EDWARD SINYAMA *v* THE PEOPLE (1993 - 1994) Z.R. 16 (S.C.)

SUPREME COURT
NGULUBE, C.J., SAKALA AND CHIRWA, JJ.S.
16TH FEBRUARY AND 6TH APRIL,1993.
(S.C.Z. JUDGMENT NO. 5 OF 1993)

Flynote

Evidence - *Res Gestae* - Definition of.

Headnote

The appellant was sentenced to death for the murder of his estranged wife. The prosecution relied on a confession statement, evidence of kerosene and matches revealed as a result of the confession and on a statement made by the

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deceased after she ran half a kilometre while burning, from her estranged husband's house. On appeal, the defence challenged all three pieces of evidence.

Held:
A statement is not ineligible as part of the *res gestae* if a question has been asked and the victim has replied or if the victim has run for half a kilometre to make the report. If the statement has otherwise been made in conditions of approximate though not exact contemporaneity by a person so intensely involved and so in the throes of the event that there is no opportunity for concoction or distortion to the disadvantage of the defendant or the advantage of the maker, then the true test and the primary concern of the Court must be whether the possibility of concoction or distortion should be disregarded in the particular case.

Cases referred to:
(1) The People v John Nguni (1977) Z.R. 376.
(2) Chisoni Banda v The People (1990-92) Z.R. 70.
(3) Ratten v R. [1971] A.C. 378.
(4) R. v Andrews [1987] 1 All E.R. 513.

For the appellant: M.S. Mwanamwambwa, Lisulo & Co.
For the respondent: F.J. Mensah, State Advocate .

Judgment

NGULUBE,C.J.: delivered the judgment of the Court.

The appellant was sentenced to suffer death for the murder of his estranged wife. The particulars were to the effect that on 26th August,1989, he murdered his wife Eunice Tembo. The prosecution's case was that on that fateful day the appellant collected the deceased from her uncle's house in Kalingalinga Compound where she was then residing and went with her to his own house half a kilometre away. It was the Prosecution's case that after an argument the appellant doused the deceased with paraffin and set her ablaze. She fled to her uncle's house from whence she had a short while ago been collected and in answer to a question told her relative PWs 2 and 3 that it was the appellant who had set her ablaze after losing his temper over a pair of shoes she had lost. The prosecution relied on the witnesses who saw her being collected and who testified to her return shortly afterwards in a terrible condition and who also

told the Court what the deceased had told them when questioned. They also relied on a warn and caution statement to the police which was a full confession and which was admitted in evidence after a trial within a trial. The prosecution further relied on evidence from the investigating police officer who deposed that the appellant showed her at his house the kerosene and box of matches used and a piece of cloth which had been torn from the skirt the deceased was wearing. The deceased died from the very severe and extensive burns suffered. The learned trial judge did not in her judgment allude to the warn and caution statement but she did refer to the rest of the evidence which we have outlined and came to the conclusion that the appellant had deliberately poured kerosene on his wife and set her on fire. The appellant did not give evidence in his own defence, a course he was perfectly entitled to adopt. He appeals to this Court against his conviction.

On behalf of the appellant, Mr Mwanamwambwa advanced four grounds of appeal. Two of these related to the warn and caution state-

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ment whose voluntariness was disputed. As we indicated during the hearing, we had no difficulty in discounting the confession statement which even the learned trial judge ultimately seemed to have ignored. We could not allow the statement to stand when the ruling given following a trial within the trial was so brief that the appellant was effectively deprived of the opportunity to challenge its corrections on appeal. In addition, the brief reasons given indicated that the burden of showing voluntariness was misplaced when the learned trial judge dealt only with the inconsistencies in the appellant's account and found he was not to be believed because he had exaggerated the beatings and had not adduced medical evidence. It was for the prosecution to satisfy the Court that the statement was free and voluntary rather than that the appellant failed to establish the involuntariness. With the disallowance of the confession statement, the issue was whether the remainder of the evidence was adequate to sustain the conviction. We are alive to the argument by Mr Mwanamwambwa that, although the learned trial judge did not refer to the confession in the judgment, she must have been influenced by it in coming to the conclusion that the appellant doused the deceased with kerosene and set her ablaze. There was in fact no support for this line of argument in the record and the submissions suggesting other possible inferences, such as suicide, could only be entertained if we accepted counsel's arguments on the statements which the deceased made to PWs 2 and 3, a matter to which we now turn.

The evidence from PWs 2, 3 and 4 showed that the appellant came to fetch his wife but shortly afterwards she arrived, severely burnt. She was crying and calling her uncle PW2 who asked her what had happened. She then told the witnesses how the appellant had burnt her. According to PW3, this witness had equally asked the question, ''What is the matter?'' and the deceased had then told them what had transpired. In his major ground of appeal Mr Mwanamwambwa submitted that what the deceased said was wrongly admitted as *res gestae* when it was hearsay evidence. It was his submission that, because the deceased walked or ran for half a kilometre from the appellant's house and because what she reported was in response to a question, her statement lacked spontaneity and did not qualify to be treated as *res gestae* so as to be an exception to the hearsay rule. It was suggested that there was in this case time and oportunity to fabricate a statement to the disadvantage of the estranged husband. Mr Mensah countered these arguments by submitting to the effect that the deceased did not have time to concoct a statement and she made her statement when she was burning and in a frame of mind induced by the most powerful consideration of the tragedy in which she found herself.

We have considered the submissions. The issue of *res gestae* has been considered by our courts in a number of cases, the leading one at the High Court level being that of *The People v*

John Nguni [1] which we approved in *Chisoni Banda v The People* [2]. We have also considered the *res gestae* principle as elaborated in cases like *Ratten v R.* [3] and *R. v Andrews* [4] and the discussion to be found in paras.11-23 to 11-25 of *Archbold Criminal Pleading, Evidence and Practice*, 43rd ed. It is apparent from the authorities that the test of admissibility is not that the statement must have been made in conditions of the exact contemporaneity as part of the transaction or

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event causing harm, as argued by Mr Mwanamwambwa. It is also not correct that a statement will be ineligible to be treated as part of the *res gestae* if a question has been asked and the victim has replied or if the victim has run for half a kilometre to make the report. If the statement has otherwise been made in conditions of approximate, though not exact, contemporaneity by a person so intensely involved and so in the throes of the event that there is no opportunity for concoction or distortion to the disadvantage of the defendant or the advantage of the maker, then the true test and the primary concern of the Court must be whether the possibility of concoction or distortion should actually be disregarded in the particular case. The possibility has to be considered against the circumstances in which the statement was made. In the case at hand, the event was certainly unusual or dramatic or traumatic.

When the deceased rushed back to her uncle's place and explained what had just happened, her statement was sufficiently spontaneous and the time factor involved was short enough to have enabled any court to find that the deceased did not have any real opportunity for reasoned reflection. The evidence speaks for itself and we find that the deceased made explanation, in answer to the inquiry by concerned relatives, while labouring under the compelling pressure of the event and as part of the event. It follows that we do not uphold the ground of appeal in this respect.

Finally, there was a ground of appeal alleging error on the part of the trial Court when it was concluded that the appellant has set the deceased on fire. We are satisfied that the submissions in this behalf do not hold when regard is had to all the evidence that was properly accepted. There was in this case, a cogent circumstantial case when the appellant collected the deceased who rushed back shortly afterwards in a terrible state. She forthwith identified the appellant as the culprit and he subsequently produced the kerosene and matches used to the police who were investigating the incident. We are satisfied that, on the evidence discussed, the conviction was fully justified.

Appeal dismissed.
