JOSEPH KNOX SIMWANZA v THE PEOPLE (1985) Z.R. 15 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, JJ.S.
20TH FEBRUARY, 1985
(S.C.Z. JUDGMENT NO. 3 OF 1985)

Flynote
Criminal Law and Procedure - Evidence - Fitness - Calling or recalling of witness after defence case - when proper.

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Evidence - Bankers' records obtained in absence of search warrant - Legality and admissibility of - Voluntary production of bankers' records by bankers - Whether search warrant necessary.
Evidence - Court calling rebutting evidence - Whether proper.

Headnote
A Court - Martial convicted the appellant of stealing public funds contrary to s.49 of the Defence Act. Certain wrongful overpayments were made into the appellant's personal bank account and he withdrew such money for his own purposes. In his defence, he alleged for the first time that he had lost his cheque book and was not party to the withdrawals deposed to by the prosecution witnesses. Thereupon, of its own volition the court recalled a witness who had produced bank records to produce further records and the cashed cheques to rebut the appellant's allegations. On appeal it was contended on behalf of the appellant that the Court Martial erred in recalling a prosecution witness at a time when the prosecution had closed its case and the appellant had given his evidence. It was also contended that the failure by the prosecution to obtain a search warrant before the appellant's account was checked and documents brought to court made the documents from the bank inadmissible as evidence.

Held:

(i) Under r. 55 of the Defence Force (Procedure) Rules, which is to the same effect as s.149 of the Criminal Procedure Code; a court may call or recall a witness to clarify an issue which is crucial to the just decision of the case and which it is in the interests of justice to clarify;

(ii) Under r.60 of the Defence Force (Procedure) Rules, which is similar to s.210 of the Criminal Procedure Code, the court may allow the prosecution to call evidence to rebut issues which have arisen ex improviso in the defence;

(iii) It is the duty of the prosecution to apply to call the rebutting evidence. It is highly undesirable, and procedural irregularity, for the court to take it upon itself to call the rebutting evidence.

(iv) The absence of search warrant does not make documents from the bank inadmissible by statute. The Evidence (Bankers' Books) Act, Cap.171 does not require that a search warrant must always be obtained and produced in court. Where the bank consented to the production

of their own documents, in the absence of any search warrant, the evidence was not illegally obtained nor was it inadmissible.

Cases referred to:

(1) Penias Tembo v The People (1980) Z.R. 218
(2) Double Mwale v The People (1984) Z.R. 76
(3) Liswaniso v The People (1976) Z.R. 277

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Legislation referred to:
Evidence (Bankers' Books) Act, Cap. 171, s. 3.

For the appellant: M.M. Mwisiya of Mwisiya and Company,
For the respondent: R.R. Balachandran, Assistant Principal, State Advocate.

Judgment

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

The Appellant was a Captain in the Zambia National Defence Force. He was tried and convicted by a Court - Martial on two counts of stealing public funds, contrary to section 49 of the Defence Act. The allegation of the first count was that the appellant stole a sum of K1,800 and on the second count that he stole a sum of K3,000.00. He was sentenced to undergo imprisonment for 18 months and in addition he was sentenced to be cashiered from the Army. He now appeals against both the conviction and the sentence.

The brief facts of the case were that the appellant used to receive his monthly salary through his bank account and that such salary was normally in the range of K200 - odd; and that this information was reflected in the salary slips and certain paysheets held by the Army Finance Directorate. There was evidence that on 28th June, 1982, there was deposited in his account, against an unauthorised payslip, a sum of K2,078.69 when the salary the appellant was entitled to was only K278.69. Before then, the balance standing to his credit is said to have been a sum of K20.22. There was, therefore, an overpayment for this month in the sum of K1,800 which the Prosecution alleged the appellant had stolen.

The evidence on the second count was to the effect that on 28th September, 1982, there was deposited into the appellant's account, against an unauthorised payslip, a sum of K3,249.62 when his salary for that month was only K249.62. Before then the appellant had in his bank account a credit balance of K199.29. The difference between the appellant's salary and the amount deposited came to K3,000 which the Prosecution alleged the Appellant had stolen on the second count.

