

THE PEOPLE v B (1980) Z.R. 219 (H.C.)

HIGH COURT
SAKALA, J.
4TH JULY, 1980
HP/24/80

Flynote
Evidence - Confession statement - Admissibility - Basis for admissibility.

Headnote
A trial within a trial was conducted to determine the admissibility of a confession statement; allegedly made by the accused. The accused related incidents of torture and duress before making the statement. He applied that the statement be excluded.

Held:

- (i) It is a fundamental principle of criminal law that when an accused raises an objection to the introduction of a confession into evidence, alleging that it was not made freely and voluntarily on account of assaults, threats or inducements, the burden of proving that a confession is voluntary is on the prosecution and at no time does this burden shift to the accused.
- (ii) The basis of the admissibility of a confession is voluntariness and not the truth of the content in the statement.

1980 ZR p220
SAKALA

J

Cases referred to:

- (1) R. v Kalyata (1963-1964) Z.R. 84.
- (2) Zondo & Ors v The Queen (1963-1964) Z.R. 97.
- (3) Kabwiki & Ors v The People (1974) Z.R. 78.

For the State: C. Kawamba Esq., Director of Public Prosecutions.
For the accused: E. N. A. Togbor, Esq., Ellis and Co.

Judgment
SAKALA, J.:

At this early stage in the trial, the prosecution are seeking to introduce into the evidence a statement recorded from the accused on the 15th and 16th August, 1979, by Assistant Commissioner of Police, Mr Muyunda, under warn and caution at Central Division Headquarters, Kabwe. The defence have objected to the introduction of the statement into the evidence on the ground that it was not made freely and voluntarily alleging that the accused was assaulted and induced into making the statement. A trial-within-a-trial was held to determine the voluntariness of the statement.

PW1, both in the main trial and in the trial-within-a-trial testified that he took part in the investigations of the case involving the accused person. He saw the accused first towards the end of April, 1979, at a prison house that was established in Sikanze Camp. He spoke to him for about two hours. In May he instructed Senior Superintendent David Ng'ambi to record a warn and caution statement from the accused. The warn and caution statement revealed that the accused declined to say anything. The Commissioner stated that from the CID's point of view the investigations in the case had come to an end. however, some time in June, 1979, he visited Lusaka Central Prison. While in the prison a number of prisoners were brought into the area where he was waiting. The accused also came in; he greeted him. According to the Commissioner the accused explained that he had seen his chap sent to record a statement from him. The Commissioner said he told him that he had seen the statement but it had nothing useful. The Commissioner explained that the accused told him that the reason was that Superintendent Ng'ambi had put to him questions as though he was waging a war on Zambia. As they chatted the accused told him that he wanted to get things off his chest. But the Commissioner told him that if he wished to make a further statement it could be taken at a later stage because at that time he was busy and he also wanted to find out whether it was possible. The Commissioner returned to his office. He asked Senior Superintendent Ng'ambi for the docket. He went through the warn and caution statement recorded by Superintendent Ng'ambi once again. After consulting the Judge's Rules the Commissioner said it was possible to obtain another statement from the accused if he so wished. By then the accused had been transferred to Kabwe. He sent a message to Kabwe. On the 15th August, he proceeded to Kabwe where he recorded the warn and caution statement from the accused in the presence of Detective Inspector Mungala. He spoke to the accused in English. Before recording the statement he warned and cautioned the accused that he had given a statement earlier and that he

1980 ZR p221
SAKALA J

was cautioning him further. The recording commenced at 1415 hours and adjourned at 1630 hours to the following day. On the following day the 16th August, 1979, the recording of the statement continued from 1440 hours to 1600 hours. The Commissioner explained that at the end of the recording he put some questions to the accused. This was intended to clear some ambiguities and to obtain certain facts which he thought were relevant and also to clear certain issues that were of public interest. He said prior to the recording of the statement he had asked the accused whether he wanted a lawyer present. But the accused asked him to proceed with the recording. According to the Commissioner the atmosphere at the time of recording the statement was friendly. He testified that the statement was made freely and voluntarily. He did not see anybody assault the accused. He did not induce the accused to make the statement nor did anybody else. The Commissioner told the court that he heard of the accused person having been assaulted by members of the public at the time he attempted to escape from the Lusaka Central Prison between the 24th and 25th April, 1979.

