PESULANI BANDA v THE PEOPLE (1979) Z.R. 202 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., BRUCE-LYLE, J.S., AND CULLINAN, AG. J.S.
13TH MARCH AND 17TH MAY, 1979
S.C.Z. JUDGMENT NO. 14 OF 1979

Flynote

Evidence - Confession statement - Whether court can convict on uncorroborated confession.

Evidence - Documentary evidence - Document not produced in court - Evidence adduced as to its content - Whether admissible - Counsel not objecting to its being acquitted - Whether renders document admissible.

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Criminal law and procedure - Unsworn statement - Accused giving unsworn statement - Whether liable to questioning by court.

Headnote

The appellant was convicted of murder. The prosecution adduced a confession statement, the admissibility of which was objected to on the grounds of duress. After a trial within a trial the trial judge ruled that the statement was admissible, but held that before he could convict on the confession statement alone there must be some other evidence pointing to guilt. At the trial the appellant elected to make an unsworn statement in which he denied any knowledge of the case, and the trial judge questioned him as to whether he had ever worked for the deceased. On receiving an affirmative answer the trial judge used such answer as other evidence pointing to the guilt of the appellant and supporting the confession.

Further evidence consisted of a piece of paper alleged to have been found in the house of the deceased with the name and address of the appellant written on it. This paper was not produced in court.

Held:

(i) The case of *Hamainda v The People* (2), which required that before there can be a conviction on a confession statement alone there must be some other evidence pointing to the accused's guilt which renders it safe to rely on a confession, has been over-ruled by *Donald Maketo & 7 Others v The People* (3), and it is possible and proper in a proper case to conviction an uncorroborated confession

(ii) In any particular case it is entirely within the discretion of the court to prefer not to convict on a confession alone unless there is additional evidence which renders it safe to do so.

(iii) When an accused elects to make an unsworn statement he is not subject to cross-examination by the prosecution nor to questioning by the court except to elucidate unclear details or to clarify ambiguities.

(iv) If the contents of a document are referred to in evidence either the document should be produced, or acceptable evidence should be given as to why its production is impossible. Lack of objection by a defence counsel does not render admissible that which is inadmissible.

Cases cited:

(1) Zeka Chinyama & 2 Others v The People S.C.Z. Judgment No. 27 of 976.
(2) The People v Hamainda (1972) Z.R. 310.
(3) Donald Maketo & 7 Others v The People S.C.Z. Judgment No. of 1979
(4) Banda v The People (1968) Z.R. 6.

For the appellant: G.M. Sheikh, Senior Legal Aid Counsel.

For the respondent:: L.Nyembele, State Advocate.

Judgment

GARDNER, AG.D.C.J.: delivered the judgment of the court.

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The appellant was convicted of murder, the particulars of the charge being that on the 30th March 1977, at Lusaka he murdered Naik Sunil. There was evidence for the prosecution that the body of an Asian man was found at house No. 402 Obote Road, Lusaka, lying on the floor with bedding material on top of it. PW1, Dr NS Pastel, a Government forensic pathologist, was present when the house was opened by the police and he confirmed the death. He also carried out a post-mortem examination and found than the deceased had been strangled with a neck-tie which was subsequently identified as belonging to the deceased. This witness also found a bone-deep stab wound on the right side of the face, a bone-deep stab wound on the left forehead, two bone-deep lacerations on the back of the head, swelling with haemorrhage on the left side of the head and swelling with laceration on the right side jaw. There was some confusion as to who identified the body to this witness. He himself said that it was identified to him by Mr V.L. Desai but no one with these initials and name was called by the prosecution. A Mr J.D. Desai said that he was friend of the deceased but had not attended the post-mortem. PW3, Mr K.K. Naik, gave evidence that he also was a friend of the deceased and was present when the police broke into the house and discovered the body. He said that he identified the body to PW1 and he was present at the post-mortem. The doctor said that the body was identified to him at the post-mortem as Mr Agabhah Dahyabhai Naik, and PW2 gave the same names of the deceased. There is no doubt that all three witnesses were talking about the same man because they all said that he was the one who died on the 30th March 1977, and they all said that he lived at 402 Obote Road, Lusaka. The post-mortem report produced by PW1 gives the name of the deceased as Chhanganlal Dahyabhai Naik, and the copy in the case record indicates that the body was identified by "Desai. Friend." The original of the post-mortem report indicates that the body was identified by "V. L Desai Friend.', PW5, Sub - Inspector Field Banda, gave evidence that' he was present at the post-mortem when the body was identified by PW3, Mr K.K. Naik, to PW1, the pathologist. He did not say what name was given as that of the deceased by PW3 but said that there were two other Asian men present at the post-mortem, one of whom had married the deceased's daughter. The only other evidence material to the identity of the deceased was the warn and caution statement, admitted in evidence as exhibit P2, in the vernacular original of which the name of the deceased is given as Mr C.D. Naik Sunil. We would comment here that the English translation produced by the prosecution refers in one place to Mr C.D. Patel Naik and in another to Mr C.D. Naik Sunil.

