NALUMINO NALUNGWANA AND ANOTHER v THE PEOPLE (1986) Z.R. 28 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., MUWO AND SAKALA, JJ.S.
25TH FEBRUARY, 1986
(S.C.Z. JUDGMENT NO . 7 OF 1986)

Flynote
Evidence - Spouse of accused - Admissibility of evidence for the prosecution.
Criminal Law and Procedure - Minor Offences - Conviction for Murder charge When appropriate to convict of receiving.
Criminal Law and Procedure - Trial within trial - Rebutting evidence as to credibility of witness - Admissibility.

Headnote
The two appellants were charged and convicted of murder on the facts that on 19th December, 1981, jointly and whilst acting together, they murdered one Tololi Minde.

On appeal it was argued that the learned Commissioner erred in admitting evidence of the Magistrate as to the credibility of the first appellant in the trial within a trial, it was also argued that the evidence of first appellant's wife was inadmissible.

Held:
(i) Evidence in rebuttal as to credibility of an appellant may not in general be admissible.
(ii) Evidence of an appellant's wife is not admissible against him on a criminal charge.
(iii) Although this was a charge of murder the appellant had ample opportunity to defend himself on any charge arising out of the theft of the goods and a conviction on such a minor charge was appropriate in this case.

For the appellants: O.R. Okafor, Senior Legal Aid Counsel,
For the appellants: R.R. Balachandran Senior State Advocate.

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

The appellants were convicted of murder, the particulars of the offence being that on the 19th of December 1981 at Mongu they jointly and whilst acting together murdered Tololi Minde.

The prosecution evidence was to the effect that on the 19th of December, 1981, the sales lady in charge of a shop in Mongu locked the shop at 20.30 hours and led it. The following morning when she went to the shop, she found that the deceased in this case, who was the night watchman, had been beaten to death and a quantity of goods had been stolen from the shop. There was abundant

evidence that within the next five days the appellants were seen selling goods which proved to have been stolen from the shop and the prosecution based its case on this recent possession by the appellants. Further in the support of the

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case against the first appellant, the prosecution produced a warn and caution statement which was a confession to having taken part in the robbery during which the night watchman was killed. Before the confession statement was admitted in evidence the first appellant complained that the statement had been taken from him under duress and a trial within a trial was held. At the trial within a trial the first appellant gave evidence that he had been beaten by the prosecution witnesses, and, in answer to a question in cross-examination, he said that he had reported the fact that he had been beaten to the magistrate at his preliminary enquiry. At the close of the cases for the prosecution and the defence in the trial within a trial, the learned trial commissioner, of his own accord, called the magistrate who had conducted the preliminary enquiry. This magistrate said in evidence that he seemed to remember the first appellant and that normally all complaints are put down in the record, and that there was no complaint to him regarding the assault.

In his ruling on the admissibility of the confession, the learned trial commissioner referred to the fact that the magistrate had denied receiving a complaint from the appellant.

Mr Okafor has argued that it was improper for the learned trial commissioner to call a witness in rebuttal of the evidence of the appellant concerning his complaint to the magistrate. He said that this was evidence in rebuttal of a collateral issue going to the credibility of the appellant.

Mr Balachandran on behalf of the State argued that a trial judge was entitled to call any witness he desired in order to ascertain the justice of the case, and he was not debarred from calling a witness to give evidence concerning a matter of credibility. He argued that in any event the evidence called for was not necessarily rebutting evidence.

We have considered the propriety of a trial judge's calling evidence as to the credibility of the statement made by the appellant in the trial within a trial. We note that in Phipson on evidence 12th edition at paragraph 1607 the following passage appears:

> "A party may not, in general, impeach the credit of his opponent's witness by calling witnesses to contradict him as to matters of credit or other collateral matters, and his answers thereon will be conclusive."

Although that rule is not absolute, in the present context it was wrong for the learned trial commissioner to have called evidence in rebuttal as to the credibility of the appellant. A trial judge always has a great deal of discretion but it was most undesirable for him to call evidence which counsel for the prosecution would not have been permitted to call. The learned trial commissioner's action amounted to a misdirection and the result was that the confession was improperly admitted. It follows that the only evidence against the first appellant was the recent possession of the stolen articles. In this connection the prosecution called evidence from the appellant's wife and the learned

trial commissioner held that such evidence was admissible under the provisions of section 151 of the Criminal Procedure Code. Mr Balachandran, has properly conceded that this was a misdirection on the part of the learned trial commissioner and the such evidence of the appellant's wife should not have been admitted.

