AMBROUS MUDENDA v THE PEOPLE (1981) Z.R. 174 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., BRUCE-LYLE, J.S. AND MUWO, AG. J.S.
20TH, 21ST MAY AND 21ST OCTOBER, 1980
(S.C.Z. JUDGMENT NO. 23 OF 1980)

Flynote
Evidence - Confessions - Statement by accused contested - Effects of failure to make a ruling.
Evidence - Confessions - Voluntariness challenged - Need for trial within trial to be instituted.

Headnote
The appellant was convicted of aggravated robbery and appealed against the conviction and sentence. A police officer attempted to tender in evidence a warn and caution statement taken from the appellant and this was resisted by the defence counsel and a trial within a, trial was conducted. The appellant in the course of his defence in the trial within a trial, stated that he never made a statement of admitting the charge but was forced to sign it and at that stage, the learned State Advocate raised the point that in the evidence of the appellant voluntariness was not in issue and therefore there was no need for the trial within a trial to continue. The learned defence counsel agreed to this

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submission whereupon the learned trial judge made a ruling agreeing with the submission of the learned state advocate and discontinued the trial within a trial on the ground that the issue raised by the appellant was a general issue and the warn and caution statement of the appellant was then accepted in evidence. When put on his defence, the appellant stated that he knew nothing about the alleged offence and also that he knew nothing about the money, the gun and the screw driver.

The learned trial judge after deciding to ignore the confession statement of the appellant, believed the evidence of the prosecution witness and rejected the denial of the appellant and convicted and sentenced the appellant to death after accepting that a firearm had been used in the robbery. On appeal:

Held:
(i) The appellant by contesting the warn and caution statement in the abortive trial within a trial raised the issue of voluntariness and the trial within a trial therefore should have been continued and a ruling made on that issue.
(ii) The appellant's statement that at the police station he was beaten up with boots on the back and chest raised the issue of voluntariness and the trial judge should have started a new trial within a trial to find out whether the warn and caution statement was voluntarily made by the appellant.
(iii) The appellant's defence that the police officer was not a truthful witness was a pertinent

issue.

(iv) The non-holding of the trial within a trial was prejudicial to the appellant and made the proceedings a mix-trial.

Case referred to:

(1) Lumangwe Wakilaba v The People (1979) Z.R. 74.

For the appellant: G. T. Moruthane (Miss); Assistant Senior Legal Aid Counsel.
For the respondent: K. C. V. Kamalanathan; Senior State Advocate.

Judgment

BRUCE LYLE, J.S.: delivered the Judgment of the court. The appellant was convicted of aggravated robbery and has appealed against the conviction and sentence.

The prosecution's case was that on the 16th March, 1979, Mr Ferreira Mostert PW1 and his wife PW2, retired to bed about 2100 hours and after a short time PW2 went to the toilet and then PW1 followed to the bathroom to drink water. PW1 was returning from the bathroom/toilet when at the door, he heard a gun shot and so he went back into the bathroom and shut the door. He then realised that the shot had come from inside the house and so he remained in the bathroom for some time and then got out and went to the bedroom door but found that it had been locked from the inside although he had earlier on left it open.

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PWs1 and 2 then went outside the house and called out for the watchman PW6, and then PWs 1 and 6 went behind the house and there heard second shot and then PW1 saw a man run out of the house into the nearby bush. It was not possible for PW1 to recognise this man but PW2 his wife, immediately suspected the appellant who had been working for them and had been helping in the house. PWs 1 and 2 then drove to neighbour's farm (Muller's farm) where they telephoned to the police after which PW1 sent a watchman at the farm PW3, to go and look for the appellant. PW1 then drove out with one Morrison Chilebwe PW4 and on the way to the appellant's house, they picked up PW3. At the house of the appellant they knocked on the door and the appellant came out and they immediately apprehended him and drove him to Muller's farm where they locked him up in a room in charge of PWs 3 and 4. According to PW3, while PW1 was away, he talked to the appellant through an open window and the appellant told him that he had fred the shots to threaten PW1 and that he had stolen money from the house and had thrown it away when he saw PW1 chasing him, that the appellant told PW4 to go for the money and to give K50 of it to his wife. PW3 further stated that he then went to where the appellant had indicated and saw the money in a white cloth and that he took it and hid it in a maize field. PW3 stated that he went alone to look for the money because he had heard PW4 and the appellant discuss about sharing it but that he wanted to retrieve it for PW1; he further stated that he later or informed PW4 that he found the money and had hidden it. PW4 Morrison Chilebwe confirmed that the appellant had told him and PW3 where he had hidden the money.

