IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KISANGA, J.A., LUBUVA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 10 OF 1995

BETWEEN

1. RICHARD LUBILO
2. MOHAMED SELEMAN ..... APPELLANTS

AND

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Tabora)

(Katiti, J.)

dated the 13th day of December, 1994

in

Criminal Appeal No. 251 of 253 of 1991

REASONS FOR JUDGMENT

LUGAKINGIRA, J.A.:

The appellants, Richard Lubilo and Mohamed Seleman, were charged in the District Court of Igunga along with several other suspects on 35 counts of armed robbery. The robberies took place in a riotous operation at Ikombandulu mining village, Igunga District, on the night of 26.4.90. The appellants were convicted on eight counts and awarded concurrent terms of 30 years' imprisonment with corporal punishment. They both appealed to the High Court where the convictions and sentences were sustained in four counts and they further appealed. Richard Lubilo died after lodging a notice of appeal but before filing a memorandum therefor, whereupon the appeal was abated on his side. When we heard the side of the remaining appellant, Mohamed Seleman, we allowed the appeal, quashed the conviction and sentence and ordered his release from custody. We reserved our reasons which we now give.

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The case was not complex. There was no evidence of identification but it is said that the night of the robberies was dark and that the atmosphere was terrorising on account of incessant bursts of gunfire. Additionally, the appellant was not found with any incriminating article but it seems he was arrested on mere suspicion. The only evidence upon which he was convicted at the trial and the conviction upheld on first appeal was a scanty statement in which he associated himself in the planning of the operation. This statement, which both courts below treated as a confession, was taken down by PW10, a ward secretary who is also supposed to be a justice of the peace. However, the statement was not cautioned and the prosecutor was not aware of its existence until PW10 was giving evidence. The appellant was not represented at the trial but he retracted and repudiated the statement alleging torture by the sungusungu vigilantes. The allegation was ignored by the trial magistrate who proceeded to base the convictions on the statement. On appeal to the High Court, Katiti, J. observed that apart from the absence of a caution, the statement was most likely prompted by torture from the sungusungu. He nevertheless similarly acted on the statement citing for authority section 29 of the Evidence Act, 1967 and the decision in Tuwamoi's case. We think the learned judge misdirected himself in both respects and we proceed to demonstrate this.

First, as regards section 29, the learned judge had this to say:

> ... section 27, it seems to me, is qualified by section 29 ... that notwithstanding promise or threats held out against the accused, the resultant confession should not be rejected unless the court is of opinion

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> that the inducement or threats was of such a nature, and made in such circumstances, as to lead the said accused person to confess untruthfully. I have closely examined the recorded statements ... and ... I remain to conclude, as did the trial magistrate, that the recorded statements ... contained nothing but the truth ...

The learned judge is saying that, unlike section 27, section 29 permits admission in evidence of involuntary statements of confession so long as they are true. The truth he has in mind is the correctness of the account in the statement rather than the truth of the accused person's self-incrimination. That this is so, and as further confirmation of his view that section 29 permits the admission of involuntary statements, it is sufficient to refer to Mtoba v. Republic [1982] T.L.R. 131, 133, where he said:

> ... section 29 of the Evidence Act, 1967, has introduced a new dimension in the admissibility of confessions. That is, in addition to the test of voluntariness, the test whether or not the inducement or torture was likely to affect the truth of the confession has been introduced, so that, if despite torture or undue influence, the truth content of the confession is not affected, mere allegations of torture will not render the confession automatically inadmissible. But as the provisions under section 29 apply procedurally, for the admissibility of such confession two tests must be carried out, first the court has to satisfy itself that the confession was voluntary in which case admissibility of the same causes no problem, secondly, if

> there are allegations of torture, the same court has to be satisfied that despite or notwithstanding the torture, the truth of the confession was not affected.

We think, with respect, this cannot be a correct construction of section 29 and the problem, as we see it, is to read into the provision what is not there. It seems necessary to set out the provision for ease of reference.

> 29. No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing unless the court is of the opinion that the inducement was made in such circumstances and was of such a nature as was likely to cause an untrue admission of guilt to be made.

