THE PEOPLE (1982) Z.R. 115 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, J.J.S.
14TH SEPTEMBER AND 5TH OCTOBER ,1982
(S.C.Z. JUDGMENT NO.28 OF 1982)
APPEAL NO.72 OF 1982

Flynote

Criminal law and procedure - Identification - Evidence of single identifying witness - Possibility of honest mistake - Need to rule out.

Evidence - Hearsay - Statements not properly introduced into the record and not falling under exceptions of rule - Position of.

Headnote

The appellant was convicted of one count of aggravated robbery and two counts of attempted murder. The trial court considered that the appellant had been properly identified at the parade by the single identifying witness despite allegations by the defence that the parade was improperly conducted and the inherent danger of an honest mistake in the circumstances. Hearsay evidence was admitted supporting the conviction.

Held:

(i) The evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake; the witness should be subjected to searching questions and careful note taken of all the prevailing conditions and the basis upon which the witness claims to recognise the accused.

(ii) If the opportunity for a positive and reliable identification is poor then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render mistaken identification too much of a coincidence.

(iii) Hearsay evidence which does not fall within the exceptions to the rule and which does not come within s.4 of the Evidence Act, Cap.170, is inadmissible as evidence of the truth of that which is alleged.

(iv) The judgment of the trial court must show on its face that adequate consideration has been given to all relevant material that has been placed before it, otherwise an acquittal may result where it is not merited.

Cases referred to:

(1) Abdallah Bin Wendo and Anor v R. 20 E.A.C.A. 166.
(2) R. v Turnbull and Ors. [1976] 3 All E.R 549.
(3) Nyambe v The People (1973) Z.R 228.
(4) Chimbini v The People (1973) Z.R. 191.
(5) Bwalya v The People (1975) Z.R. 227.

(6) Chate v The People (1975) Z.R. 232.

(7) Chipango and Ors v The People (1978) Z.R. 304.
(8) Miyoba v The People (1977) Z.R. 218.

Legislation referred to:
Evidence Act, Cap.170, s 4.

For the appellant: J. R. Matsiko, Legal Aid Counsel.
For the respondent: M. Mwiinga, Senior State Advocate.

Judgment

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

On the 14th September, 1982, we allowed the appeal of the appellant, quashed the convictions and sentences, and said we would give our reasons for so doing later. We now give those reasons.

The appellant was tried and convicted of one count of aggravated robbery and two counts of attempted murder. He was sentenced to death on the former charge and to life imprisonment on the latter charges. There was evidence from the prosecution that on 25th October 1979, three men, driving a stolen Fiat motor car, went to Kalulushi for the purpose of staging an armed robbery at PW1's shop. One robber, the driver, remained in the get-away car while the other two men carried out the actual robbery. There was evidence that of these two men one was armed with a rifle which he fired into the crowded shop injuring PWs 2 and 3, the complainants on the attempted murder charges. PW1 hid himself under, some shelves when PW2, the customer he was serving, was shot down. Neither of these two witnesses actually saw the robbers. PW3 ran out of the shop and headed for the clinic as soon as he saw that he had been shot. He, too, did not observe the robbers. PW4, the shop assistant, rushed out of the shop with the rest of the customers who were chased out by the armed bandits and it was PW4 alone who stated that he had observed the robbers and identified the appellant as the man who had collected the cash from the till after his armed confederate had cleared the shop of the customers. That the offences was committed was not in dispute. What was disputed was the identification of the appellant as one of the robbers involved.

The learned trial commissioner found that PW4 had properly identified the appellant at an identification parade, and dismissed allegations by the defence that the parade had not been properly conducted. It is clear from a reading of the relevant passage in the judgment that the court below considered that, having dismissed the complaint regarding the parade, the identification at the parade alone was sufficient to warrant a conclusion that PW4 had properly identified the appellant. This approach is manifestly unsatisfactory. This was a case where there was in fact only a single identifying witness, a witness who, on his own admission, was frightened and rushed out of the shop together with the customers. PW4 had stated that he had seen the appellant entering the shop as he himself was rushing out for safety. It is quite clear on these facts, therefore, that PW4 could only have had at best a momentary glimpse of the appellant. In these circumstances there is a great deal of merit in the ground appeal which attacks the quality of identification in this case. There is a string of cases which set out the correct

approach to the evidence of a single identifying witness. Those cases also lay down the

requirements that a trial court should show in its judgment that it is alive to the dangers of an honest mistaken identification. The cases (such as *Abdullah Bin Wendo and Another v R.* (1) *R. v Turnbull and Another* (2), *Nyambe v The People* (3), *Chimbini v The People* (4), *Bwalya v The People* (5) and *Chate v The People* (6) all establish the need to test and evaluate with greatest care the evidence of a single identifying witness to exclude the dangers of an honest mistake before such evidence can be regarded as reliable. The witness should normally be subjected to searching questions, and careful note taken of all the prevailing conditions as well as the basis upon which the witness claims to be able to recognise the accused. If, in all the circumstances, the opportunity for a positive and reliable identification is poor, then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render a mistaken identification too much of coincidence. The evidence in this case showed that out of four possible eye-witnesses only one frightened witness was running out of the shop for safety. Identification in those circumstances could hardly be regarded as reliable and, in any event, the failure on the part of the learned trial commissioner to warn himself with regard to the possibility of an honest mistake on the part of PW4 was misdirection.