In cross-examination the Commissioner stated that he was aware that on the 4th May, Mr Ng'ambi interrogated the accused and that the accused declined to say anything. According to the Commissioner, it was not odd that on the 15th August, 1979, he should have cautioned the accused in order to clear points arising from a statement he had not made. He said the accused did not show any ill feelings when he earlier spoke to him apart from complaining about Superintendent

Ng'ambi's questioning. The Commissioner further stated that after consulting the Judges' Rules, he did not see anything prohibiting him from recording a further statement from the accused. He denied that he put pressure on the accused in order to obtain the statement of the 15th August, 1979. He said he was not satisfied with the accused's declining to make a statement on the 4th May. But there was nothing that he could have done at that time. According to the Commissioner when a person declines to make a statement and further questions came up which lead him into saying something he would not call that pressure. He said the long lapse between the 4th May and 15th August, 1979, was due to his absence as he was out of the country. The Commissioner also explained that Martin was the accused's corroborator who was considered as an accomplice at the time of the statement. In the Commissioner's view, it was a normal practice to introduce an accomplice to a person from whom a statement was to be recorded. The Commissioner denied conducting a private interrogation in a store room immediately before the recording of the statement. The Commissioner also told the court that arrangements had been made for the 8th June and 9th August for Mr Fluck to attend the recording of the statement. But on both these days he was not around Lusaka. He testified that it would be false to allege that he interrogated, tortured and humiliated the accused between the 1st April and August when the statement was recorded. He conceded that during the period that he was in and out of the country he would not know if other officers tortured or humiliated the accused. He said he was not in a position to deny that the accused was tortured. He could not remember the period

1980 ZR p222
SAKALA J

the accused attended the hospital. He is not aware of any interrogation centre. But he is aware of a temporary prison that was established in Sikanze Camp. He is also not aware of an interrogation centre otherwise known as "the house". He explained that blankets are put over the heads of persons taken for interrogation for security precautions. The Commissioner also stated that at the time he saw the accused he looked healthy and fit other than for the injuries sustained front the abortive prison escape. He denied clapping the accused on the head and neck when he first saw him. He also denied asking officers to stop torturing the accused on account of the accused's screaming. The Commissioner further explained that if anybody made promises to the accused he would not have known. But the accused being a sane and normal person he would have said so after the caution. He was not aware that other officers interrogated the accused between the 4th May and 15th August, 1979.

PW2 testified that in August, 1979, he was stationed at Kabwe Police Station. He is aware that a warn and caution statement was recorded from the accused on the 15th August, in Kabwe by Mr Muyunda. There were only three people present the third being the accused. The accused was warned and cautioned before the statement was written down. The recording commenced at 1415 hours on the 15th August, adjourned to the following day at 1620 hours. On the 16th August, the recording continued from 1440 hours and ended at 1700 hours. The Inspector recognised the signature of Mr Muyunda and the accused on the statement. He did not see anyone assaulting the accused on the 15th or 16th August, 1979. He denied that either he or Mr Muyunda promised or induced the accused person to make a statement. He said the accused was not forced to make a statement It was a free and voluntary statement. He took no part in the investigations of the case, his role was to witness the recording of the statement. In cross-examination he said his signature was

not on the statement. But he was present when the statement was recorded. He said he signed the statement but he could not see his signature. He could not know if anybody assaulted the accused before the recording of the statement neither would he have known if anybody promised the accused anything.

PW3, a prison officer, told the court that on the 23rd April, 1979, he was not on duty. But at about 1730 hours he was coming from Sikanze Camp. On approaching the prison on his way to his house within the prison camp he heard a lot of noise from inside the prison and from the southern part of the prison alleging that somebody had escaped. He went around the prison. At the southern part of the prison outside the prison wire fence he saw many people lifting the accused and throwing him back into the prison fence. He jumped into the prison fence and joined some army, police and prison officers who were separating the people who were demanding for the accused whom they alleged to be Smith. He did not see the accused being beaten. But he observed a swollen eye with blood on his face. There were more than fifty people around, women and children. He handed over the accused to the chief officer and left. The witness explained that the accused was in prison under a

1980 ZR p223
SAKALA J

Police detention order dated 4th April, 1979. This witness produced the prisoners record in relation to the accused.

