BENARD CHISHA v THE PEOPLE (1980) Z.R. 36 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER, AG. D.C.J., AND CULLINAN, AG. J.S
10TH JULY, 28TH AUGUST ,1979, AND 18TH MARCH, 1980
S.C.Z. JUDGMENT NO. 4 OF 1980

Flynote
Evidence - Child of tender years - Necessity for corroboration

Headnote
The case against the applicant rested solely on the evidence of a boy aged fourteen years. The trial magistrate conducted a perfectly proper *voire dire*, at the end of which he was satisfied that the boy was able to give evidence on oath. The issue was whether the sworn evidence of a child is to be treated like the sworn evidence of any other witness.

Held:
The sworn evidence of a child requires corroboration.

Cases referred to:

(1) R. v Campbell, [1956] 2 All E.R. 272.
(2) Phiri (E) and Ors v The People (1978) Z.R. 79.
(3) D.P.P. v Hester, [1972] 3 All E.R. 1056.
(4) R. v Dossi (1918) Cr. App. Rep. 158.
(5) D.P.P. v Kilbourne, [1973] 1 All E.R. 440.

For the applicant: F. M. Mumba (Mrs), Director of Legal Aid.
For the respondent: K.C.V. Kamalanathan, Senior State Advocate.

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

This is an application for leave to appeal against conviction on a charge of stealing K29 in cash from the person of a named complainant. At the end of the hearing we treated the application as an appeal, allowed the appeal and said we would give reasons for our decision at a later date; we now do so.

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The case against the applicant rested solely on the evidence of Charles Makumba - a boy aged fourteen years at the time of the trial. The learned trial magistrate conducted a perfectly proper

voire dire in terms of s. 122 (1) of the Juveniles Act, Cap. 217, at the end of which he ores satisfied that the boy was able to give evidence on oath. In his sworn evidence the boy described the circumstances in which he said the theft had occurred. He said that at 1500 hours on 25th May, 1978, he had been selling refreshments at a bus station in Chingola when, as he attended to the complainant, he observed a man relieve the complainant of a purse from the latter's waistcoat pocket. The man then dashed off to a nearby taxi and was immediately driven out of sight. The complainant did not realise what had happened to him until his attention was drawn to it by the boy. Three days later the boy identified at the same bus station the alleged thief who turned out to be the applicant.

The main issue that arises in this case is one whether the sworn evidence of a child is to be treated like the sworn evidence of any other witness.

It is well-established that as a matter of law, the sworn evidence of child, in criminal cases, does not require corroboration but that the court should warn itself that there is a risk in acting on the uncorroborated evidence of young boys and girls; see per Lord Goddard, C.J., in *R. v Campbell* (1). As it is necessary to heed the warning, corroboration of the sworn evidence of a child is, in practice, usually looked for. There need not now be a technical approach to corroboration: evidence of "something more" suffices. In *Phiri (E) and Ors v The People* (2), at p. 107 marginal 14 we said that evidence of "something; more":

> "must be circumstances which, though not constituting corroboration as a matter of strict law, yet satisfy the court that the danger . . . has been excluded and that it is safe to rely on the evidence . . . implicating the accused."

It is common cause that in the present case there was no corroboration of the sworn evidence given by the boy.

Mr Kamalanathan argued that once a child is properly allowed to give evidence on oath such evidence should be placed on an equal footing as the sworn evidence of any other witness in respect of which it is not necessary for the court to warn itself.

Clearly, the effect of this submission, if accepted, would be to overturn the well-established rule of practice in which case the need for the warning and the need to look for corroboration in all cases invoicing children who give sworn evidence would no longer arise.

In responding to the argument it is necessary to examine why it is that certain statutory enactments impose the necessity in some instances of leaving more than one witness before there can be a conviction and, similarly, why courts have given guidance in terms which have become established rules of practice. On this, the following passage from the judgment of Lord Morris of Borth - Y-Gest in *D.P.P. v Hester* (3), at p. 1059

marginals *h* and *i* and at p. 1060 marginal *a* is both relevant and instructive:

> "The accumulated experience of courts of law, reflecting accepted general knowledge of the ways of the world, has shown that there are many circumstances and situations in which it is unwise to found settled conclusions on the testimony of one person alone. The reasons for this are diverse. There are some suggestions which can readily be made but which are only with more difficulty rebutted. There may in some cases be motives of self-interest; or of self-exculpation; or of vindictiveness. In some situations the straight line of truth is diverted by the influence of emotion or of hysteria or of alarm or of remorse.Sometimes it may be that owing to immaturity or perhaps to lively imaginative gifts there is no true appreciation of the gulf that separates truth from falsehood. It must, therefore, be sound policy to have rules of law or of practice which are designed to avert the peril that findings of guilt may be insecurely based."

In that case, Lord Diplock spoke to the same effect at p. 1072 marginals *f* and *g:*

> "But common sense, the mother of the common law, suggests that there are certain categories of witnesses whose testimony as to particular matters may well be unreliable either because they may have some interest of their own to serve by telling a false story, or through defect of intellect or understanding or, as in the case of those alleging sexual acts committed on them by others, because experience shows the danger that fantasy may supplant or supplement genuine recollection."

