PATRICK SAKALA v THE PEOPLE (1980) Z.R. 205 (S.C.)

SUPREME COURT
SILUNGWE, C.J., BRUCE-LYLE, J.S. AND MUWO AG.J.S.
9TH OCTOBER,1979 AND 25TH MARCH ,1980
S.C.Z. JUDGMENT NO. 8 OF 1980

Flynote
Evidence - Circumstantial evidence - Acceptance of.

Headnote
The appellant was convicted of murder of a boy aged four years, Rute with her child aged four years and the appellant had been travelling together for about two hours. The appellant proposed love to Rute and on her refusal he assaulted her so severely that she was rendered unconscious for about eight hours. On regaining consciousness, she found that her suitcase had disappeared and the child was dead. There was no dispute as to the appellant's identity nor was the assault challenged. The crucial issue was whether the appellant caused the child's death. On appeal the appellant denied killing the child and argued that there was no direct evidence connecting him with the offence.

Held:
The circumstantial evidence was so cogent and compelling that no rational hypothesis other than murder could the facts in this case be accounted for.

Cases referred to:
(1) Nalishwa v The People (1972) Z.R. 26.
(2) Chigowe v The People (1977) Z.R. 21.
(3) Chinyama and Ors v The People (1977) Z.R. 426.
(4) Petrol v The People (1973) Z.R. 145 (C.A.).
(5) R.v Onufrejczyk, [1955] 1 Q.B. 388; 39 Cr. App. Rep. 1.
(6) Nkumbula v R. 1961 R. & N. 589.

For the appellant: F.N. Mumba (Mrs), Director of Legal Aid.
For the respondent: R. Balachandran, State Advocate.

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Judgment
SILUNGWE, C.J.: delivered the judgment of the court.

The appellant was convicted of the murder of one Fabiano Banda Magamba-a boy aged about four years.

The circumstances of the case were briefly these. Rute Sakala, a young housewife, had arrived at Katete from Lusaka on Sunday, 2nd July, 1978. With her son-Fabiano-on her back, she set out on foot at about 0600 hours to return to her village; she was carrying a suitcase containing clothes and blankets. Shortly afterwards she was joined by a man-the appellant-and together they travelled for about two hours talking and chatting. At about 0800 hours Rute felt tired and so she put the child down so that it could walk on its own. The appellant then proposed love to Rute but this was turned down. Incensed by the refusal he pulled her into the bush a short distance from the footpath. As the child played a few metres away, the appellant started to assault Rute-he assaulted her so severely that she was rendered unconscious for about eight hours.

On regaining consciousness Rute discovered that the appellant, the child and the suitcase had all disappeared. She then searched in the immediate neighbourhood and there found, to her horror, the dead body of her child with a cloth belt which had been taken from her dress tightly wound around the child's neck. She carried the child's body to a nearby village and was then hospitalised. After her discharge from hospital she readily identified the appellant at an identification parade held ten days after the incident.

There is here no dispute as to the appellant's identity nor is the assault on Rute by him challenged. What is challenged, and indeed the crucial issue, is the allegation that the appellant caused the child's death. There were three grounds on which the appeal was fought:

(a) that the confession statements allegedly made by the appellant ought to have been excluded;
(b) that the conviction was not competent in the absence of any specific medical finding as to the cause of the child's death since death by natural causes had not been ruled out; and
(c) that in the absence of direct evidence implicating the appellant with the killing, the child could have been killed by a third party.

The learned State Advocate accepted the submission in regard to the first ground of appeal and agreed that the alleged confession statements ought to have been excluded on the ground that when the second statement was made, the inducement in respect of the first had not been dissipated. In *Nalishwa v The People* (1), and more recently in *Chigowe v The People* (2), we reaffirmed, at pp. 27 and 25 respectively, the settled law position that where two confessions are made and the first is held not to have been freely and voluntarily made, the second will be equally inadmissible even though there has been no fresh inducement, unless it is shown that the previous inducement had ceased to operate on the mind of the accused.

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However, this case is distinguishable from *Nalishwa* (1), and *Chigowe* (2), in that here, it was the second statement, not the first, that was disputed. It is likely that this situation arose from the fact that the statement on arrest, which happened to be the second in point of time, was introduced earlier than was the warn and caution statement. In the circumstances, therefore, it is not open to argument that the second statement tainted the first. And so, different considerations must apply here, namely, those pertaining to the exercise of the court's discretion.

During a trial-within-a-trial with regard to the second statement, the appellant gave evidence to the effect that he had been taken into Police custody on 11th July, 1978, and been beaten that night and also on the following day from 0800 hours to 1000 hours. He made a warn and caution statement to a woman detective constable on 12th July, at 1150 hours and another statement to a detective sub-inspector when he was arrested on 13th July, at 1510 hours. The second statement was made when the Police allegedly said to him "speak, admit the case". In his ruling, following the trial-within-a-trial, the learned commissioner said, in part:

> "Any beating which he alleges took place on the night of 11th July and the morning of 12th July cannot relate to the arrest which occurred on 13th July, at 1510 hours. The lapse oil time between 10 hours on 12th and 15 hours on the 13th is 29 hours. Even assuming therefore that the accused was manhandled on the night of 11th July and the morning of 12th July, I do not see anything to suggest he was beaten at 1510 hours on 13th July, 1978 or that earlier assaults of 29 hours ago still operated on his mind . . . I . . . hold that accused was not beaten at 1510 hours on 13th July, and that the reply then was free and voluntary."