No evidence was given by any witness to the effect that the deceased was known by the name Sunil, and there is no explanation as to why the name Sunil appears in the particulars of the charge. In analysing this confusing evidence the learned trial judge found that he was satisfied that the body found in house No. 402 Obote Road was the body of the owner of the house whose name was Mr Naik. He pointed out that the body had been seen in the house by PW1, the pathologist, prior to the

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post-mortem examination and had also been seen there by PW3 whose identification of the body was confirmed by PW5. The learned judge then said that he could not see how the confusion as to the name helped the defence case, and in the circumstances even agree with him. Counsel for the appellant did not take the point that the name on the charge was different from the various names attributed to the deceased, and we find that the appellant was not prejudiced. Mr Sheikh, Legal Aid Counsel for the appellant, did not raise this issue as a ground of appeal but we have raised it because we must comment that the confusion should never have arisen. It is difficult to understand how it was possible for the doctor who produced the post-mortem report relating to C.D. Naik (with his full name) could have given evidence that the name of the deceased was A.D. Naik (with his full name), and the State Advocate who had PW1's statement to the police before him should have cleared up this discrepancy when the witness first referred to A.D. Naik. Furthermore, the translator of the original warn and caution statement was careless in his translation and added to the confusion. The post-mortem report indicated that the identification of the body was by Mr V.L. Desai whereas the State Advocate who was prosecuting had before him a statement of PW3, Mr K.K. Naik, who was in fact the identifying witness, and this discrepancy should have been

investigated before the case was presented to the court. None of the police statements refer to the deceased as Naik Sunil and whoever drafted the information should have been aware of the discrepancy.

Turning now to the rest of the evidence, the prosecution produced statement made by the appellant in which he said that for a week before the 30th March he had been arguing with the deceased about 70n which was owed for his work as a servant of the deceased, and on the 30th March they quarrelled, as a result of which he took up a broom and hit the deceased with the handle so that he fell under the bed. He then said he took the deceased and tied him up, and on his way out of the house he took away a wristwatch belonging to the deceased. The admissibility of this statement was contested by defence counsel and a trial-within-a trial was heard after which, the learned trial judge being satisfied that it was admissible, the statement was admitted in evidence.

There was further evidence that PW4, a police officer, found a piece of paper in the house with the appellant's name and address written on it and, using this information, he traced the appellant and found him wearing a wristwatch on the back of which the name C.D. Naik was engraved. In cross-examination this witness said that an attempt had been made to file off the name so that only the letters "C" and "ik" were discernible.

In his defence the appellant gave an unsworn statement in which he said that he did not know the case and did not know when the offence occurred. He was asked by the learned trial judge whether he knew the deceased and he replied that he did piece-work for the deceased from the 8th March to the 15th March.

In his judgment the learned trial judge said that he was able to convict on the confession statement provided there was additional

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evidence which pointed to the accused's guilt. He found such additional evidence in the fact that the appellant was a servant of the deceased and that a watch was found on him with the initials C.D. and he was satisfied that it was saw to rely upon the confession in order to support the conviction.

