DAVID DIMUNA v THE PEOPLE (1989) S.J. (S.C.)

SUPREME COURT
GARDNER, J.S., BWEUPE AND CHAILA, AG., JJ.S.
(S.C.Z. JUDGMENT NO. 23 OF 1989)

Flynote
Evidence - Failure by police to take fingerprints from crime scene - Dereliction of duty
Evidence - Corroboration - Whether required by law in case of evidence by a single police witness

Headnote
The appellant was found guilty of the murder of a baby. The facts were that the appellant was the person last seen holding the baby alive. The police questioned the appellant and he later led them to the place where the dead body of the baby was found. The baby's throat had been slashed and a bloodstained knife was lying beside it.

Held:
(i) It could be a dereliction of duty from which certain presumptions would arise when the police have an opportunity to take fingerprints and do not do so, but it must be established that the police did in fact have an opportunity to take fingerprints in that it must be established that the surface of the material, to be tested, the climatic conditions and other circumstances would enable the police to take such prints. In the absence of such evidence there is no dereliction of duty.
(ii) There is no suggestion that there is any rule of law or otherwise for there to be corroboration for a single police witness
(iii) Whilst a court must not hold the fact that an accused remains silent against him, there is no impropriety in comment that only the prosecution evidence is available to the court

Case referred to:
(1) Kalebu v The People (1977) Z.R. 169

For the appellant: J. Mwanakatwe, Deputy Director, Legal Aid
For the respondent: G.S. Phiri, Senior State Advocate

Judgment
GARDNER, J.S.: Delivered the judgment of the court

The appellant was convicted of murder, the particulars of the charge being that he, on the 17th January, 1986, at Lusaka did murder Edson Kyamulanda. The evidence adduced by the prosecution in support of the charge was to the effect that PW.2, a house servant in the employ of the parents of the deceased, who was a young boy aged approximately one year and seven months, was left in charge of the deceased, and, on the day in question, he had left the deceased outside the house whilst he, the witness, went into the kitchen. When he came out of the house the child was missing. He therefore, went searching for the boy and, as result of what he was told, he went to the house of the appellant and questioned him, but the appellant denied having the child. Despite this the appellant was taken to Chelston police as a result of

which he led the police on what was described as a wild goose chase because nothing was found. Subsequently, however the appellant was questioned by two police officers PW7 and PW8, after which he led the police to a place near a ditch in which the body of the deceased was found. When found it was seen that the throat of the child was cut and a bloodstained knife was lying near the body. There was evidence from two witnesses that they had earlier seen the appellant carrying the deceased in his arms when the child was still alive. On this evidence the learned judge found that the appellant, having been the last person to have been seen with the child alive, and having been the person who pointed out the body to the police was guilty of the offence of murder of the child.

In addition to the evidence of the threat of the child having been cut, the post mortem evidence revealed that the child had been sodomised. Mr. Mwanakatwe on behalf of the appellant argued that the evidence of the identifying witnesses, who alleged that they had seen the appellant carrying the child, was suspect and wasnot sufficient to warrant conviction. He also criticised the fact that when the knife was found it was not subjected to a finger-print test, and he referred the court to the case of Kalebu Banda v The People (1), in which this court said that, except in cases where accused person are for instance, caught when coming out of a stolen car, if the police fail to make finger-print tests when they have an opportunity to do so they are guilty of dereliction of duty, as a result of which there is a rebuttable presumption that any fingerprints on a particular article are not those of the appellant. He also argued that, in view of the fact that the evidence of the police officer, PW8, as to the finding of the body, was challenged, another police officer who was present at the scene should have been called to corroborate that evidence.

Mr. Phiri, on behalf of the State argued that there was strong circumstantial evidence and that there is no rule of law which calls for the corroboration of one police witness even though the first witness is challenged. He said that in any event the rest of the evidence adduced by the prosecution was ample corroboration for the evidence of the police witness.

We have considered the evidence of the witnesses who said that they saw the appellant carrying the child in his arms and we are satisfied that there is no reason why that evidence should not be accepted. On a test of credibility the learned trial judge was entitled to rely on that evidence. Mr. Mwanakatwe criticied the learned trial judge for his comments on the silence of the appellant when put on his defence when the learned trial judge said in his judgment "the accused in this court was at a loss to hazard any defence; despite this court's advising him of the unwise choice of remaining silent, when put on his defence he elected to say nothing". In this respect, in the course of the trial, when the learned trial judge found that there was a case to answer and put the appellant on his defence, he explained the courses open to the appellant and said "you may elect also to remain silent but you have to understand that is an unwise course to take because at this point in time. I have evidence from the prosecution and I do not have anything from your dise". There is nothing improper in a judge's commenting on the fact that an appellant has remained silent. Whilst a court must not hold the fact that an accused remains silent against him, there is no impropriety in comment that only the prosecution evidence as available to the court. It is no more than a statement of fact and does not suggest that remaining silent is an indication of guilt. Mr. Mwanakatwe's criticism theefore cannot succeed as a ground of appeal.

With regard to the question of test for fingerprints, we agree that in the case of Kalebu Banda -v- The people (1) we did point out that it could be a dereliction of duty from which certain presumptions would arise when the police have an opportunity to take fingerprints and do not do so, but we have also pointed out that it must be established that the police did in fact have an opportunity to take fingerprints in that it must be established that the surface of the material, to be tested, the climatic conditions and other circumstances would enable the police to take such prints. In the absence of such evidence there is no dereliction of duty. This

ground of appeal must also fail. With regard to the question whether or not one police officer who is challenged should be corroborated, we confirm that we have said that it may be desirable in such circumstances, if there are other police officers available, for them to be called to give evidence. But there is no suggestion that there is any rule of law or otherwise for there to be corroboration for a single police witness. In this particular case we agree in any event with the learned State Advocate when he said that the fact that the appellant was the last person to be seen with the child alive was corroboration of the other evidence. That ground of appeal must also fail.

On the whole of the evidence we are satisfied that the trial court dealt with this case properly and none of the grounds of appeal can succeed. The conviction must therefore stand. The appeal against conviction is dismissed; the sentence of death for this particular offence is mandatory and no appeal lies therfrom. One other matter which was dealt with by Mr. Mwanakatwe on behalf of the appellant was the suggestion that the appellant was a juvenile at the time of the commission on the offence. In order to ascertain the truth of the matter this court ordered that there should be medical examination. The court received a report that the appellant was in 1988 at least twenty-five years of age and, as the offence was committed in January, 1986, that would indicate that the appellant was no longer a juvenile at the time of the commission of the offence. We were therefore asked to adjourn the matter so that the appellant could produce his national registration card. When he produced the card it was found that he was born in 1958. After this Mr Mwanakatwe, on behalf of the appellant, indicated to the court that he would not pursue the argument that the appellant was ajuvenile. We agree with this course taken by Mr. Mwanakatwe and find that the appellant was not a juvenile at the time of the commission of the offence and the law therefore must take its course.

Appeal dismissed.