The foregoing was compounded by a further misdirection which counsel for the appellant has pointed out in one of his grounds of appeal. This was the learned commissioner had made certain findings which he regarded as supporting PW4's evidence of identification by treating as evidence the contents of statements made to the police by two prospective prosecution witness who were not called to give evidence in court, but copies of whose statements had been furnished to the court under the summary committal procedure. The learned commissioner appears to have accepted an unsubstantial allegation made by a police officer that some friends of the appellant had kidnapped the prospective witness to Zaire, and, on the basis that their non-availability to testify was attributable solely to the "clever under-handed" conduct of the appellant and his friends, he considered himself to be at liberty to reply on their statements to the police. Accordingly, the learned commissioner found as fact from those statements that four men had staged the robbery, a finding which was in direct conflict with the evidence of the eye-witness, PW4, who said three men staged the robbery. On the same basis the learned Commissioner found as a fact that the prospective witnesses had, on 26th November 1979, at Kamatipa Compound, identified the appellant to Detective Sergeant Sitaka, as one of the four robbers they had seen in the get-away car at Kalulushi on the day of the robbery. The learned commissioner further found that the statements to the police of those two prospective witnesses fully supported the identification of the appellant by PW4, and accordingly ruled out any question of mistaken identity.

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The statements relied upon were neither depositions tallied before a subordinate court nor business records within the meaning of a. 4 of the Evidence Act, Cap. 170. In fact they had not been introduced or tendered in evidence in any of the recognised circumstances such as to contradict a witness. We have here a situation where statements to the police were treated as evidence and their contents as truth in the absence of any opportunity to challenge their purport by cross-examination of the witness deposing thereto. We can find no provision under our laws for the use of statements to the police for this sort of purpose. In *Chipango and Others v The People* (7), this court said at p.314:

> "It was submitted that this court had an inherent jurisdiction to see that justice prevailed and that in the exceptional circumstances of this case we should regard ourselves as at liberty to look at the statements of the witnesses in question to ascertain whether or not evidence favourable or the appellants or unfavourable to the prosecution had not been presented to the trial court and which, if presented, might have affected the outcome. We cannot accede to this proposition. We have made it clear in a number of cases (*see* for instance, *Miyoba v The People* (8)) that this court cannot and will not look at depositions on the statements supplied under the summary committal procedure-or indeed any other statement alleged to have been made by a witness at some other time unless that statement has been properly introduced into the record."

We are of the opinion that the condition expressed in the concluding statement of the passage quoted above should apply to every case whether on appeal or at trial. It follows that where the statement has not been properly introduced into the record it is not part of the evidence on record before the court, and any use of such statement as evidence is serious misdirection.

The learned trial commissioner also considered that he could rely on the evidence of Detective Sergeant Sitaka as to what the two prospective witness had told him concerning the, appellant on 26th November, 1979, when they allegedly led the police officer to Kamatipa Compound where they allegedly identified the appellant to be one of the four men who were in the stolen car which was used in the robbery at Kalulushi on 25th October, 1979. Evidence of a statement made to a witness by a person who is not himself called is hearsay and inadmissible where the object of the evidence is to establish the truth of what is detained in the statement. That was the position in this case where the court below treated the hearsay evidence as representing the truth when, quite clearly, the statements did not fall under any of the recognised exceptions to the hearsay rule which arise both at common law and under statute.

There is one other matter we must comment upon. The appellant had denied any knowledge of the two prospective witnesses and had denied that Detective Sergeant Sitaka had apprehended him on 26th November,

1979, as the witness alleged. The appellant pointed out in his evidence by that date he was already in custody at the prison. Grave doubts must arise as to the credibility of Detective Sergeant Sitaka, when it is on record that the appellant was detained on 2nd November, 1979, under a detention order made under reg. 33 (6) of the Preservation of Public Security Regulations. That detention order was revoked on the 6th November, 1979, the day on which PW11 also conducted the identification parade. The evidence, therefore, that the two prospective witnesses had led Detective Sergeant Sitaka to Kamatipa Compound and there identified the appellant at a time when the appellant was already in custody must, in the circumstances, be a fabrication. Yet, the court below convicted on such evidence and did not even mention the appellant's evidence on the point. We repeat what we have said time and again, that the judgment of any trial court must show on its face that adequate consideration has been given to all the relevant material that has been placed before it, and if no or insufficient consideration has been given to evidence favourable to an accused person the verdict becomes assailable and an acquittal may result where none was otherwise

merited. The learned Senior State Advocate has indicated quite properly in the circumstances that the State does not support the convictions. It was for the foregoing reasons that we allowed the appeal, quashed the convictions and sentences on all three counts and acquitted the appellant.

Appeal allowed

THE PEOPLE v