

WEBSTER KAYI LUMBWE v THE PEOPLE (1986) Z.R. 93 (S.C.)

SUPREME COURT
SILUNGWE, C.J., NGULUBE, D.C.J., AND MUWO, J.S.
11TH JULY, 1984 AND 23RD SEPTEMBER, 1986
(S.C.Z.) JUDGMENT NO. 23 OF 1986)

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Flynote

Courts - Court of appeal - Finding of fact - Interference with - when possible.

Criminal law and procedure - Espionage - What amounts to Evidence - Confession - Voluntariness
- Withdrawal of objection to admission in order to enable cross examination of prosecution witness
- Effect of.

Sentence - Appeal - Mandatory minimum - whether appeal lies.

Headnote

The accused appealed against his conviction on a charge of espionage contrary to section 3 (c) of the State Security Act. He was alleged to have passed classified information to the CIA: an action prejudicial to the safety or interests of the Republic of Zambia and intended to be directly or indirectly useful to a foreign power. He was given the minimum mandatory sentence of twenty years imprisonment with hard labour. Grounds of Appeal were inter alia that his confession was wrongly admitted and that the trial court misdirected itself in finding the charge of espionage proved after choosing to believe the prosecution witnesses.

Held:

- (i) An appeal court will not interfere with a trial court finding of fact, on the issue of credibility unless it is clearly shown that the finding was erroneous.
- (ii) When an objection to the admissibility of a confession was withdrawn in order to enable the defence to cross - examine on it, an appellant cannot complain about its admission unless he can point to an irregularity or impropriety rendering its admission unsatisfactory.
- (iii) No appeal lies against a mandatory minimum sentence.

Cases cited:

- (1) Kenmuir v Hattingh (1974) Z.R. 162
- (2) Malawo v Bulk Carriers (Zambia) Ltd (1978) Z.R. 185

Legislation

referred

to:

State Security Act, Cap. 110, s. 3 (c)

Supreme Court Act, Cap. 52, s. 22 (c)

For the appellant: T.C. Chalanshi & Co.

For the respondent: N. Sivakamaran, Senior State Advocate.

Judgment

SILUNGWE, C.J.: Delivered the judgment of the court. This is an appeal against conviction on a charge of espionage, contrary to section 3 (c) of the State Security Act, Cap. 110. At the appellant's trial, the allegation was that, on a date unknown but between January 1, 1979 and April 30, 1981 at Lusaka, he communicated with, or passed on information to, the Central Intelligence Agency (hereinafter referred to as the CIA) and that the said information was prejudicial to the safety or interests of the Republic of Zambia, it having been intended to be directly or indirectly useful to a foreign power. The appellant was

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convicted as charged and given the minimum mandatory sentence of twenty years imprisonment with hard labour, effective from June 22nd, 1981. The appeal is against conviction only.

We give here below a precise of the evidence on which the appellant was convicted.

The appellant, joined the Zambia Security Intelligence Service (henceforth referred to as the Z.S.I.S.) as an intelligence officer in February 1971 at the age of twenty years. Sometime in May or June 1976, he attended an External Operations Course organised by the C.I.A., apparently for the benefit of some of the Z.S.I.S. personnel. One of the course instructors was a Mr Frederick Lundahl, a Second Secretary and an officially declared C.I.A. agent, then based at the American Embassy in Lusaka.

On May 11, 1977, the appellant wrote a letter of resignation from the Z.S.I.S. in consequence of which his services were terminated on the following day.

About December 1977, the appellant's fellow church-goer by the name of John Chisanga offered to absorb him in a business venture - a cloth manufacturing factory called Millenia Garments. Mr Chisanga's senior partner was a Jew called Mark Zemark. The appellant was appointed as a factory manager, a position he regarded as "a blessing from God." However, that business venture soon fell apart due to differences between the partners over financial matters.

In December, 1973, the appellant contacted Mr. Lundahl by telephone and, on meeting him, sought employment with the C.I.A. As a result of this initiative, the appellant was taken on as an agent of the C.I.A. and worked as such during the period January 1979 to April 1981, using, the cover name of John Dube.

