IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CRIMINAL APPEAL NO. 20 OF 1999

(Being High Court Criminal Case No. 25 of 1997)

BETWEEN:

CHARLES ZGAMBO.....APPELLANT

- and -

THE REPUBLIC.....RESPONDENT

BEFORE: THE HONOURABLE THE CHIEF JUSTICE
THE HONOURABLE MR JUSTICE UNYOLO, JA
THE HONOURABLE MR JUSTICE KALAILE, JA
Major Liwimbi, Counsel for the Appellant
Chimwaza, (Miss), Counsel for the State
Sinalo (Mrs), Court Reporter
Mangwana (Mrs), Official Interpreter

J U D G M E N T

Unyolo, JA

The appellant was arraigned before the Court below on a charge of murder, contrary to section 209 of the Penal Code. He denied the charge. A total of four witnesses were called by the

prosecution. The appellant, on his part, opted not to give evidence, exercising his constitutional right not to testify. At the end, the jury found the appellant guilty of manslaughter and he was convicted accordingly and sentenced to five years imprisonment with hard labour. He now appeals to this Court against the conviction. Five grounds of appeal were filed, as follows:

"1. The learned Judge misdirected himself by allowing the prosecution to proceed treating PW 2 as a hostile witness without following the requisite procedure.

2. The learned Judge misdirected the jury to disregard the evidence of PW 2.

3. The learned Judge misdirected the jury on the law relating to confession statements and/alternatively misdirected the jury to disregard PEX 3.

4. The learned Judge erred in not in not addressing the aspect of corroboration.

5. The finding of guilty by the jury of the convict was therefore improper as it was arrived at on gross and/material misdirection of the jury by the learned Judge and should therefore beset aside and the resultant sentence quashed."

While on this point, it is to be observed that before the hearing of the appeal commenced, Counsel for the State indicated in her skeleton arguments that the State conceded the first three grounds of appeal and that she would therefore only argue the remaining two grounds. Both sides accordingly addressed the Court only on these two grounds of appeal.

Although this was the position, it may be useful to make a few observations here. We will deal with the first and second grounds of appeal together. What transpired on this aspect was that not long after the second prosecution witness (PW 2) had started giving his evidence, Counsel for the State felt uncomfortable with some of the answers the witness had

given. Counsel thereupon applied to the Court to have the witness treated as hostile. It went on like this:

"**CHIMWAZA:** I feel that the evidence given by the witness is hostile. I want to apply that he be treated as hostile.

LIWIMBI: I suppose that the State would give a basis for such an application. It is not always that such a witness gives unfavourable evidence should be treated as hostile. We object to him being treated as hostile.

CHIMWAZA: When I applied to treat the witness as hostile I had a statement that he

made to police as a basis for this application. All through I did not mention this in my application. I am sure the same can be granted a Court's discretion if the same will not occasion a failure of justice. That is all.

COURT: I request the Jury to retire. I will allow Counsel to cross-examine the witness."

Section 230 of the Criminal Procedure and Evidence Code gives the court discretion to allow a party calling a witness to have the witness treated as hostile and to cross-examine the witness. It is trite that where such an application succeeds, the evidence given by the witness is disregarded in its entirety. However, there is a procedure which must be followed in this regard.

As was rightly stated by **Banda, Ag J** (as he then was) in **Magombo and Phiri vs The Republic, 10 MLR 1**, the correct procedure to be followed on an application to treat a prosecution witness as hostile is that the prosecution must lay the proper foundation in support of the application. Where the prosecutor has in his possession a statement made by the prosecution witness on an earlier occasion which is in direct contradiction to the witness's evidence in court, he must show the statement to the court and ask leave to have the witness treated as hostile. The witness must be asked if he had made the prior statement and his attention must be drawn to the occasion when the statement was made, proving circumstances so as to sufficiently designate the occasion the statement was made and giving the witness an opportunity to see the statement and identify it. Once this foundation has been laid, the court may, in its discretion, grant leave and the cross-examining of the witness, with a view to discrediting him, can proceed.

It is clear from the passage we have reproduced above that the procedure followed at the hearing in the Court below was not correct, and it is difficult to support the leave that was granted by the Court to have the witness treated as hostile, and the direction to the jury that followed during summing-up, particularly considering the content and substance of the cross-examination that ensued.