The defence which the appellant advanced at his trial was to the effect that he was not aware of the unauthorised deposits and that he had not sanctioned the withdrawals alleged by the Prosecution.

On behalf of the appellant, Mr Mwisiya advanced two main grounds of appeal. The first is that the Court-Martial erred in recalling a witness from the Bank to produce the cheques allegedly issued by the appellant at a time when the Prosecution had closed its case and the appellant had given his

evidence. The second ground was to the effect that the Prosecution had not complied with the Evidence (Bankers' Books) Act, Cap.171 in that no order of the Court was obtained before the appellant's account was checked and documents brought to Court. In relations to the first ground of appeal it was Mr Mwisiya's contention that the Prosecution had failed to establish a prima facie case at the time when their case was closed; the argument being that, at that stage, there was no evidence to show a prima facie case that the appellant had converted

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any of the money deposited in his account. Mr Mwisiya relies on *Penias Tembo v The People* (1) which held to the effect 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 that no evidence which is led thereafter can remedy the deficiency in the Prosecution evidence.

We do not, however, accede to the submission that the appellant was wrongly placed in his defence. As Mr Balachandran pointed out, there was evidence adduced by the Prosecution which established a prima facie case. In particular, the ledger card did provide prima facie evidence of withdrawals and therefore, of the conversion, in terms of section 3 of the Evidence (Bankers Books) Act, Cap.171 Section 3 aforesaid reads:

> "Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded."

In the premises that portion of Mr Mwisiya's argument to the effect that there was no prima facie case fails. There was, however, a submission to the effect that when the Court recalled a witness from the bank to produce the cheques and to answer certain other questions, such witness was in fact called to rebut evidence given by the appellant in his defence which was to the effect that he had lost the cheque book and had not been party to the withdrawals deposed to by the witness. If we understood him correctly, Mr Balachandran agrees that the recalling of PW2 was for he purpose of rebutting allegations which the Appellant made for the first time in his defence. It is to be observed that the power of the Court to recall a witness is contained in Rule 55 of the Defence Force (Procedure) Rules which is to the same effect as Section 149 of the Criminal Procedure Code. Under these provisions, a Court may call or recall a witness to clarify an issue which is crucial to the just decision of the case and which the Court considers to be in the interest of justice to have clarified. But where, as here, the object of the exercise is to rebut issues which have arisen ex improvise in the defence, the rebuttal is provided for in Rule 60 of the Defence Force (Procedure) Rules which is similar to section 210 of the Criminal Procedure Code which Mr Mwisiya had cited in his argument. In dealing with the recalling of witnesses under Section 149 of the Criminal Procedure Code, which we have said is similar to Rule 55, this Court observed, in the case of *Double Mwale v The People* (2), to the effect that the power conferred upon the Court is designed to ensure that justice is done not only to the accused but to society as well. But we also made the point that the power should be exercised in a proper case and that the discretion of the Court should be exercised with all due regard to the traditional considerations for the exercise of a judicial discretion in a criminal matter. We said the section could not be legitimately used for purposes such as supplying defects which have arisen in the Prosecution case or where the result would be merely

to discredit a witness. We also made the point, in that case, that the Court should not normally exercise

its discretion of its own motion when the result would merely be to prejudice the accused's position. As we have already indicated, the principles in that case refer to the calling or recalling of witnesses in the interests of justice. But similar consideration can be discerned from Rule 60 and section 210 to which we have referred with regard to the calling of rebutting evidence. In our view, it was clearly the duty of the Prosecution to apply to call the rebutting evidence. It was, in our opinion, highly undesirable for the Court to assume the role of the Prosecution and to enter into the arena reserved for the parties when in fact Rule 60 of the Defence Force (Procedure) Rules makes it clear that it is for the Prosecution to call evidence in rebuttal if the accused raised any matter in his defence for the first time which they could not reasonably have foreseen. We find, under the circumstances, that when the Court - Martial took it upon itself to call rebutting evidence it committed a procedural irregularity. However, we have no doubt that the evidence itself was otherwise admissible and it could have been adduced in a proper manner at the instance of the proper party. As there was a possible way of introducing the evidence, we do not see that the irregularity occasioned any miscarriage of justice. Though, therefore, the point taken has been determined in favour of the appellant, it cannot affect the outcome of this Appeal.