Mr Sheikh appealed on the ground that the statement should not have been admitted and that in his ruling on the subject the learned trial judge had failed to analyse the evidence correctly and had failed to exercise his discretion to exclude the statement. In the trial within a trial the appellant gave evidence that he had been arrested on the 13th April and had been taken to Kabwata police station at about 1600 hours and immediately he was questioned about person who died. His clothes were stripped off and PW4 and another police officer started beating him with a hose pipe on his feet and fingertips, and with belt on his buttocks. That night he was put in a cell but throughout the night he was taken out of the cell and suffered more beating. During this night he had only his underpants to wear. He said that during this time he was given nothing to eat until sunset on the 14th of April and that the statement which was produced was not taken at 1400 hours but later than that. He said he signed the statement because he was being subjected to beatings. He said that he was so severely injured on the feet that he could not walk and, although he appeared before two courts before finally being remanded to the High Court for trial by senior resident magistrate, and, although he had complained to those two courts, the first magistrate, Mrs Nyoni, told him that he could complain to the next court where he would be taken, and when he appeared before the next court, which was Mrs Sitali's court, he was told there was no help they could offer. Finally when he appeared before the senior resident magistrate he did not complain although he was still unwell at the time, in that his skin was coming off but he did not know whether it was caused by the beatings. In January 1978 he attended the prison clinic where he was given some tablets. He maintained that although he had asked the prison authorities if he could go for treatment immediately after the beating they refused to allow him to do so; he said that he ha not complained to the various magistrates about this refusal to give him treatment but only about the fact that he had been beaten.

The prosecution called evidence in the trial-within-a trial from PW4, the investigating officer, and PW6, another police officer who was present when the statement was taken. They both denied that any form of duress had been applied to the appellant and, although neither of these witnesses could say whether or not the appellant was fed on the 13th April, PW6 said that on the 14th he gave the appellant bananas, Coca - Cola and a loaf of bread. The appellant said that he was arrested on the

13th April, he spent the night at Kabwata Police Station and sometime after sunrise on the 14th before he made his statement he was told he would be taken to Woodlands Police Station where they were going to teach him something. He said he spent the night at Woodlands Police Station and was taken back to Kabwata the following day so that the statement was taken on

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the 15th April not the 14th as it was dated. PW said that when the accused was arrested on the afternoon of the 13th April he was taken to Kabwata and that the appellant was transferred to Woodlands Police Station because they had proper cells there. When he was cross-examined it was put to him that he had taken the appellant to Woodlands Police Station that night but he said he was not responsible for transporting the accused on that day. He said there were no facilities for providing food at Kabwata. PW5, police officer from Woodlands Police Station, in answer to leading question by the prosecuting State Advocate said that the appellant was brought to Woodlands Police Station at 1850 hours on the night of the 14th April, 1977, that he was removed from Woodlands the following morning and that he did not see him again. PW6 confirmed that on the 14th April, the statement was taken from the appellant. In referring to the discrepancies in the evidence the learned trial judge accepted the evidence of the appellant that he had spent the first night at Kabwata Police Station where there was no proper cell accommodation. He accepted the police evidence that the statement was taken in the afternoon of the 14th April which he found to be a period of fifteen to twenty hours after the apprehension of the appellant. The learned judge said that the issue must be resolved on the basis of credibility and having heard the witnesses he found that he could not accept the appellant's evidence that after he complained of his beatings to the two lower courts he was told there was no help they could offer. But having heard and seen the prosecution witnesses he had no hesitation in finding that they had treated the accused fairly. Whilst accepting that the appellant was not given food on the 13th April he said that he was unable to find that this was aimed at inducing the appellant to make a statement. He accepted the evidence that the appellant was given food on the morning of the 14th April. The learned trial judge also considered the exercise of his discretion and considered the allegations of beatings, prevention from sleep, denial of food and water, and the unduly lengthy period. The learned judge said after considering these allegations he rejected them as untrue and that he was satisfied that the confession was voluntary. In quoting the case of *Zeka Chinyama and Two Others v The People* (1) the learned judge referred to the passage therein in which this court said that a court would first satisfy itself that a statement was freely and voluntarily made and then, if so satisfied, "a court in a proper case must then consider whether the confession should in the exercise of its discretion be excluded, notwithstanding that it was voluntary and therefore, strictly speaking, admissible because in all the circumstances the strict application of the rules as to admissibility would operate unfairly against the accused". In this case the learned trial judge found that there was no impropriety on the part of the police and there was therefore no reason for him to exercise his discretion to exclude the statement. The learned trial judge did not specifically deal with the only matter of possible impropriety, as distinct from duress, which was the question of the unduly lengthy period; but it is quite clear from the tenor of his ruling in this matter that be did not consider that the delay before taking the statement, from approximately 1600 hours on the 13th April to 1400 hours on the 14th April, was unduly lengthy and in this respect, although Mr Sheikh has

