BENSON PHIRI (1st Appellant) SANNY MWANZA (2nd Appellant) *v* THE PEOPLE (Respondent)

ngulube, C.J., Sakala, and Chitengi, J.J.S.

4th June, 2002 and 3rd September, 2002.

(SCZ Judgment 25 of 2002).

Flynote

Evidence – Identification – Adequacy of.

Evidence - XXXXX – What amounts to.

Criminal Law – Co-accused – common purpose – Evidence of.

Headnote

The appellants were sentenced to death following a charge of murder contrary to section 200 of the Penal Code. The particulars of the offence alleged that the two appellants and co-accused, on 7th September, 2000, at Ndola District of the Copperbelt Province of the Republic of Zambia did murder Michael Chulu. The co-accused was acquitted.

The case for the prosecution centered on the evidence of PW2. The learned trial Judge accepted the evidence of PW2 and found that PW2 saw the first appellant pull out a knife and stab the deceased. The appellants criticized the evidence upon which the conviction was based, identification of the appellants and raised an issue in relation to the death sentence.

Held:

(i) The testimony of a single witness who knew the accused prior to the incident at issue is adequate to support conviction.

(ii) Although the second appellant took part in assaulting the deceased, it cannot be said that he knew that the first appellant would use a knife.

Legislation referred to:

Penal Code Cap. 87 ss. 200 and 247.

Cases referred to:

(1) *Katebe v The People* (1975) Z.R. 13
(2) *Nyamise v The People* (1973) Z.R. 288
(3) *The People v Phiri* (1980) Z.R. 249
(4) *Kaonga v The People* (1979) Z.R. 21

(5) *Mwape v The People* (1976) Z.R. 160

K. Msoni of J.B. Sakala and Company and D.B. Mupeta Senior Legal Aid Counsel for the appellants.

A Eyaa Senior State Advocate for the State

Judgment

SAKALA, J.S., delivered the judgment of the Court:

The appellants were sentenced to death following upon their convictions on a charge of murder contrary to section 200 of the Penal Code. The Particulars of the offence alleged that the two appellants and co-accused on 7th September, 2000, at Ndola District of the Copperbelt Province of the Republic of Zambia, did murder Michael Chulu. The co-accused was acquitted.

The fact that the deceased was stabbed to death was conclusively established by the prosecution evidence. The case for the prosecution centered on the evidence of PW2. According to this witness, the deceased, who was a Choir Master of their church, had visited her. After they had discussed the possibility of her being baptized in the Pentecostal Church, she decided to escort him, and on the way they met three people. According to the evidence of PW2, she knew the three as neighbours. She testified that she knew the first appellant as the father of Mercy. According to her evidence, when they met the three people, the first appellant asked the deceased whether he knew the person the three had apprehended. When the deceased confirmed knowing him, a fight erupted. According to her evidence, these two appellants started beating the deceased and in the course of a fight, the first appellant pulled out a knife and stabbed the deceased. PW2 testified further that she ran away from the scene, but while running away she heard the deceased cry out "Father of Mercy you have killed me". The next day the deceased was found dead. The matter was reported to the Police. PW2 led the police to the arrest of the appellants and the co-accused.

In their defence, both appellants denied knowing PW2 or being a neighbour. They totally denied being at the scene or being involved in the offence. The learned trial judge accepted the evidence of PW2 and found that apart from knowing the appellants as neighbours, she had ample opportunity to observe them at the material time. The leaned trial judge accepted that PW2 saw the first appellant pull out a knife; and stab the deceased. The court found that the second appellant participated in beating the deceased, while the co-accused did not participate in the fight.

Mr. Msoni filed written heads of arguments supplemented by oral submissions based on two grounds of appeal. But before arguing the appeal, he added a third ground of appeal against sentence. The first ground of appeal criticized the evidence on which the conviction was based. The gist of the criticism was that the learned trial judge relied heavily on the evidence of PW2, the only eye witness, whose evidence was inconsistent and unreliable. It was pointed out that while PW2 testified that the first appellant produced a knife and stabbed the deceased in the groin; the postmortem evidence showed that the deceased was not stabbed in the groin. Mr. Msoni also pointed out that the evidence of PW2 was that she ran away when she saw the appellant produce a knife. Counsel submitted that it is incredible that PW2, who said the deceased was their Choir Master, should have ran away and went to sleep without reporting the incident anywhere. Mr. Msoni contended in the written heads of argument that PW2 was inconsistent under cross examination when she admitted running away when she saw a knife but at the same time stating that she saw the first appellant stab the deceased.

Another point raised on the first ground was one of alibi. The argument was that the learned trial judge having acknowledged the appellant's denial of their involvement in that they were not at the scene of crime as they were at their respectable homes asleep, the court failed to consider the defence. It was pointed out that the investigating officers failed to investigate the alibi. Counsel submitted that on the authority of *Katebe v The people(1)* failure to investigate the alibi was fatal to the prosecution case as there was no evidence connecting the appellants to the murder of the deceased.

