IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

Appeal No. 153/2015
154/2015
155/2015
156/2015
157/2015

B E T W E E N :

HUMPHREY MASAUSO PHIRI	**1ST APPELLANT**
RICHARD PHIRI	**2ND APPELLANT**
DAVISON PHIRI	**3RD APPELLANT**
JONATHAN BANDA	**4TH APPELLANT**
JAMES PHIRI THAULO	**5TH APPELLANT**

v.

THE PEOPLE	**RESPONDENT**

Coram: **Phiri, Muyovwe and Malila, JJS**
On 5th April, 2016 and 12th July, 2016

For the Appellants: Mr. H. Mweemba, Legal Aid Counsel – Legal Aid Board
For the Respondent: Mrs. M. B. Nawa, Deputy Chief State Advocate – National Prosecutions Authority

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J U D G M E N T

Malila, JS delivered the judgment of the court.

Cases referred to:

1. *David Zulu v. The People (1977) ZR 151*
2. *Crispin Soondo v. The People (1981) ZR 302*

3. *Bwalya v. The People (1975) ZR 291(reprint)*
4. *Woolmington v. DPP (1935-462)*
5. *Naweji v. The People (1981) SCZ Judgment (unreported)*
6. *Saidi Banda v. The People (Selected Judgment No. 30 of 2015)*
7. *P.L. Taylor and Others v. R (21 Cr. App R20 at page 21)*

The five prisoners (now appellants), were convicted by the Chipata High Court for the offences of murder and aggravated robbery contrary to sections 200 and 294(2) respectively, of the Penal Code, chapter 87 of the Laws of Zambia.

The particulars of the offences were that the five appellants on the 17th November, 2008 at Petauke in the Petauke District of the Eastern Province of the Republic of Zambia, jointly and whilst acting together, did murder Simeon Phiri (the deceased). It was further alleged that the five on the same day, and at the same place, jointly and whilst acting together and whilst armed with a firearm did steal from Cecilia Banda the deceased's wife, the sum of K1,200,000.00 (at the time), the property of the said Cecilia Banda, and that at, or immediately before the time of stealing, did use or threaten actual violence to the said Cecilia Banda in order to obtain or overcome resistance to the said property being stolen.

A summary of the prosecution's case as narrated by eight witnesses was that on the night of the 17th November 2008, the deceased and his wife were asleep when a knock was heard on their door. The deceased got off his bed to check on who was knocking. No sooner had he opened the door than were two gun shots heard. The deceased had been shot. The deceased's wife went to the door and found the deceased lying dead. One of the assailants demanded money from her and threatened to kill her also if she did not produce it. She crawled back into the house, got money from a bag and handed it over. She did not see or clearly notice the person she handed the money to. A while later she went outside only to find the thatched house of one of her children, Cosmas Mwale, on fire and there was no one near the scene of the fire. She later saw herds boy, Manzanzo, whom she told about the shooting. He in turn went to Chikalaba Village to inform the villagers.

Cosmas Mwale meanwhile reported the incident to Petauke Police Station who later came to the scene. Ten (10) empty cartridges were picked from the scene.

Earlier on, following the gunshots, PW3, Emmanuel Mwale, went into the direction of his parent's house and heard someone he recognized as Davison Phiri, the third appellant, demanding money.

On her way to draw water on the 20th November, 2008, PW4 Mary Phiri, happened to have passed through a tavern. She found her brother, Richard Phiri, the second appellant, arguing with Humphrey Masauso Phiri, the first appellant, over sharing some money.

The critical evidence of the prosecution that connected the appellants to the crimes was that of PW3, Emmanuel Mwale and PW4, Mary Phiri. The former testified that he heard someone demanding money from his mother in the aftermath of the shooting. He recognized the voice as belonging to Davison Phiri, the third appellant, whom he had known and interacted with regularly. Davison Zulu had a distinct Mozambican accent. Mary Phiri on the other hand found the first and second appellants arguing about how to share some money between them. There was also the evidence of Isaac Mwale, PW5, a village headman. He testified that he met the first and second appellants at a tavern owned by

Chizola. During the meeting, the second appellant narrated how he broke into two other peoples' houses and stole therefrom and how they were planning one other robbery. This prompted PW5 with the help of one other person to report the matter to the police. The police then came and apprehended the first and second appellants on suspicion that they committed the crimes subject of the present appeal.

There was also evidence by PW7, Detective Inspector Sikalumbi Chisanga, who apprehended James 'Renamo' Phiri after a tip off from members of the public. When interviewed, James 'Renamo' Phiri revealed that the gun which was used to kill the deceased was in the hands of his friend Jonathan Banda. The latter led the police to the recovery of an AK 47 rifle with an empty magazine about fifty metres from his house. This firearm was submitted to the Ballistic Expert, Matilda Busiku, who was PW6. Her analysis of the firearm and the empty cartridges found at the scene of the shooting confirmed that the cartridges were fired from the AK 47 rifle recovered from the fourth appellant with the help of the fifth appellant.