On January 7, 1980, the appellant rejoined the Public Service, this time as a protocol officer in the Ministry of Foreign Affairs.

In the evening of Thursday April 9, Mr. Obino Richard Haambote, a Director of External Operations in the Z.S.I.S. was having refreshments at the Lusaka Theatre Club when he was approached by the appellant and informed by him that he (the appellant) had "something urgent and very important to tell him." Mr. Haambote and the appellant then went to the appellant's flat at Pipit Court where the appellant confessed that he had been a CIA agent since the end of 1978.

When asked why he had seen it fit to confess, the appellant replied that, as a Christian, his conscience was not free and, as such, he could no longer continue to work for a foreign organisation against the interests of his country. It was agreed that the appellant would reduce their discussion to writing. Mr. Haambote was then asked to make arrangements for the appellant to have audience with the President.

In the morning of April 10, 1981, Mr. Haambote reported the appellant's confession to Mr AK. Mbewe, then Director-General of Z.S.I.S., as well as the appellant's wish to be received by the President.

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Thereafter the appellant gave a preliminary report in his own handwriting to Mr Haambote entitled: "How I met the C.I.A." The report was later produced and admitted in evidence.

In accordance with his request, the appellant was granted audience by the President at State House on the 10th April. Also present at that meeting were Messrs Mbewe and Haambote. When the appellant repeated his confession and the reason for it, the President asked him to tell Mr. Haambote all about his association with the CIA and the information he had passed to that organisation.

The confession was subsequently discussed in detail by the appellant and Mr Haambote at a State House Lodge on the 16th of April, as a result of which the appellant prepared a document entitled: "How I got in touch with the C.I.A." which, like the preliminary report, was subsequently received in evidence. A further discussion between the appellant and Mr. Haambote took place at the same venue on the 18th of April and, on that occasion, the discussion was tape-recorded. Both the tape and the micro-tape recorder were later received in evidence.

On the 22nd of June, the police launched a full-scale investigation into the case and Detective Inspector Andrew Mwape was detailed by the Senior Superintendent Donald Yanda to look for any evidence relevant to a charge of espionage. Accordingly, a search warrant was issued and the appellant's residence was searched, as a result of which the following documents were discovered in a concealment device located in the sitting room: (a) a letter addressed to the President; (b) a letter of confession addressed to the United States Ambassador in Zambia; (c) Requirements levied on me; and (d) "My encounter with Bishop Muzorewa." All these documents were subsequently and properly admitted in evidence. The appellant was said to have passed specific classified information to the C.I.A.

The appellant's story is that, whilst he was working for the Z.S.I.S, Mr. Wilted Phiri, then Director-General of that organisation, but who was later to be succeeded by Mr Mbewe told the appellant that the Z.S.I.S. was to launch an operation or scheme against the C.I.A. to be operated by the appellant. According to the appellant, Mr. Phiri advised him in May, 1977, that, in order for the scheme to succeed, it was necessary for him to resign from the Z.S.I.S. Pursuant to that advice, he wrote a letter of resignation on the 11th of May and, on the following day, his services with the Z.S.I.S. were terminated. Mr Phiri allegedly promised to render financial assistance to him.

It was alleged that, in compliance with Mr Phiri's instruction, the appellant contacted Mr Lundahl, using the cover name of John Dube. After the contact had been established, Mr. Phiri is said to have given him carefully selected information about the Soviet Union which he then passed on to the Americans at their request.

When Mr. Phiri was appointed as Minister of Home Affairs in 1978, Mr AK. Mbewe took over from him as head of the Z.S.I.S. and continued with the scheme against the CIA In pursuance of the scheme, the

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appellant purportedly resigned from the Z.S.I.S. and thereafter worked as a double agent. In 1980, however, the appellant, having got tired of serving as a double agent, joined the civil service in the Ministry of Foreign Affairs and was placed in the protocol section of the Ministry.