At the end of the evidence for the prosecution in the trial-within,-a-trial, the accused, who gave his occupation as a pilot, also gave evidence on oath. He testified that on the 1st April, 1979, he was detained at the airport. He was interrogated and searched at the airport and taken to Lusaka Central Police Station. He denied making a free and voluntary statement. He explained that at the police station he was put in the cells until the 4th April. He was later served with a detention order and taken to Lusaka Central Prison. The week following he was taken on several days from the prison to the Police headquarters where he was interviewed in a room. He remembers Superintendent Ndayo as among the persons who interviewed him. There were on this occasion seven other officers but he could not remember their names. These officers took turns in asking questions. According to the accused the interview lasted generally two hours in the mornings and two hours in the afternoons with lunch break when he would be taken back to the prison. The week commencing 16th to 20th April, 1979, he was again taken from the prison to Police headquarters where he was again interviewed basically by the same people. According to the accused the purpose of the interviews was to obtain information from him. He said he answered every question that they asked but some of the officers chose not to believe the answers. He was helpful as he could. He could not remember the 4th May, 1979, but on the 24th April, a statement was taken from him in relation to the attempted escape. He also said that during the first week of June an attempt to make a statement was made. On the 22nd June, another attempt to make a statement was made. On the 15th and 16th August, he was asked to make a statement. In the course of interrogations in the attempts to obtain statements he was subjected to physical violence and assaults. On the 25th May he was convicted and imprisoned in the Lusaka Central Prison. Before lunch on that date he was called from the main part of the prison to the reception where he was handcuffed and leg-irons put on him and blindfolded. There were armed men in military uniforms. He was removed from the prison and

driven away. He said he was in very great anxiety. After a short journey in a car he was removed and led into a building, still blindfolded. He was left sitting, still blindfolded for several hours until what; he took to be evening time. The blindfolds were removed but not the handcuffs and leg irons. He found himself seated on the floor in front of four men, among whom was Superintendent Ndayo. The room had one door leading to it, the windows were all blanketed off. One of the men said "good evening Michael, we now have you for five months and we can talk to you about the subjects we wish until you tell us what we want to hear." The accused explained that from that point interrogations proceeded which were to last continuously for over ten days and from then after a period of some months. Each interrogation lasted continuously until the following morning. He said he was deprived of sleep, food and toilet facilities. He was not interrogated by the same people. He remembers seeing main teams of three people coming into

1980 ZR p224
SAKALA J

the room for periods between one to three hours or four hours before being relieved by another team while other people entered the room but not attached to any team. He said all this took place at a place called the interrogation centre which name he learnt from talking to other prisoners. He stated that the people who interrogated him appeared to believe that he was engaged in intelligence gathering mission against Zambia.

They appeared to him to be interested in gathering names of people in Zambia who they thought were enemies of the State. They spent, according to him a long time talking about the white farming community. He was returned back to the central prison on the 4th June, 1979, which was a Monday. On the 5th or 6th June, 1979, he was taken from central prison to Kabwata Police Station where he was taken into a room. A Police officer by the first name of "David" said that he wished to take a statement from him. The accused stated that the officer read out a long and horrifying statement of alleged crimes. He told him that he did not want to make a statement. He explained that he was taken to Kabwata Police Station in handcuffs and leg irons and blindfolded. He was put at the back of a Land - Rover where he was made to lie on the floor and a blanket put over him. On 7th June, he was again called to the reception where he went through exactly the same sequence as on the 25th May. After another journey of about twenty minutes he was led into a building, the blindfold was removed. The accused testified that between the 12th and 20th June, he had lost about forty to fifty pounds in weight. He had severe internal problems which he assumed to be from the severe beatings he received. He was passing a lot of blood through diarrhoea and when urinating. He said he was physically in a very weak condition. He asked the prison authorities for medical attention. There was no doctor or medical assistant available in prison. They took him to the University Teaching Hospital under armed escort. He was examined and some tablets were prescribed to help the internal problem. He also gave the doctor the samples. An appointment had been made for him to see the same doctor but before the appointment he was removed from Lusaka Central Prison. On the 21st or 22nd July, 1979, he was taken back to the house. When the blindfold was removed he found himself in the same room. There were seven men whom he recognised to be from the different interrogation teams. Others told him that they wanted him to identify somebody. A blanket was put over his head when the blanket was removed he observed that Superintendent Ndayo was in the room with an African man from whom a blanket was similarly removed at the same time.

Superintendent Ndayo warned and cautioned both him and the African and asked them if they

recognised each other. He denied knowing the African. The African initially said "No" but later said "Yes". This other man was said to be Martin. Superintendent Ndayo then recorded a lengthy statement from the African in the accused's presence. The accused said the African man made incriminating statements against him. After the African made the statement he was removed from the room. One of the interrogating teams came in and said "Right you have heard the evidence against you now we want a statement from you." He told them that he had never seen the man before. After a period of a couple of days he was subjected to torture. He was fairly beaten extensively

1980 ZR p225
SAKALA J

and burnt with cigarettes for about four times. He was dished into ice water, deprived of sleep and food throughout the whole period. A plastic bag was held over his head with little air which did not last very long. A piece of wire at one stage was introduced into his urethra also known as the tube of the penis. He said he was kicked but not with boots. At one stage he was beaten with a hose from an ordinary garden hose. He also stated that he was beaten extensively around the genital and anal regions. This was done by a number of officers. There were over twenty people at different times half a dozen specialised in torturing anal also half a dozen specialised in being friendly. He said some of the officers appeared embarrassed by what was going on. He said at a later stage when he was in Kabwe Maximum Security Prison at different times, some officers from the Zambia Army and Air Force came to interrogate him and openly apologised for some of the behaviour that was going on. He said on the first occasion he was subjected to an electric shock. According to the accused all these were aimed at making him say that he knew the man "Martin" and to make a statement to corroborate him. He explained that when he was first taken to the house one of the officers took out a pistol and loaded it; made him to kneel on the floor and said "This is your last chance, tell us now or I am going to shoot you."

