ERNEST MWABA AND CHABAYA NDALA AND SIMUSHI MANYIMA AND WAMUNYIMA WALUSIKU AND ERUSTUS KAKUMBI BANDA v THE PEOPLE (1987) Z.R. 19 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, J.S., AND SAKALA, JJ.S.
7TH OCTOBER AND 19TH NOVEMBER,1987
(S.C.Z. JUDGMENT NO. 23 OF 1987)

Flynote

Criminal Law and Procedure - Common criminal purpose - Act of one not fatal unless accompanied by act of others - Whether the one liable.

Criminal law and Procedure - Common criminal purpose - Persons other than accused also involved - Liability of accused.

Headnote

The accused were convicted of manslaughter. The prosecution evidence was that they arrested the deceased and interrogated him in a nearby school. Late at night he was taken into the bush and whilst handcuffed was beaten with planks and sticks. His feet were burnt. There was also evidence that the deceased was severely assaulted by other villagers.

The accused argued that because persons other than the accused assaulted the deceased the death could not be attributed specifically to any of the accused; that because others who participated in an assault were not prosecuted there was no common intention by the accused to cause the death and only the offence of assault was committed.

Held:

(i) Where joint adventurers attack the same person then, unless one of them suddenly does something which is out of line with the common scheme and to which alone the resulting death is attributable, they will be liable.

(ii) Where the evidence shows that each person actively participated in an assault then they were all *crimines participes.* The fact that other persons may have also assaulted the deceased at one stage can make no difference where the nature of the assaults was such that their cumulative affect overcame the deceased.

Case cited:

(1) Mohan & Another v Regina [1967] 2 All E.R. 58

Legislation referred to:

Penal Code, Cap.146, ss. 207 (d), (e)

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For the appellants: D.M.Luywa, Messrs Mwisiya & Company.
For the respondent: K.C.Chanda, Senior State Advocate.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court.

The first appellant received four years and the rest received three years imprisonment with hard labour each for manslaughter. The particulars alleged that between 14th and 15th May, 1985, at Mongu, jointly and whilst acting together they unlawfully caused the death of Mubita Munalula.

The evidence established that the deceased was a suspect in a theft case in respect of goods stolen from the 4th appellant's house. The deceased was collected from his village and taken to a nearby school where he was interrogated. He was taken to the bush at night and the next morning for him to reveal the whereabouts of the property, which was not found, and finally he was tied to a tree when he expired. All the while, the deceased was in handcuffs and subsequently and in addition he was tied up with ropes as well. The medical evidence was that the deceased died as a result of shock and exhaustion from multiple contusions and sundry other small injuries, including burns on his feet, which he sustained when he was assaulted. The prosecution case, which was accepted by the learned trial commissioner, was that it was the appellants who continuously assaulted the deceased, sometimes singly and sometimes jointly, at the school, in the bush and his village when he was taken there in the course of the attempt to recover the properly the deceased was suspected to have stolen and which the deceased had allegedly admitted to have stolen when he was interrogated during the night at the school. The appellants' case was that they did not participate in any of the assaults on the deceased; that from the time of his apprehension, a mob of villagers gathered as the deceased was marched through the villages to the school and it was the mob which severely assaulted the deceased; that the deceased was not beaten by them with any sticks as alleged by the prosecution witnesses but father it was PWs 1 and 5 who later assaulted the deceased with planks and sticks when the deceased annoyed them by claiming that some of the stolen goods were with the witnesses; and that the burns on the deceased's feet were not as a result of their having deliberately burnt him to encourage him to walk on when he became exhausted but were as a result of the deceased accidentally stumbling into a fire. The learned trial commissioner resolved the conflict on an issue of credibility. She accepted the evidence of PWs 1, 2, 3 and 4 who witnessed the assaults at one stage or "other and rejected the claim that other persons beat up the deceased.

One ground of appeal alleged error on the part of the learned trial commissioner in failing to take into account the possibility that other persons beat-up the deceased. We note that the learned trial commissioner had in fact specifically considered this issue, discounted it, and accepted the eye witness evidence against the appellants. Counsel for the appellants argues that, if in fact the mob had already inflicted injury from which the deceased would have died in any event, the appellants were not liable. In our considered opinion, and in view of the law to which we shall be referring in a moment, once there was credible evidence that the appellants participated in a concerted enterprise of interrogating the deceased in an attempt to recover stolen property, and once the evidence showed that each appellant actively participated in the assault, then they were all *crimines participes*. The fact that other persons may

have also assaulted the deceased at one stage or another can make no difference where the nature of

the assaults was such that - as in this case - it was their cumulative effect which overcame the deceased. The evidence accepted by the trial court was that each appellant assaulted the deceased and at other times aided and abetted the others while trying to extract information concerning the whereabouts of the stolen property. A positive finding, therefore, that other villagers also participated in the assaults would not relieve the appellants of their own liability. As active participants in the venture, they would all be principal offenders within the meaning of section 21 of the Penal Code.