To begin with, the law of this country is that in order for a confession to be admitted in evidence, it must be voluntary. The law places the onus on the prosecution to prove affirmatively the voluntariness of any confession sought to be put in evidence. That is a rule of procedure which emerges from the totality of sections 27 and 28 of the Evidence Act as well as decided cases over the years. Except in the limited context of evidence obtained in consequence of inadmissible confessions, there is no exception or qualification to the rule. Section 29 does not qualify section 27 but it is complementary to it. What the section does is to salvage otherwise voluntary confessions which would be lost if every promise or threat were taken at face value and to exclude those confessions which are in fact the product of promises and threats.

Nowhere in the section is the word "involuntary" used and nowhere does the expression "true confession" occur, and this is because the section is concerned with voluntary confessions as opposed to confessions where the confessing person might have been induced to make "an untrue admission of guilt", i.e., to incriminate himself falsely. Therefore, the question to be considered in relation to section 29 is two-fold: It is whether any promise or threat was held out to induce the confession and, if so, whether the accused person was induced by such promise or threat to make the confession. If the answer to both limbs of the question is in the affirmative, the confession is inadmissible. But if, on the other hand, the court is of the opinion that the promises and threats were not of such a nature and were not offered in such circumstances as to operate on the mind of the accused, the confession is admissible. Such a confession, not being the product of the threats and promises, is a species of voluntary confessions. The question whether or not the threats and promises have operated on the mind of the accused is a subjective one and the court will have to decide each case on its peculiar facts. Some threats and promises may by their nature make no impression on some people. Should such people go ahead and confess, they will be taken to do so out of their own freewill and their confessions will be admissible. Similarly, where the threats and promises are remote in point of time to the confession so as to have had no influence on the mind of the accused, section 30 provides that such a confession is relevant and admissible. But take the example given in WIGMORE, para 322, of a threat of instant hanging by a mob unless a confession is forthcoming; that may conceivably make the contingencies of a confession, any confession, more desirable than the certain consequence of silence.

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Section 29 is by no means an innovation by our Evidence Act but its substance has existed and does exist in equivalent provisions in some other jurisdiction. The underlying principle in all those provisions is that there is a danger where threats or promises are used for the accused to incriminate himself falsely. In R v. Court, 7 C.& P. 486, Littledale, J. said:

> The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of the offence which he really never committed.

This passage is cited in BASU (1942 : 407) in illustration of comments on section 24 of the Indian Evidence Act, 1872, which, although differently worded, has the same objective as our section 29. In general the position of the confessing person which causes disrust is that of being compelled to choose between two alternatives, one of which involves a confession of guilt irrespective of its truth or falsity.

It is also opportune at this juncture to emphasize that there is a distinction between the truth or correctness of a confession, which Katiti, J. had in mind, and the truth of self-incrimination by the accused. Section 29 is not concerned with the former, and makes no mention of it, but it is concerned with the latter. A confession may therefore be true, that is, a correct account of what took place, but it may be false in the aspect of self-incrimination by the accused. Where there is likelihood of an untrue admission of guilt being made, the confession has to be excluded even if it be true in all other respects. We wish to illustrate this

proposition with the position in England. In R. v. Thompson [1893] 2 QB 12, 16, it is thus said, citing Pollock, C.B. in R. v. Williams, 2 Den. C.C. 474:

> ... the true ground of the exclusion is not that there is any presumption of law that a confession not free and voluntary is false, but that it would not be safe to receive a statement made under any influence or fear.

In the same William's case, Campbell, C.J. said:

> I doubt whether the rule excluding confessions made in consequence of an inducement held out proceeds from the presumption that the confession is untrue; but rather that it would be dangerous to receive such evidence, and that for the due administration of justice it is better that it should be withdrawn from the consideration of the jury.

Finally, in the discussion on section 76 (2) of the English Police and Criminal Evidence Act, 1984, another equivalent of our section 29, HALSBURY's LAWS, 4th ed., Vol. 11, para 1124, states:

> If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused, it is represented to the court that the confession was or may have been obtained (1) by oppression of the person who made it; or (2) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court may not allow the confession to be given in evidence against him, except in so

> far as the prosecution proves to the court beyond reasonable doubt that the confession, notwithstanding that it may be true [our emphasis], was not so obtained.

