

SAMMY KAMBILIMA NGATI, MUMBA CHISHIMBA EDWARD AND DAVY MUSONDA CHANDA v THE PEOPLE

Supreme Court
Sakala, Chirwa and Chibesakunda, JJJS
18th April, 2001 and 21st October, 2003
(SCZ Judgment No. 14 of 2003)

Flynote

*Criminal Law – Crime – Origin – Effect
Evidence – Corroboration – Whether court competent to convict on the testimony of a single witness.*

Headnote

The offences for which the appellants were tried and convicted on were all committed in the Democratic Republic of Congo and the first and second appellants are said to be Congolese.

The trial took place at Ndola in Zambia. Thus, the question of jurisdiction of the Zambian courts arose. This question of jurisdiction although not raised at trial, was raised at the hearing of the appeal.

Held:

1. Crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and common law must face this new reality.
2. The appellants are Zambians and although the offence was committed out of Zambia, the Penal Code applies to the appellants by virtue of Section 6 (1) of the Penal Code.
3. It is settled law that a court is competent to convict on a single identifying witness provided the possibility of an honest mistaken identity is eliminated.

Cases referred to:

1. *Liangsiriprasert v Government of The United States of America* [1991] 1 AC 225
2. *Amenda v The People* (1977) Z.R. 184
3. *Phiri v The People* (1978) Z.R. 79
4. *Chola v The People* (1988-89) Z.R 163
5. *Mpofu v Magura v The People* [1988-89] 24

Legislation referred to:

Penal Code, Chapter 87 of the Laws of Zambia Section 6 (1).
A. Mwansa, Legal Resources, Chambers, Kabwe for the appellants
C.F.R. Mchenga, Senior state Advocate for the People

Judgment

CHIRWA, J S, delivered judgment of the Court.

The very long delay of delivering of this judgment is deeply regretted. The delay has been caused by the issue of jurisdiction that the case raised. The question of jurisdiction of the Zambian Courts arose because the offences for which the appellants were tried and convicted on, were all committed in the Democratic Republic of Congo (Congo D.R.) and the 1st and 2nd appellants are said to be Congolese. The trial took place here in Zambia at Ndola. The people killed and robbed in the three counts were Zambians. The court took time to do some research on the matter and assistance was sought from the Ministry of Foreign Affairs as to whether there was any Treaty or Agreement involving the Pedicle where the offences occurred and their response was that their records only start from 1964 and that they would seek assistance from their London and Brussels Missions, but we have got nothing. The court also wrote to National Archives where the only information it got was that the problem of the Pedicle is an old one and started from as early as 1946. This question of jurisdiction, although not raised at trial, was raised at the hearing of the appeal and it was so important as it may affect many and also the relationship between the two countries.

The three appellants; Sammy Kambilima Ngati, Mumba Chishimba Edward and Davy Musonda Chanda (hereinafter referred to as 1st, 2nd and 3rd appellants), were jointly charged with one other person who died before trial with three counts. The first two counts were of murder, contrary to, Section 200 of the Penal Code, Cap. 87. The particulars of the first count were that the three appellants, on 1st May, 1997, within the Pedicle, in the Mokambo District of the Shaba Province of the Democratic Republic of Congo, jointly and whilst acting together did murder Kenneth Chibwe.

The particulars of the second count were that the three appellants, on 1st day of May, 1997, within the Pedicle, in the Mokambo District of the Shaba Province of the Democratic Republic of Congo, jointly and whilst acting together did murder Shadrack Kalenga.

The third count was of aggravated robbery, contrary to section 294 (2) of the Penal Code, Cap. 87. The particulars were that the three appellants, on 1st day of May, 1997, within the Pedicle in the Mokambo District of the Democratic Republic of Congo, jointly and whilst acting together and whilst armed with a gun, did rob Juliet Chilufya of 1 bag, 1 blanket, 2 dresses, 1 chitenge material, 10 kg sugar, K35, 000.00 cash, all together valued at K112, 500.00, the property of the said Juliet Chilufya and at or immediately before or immediately after the time of such robbery, did use or threatened to use actual violence in order to obtain or retain the said property. Prosecution led evidence from nine witnesses. PW1 testified that his company, AMC Contractors, had been awarded a contract by the National Roads Board of Zambia to work on a road that passes through the Pedicle in Congo, popularly known as the Pedicle road. He had his men on two camps. On 1st May, 1997, his son Kenneth Chibwe, set off from Mufulira for the Pedicle road to supervise workers. He left in a Toyota Land Cruiser registration number AAJ 3842, driven by Shadrack Kalenga. Kenneth Chibwe and Shadrack Kalenga are the victims of murder in counts one and two. They left in the morning and was expecting them back before 1200 hours as he, himself, was to start off for Mansa later for a meeting with the Permanent secretary there, on 2nd May, 1997. His son did not come back and at about 1345 hours he started off for Mansa using the Pedicle road. He drove about 25 km on the Pedicle road and reached his first camp and made inquiries about his son from his man in charge of the camp. The man confirmed that his son had passed the camp earlier in the day but did not stop. PW1 drove on and on the way he found one of his grader operators. He did not stop until he reached his second camp where he found his workers who were not working. He