The appellant's allegation was that, in March, 1981, Mr, Mbewe told him that he did not know what the objectives of the operation were and so he was asked to write a confession stating how the operation had started and all that had transpired between him and the Americans. Mr. Mbewe is said to have promised that he would influence the President to appoint the appellant as ambassador to Portugal and that he would be given some financial and material reward, It was further alleged that Mr. Mbewe had given him the concealment device. According to the appellant's confession, to which we shall revert later on, the concealment device had been given to him by the C.I.A. after it had been flown from Washington D.C. for his use whenever he wanted to store sensitive material until such time as he was able to pass it on to the CIA or to utilise it. Mr. Mbewe had allegedly told him during the first week of April 1981 to make a confession to Mr. Haambote and to state therein how the operation had started and what ha transpired between him and the Americans. Consequently, when he met Mr. Haambote at the Lusaka Theatre Club on the 9th of that month he took him to his flat and confessed to have a working relationship with the C.I.A. This allegation was specifically refuted by Mr. Mbewe.

With reference to the audience that he had with the President, the appellant's position was that he had made no confession before him but that the President had merely thanked him for his patriotism and promised him a promotion within a matter of weeks. The appellant further stated that the confession allegedly made at State Lodge had been rehearsed by him at Mr. Haambote's suggestion.

It suffices to say that the appellant's contention on all material issues stand poles apart from the evidence adduced by the prosecution which was accepted by the trial court.

This appeal raised four main issues, namely, (a) did the appellant, join the C.I.A. in furtherance of a scheme mounted by the Z.S.I.S. against the C.I.A.? (b) did he make a free voluntary confession? (c) did he pass any classified information which was prejudicial to the safety or interests of the Republic of Zambia and which was intended to be directly or indirectly useful to a foreign power? and (d) did the learned trial judge err by deciding the issue of credibility against the appellant?

As regards the first issue, Mr. Chalanshi, learned counsel for the appellant, urged us to accept the argument that the appellant's relationship with the CIA had not come about as a result of his

volition but that this had been in obedience to instructions from his superior officers and that he reasonably believed that the relationship was necessary in the discharge of his duties as an intelligence officer so as to facilitate the success of the scheme against the C.I.A. which had been initiated by Mr. Phiri and later perpetuated by Mr. Mbewe, Mr. Chalanshi submitted that his client's resignation from the Z.S.I.S. had

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been in pursuance of a previous instruction given to him by Mr. Phiri in furtherance of the scheme and that, because of that arrangement, his resignation was too readily accepted by the Z.S.I.S. The prosecution's position was that this allegation was baseless.

It is common ground that the appellant was an agent of the C.I.A. during the period January 1979 to April 1981 and that he used the cover name of John Dube. There is however nothing a record to support the existence of any such scheme or operation against the C.I.A., as alleged by the appellant. The prosecution evidence, especially that of Messrs Phiri, Mbewe and Haambote and of documents found in the concealment device makes it abundantly clear that the appellant had freely chosen to resign from the Z.S.I.S. and later to work for the C.I.A. It is evident that his resignation was prompted by feelings of frustration for lack of promotion and that thereafter his initiative to join the C.I.A. was inter alia, dictated by the effects of poverty. What happened was that, when the appellant found himself without any material means of support, he decided to contact the C.I.A. He later spoke of his reaction in these terms: "At first I trembled at the thought of betraying my own country. But the grim uncertain future ahead of me gave me false courage." In his own words, "the real reason for contacting the C.I.A. " was that he "had drifted into sin and forgotten God" and that he had been motivated by "financial destitution, misguided youthful adventurism" and "bitterness" against his superiors in the Z.S.I.S. and "indirectly against the Government of President; Kaunda." Explaining how he had got in touch with the C.I.A., the appellant, said:

"I had no employment. I had been, I thought unfairly treated by the Intelligence Service. I thought that I had all the talent that people could tap on and to find myself walking in the street, with torn shoes and no employment when I had such a dangerous career behind me and harbouring so much amount of hatred, sort of bitterness against the system, I wanted to at least make some revenge and show those people who were in positions of authority and power at that time that when you neglect talent and ability you only do it at your own peril."