In the light of these observations, with which we agree, and our own appreciation of the position, it is incorrect to say that involuntary confessions are admissible under section 29 when they are true. Until the prosecution have established that the accused was unlikely to make an untrue admission of guilt, the truth of the statement matters for nothing.

There are in fact decisions of the High Court and this Court which reflect our view of section 29. One such decision is by Rubama, J. in Izengo v. Republic [1982] T.L.R. 237. After accepting the prosecution evidence that the appellant had been severely assaulted before making the confession attributed to him, the late judge said:

> Going by the testimony of PW4 one tends to believe that this assault had preceded any confession made by the appellant. In accordance with section 29 of the Evidence Act, 1967, I hold that this admission of guilt, if it was ever made ..., was made in such circumstances and was of such a nature as was unlikely to be a true admission of guilt. The appellant must have made it to save his life.

The learned judge was unconcerned whether the confession was true; it had to be rejected because the appellant made it to save his life and may, therefore, have made an untrue admission of guilt. The other decision is, ironically, one by Katiti, J. himself.

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In Maziku v. Republic [1992] T.L.R. 227, the learned judge had this to say after referring to section 29:

> ... it is a view I humbly hold, again, that a confession is not just rejectable because threats have been made. Not at all in my view. This is because it is for the prosecution to prove voluntariness of the confession, and once a threat has been shown to have been made, the court may presume that it induced the confession until the prosecution proves that there was no casual connection - see Smith [1959] 2 QB 35; [1959] 2 All E.R. 193. So that where you have threats and a confession far apart, without casual connection and no chance of such threats inducing confession, such confession should be taken to be free of inducement, voluntary and admissible [our emphasis].

That is precisely the essence of section 29 although the learned judge thought he was saying something in addition to it. The section is about free and voluntary confessions which, despite threats and promises, are not the products of such.

At the level of this Court it has been pointed out that section 29 mentions promises and threats only, but not actual torture. Where torture is alleged this Court has taken a more serious view and has implicitly presumed an associated confession to be vitiated and incapable of admission under section 29. This position is well stated in, inter alia, Maona & Another v. Republic Crim. App. No. 215 of 1992 and Marus Kisukuli v. Republic, Crim. App. No. 146 of 1993 (both unreported). We are, of course, not unaware of Mlowo v. Republic [1995] T.L.R. 187, where this Court said:

"... if a confession was involuntary, then it will be accepted under section 29 if the court is of the opinion that the confession constitutes the truth. In view of what we have endeavoured to show, this statement is not without difficulty and it may require re-examination. But it should be noted that the Court was quick to add: "We may point out that this holding is not in conflict with our previous decision in Marus Kisukuli v. Republic. There we said that section 29 cannot be used where there is actual torture. Here there was no proof of torture but only threats thereof." The Court therefore appears to have been saying that with threats only, it may be possible to make an admissible confession, but not with torture.

Reverting to the case at hand, what is the position? Ideally, matters of voluntariness of a confession are determined in a trial within a trial and it is at that stage that the application of section 29 is considered. All the same, even at the appellate stage the appellate court would be entitled to review the evidence and make its own findings. In this case Katiti, J. pointedly observed that the appellant's statement was most likely prompted by the sungusungu torture. Having said so, he could not then turn to section 29 because the section does not permit the admission of involuntary statements and in view of the position taken by this Court where torture is alleged. Had he directed himself properly on the application of the section, he would have considered the appellant's allegation that he was in sungusungu custody for ten days and that there were about 30 of them - the type of mob that WIGMORE has in mind. He would further have considered the fact that the appellant was taken out of sungusungu custody for interrogation by PW10 and returned to them thereafter, which made

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the connection between his ordeal and his statement not just casual but real. When the appellant was finally handed over to the police, he was taken to hospital for treatment. He tendered a medical chit, Exh. D1, which is duly listed but not contained in the record of appeal. In the absence of any evidence by the prosecution in refutation of all this, we think, on a proper direction, the learned judge would inevitably have held that the inducement held out to the appellant was of such a nature and was made in such circumstances as was likely to cause an untrue admission of guilt to be made. He would consequently have rejected the statement.

