

IN THE SUPREME COURT OF ZAMBIA

Appeal No. 32-33 of 19

HOLDEN AT LUSAKA

(Appellate Jurisdiction)

B E T W E E N:	Andrew Chifita Chiwala	1st Appellant
	Lackson Chinda	2nd Appellant
	Honest Kasongo	3rd Appellant
	Luck Chileshe	4th Appellant
	Kizito Kalilele	5th Appellant
	And	
	The People	Respondent

Coram: Gardner, Chaila and Muzyamba JJJS.,
23rd August, 1994.

Mr. M.A.C. Samad Senior Legal Aid Counsel appeared for the appellants.
Mr. Mukelabai Acting Senior State Advocate appeared for the State.

J U D G M E N T

Gardner J.S. delivered the judgment of the court.

The court was informed by Mr. Mukelabai on behalf of the state that the second appellant Lackson Chinda died on the 7th January, 1994 of natural causes, his appeal therefore abates.

The appellants were convicted of aggravated robbery. The particulars of the charge were that they whilst acting together did rob Aaron Daka of 43 head of cattle and other items valued in total K1,920,000.00 and at or immediately before or after the robbery did use or threaten to use actual violence.

The prosecution evidence was that the items referred to in the charge were stolen and that the watchman who was guarding the cattle was threatened by a number of men who stole the cattle and the items referred to.

There was no direct evidence against any of the appellants but confession statements by each one of them were produced in the court below. Defence counsel in the court below objected to the production of the statement

on the grounds that they have been obtained under duress. The learned trial commissioner therefore held a trial within a trial. During the trial within a trial only the second appellant agreed that he had made a statement; the rest of the appellants denied that they had made any statements at all. All of the appellants said that they had been subjected to oppressive behaviour by both the army and police officers and that they had been beaten. Each one of them said that he suffered from injured ribs. The learned trial commissioner said in his ruling after the trial within a trial that for four of the appellants there was no need for a trial within a trial and the question of whether or not they had made statements at all was one of the general issues in the trial. Thereafter, in his judgment he gave no reasons why he accepted that the statements had in fact been made. All he said was: "The accused persons categorically denied both in the trial within a trial and in the main trial that they made any statements to the police. I therefore found no reasons to exclude them."

With regard to the complaint by all of the appellants that they had suffered injured ribs, despite the fact that a witness was called to say they had been examined in hospital and found to have painful ribs, the learned trial commissioner said: "As to the medical evidence the causes of painful ribs was not ascertained. As such it is unreliable." The learned commissioner then went on to say that he was satisfied beyond all reasonable doubt that no force was applied to the second appellant or the others in order to make them make statements.

Mr. Mukelabai on behalf of the state has very properly indicated that he does not support the convictions because they depended solely upon the confession evidence which should not have been admitted. We agree that the learned trial commissioner misdirected himself when he said that the causes of painful ribs had not been ascertained. The appellants themselves said the cause was the beatings they received, and thus their complaints were supported by the evidence. Furthermore, having treated the question of whether or not the statements were made as one of the general issues, the learned trial judge gave no reasons for accepting the prosecution evidence in that respect. For these reasons we are satisfied that the statements were improperly admitted.

The court did observe that at one stage in the trial, immediately after

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the disputed confession statements were admitted, the prosecution sought to introduce statements made by the appellants on their arrest. At this stage the defence counsel indicated that he did not object to the introduction of these statements and when they were admitted it transpired that two of the statements were admissions of having committed the offence.

Mr. Samad on behalf of the appellants has pointed out that the defence counsel's principal objection throughout had been that the appellants had been beaten and that his failure to object to the introduction of the further admissions must have been a mistake. Mr. Mukelabai on behalf of the state conceded that this must have been so, and we agree that the behaviour of the defence counsel was inconsistent and he could not possibly have intended to agree to the admission of a further confession statements without objection. We agree that a mistake was made but we would point out the danger of any defence counsel agreeing to the admission of documents until he has seen them.

In view of the fact that there was no evidence against the appellants other than the confession statements, and those confession statements should not have been admitted for the reasons we have indicated, the appeals against conviction are allowed. The convictions are quashed and the sentences are set aside.

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B. T. Gardner
SUPREME COURT JUDGE
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M. S. Chaila
SUPREME COURT JUDGE
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W. M. Muzyamba
SUPREME COURT JUDGE
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