The accused also told the court that in the month of July very little happened to him apart from being in solitary confinement. He further testified that the first time he met Assistant Commissioner Muyunda was on the 25th May in the early hours of the 26th. This was at the house. On that occasion the Commissioner told him that he was a very high ranking police officer stating that he knew who the accused was and what he had been doing. He said he needed a confession from him in order to take the matter to court. The Commissioner also told him that he was very annoyed as he was making him work on holidays. When he had wanted to spend the time with his son. The accused said he made some remarks as to how his son was. The Commissioner then said "Don't get it funny with me." He then hit the accused on the side of the face.

The accused also testified that immediately prior to the 15th August, when the statement was taken without any notice, an armed guard came into the court yard of the prison and told him to put on a pair of shorts and a shirt. He was then blindfolded, removed from the prison to some kind of a closed truck. After a very short journey the blindfold was removed he then found himself in a room where there were two or three Police officers present, one he recognised as David. After a short while an African was brought into the room similarly handcuffed. The Superintendent introduced him as Martin. He was taken back to the prison over lunch time. He was again taken from the prison in a similar fashion as in the morning. At about 1345 hours the blindfold was removed and

he found himself in company of three men dressed in military uniforms, two of them were armed. He was jostled for a period of five to ten minutes. A lot of remarks of him being a white racist and an enemy and an agent were made. The Commissioner came to the room and the jostling stopped. Mr Muyunda shook hands with him. He asked how he was doing

1980 ZR p226
SAKALA J

and he referred to the introduction of an African in the morning and said he wanted to take a warn and caution statement from him. The Commissioner told him that if they get this out of the way and he co-operated he could arrange to have him removed from solitary confinement and to wear clothes again. He also told him that he will issue instructions to treat him as a human being again. The Commissioner further told him that they had friends of his in custody including some pilots and stewards of Botswana Airways. He further told him that this case was causing a lot of disruption and has caused Botswana Airways to stop operating for several weeks to this country. The Commissioner further pointed out that if he co-operated these men would be released but if he did not he would be taken back to the house and eventually a statement would be made. Five minutes after the conversation the recording of the statement commenced. The accused told the Commissioner that if he was going to make a statement he would like Mr Fluck to be present but the Commissioner explained to him that he was involved in an espionage case and that there would be no lawyers in Zambia who would be prepared to represent him. The blindfold was put back on him and he was removed upstairs escorted by the armed guards. He found himself in a small office. The Commissioner then read a lengthy caution to him and in a period of two days, the accused said he produced a statement that he thought was satisfying. He said the contents of the statement were not true and were made to satisfy his interrogators. The accused stated that at that time considering what he had gone through in May and June and to go through them again, he was confused in his mind and thought he was lucky to be alive. He also knew at that time that several pilots who were his friends were held in different stations. He knew that at one period when he was in the house there was a woman present in the house whom he assumed to be in some sort of custody. He was also told that apart from the pilots of Botswana Airways, some stewards and airhostesses were also held. He said these facts concerned him greatly. He thought of a woman especially going through anything to which he had been subjected to. He said his morale was at the lowest ebb of his life. He also thought of being in solitary confinement in a jail in the middle of Africa apparently at a complete mercy of people who could shift him from place to place at will. He had been told that he had no legal representative. He said it seemed to him that the only thing he had to do was to ride along with a tide of events in the hope that at some stage his circumstances would become public and he could be in touch with either the British High Commission within this country or arrange for some firm of legal representatives. He considered himself to have been in a very perilous condition. He denied telling the Commissioner that he made a statement to get things off his chest. He said he had nothing to get off his chest. According to the accused the statement was not made either freely or voluntarily. He was left with no doubt whatsoever that if he refused to make it, life would become much harder than it already was. He said at that period of his life he had never been more worried. In cross-examination the accused explained that he was detained at Lusaka International Airport on the 1st April, 1979, when he was about to

