teeth with a panga, there is authority for saying that, having regard to the importance of the allegation, the learned trial judge would have been justified in exercising his discretion to recall the eyewitnesses and in particular, PW. 4 who it was alleged had carried away the pangas. It would then have been possible to ascertain the truth as to whether or not the appellant had lost his teeth at the hands of the deceased.

In *William Sullivan v R.* (5), the accused made an allegation, for the first time, in his evidence, suggesting that someone else may have murdered the deceased. The trial judge recalled some witnesses who gave rebutting evidence. On appeal, the Court of Criminal Appeal held that, so far as that was rebutting evidence to answer evidence set up by the accused for the first time, no objection could be taken. Again, in *The King v Dora Harris* (6), it was accepted that, if the interests of justice so demand, a judge can call a witness on a matter which has arisen ex improviso, which no human ingenuity can foresee, on the part of the prisoner. If, therefore, the appellant in this case had raised the allegation in issue ex improviso, we would agree with Mr Patel's submission that, having regard to the importance of the matter so raised, and having regard to the terms of section 149 of the Criminal Procedure Code, the learned trial judge had misdirected himself in the manner alleged.

But, it was in fact not correct to say that all the prosecution witnesses had not been cross-examined on the suggestion that the deceased had knocked out the appellant's teeth. In this regard, the record shows that both PW. 4, who had apprehended and bound the appellant, and PW. 7, the investigating officer, had been cross-examined on this issue.

Admittedly, the use of a panga was not canvassed at that stage, but then there can be no doubt that the appellant was advancing the basic allegation that it was the deceased who had knocked out his teeth.

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Furthermore, there was evidence that the appellant had kept his teeth especially to produce as evidence. In these circumstances, we consider that the learned trial judge had misdirected himself on the facts when he found that the appellant's allegation was an afterthought on the ground that none of the prosecution witnesses had been cross-examined on the point.

In all the circumstances and for the foregoing reasons we feel that it would be unsafe to allow a conviction for murder to stand. However, the undisputed facts amply justify a conviction on the lesser charge of manslaughter. In the result we allow the appeal against conviction on the charge of murder. That conviction is quashed and in its place we substitute a conviction for manslaughter contrary to section 199 of the Penal Code.

Appeal allowed
