BANDA v THE PEOPLE (1990 - 1992) Z.R. 70 (S.C.) 20

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA, JJ.S.
15TH OCTOBER AND 19TH NOVEMBER, 1991
(S.C.Z. JUDGMENT NO. 8 OF 1991)

Flynote

Criminal procedure - Confession - Failure to administer warn and caution statement creating rebuttable presumption of involuntariness.
Criminal procedure - Confession - Counsel informing Court that initial instructions were that statement voluntary - Such precluding accused from receiving fair consideration of challenge to admissibility of statement.

Headnote

During his trial on a murder charge a statement, in which he confessed to the offence, was admitted in evidence against the appellant. There was a discrepancy between the police officer who took down the statement and a civilian witness as to whether the required warn and caution statement had actually been administered. In admitting the statement the trial Court had relied heavily on a statement from the bar by the appellant's counsel during the trial that his initial instructions had been that the statement was free and voluntary. On appeal the Court held that the failure to administer the warn and caution created a rebuttable presumption of involuntariness and, as there was a discrepancy between the prosecution witnesses as to whether this had happened, it had not been rebutted. It was further held that the statement should be excluded as the stance taken by the appellant's counsel at the trial had amounted to actual prejudice to the appellant. The appellant's challenge to the admission of the statement could not have received fair consideration when defending counsel made damaging statements, contrary to his duty to the client. The statement was excluded but, as there was sufficient other evidence to convict the appellant, the appeal was dismissed.

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Cases referred to:
(1) Shamwana and Others v The People (1985) Z.R .41.
(2) The People v John Nguni (1977) Z.R. 376.

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

Judgment

NGULUBE, D.C.J.: delivered judgment of the Court.

The appellant was convicted of the murder of Lamiwe Banda and sentenced to capital punishment. The particulars alleged that on 18th October, 1989, at Chingola Village in Chief Kawaza's area in Katete District, he murdered the deceased. The prosecution case established that the deceased died from traumatic perforation of her private parts and rectum and the allegation was that it was the appellant who inflicted the fatal injuries by violent insertion of a knobkerrie. There was evidence from a number of witnesses that the deceased told them it was Chisoni who had assaulted her and injured her very badly including in the private parts. In particular, PW5 testified that on the fateful day, the deceased had passed by her house and

told her she was going to have some beer. A short while later, the deceased came and fell in her yard and told PW5 that Chisoni had assaulted her and injured her with a knobkerrie. PW1 was one of those summoned and the deceased told him too that it was Chisoni who had injured her after she had rejected his sexual advances. There was evidence also from PW2 who together with PW3 apprehended Chisoni, the appellant, that twice the appellant escaped and ran away from them but was recaptured. PW2 testified that the appellant admitted that he had killed the deceased and gave the reason that she had refused to have sexual intercourse with him. There was, in addition, a full confession recorded by PW7, a police officer, and witnessed by PW6, a civilian, who happened to be at the police station to report another matter altogether. The warn and caution statement was admitted at first without any objection but when allegations of assaults and inducements were made during the defence case, the learned trial judge correctly held a belated trial within the trial and still ruled in favour of admitting the statement. In the course of dealing with the warn and caution statement, the learned counsel then acting for the appellant disclosed to the Court that he was surprised by the allegation of involuntariness being raised by the accused since his earlier instructions were that it was a free and voluntary statement and counsel gave as his opinion that the confession was voluntary. The learned trial judge in his judgment explicitly relied quite heavily on defending counsel's statements from the Bar as fortifying his finding on the question of voluntariness an consequent admissibility of the statement.