Under the second ground of appeal, Mr Mwisiya has argued that the evidence obtained from the bank was obtained illegally and in contravention of Cap.171 of the Laws. We do not see how that Act can be read in the manner suggested by Mr Mwisiya to the effect that, it is always necessary to obtain a search warrant which must be produced in evidence before evidence based on banker's records can be admitted by the Court. We agree with Mr Balachandran that a proper reading of the Act will show that the object of the Act was to oblige bankers to produce documents which they would otherwise not have been obliged to produce under the law relating to the relationship between the banker and his customer. Article 19 of the Constitution of Zambia, which Mr Mwisiya has prayed in aid, does not even arise in this matter since the privilege is that of the banker and since the documents inspected and produced were the property of the bank which had consented in the matter. We find that we are unable to assume that there was any irregularity more especially when the issue was not even raised at the trial. We are satisfied that the absence of a search warrant does not make documents from the bank inadmissible by statute and, for this reason, we find that there is no need, as suggested by Mwisiya, for us to consider if the case of *Liswaniso v The People* (3) is good or bad law. The point discussed in that case does not arise and, as presently advised, we still feel that our decision in Liswaniso is good law.

Mr Mwisiya has also argued that the documents from the bank were inadmissible because they were mere copies and not verified as required by Cap.171. We note that the record does not support the assumption which Mr Mwisiya asks us to make to the effect that the documents were mere copies. We observed that no question was raised at the trial to that effect and in any case certain portions of the record to which our attention

was drawn by Mr Balachandran indicate that the documents were originals. We therefore apply the maxim "omnia praesamuntur rite es acta."

Mr Mwisiya also suggested that the appellant may have received certain other moneys and allowances and that would account for the moneys which the Prosecution contended were overpaid. We must point out that this was not the defence advance by the appellant and we must decline to speculate as to what other defences the Appellant may have had. As already indicated the Appellant's defence was that he was not aware of the transactions on his account. But the evidence which was accepted established that the appellant had, after the deposit of June,1982, withdrawn various sums in aggregate totalling some K1,899, a sum so manifestly beyond his legitimate receipts that the conclusion is not to be resisted that he was aware of the larger deposit. Similarly, the evidence established that, after the deposit of September, 1982, the appellant withdrew various sums totalling about K2,200 which sum is, once again so vastly greater than he can possibly have had in normal receipts of salary. There was evidence, therefore, before the Court - Martial which we regard to have been and to be overwhelming against the Appellant. The appeal against conviction is accordingly dismissed.

Before we leave the question of conviction, however, we wish to observe that in relation to the first count there was evidence that after withdrawing from the large deposit referred to, there was standing to the Appellant's credit in his bank account a sum of K199.29n. It is clear to us, therefore, since this amount was less that the Appellant's salary that the appellant had exhausted the entire sum of K1,800 representing the overpayment on the first count. We do not disturb the conviction on that count. However, with regard to the second count the same was not the case. The evidence indicated that the appellant was as entitled to a salary of K249.62 which together with the balance in his account to which we have already referred, meant that the Appellant had in his account money which could be regarded as his own amounting to K448.91. There was evidence that as at 22nd October, 1982, the Appellant had withdrawn all the money except for K1,248.91. When credit is given for the sum of K448.91, aforesaid, it is seen that the sum of K880 was not withdrawn and, therefore, not converted out of the amount on the second count. For this reason, we propose to amend the conviction on the second count so that the appellant is guilty of theft of K2,200.As already indicated, the appeal against conviction is dismissed.

With regard to the sentence, that is 18 months imprisonment with hard labour plus cashiering, we agree with Mr Mwisiya that the sentence should be regarded as too severe. We agree that, as there was no evidence of conspiracy and since the appellant merely took advantage of overpayments, an effective prison term plus cashiering comes to us with a sense of shock. We will allow the appeal against sentence by altering

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the effect thereof. We suspend the whole prison term on condition that for a period of 12 months from today the appellant is not convicted of any offence involving dishonesty. We do not propose to interfere with the sentence of cashiering.

Appeal against conviction dismissed; but that against sentence allowed.