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IN THE COURT OF APPEAL OF ZAMBIA APPEAL No. 95/2020
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

CACIOUS KIWALA
AND
THE PEOPLE

APPELLANT
RESPONDENT



CORAM : Mchenga, Chishimba and Sichinga JJA
On the 17th February, 2021 and 24th February, 2021

For the Appellant : Mr. H. M. Mweemba, Deputy Director Legal Aid Board.

For the Respondent : Mr. C. Ngoma Senior State Advocate National Prosecution authority.

JUDGMENT

CHISHIMBA, JA, delivered the Judgment of the Court.

Cases referred to:

1. David Zulu v The People (1977) ZR 151
2. Woolmington v. Director of Public Prosecution (1935) AC 426
3. Chabala v. The People (1976) ZR 14
4. Salumwena v. The People (1967) ZR 254
5. Dorothy Mutale and Another v. The People (1995-97) ZR 163
6. Ilunga Kabala & John Masefu v The People (1981) ZR 102
7. Bwanausi v. The (1970) ZR 103.
8. Chitala Musonda v. Tahe People SCZ Appeal No. 138 of 2014.
9. Sakala v. The People (1980) ZR 205.

10. Attorney General v. Marcus Kampumpa Achiume (1983) ZR1 (S.C)
11. Ivess Mukonde v. The People (2011) 2 ZR 134
12. Sydney Zonde, Aaron Sakala, Edward Chikumbi v. The People (1980) Z.R. 337

Legislation referred to:

1. The Penal Code Act Chapter 87 of the Laws of Zambia

1.0 INTRODUCTION

1.1 The appellant was charged with and convicted of the offence of murder contrary to **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia**. The particulars of offence alleged that on 9th April, 2015 at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown, the appellant did murder one Bright Hang'andu.

2.0 BACKGROUND

2.1 At the trial of the matter, the prosecution called five witnesses. The summary of their evidence is that before midnight on 8th April, 2015, Osward Chunga (PW1) was on his way home from drinking when he reached a corner where a truck was parked. As he walked by, an unknown person struck him at the back of his head and he fainted. When he regained consciousness, he

continued walking but that about fifty meters from the truck, he discovered the body of a person he knew as Bright Hang'andu, the deceased. He proceeded home and alerted his sister who, together with him, informed the family of the deceased. The body was then picked and taken to Chingwere Clinic and then to the University Teaching Hospital mortuary.

- 2.2 Frank Jere (PW2) is the employer of the deceased. He told the Court that at around 01:13 hrs, he received a phone call from the sister of the deceased informing him that the deceased had been severely beaten and was being taken to Chingwere Clinic. On his way to the clinic, he stopped by the truck. He observed that the windows and doors of the truck were open and two heavy duty batteries were missing. On reaching the clinic, PW2 observed that the deceased had a deep cut on the head and was told that he had died.
- 2.3 Pethias Hang'andu (PW3) testified that on the fateful night, he received a phone call from an unknown person informing him that his brother had been murdered. He rushed to Chingwere Clinic where he found the body of the deceased was in PW2's vehicle en-route to the UTH. Of relevance, PW3 testified that on

the second day of the funeral, the appellant approached him and the family at the funeral house and told them that he knew who had murdered the deceased. After the deceased had been buried, the appellant again approached the family claiming to know the people who had attacked the deceased. The accused, who claimed to know the deceased, then led them to the place where his cousin, James Chibwe lived. At the house, PW2 recovered his spanner, which was blood stained. He also recovered a pair of black formal shoes under the bed that belonged to the deceased. The spanner was later handed to PW5, the arresting officer, for further investigations.

- 2.4 PW3 was later called to Matero Police Station where he was shown a blood stained bed sheet that belonged to the deceased. According to this witness, a month later, PW5 again summoned him to the police station where he met the Appellant again and was shown three t-shirts. He identified two of them as having belonged to the deceased.
- 2.5 Dailies Tembo (PW4) is the widow of the deceased. Her testimony was that on 5th April, 2015, her husband left for Sesheke and returned on 8th April, 2015. As the car park was full, he packed

his truck by the roadside outside their home. At around midnight, the deceased went to check the vehicle. She retired to bed at around 01:00 hrs as she assumed that he had fallen asleep in the truck. A short while later, her sister-in-law arrived home and informed her that her husband had been murdered. Sometime later, she was invited to go to Matero Police Station where she identified two t-shirts that belonged to the deceased which she had parked for him when he travelled to Sesheke.

