

IN THE SUPREME COURT OF ZAMBIA ~~in the~~ Appeal No.21/2021
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

CHARLES GONDWE

APPELLANT

AND

THE PEOPLE

RESPONDENT

[3] The court of law authorized the trial court to try the appellant on the

CORAM: Hamaundu, Kajimanga and Mutuna, JJS
On 4th May 2021 and 10th August 2021

For the Appellant: Mr. C. Siatwinda, Senior Legal Aid Counsel

For the Respondent: Mr. E. K. Sakala, State Advocate

JUDGMENT

Kajimanga, JS delivered the judgment of the court down at the place

where he has witnessed a fight between two parties who intended home. The
Cases referred to:

[1] William Muzala Chipango & Others v The People (1978) Z.R. 435

[2] Emmanuel Phiri v The People (1982) Z.R. 77

[3] Emmanuel Phiri and Others v The People (1978) Z.R. 79

Introduction

[1] The appellant was tried and convicted on a charge of murder. It

was alleged that on 6th October 2011 at Luanshya, the appellant
whilst acting together with John Kunda, Martha Kabwe and

Harrison Seni, murdered Binwell Kanyinga (the deceased). He now appeals to this Court against his conviction.

[2] The appeal discusses the principles governing the treatment of evidence of accomplice witnesses or witnesses with an interest to serve.

The Prosecution's Evidence

[3] The trial judge anchored her conviction of the appellant on the evidence of PW5 and PW1. The evidence of PW1 was that on 6th October 2014 between 22:00 hours and 22:30 hours, PW1 was in a cab on his way to Kalala when he saw a lady he identified as Martha, in the company of four men whom he did not know and that the men were fighting with a man who was lying down. Upon his return from Kalala, he found a person lying down at the place where he had witnessed a fight and he proceeded home. The following morning, PW1 went to Don't Kubeba Bar for a drink and he enquired from the said Martha, the bar lady, as to who the person being beaten the previous night was. She however, ordered him to leave or else she would spill the water she was using to wash the tins on him. PW1 then left the bar and went to the next tavern where he bought beer and started drinking.

[4] The following day, PW1 heard that the victim of the beating had died. He then went to Don't Kubeba Bar to inform Martha about the same, but she again ordered him to leave the bar. PW1 left and went to the next bar. Shortly afterwards, Martha came and invited him to go back to Don't Kubeba Bar where she later offered him beer and cigarettes. PW1 then decided to go home and Martha followed him. Along the way, he told her that what she did was wrong. Whilst talking to her, he realized that the appellant, who was among the people who were beating the deceased, was following him. The appellant then held him by the neck and threatened him. Thereafter, PW1 went to the funeral house of the deceased and informed a certain man there that Martha and some other people were responsible for what happened to the deceased and that they also wanted to kill him.

[5] Afterwards, PW1 and some members of the deceased's family went to the police station and got an officer who went with them to Martha's house where Martha and Harrison Seni were apprehended. The officer then dropped PW1 and the deceased's relatives at the funeral house and proceeded with the two suspects to the police station. The officer later came to the funeral

house and informed him that Martha and Harrison Seni had told him the people who were in their company on the material day, and this led to the apprehension of PW5 who also named other people.

[6] PW5 testified that around 23:00 hours on 6th October 2011, he was at Don't Kubeba Bar. Although he had gone there alone, the appellant, John Kunda, Martha Kabwe and Harrison Seni sat with him. When he went outside with the intention of going home, the appellant told him that they should walk together because he wanted to escort Martha Kabwe and John Kunda home. When they reached the roadside, they found a person who was drunk lying in a furrow which was by the roadside. A person whom PW5 did not know went there and identified the person who was lying in the furrow as his neighbour and asked PW5 to help lift him which he did. By then, John Kunda, Martha Kabwe, Harrison Seni and the appellant had passed that place and proceeded ahead. PW5 also proceeded home but just before he entered the yard of his house, he saw some people beating a person. He rushed there and found the appellant beating a person who was lying on the ground. That the appellant was kicking that person on the head

with shoes on while Martha Kabwe stood watching. PW5 stated that he was not able to identify the person who was being beaten because he was covered with a bomber jacket on his face. While PW5 was at the scene, a vehicle that was in front of them turned on the lights and then switched them off. He later left the scene and went home, and the others also left. The following morning, PW5 discovered that the person who had been beaten was the deceased.

- [7] At the close of the prosecution's case, John Kunda, Martha Kabwe and Harrison Seni were not found with a case to answer and were consequently acquitted. The appellant was, however, found with a case to answer and put on his defence.

