BONIFACE CHANDA CHOLA, CHRISTOPHER NYAMANDE AND NELSON SICHULA v THE PEOPLE (1989) S.J.

SUPREME COURT
NGULUBE, D.C.J., GARDNER, A.J.S. AND CHAILA, J.S.
3RD OCTOBER AND 15TH NOVEMBER, 1989
(S.C.Z. JUDGMENT NO. 16 OF 1989)

Flynote
Criminal Procedure - the effect on a trial of an accused not pleading to a charge
Evidence - accomplices and witnesses with an interest to serve - Confessions - demonstrations which amount to confessions - corroboration

Headnote
The three accused were tried and convicted on a charge of murder and another of armed aggravated robbery arising out of the same transaction. Each was sentenced to receive capital punishment. The case against the accused was that in 1984, they shot and killed one Amos Ilubala Linyama, a Member of Parliament while stealing his car. The deceased had gone to Libala to pick up his wife from her parents' home when the incident happened. It was not in dispute that the accused were tried on the aggravated robbery charge without taking plea. After the trial, all the accused appealed against their conviction and the first accused also appealed against the sentence on the ground that he was a juvenile at the time and, therefore, exempted by the relevant law from capital punishment.

Held:
(i) A trial without a plea on a charge is a complete nullity.
(ii) A person is not to be treated as an accomplice unless he is *participes criminis* in respect of the actual crime.
(iii) Prosecution witnesses are *participes criminis* in respect of the actual crime charged and, therefore, accomplices if, on any view, they are principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in case of misdemeanours). They also include receivers of stolen property and, generally, witnesses who took part in and were privy to the crime to which they depose against the accused.
(iv) The critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence. Where it is reasonable to recognise this possibility, the danger of false implication is present and it must be excluded before a conviction can be held to be safe.
(v) The presumption of innocence and the rule against an accused being compelled to incriminate himself have resulted in the requirement that the prosecution must prove beyond reasonable doubt that a confession was made freely and voluntarily. The danger which the system of criminal justice guards against by this requirement is that even the innocent could be forced to make unreliable self-incriminating statements which have been induced.
(vi) A demonstration which amounts to a confession must equally be proved to have been given freely and voluntarily after due caution.

Cases referred to:
1. Banda v The People (1970) Z.R. 14
2. Emmanuel Phiri and Others v The People (1978) Z.R. 79

3. Musupi v The People (1978) Z.R. 271
4. Ali and Another v The People (1973) Z.R. 232
5. R v Frank (1958) R and N 853
6. Mulenga v R (1959) 1 R and N. 41
7. Li Shu-Ling v R (1989) A.C. (145-281) 270
8. Shamwana and Others v The People (1985) Z.R. 41
9. Credland v Knowler (1951) 35 Cr. App. R. 48
10. DPP v Kilbourne (1973) 1 All E.R. 440

For the first and third appellants: Ms. Henriques, Assistant Senior Legal Aid Counsel
For the second appellant: Mr. L.P. Mwanawasa of Mwanawasa & Company.
For the respondent: Mr. A.B. Munthali, Assistant Senior State Advocate

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Judgment

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

The appellants were tried and convicted on a charge of murder and another of armed aggravated robbery arising out of the same transaction. Each was sentenced to receive capital punishment. The particulars of offence on the murder charge were that they and a co-accused murdered Amos Ilubala Linyama at Lusaka, on 2nd August, 1984. The particulars on the armed aggravated robbery charge were to the effect that the same people on the same occasion stole the deceased's motor vehicle using a firearm. The evidence established quite conclusively that the deceased, who was a Member of Parliament, was killed in the course of an armed robbery against him at around 21.00 hours on 2nd August, 1984, in the Libala township of Lusaka where he had gone to collect his wife, PW1, from her parent's home. As they got into their car, ready to drive off to their house, one robber got hold of PW1 and threw her in a flowerbed while another harassed the deceased who grappled with him. PW1 saw at least three robbers and heard one of them shout, "Now bring the keys! Now shoot!"