In the document entitled "How I got in touch with the C.I.A." the appellant states how he was recruited into the C.I.A., how he underwent rigorous screening by a C.I.A. expert from Washington D.C.; his passing "with flying colours" of the pre-recruitment screening which included a technical device and how the C.I.A. took him "into their confidence." His initial monthly salary was K200.00 plus K100.00 to cover operational expenses. Although the appellant alleged that there was an arrangement between Mr. Phiri and himself to surrender to the Z.S.I.S. any financial or material remuneration received from the C.I.A., there is no evidence whatsoever, not even from the appellant himself, that any such remuneration was ever passed on to the Z.S.I.S. However as we have said above, there was no evidence to support the alleged scheme and, consequently, the remuneration that the appellant received from the CIA was entirely for his own personal benefit.

In the document "How I got in touch with the C.I.A." the appellant indicates that he was free to leave the C.I.A. and join any other organisation, including the civil service. He sought employment with the Zambia Army and even went to the extent of having an interview with Mr. Masheke, the Deputy Army Commander, but later decided to join the civil service as a protocol officer in the Ministry of Foreign Affairs. Surely, if the appellant had in reality been an officer of the Z.S.I.S. at the time that he became an agent of the CIA that is, if he had merely been acting on behalf of the Z.S.I.S. to facilitate the success of a scheme or operation mounted by the Z.S.I.S. against the C.I.A., as alleged by him, he would not have had the liberty to seek other employment. The truth of the matter is that he sought other employment because, as he himself put it: "he was not in the least interested in rejoining the Intelligence Service."

The reality of the appellant's resignation was that, when he realised that prospects for his promotion were remote, he became frustrated. He then wrote a letter of resignation from Z.S.I.S. intending thereby to merely find out if his superiors regarded him worthy of advancement in the service. Unfortunately for him, the letter of resignation did not bring about the intended result. Instead, his resignation was accepted immediately because, as Messrs Phiri and Mbewe were later to testify, he was no longer interested in his job.

The second issue is whether the appellant made a free and voluntary confession on separate occasions, firstly, to Mr. Haambote; secondly at State House before the President, Messrs Mbewe and Haambote; and thirdly to Mr Haambote at State Lodge.

At the hearing of the appeal, it was contended by Mr. Chalanshi that the confession ought not to have been admitted in evidence on three grounds: First, that the confession was not voluntary as the appellant had been instructed by Mr. Mbewe to make it, indicating how the operation against the C.I.A. had been initiated by Mr. Phiri; second, that Mr. Haambote had made the appellant to rehearse the tape-recorded confession; and third, that the customary warn and caution had not been administered at the right time. The contention may shortly be disposed of.

Although an objection was initially raised at the trial by the appellant's counsel against the admission of the confession, including the tape-recorded part of it, the objection was quickly withdrawn on the appellant's instructions, giving as a reason the need to cross-examine prosecution witnesses on it. Thereafter the confession was admitted in evidence. In our judgment, the appellant's counsel, though different from the one that conducted the defence at the trial, cannot now be heard to complain against the admission of the confession unless he can point to an impropriety or irregularity rendering the admissibility of the confession unsatisfactory, this Mr Chalanshi was not able to do. It is to be noted that the learned trial judge had considered the exercise of his discretion in the matter and that he had exercised it in favour of

admission of the confession . There was thus no misdirection in the admission by the learned trial judge of the appellant's confession. Indeed, it is evident from the prosecution evidence, particularly that given by Messrs Mbewe and Haambote as well as the contents of the document entitled: "How

I got in touch with the C.I.A." under a paragraph headed: "Why I confessed", that the appellant confessed because, as a Christian, he wanted to have a "free conscience," it being no longer his desire to serve the C.I.A. against the interest of his country. In his own words, he said:

"What really troubled me was the spirit of the living God. I could not continue to pray to God and ask for forgiveness with full knowledge of my acts of treachery. I realised that my confession would be a risk which would take me to prison for the rest of my life if the authorities did not believe my story, but better die with a free mind and with a firm belief that what I did under the circumstances was the best I could do for my country. I have come out whole heartedly and there is no deception in me."

Further, the appellant had volunteered his confession in the hope that it might become a mitigating factor and save him from a "long spell of imprisonment or even possible execution". The appellant made it known that had he not confessed his involvement with the C.I.A., he "could have gone on for more than ten (10) years without any fear of being detected" because of certain precautionary measures that had been taken.