- 2.6 The summary of the evidence of Det. Insp. Felix Mwenda (PW5) is that in the process of investigating the murder of the deceased, he received information that one James Chibwe had been apprehended by police in Mwembeshi. When interviewed, Chibwe denied committing the offence and told PW5 that his cousin, the appellant had threatened to either have him sent to prison or that he would die. On 22nd April, 2015, PW3 gave him a spanner that was recovered from Chibwe's home but that when interviewed, Chibwe denied any knowledge of the same.
- 2.7 PW5 told the Court that a team of officers from Mwembeshi Police Post did visit and search Chibwe's house. On 24th April, 2015, PW5 met PW3 and the appellant. At this encounter, PW5

was given three t-shirts that the appellant claimed were found under the bed in Chibwe's room. Two of these shirts were later identified by PW4 as having belonged to the deceased. When asked as to how he knew that the shirts belonged to the deceased, the appellant became jittery which led PW5 to apprehend him for further investigations.

- 2.8 When PW5 interviewed the appellant, he told him that he found the shirts in Chibwe's room. When Chibwe was asked, he denied any knowledge of them. As the said room had earlier been thoroughly searched by officers from Mwembeshi Police Post together with relatives of the deceased, PW5 decided to charge and arrest the appellant for the offence of murder. Later, on 26th April, 2015, Chibwe was released due to insufficient evidence.
- 2.9 In his defence, the appellant told the court that on 10th April, 2015, he went to collect rentals from the tenants of their family house where Chibwe lived and found the door to Chibwe's room open. He entered and found batteries of different sizes, a jack and chain, among other things. When he visited the funeral house, he learnt that some property had also been stolen from

the truck, including batteries. He invited the family of the deceased to inspect Chibwe's room. A visit to the room on the day the deceased was buried, and a consequent search yielded a spanner.

2.10 According to the appellant, in May 2015, he decided to remove all the property belonging to Chibwe as he was in police custody. As he was removing Chibwe's clothes, he discovered three t-shirts that belonged to the deceased, whom he knew. He took the t-shirts to PW3 who called PW5. PW3 took the shirts for identification to PW4. A few days later, PW3 called and asked him to meet him at Matero Police Station where he was subsequently detained while Chibwe was released.

3.0 **DECISION OF THE COURT BELOW**

3.1 The court below was satisfied that the deceased had died as a result of the injuries he had sustained from the attack as per the postmortem report. As there was no eye witness to the commission of the offence, the court was of the view that the case was based on circumstantial evidence. The appellant came to be connected to the commission of the offence after first being

an informer and later presenting to the police three t-shirts, two of which were identified as the deceased's.

- 3.2 Guided by the case of **David Zulu v The People**¹, the court found that when the blood-stained spanner was initially found in Chibwe's room, the only reasonable inference that could be drawn was that James Chibwe had killed the deceased. However, the learned Judge observed that it was odd that the appellant had easy access to the room in the absence of Chibwe; had taken upon himself an investigative role in the matter as opposed to reporting the matter to the police; had taken relatives of the deceased to Chibwe's room in his absence when he well knew that Chibwe had been apprehended by the police; the appellant did not attend the burial but led PW3 and others to the room where the spanner was discovered. All this led the court below to form the view that the appellant could have planted incriminating evidence in the room so as to ensure that he was not considered a suspect in the case.
- 3.3 The learned Judge put all these strands or pieces of evidence together and found that they could not be mere odd coincidences. To her, the appellant had the opportunity to enter

the room and to do as he pleased. She also found it strange that the appellant found the t-shirts stashed in a cupboard in Chibwe's room and yet PW3 had earlier conducted a search therein with police. In addition, the fact that there was bad blood between the appellant and Chibwe provided a motive for the false implication of Chibwe.

- 3.4 The circumstantial evidence, coupled with the possession of property that was recently stolen in the form of the spanner and the t-shirts, led PW5 not to accept the appellant's explanation of how he came in possession of the property. Consequently, although the evidence against the appellant was circumstantial, the trial court found that the totality of the evidence had taken the case out of the realm of conjecture and permitted it to attain such a degree of cogency which could permit only an inference of guilt. The appellant was thus convicted and sentenced to death.

