

DECIDED
24 February 1978

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Wendelin and Benedicto had stolen the .il.i: troni Kagondo 1 Hospital and hidden 'it.. there. But a soldier, 10.UD3705 Cpl. Raaadhani TTasudi (p173) had a slightly different' story. He arrived at the scone and :eound ercus surrounded by a i.lOb of a1bout200vill'ers. 70 saw a ndle of clothes ilacod a Pereus' e f e e t and 1.:le villagers showed xli:1 a bicycle sonic distance away. Then Porous directed the soldier to a spot where ;he .niilk was found. " phoned the.policp Who cane the foll,own day and 'took Porous and the ie.as away. It is true, therefore, that Bonodicto was not' at hone when all this was happenixg at his shanba. Significantly, no one cane to testify aeto when and where Benedicto was arrested The story ca,efrc.' Benedicto hmnsel. Ho and his wife, LTvanahawa Husa (D'12) had left on the nlonaing of firs U Jii'e to see off T' ar'na s's Ic w1r and or businoe in Bukoba town. They returned on 4 June. But on the way hone' they wore picked up by soldiers, who knew thea very well, and detained in Wahoya TPDF Caup. Benedicto waS ascanito' until he hocano uncOnscious. The seriousn.ese of the assault was confirnod by Ho,B'.1363 D/CD1. Sanviel (PW5) to whon Benedicto was finally handed by Ranadhani TTaswdi (PW3). In fact, Benedicto had to be adniittod in hospital. Bonodicto therefore denied. to evo been bos?igod or to have escaped fro' his house ie tonJrcd frrc vclot of hie rsol and denied any Iniovilodge of the two pacJ.:sts of nilk The trial magistrate coiividtd the apDcllante solely on the alleged confession by Porous He. sto ed that the confession was adniosible, saying ths;b it was not made bet ore a :2011cc officer, and oninod that it was a voluntary confession. First of all, it is doubtful who thei Porous ,nado a,ny cefossion. If hO dtd, there is no oplanation why it was hoard by Burchard alone.. It 'was ccrtOinly not hoard by Raric aJ - c uJ.i 'h' 1 e j tcr cc id Iiat 'P ro LiS did ii 0 uC 11 i 10 how ho know that there was xilJ: at thc spot. ' In fact, ii; is equally doubtful wbetiier Pe'reus pointed out tho spot. This was alloged,by Renadhani alone hut Durcharad said' that the ,iilk was just discovered in the course of the search. iToi, which of thosc witneocco was to be bolievod and on which point? 'I find it difficult to rosolvo the issue and the trial magistrate foyer gave it thaught at all. In jTy opinion. end even though Porous could not risk onto ring his dotncc, the doubt sioinld be resolved aga:nt the prosecution which aduced' this contradictory ovidoxicO. ' I therefore find it safer to conclude that I'erOus neither pointed to the milk nor confessed to its theft. It was just found in the course of the search. Secondly, ass,:ningthoro was any confession, it is doubtful whether it was voJiuntarily nado. With a :iob of aout 200 hostile vllJn,orr surrounding Porous - the rii wich,iad already placoc a candle' ox clpti'es at his ioot - it is not diffiOult to sac that ho could have been edged into saying what he did. The ,cireu,istancos do not surelyroiirb to a voluntary confession, Finally, the trial naagistratc erred in holding thit the confession was not nOde to a police of ricer, Buieh rd as a iil ' a e As sn no hid hc powers of a police officer e:orcisaiJ1e by a consteblo. The so-called confession was therefore enbiudod by section 27 of the idonco Act, 1957. y t 7hat othor evidence wa here to CojJaeCt the appellants with the offence? I willstart with Yendolin. A s;aail quantity of milk was faoond :Laliie house and he gave an explanation supported by a cniio.nt tho flilk was tahe; to the Jiospital by .[ioid (FT5) nnd. Sister Thritha (711) af;er instructing Wondelixa aria i;he tro cell leers to stay behind. bendel:i.n therof ore charged that the y had changed the riik i:a laic absence. I do not see how the n:cocccirton could legitin'tely escape ouch an accusation after this conduct. In fact there VICTC factors tending to the truth of ;hc accree io'i Tho first j'i Sistr ria s a sharaeless liar. She denied going to 7endolin's house for tho search when in fact rule did A irson of that poisoned .aontalty

could very well collude in changing the milk if it was found different from the stolen type. The second factor is that the prosecution refrained from questioning the cell leaders who witnessed the search. They had to be called on 7, ending in decision. In purpose of calling the leaders to witness the search was to make them available for giving evidence on the search. Since the prosecution decided to exclude them it can safely be assumed that the prosecution knew that they would give embarrassing evidence. Indeed, Yohana Thomas (D.73), stated that the milk lie saw at W Viendoini's house was of the very type even his own children got from the Clinic. In these circumstances it is established that the prosecution did not prove its case against Thndolin. I think, with respect that the milk was found in the defendant's private property. I finally come to Bonodictio. It is true that two packets of milk were unearthed not far from his house. Items, too, that are usual as SLIILCIC Jj indicate as having been the property of the Joseph Gal. All that was purely circumstantial. Circumstantial evidence should not be acted upon if it can be explained away by other consistent factors here. There are factors here. Firstly, there was no evidence that Benedicto owned the cassava field in which the milk was found. Secondly, there were two houses near that spot, the other one being the abode of Perous. There was no evidence to connect the milk with Benedicto's house as opposed to Porous's house. Of course, T nero was the son of Benedicto's son. It is a doubtful story and I think: Brnciurd lied for reasons known to himself. I find it ridiculous to suggest that Bonodictio and three others who were said to be in his house escaped unnoticed from the watchful eyes of a gang of villagers. I accept Benedicto's version that he had left peacefully on his business. It is likely that Burc. Iard and his gang arrived after Benedicto and his wife had gone away. Ilurchard must have lied, but it was in keeping with his character for he also lied on the confession. I find, therefore, that Burc was a accomplice to the crime. He aided with the offence. By reason of the foregoing I am of the opinion that the appellants' conviction. The trial magistrate would certainly have come to a different decision had he not misdirected himself on the facts and admitted the alleged confession. Even the Eepuic did not seek to support his decision. I allow these appeals and quash the convictions and sentences. The appellants should be set free forthwith. I am fully satisfied. It is a pity that Bonodictio was so savagely assaulted by members of our defence forces and I hope someone will inculcate discipline there. 2nd IL 1G OTJTk' S h LUGKT' TC SEA 24th February, 1978 JUDGE

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