The deceased was shot and killed instantly and the robbers made off with the car amid much gunfire. There was evidence from PW2, an accomplice supported by border officials that, as early as shortly after 06.00 hours the next day, he had driven the stolen car into Zaire. There was no eye-witness identification of the appellants. The issue at the trial concerned the identity of the offenders and whether the appellants were properly connected and identified as the robbers involved. All the appellants have appealed against their conviction and the first appellant has also appealed against the sentence on the ground that he was a juvenile at the time and, therefore, exempted by the relevant law from capital punishment.

We propose to begin with the armed aggravated robbery charge which can be shortly disposed of. This charge was introduced by way of amendment to the information after pleas had already been taken on the murder charge. It is not in dispute that the appellants were tried on this charge without a plea ever being taken. Following the principle and for the reasons discussed in *Banda v The People* (1) the trial without a plea on this charge was a complete nullity and we must quash the proceedings to the extent that they related to this charge. The conviction and sentences in respect of the armed aggravated robbery charge are quashed and we leave it to the prosecution to decide if they wish to re-instate this prosecution.

We now turn to the murder charge. There was evidence from PW2, the accomplice, which directly implicated all three appellants but which had to be corroborated. This was the witness who stated that he was hired by one George Kabongo to drive the vehicle to Lubumbashi. He came to Lusaka on 31st July, 1984, and was taken by Kabongo to PW5's house in Marapodi where was introduced to he three appellants at a time when the vehicle had not yet been stolen and where the appellants held a discussion with Kabongo in a language he could not

understand except for the words “not yet ba mudala”. PW2 spent the night of 1st August, 1984, with the appellants at PW5’s house. On 2nd August, 1984, PW2 left PW5’s house in company with the appellants but parted ways when they got to the main road. PW2 went to visit someone else and returned to PW5’s house in the evening. Around 23.00 hours, that is, about two hours after the murder and robbery, all the appellants came to fetch him in a taxi. They took him to Barlastone Park township west of Lusaka and he found the deceased’s car parked behind a house. The second appellant then handed over the car keys while Kabongo gave him fuel money. PW2 sped off for Zaire and lied at Mokambo border post early on 3rd August, 1984, to say he was on his way to Mansa when in actual fact he was headed for Lubumbashi. PW5 confirmed having kept Kabongo, PW2, and the appellants at his house. There was evidence also from PWs 3 and 4, who were soldiers, to the effect that they had supplied firearms to one Oliver Bwalya who passed them on to the appellants. PW 4 stole a sub-machine gun and a pistol which he gave to Bwalya who passed them on to the appellants. When PWs 3 and 4 wanted to retrieve the guns, they were taken to the appellants’ house by Bwalya and there met the three appellants. They did not retrieve the guns. On 3rd August, 1984, the appellants called at the working place of PWs 3 and 4. Having already heard about the murder and robbery of the previous night in Libala, PW4 asked the appellants in the presence and hearing of PW3 whether they were the ones who had committed the offences. The 2nd appellant denied but later the first appellant admitted, whereupon the second and third appellants remained silent. The guns, though later retrieved, were not handed over to the police, neither did PWs 3 and 4 report the matter to the police. All these witnesses, that is, PWs 2, 3, 4 and 5, were all detained by the police for varying periods of time until the State decided to use them as witnesses. It should also be mentioned that there was no evidence to connect the guns lent by PWs 3 and 4 to this murder.

There was also evidence from the police witnesses that, in the course of the investigations, the first and second appellants led the police to the scene in Libala and indicated where they had stood and where the offence took place and photographs were taken.

