IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO. 128 OF 1995

HOLDEN AT NDOLA

(Criminal Jurisdiction)

ALLAN KUNDA Appellant

v

THE PEOPLE Respondent

Coram: Ngulube, C.J., Chirwa JS and Lewanika Ag. JS

on 6th June, 1996.

For the Appellant : Miss W.L. Henriques, Deputy Director of Legal Aid

For the Respondent: Mr. B.O. Okafor, Principal State Advocate

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J U D G M E N T

Chirwa JS delivered the Judgment of the Court.

The appellant was convicted on one count of Aggravated Robbery contrary to Section 294(1) of the Penal Code. The particulars allege that the appellant on 2nd February, 1993 at Ndola jointly and whilst acting together with other persons unknown and armed with a firearm robbed one Maxwell Mwale of one Toyota Dyna motor vehicle valued at K1.5m the property of Ndola Bakery and that at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said Maxwell Mwale in order to obtain and retain the said motor vehicle. After his conviction the appellant was sentenced to the mandatory death sentence. He has now appealed to this court against the conviction.

In arguing this appeal Miss Henriques advanced two grounds of appeal. The first one was that the learned trial judge erred in admitting the warn and caution statement recorded from the appellant.

In arguing this ground it was advanced that PW10 who recorded the warn and caution statement testified that before he did that he interviewed the appellant and this was done before he warned and cautioned him. She further submitted that the detailed warning and rights were not explained to the appellant. He was never warned that anything he may say may be given in evidence. The main objection to this statement was that the appellant was beaten and starved for a number of days in the cells. A trial within a trial was held to determine the voluntariness of this statement and on behalf of the prosecution, the recording officer and one other officer gave evidence. They both denied beating the appellant and as to the second witness who witnessed the statement testified that he saw the appellant take some food whilst in police cells. This denial of the two officers beating up the appellant is confirmed by the appellant himself who told the court below that the two officers were not part of the group that assaulted him. Miss Henriques also took the issue that the witness who testified that he saw the appellant eat in the cells did not give details as to when and what type of food the appellant was eating and also who brought that food. She submitted that since on the confession evidence against the appellant, bearing in mind circumstances under which it was obtained, this warn and caution statement should be disregarded by this court and in the absence of any other evidence connecting the appellant to the robbery, he ought to be acquitted.

The second ground of appeal on which Miss Henriques wanted to attack this appeal was on blood samples. The first was collected from the motor vehicle in question and the other sample collected from the appellant. However, after being drawn to the fact that both samples were of the same group, she did not pursue this angle of the appeal. However, she also took the issue of the finger prints allegedly collected or lifted from the motor vehicle by PW4.

She submitted that since the results of the same are not known, this should be assumed in favour of the appellant that the finger prints collected or lifted from the motor vehicle did not belong to the appellant.

In supporting this conviction Mr. Okafor for the State has submitted that the learned trial judge was in a better position to observe the witnesses and that when the evidence as adduced by the prosecution and that by the appellant, the learned trial judge correctly disregarded the evidence by the appellant. He submitted that the warn and caution statement was recorded from the appellant within 24 hours of his apprehension at Mukambo. Further that at the trial the appellant was adequately represented and taking the totality of the evidence as to his injury, and also the blood samples collected from him and from the motor vehicle, these rendered support to the warn and caution statement which as the learned trial judge found was free and voluntary were sufficient to sustain the conviction.

We have considered the evidence at the trial within the trial and also the detailed ruling that the learned trial judge gave after trial within a trial. We have also borne in mind the circumstances under which the appellant was apprehended and also the time when the warn and caution statement was recorded from him. We have found it extremely difficult to find any unfair circumstances under which this warn and caution statement was recorded and we have been unable to find any errors as to the findings of the learned trial judge on this point. We agree with him that this warn and caution statement was free and voluntary and a court is entitled to convict on a warn and caution statement and authorities on this point are bound in this court and other courts of similar jurisdiction.

The court was competent to convict on a confession and having agreed with the learned trial judge that the statement was free and voluntary and having accepted that there were no circumstances under which he could exercise his discretion to eliminate it, we confirm the conviction of the appellant. The appeal against conviction is dismissed. There is no appeal against the mandatory death sentence.

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M.S. Ngulube
CHIEF JUSTICE

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D.K. Chirwa
SUPREME COURT JUDGE

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D.M. Lewanika
AG. SUPREME COURT JUDGE