The Appellant's Evidence

- [8] In his defence, the appellant testified that on the material day he went to Don't Kubeba Bar around 17:00 hours where he found John Kunda, Martha Kabwe and PW5 drinking beer and he joined them. They were later joined by Harrison Seni and they all drank together until 22:30 hours when the appellant wanted to leave. However, Harrison Seni asked him to wait for John Kunda and Martha Kabwe to close the bar so that they could escort them.

After the bar was closed, the appellant left with John Kunda, Martha Kabwe, Harrison Seni and PW5. On the way, they met two men, one of them asked the appellant and the people he was with to help him put his colleague who was very drunk on his back. The appellant, PW5 and Harrison Seni stopped to assist that person while Martha Kabwe and John Kunda continued walking. They later heard Martha Kabwe shouting to Harrison Seni that they should go and see John Kunda who was fighting. Harrison Seni rushed there first and the appellant followed, while PW5 remained assisting that person.

- [9] When the appellant reached the place where John Kunda was said to be fighting with someone, he found Harrison Seni pulling John Kunda away. When the appellant asked John Kunda what was happening, he did not answer. He then asked Harrison Seni which person was fighting with John Kunda and Harrison Seni pointed at the person who was at the scene. Thereafter, Harrison Seni advised the appellant to just leave that person and both the appellant and Harrison Seni left for their respective homes. That PW5 did not witness anything because by the time he reached the scene, the appellant, John Kunda, Harrison Seni and Martha

Kabwe had all started off for home.

Consideration of the matter by the learned trial judge

[10] The trial judge found that on the evidence before her, it was the appellant who beat the deceased resulting in his death. This finding, according to the trial judge, was confirmed by the testimony of PW5 who stated that he saw the appellant kicking the deceased on the head and that the victim was covered with a bomber jacket on his face. That the fact of the bomber jacket was corroborated by PW8 who stated that she recognized the deceased at the roadside the following morning through, among other things, the black bomber jacket that he was wearing.

[11] Further, that PW5's evidence of seeing a vehicle that was in front of them turning on lights and then switching them off at the time the deceased was being beaten is corroborated by the evidence of PW1 who stated that while he was in a cab going to Kalala, he found four men fighting with a man who was lying down and on his way home, he saw a person lying at the place where he had found a fight. The trial judge found that PW5's description of what happened and what the deceased was wearing could not be a mere fabrication calculated to falsely implicate the appellant and

therefore, PW5 told the court the truth when he stated that he saw the appellant beating the deceased.

[12] The trial judge also found the appellant's behaviour strange when he held PW1 by the neck and threatened him after PW1 told Martha Kabwe that what she did on the fateful night was wrong. That this behaviour shows that he was guilty and as such the trial judge was satisfied that the danger that the appellant was being falsely implicated by an accomplice had been excluded. She, therefore, found it safe to rely on the evidence of PW5 on the ground that it was "special and compelling".

The ground of appeal to this Court

[13] Aggrieved by this decision, the appellant now appeals to this court against his conviction. The sole ground of appeal is that the court below erred both in law and fact by accepting the identification evidence of PW5, a suspect witness, when the danger of false implication was not excluded as there was no corroborative evidence on the identity of the offender.

[14] In the appellant's written heads of argument, Mr. Siatwinda submitted that the trial judge rightly found PW5 to be an accomplice witness whose evidence required corroboration or

something more than a belief that he was telling the truth based simply on his demeanor and plausibility of his evidence. From the evidence on record, counsel contended, the danger of false implication was not excluded as there was no corroborative evidence on the identity of the appellant as the offender. According to counsel, the danger of false implication should have been excluded before accepting the identification evidence of PW5. The case of *William Muzala Chipango & Others v The People*¹ was cited in support of this argument.

[15] Relying on the case of *Emmanuel Phiri v The People*², counsel submitted that the suspect evidence of PW5 must be given a similar treatment as in sexual offences. There must be corroboration for both the commission of the offence and identity of the offender to exclude the danger of false implication.

[16] We were referred to the following passage at page J25 of the trial court's judgment:

"I also find the accused's behaviour strange when he held PW1 by the neck and threatened to do rubbish things to him after PW1 had told Martha Kabwe that what she did on the fateful night was wrong. This behaviour of the accused shows that he was guilty and constitutes part of the "something more" which satisfies the court that the danger that the accused was being falsely implicated has been excluded. I,

therefore, find it safe to rely on the evidence of PW5 on the ground that it is “special and compelling.”