4.0 GROUNDS OF APPEAL

- 4.1 The appellant filed into court one ground of appeal; that the learned trial judge erred in law and in fact when she convicted the appellant on insufficient evidence. In the heads of

argument, it is submitted that the burden of proof lies on the prosecution and does not shift. The case of **Woolmington v. Director of Public Prosecution** ⁽²⁾ was cited as authority. It is contended that the prosecution failed to discharge the burden of proof beyond all reasonable doubt.

- 4.2 It is submitted that though the case is based on circumstantial evidence as properly found by the court below which relied upon the case of **David Zulu v. The People (supra)**, the case had not been taken out of the realm of conjecture, to attain such a degree of cogency to only permit an inference of guilt.
- 4.3 The appellant recited the evidence by of PW5 the arresting officer who became suspicious of the appellant when he mentioned 3 t-shirts recovered from James Chibwe's room when PW3 had testified that they had searched the house prior to that and no T-shirts were discovered. The evidence by PW5 that there was bad blood between the appellant and James Chibwe was hearsay evidence and inadmissible. It ought not to have influenced the court in concluding that the appellant killed the deceased.

- 4.4 The appellant further contended that independent investigations ought to have been conducted, by collecting finger prints on the truck to exclude the possibility of James Chibwe's involvement.
- 4.5 The appellant argues that he merely reported his cousin Chibwe on suspicion that he had in his possession items believed to be stolen from the deceased's truck and led to the apprehension of his cousin. Had he killed the deceased, he would not have brought the T-shirts in issue.
- 4.6 As regards the case of ***Chabala v. The People***⁽³⁾ relied upon by the court, the appellant contends that the learned trial judge misapplied the law stated therein, on a person being in possession of property recently stolen and no explanation is given, leading to inferences of guilt. The appellant argues that he gave a reasonable explanation on the items found, that he came across the T-shirts when he was clearing Chibwe's room which he recognized as belonging to the deceased and took them to the relatives of the deceased. It was argued that the explanation given is one that is reasonable. Therefore, the state did not discharge the burdens of proof beyond reasonable

doubt. As authority, the cases of ***Salumwena v. The People***⁽⁴⁾ and ***Dorothy Mutale and Another v. The People***⁽⁵⁾ were cited.

In the latter case, the court stated that where two or more inferences are possible, a more favourable one to an accused person should be adopted if there is nothing in the case to exclude such inference.

- 4.7 The alleged investigative role of the appellant cannot be a reason enough to conclude that he murdered the deceased. The appellant showed more intention of assisting the family and had nothing to gain by killing the deceased. The issue of bad blood over the room was remote for intention.
- 4.8 We were urged to take the inference that is more beneficial to the appellant. Further that the odd evidence raised by the trial court is too remote to conclude that the appellant caused the death of the deceased. In a nutshell, that there are more inferences to be drawn, favourable to the appellant. Therefore, the appeal should be allowed.
- 4.9 The respondent filed with leave of court heads of argument, in which they recite the summary of evidence before the court below and the consideration by the trial Judge. It was

submitted that the case is based on purely circumstantial evidence as no one saw the appellant murder the deceased. That the court below properly applied the guidelines by the Supreme Court as laid down in the case of **David Zulu** (supra) on guarding against drawing wrong inferences. The circumstantial evidence in this case was contended to be so cogent and compelling that there was no rational hypothesis other than that the appellant murdered the deceased.

- 4.10 The respondents submit that the appellant failed to give a reasonable explanation on how he came into possession of two t-shirts belonging to the deceased that were at the time recently stolen. Further that the appellant gave conflicting statements regarding recovering of the T-shirts in issue. Therefore, the trial court properly adhered to the guidance in the cited case of **Chabala v. The People**⁽³⁾. The court was on terra firma when it rejected the explanation as it considered it not to be reasonably true having regard to all the circumstances of the case.

4.11 We were referred to the case of ***Ilunga Kabala & John Masefu v. The People*** ⁽⁶⁾ on odd coincidences, if unexplained being supporting evidence.

4.12 The court having rejected the explanation by the appellant on the recent possession of T-shirts, was on firm ground to draw an inference of guilty as it was the only reasonable inference having regard to the evidence. As authority the cases of ***Bwanausi v. The People*** ⁽⁷⁾ and ***Chitala Musonda v. Take People*** ⁽⁸⁾.

