

CHARLES NDALA NDALA v THE PEOPLE (1980) Z.R. 183 (S.C.)

SUPREME COURT

SILUNGWE, C.J., BRUCE-LYLE, J.S. AND CULLINAN, AG.J.S.

8TH APRIL AND 6TH MAY, 1980

S.C.Z. JUDGMENT NO. 11 OF 1980.

Flynote

Evidence Child of tender years - *Voire dire* - Proper procedure.

Facts and holdings as stated in the judgment below.

Cases cited:

- (1) Sakala v The People (1972) Z.R. 35.
- (2) Zulu v The People (1973) Z.R. 326.
- (3) Phiri v The People (1975) Z.R. 30.

For the appellant: In person.

For the respondent: K. C. V. Kamalanathan, Senior State Advocate.

Judgment

CULLINAN,AG. J.S.: delivered the judgment of the court.

The appellant was convicted of stock theft. On 8th April, 1980, we allowed his appeal against conviction stating that we would give our reasons therefore at a later stage. We now give those reasons.

A stolen cow, the subject of the charge, was allegedly found in the possession of a boy aged twelve years. The latter testified that the cow was left in his care by the appellant and his co-accused and that he accepted it under duress. As the learned trial magistrate observed, that was the only evidence against the appellant. Before receiving the young boy's evidence the magistrate concluded that he was a child of tender years and held a *voire dire*. After questioning him he recorded:

"Order: The court is satisfied that the witness is of sufficient intelligence to justify the receipt of his evidence. He also understands the duty of speaking the truth. His testimony will be sworn."

The learned trial magistrate did not record whether or not he had concluded that the young boy understood the nature of an oath. If the magistrate was satisfied that he did then the young boy could have been sworn in the ordinary way without the necessity of reaching the conclusions recorded. The word "sworn" quoted above however was apparently first written as "unsworn" and was then amended to read as "sworn". The learned trial magistrate did not in fact record that the witness had been duly sworn. To complicate matters the learned magistrate referred in his judgment to the young boy's evidence as "unsworn".

What the Court of Appeal said in the case of *Sakala v The People* (1) at p. 36 applies equally to this case, namely:

". . . the record does not enable this court to satisfy itself that the trial court has appreciated and carried out its duty."

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CULLINAN,

Ag.

J.S.

We can only regard the *voire dire* as being defective - see also *Zulu v The People* (2) at p. 328. No question of a re-trial arises however. The learned Senior State Advocate, Mr Kamalanathan indicated that the State did not support the conviction and very properly drew our attention to further defects in the trial. He submitted that the learned trial magistrate never considered whether the young boy, found in possession of the stolen animal, might be a witness with a possible interest to serve; there was in any event no corroborative or supporting evidence and the learned trial magistrate's conclusion in regarding a question, asked by the appellant of the young boy in cross-examination, as supporting evidence must amount to a misdirection; the latter's evidence was contradictory; further, the learned trial magistrate made no reference whatsoever in his judgment to the appellant's sworn evidence in his defence. We agree with these submissions. For all of the above reasons we allowed the appeal and set aside the finding and sentence.

In passing we wish to repeat the observations by this court in the case of *Phiri v The People* (3) at p. 31:

"The effect of section 122 of the Juveniles Act (Cap. 217) has been set out by this court in a number of recent cases (*see* for instance *Zulu v The People* (2) and the cases there cited) and we do not propose to set out again the proper procedure and tests as explained in those cases. It seems necessary however to urge that these cases be studied."

Appeal allowed

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