JOSEPH MUTABA TOBO v THE PEOPLE (1990 - 1992) Z.R. 140 (S.C.)

SUPREME COURT
GARDNER, SAKALA AND CHAILA, J.J.S.
5TH MARCH AND 6TH MAY, 1991
(S.C.Z. JUDGMENT NO. 2 OF 1991)

Flynote

Criminal procedure - Confession - Voluntariness - Court not to have sight of or take into account detail in statement in determining voluntariness.
Criminal procedure - Confession - Voluntariness - Torture prior to police becoming involved in investigation not to be ignored.
Evidence - Expert - Evaluation of - Medical expert - Medical expert entitled to take into account reports of other doctors and what told to him by patient.

Headnote

In determining whether a confession statement was made voluntarily the Court should not have sight of it in order to satisfy itself that, taking into account the detail in the statement, the accused made it. It is also incorrect to ignore the fact that the person making the statement was tortured before the police became involved in the investigation. While the real value of the evidence of a medical expert consists of logical inferences which he draws from what he himself observes, it can also be accepted that when doctors examine a patient in the course of their duties they make notes and any doctor would be able to make an opinion based on those notes. There is nothing wrong or unacceptable about a doctor taking into account what a patient has told him or other doctors have recorded about a patient in coming to his opinion.

Cases referred to:
(1) Musongo v The People (1978) Z.R. 266.
(2) Mushanga v The People S.C.Z. Judgment No. 18 of 1983.

For the appellant: S.K.Munthali, Senior Legal Aid Counsel.
For the respondent:: A.B.Munthali, Assistant Senior State Advocate.

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Judgment

SAKALA, J.S.: delivered the judgment of the Court.

The appellant was tried and convicted for the offence of murder contrary to s. 200 of the Penal Code cap.146 of the Laws of Zambia. The particulars of the offence alleged that on 21st September, 1980 at Kasama, in the Kasama District of the Northern Province of the Republic of Zambia, he murdered Salome Safeli Chitabo. He was sentenced to death. He has appealed against conviction.

The prosecution case was that PWs 1,2 and the appellant had been at a beer party together with the deceased at PW2's farm. Later PW1, the appellant and the deceased left the beer party. According to the case for the prosecution, the three walked for some distance before

PW1 branched off to proceed to his farm while the appellant and the deceased, who stayed in the same village, proceeded on for their village. The case for the prosecution was further to the effect that the appellant was the last person to be seen in the company of the deceased when she was still alive on the evening of 21st September, 1980. The prosecution case was also to the effect that the appellant was apprehended the following day by a group of people but later handed over to PW3 and the appellant's father. PW3, a court messenger by occupation, and the appellant's father interrogated the appellant and, following upon what he told them, the appellant later took his father and PW3 to an anthill, off the path, where they found the deceased's half naked body with bruises. The prosecution further relied for their case on a warn and caution statement recorded by the police from the appellant admitted in evidence after a trial-within-a-trial.

The appellant did not himself give evidence on oath in his defence, a course he was entitled to take. He, however, called a medical doctor in his defence. The doctor's evidence was briefly that he was a consultant psychiatrist at Chianama Hills Hospital. On 6th November, 1981, he examined the appellant as ordered by Court. The doctor explained that at the time of admission the appellant had a flattening effect on him. His look was vacant and he was not sure about the dates, months and years. According to the doctor the appellant complained of hearing some voices which he did experience while in Kasama in 1979. According to the doctor one of the appellant's brothers suffered from mental illness. The doctor also explained that, apart from him, other doctors and clinical psychiatrists conducted some speed tests and that at the time the appellant was found to smile or giggle on his own without cause. The doctor further stated that a Mr Mulenga also found the flat effect and retardation of mental effect on the appellant who was taking too long to think. The appellant, according to the doctor, stayed with them for one year and three months. About 11th March, 1983, he escaped with other patients from Chianama Hills Hospital after he had improved. According to the doctor the appellant was likely to have been mentally disturbed at the time of committing the offence. The doctor was not cross-examined by the prosecution. The Court, however, put some questions to him. In answer to the Court's questions the doctor said:

> ''The aspect relating to the accused sleeping it off after killing a human being and then reporting to an uncle the following day that the lady was dead would suggest irrational mental effect on his part.''

