ALIMON NJOVU AND FELIX T. NJOVU v THE PEOPLE (1988 - 1989) Z.R. 5 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., BWEUPE AND CHAILA, AG. JJ.S.
19TH APRIL , 1988
(S.C.Z. JUDGMENT NO. 22 OF 1988)

Flynote

Criminal law and procedure - Confession statement - Statement containing mitigating factors as well as admissions - Mitigating factors weighed in accused's favour unless disproved.

Headnote

The first appellant was charged with murder committed during a robbery. After his arrest, the accused made a statement to the police in which he admitted being present when the victim, a night-watchman, was assaulted. In his statement he said he had taken part in the attack on the watchman and implored those involved in the attack not to kill the watchman. There was no evidence that he did attack the watchman. The trial Judge did not accept that the first appellant took no part in beating the deceased and convicted the appellant. The appellant appealed.

Held:
When an accused's confession is used against him, the mitigating factors mentioned in the confession should weigh in his favour unless such factors are specifically disproved.

Case referred to:
(1) Mwape v The People (1976) Z.R. 160

For the appellants: J. Mwanakatwe, Assistant Senior Legal Aid Counsel.
For the respondent: G.S. Phiri, 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 they, together with others, on 17 March 1984 at Lusaka, jointly and whilst acting together, did murder Emmanuel Mulenshi.

The prosecution evidence was to the effect that both appellants took part in a concerted robbery and store breaking at Vintage Zambia Limited and there they murdered the night-watchman and stole a quantity of goods including in particular one welding machine. The evidence against both appellants was that they were in possession of the welding machine after the robbery and in connection with the charge of murder both appellants made statements to the police to the effect that they were present when the night-watchman was assaulted.

Mr Phiri the learned State Advocate has very properly indicated that he does not support the

conviction of the second appellant for murder but he does support a conviction for store breaking.

Mr Mwanakatwe on behalf of the first appellant has argued that, because the appellant was in custody for three days before the statement was taken from him, the learned trial Judge should have exercised his discretion by refusing to admit the confession statement. We have considered this and other arguments put forward by *Mr Mwanakatwe* as to why the confession statement should have been excluded, and we are satisfied that, after a trial-within-a-trial, the learned trial Judge did not misdirect himself in any way when he found that the statement of the first appellant should be admitted. This ground of appeal therefore fails.

Mr Mwanakatwe further argued that if the statements were admitted, the first appellant did no more than admit being present with a gang of people who intended to carry out a store breaking and that he had specifically taken no part in the attack on the watchman. On the contrary he had implored his friends not to kill the watchman. In reply *Mr Phiri* has argued that the very fact that there was a watchman there, as was known to the appellants, indicated that they intended to use force against him, that everybody in the gang who took part in the venture was acting under a common purpose, and all who were proven to have taken part in

the assault or were present when the assault was taking place are properly guilty of murder.In dealing with this aspect the learned trial Judge said this:

> "I do not accept that he, (the first appellant) did not take part in beating the deceased; nor that he told them not to kill him. If he did not take part in beating and killing the deceased then the only thing for him to have done was to report the matter to the police or nearest authority, but he did not do so."

Mr Phiri concedes that when the learned trial Judge said that the natural thing for the appellant to have done was to report to the police he misdirected himself, because obviously the appellant knew that he was guilty of at least store breaking and it could hardly be said that it would be natural for a person who knows he is a criminal to report to the police. A similar situation was dealt with in the case of *Mwape v The People* (1), in that case the learned Chief Justice Silungwe said:

> " We consider that the second portion of Mr Anyorah's proposition is a *non sequitur*, because there is nothing in the evidence to suggest that there was agreement to use violence if necessary, or if there was, that the appellant was party to such agreement. The robbers may well have anticipated the presence of a guard, but they may have planned to effect entry into the premises only if they could avoid detection, and after blowing open the safe, to run away and specifically avoid contact with any guard or guards. It cannot on the evidence, be assumed against the appellant that the plan was to use violence if necessary . . . "

In this case, although there is evidence that the appellant was in possession of the welding machine after the robbery, which would make him at least guilty of receiving, the only evidence to connect him with the theft is his own confession. We think it proper that when a person's confession is used against him, the mitigating factors mentioned in the same confession should weigh in his favour,

unless, of course such factors are specifically disproved. In this case, despite the learned trial Judge's finding, there was no evidence to disprove what the appellant said in mitigation in his statement and it is proper that we should take into account what he said in his own favour. We accept that in this case the first appellant did not intend that any violence should be used during the course of the theft from the premises which were being subjected to the attentions of the gang. In view of what we have said the appeals of both appellants against the convictions of murder are allowed. The convictions for that offence are quashed and the sentences are set aside. In their place we substitute the convictions of each appellant for the offence of store breaking, and the sentences for each appellant of six years imprisonment with hard labour with effect from 23 March 1984.

Appeals allowed.