Mr Luywa argued that, if the appellants did assault the deceased, then because several other individuals who have either not been prosecuted or convicted with them also participated, and in any event, there was no common intention to cause the death of the deceased. That being the case, then each participant, including the appellants, individually only committed an offence of common assault and that this would be the proper verdict in such a case, so the argument went. We have considered this submission and find that it cannot stand. The deceased died as a result of the unlawful assaults and the offence cannot be a common assault simply because it is not known whose blow or blows proved fatal. Where joint adventurers attack the same person, then unless one of them suddenly does something which is out of line with the common scheme and to which alone the resulting death is attributable, they will all be liable. But where, as here, the assaults were of a similar nature involving the use of hands and whips only, so that it is impossible to attribute the death to the blows of any particular individual, then each adventurer has caused the death of the deceased within the statutory definitions contained in section 207(d) and (e) of the Penal Code. On the evidence, and even assuming that a mote had already inflicted serious injuries, each appellant would still be liable for causing the death. Under The section referred to, the appellants would be liable if their assaults hastened the death of the deceased if he was then already suffering from serious injuries inflicted by the mob from which he would have died even had the appellants not assaulted him. Similarly, each appellant is liable even if his own blows would not have been fatal had they not been accompanied by the blows of other persons. Thus, once more or less equal participation in the unlawful assaults on the same victim was established, it was unnecessary to show who struck the fatal blow and each was fully liable for the manslaughter: see for instance *Mohan & Another v Regina* (1) a case of murder but where this principle was applied.

The principal issue was whether or not the learned trial commissioner was right in accepting the evidence that the appellants had assaulted the deceased. Mr Luywa's submissions were to the effect that there was a misdirection in the findings based on an issue of credibility as between the prosecution case and that set up by the appellants.

The argument was that the eye witnesses called by the prosecution were all suspect for the reason that they were either related to the deceased or that they themselves were alleged by the defence to have assaulted the deceased. It was argued that, in evaluating the conflicting stories, the learned trial commissioner did not adequately consider the discrepancies which weakened the prosecution case and the evidence favourable to the appellants Examples of this were said to include the use made of one appellant's

warn and caution statement only in respect of the deliberate burning of the deceased's feet when the

statement contained other facts favourable to that appellant. The short answer to the complaint in that respect is that the learned trial commissioner was there discussing solely the issue of how the deceased got burnt. She very carefully, in our view, contrasted the prosecution account with that of the appellants which was, in any case, manifestly improbable. It is our considered opinion that the learned trial commissioner had correctly identified the central issue in the whole case to be one of credibility between two sets of conflicting accounts. The witnesses who are alleged to be suspect witnesses can be divided into two camps: There were the witnesses from the same village as the deceased and PW.3, the special constable, who had apprehended the deceased and left him under the charge of the first appellant, another special constable. They gave their evidence from such different positions that, quite clearly, it was inconceivable that they had jointly fabricated a story to falsely implicate the appellants. Over circumstances, some of which were common cause, also provided support for their evidence: These were that the appellants took the deceased from the school at night when it had been agreed to continue the investigations only the following morning; they took the deceased Into the bush after he had allegedly admitted the offence and kept returning him to the bush despite his failure to locate any property; they tied him up with ropes, manhandled him and burnt his feet when he had collapsed. Finally, they left him tied to a tree. All these factors were inconsistent with a course of investigation free from the application of violence, as contended by the appellants.

We cannot reverse the findings of fact based on an issue of credibility unless it is positively demonstrated to us that the learned trial commissioner, who had the advantage of seeing and hearing the witnesses at first hand, clearly fell into error or misdirected herself in some way. The learned trial commissioner had before her the very items of evidence which the appellants urge in their favour; she fully set out and considered the two conflicting stories; she gave detailed reasons why she was accepting the prosecution case and rejecting that of the appellants. For our part, we are unable to say that she had misdirected herself in any way. In truth there are no grounds upon which we can interfere and the appeals against conviction are dismissed.

With regard to the sentences imposed, the learned trial commissioner again gave reasons for sentencing the first appellant to four years imprisonment. The firm appellant clearly played the leading role and as a special constable he should not have adopted a violent method of investigating the alleged theft. We cannot say that for persons who take the law in their own hands and assault suspects in this manner, these sentences were either wrong in principle or in any way extravagant so as to comets us with a sense of shock. The appeals against the sentences are also dismissed.

Appeal dismissed