made inquiries about his son; the workers told him that they had not seen his son. He got worried, as he never overtook his son on the way. He made a U-turn and got back where he had earlier on passed his grader and inquired from the operator if he had seen his son. He was told that he had not seen his son. However, one of his workers told him that he had observed some tyre marks leading into the bush from the road. He saw the tyre marks. He got more worried as it was unusual for his son to go out of the road where they were working. PW 1 then rushed to Mokambo border post and reported to the Army Officers of the Congo D.R. at the post. He was advised to report to Zambia Police. He reported on the Zambian border where Immigration Officers contacted the Zambia Police. He was given two Zambia Police Officers and two immigration Officers and came back to Congo DR Army border post where he was given some soldiers and came to where he had seen the tyre marks leading into the bush. The Congo army officers advised the Zambians to remain at the road while they went into the bush following the tyre marks. After a short while, the Congolese army officers reported that they had seen a vehicle behind an anthill. They were invited to see the vehicle and he recognized the vehicle as his, used by his son and Shadrack Kalenga. He observed that the Zambian number plates had been removed and replaced with Congolese number plates. The vehicle was driven to Mokambo border post. The Congolese soldiers went back to the bush but did not find anything useful. They were allowed to collect the vehicle and bring it back to Zambia.

On 2nd May, 1997, PW 1 went back to look for his son and the driver. He was accompanied by Zambia Police Officers and at the scene they found some Immigration Officers from Mansa. The Congolese soldiers suggested that they search the other side of the road not searched previous day and they went with some Immigration Officers. After a short while, the search party came back and reported to have found a body. PW1 went with the soldiers into the bush using his motor vehicle to the place where the body had been found and he identified the body as that of his son. A short distance from where his son's body was found, they also found the body of the driver. Both bodies were naked and the Congolese authorities allowed them to bring the bodies to Zambia.

PW 4 was Juliet Chilufya, the complainant in the third count of aggravated robbery. She testified that she lives in Chingola. On 1st May, 1997, she was on her way to Mansa. She was given a lift in a land cruiser in Mufulira and they were three women and two men in the vehicle. As they were driving on the Pedicle road, they were stopped by one man whom the driver recognized. As the driver was exchanging greetings with this man, four men sprung up from the bush, one armed with a gun and the other three with knives. These people wanted to grab the vehicle keys but the driver resisted. The man armed with a gun fired in the air and the driver surrendered the keys. When they got the keys, they ordered all those in the vehicle to come out and they were taken into the bush while the men who had stopped the vehicle jumped into the vehicle and drove it into the bush. In the bush, the four men were joined by the man who had driven the vehicle away and the women were then raped. After raping the women, they were told to stand up. One of the men then stabbed the other man they came with in the vehicle. On seeing this, PW4 shouted but she was kicked in the pubic hair area and she lost consciousness. At this stage, they had been with the assailants for about two hours. When she was asked her relationship with the driver and whether they stayed together in Mufulira, she told them that there was no relationship and that she came from Chingola. The men did not believe her and one of them proposed that they break one of her fingers to get the truth and one of them broke her fourth finger. They assaulted her and raped her again after which she was told to run threatening to tear her vagina if she did not run. She started running. At that time, she was naked and bleeding from her vagina. She walked in great pain and it was not long, then it became dark. When she left the scene, she did not see her friends. When it became dark, she slept by a log. The following day, she continued walking not knowing where she was as it was in the bush. After walking for a long time, around 1400 hours she came to a road and she sat by a tree. As she sat under a tree, there came a woman from whom she asked for a chitenge to wrap herself in and she also inquired where she was and she was told that she was in Mufulira. She asked this woman to escort her to the Police Station, the woman refused, but only gave her directions and she walked up to Kamuchanga Police Station where she reported the matter. She was then taken to Kamuchanga Hospital

where she was treated. After treatment, she went back to the Police Station where she was told that Police had apprehended two men who may be involved. She later attended an identification parade where she identified the 1st appellant as one of the robbers. She further testified that she attended two other identification parades where she identified the other two appellants. PW 4, further told the court that the 1st appellant was the one who stabbed the man in the bush and the 2nd appellant was the one who proposed that they should kill them so that they do not recognize them and he is the one who broke her finger. The 3rd appellant was the man who stopped the vehicle and drove it away after they were ordered to come out of the vehicle.