The learned trial judge found that PW2 was an accomplice but that PWs 3, 4 and 5 were not accomplices. We found that PW2 was corroborated by PW5 as to the events at his house and by PWs 3 and 4 in relation to the admission made by the first appellant which was held to be the confession of all of them because the second and third appellants kept quiet in the face of such an incriminating admission. The confession was thus held to apply to all of them and to corroborate PW2 against each appellant. The learned trial judge also found that the leading of the police to the scene by the first and second appellants was voluntary and supported their guilt. The learned trial judge also rejected the defences of denial and alibi put forward by the appellants.

On behalf of the appellants, counsel advanced a number of grounds of appeal, some common to all of them. One ground alleged error on the part of the learned trial judge in declining to treat PWs 3, 4 and 5 as accomplices. Mr Munthali argued that the learned trial judge was not wrong to find that these witnesses were not associated with the appellants in relation to the specific charge against them. We agreed that the finding that the witnesses were not accomplices as such could not be faulted. As we recognised in *Emmanuel Phiri v The People* (2) at page 99 to 100:

> “…. A person is not to be treated as an accomplice unless he is *participes criminis* in respect of the actual crime.”

Prosecution witnesses are *participes criminis* in respect of the actual crime charged and, therefore, accomplices if, on any view, they are principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in case of misdemeanours). They also include receivers of stolen property and, generally, witnesses who

took part in and were privy to the crime to which they depose against the accused.

However, there was force in the alternative submission that, even if they were not accomplices, the learned trial judge ought to have made a finding that, because of the particular circumstances of the case and their roles, these were witnesses who may have had possible interests of their own to serve as we pointed out in *Musupi v The People* (3), the critical consideration is not whether the witnesses did in fact have interest or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence. Where it is reasonable to recognise this possibility, the danger of false implication is present and it must be excluded before a conviction can be held to be safe. In other words, once this is a reasonable possibility, their evidence falls to be approached on the same footing as for accomplices. As Mr. Mwanawasa and Miss Henriques pointed out, PWs 3, 4 and 5 were all detained in connection with this case. To the extent that the learned trial judge did not consider whether, although not accomplices, they were suspect witnesses for the reason discussed, he fell into error. We shall deal with the effect of this mistake later.

Another ground common to the second and third appellants criticised the finding that the admission of guilt made by the first appellant to PWs 3 and 4 in their presence, and their silence, made it the confession of all of them and was a factor supportive of their convictions. We wish to reiterate the principle in *Ali and Another v The People* (4) that mere silence in the face of an accusation or, in this case, the first appellant's admission by the second and third appellants. The evidence had to show that the second and third appellants, by some positive conduct, action or demeanour accepted the truth of the admission. Mr. Munthali argued that the second and third appellants had adopted the confession by conduct, that is, by their silence. This argument is circular and begs the question since no adverse inference could be drawn if all there was to rely upon was their mere silence. In any case, the evidence was the second appellant had consistently denied the accusation when asked by PWs 3 and 4 and the words used by the first appellant - to which we will refer later - were equivocal in the circumstances of this case where there were names of other suspects who are not among the appellants. Once again, the learned trial judge erred in drawing an adverse inference from this silence and in finding that the second and third appellants had adopted the first appellant's confession. The effect of this error will be considered later.

There was a ground of appeal which alleged error in the finding that the first and second appellants had, separately, voluntarily led the police to the scene and voluntarily posed for photographs while pointing at where they had stood on the night of the offence and where the deceased's vehicle was parked and so on. The appellants concerned had disputed this evidence which they contended had been forcibly stage-managed and did not reflect any truth or actual re-enactment of the events that night in which they had denied any participation. This was not a case where the leading of the police to the scene or elsewhere by an accused, whether voluntarily or not, had resulted in the discovery of real evidence - which is always admissible - or the discovery of anything else not already known to the police. The only utility to such evidence at all is that the prosecution expects it to be treated as confessionary evidence. The presumption of innocence and the rule against an accused being compelled to incriminate himself have resulted in the requirement that the prosecution must prove beyond reasonable doubt that a confession was made freely and voluntarily. The danger which the system of criminal justice guards against by this requirement is that even the innocent could be forced to make unreliable self-incriminating statements which have been induced. A demonstration which amounts to a confession must equally be proved to have been given freely and voluntarily after due caution. Thus, in *R v Frank* (5) indications by an accused at the scene which were a constituent part of an inadmissible confession were held by the Federal Supreme Court to be equally inadmissible. Again in *Mulenga v R* (6), the Federal Supreme Court was not prepared to support the inference that the appellant in that case (who was represented by Mr. Gardner, as he then was) had murdered the deceased simply from the fact