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urged us to find that there were grounds for the exercise of the judge's discretion, we agree with the learned trial judge that, having dismissed the evidence relating to duress, there was no unfair conduct to give rise to the exercise of his discretion. Mr Sheikh argued that on the analysis of the evidence the learned trial judge should not have accepted the evidence of the police officers, that he should have considered what happened at Kabwata on the night of the 13th April, and the fact that PW4 said there were no facilities for food at Kabwata, and the discrepancy between the evidence of PWs 4 and 6 where one said that only two police officers were present when the statement was signed and the other said that a third police officer was present. The evidence of PW4 that no facilities for food were available does not in any way contradict the evidence of PW6, who said he purchased the bananas, Coca - Cola and bread from the market and the discrepancy in the evidence as to who was present could be attributed to a lapse of memory on the part of one or both of the police witnesses and should not affect the acceptance of their general evidence as being true. At this stage, before the learned judge saw the contents of the statement, and on the evidence adduced in the trial-within-a trial, the learned trial judge was entitled, as he did, to accept the evidence of the prosecution and disbelieve that of the defence. There is nothing in the evidence or the learned

judge's ruling to justify finding by this court that no reasonable court could have arrived at the same findings of fact.

However, in dealing with the matter in his final judgment the learned judge said that he had still to consider the question of the admissibility of the statement if there was other evidence in the whole of the trial which made it necessary so to do. He found no such evidence, and he then considered what weight should be attached to the confession. He decided, having considered the case of *Hamainda v The People* (2), that he could convict on the confession statement alone provided that there was some other evidence pointing to the accused's guilt which rendered it safe to rely on the confession. This court dealt with the question of convicting on confession statement alone in the case of *Donald Maketo & Seven Others v The People* (3) in which Silungwe C.J., referring to other authorities and in particular to the case of *Banda v The People* (4), where the Court of Appeal said that it was possible and proper in proper case to convict on an uncorroborated confession, said:

> "In the light of this we are bound to say that *Hamainda v The People* (2), a High Court decision, was wrongly decided."

In our view the learned trial judge could have convicted on an uncorroborated confession but it was entirely within his discretion to hold that he preferred not to do so on this particular confession unless there was additional evidence. The learned judge then went on to find such additional evidence.

The learned trial judge did not however consider the whole of the circumstances of this case when reconsidering the admissibility of the statement, nor did he consider the weight to be attached to the statement in the light of the whole of such circumstances.

