

UGANDA / JUDGMENT

Rex v Nusrupia and Another (Criminal Appeals Nos. 167 and 168 of 1941) [1941] EACA 89 (1 January 1941) [1941] EACA 89

COURT

East African Court of Appeal

BEFORE

Sheridan, (C.J. Kenya), Whitley CJ, Wilson J

CASE / FILE NUMBER

Criminal Appeals Nos. 167 and 168 of 1941

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COURT OF APPEAL FOR EASTERN AFRICA

Before Sir Joseph Sheridan, C. J. (Kenya), Sir Norman Whitley, C. J. (Uganda) and WILSON, J. (Tanganyika)

REX, Respondent (Original Prosecutor)**KIFUNGU s/o NUSURUPIA, SHAURITANGA s/o MBALU, Appellants****(Original Accused Nos. 1 and 2)**

Criminal Appeals Nos. 167 and 168 of 1941

Appeals from decision of H. M. High Court of Tanganyika

Criminal Law-Evidence-Definition of confession-Joint trial-Indian Evidence Act. section 30.

Appellants appealed from a conviction of murder. A statement alleged to have been made by the second accused about one month prior to the alleged commission of the offence to the effect that the first appellant had given him one shilling to assist him to kill the deceased was relied on as a confession by the second appellant as against him and was also taken into consideration under section 30 of the Indian Evidence Act as against the first appellant.

Held \$(10-11-41)\$.—(1) A confession connotes an unequivocal admission of having committed an act which in law amounts to a crime.

(2) That the statement was admissible as against the second appellant as an admission of an incriminating circumstance which fell far short of a confession.

- (3) That since the statement was not a confession it could not be considered as against the first appellant under section 30 of the Indian Evidence Act.

Appeals allowed.

Appellants absent unrepresented.

Kingsley, Crown Counsel, for the Crown.

JUDGMENT (delivered by SIR JOSEPH SHERIDAN, C. J.).-This case was tried by a magistrate in the exercise of extended jurisdiction and both accused were convicted of murder and sentenced to death. The convictions and sentences were confirmed by the High Court in the following order:-

"As regards the accused, Shauritanga, the evidence of Mbeleyameza d/o Kauta, his wife, which was believed by the trial magistrate and by the assessors, amounts to an admission of his guilt. As regards the accused, Kifungu, there is evidence of motive (Mtosafi s/o Mapoto), of intention (Omari s/o Ngarakolo, Benedict s/o Alexander, Laurentia d/o Kabulule), and of opportunity; added to this is the fact that he gave what the court and assessors believed to be a false account of his movements on the evening upon which the crime must have been committed (Laurentia, Teresia d/o Njengile). Further, by section 30 of the Indian Evidence Act the confession of his co-accused can be taken into account against him. All this evidence seems to me to be incompatible with any reasonable hypothesis other than that of the truth of the accusation against him. The convictions are accordingly confirmed."

There can be no doubt that the so-called confession said to have been made by the second appellant must have weighed and weighed a great deal in convicting both accused. Such is clear from the language of the High Court order.

The question as to whether what is characterized as a confession is a confession, on the assumption of course that the statement was made to Mbeleyameza the wife of the second accused is most important. At page 25 of her evidence she said "I was surprised that my husband gave me the shilling I mentioned yesterday and I asked him why he was giving it to me to which he replied 'It was given to me by Kifungu to assist him to kill Kazimangunda'". It will be seen at once that this statement is not a confession. It was made, if made at all, a month prior to the commission of the offence on which the accused were arraigned. Page 82 of Mbeleyameza's deposition which we are entitled to look at in the interests of the accused reads "One day about a month before the *pombe* drink at Mumini's my husband gave me a shilling and told me that Kifungu had asked him to give me the shilling because Kifungu wanted my husband's help to kill a person". Those quoted passages are destructive of the notion of a confession. A confession connotes an unequivocal admission of having committed an act which in law amounts to a crime. It is provided by section 30 of the Indian Evidence Act: —

"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who . . . makes such confession."

Against the first accused Kifungu therefore what may have been said to Mbeleyameza is inadmissible and against the second accused Shauritanga it is nothing more than the admission of an incriminating circumstance but a circumstance a month anterior to the crime having relation to a motive to commit a crime and in no way a confession of having committed a crime. In *Pakala Narayana Swami v. Emperor* (1939) A. I. R. 47. Confession is defined by the Privy Council: —

"The word 'confession' as used in Evidence Act cannot be construed as meaning a statement by an accused 'suggesting the inference that he committed' the crime. A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession. A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed."

The latter part of these observations by the Board are of course not applicable to the present case but we have included them since they may be usefully borne in mind for application in other cases. Besides this statement wrongly taken into account against the first accused Kifungu, there is other evidence against him, strong evidence of motive and intention and there is also the evidence of Mtosafi disclosing motive; there is also other circumstantial evidence but we are left in no doubt that the evidence of the so-called confession not only must have played a major part in the conviction of the first accused but may very well have been the evidence which in the minds of both courts turned the scale against him. In short it is a piece of "evidence" of such importance that we consider that the conviction of the first accused cannot be allowed to stand independently of it. Nor as against the second accused do we consider that it would be safe to allow the conviction to stand, for it was a misdirection to class this statement to Mbeleyameza as a confession. We have already stated our views as to what it was.

Generally, as regards the trial of both accused, we have some observations to make. The woman Mbeleyameza, the record discloses, was an unsatisfactory witness who in the early stages of her evidence said that she knew nothing about the matter, and who at the conclusion of her evidence was styled a "difficult" witness who continually contradicted herself. During her evidence there were

adjournments for the purpose of allowing her to recover herself from what the magistrate termed a condition of nervousness and fright. The danger of such adjournments must be obvious, for unless a witness during the adjournment is kept under some sort of supervision there exist opportunities of bringing pressure to bear on her.

It is clear to us that this woman cannot be regarded as a satisfactory witness and it is for that reason that the question of the admission of the statement made to her and the interpretation put upon that statement assume such importance in the case. Looking at page 64 of the record, the last page of the judgment the magistrate was clearly unfavourably impressed by the demeanour of both accused; while allowing that demeanour is a matter within his province we consider that he went too far in his inference when he said "The demeanour of the accused Nos. 1 and 2 in court is not that of innocent men. The attitude of accused No. 1 is half defiant and seems to be that of a man who having committed a crime which he believes no one has seen challenges anyone to prove it". It must never be forgotten that the position of the prisoner in the dock must be a most trying one when, as he may think, witnesses are giving false testimony against him. His reactions in such circumstances may well be violent and his expressions correspondingly so and the danger of drawing unfavourable inferences from such conduct must be manifest. We would also observe that the evidence of both accused before the committing magistrate which was of an exculpatory nature was not put in evidence by the prosecutor at the trial, as it should have been. \$ \rightarrow \$

The appeals are allowed and the accused acquitted and directed to be set at liberty.

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