The first appellant in his defence gave evidence that on the evening of the 20th of December, he was approached by one Simasiku who said he had some clothing and other articles to sell. He said Simasiku requested his help in selling the goods and he agreed to help him. The first appellant said that that was why he was found in possession of the goods after the incident at the shop were the goods were stolen. He denied taking part in the murder or the robbery.

In considering whether the appellant's explanation could reasonably be true, the learned trial commissioner took into account the confession of the first appellant and the evidence given by the first appellant's wife. Neither of these two items of evidence should have been admitted and both these misdirections by the learned trial commissioner led to the conviction of the first appellant on the charge of murder. This is not therefore a case where the proviso to section 15 (1) of the Supreme Court act can be applied. The first appellant's appeal against his conviction for murder is allowed and the sentence is set aside.

We turn now to the second appellant. His statement taken by the police was a denial, and in it he said that he had received goods from the first appellant on the 21st of December, and he also had agreed to sell the goods on behalf of another.

The prosecution evidence against this appellant, apart from the general evidence from a number of witnesses that he had sold them goods, was the evidence on pw.7, his former girl friend, who gave evidence that, at 03.00 hours on the 20th of December, whilst she was at an initiation ceremony, the second appellant had come to her and given her a quantity of goods which were found in her possession by the police. There was further evidence from pw.10 a villager, who said he saw the second appellant at 09.00 hours on the 20th of December at the same initiation ceremony, and he had purchased a skipper from the second appellant.

Mr Okafor on behalf of the second appellant argued that pw.7 was a witness with a possible interest of her own to serve, and, although the second appellant had admitted being in possession of the stolen goods at other times, his possession at the early hour of 03.00 hours in the morning of the 20th of December was evidenced only by the uncorroborated evidence of pw.7.

Mr Balachandran argued in reply that the evidence of pw.10 who saw the second appellant with the stolen goods at 09.00 hours of the same morning was corroboration of PW.7's evidence that he had the stolen goods at 03.00 hours that morning. We have considered this argument, and it is our view that PW.7 was a witness with a possible interest of her own to serve and her evidence of receiving goods at 03.00

hours from the second appellant was not corroborated by the evidence of PW.10 which related to the possession of the goods at 09.00 hours.

In considering whether or not the recent possession by the 2nd appellant led to the inevitable conclusion that he had taken part in the murder, the learned trial commissioner relied on the evidence of PW. that she received the goods from the second appellant at 03.00 hours, which must have been very shortly after the time of the murder.

As we have indicated, the evidence of PW.7 to this effect should not have been accepted without corroboration, and the only evidence remaining is that of PW.10, who alleged that he saw the second appellant with the stolen goods at 09.00 hours on the 20th of December. If the conviction against the second appellant is to stand PW.10's evidence as to date and time must be accepted as indicating that prior to 09.00 hour on the 20th of December there would have been no opportunity for the second appellant to have received the stolen goods from some other person who was the real perpetrator of the murder.

As we have found, it was reasonable for the first appellant to explain that he received the goods on the evening of the same day, the 20th of December, and in considering the reasonableness of the explanation of the second appellant, we take into account the fact that the evidence at the trial was given seventeen months after the date of the murder. As the initiation ceremony referred to continued for a number of days, there was no evidence to indicate that PW.10 must have been absolutely sure of the times he mentioned in his evidence by reference to some other known incident and we consider that it would be unsafe to convict by relying solely on that witness's evidence as to time. The appeal of the second appellant against his conviction for murder is allowed, and his sentence is set aside.

We turn now to consider whether or not either of the appellants are guilty of a minor offence.

We appreciate that this was a charge of murder, but there is no doubt that the whole of the evidence was directed to show recent possession by the appellants of the goods stolen in the robbery. They had ample opportunity, therefore, to defend themselves on any charge arising out of the theft of the goods. There was prosecution evidence to the effect that both appellants ran away after the police came searching for the goods, and we are quite satisfied that the evidence establishes their guilt of receiving stolen property knowing it to have been stolen contrary to section 318 of the Penal Code.

We substitute convictions of receiving stolen property contrary to section 318 of the Penal Code and we impose a sentence on each appellant of three years imprisonment with hard labour with effect from the 25th June, 1982, the date of their arrest.

Appeal allowed
