BANDA v THE PEOPLE (1968) ZR 146 (HC)
HIGH COURT
WHELAN J
1st NOVEMBER 1968

Flynote and Headnote

[1] Criminal procedure - Defences - Raised by accused in statement to police - Duty on prosecution to rebut.

In a charge of dangerous driving, the accused raised a defence of mechanical failure in a statement made two and half hours after the incident; the defence having been raised at this stage [and apparently not at the trial - *ed*.], the prosecution bore the *onus* of negativing it at trial.

WHELAN J
Gani, Legal Aid Counsel, for the appellant.
Chaila, State Advocate, for the respondent.

Judgment

Whelan J: On the 21st August, 1968, in the subordinate court of the third class for the Luanshya District, the appellant was convicted of dangerous driving. He appeals to this court against his conviction. I consider that his appeal should be allowed in view of a misdirection in the magistrate's judgment which involved the *onus* of proof.

[1] The appellant was driving a motor car along a road when it started to swerve from the left to the right of the road and then collided with another motor car which was travelling towards it. This collision occurred at approximately 9.30 a.m. At 11.55 a.m. the appellant made a statement to the police about the accident in which he said, *inter alia*, that during his journey and immediately prior to the accident his steering became loose and that he did not notice it to be loose when he started his journey. The prosecution did not produce this statement in evidence, but the accused called the police officer, to whom it was made, to produce it. It is suggested here that the statement should not have been produced as it is hearsay and not part of the *res gestae*. It is part of the *res gestae*, and I cannot imagine objection being made to it - or indeed it not being produced in evidence by the prosecution had it contained a damaging admission. This being so the prosecution were aware some two and a half hours after the accident that the accused was saying that his steering suddenly failed. This defence having been raised at that stage, the prosecution knew or should have known then that they would have to rebut it - the *onus* of proof never shifting to the accused but remaining on the prosecution to negative such a defence. Not only was no evidence to negative the defence of sudden mechanical failure led before the magistrate, but the magistrate said: "The court cannot rely on the statement made by the accused to police as reliable that accused had a mechanical fault . . . in the absence of evidence of mechanical fault this action (that of the accused's vehicle swerving) can rightly be inferred that the accused overdid the coming onto the road from his left." Later he said: "Where the accused claims defence, it is not the duty of the prosecution to prove that defence as in this case." It would seem that the magistrate disregarded the principle that it is not for an accused to prove his innocence but for the prosecution to prove his guilt and to negative any defences put forward - as was the defence of mechanical failure by the accused two and a half hours after the accident, in this case. The appeal is allowed. The conviction and sentence are quashed.

Appeal allowed.