1980 ZR p227

SAKALA J

board a flight. He went through the usual immigration formalities. He had his passport. He explained that his occupation involved travelling around the world and in some areas like South East Asia and part of Africa it is an occupational necessity to have more than one passport. He admitted that he had two passports but he has no idea where the other passport is. The other passport is in the name of Borlace. The accused further testified in cross-examination that he told a Muyunda lies in the statement of the 15th August, 1979, to insure that he was not taken back to the house to be beaten. He knew what to say as it became something like a parrot would say. The accused explained that the beatings ceased at the end of June but things had not changed. He was kept in solitary confinement in extreme discomfort. He also testified that he flies helicopters, heavy engine planes as well as military and civil aircrafts. He has served in the armed forces for a period of more than nine years. He underwent military training which meant he also underwent survival technics in the armed forces and he was also taught to withstand discomfort. In 1976 he was decorated for gallantry in Rhodesia. He said the beatings started on the 21st May, and ended at the end of June. He stated that despite the fact that he had been in the armed forces for nine years and decorated for gallantry being kept in solitary confinement can have effect on any person of any calibre. He told the court that Superintendent Ndayo was present everytime he was interviewed prior to the attempted escape. He [Ndayo] did not personally assault him although he must have known what was going on in the house.

At the end of his evidence the accused called Mr Fluck who appears on record as DW2. Mr Fluck's evidence related to his various unsuccessful attempts to see the accused person at the time he was in custody. He also testified to his various unsuccessful attempts to arrange with the Police to be present whenever they wanted to record a warn and caution statement from the accused. Mr Fluck testified that on the 31st July, he attended at Kabwe Maximum Prison where he was allowed a very short interview with the accused. At first he found it difficult to recognise him. He had lost a considerable amount of weight. He found his morale at a very low ebb. At that time he found it difficult to carry out any conversation with the accused as there were four other prison officers in the room. But the accused informed him that he was in solitary confinement and was at that time in leg irons. Mr Fluck's evidence is on record and I do not find it necessary to go through it in detail. Suffice it however to state that despite the various arrangements that were made between him and the Police to be present at the time of recording the statement he never attended the sessions.

The foregoing is both the prosecution and defence evidence in this trial-within-a-trial. At the end of the defence evidence both learned counsel made submissions. On behalf of the accused Mr Togbor has submitted that the defence objection to the introduction of the statement is based on the ground that it was neither freely nor voluntarily made in that it was induced during a period of some five months between April and August, 1979. He contended that during this period the accused was subjected to solitary confinement, frequent assaults and violence to his person. He

1980 ZR p228
SAKALA J

further contended that during the same period the accused was subjected to humiliation, deprivation of the normal human needs, namely, sleep, food and refreshments. Mr Togbor also argued that the

accused was induced into making the statement by torture, threats and promises. In the alternative Mr Togbor contended that even if the court was to hold: that the statement was voluntary the court still has discretion to exclude it if it was obtained in circumstances amounting to the breach of the Judges' Rules. He submitted that in the instant case there were a number of breaches of the Judges' Rules for instance the caution introducing Martin whom the prosecution did not call and the refusal of the Police to have the accused represented at the time of recording the statement. On behalf of the State, the learned Director of Public Prosecutions submitted that the accused was never assaulted, the only assault he suffered was at the hands of the members of the public at the time of his attempted escape from lawful custody. It was the learned Director of Public Prosecutions' contention that the stories of assaults, movements of up and down, as well as promises are all false. With regards to the prosecution's failure to call Martin the learned Director of Public Prosecution pointed out that this man is and was a suspect in the case and is in detention; thus the State would not have been so foolish to call him as a witness. With regards to the assaults the position of the learned Director of Public Prosecutions is that the State had asked the defence for names of who assaulted the accused. Since the defence did not do so, the learned Director submits that the accused was not assaulted and alleged. It is the learned Director's contention that the Judges' Rules were not breached. In the alternative, the learned Director submitted that if the accused was assaulted as contended by the month of July those assaults had ended and the promises, inducements as well as the beatings if true, must have been removed by the time the warn and caution statement was obtained from him on the 15th August, 1979.