[17] It was submitted that there is no evidence that the appellant knew what PW1 had told Martha Kabwe. At the time when PW1 informed Marthat Kabwe that what she did was wrong, counsel went on, there is no evidence that the appellant heard or overheard that conversation. Counsel submitted that it cannot be said that what the appellant did to PW1 amounts to corroboration or “*something more*” that it was the appellant who was the offender.

[18] It was contended, with regard to the identity of the offender, that the lower court did not give any reason why it believed the allegation of PW5 that it was the appellant who beat the deceased by kicking him in the head. According to counsel, this was a misdirection as the trial court failed to reveal its mind upon the matter. That the case of *Emmanuel Phiri and Others v The People*³ is instructive on the treatment of cases requiring corroboration. Counsel reiterated that in the present case, the lower court seems to have believed in the truth of the evidence of PW5 as to the identity of the offender simply on his demeanour and the plausibility of his evidence, thus treating him like any other

witness, when he was a suspect witness with a possible interest to serve. We were accordingly urged to allow the appeal, set aside the conviction and acquit the appellant.

[19] In the respondent's brief written heads of argument, Mr. Sakala submitted that the evidence of PW5 of seeing a vehicle during the incident was corroborated by the evidence of PW1 who stated that he found a person lying where PW5 said he found the appellant beating the deceased.

[20] As to the identity of the appellant, it was submitted that PW5 was able to identify him because they were together on the material date prior to and during the incident. Further, that A1 was also able to identify the appellant when he grabbed him by the neck and he remembered him as being part of the group that he saw assaulting the deceased. According to Mr. Sakala, the lower court rightly found that there was corroboration in both the commission of the crime and identity of the appellant and it was on firm ground in convicting him. We were accordingly urged to dismiss the appeal.

[21] At the hearing, both counsel orally augmented their written heads of argument. We will not reproduce their oral arguments as they

were a repetition of their written heads of argument.

Consideration of the appeal by this Court and decision

- [22] The question for determination in this appeal is whether there was corroboration of the evidence of PW5 (an accomplice witness) relating to the identity of the appellant as the perpetrator of the crime, to exclude the danger of false implication.
- [23] The thrust of the appellant's argument in support of the sole ground of appeal is that the danger of false implication was not excluded as the evidence of PW5 on the identity of the offender was not corroborated. The position of the State is that the lower court was on firm ground in convicting the appellant as there was corroboration in both the commission of the crime and his identity.
- [24] In the case of *Emmanuel Phiri and Others v The People*³, this Court summarised the principles governing the treatment of evidence of accomplices or witnesses with an interest to serve at pages 106 – 107 as follows:

“(1) A judge (or magistrate) sitting alone or with assessors must direct himself, and the assessors if any, as to the dangers of convicting on the uncorroborated evidence of accomplices with the same care as he would direct a jury, and his judgment must show that he has done so. No particular form of words is

necessary for such a direction. What is necessary is that the judgment shows that the judge has applied his mind to the particular dangers raised by the nature and the facts of the particular case before him.

- (2) *The judge should then examine the evidence and consider whether in the circumstances of the case those dangers have been excluded. The judge should set out the reasons for his conclusions; his “mind upon the matter should be clearly revealed” (Chiu Nang Hong (13)).*
- (3) *As a matter of law, those reasons must consist in something more than a belief in the truth of the evidence of accomplices based simply on their demeanour and the plausibility of their evidence – considerations which apply to any witness. If there be nothing more, the court must acquit.*
- (4) *The “something more” must be circumstances which, though not constituting corroboration as a matter of strict law, yet satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the accomplice implicating the accused. This is what is meant by “special and compelling grounds” as used in Canisio (15).*
- (5) *These circumstances do not lend themselves to close description; the nature and sufficiency of the evidence in question will depend on the nature and the facts of the particular case. As a principle, however, the evidence will be in the nature of corroboration in that it must of necessity support or confirm. For instance, it may fall short of being corroboration as a matter of strict law only because of some technicality in the existing law of corroboration; or the evidence may be of circumstances which negative any motive for false implication. These examples are not intended to be exhaustive.”*

- [25] Turning to this appeal, the trial judge, after considering the evidence stated as follows at pages J23 and J24 of her judgment:

"I have looked at the evidence of PW1 and PW5 and I believe PW1 when he stated that he saw some men beating a man who was lying down. I also believe that he had a close look at the accused when he grabbed him by the neck and could not have mistaken someone else for him.