And so it is that by reason of immaturity of mind a child, whether sworn or unsworn, falls within the category of what may conveniently be called "suspect witnesses" whose evidence must of necessity be treated as suspect. A conviction which is founded on suspect evidence cannot be regarded as safe and satisfactory unless such evidence is supported to such an extent as satisfies the trier of facts that the danger inherent in placing reliance upon suspect evidence has been excluded.

The sworn evidence of a child is suspect simply for the reason that it is the evidence of a child - as the child's mind is yet to mature; additionally, it may be suspect, for example, where the aspect of accomplice evidence or evidence in a sexual case, arises.

Although children may be less likely to be fraudulent or acting from improper motives than adults yet they are, as Atkin, J., observed in *R.v Dossi* (4), at, p. 161:

> "possibly more under the influence of third persons - sometimes their parents - than are adults, and they are apt to allow their imaginations to run away with them and to invent untrue stories."

The observations of Lord Morris of Borth - Y-Gest in the previously cited passage from *Hester* (3), are also in point in this connection:

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> "Sometimes it may be that owing to immaturity or perhaps to lively imaginative gifts there

is no appreciation of the gulf that separates truth from falsehood."

In *D.P.P. v Kilbourne* (5), at p. 454 marginals *f* and *g* Lord Hailsham of St Marylebone, L.C., put the matter thus:

"When a small boy relates a sexual incident implicating a given man he may be indulging in fantasy."

Commenting upon the evidence of two girls - Valerie aged twelve years (sworn) and June aged nine years (unsworn) - in *Hester* (3), Lord Diplock said at p. 1076, marginals *e* and *f:*

"What the jury needed to be told as respects the third count was that the only evidence inculpating the respondent was that of the two children, Valerie and June; and that in considering whether their evidence could be accepted as true, they should bear in mind the danger that any child so young as these were, particularly June, may be incapable of fully understanding or remembering and describing accurately events that happened at some time past and that young children are prone to be both imaginative and suggestible."

Although Best in his book on *Evidence*, 12th edn. para. 158 at p. 147, appears in one breath to lend support to Mr Kamalanathan's argument, he immediately gives a caveat in the next breath:

". . . the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; and what is wanting in the perfection of the intellectual faculties is sometimes more than compensated by the absence of motives to deceive. This must not, however, be taken too literally: some children indulge in habits of romancing, which often lead them to state as facts circumstances having no existence but in their own imaginations; and the like consequence is not infrequently induced in other children by suggestions or threats of grown-up persons acting on their own fears and unformed judgments."

Nokes summarises the position well in his book on *Evidence* 2nd edn. at p. 454:

"The sworn evidence of a young child, whether accomplice or not, requires corroboration in practice; and the judge should warn the jury of the risk of acting on the uncorroborated evidence of such children. There is no fixed rule as to when children grow out of this category. The evidence of young children is always subject to doubt. Very young children live largely in a world of imagination, and their powers of observation, understanding, memory and expressions are rudimentary. Most children are influenced by what they hear from adults, not necessarily by way of deliberate suggestion or instruction. Yet the evidence of children may be . . . accurate, particularly with regard to offences committed against themselves."

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As we see it the well-established rule of practice applies to all children who give evidence on oath.

On the authorities referred to in this case, it emerges that the logical basis upon which the sworn evidence of a child, whether of tender years or above, which makes it suspect and, therefore, in need of corroboration, must inescapably be such child's immaturity of mind. It is the immaturity of mind that directly accounts for a child's susceptibility to the influence of third persons, fantasy, and lack of appreciation of the gulf that separates truth from falsehood. It is thus good law that the sworn evidence of a child does not qualify to be ranked together with the sworn evidence of any other witness concerning which it is unnecessary for a trial court to warn itself or to look for corroboration.

There is always a degree of uncertainty as to whether a particular witness should be treated as a child for the purpose of deciding whether his evidence requires corroboration. However, courts will no doubt be guided by the statutory definition of a "child" which, in Zambia, means a person who has not attained the age of sixteen years (*see* s. 122 (1) of the Juveniles Act).

As we have earlier indicated, there was, in this case, no corroboration of the boy's sworn evidence. The trial court treated as corroboration evidence which could not conceivably be treated as such or indeed as "something more". This was a fatal misdirection. For this reason alone, and as the proviso to s. 15 (1) of the Supreme Court Act could not be called in aid, the appeal against conviction was bound to succeed.

Apart from the misdirection aforesaid, there were two other misdirections concerning which the applicant could have succeeded also. The first of these misdirections was the trial court's failure to allow the applicant to call a defence witness; and the second was the possibility of an honestly mistaken identification. It is unnecessary for us to delve into the details of either of these misdirections in view of the misdirection respecting lack of corroboration of the boy's evidence.

For the reasons given, we granted the application, treated it as the appeal, allowed the appeal, quashed the conviction and set aside the sentence

Appeal allowed

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