When PW1 had left the appellant in the charge of PW3 and 4, he went to his house where he found police officers PWs 8 and 9. According to PW9 he examined the house of PW1 and found that a cabinet in which money was alleged to have been kept, was forced open and also that he noticed a

bullet hole in a window in the bedroom. PW9 farther stated that he collected the appellant from Muller's farm and that in the house of the appellant he picked up a wet pair of trousers and then took the appellant back to the police station; that after questioning, the appellant led him to a place where he alleged he had hidden the money but nothing was found there and the appellant told him that the money could have been takers by either PW3 or PW4 as he had told them where the money was; that PWs 3 and 4 were subsequently questioned and PW3 led him to where he had hidden the money and that the money was found wrapped in a white jacket. PW9 further stated that after the money had been discovered the appellant again directed him to a place where he stated he had thrown away the gun he had used and that the appellant searched the area and got the gun which he handed over to him and that he found a spent cartridge in the chamber of the gun and two live cartridges; that he took the appellant back to PW1's house where the money was counted and found to be K1,822.30n; that the appellant was taken back to his house where he picked up a screw driver which he stated he had used to open the steel cabinet in PW1's house.

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PW9 the police officer attempted to tender in evidence a warn and caution statement taken from the appellant and this was resisted by the defence counsel and a trial within a trial was conducted. The appellant in the course of his defence in the trial within a trial, stated that he never made a statement but was forced to sign it and at that stage, the learned State Advocate raised the point that in the evidence of the appellant voluntariness was not, in issue and therefore there was no need for the trial within a trial to continue. The learned defence counsel agreed to this submission whereupon the learned trial judge made a ruling agreeing with the submission of the learned Sate Advocate and discontinued the trial within a trial on the ground that the issue raised by the appellant was a general issue and the warn and caution statement of the appellant was then accepted in evidence. In that statement the appellant admitted that he stole the money after threatening PW1 with a gun which he had got from the house of PW1 when he had worked there. When put on his defence, the appellant stated that he knew nothing about the alleged offence and also that be knew nothing about the money, the gun and the screw driver. He also denied having told PWs3 and 4 that he had taken the money and hidden it. He further stated that PW3 having been found in possession of the money, was capable of telling lies to exculpate himself; that PW9 the police officer, also told lies when he stated that he the appellant had led him to a place where he had produced the gun and also that the appellant had produced the screw driver at his house. In answer to a question by the court, the appellant stated that he was beaten up at the police station after the money and gun had been recovered. The learned trial judge after deciding to ignore the confession statement of the appellant and we shall deal with his reasons for so doing later on this judgment, believed the evidence of the prosecution witnesses and rejected the denial of the appellant and convicted and sentenced the appellant to death after accepting that the firearm had been used in the robbery.

Miss Moruthane, Assistant Senior Legal Aid Counsel, argued this appeal on several grounds for reasons which would be apparent at the end of this judgment, we do not propose to give any ruling on those grounds. After learned counsel for the appellant had finished with her submissions we raised a point with the learned Senior State Advocate regarding the course adopted by the learned trial judge in discontinuing with the trial within a trial as it affected the evidence of PW9 in the rest of the trial. The conviction of the appellant in our view depended to a very great measure on the reliance placed on the credibility of PW9 the police officer. PW9 stated that as a result of what the

appellant told him he went with the appellant to a place where the appellant stated he had hidden the money and when the money was not found the appellant told him that he had earlier on admitted to PWs3 and 4 that he had stolen the money and had shown PWs3 and 4 where he had hidden it and that as a result PW3 led him and other police officers to where he had hidden the money after he had retrieved it from where the appellant had earlier on directed him and that PW3 produced the money which was wrapped in a white jacket. Appellant in his defence

