IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO. 30 OF 1986

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN: DONALD MWALE Appellant

vs

THE PEOPLE Respondent

CORAM: Ngulube, D.C.J., Gardner and Sakala JJ.S

6 October, 1987

For the Appellant : Mr. C. P. Sakala, Ag. Director of Legal Aid

For the Respodent : Mr. K. C. Chanda, Senior State Advocate

J U D G M E N T

Sakala, J.S. delivered the judgment of the court.

Cases referred to: (1) Tapisha vs The People (1973) ZR 232

The appellant was sentenced to death following upon his conviction on a charge of murder. The particulars of the offence alleged that on 18th April, 1985 the appellant, with two others at Lundazi, jointly and whilst acting together murdered Josephine Nkhoma.

The evidence for the prosecution was that on 18th April, 1985 the deceased, a girl of three years old, was playing around the place where PW1, her father, was drinking beer with others at Lusengiza Wild Life Camp. The appellant and his two co-accused later joined PW1 drinking beer. The evidence of PW1 was that, that was the second occasion for him to see the appellant and his co-accused. After sometime, PW1 noticed that his daughter was not present. He made some inquiries about his daughter but the inquiries proved negative. The appellant and his co-accused left the place where they were drinking beer. PW1 and his wife decided to check at the fields some twenty minutes after the appellant and his

co-accused had left the scene. PW1 and his wife were later joined by other people looking for their daughter. On the way to the fields the search party noticed the child's foot prints, and also noticed the prints of a man's shoes. The party followed the shoe prints until they found a chitenge material. The shoe prints led them to a tree where they found a pool of blood. Finally the deceased's body was found in the nearby bush. PW1 testified that he observed that the deceased had several stab wounds on the neck and the forehead. The hair on the one side of the head was cut. The deceased's private parts were removed. PW1 remained at the scene with the deceased's body while PW's 2 and 3 continued following the shoe and foot prints. Later PW's 2 and 3 reported to PW1 having found the appellant and his two co-accused; the appellant was wearing the shoes whose prints PW's 2 and 3 had been following.

According to the prosecution witnesses, a shirt which one of the appellant's co-accused was wearing had blood stains. Both of the co-accused according to the prosecution evidence informed PW's 1, 2 and 3 that the appellant was the one who had killed the deceased but the appellant denied stating that the deceased was killed by his two co-accused persons. The matter was reported at Lundazi Police Station on 19th April. The body of the deceased was conveyed to Lundazi General Hospital mortuary. Suffice it to mention that a search of the deceased's private parts proved fruitless. The appellant and his co-accused were taken to Lundazi Police Station where on 20th April statements were recorded from them under warn and caution by PW4, a detective constable. The statements were admitted in evidence after a trial within a trial. The appellant and his co-accused did not give evidence in the trial within a trial nor in the main trial at the close of the prosecution case.

The learned trial judge considered the prosecution evidence and the appellant's warn and caution statement. He found that the appellant's co-accused did not take part in the killing of the deceased but on the basis of the appellant's warn and caution statement the learned trial judge found that the prosecution had proved the charge of murder against the appellant and convicted him accordingly. The court found that a case against the appellant's co-accused had not been proved and accordingly acquitted them.

On behalf of the appellant Mr. Sakala, the acting Director of Legal Aid, argued three additional grounds of appeal before us. The first ground was that the learned trial judge misdirected himself in holding a trial within a trial when the appellant made the allegation that he had not made any statement to the police but that he was forced to sign a statement. According to the learned Director the correct position is that when the appellant makes an allegation that he did not make a statement to the police but that he was forced to sign the statement; the allegation of the appellant having been forced to sign a statement becomes one of a general issue to be dealt with in the main trial. It is perhaps necessary to deal with this ground at this stage. The arguments advanced by the learned Director have been considered in a number of cases before this court. One of those cases is Tapisha vs The People (1). Very briefly the applicant in that case was convicted of theft. Part of the case for the prosecution was the evidence of a police officer to whom the applicant was alleged to have made a free and voluntary statement. Objection was taken on the ground that the statement was made as a result of beatings and a trial within a trial was commenced. When this trial within a trial was almost concluded it was established that the applicant would allege that he made no statement but that he was forced to sign his name in a notebook. The magistrate

thereupon discontinued the trial within a trial on the ground that the denial that a statement was made is a matter for the general issues and not for a trial within a trial. The Court of Appeal, among others, held that where any question arises as to the voluntariness of a statement or any part of it, including the signature, then, because the voluntariness is, as a matter of law, a condition precedent to the admissibility of the statement, this issue must be decided as a preliminary one by means of a trial within a trial.

In the instant case although the appellant alleged that he did not make a statement to the police he further complained that he had been forced to sign the statement which he did not make. We agree with Mr. Chanda, the Senior State Advocate, that there are two circumstances that lead to a holding of a trial within a trial in determining the voluntariness of a statement when it is challenged. The first instance is when the appellant alleges that he was forced into making a statement and the second is when the appellant alleges that he did not make a statement but was forced to sign a statement. In both these circumstances the issue is not a general issue. It is an issue that must be determined upon holding a trial within a trial. In the instant case we find no misdirection on the part of the learned trial judge in holding a trial within a trial.

The second ground was that the learned trial judge misdirected himself in not dealing with the general issue raised in the additional ground one. We find it unnecessary to deal with this ground as it has already been taken care of in the arguments already considered. The third ground alleged that the warn and caution statement should not have been admitted as having been recorded freely and voluntarily. The basis for this ground is that the recording of a warn and caution statement

was not witnessed. We have no hesitation in saying that we know no law and we know no rule of practice to the effect that every warn and caution statement should be witnessed. In any case the witnessing of a warn and caution statement is for the protection of the police in the event that allegations are made that the accused was beaten. This ground of appeal does not in our view assist the appellant.

We have very carefully examined the evidence on record. We are satisfied that the confession statement was properly admitted and that the trial judge properly relied on it. The confession statement was admitted in evidence after a trial within a trial in which the appellant remained silent. The appellant was entitled to remain silent but if an accused objects to the production of a statement on the basis of certain allegations, he takes the risk of the statement being admitted in evidence if the prosecution denies the allegations made. The confession statement was a complete admission of how the appellant brutally killed the innocent child by stabbing her in the neck several times, hitting her head against a tree and finally removing her private parts. When the appellant and the co-accused were confronted by the prosecution witnesses they accused each other of having killed the deceased. In the warn and caution statement the appellant pointed out that his co-accused were not parties to the killing of the child. The evidence in support of the conviction was, in our view so overwhelming that we find no merit in this appeal. The appeal against conviction is dismissed and no appeal lies against the mandatory death sentence for the offence of murder.

.....
M. M. S. Ngulube
DEPUTY CHIEF JUSTICE

.....
B. T. Gardner
SUPREME COURT JUDGE

.....
F. L. Sakala
SUPREME COURT JUDGE