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The doctor's full report was presented before the Court. The conclusion in the report reads as follows: (SIC)

> ''In my opinion Mr Joseph M. Tobo suffers from 'Psychiatic illness'. It is one of the major psychiatric disorders where the patient holds a false belief which is a product of irrational thinking. As reported, prior to the alleged effect, he was hearing some voices threatening to kill him. These voices, he thought were coming from the deceased and there is a strong likelihood that at that time of the alleged offence he was mentally disturbed by his illness and acted on false belief. He now attends UTH psychiatric clinic from Lusaka Remand Prison and has shown satisfactory progress with the prescribed medication. He does not hallucinate any more but in my opinion he would require long-term psychiatric follow-up and care from an institution where securities are better.''

The learned trial Commissioner, relying on the warn and caution statement and the circumstantial evidence, found that the appellant assaulted the deceased sexually in the

course of which he strangled and killed her. The learned trial commissioner's verdict was finally based on the appellant's conduct wherein he failed to tell anybody of the death of the deceased bearing in mind that he was the last person seen in company of the deceased and also being the person who led to the recovery of the deceased's body. The learned Commissioner noted that the issue of insanity had been raised very late in the proceedings. The Court rejected the doctor's opinion raising the defence of insanity. After carefully examining the doctor's evidence the learned Commissoner stated in his judgment:

> ''Here, I have recognised the raw material supplied to the doctor as pure deceit. The opinion cannot therefore be correct. It is vacant. Let it be known from now on that the real value of the evidence of a medical expert consists in the logical inferences which he draws from what he had himself observed, not from what he merely surmises or has been told by others (*A.G. v Nottingham Corporation* [1904] Ch. 673; *Metropolitan Asylum Dist v Hill*474 T 29). The report lacks those logical inferences.
>
> It has no value to this investigation. Quite apart from this fault, the doctor blundered also when he mentioned what the accused said as to the facts of the case. That was wrong and unacceptable.
> (*Averson v Lord Kinnard 6 East* 188).''

The learned trial commissoner concluded that the defence of insanity was faked and could not be accepted.

On behalf of the appellant, Mr S. K. Munthali filed three additional grounds of appeal, namely:

(1) That the learned trial commissioner misdirected himself by failing to treat PW1 as a witness with a possible interest of his own to serve whose testimony should have been regarded with caution;
(2) That the learned trial commissioner misdirected himself by admitting the confession which was not proved beyond reasonable doubt to have been made voluntarily; and
(3) That the leaned trial commissoner misdirected himself by failing to make a special finding under the provisions of s.167 of the Criminal Procedure Code based on the unchallenged evidence of PW5, the psychiatrist.

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In his written heads of argument the first and third grounds were argued together. But as we see it, this appeal succeeds or fails depending on what view we take of ground three which raises the defence of insanity. We must at this juncture observe that the learned Assistant Senior Advocate appearing on behalf of the people did not make submissions in reply to the submissions made on behalf of the appellant apart from informing the Court he supported the conviction.

As regards ground one, namely that the learned trial Commissioner misdirected himself by failing to treat PW1 as a witness with a possible interest of his own to serve whose testimony should have been treated with caution, we are satisfied that this ground, on the evidence on record, was well taken. PW1 and the appellant were the last persons seen in company of the deceased when still alive the evening before her body was found in the bush. He was therefore in a category of a suspect witness. The learned trial commissoner never addressed his mind to this aspect anywhere in his judgment and not even a mention of it was made. This, we agree, was certainly a misdirection.

The submission on ground two was that there was no direct evidence connecting the appellant

with commission of the offence apart from the confession statement which should, in any event, have been excluded on the ground that during the trial-within-a-trial only one witness was called when the allegation of assault was levelled at two police officers. In the alternative it was submitted that the learned trial commissioner should have exercised his discretion to exclude the statement on the basis that shortly before the confesssion was made the appellant was subjected to some force by messengers and villagers. The case of *Musongo v The People* [1] was cited in support of this alternative submission. We hasten to observe that although there was no direct evidence connecting the appellant with the offence committed there was in addition to the warn and caution statement, subject to what we shall say later, the evidence of the appellant leading the prosecution witness to the recovery of the deceased's body. But the calling of the second proesecution witness in the trial-within-a-trial would have been desirable but not necessary if the prosecution had already proved its case.