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denied these aspects of PW9's evidence and stated that PW9 had not told the court the truth. PW9 further stated that he went to the appellant's house and that in the presence of the appellant he searched the house and found a screw driver and that the appellant told him that he had used the very screw driver to open the steel cabinet in PW1's house from which he had taken the money. The appellant denied that he had ever gone to his house with PW9 and that the screw driver did not belong to him. PW9 still further stated that the appellant had led him to a spot where he had hidden the gun which he had used for the robbery and that the appellant had gone into the bush and produced the gun. The appellant denied having gone with PW9 to look for the gun. The evidence of PW9 relating to the finding of the gun, money and screw driver formed the basis for the conviction of the appellant and the findings of the learned trial judge rested solely in our new, on the credibility of PW9.

The appellant in his evidence in the abortive trial within a trial, stated that he never made the alleged warn and caution statement and that he was forced to sign it. This evidence on the authorities, raised the issue of voluntariness and the trial within a trial therefore should have been continued and a ruling made on that issue. Again the appellant in his evidence in defence, to a question by the court stated that at the police station he was beaten up with boots on the back and chest. The issue of voluntariness was in our view again raised and the learned trial judge should have on the authority of *Lumangwe Wakilaba v The People* (1) started a new trial within a trial to find out whether or not the warn and caution statement though already admitted in evidence, was voluntarily made by the appellant. The trial within a trial having been wrongly discontinued and this was conceded to by the learned trial judge in his judgment, and trial within a trial not having been held when the issue of volntariness was again raised in the defence, the learned trial judge rightly in our view disregarded the confession statement in his judgment.

However, the learned trial judge having found his conviction of the appellant on the evidence of PW9 the police investigating officer, the appellant's defence that PW9 was not a truthful witness was a pertinent issue. It can be argued that the confession statement having been ignored by the learned trial judge and the learned trial judge having heard and observed PW9 was not in error in finding as a fact that PW9 was a credible witness and that this court can only disturb that finding if in the opinion of this court, it is not supported. PW9 stated that the money was found wrapped in a white jacket which belonged to the appellant and although the appellant admitted that the jacket belonged to him, we find that PW4's evidence that the money was wrapped in a white cloth was in direct conflict with that of PW9. There was an indirect suggestion by the appellant that PW9 in his evidence introduced the white jacket to make the case against him conclusive; this conflict was never resolved by the learnd trial judge. The appellant in his defence denied having led PW9 to a spot and denied having produced any gun to PW9; he also denied accompanying PW9 to his house

and denied handing any screw driver

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to PW9. The trial within a trial not having been concluded and in the absence of another necessary trial within a trial, we are not in a position to say whether or not PW9 would have inevitably been found to be a credible witness in relation to the confession statement. If in the trials within a trial PW9 had been found not to be a credible witness that finding would in our view, have substantially affected the determination of the issue of PW9's credibility in the rest of the trial. If on the other hand, PW9 had been found to be credible in the trials within a trial that finding would substantially support the finding of the learned trial judge in his final judgment. It is therefore our view that the non-holding of the trials within a trial was prejudicial to the appellant and makes the proceedings in this case a mis-trial. This in our view, affects substantially the finding of fact by the trial judge as to the issue of credibility of PW9. The learned Senior State Advocate Mr Kamalanathan, has conceed that this case be remitted to the High Court for a re-trial, but Miss Moruthane for the appellant, has argued that the appeal be allowed and there should be no order for a re-trial.

Having held that there has been a mis-trial we consider that the appropriate course in the interest of justice, would be to remit the case to the High Court for re-trial. This appeal is therefore allowed; the conviction is quashed and the sentence is set aside. We further order that this case be remitted to the High Court for a re-trial by a different judge of the High Court.

Retrial ordered

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