It must be put on record that this witness also identified the fourth person who died before the trial commenced. PW9 was D/Sgt. Banda, the investigating officer. His evidence was to the effect that on 7th May, 1997, he received three dockets: two for murder and the one for aggravated robbery. The offences were alleged to have been committed on the Pedicle road. The murder dockets involved Kenneth Chibwe and Shadrack Kalenga as the deceased and in the aggravated robbery case, the complainant was Juliet Chilufya. In the course of his investigations, he came across some information that the person involved in the crimes was Kaputula Mulenga (the person who died before trial) and his three friends who were in Congo. He approached the Congolese Officer-in-charge of the army at Mokambo who promised to help them. On 8th May, 1997, he got a report that the said Kaputula Mulenga had been apprehended and he went to Mokambo and brought Kaputula Mulenga to Zambia and upon interrogating him, Kaputula Mulenga confessed involvement in the crimes together with the three appellants now. Kaputula Mulenga revealed that the 1st appellant had gone into hiding in Kasumbalesa in Congo and on 10th May, 1997, he led PW9 and other Police Officers, together with some Congolese soldiers to Kasumbalesa. As they were driving towards the Army Offices in Kasumbalesa, Kaputula spotted the 1st appellant and the 1st appellant was apprehended and brought to Zambia. Before being brought to Zambia, 1st appellant was interviewed over the matters and he admitted his involvement that he was involved with another Zambian by the name of Davy but did not know where this Davy was. He further said that the clothes stolen from one of the deceased were with him in Lubumbashi and that the clothes stolen from the driver were left in the bush where the crime was committed. The following day he led the Police Officers to Lubumbashi. But they did not find Saji another suspect who was seen with the 1st appellant's wife and they were said to have gone to Kisangani. PW 9, the other Police Officers, and 1st appellant and Kaputula returned to Zambia on 12th May, 1997. In the afternoon of that day, the 1st appellant and Kaputula led PW 9, PW 8 and other Police Officers to the scene of the crimes on Pedicle road in Congo.

At the scene, the 1st appellant showed the officers the positions of where the motor vehicle keys were hidden but on search nothing was found, but only some torn pieces of paper which upon being pasted together showed that they were invoices for AMC Contractors. At the scene were also recovered clothes worn by the deceased, Shadrack Kalenga, and they were later identified by his young brother PW 3. While at the scene, necessary photographs were taken by PW 8, scenes of crimes officer. After this, the 1st appellant and Kaputula were arrested for the subject offences. After one week, PW 9, received some information from the Congolese Army that Edward Chishimba, the 2nd appellant, had been apprehended and he went there and brought the 2nd appellant to Zambia. The 2nd appellant volunteered to show PW 9 the scene of the crimes and when PW 9 wanted the 2nd appellant to show him the scene, the Congolese soldiers refused to allow them to go and threatened to kill the 2nd appellant. As a result, the 2nd appellant did not show them the scene. PW 9, further told the court that on receipt of further information, he apprehended the 3rd appellant, Davy Chanda Musonda, in Kitwe and the 3rd appellant admitted that he was one of the people he was with when the offences were committed. The three appellants, together with Kaputula Mulenga (deceased), were then jointly charged with the subject offences and on being warned and cautioned they all denied the offences.

There is further prosecution evidence that PW 7, D/Chief Inspector in the Zambia Police, conducted three identification parades. At the first parade, the suspects were 1st appellant

and the deceased Kaputula and the single identifying witness, Juliet Chilufya, PW 4, identified both of them. On the second identification parade, the 2nd appellant was the only suspect and PW 4 identified him. The third identification parade involved the third appellant and PW 4 also identified him.