that he had led the police to the *locus in quo* where the body was found. They stated, *obiter*, that there may be exception to the admissibility of evidence that things were discovered as a result of an inadmissible statement when the statement was extracted by grossly illegal means; but this sentiment can no longer be valid since it is now settled and accepted that evidence uncovered in an illegal fashion will, if relevant, be admissible. However, the discussion in that case illustrated the possible unreliability of such indirect confessionary evidence and the consequent dangers of attempting to draw an inference of guilt from disputed allegations that an accused led the police to the scene. We have also considered the discussion in *Li Shu-ling v R* (7) where there was a video recording of the accused demonstrating how he had committed the offence. It was held that since a video recording of his voluntary confession statement and of any accompanying demonstration given by him at the time of that recording would be admissible in evidence, a video recording of his re-enacting at the scene after he had made an oral confession was admissible. The Privy Council observed, at page 279:

> "The truth is that if an accused has himself voluntarily agreed to demonstrate how he committed a crime it is very much more difficult for him to escape from the visual record of his confession than it is to challenge an oral confession with suggestions that he was misunderstood or misrecorded or had words put into his mouth. Provided an accused is given proper warning that he need not take part in the video recording and agrees to do so voluntarily the video film is in principle admissible in evidence as a confession and will in some cases prove to be most valuable evidence of guilt."

In the instant case, there was, of course, no video film but still photographs the incriminating purport of which had to be supplied verbally by the police officers. There was also no caution given to the first and second appellants. There was nothing to refute their claim that the police demanded that they pose and point at various spots other than the word of the police officers. The resulting photographs were meaningless unless accompanied by the oral explanations of the police, such as, that the accused then said: - "This is where I stood and that is where the vehicle was parked when I committed the offence," and so on. In substance and in truth, this was a question of an oral confession. Simply because there were still photographs to accompany a disputed oral confession at the scene did not relieve the prosecution of their duty to prove voluntariness of the oral confession in the normal manner. What is more, the disputed leading of the police to a place they already knew and where no real evidence or fresh evidence was uncovered can hardly be regarded as a reliable and solid foundation on which to draw an inference of guilt.

It is clear that the misdirections to which we have referred were serious and the convictions can only stand if, in relation to each appellant, we can apply the proviso to section 15 of the Supreme Court of Zambia Act. We now propose to deal with the grounds of appeal relating to the credibility of the witnesses and the issue of corroboration. It was argued that PWs 2, 3, 4 and 5 were not credible witnesses. In relation to PWs 3 and 4 some discrepancies were pointed out by the short answer to this as Mr. Munthali correctly argued, was that the discrepancies were minor and did not detract from the substance and purport of their evidence which was agreed in all material aspects. With regard to PW2, it was argued that this was a witness whose evidence was at variance with his statement to the police, particularly as regards his failure at first to implicate the appellants, advancing the unsatisfactory reason that he was afraid of them. PW2 was an accomplice and it is precisely on the question of identity that an accomplice most needs to be corroborated. He would necessarily know the facts and the danger to be guarded against is one of false implication of the accused. It follows, therefore, that neither his consistency nor inconsistency on the question of identity would obviate the need to look for support on the point. PW5's credibility was attacked on the basis that he gave different residential addresses and did not explain the need for the appellants, who had their own houses, to reside in his house. This, we consider, did not detract from his credibility such

that his entire evidence could not be truthful.