Similarly, I accept the evidence of PW5 that he knew the accused very well and was actually with him at Don't Kubeba Bar and further, that he walked with him up to the place where they started assisting to put someone on his colleague's back. I observed the demeanour of PW5 and I find that he is a credible witness."

- [26] After applying her mind to the dangers of convicting the appellant on the uncorroborated evidence of PW5 (an accomplice witness), the trial judge continued at page J25 as follows:

"PW5's evidence of seeing a vehicle that was in front of them turning on lights and then switching them off at the time the deceased was being beaten is corroborated by the evidence of PW1... who stated that while he was in the cab going to Kalala, he found a fight taking place and four men were fighting with a man who was lying down. On his way back home, PW1 found a person lying down at the place he had found a fight. I am therefore, satisfied that PW5... told the court the truth when he stated that he saw the accused beating the deceased. Further, I find that PW5's description of what happened

and what the deceased was wearing is such that it cannot just be a mere fabrication calculated to falsely implicate the accused.

I also find the Accused's behaviour strange when he held PW1 by the neck and threatened to do rubbish things to him after PW1 had told Martha Kabwe that what she did on the fateful night was wrong. This behaviour of the accused shows that he was guilty and constitutes part of the "something more" which satisfied the court that the danger that the accused was being falsely implicated has been excluded. I, therefore, find it safe to rely on the evidence of PW5 on the ground that it is "special and compelling."

- [27] The appellant does not disagree with the State that there was corroboration of the evidence of PW5 by PW1 on the commission of the crime. Neither do we. However, the critical issue in this appeal is whether there was corroboration on the identity of the appellant as the person who caused the death of the deceased. As the trial judge aptly found, PW5 was an accomplice witness, having been one of the suspects detained with the appellant in connection with the death of the deceased. As per the principles enunciated in the case of *Emmanuel Phiri and Others v The People*³ quoted in paragraph 24 above, his evidence relating to the appellant's identity required corroboration in order to exclude the danger of false implication.
- [28] According to the trial judge, the corroborative evidence on the

appellant's identity came from PW1. Specifically, that the evidence of PW5 of seeing a vehicle in front of them turning on lights and then switching them off when the deceased was being beaten was corroborated by PW1 to the effect that while he (PW1) was in the cab going to Kalala, he found four men fighting with a man who was lying down; and that on his way back, he found a person lying where he had witnessed a fight.

[29] Contrary to the finding by the trial judge, the evidence of PW1 as revealed in the preceding paragraph does not constitute corroboration of the evidence of PW5 on the identity of the appellant as the one who assaulted the deceased. We have read the evidence of PW1 in the record. Nowhere does it show that PW1 saw the appellant beating the deceased. What he said was this:

"When I reached at that place where the fight was taking place I saw a lady and men who were the ones fighting and there was somebody lying down. When I arrived at that place I was able to identify the lady I did not know the men that were there." [Emphasis added]

Therefore, the finding by the trial judge that PW5's evidence on the identity of the appellant was corroborated by PW1 was a misdirection.

- [30] We also disagree with the finding by the trial judge that the appellant's holding of PW1 by the neck showed that he was guilty and constituted part of the "*something more*" which satisfied the court that the danger that the appellant was being falsely implicated had been excluded. First of all, what triggered the appellant's holding of PW1 by the neck is murky. Secondly, we accept the argument by counsel for the appellant that there is no evidence to the effect that the appellant knew what PW1 had told Martha Kabwe or that he overheard the conversation between PW1 and Martha Kabwe.
- [31] PW1's evidence was simply that whilst talking to Martha, he realized that the appellant was following him. We can safely assume from this evidence that the appellant was at a distance when PW1 was talking to Martha and he could not have been privy to the duo's discussion. In the circumstances, it cannot be said with certainty, that the appellant's mere holding of PW1 by the neck constitutes corroboration or "*something more*" that the appellant was the offender.
- [32] Contrary to the finding by the trial judge, the evidence of PW5 in relation to the identity of the appellant is far from being

“special and compelling”, to result in the safe conviction of the appellant. We are satisfied that the danger of false implication was not excluded. It was therefore, a misdirection by the trial judge to rely on the demeanour of PW5 (an accomplice) that he was a credible witness.

Conclusion

[33] In the final analysis, we conclude that on facts of this case, it was unsafe to convict the appellant for the murder of the deceased. We accordingly allow the appeal and set aside the conviction. Consequently, we acquit the appellant forthwith.



E. M. Hamaundu
SUPREME COURT JUDGE



C. Kajimanga
SUPREME COURT JUDGE



N. K. Mutuna
SUPRME COURT JUDGE