It is a matter for observation that the trial court made no ruling as to whether there was, or there was not, any truth in the appellant's allegation that he had been subjected to physical violence from 11th to 12th July. Because of the absence of such ruling, and notwithstanding the fact that the defence registered no objection as to the admissibility of the first statement, it became peremptory for the court to consider whether this was a proper case for the application of the principles of fair conduct, that is, whether the appellant had been so unfairly or improperly treated in all the circumstances that the evidence of his alleged confessions desired to be rejected in the exercise of its discretion. *See Chinyama and Ors v The People* (3), and *Petrol v The People* (4). As in *Nalishwa* (1), there was in this case no reference made by the trial court to the exercise of its discretion and so, failure to consider the matter of its discretion in connection with both statements, constituted a serious misdirection. As we cannot say that had the matter of the exercise of the discretion been considered by the trial court it must inevitably have admitted the statements, we are bound to rule that the statements were wrongly admitted.

Coming now to the second ground of appeal, the point that there was no specific medical finding as to the cause of death was well taken. We find it rather intriguing that the doctor who performed the post-mortem

examination on the child's body should, in the circumstances of the case, have been unable to form an opinion as to the cause of death. To exacerbate the situation, the doctor was not present in the country at the time of the trial and so no light could be shed upon the medical findings. The question that arises is whether the child could have met his death by natural causes.

The issue raised in the second ground of appeal seems to have been adequately covered by the following passage appearing in the trial court's judgment:

> "I am bound to assume that natural causes have not been ruled out unless there are compelling facts to the contrary when it would be totally unacceptable so to assume. In fact, I find such compelling facts to exist.The child was no doubt alive before the mother lost consciousness. It was dead when the mother found it at about 1600 hours when she recovered consciousness. There were bruises on its neck and suboccipal haematoma. There was a belt wound tightly around its neck. It would be madness to talk about natural causes in such circumstances. In the event, even though the medical evidence as to (the) cause of death is uncertain, I am certain, not and of the cause of death in medical language, but of the type of death the child met, namely that it was unnatural and certainly not at its own hands."

We are of the view that the learned Commissioner properly directed him self in the matter. Our view is strengthened by the case of *R. v Onufrejczyk* (5), where it was held that on a charge of murder, the fact of death is provable by circumstantial evidence notwithstanding that neither the body nor any trace of the body has been found and that the prisoner has made no confession of any participation in the crime. And in *Nkumbula v R.* (6), - a case of causing death by dangerous driving - Clayden, F. C. J, delivering the judgment of the Federal Supreme Court had this to say at p. 593 marginal B:

> "That there was not the expert evidence of a doctor as to the cause of the death of Chitundu is not fatal to the Crown case."

We are satisfied that the circumstantial evidence was so cogent and compelling that on no rational hypothesis other than murder can the facts in this case be accounted for. The submission based on this ground therefore fails.

Finally, it was submitted that in the absence of direct evidence implicating the appellate with the killing, the child could have been killed by a third party.

There was, evidence that the appellant had stolen Rute's suitcase together with its contents and, indeed, a dress identified by Rute to be hers was put in evidence as an exhibit having been recovered be the Police from a member of the public to whom it had been given by the appellant. It has been argued that the fact that certain of the article is, in particular the dress just referred to, were shown to belong to Rute, was evidence that

implicated the appellant with the offence of theft, not that he was responsible for the child's death- since this could have been caused by someone else.

As there were no eye-witnesses to the killing, circumstantial evidence must once again be called in aid. The question is: can it be said that there existed such circumstances as rendered the commission of the crime by the appellant certain and left no room for a reasonable doubt? The learned commissioner answered this question in the affirmative. As he put it:

> "The accused was there and had access to the child. He had the opportunity to commit the offence.. Having battered the child's mother and stolen her suitcase, he had the motive....I cannot see a third party, a stranger who had nothing to do with the battering of P.W.1 (Rute), who had nothing to do with stealing P.W. 1's property, simply coming upon a little boy alone in the bush near where his mother lies unconscious and forthwith proceed to take a belt from the prostrate women end squeeze it tightly around the neck of such a small child."

We agree that the circumstantial evidence implicating the appellant with the crime charged is overwhelming. He had the opportunity and the motive. It seems probable to us that baring beaten up the child's mother and left her for dead the appellant must have decided to take the child's life in an effort to eliminate the chances of his being later identified by the child.

In conclusion, although the trial court misdirected itself on the question of admissibility of the appellant's statements to the Police, there was nevertheless ample evidence on which it must inevitably have found the appellant guilty as charged. The appeal against conviction is dismissed.

Appeal dismissed

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