We now deal with the issue of corroboration. PW2 was an accomplice and we have said PWs 3, 4 and 5 were witnesses who may have had their own interests to serve. The approach to both categories is the same and it is necessary to examine the circumstances to see if the danger of a jointly fabricated story was excluded and if there was support for their evidence. In this regard, PWs 2 and 5 who stayed together fall into one camp and PWs 3 and 4 into another. It is apparent that while the two in one camp may have had an opportunity to rehearse a story, the evidence did not suggest that the two sets had ever met so as to raise the possibility that all four jointly agreed falsely to implicate the appellants. They gave independent evidence of separate incidents and for that reason, in accordance with the decision in *Shamwana and Others v The People* (8), the two sets can be mutually corroborative since there is no danger of joint fabrication. It is also pertinent to recall the remarks of the Lord Chief Justice in *Credland v Knowler* (9), which we cited with approval in the *Shamwana* case, that: -

> "As has been pointed out over and over again, where the question is whether a person's evidence is corroborated, the whole story has not to be corroborated, because if there is evidence independent of the person whose evidence requires corroboration which covers the whole matter, there is no need to call that first person at all. The evidence has only to be corroborated 'in some material particular ...., by some other evidence."

We recall also the useful comment by Lord Reidin *DPP v Kilbourne* (10) at Page 456:

> "There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement, one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter. The better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in .... And the law says that a witness cannot corroborate himself. In the maker of the doubted statement has consistently said the same thing since the event described happened. But the justification of the legal view must, I think, be that generally it would be too dangerous to take this into account and therefore it is best to have a universal rule."

With these principles in mind and having regard to what we have already said about the various aspects of the case called in question, we now proceed to examine if each appellant's conviction, individually, should be upheld. We bear in mind also their submissions that the witnesses were not corroborated and could not corroborate each other on the important question of the identification of each of these appellants as the perpetrators of this terrible murder. As against the first appellant, we have discounted the evidence that he led the police to the scene and there posed for some photographs, evidence which falls to be treated on the same footing as a confession and must be voluntary. However, the direct evidence of PW2 against him was corroborated by his confession to PWs 3 and 4 who were giving independent evidence of separate incidents. We are alive to the submission that the witnesses' recollection of the exact words of the confession left much to be desired, but there can be no mistaking the substance of his admission when PW4 asked a direct question whether the appellants were the ones who had killed the deceased the previous night. The first appellant said, "yes, it is we with my group" or "yes, it is we who had done it" or "yes, it is we who killed the one you are asking about". To us the first appellant's confession to PWs 3 and 4 was clear, whichever were the words. As against the second appellant, we have discounted the leading of the police to the scene and his silence when the first appellant admitted the offence to PWs 3 and 4 to whom he had personally denied the allegation. That leaves the evidence of PWs 2 and 5 who were in the same camp. At best, the evidence of PWs 3 and 4 corroborated PWs2 and 5 only to the extent that all these appellants were associates who were to be found in each other's

company. But then, there were other suspects, like Oliver Bwalya, and association alone is not sufficient to corroborate PW2 on the vital question of the second appellant's participation in and identification with the offence. What we have said about the second appellant applies equally to the third appellant except, of course, on the question of leading the police to the scene since he was not alleged to have done so.

The result of the foregoing is that, although the suspicion is very strong that the second and third appellants were members of the same gang, there is no corroboration for PW2's evidence against them and the danger of false implication of these two by him has not been excluded. We are unable to apply the proviso and the appeals of the second and third appellants are allowed. Their convictions are quashed and their sentences set aside. The first appellant was properly convicted and PW2 was corroborated in relation to him by the admission to PWs 3 and 4. We dismiss his appeal against conviction. With regard to the sentence of death, the medical report received supported his contention that he was a juvenile at the time when he committed this offence. In accordance with Section 25 of the Penal Code, the sentence of death is set aside and in its place we substitute the sentence that the first appellant shall be detained during the President's pleasure.

1st appellant's appeal dismissed,
2nd and 3rd appellants' appeal allowed.