I have very seriously addressed my mind to all the evidence in this trial-within-a-trial. I have also very carefully considered all the submissions by both counsel. It is common ground that the accused was apprehended on the 1st April, 1979, at Lusaka International Airport subsequently detained pursuant to a Police detention order. It is also common ground that while in custody, the accused attempted to escape as a result of which he was prosecuted for escape from lawful custody, convicted and sentenced to eight months by the subordinate court of the first class for the Lusaka District. It is further common ground that on the 4th May, 1979, a warn and caution statement was recorded from the accused at Kabwata Police Station by Superintendent Ng'ambi in which the accused told the Superintendent that he did not wish to say anything at that stage. But despite that, the Superintendent proceeded to ask the accused some questions. It is common cause that on the 15th and 16th August, 1979 Assistant Commissioner Muyunda recorded a warn and caution statement from the accused person at Kabwe Division Headquarters. The statement was witnessed by Inspector Mungala but he did not sign it. The law governing the admissibility of confessions into a criminal trial has been the subject of discussion in several cases that it is now settled

1980 ZR p229
SAKALA J

(see para. 138C, *Archbold* 39th ed.). There are several authorities cited under that paragraph that I do not consider it necessary to make this ruling as a treatise on principles governing admissibility of confessions. Be that as it may, on account of the cross-examination adopted in this trial-within-a-trial and also on account of the issues raised in the submissions, it becomes imperative to briefly state some of those principles relevant to the issues raised in this trial-within-a-trial.

It is a fundamental principle of criminal law that when an accused raises an objection to the

introduction of a confession into the evidence, alleging that it was not made freely and voluntarily, on account of assaults, threats or inducements, the burden of proving that a confession is voluntary is on the prosecution (see headnote in *R v John Kalyata* (1)). At no time does this burden shift on to the accused. Thus in *Zondo & Ors v The Queen* (2) Conroy, C.J., at p. 100 stated:

"It is trite law that when the Crown seeks to put in a confession the burden rests on the Crown to establish, beyond a reasonable doubt that the confession was made freely and voluntarily, and that the prisoner was not induced by any promise of favour, or any menace or undue terror, to confess. It is also trite law that a judge has a discretion to exclude a statement, even though freely and voluntarily made and otherwise admissible, if he considers it was taken in circumstances unfair to the accused. Thus it confession, freely and voluntarily made, is sometimes excluded in the exercise of this discretion if there has been a breach of the Judges' Rules."

In the same case Charles, J, at p. 108 made the same point in the following words:

"The rule of law governing the admissibility of extra-judicial incriminating statements by accused persons may be stated shortly as being that such a statement is not admissible in evidence against the maker upon his trial on a criminal charge unless it is proved, beyond reasonable doubt, to the presiding judge that the statement was made without any inducement by a person in authority whereby the accused was led to believe that it would be his duty, or it would be to his temporal advantage to make a statement, or it would be to his temporal disadvantage not to make a statement, when the opportunity became available to him. "

Following upon these principles the Court of Appeal in the *Zondo* case among others held that in deciding whether a statement made by an accused person to the Police is admissible, the test which a court must apply is not whether the Judges' Rules have been infringed, but whether the prosecution has affirmatively established that the statement was made freely and voluntarily. It follows that all the accused has to do at his trial is to raise the issue of voluntariness.

In the instant that it would appear to me that a Martin named in the caution as well as in one of the counts in the information must be a vital witness for the prosecution. The reason given by the learned Director for

1980 ZR p230
SAKALA J

not calling him in this trial-within-a-trial when according to him, he is in detention, is, with greatest respect, unsatisfactory and certainly unconvincing in a case of this magnitude. The accused has made very serious allegations which centre on this Martin. I cannot say these allegations have been challenged. In my humble opinion to argue that the defence were offered assistance to give names of the accused's assailants to enable the prosecution to call them and testify against the accused overlooks the above cited principles and begs the question. This is a very serious case, investigated and prosecuted by the highest officers of the State. I cannot accept that the learned Director is not in a position to know which officers were involved in the investigations of this case. In any case

Superintendent Ndayo's name has come out as a person present at all the interrogations. Why has he not been called ?

The basis of the admissibility of a confession is voluntariness and not the truth of the content in the statement. Thus in the case of *Kabwika and Ors v The People* (3), at p. 82, Baron, D.C.J., observed:

"The probabilities are that the confessions of the second and third appellants were the truth. But the issue is not truth but voluntariness. Our law is clear, and the cases are legion, that even though the court; may be satisfied that what an accused person has said in a statement to the police is in fact true, that statement is in admissible as evidence unless the prosecution prove that it was freely and voluntarily made. Thus in *Zondo and Others v R* Charles J. said at page 113: 'The basis upon which evidence of an incriminating statement is excluded in the absence of proof of the condition of admissibility is not that the law presumes the statement to be untrue in the absence of such proof, but because of the danger which induced confessions or admissions present to the innocent and the due administration of justice. That danger has been aptly pointed out by the American authority on evidence, Professor Wigmore (Evidence, Vol. 4, section 2250) in the following passage:

The real objection is that ant system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources ...ultimately the innocent are jeopardised by the encroachment Off a bad system.' "

In *Zondo* case again Charles, J, at p. 108 said:

"The leading authorities for that statement, are *Regina v Baldry* [1852] 2 Den. 430, and *Regina v Thompson* [1893] 2 Q.B. 12, both of which have received the approval of the Privy Council in *Ibrahim v The King* [1914] A.C. 579 and again only recently, in *Sparks v R* [1964] 1 All E.R. 727. According to those authorities

1980 ZR p231
SAKALA J

the basis upon which evidence of an incriminating statement is excluded in the absence of proof of the condition of admissibility is not that the law presumes the statement to be untrue in the absence of such proof, but because of the danger which induced confessions or admissions present to the innocent and the due administration of justice."