4.13 In respect of the circumstantial evidence, the case of ***Sakala v. The People*** ⁽⁹⁾ was cited where the court stated as follows;

"that to succeed, circumstantial evidence must be so overwhelming and so cogent and compelling that no other rational hypothesis than that the appellant murdered the deceased existed. The evidence though circumstantial must be able to link the appellant to the commission of the offence or the scene of the crime".

4.14 It was argued that the appellant was linked to the crime because of his possession of the two T-shirts stolen during commission of the crime of murder, which he failed to give a reasonable explanation.

4.15 As regards the contention of failure to lift fingerprints from the truck to exclude James Chibwe's involvement, it was contended that it appears from the record that lifting fingerprints would have been an effort in futility as it was apparent that other people who were at the scene earlier had handled the truck prior to the scene visit by officers.

4.16 Further, that in his attempt to mislead PW3 and PW5, the appellant included one T-shirt belonging to James Chibwe to prove that the two T-shirts of the deceased were found in Chibwe's room.

4.17 The court was urged not to interfere with the findings of fact made by the trial court which had the opportunity to observe the demeanour of the witnesses. The case of **Attorney General v. Marcus Kampumpa Achiume** ⁽¹⁰⁾ was cited on instances when an appellate court may reverse findings of fact. Namely, instances where the findings made are perverse or were made in the absence of any relevant evidence and upon misapprehension of facts, etc.

4.18 We were urged to dismiss the appeal because the circumstantial evidence was cogent and compelling that no rational hypothesis

other than inference of guilty could be drawn. In addition we were urged to also find the Appellant guilty of aggravated robbery as the evidence clearly shows that in the commission of murder, the deceased was robbed of his property.

5.0 DECISION OF THE COURT

- 5.1 We have considered the appeal, the evidence adduced in the court below, the submissions and authorities cited by learned Counsel.
- 5.2 A consideration of the evidence adduced in the court below shows that the case was based on circumstantial evidence in that, there was no eye witness to the murder of the deceased, and secondly, the possession of property recently stolen.

6.0 CIRCUMSTANTIAL EVIDENCE

- 6.1 With regard to circumstantial evidence, there was no dispute that the evidence available was as follows:

- 1) *The appellant led PW3 and other relatives to the room where Chibwe lived;***
- 2) *A spanner belonging to PW3, who had lent it to the deceased, and shoes belonging to the deceased, were recovered in the same room. The shoes, though never produced in evidence, were found under the bed;***
- 3) *Though the date is not clear, it is not in dispute that a search of the room was conducted by Mwembeshi Police who also***

recovered some heavy duty batteries and other vehicle accessories belonging to unknown persons;

- 4) *That later, the appellant approached PW3 with three t-shirts, two of which were positively identified by PW3 and PW4 as belonging to the deceased, claiming that he recovered them from the room. Initially the appellant claimed that he found them in a cupboard but later stated that they were under the bed. (it is the same bed under-which the shoes of the deceased were found following a search by PW3 and the police); and*
- 5) *That the appellant decided to report his findings to the family as opposed to the police, even when he was aware that Chibwe had been apprehended.*

6.2 In **David Zulu v The People**⁽¹⁾, the Supreme Court held that:

"It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt."

And further that;

"Where a conclusion is based purely on inference, that inference may be drawn only if it is the only reasonable inference on the evidence; an examination of the alternative and a consideration of whether they or any of them may be said to be reasonably possible cannot be condemned as speculation."

6.3 From the available evidence, the conduct of the appellant in reporting his discoveries to the family of the deceased as opposed

to the police; the discovery of the t-shirts several days after a search of the room had been conducted; and the conflicting accounts as to where exactly in the room he found the t-shirts, suggested that an inference of guilt was the only reasonable inference to be drawn in the circumstances.

6.4 Further, the conduct of the appellant in its totality, was not only irregular, but odd and suspicious. This behaviour of choosing to investigate rather than report to the police, coupled with the discovery of property that was last known to be in the possession of the deceased, amounted to odd coincidences. In any case, the explanation tendered by the appellant cannot be said to be reasonably possible.