The second ground of appeal centered on the issue of identification. The contention was that the alleged killing of the deceased took place in the night, that although PW2 claimed that she saw the appellants who were neighbours, her evidence could not be reliable as she was mistaken as to where the deceased was stabbed or she did not see clearly. Citing the cases of *Nyamise v The People (2)* and *The People v Phiri (3)* on guidelines of what an identifying witness should specify, counsel submitted that the possibility of an honest mistake could not be ruled out.

The third ground raised the issue of death sentence. The arguments were that the circumstances leading to the death of the deceased are very unclear to the extent that even the investigating officers were at pains to establish the motive for the killing. Equally, the reasons advanced by PW2 were unclear as to the cause of the alleged fight. According to Counsel, this was a causeless fight.

Mr. Mupeta, while adopting Mr. Msoni's submissions in relation to the first appellant, submitted mainly on the case for the second appellant. Mr Mupeta submitted that the case of the second appellant raises the issue of common purpose in the commission of a crime. Relying on the authorities of *Kaonga v The People (4)* and *Mwape v The People (5)* , he submitted that the production of a knife by the first appellant went beyond a common purpose of assaulting the deceased. Counsel contended that whoever produced the knife and stabbed the deceased, there was no common purpose to stab. It was submitted that the second appellant never knew that the first appellant had and would use a knife. Mr. Mupeta contended that had the court addressed its mind to the principle of common purpose, the second appellant would not have been found guilty of murder.

On extenuating circumstances, Mr. Mupeta submitted that the weapon used matters and that in the instant case a knife was not proved to have been used as the wounds were more in length than in depth. Mr. Mupeta drew our attention to page 15 of the record where the evidence suggests that there was a quarrel which would have been serious but that the evidence was not clear but still important.

Mr. Eyaa on behalf of the state supported the convictions. He submitted that the inconsistencies by PW2 were minor which did not affect the totality of the evidence. Mr. Eyaa pointed out that the cry of the deceased "Father of Mercy you have killed me," as testified by PW2 was not alluded to in the alleged inconsistencies in the evidence of PW2. Counsel argued that the main issue in the case is whether there was death at the scene, whether there were injuries from a knife or sharp object. He submitted that the prosecution evidence established that the deceased died near the scene from deep cuts consistent with the use of a sharp object. Counsel further submitted that the position of the cuts was irrelevant. On Identity, Counsel pointed out that PW2 testified that they were neighbours, there was moonlight; and the deceased and the appellants talked face to face. Counsel submitted that in these circumstances, there could be no possibility of honest mistake in identification.We have carefully considered the evidence on record, the judgment of the learned trial judge as well as the powerful submissions on behalf of the appellants and on behalf of the State. The case for the prosecution and indeed the convictions of the appellants were all based on the evidence of PW2. The death of the deceased was not in dispute. The appellants denied being near the scene where the deceased was murdered. While we accept that there were inconsistencies in

the evidence of PW2, like where the actual stabbing was done, we are satisfied that the inconsistencies were not fatal to the prosecution case. The evidence of PW2 was that she knew the appellants. On the material day she saw the first appellant pull out a knife and stab the deceased. She saw the second appellant join the assault. She heard the deceased shout "Father of Mercy you have killed :, above all, she led the police to the arrest of the appellants.

We are satisfied that PW2 was properly held as a reliable witness. The issue of honest mistaken identification did not therefore arise. However, each appellant's case, from the evidence of PW2 stands on a different footing from each other. The issue of common purpose in the commission of a crime as raised by Mr. Mupeta in relation to the second appellant was well taken and has merit. The evidence of PW2 is that she saw the first appellant pull out a knife and stab the deceased. Although we accept that the second appellant took a part in assaulting the deceased, we cannot say that he knew that the first appellant would use a knife. In the circumstances, we find it unsafe to uphold the conviction of murder as against the second appellant. We quash the conviction of murder and set aside the death sentence. On the evidence, we find the second appellant guilty of common assault contrary to section 247 of the Penal Code. We shall revert to the sentence to be imposed later.

Turning to the first appellant, the evidence that he stabbed the decease is overwhelming. We therefore dismiss the first appellant's appeal against conviction for murder. Turning to sentences, the second appellant having been found guilty of common assault, we sentence him to the maximum sentence for that offence. Namely, 12 months imprisonment with hard labour from the date of his arrest.

As regards the first appellant, we accept the evidence that before the deceased was stabbed, there was a quarrel followed by a fight. Although the fist appellant did not raise the defence of provocation, and although the evidence of the quarrel and the fight does not establish any provocation, we accept that there were extenuating circumstances in the instant case warranting the imposition of any sentence other than the death sentence. We therefore set aside the death sentence and on the facts of the case, particularly the use of a weapon, we sentence the first appellant to 20 years imprisonment with hard labour with effect from the date of arrest.

Appeal allowed.