It follows that in this trial-within-a-trial the truth or the falsity of the contents of the statement should at least at this juncture not be the concern of this court. My concern therefore is whether the accused made the statement freely and voluntarily.

The prosecution in support of the contention that the statement was made freely and voluntarily have called three witnesses. The evidence of PW 1, Assistant Commissioner of Police, Mr Muyunda, who recorded the statement from the accused person reveals that he first saw the accused towards the end of April, 1979, at a prison house. He again met the accused sometime in June, 1979, at the prison when he went for some investigations nothing to do with the accused. On that

occasion according to the Commissioner he had a chat with the accused person in which the accused is alleged to have told the Commissioner that he wanted to get thigh off his chest. The Commissioner told the court that he explained to the accused that if he wished to make a further statement it could be recorded at a later stage because he was at that time busy and he wanted to find out whether it was possible. The next time, according to the Commissioner when he met the accused was on the 15th August, 1979, at Kabwe when he recorded his statement. According to the Commissioner's earlier evidence he was assigned to take part in what was known as the Borlace case about the middle or end of April. We do not know the other members of the investigations. But I have no doubt the Commissioner knows them. In as far as PW2 is concerned, he had nothing to do with the investigations of the case involving the accused. His role was merely to witness the recording of the statement by the Assistant Commissioner of Police. For reasons not apparent to this court he did not sign the statement. He gave no explanation for the omission, neither did the Commissioner give one. In as far as PW3 is concerned, his evidence is not in dispute. He witnessed the assault on the accused person by the members of the public when he attempted to escape from lawful custody. Both Assistant Commissioner of Police as well as Inspector Mungala who witnessed the recording of the statement, conceded that they are not in a position to say whether the accused had been assaulted and tortured by other officers. Equally they were not in a position to say whether any inducements were made to the accused person. This in my view was a commendable frankness on the part of these witnesses.

From the prosecution evidence, it is quite clear that PW1 could not be said to have been involved in the investigations of this case to a great extent although assigned to take part. But the Commissioner insisted that the statement was made freely and voluntarily.

The case for the defence is that after spending almost four days in the police cells at Lusaka Central Police Station the accused was taken to

1980 ZR p232
SAKALA J

Lusaka Central Prison on 4th April, 1970. The week following according to the accused he was taken for several days from the prison to police headquarters where he was interviewed in a room. Among his interviewers he remembers Superintendent Ndayo. There were seven officers present. They took turns in questioning him. The interview lasted two hours in the morning, two hours in the afternoon with a lunch break when he would be taken back to the prison. It is also the defence case that between 14th and 20th April, he was again taken from the prison to police headquarters where he was again interviewed basically by the same people. The accused said the purpose of the interview was to obtain information from him. The accused has alleged that in the course of these interrogations he was subjected to physical violence and assaults. It is also the case on the defence that on the 25th May after the accused's conviction and imprisonment for escaping from lawful custody he was taken from Lusaka Central Prison handcuffed, leg-ironed and blindfolded and driven away. At that time he was in very great anxiety. After a short journey in a car he was removed and led into a building still blindfolded. He was left sitting still blindfolded for several hours. After the blindfolds were removed he found himself seated on the floor in front of four men among whom was Superintendent Ndayo. It is the accused's contention that from that point interrogations proceeded continuously for ten days. He had no sleep, no food and no toilet facilities.

These interrogations are alleged to have taken place at an interrogation centre. The accused said he was returned to the central prison from the interrogation centre on the 4th June, a Monday. On the 5th or 6th June he was taken from the prison to Kabwata Police Station where a Police officer by the name of David was to record a statement from him but he declined to make a statement. On the 7th June, the defence allege that the accused was again taken from Lusaka Central Prison, blindfolded to a house where the interrogations were again carried out. On the 21st or 22nd July, he was taken from Lusaka Central Prison to the house blindfolded. When the blindfold was removed there were seven men whom he recognised to be from the different teams that interrogated him earlier. A blanket was put over his head. When it was removed he observed that Superintendent Ndayo was in the room with an African from whom a blanket was similarly removed. Superintendent Ndayo cautioned both of them and then asked each of them if they recognised each other. The accused denied. The African agreed after initially having denied. This man was said to be a Martin the accused's accomplice. According to the accused Superintendent Mayo recorded a statement from Martin incriminating the accused. Later an investigating team came in and said "Right you have heard the evidence against you, now we want a statement from you." He said after this incident he was beaten extensively and burnt with cigarettes. A plastic bag with little a was put on his head, a piece of wire was introduced to his urethra. The accused also told the court that at the first occasion he was subjected to an electric shock. He also testified to at incident when a revolver was loaded in his eye and threats made to shoot him. The accused said very little happened in the month of July after this incident apart from solitary confinement. In solitary confinement he was handled with leg irons on and kept knelled. The accused explained that in the month of July,