6.5 **OPPORTUNITY TO INCRIMINATE CHIBWE**

The evidence on record further suggests that the appellant had the opportunity to implicate Chibwe with incriminating evidence by planting it in his room. The evidence of the appellant was to the effect that when he first entered the room, Chibwe was not home. Later, when he led PW3 and others to the house, the court was told that Chibwe was not home having been apprehended by the police. The court was further told that

to gain access to the room, the lock had to be broken. No plausible reason was given for entering the room in the absence of Chibwe or to invite the police, who had already searched the premises. By so doing, the appellant had the opportunity to incriminate Chibwe for an offence he had not committed. The circumstances of the case, taken together, demonstrate that the appellant had the opportunity to incriminate Chibwe, his relative, with whom he was said to have a grudge. The grudge arose from Chibwe's continued occupation of a room in a house that belonged to the father of the appellant.

6.6 POSSESSION OF RECENTLY STOLEN PROPERTY

There was no dispute that the blood-stained spanner, black shoes and the two t-shirts belonged to the deceased and that they were in his custody at the time of his death. Further, it was not in dispute that these items were found within days of their being stolen from the deceased. There is no dispute that these items were allegedly found by the appellant as he is the one who brought them to the attention of PW3 and the police. Therefore, the said items fall in the category of property that was recently stolen.

6.7 The court below considered the case of ***Chabala v The People***⁽³⁾ wherein it was held that:

- (i) *If a person is in possession of property recently stolen and gives no explanation, the proper inference from all the circumstances of the case may be that he was the thief, or broke in to steal and stole, or was a receiver, or even, despite no explanation, cannot be said beyond reasonable doubt to be guilty.*
- (ii) *If explanation is given, because guilt is a matter of inference, there cannot be conviction if the explanation might reasonably be true, for then guilt is not the only reasonable inference. It is not correct to say that the accused must give satisfactory explanation.*

In light of this guidance, the question that arises is whether the accused tendered an explanation of how he came into possession of the property in issue.

6.8 A perusal of the record of appeal shows that the appellant approached the family of the deceased saying he knew who had committed the murder of the deceased. He later led PW3 to Chibwe's room where the shoes and spanner were recovered. Some days later, he presented two t-shirts to PW3 and PW5 that he claims to have found, initially under the bed and then a cupboard in Chibwe's room. The appellant was implicitly saying

that Chibwe was behind the killing of the deceased as the property was found in his room.

6.9 However, this explanation was rejected by the learned Judge in the court below as she found it to be odd that the appellant kept finding the property without involving the police. Further, the fact that the room had been searched by PW3 and the police, including under the bed where the black shoes were found and the cupboard, showed that the explanation tendered by the appellant could not be reasonably true.

6.10 In the case of ***Sydney Zonde, Aaron Sakala, Edward Chikumbi v. The People***⁽¹²⁾, it was held that:

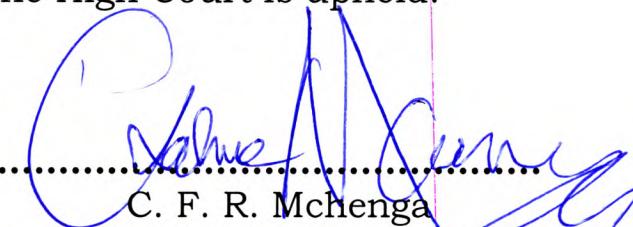
"The doctrine of recent possession applies to a person in the absence of any explanation that might be true when found in possession of the complainant's property barely a few hours after the complainant had suffered an aggravated robbery."

Taking into account all the circumstances of the case, the explanation tendered by the appellant cannot reasonably be true and was thus, rightly rejected by the trial court. There is no other inference that can be drawn from the circumstances. Therefore, in all the circumstances of the case, the inference to

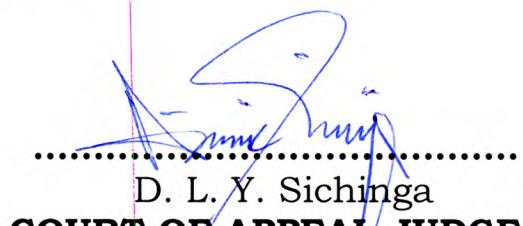
be drawn is that the appellant is the one who unlawfully obtained the property from the deceased after killing him.

7.0 **CONCLUSION**

- 7.1 We are of the view that the court below was on firm ground by convicting the appellant based on circumstantial evidence. The circumstantial evidence had attained such a degree of cogency, permitting only the reasonable inference of guilt.
- 7.2 We accordingly dismiss the appeal. The conviction and sentence by the High Court is upheld.


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C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL


.....
F. M. Chishimba
COURT OF APPEAL JUDGE


.....
D. L. Y. Sichinga
COURT OF APPEAL JUDGE