We now turn to the third ground of appeal where it is said that in the summing-up the learned Judge misdirected the jury on the law relating to confession statements. The relevant passage on this aspect reads as follows:

"Members of the Jury, let me inform you that PW 3 and PW 4 are formal State witnesses. Their evidence is of no assistance to you in deciding what happened so that Enock Waladi should die. You will recall that PW 3 tendered the caution statement of the accused person in which it is alleged that the deceased was hit by him PW 1. The law on this subject is that a statement which contains an admission is always admissible as a declaration against interests and is evidence of the facts admitted. Otherwise, a statement made by an accused person is never evidence of the facts in the statement. A denial statement, like the one made by the accused person in this case,

is admissible to show the attitude of the accused person at the time he made it. You are therefore entitled to ignore the contents of the caution statement of the accused person."

With all deference, it is not entirely clear what the learned Judge meant in this passage. To put the matter in perspective, the position here was that in his caution statement to the Police, which was tendered in evidence at the trial, the appellant said that the deceased was assaulted by his, the appellant's, girl friend (PW 1). He said that PW 1 struck the deceased in the head with a pail, forcing him to fall down on the steps of the house. He denied having killed the deceased. It will also be recalled, as we have earlier indicated, that the appellant chose not to testify in his defence at the trial.

It is trite law that a wholly self-serving or purely exculpatory statement made by an accused is generally not evidence of the facts stated. But as was correctly held in **R vs Donaldson, 64 Cr. App. R. 59, 64**, such a statement, though it is not evidence of the facts stated therein, is evidence in the trial, in that it is evidence that the accused person made the statement and of his reaction, which is part of the general picture which the jury have to consider. It was held in that case, again correctly in our view, that it would be a misdirection to tell the jury that anything which an accused person may have said is not evidence in the case, save in so far as it may

consist of an admission. We thought that it would be useful to restate the legal position on this point.

Finally, we turn to the fourth and fifth grounds of appeal which were argued together. The main submission on this aspect was that the learned Judge erred in law in not addressing the issue of corroboration. Counsel for the appellant submitted that the evidence which the prosecution relied on came from a single witness, namely, PW 1. Counsel argued that as the matter stood, corroboration of the evidence was required and that the jury should have been so instructed, or at least told of the danger of finding the appellant guilty on such evidence.

With respect, we are unable to accept the submission. The first observation to be made is that generally, no particular number of witnesses is required for the proof of any fact: see section 212 of the Criminal Procedure and Evidence Code. A single witness may suffice to prove a case. It is in the final analysis really a question of whether, upon weighing the evidence the witness has given, the court or jury is satisfied that the evidence is true. Just to add that there are of course some situations where statutes have expressly required that there should be corroborative evidence. One example of this is section 244(1) of the Criminal Procedure and Evidence Code which provides that no person shall be convicted of the offence of sedition under section 51 of the Penal Code on the uncorroborated evidence of one witness. Another example is the evidence of a witness of immature age who gives unsworn evidence. Corroboration of the evidence of such a witness is required as a matter of law under section 6(2) of the Oaths, Affirmations and Declarations Act. The present case does not fall in this class. Counsel's submission on this aspect must therefore fail.

A secondary point taken by Counsel for the appellant was that the evidence which was relied on in this case was circumstantial and that the learned Judge ought to have examined the evidence critically in his summing-up to the Jury, bearing in mind this point.

The evidence on record is clear. Apart from the issue of credibility, it is noted that PW 1 testified, among other things, about what she actually saw with her own eyes, and what she did. In the circumstances, we are unable to agree with learned Counsel for the appellant in his submission on this aspect. The submission must therefore fail.

We have carefully considered the evidence. There was ample evidence from PW 1 against the appellant. The jury, who were the judges of fact, believed her. It is also to be noted that the injuries sustained by the deceased, as described in the postmortem report, were consistent with the evidence given by the witness. All in all, we can find no basis upon which the finding and verdict of the jury can be faulted.

Accordingly, the appeal fails and it is dismissed in its entirety.

DELIVERED in open Court this 17th day of April 2000, at Blantyre.

Sgd .....

R A BANDA, CJ

Sgd .....

L E UNYOLO, JA

Sgd .....

J B KALAILE, JA