The misdirection on the application of Tuwamoi's case will be briefly dealt with. It similarly derived from the supposed truth of the appellant's statement. The learned judge said:

> Ordinarily, as a matter of practice, corroboration of a retracted/repudiated confession has to be supplied before basing a conviction thereon, though the court may rely on the same and convict it without corroboration if the court is fully satisfied ... that the confession is verily true - see Tuwamoi v. Uganda [1967] E.A. 84 ... So it would seem to me that the overriding factor in the truthfulness of the confession ... I have, with respect, sweatingly scrutinised the above statements, I have given them omnipresent opportunity of consideration, and I have emerged fully satisfied that the same disclose nothing but the truth, and on the authority of the above case, I hereby uphold the convictions ...

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The judge is of course correct that the court may base a conviction on a retracted or repudiated confession without corroboration if it is fully satisfied that the confession is true. That, however, is only part of the story. The confession must be voluntary in the first place, and Tuwamoi does not purport to lay down that a conviction may be founded on an involuntary confession if it is true. This is what was said in the case, at p. 91:

> A conviction can be founded on a confession of guilt by an accused person. The prosecution must first prove that this confession has been properly and legally made. The main essential for the validity of a confession is that it is voluntary, but the other legal requirements for each territory must also be established ... If the court is satisfied that the statement is properly admissible and so admits it, then when the court is arriving at its judgment it will consider all the evidence before it and all the circumstances of the case, and in doing so will consider the weight to be placed on any confession that has been admitted. In assessing a confession the main consideration at this stage will be, is it true? And if the confession is the only evidence against an accused then the court must decide whether the accused has correctly related what happened and whether the statement establishes his guilt with that degree of certainty required in a criminal case. This applies to all confessions whether they have been retracted or repudiated or admitted ...

What this passage says is that in order for any confession to be admitted in evidence, it must first and foremost be adjudged voluntary. If it is involuntary, that is the end of the matter

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and it cannot be admitted. If it is adjudged voluntary and admitted but it is retracted or repudiated by the accused, the court will then as a matter of practice look for corroboration. But if corroboration cannot be found, that is, if the confession is the only evidence against the accused, the court may found a conviction thereon if it is fully satisfied that the confession is true. In this context the truth relates to the correctness of the account given. There is no question, therefore, of Tuwamoi authorising convictions on involuntary statements on the ground that they are true. Indeed a glance through the reported cases in which that decision has been cited and applied will reveal that the confessions in question were first adjudged voluntary in a trial within a trial. In the case before us the High Court found that the appellant's statement was not voluntary. That should have marked the end of the matter and Tuwamoi did not apply. The statement, being involuntary, was illegal and inadmissible and the court was precluded from looking for corroboration or considering whether it was true. Once, again it had to be rejected.

As stated earlier, there was no other evidence implicating the appellant in the robberies except his statement. We think it has sufficiently been demonstrated that the statement was improperly admitted and acted upon. It is for these reasons that we were of the opinion that the appellant's convictions were bad in law and made the orders stated at the beginning.

DATED at DAR ES SALAAM this 17th day of May, 2001.

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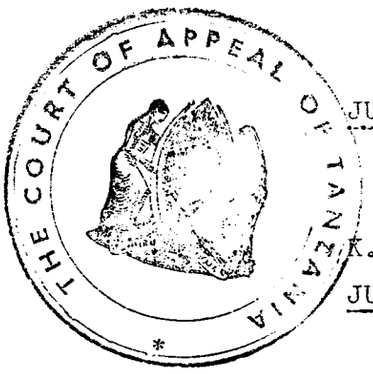
R. H. KISANGA
JUSTICE OF APPEAL



D. Z. LUBUVA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(F.L.K. WAMBALI)
DEPUTY REGISTRAR