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The appellant was apprehended on the 13th April 1977, and on the 14th April, having made his statement, he was arrested on a charge of murdering Mr Naik, the deceased. On the 29th December 1977, that charge was withdrawn and the appellant was re-arrested on charge of having, together with two others, namely Saili Mvula and Henex Phiri, murdered the deceased. At the beginning of the trial all three accused were called upon to plead and they pleaded not guilty. After the plea was taken the State Advocate indicated to the court that he was offering no evidence against the other two accused and they were duly acquitted. It is apparent therefore that until the date of the trial, which was the 11th August 1978, the police were of the opinion that the appellant's confession statement in which he said that he was alone when he struck the deceased, was untrue. Counsel for the defence attempted to cross-examine PW4, the investigating officer about the case against the two other accused; but, although she was not specifically prevented from continuing with her cross-examination, it is evident from the record that she was discouraged from inquiring into the part alleged to have been played by the other two accused. Eventually, after the learned judge had said that he was reluctant to make the cross-examination difficult, but that he must proceed on the basis that questions being asked were relevant and went towards resolving issues, as fast as possible in the interests of justice, counsel for the defence said that she did not wish to pursue it further. It is unfortunate that this line of cross-examination was not proceeded with because it was of great relevance for the court to ascertain how it was possible for the prosecution to rely on a confession statement implicating the appellant alone when in fact at one stage they had considered that there was sufficient evidence to proceed against three accused jointly. If the statement was untrue or suspected of being untrue it should have put the trial court on inquiry as to whether the appellant did in fact make such a statement or whether the words were put into his mouth by the interrogating officers as he alleged. In considering whether or not the interrogating officers there capable of putting words into persons' mouths the trial court should have taken into account the evidence of J .D. Desai, PW2. This witness said that he made a statement to the police and that he read it himself and signed it after pointing out mistakes to the police who said that he could tell a later court that what he had said was a mistake. The statement which was put to him read as follows:

> "I am staying at Obote Plot. I have been staying with the late Mr Naik who was my uncle. . . on this day, again on this date of the post-mortem I went to the mortuary and I saw a grey tie which was tied on his neck which I identified to be one of the ties he used to wear at the time he was alive."

In cross-examination he said the first statement about staying with and being related to the deceased was a mistake and, as we have said, the police told him that he could remedy that mistake when he appeared in court and, in respect of the evidence relating to the post-mortem and the tie, he said that the CID told him "we have taken this tie from his neck; can you identify whether he was using it on the neck as his

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neck tie". He specifically said that he had not been at the post-mortem and had not seen the tie round the deceased's neck although he recognised the tie as belonging to the deceased. No doubt the learned State Advocate was confused because he had before him a statement by this witness which was blatantly false although the falsity, fortunately, did not affect the issue before the court. It is possible that the learned State Advocate thought that this witness, J.D. Desai, was the V.L. Desai referred to in the post-mortem report and in the evidence of PW1 as having been the person who identified the body to him. Be that as it may, we view with alarm a situation where a police officer, taking a statement from a witness, writes out a statement which is completely contrary to the evidence of the witness, and that such witness should sign such statement merely on the word of policeman that he could point out any mistakes later when he is in court. Had the learned trial judge in considering the appellant's statement in his judgment considered the whole of the circumstances of the case, that is to say, that, to support a charge against the original three accused, the statement by the appellant that he was alone must be untrue, it is possible that he might have revised his decision to admit the document; but in any event he failed to consider what weight should be attached to the statement having regard to the circumstances to which we have referred. We are unable to say what course the learned trial judge would have taken, and in the circumstances, in favour of the appellant we consider that it was unsafe to rely on the confession.

As to the remainder of the evidence, PW4 said that when he searched the house of the deceased he found a piece of paper on which was written the name and address of the appellant. The piece of paper was not produced and therefore the evidence as to its contents was not the best evidence and should not have been accepted by the trial court. Either the document should have been produced or acceptable evidence should have been given as to why its production was impossible. No objection was taken by defence counsel at the time but lack of such objection does not render admissible that which is inadmissible.

The learned trial judge apparently did not entirely rely on this evidence because, after the appellant had made an unsworn statement saying that he did not know the case and did not know when the offence occurred, the learned trial judge asked him if he knew the deceased and, when he received a reply that the appellant had on one occasion done piece-work for him, the learned trial judge went on to ask him when he had done such work, and received a reply that it was on the 8th March to the 16th March, 1977.

When an accused person elects to make an unsworn statement he is not subject to cross-examination by the prosecution and neither is he subject to questioning by the court; except of course to elucidate unclear details or to clarify ambiguities. The answers to the questions asked by the court were therefore inadmissible. In his judgment the learned trial judge relied on the evidence that the appellant had been

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a domestic servant of the deceased in order to support the conviction; this was a misdirection.

The court declined to apply the proviso and allowed the appeal.
Appeal allowed