At the close of the prosecution case, the appellants were put on their defence and they all elected to give evidence on oath. In his defence, the 1st appellant told the court that he is a marketeer in Lubumbashi and that he was never near the scene of the crime. He denied being involved. He told the court that he was apprehended in Lubumbashi on 13th May, 1997, and brought to Zambia. In the vehicle that the Police used was one man in handcuffs who they say pointed him out to the Police that he was involved in the crimes. He said that PW4 identified him at the parade because she saw him at the Police Station before the parade. He denied leading the Police to the scene of crime but that they were led to the scene by one Walubita.

The 2nd appellant also denied involvement in the crimes. He told the court that on 1st May 1997, he was at St. Joseph Catholic Parish Church where there was a football match. At about 1700 hours, as he was going home, he heard that PW 1's son had been killed. He said it was the same day that Kabila's soldiers took over the town. On 2nd May 1997, he saw a motor vehicle from Zambia which came and collected two bodies. After about two to three weeks, he had gone to his maize field and on his return he found no one at home and was informed that his wife had been taken by Kabila's soldiers and he followed her and when he found her, he was told that Police were looking for him and that he would be picked by Zambia Police the following day. The following day he was picked by Zambia Police and brought to Mufulira where he was accused of killing Chibwe and his driver. He denied this accusation. He said that although PW 4 identified him at an identification parade, it was a mistake that he took part in the crimes. He denied that he is the one that broke PW 4's finger. The 3rd appellant also denied taking part in the crimes. He talked more of how he was apprehended on 29th June, 1997. He accused the police of having taken his sewing machine, one mattress and a radio cassette.

The learned trial judge, after evaluating the evidence, found as a fact that the two murders and the robbery were committed and that there was only one witness, PW 4, to the crimes. The learned trial judge properly guided himself on the law regarding single identifying witness; and the danger of honest mistake of identification, particularly where the person was not previously known. The question is not of honesty, but reliability. The learned judge considered the circumstances under which the crimes were committed and the length of time the witness was with the attackers. He was satisfied that PW 4 had ample opportunity to observe the assailants and that her evidence was reliable and accepted her evidence on identification.

The appeal is founded on two grounds, namely lack of jurisdiction of the Zambian criminal courts over the 1st and 2nd appellants on the allegation that they were non-Zambians and the crimes were alleged to have been wholly committed in Congo D.R. The second ground was founded on evidence of a single witness.

In arguing the first ground of appeal, Mr. Mwansa for the appellants, submitted that the 1st and 2nd appellants are not amenable to the Zambian Criminal Jurisdiction as they are Congolese and the crimes were committed in the Congo D.R. Reference was made to Section 6 (1) of the Penal Code, Cap. 87. The objection to jurisdiction should have been raised at the start of the trial so that the learned judge could have made an inquiry into the claim by the 1st and 2nd appellants. As it is now, it is raised when there is no evidence on record to prove that the two appellants are non-Zambians. The appellants themselves in their evidence in court never alleged that they were not Zambians. The fact that they were apprehended in the Congo is not sufficient to found the objection of jurisdiction. We agree with the authorities referred to us by Mr. Mwansa that criminal law is of territorial effect at Common Law unless

modified by Statute. In agreeing with this general statement of the law, we bear in mind the obiter dictum of Lord Griffiths in the Privy Council decision in the case of *Somchai Liangsiriprasert v Government of the United States of America (1)*, at page 251 where he states: -

"Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and Common Law must face this new reality".

We note that the case of *Liangsiriprasert* was concerned with the crime of conspiracy, but the obiter dictum of Lord Griffiths cannot be ignored in this case.

We did indicate earlier in our judgment that we did endeavour to see if there was any Treaty or Agreement between Zambia and the Congo over the use of the Pedicle. Our search has revealed that there is no Treaty or Agreement between the two countries. What is obtaining is comity between the two countries. The records from the National Archives do give some background on this relationship. The records show that previously the Belgian Congo used to charge a toll fee for both motor vehicles and people using the Pedicle road from the then Northern Province (now Luapula), to the then Western Province (now Copperbelt) using the pedicle road and this road was essential to Northern Rhodesia (Zambia), as it was the shortest link between the two provinces. Even as early as 1946, the question of maintenance of this road was a problem because the Belgian Congo government did not see the importance of the road, but at the same time could not give it to Northern Rhodesia. However, in view of the importance of this road to Northern Rhodesia, the two countries agreed on an annual payment by the Northern Rhodesia government to Belgian Congo for the maintenance of the road and the toll fees were abolished. As of now, the Zambian government maintains the road and it is because of this arrangement that AMC Contractors were awarded a contract by the Zambian National Roads Board to work on the road and the two deceased persons left Mufulira on that fateful day to check on the progress of the road. The two deceased persons were Zambians and the victim of the aggravated robbery charge is a Zambian. It is with these sets of factors in the background that we feel the dictum of Lord Griffiths is useful. These are also factors that the learned trial judge would have taken into account when considering the question of jurisdiction, if the same were raised at the trial stage. Evidence could have been led on the issue of nationality of the appellants. The objection has come too late in the day on which this appellate court could do nothing, because, even the appellants themselves, never raised the issue of nationality in their evidence. This is, it seems, an afterthought objection.