As regards the alternative submission on ground two we note that the appellant was interrogated, among others, by PW3, a messenger by occupation, but what was said to PW3 was not part of the prosecution case. In the circumstances the authority of *Musongo's* case does not therefore assist the appellant.

We have examined the trial Commissioner's ruling in the trial-within-a-trial. We note that to satisfy himself that the appellant made the statement he had to look at it. On account of the details in the statement he was satisified that the appellant made it. This, in our view, was a wrong approach to the determination of the voluntariness of a challenged statement. We have also noted that in his ruling the learned trial Commissioner accepted that the alleged torture of the appellant must have been before the police became involved in the investigation, hence the alleged torture could not have influenced him to make a statement. Mr *Munthali's* submission is that the Court should have exercised its discretion to exclude the statement on the ground that shortly before the confession was made

the appellant was subjected to some force. We are inclined to agree with this submission. In this judgment the evidence of the confession will therefore be excluded.

One of the submissions on the main ground of appeal, namely the defence of insanity, is that, before the trial started, the appellant was referred to Chianama Hospital for examination. The argument on this ground is that trial Commissioner's observation that the issue of insanity was raised very late in the proceeding was erroneous. We agree with this submission. We also note from the record that PW2 was cross-examined at great length as to the appellant's mental state. We further note that PW3 was also questioned at some length by the Court as to the mental condition of the appellant. In our view this shows that before and during trial both the defence and the Court were anxious as to the appellant's mental condition at the time of commission of the offence.

The learned trial Commissioner rejected the doctor's opinion on the basis that he was supplied with ''raw material'' which was ''pure deceit''. In our view this was an incorrect assessment and a serious misunderstanding of the doctor's examination of the appellant on which he based his opinion. We wholly agree with the commissioner that ''the real value of the evidence of a medical expert consists in the logical inferences which he draws from what he had himself observed,'' but we would also like to accept that when doctors examine a patient in the course of their duties, they make notes and any doctor would be able to make an opinion based on those notes.

In the instant appeal the crucial evidence of the doctor was that he is a consultant psychiastrist. He talked to and examined the appellant.

He made certain observations: ''flattening effect and vacant look.'' The doctor had access to the test carried out on the appellant by other doctors and clinical psychiatrists apart from what he himself carried out. The doctor's evidence was also to the effect that the appellant was likely to have been mentally disturbed at the time of committing the offence. On the material that was before him, the doctor said: ''In my opinion Mr Joseph M. Tobo suffers from 'Psychiatric illness'.''

On the material that was before the doctor we are unable to say that his opinion, or his report for that matter, lacked logical inferences. There is nothing wrong or unacceptable for a doctor to take into account what a patient has told him in forming his opinion, let alone what other doctors have recorded about a patient.

In our view the learned trial commissioner seriously misdirected himself in his analysis of the doctor's evidence and his opinion in relation to the defence of insanity.

In the case of *Mushanga v The People* [2] this Court had the opportunity of doctor's evidence in relation to the defence of insanity. We said in that case:

> ''On an issue of mental disablility, the medical evidence presented to the trial court may or may not be conclusive. However the Court is bound to consider the medical evidence together with all other relevant evidence. Its quality and weight will be assessed in light of all the other facts and circumstances of the case. But, as the cases which we have already mentioned indicate, medical evidence will usually be considered to be more reliable than the assertions by or

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> on behalf of an accused. In this regard we are satisfied that the submissions, to the effect that the doctor's opinion in this case should be overturned, hold no attraction for us.''

In the instant appeal the finding that the opinion of the doctor was vacant was not supported by the evidence, particularly nothing that the prosecution did not challenge his opinion. We agree with the submissions on behalf of the appellant that on the balance of probabilities the defence had proved that the appellant was sufferring from a disease of the mind at the time of the commission of the offence. We are satisfied on the other hand that, even if the confession was excluded, the evidence adequately connected the appellant with the commission of the offence. For the reasons we have stated we enter a verdict of not guilty by reason of insanity and order that the appellant be detained at the President's pleasure. To the extent the appeal is allowed. It also follows that the decision reported at (1985) Z.R. 158 is overruled.

Appeal allowed.