1980 ZR p233
SAKALA J

Kabwe was very cold. According to the accused he first met the Assistant Commissioner of Police on the 25th May, in the early hours of 26th at the interrogation centre. The Commissioner told him that he needed a confession from him in order to take the matter to court. It is on that occasion when the accused alleged that the Commissioner hit him on the side of the face. According to the accused on the 15th August, the day of the statement he was called by a guard. He was requested to put on a pair of shorts and shirt. He was blindfolded and taken from the prison in a closed truck. After a very short journey the blindfold was removed, he found himself in a room where there were two or three Police officers present. One he recognised as David. After a short while an African introduced as Martin was brought in. Thereafter he was taken back to the prison. In the afternoon he was again called from the prison, blindfolded. When the blindfold was removed, he found himself in the company of three men dressed in army uniforms two of whom were armed. He was jostled, for a period of five to ten minutes. The Commissioner then came into the room and informed him that he wanted to take a warn and caution statement. He told him that if he co-operated he would arrange that he would be removed from solitary confinement. He would wear his clothes again and be treated as a human being again. The Commissioner is also alleged to have told him that his friends were in custody resulting in the disruption of Botswana Airways.

The accused told the court that the contents of the statement were not true. They were made to satisfy his interrogators. He said considering what he had gone through in May and June, he was not prepared to go through that again. The accused concluded his evidence in chief by saying that it seemed to him that the only thing he was to do was to ride along with a tide of events in the hope

that at some stage his circumstances would become public. He said the statement was not made either freely or voluntarily contending that he was left with no doubt whatsoever that if he refused to make it life would have become much harder than it already was.

I have already observed that the burden of proof is on the prosecution. The accused's story raises numerous issues for consideration. Most of them have not been challenged by the prosecution. As a matter of fact no single question was put to the accused in cross-examination about his alleged movements in and out of prison. Why was the accused taken so often out of prison between April and June when at times he was kept out of prison for several days? The accused said he was taken for interrogation. He says it was during the period of interrogation that he was assaulted, tortured and threatened. The prosecution has not challenged these allegations by any evidence. If the prosecution's case is that the accused was not taken out of prison they could have easily proved this point by leading evidence from the prison officers at Lusaka Central Prison. This the prosecution has not done. I have no alternative but to accept the accused's story that he was taken out of prison on several occasions for purposes of interrogations. The prosecution has called no single witness from the interrogation teams; not even Superintendent Ndayo who was specifically mentioned by the accused. Again

1980 ZR p234
SAKALA J

I have no alternative but to accept the accused's allegations of torture and assaults. The accused has alleged that while at Kabwe Maximum Prison he was kept naked in a cell in solitary confinement in the cold month of July. Not a single witness from Kabwe Maximum Prison has been called to rebut this allegation. It is on record unchallenged. I have again no alternative but also to accept this allegation. In short I find that the entire defence case has not been shaken in a material aspect.

This being the case, I find as a fact that the accused was assaulted physically and mentally humiliated, kept in solitary confinement naked in order to induce him to make a statement. I am unable to say that these matters have been removed by the time the accused made his statement on the 15th and 16th August, 1979. This being the case, I hold that the statement recorded from the accused by the Assistant Commissioner of Police on the 15th and 16th August, 1979, under warn and caution was not made freely and voluntarily. As such I refuse to admit it in evidence.

I must confess that I have come to this conclusion not with any hesitation but with considerable regret. I say this because it is probable that the confession is the truth. But as already pointed out, the issue is not truth but voluntariness. According to our law even though a court may be satisfied that what an accused person said in a statement to the Police is in fact true, that statement is inadmissible as evidence unless the prosecution prove that it was freely and voluntarily made. The prosecution has failed to prove this in the instant case. Accordingly I rule that the statement recorded from the accused on 15th and 16th August, 1979, under warn and caution by PW1 is inadmissible as evidence.

Statement inadmissible

1980 ZR p234