The first ground of appeal attacked the finding that the warn and caution statement was voluntary while the second ground attacked the admission of the same statement on the basis of unfortunate remarks from the Bar by the defending counsel. In relation to the first limb, Mr *Munthali* relied on the evidence of PW5 who testified that he did not hear any warn and caution actually being administered and that at first the appellant was reluctant to speak and only did so when PW7 persisted. The objection raised by the defence was based on alleged assaults and these

were discounted after the learned trial judge found on an issue of credibility that PWs 6 and 7 were to be believed. We can find nothing wrong with that determination. However, the complaint concerning the absence of any actual administration of the warn and caution, although it was written at the top of of the statement, was well taken having regard to the evidence of PW6. In terms of *Shamwana and Others v The People* [1] the failure to administer a warn and caution raises a rebuttable presumption of involuntariness and unfairness and it is for the prosecution to advance an explanation acceptable to the Court for the breach of the relevant judge's rule if the Court is to exercise its discretion in favour of admission. No explanation is available in this case where PW7 took the position that he had administered a warn and caution while PW6 contradicted this. There is yet another reason why we should uphold Mr *Munthali's* objection to the warn and caution statement. This relates to the second ground of appeal which attacked heavy reliance placed by the learned trial judge on the defence counsel's damaging statements from the Bar. In note 11 of para.1137 of *Halsbury's*, 4th ed., vol. 3, the learned authors suggest that where a confession of guilt is made to counsel before trial, he could decline to take up the defence of the case; where a confession made to him during trial does not debar him from testing the prosecution case to the fault and setting up available defences so long as he does not set up an affirmative case inconsistent with the confession. The discussion at para. 1195 of the same volume of *Halsbury's* underlines the duty of non-disclosure by counsel of information confided in him by his client which counsel is not entitled to communicate to anyone else if it would be to the detriment of his client. We agree with these observations. In this case, the stance taken by defending counsel, hostile as it was to the accused's interests, not only put the appellant in a fix, as the saying goes, but also

resulted in actual prejudice when the learned trial judge expressed satisfaction that, because his own lawyer had said so, the confession statement recorded by PW7 must have been free and voluntary and the objections raised by the appellant had to be dismissed. We do not see how the appellant's challenge to the admission of his warn and caution statement can be said to have received fair consideration when defending counsel made damaging statements, contrary to his duties to the client. The grounds in this respect are upheld and the statement recorded by PW7 will be disregarded for the purposes of this judgment.

Mr *Munthali* sought to argue that the learned trial judge did not rely on any other evidence and that we should not consider such other evidence. On the contrary, as Mr *Lwali* pointed out, there was other evidence which the learned trial judge accepted. This consisted of the statements made by the deceased to PWs 1 and 5 and the confession made to PW2, a civilian who had apprehended the appellant and against whom there was no suggestion of any impropriety. In relation to PW5, to whom the deceased made a report immediately after the indicent, and PW1, who was told the same things later that day, Mr *Lwali* submitted that their evidence was admissible as *res gestae* on the grounds which were fully discussed by Cullinan, J., as he then was, in *The People v John Ng'uni* [2]. He submitted that there was no possibility in this case that at the time when the deceased spoke to the witnesses she could have distorted the

account or concocted a story. We respectfully agree with the decision in *Ng'uni* that evidence of a statement made by a person who is not called as a witness (in this case the deceased) may be admitted as part of the *res gestae* and can be treated as an exception to the hearsay rule provided it was made in such conditions of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or to the disadvantage of the accused. The tests discussed in *Ng'uni* were fully met here and the evidence of what the deceased said was properly admitted. It is not correct, as Mr *Munthali* suggested, that the accused in *Ng'uni* was acquitted on the rejection of this type of evidence; he was acquitted because the eyewitnesses who purported to repeat what the deceased said were themselves not credible and appeared anxious to conceal the presence of and the roles played by some members of their family whom the accused had implicated. In the case at hand, no such adverse finding on credibility was made or could be made against PWs 1 and 5. What is more, there was nothing else in *Ng'uni* to support the evidence of the suspect witnesses as to the words allegedly uttered by the deceased there implicating the accused, while in this case there was the evidence of PW2 to whom this appellant confessed.

We are satisfied that even had the learned trial judge excluded the warn and caution statement recorded by PW7, he must have convicted in any event on the remainder of the evidence.

The appeal is dismissed. We have nothing to comment on the mandatory sentence.

Appeal dismissed.
