FRANCIS MAYABA v THE PEOPLE

SUPREME COURT
NGULUBE, C.J., SAKALA AND MUZYAMBA, JJ.S.
3RD MARCH AND 6TH APRIL, 1999.
(S.C.Z. JUDGMENT NO. 5 OF1999)

Flynote
Criminal Law - murder -section 200 of Penal Code. Criminal Law - evidence - corroboration - lack of Sentence - whether too excessive - consideration of mitigating factors.

Headnote
The appellant was convicted of murder and sentenced to 20 years imprisonment. He was charged with three other accused. The second accused died before sentence, the third accused was a juvenile who was accordingly sent to a reformatory. The fourth accused was found with no case to answer.

On the day in question the appellant and his co-accused apprehended the deceased and tied his hands. They did so on the suspicion that the deceased had stolen money from one Esnart Mpokota, the mother the appellant. When they failed to recover the money from the deceased they and other villagers assaulted him, burnt his back and tied him to a tree. He was left overnight and the following night the deceased was found dead. The appellant and his co-accused were then arrested and charged.

It was submitted by Counsel for the appellant that the trial Judge misdirected himself in law and fact by convicting the appellant on the evidence of a single witness and he misdirected himself by convicting the appellant on a confession statement which was not well proved. It was also argued that the appellant was a young man aged 20 and therefore deserved leniency.

Held:
The facts of this case did not support a conviction of murder because quite apart from the element of provocation and drunkeness negativing intent to kill, this was a case of mob instant justice and there was no evidence to show that the appellant or the juvenile delivered the fatal blow that caused the death. The sentence was too excessive.

Appeal allowed.

Conviction for murder quashed and substituted with a conviction for manslaughter. The Juvenile was to be immediately released.

Legislation referred to:
1. Penal Code, Cap.87, Section 200.

For the Appellant: S.R. Chirambo, Deputy Director of Legal Aid.
For the Respondent: R.O. Okafor, Principal State Advocate.

Judgment
MUZYAMBA, J.S.: delivered the judgment of the court.

The appellant was jointly charged with four others of murder Contrary to Section 200 of the Penal Code, Cap 87 of the Laws of Zambia. He was convicted and sentenced to 20 years imprisonment with hard labour. The particulars of the offence were that Francis Mayaba, Godwin Daka, Gilbert Mulabwa and Evan Nambanda Nambwala on 24th November,1995, at Monze in the Monze District of the Southern Province of the Republic of Zambia jointly and whilst acting together did murder ALFRED JABA.

The fourth accused was found with no case to answer and acquitted. The second accused died before sentence. The third accused was also convicted as charged but being a juvenile he was sent to a reformatory.

The appellant now appeals to this court against both conviction and sentence.

The facts of this case are that on 23rd November,1995, there was a beer party at the house of PW.1, Esnart Mpokota, the appellant's mother.The deceased was at the beer party and he is alleged to have stolen Mpokota's money gained form beer sales. The appellant and his co-accused apprehended the deceased and tied his hands.The deceased is said to have led them to PW.4, Diness Jaba and other places in an attempt to recover the money. When they failed to recover the money they took the deceased back to the beer party where they and other villagers severely assaulted him and burnt his back and tied him to a tree. He was left over night and the following day the deceased was found dead. The matter was reported to the Police and investigations led to the arrest of the appellant and his co-accuseds. A warn and caution statement was recorded from the appellant in which he gave details of events leading to the death of the deceased. At the trial the appellant denied ever making a statement to the Police.

On behalf of the appellant Mr. Chirambo advanced two grounds of appeal, one that the learned trial Judge misdirected himself in law and fact by convicting the appellant on the evidence of a single identifying witness and two that the court below erred in law by convicting the appellant on a confession statement which was not well proved. In the course of arguing these grounds which were without merit in that the identity of the appellant was not seriously contested in the court below and the learned trial Judge adopted the correct approach when the appellant repudiated his statement, we invited him to critically look at the facts of this case and see whether or not they supported the charge and conviction of murder or would support a lesser offence of manslaughter. It was only then that he saw the real issue and argued that there was no intent on the part of the appellant to kill the deceased because he had been drinking beer and was provoked because the deceased stole his mother's money. Further that this was an instant justice case and it was not clear whose blow cause the death of the deceased. In response Mr. Okafor said that after reading through the case record he wrote on the cover ''manslaughter'' with a question mark meaning that the appellant should be given the benefit of the doubt.

On sentence, Mr. Chirambo argued that the appellant was a first offender and a young man aged 20 years who deserved leniency. That the sentence of 20 years imprisonment must therefore come to us with a sense of shock. On whether or not we should disturb the reformatory order although the juvenile offender did not appeal both Counsel left it to us to decide.

We have examined the evidence on record and the judgment of the learned trial Judge and we have also considered the arguments by both Counsel and we agree with them that the facts of this case do not support the conviction of murder because quite apart from the element of provocation and drunkeness negativing intent to kill, this was a case of mob instant justice and there is no evidence that the appellant or indeed the juvenile offender delivered the fatal blow that caused the death of the deceased. We would therefore allow the appeal and quash the conviction for murder and substitute a conviction for manslaughter contrary to Section 1999.

As regards sentence we agree with Mr. Chirambo that 20 years imprisonment, even for extenuated murder is excessive and it comes to us with a sense of shock. The appeal against sentence is also allowed. The sentence is set aside and we impose a sentence of 5 years imprisonment with hard labour effective from 8th December 1995 the date the appellant was taken into custody.

We now turn to the juvenile offender. Although he did not appeal yet we have inherent jurisdiction to interfere in order to meet the ends of justice. We therefore propose to interfere here. For the same reasons we gave in respect of the appellant we quash conviction for murder and substitute a conviction for manslaughter contrary to Section 199. With sentence, we set aside the reformatory order and we commit the offender to a probation officer for supervision for 1 year but since he has been in a reformatory for over a year now this will not be necessary. He should therefore be released forthwith.