As to why the appellant had chosen to make his confession to Mr. Haambote, he said that he had known him quite well since 1971 and that Mr. Haambote was like a brother to him as he had previously given him some very valuable advice. He said further that Mr. Haambote was the only man out of the entire organisation who had come to his help, including financial help, whenever need arose. He confessed to Mr. Haambote because he knew that he "would strike an understanding chord."

It is significant to observe that, in a letter dated June 18th, 1981, addressed to the American Ambassador accredited to Zambia, the appellant told him that he had made a confession about his involvement with the C.I.A. and, fearing that the Director-General might decide to take him to court, he told the ambassador that (a) the C.I.A. should not abandon people who had risked their lives and co-operated with them; (b) that if he were to be taken to court as a self-confessed spy who had revealed so much, the image of the C.I.A. might suffer; and (c) that, for humanitarian grounds, the ambassador should be mindful of the anguish and deep sorrow that would be inflicted on his mother, father and brothers if he were to be executed or sentenced to a long prison term ranging from 20 to 30 years. The appellant then expressed his desire to flee the country in order to avert a court action which he sensed would come sooner or later; asked for a job in the United States of America; and wished to be given financial assistance for the benefit of his poor parents whom he would leave behind.

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The next issue is whether the appellant passed any information prejudicial to the safety or interests of Zambia thereby intending it to be directly or indirectly useful to a foreign power.

During examination-in-chief and cross-examination the appellant admitted having passed some information to the C.I.A. but claimed that the information passed was innocuous. However, in a document entitled "Requirements levied on me", the appellant sets out what information he had been asked to communicate to the C.I.A. The last paragraph of that document, which is headed

"What I was able to pass", gives a list of some of the classified information that the appellant communicated to the CIA. That list includes the following: (a) information relating to the granting of visas to Soviet nationals and their movements in Zambia and about a memorandum in which the Soviets had complained about the establishment of a cultural centre in Lusaka; (b) information about the existence, location and deployment of SAM3 missiles in Zambia, (c) minutes of the 36th Session of the OAU Liberation Committee Meeting that had recently been held in Dar-es - Salaam; (d) A recent brief on the Reagan administration submitted to the Headquarters of the Ministry of Foreign Affairs by Ambassador Ngonda in Washington D.C.; and (e) names of Directors of various desks at the Ministry Headquarters.

All this constitutes sufficient evidence that the appellant did communicate classified information that was prejudicial to the safety or interests of Zambia thereby intending it to be indirectly or directly useful to the United States of America. The learned trial judge was, therefore, entitled to find that this ingredient of the charge had been established by the prosecution.

Finally, Mr. Chalanshi raised the issue of credibility. He argued that it was clear from the trial court's judgment that the appellant had been convicted solely on credibility and added that, in so doing, the court had fallen into error by not having adequately considered the credibility of the appellant's version of the story. He relied on our judgments in *Kenmuir v Hattingh* (1) and *Malawo v Bulk Carriers (Zambia) Ltd* (2) where we had said at pages 163, lines 36 to 40; and 187, lines 16 to 20 respectively, that where questions of credibility are involved, an appellate court which has not had the advantage of seeing and hearing witnesses will not interfere with findings of fact made by the trial judge unless it is clearly shown that he has fallen into error.

We do not consider that Mr. Chalanshi demonstrated a basis on which we could reverse the learned trial judge's findings on credibility. We are satisfied that he fully considered the evidence before him and that there was no misdirection in his acceptance of the prosecution story and rejection of the appellant's version.

What we have said in this judgment leaves us in no doubt whatsoever that the appellant's conviction was fully justified. The appeal against conviction is dismissed.

There is no appeal against the mandatory minimum sentence of 20 years imprisonment with hard labour, and rightly so, as no appeal lies

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against a mandatory minimum sentence.

However, as the appellant's application to be treated as an unconvicted prisoner pending the determination of his appeal by this Court was granted in terms of section 22(a) of the Supreme Court Act, Cap. 52, it is directed that, on account of the delay in having this appeal determined, one half of the period during which he was treated as an unconvicted prisoner will be credited to him but the other half will count as if he had been on bail pending the determination of the appeal.

Appeal dismissed.