The appellants are Zambians and although the offence was committed out of Zambia, the Penal Code applies to the appellants by virtue of Section 6 (1) of the Penal Code. The defence based on lack of jurisdiction of the Zambian criminal courts cannot succeed in this matter and it is dismissed. The second ground of appeal although was indicated to be based on single identification witness, was cast wider to include dereliction of duty by the Police to investigate the alibi of the 2nd appellant and the admission of the evidence on the Police being led to the scene of the crimes. In arguing this ground, it was submitted that the learned trial judge misdirected himself in convicting the appellants on unsupported evidence of a single witness whose total evidence was not properly evaluated. It was argued that the witness should not have been believed that she walked a distance of over 40 kilometres from the direction of Mokambo and reported to Kamuchanga Police Station, which is in the opposite direction of Mufulira as one comes from Kitwe. It was submitted that evidence of PW4, although moving, was not believable taking into account that she was traumatized, and brutally assaulted. To support his submission, Mr Mwansa referred us to the cases of *Amenda v The People (2)*; *Phiri v The People (3)*. Mr Mwansa further submitted that the evidence of the appellant leading the Police to the scene of crime should not have been considered as it was not clear as to who actually did the leading and in support, the case of *Chola v The People (4)*, was relied on. Finally, it was argued that there was dereliction of duty by the Police is not investigating the alibi of the 2nd appellant.

In reply, Mr. Mchenga, for the State, supported the convictions. He submitted that the learned trial judge warned himself of the danger of convicting on a single identifying witness and in doing so he analysed the evidence of the witness in detail taking into account the time it took for the crimes to be committed and what was actually done to her. It was submitted that the learned trial judge correctly directed himself and came to the conclusion that the possibility of an honest mistake had been eliminated. It was also argued that the evidence of PW 8 and 9, that the 1st appellant led the Police to the scene where some torn invoices were recovered and when reconstructed, showed that they belonged to AMC Contractors and were in the vehicle before the crimes were committed and clothes worn by the deceased Shadrack Kalenga before the crimes were recovered from the scene, corroborated the evidence of PW 4.

We have considered the arguments advanced in this second ground of appeal. It is settled law that a court is competent to convict on a single identifying witness provided the possibility of an honest mistaken identity is eliminated. We have considered the evidence of the single identifying witness, PW 4, from her position in the vehicle and when they were flagged down by someone along the pedicle road. We agree that once the vehicle was grabbed from them and they were led into the bush, the witness and others were brutally traumatized. She was physically assaulted and then raped and became unconscious, but before that, she witnessed the killing of Kenneth Chibwe, by the 1st appellant. She further narrated that from the time the motor vehicle was grabbed from them and when she lost consciousness after being assaulted, about two hours elapsed and all the five attackers were present. She further told the court that the 3rd appellant was known by the driver of the motor vehicle, that is the man who flagged the vehicle and who drove the vehicle after they were ordered to jump out of the vehicle and the four armed men who joined him whilst he was talking to the driver. It was during these two hours that the two women she was with and herself were raped. This was in the morning around 1000 hours and she saw the 1st appellant stab Kenneth Chibwe and when she screamed she was hit in the groin and she fainted. When she came round, she was only with two of the attackers, the 1st appellant and the one who died before trial, but whom she identified at an identification parade. She identified the 2nd appellant as the one who broke her finger to force her to admit that she was related to Shadrack Kalenga, the deceased driver. She identified the 3rd appellant as the one who flagged them down and who later drove the vehicle into the bush after they were told to jump off the vehicle. All these happenings clearly show that the witness was with the attackers for a long time and during broad daylight. From the evidence we are satisfied, as the learned trial judge was, that the witness had good opportunity to observe the attackers and she saw what each of them did. The possibility of mistaken, but honest identity is eliminated. The court correctly found the appellants guilty of the three counts as charged and we see no merits in the appeals and they are dismissed.

Appeal dismissed