The appellants gave sworn evidence on their own behalf and did not call any other witnesses. They denied any involvement in the two crimes for which they stood charged and narrated their past criminal records and how they were arrested in connection with the offences for which they were convicted and prompting the present appeal.

At the close of the trial, the learned trial judge found that the evidence before him was entirely circumstantial. He, however, found that all the appellants had been so materially linked to the crime by the strong and compelling circumstantial evidence that the conclusion was inevitable that they were guilty beyond reasonable doubt, of the offences for which they stood charged. He, accordingly, convicted them of murder and aggravated robbery and sentenced them to death. Unhappy with the judgment of the trial court the appellants appealed (each took out a notice of intention to appeal.)

At the hearing of the appeal, we allowed Mr. Mweemba's application to file the lone ground of appeal and heads of argument out of time. This followed an intimation of no objection from Mrs.

Nawa, learned Deputy Chief State Advocate. The one ground of appeal reads as follows:

> **"The learned judge in the court below erred both in law and fact and misdirected itself by convicting the appellants on circumstantial evidence that would raise several inferences other than that of guilty** (sic!)."

Mr. Mweemba indicated that he would rely on the filed heads of argument which he was to augment with brief oral submissions. In his written heads of argument, Mr. Mweemba began by quoting our *dictum* in the case of **David Zulu v. The People**[1] regarding the weakness peculiar to circumstantial evidence and the need for trial courts to exercise caution and circumspection when dealing with such evidence.

The thrust of Mr. Mweemba's argument before us was that it was wrong for the learned trial judge to have found that merely because the appellants may have somewhere along the way, lied in some respects, they were guilty of the offences for which they were convicted. He quoted the case of **Crispin Soondo v. The People**[2] and that of **Bwalya v. The People**[3]. In the former case, the court observed that:

> **"Even if an *alibi* was a deliberate lie on the part of the appellant the inference cannot be drawn that he did it because he had been involved in the offence. A man charged with an offence may well seek to exculpate himself on a dishonest basis even though he was not involved in the offence."**

According to the learned counsel, the learned trial judge should have convincingly justified the inference of guilt which he drew from the circumstantial evidence before him. He did not. The learned counsel submitted that the evidence against the first, second and third appellants, was too remote to invite an inference of guilt. Furthermore, according to Mr. Mweemba, evidence of the gun allegedly used in the commission of the alleged crime left much to be desired in that it was linked to the murder and aggravated robbery only remotely leaving room for many other inferences other than the guilt of the appellants.

In supplementing his written arguments, Mr. Mweemba narrowed his observations to the evidence of specific witnesses. In his view, the first two prosecution witnesses did not give any evidence that connected the appellants to the crimes. PW4, according to Mr. Mweemba, gave evidence that sought to connect the appellants to the crimes. The judge in the court below made a

specific finding in his judgment at page 150 of the record of appeal that the evidence of PW4 linked the first appellant to the crimes. Yet, according to Mr. Mweemba, the evidence of the first appellant sharing the money came from PW7 who was the arresting officer and is not on record as having been given by PW4.

The learned counsel also submitted that the evidence of PW5 was not useful as it related to two of the appellants causing trouble for each other over cigarettes. There was also a narration regarding other theft and robberies that occurred elsewhere or were being planned which narration was irrelevant.

Mr. Mweemba also raised a number of other issues regarding the evidence of the prosecution witnesses to support the general position that he took that the evidence did not sufficiently connect the appellants to the crimes for which they stood charged and were convicted. We were urged to uphold the appeal.

Mrs. Nawa, was equally allowed to submit her written heads of argument late. She intimated that the State did not support the conviction of the first and second appellants. In her written heads

of argument, she submitted that not all evidence that implicates an accused person can secure a conviction. She referred us to the case of **Woolmington v. DPP**[4].

The learned counsel started her explanation of the position she took with the situation of the first and second appellants by asking herself the question what evidence implicated the duo; and whether such evidence proved the two prisoners' guilt beyond reasonable doubt. According to Mrs. Nawa, the evidence that implicates the first and second appellants was that given by PW4 who testified that she heard the two arguing over money and that the sharing of it was not equitable. PW4 stated that she did not hear from the conversation between the two where the money, subject of the sharing, was from, and yet, the learned trial judge at J15 (lines 18-19) used this as a basis for convicting them, having assumed that the money was from the robbery and killing of a person; and that the deceased was the only one robbed and killed in the area some two days previously. The learned counsel for the respondent further pointed out that the testimony of PW4, does not show that she ever stated that the first and second appellants were

arguing about money they had robbed after killing someone in the area. According to Mrs. Nawa, the reason for the judge's conviction of the first and second appellants was flawed and cannot be relied upon.

The learned trial judge also took into account the testimony of Isaac Mwale, the village headman, to the effect that in his discussion with the first and second appellants, they narrated to him how the second appellant was planning to stage other robberies. This too, according to Mrs. Nawa, was a wrong premise to base a conviction on, as it connected some of the appellants to things not related to the charges the appellants were facing. It was for these reasons, according to Mrs. Nawa, that the State did not support the conviction of the first and second appellants.

As regards the third, fourth and fifth appellants, Mrs. Nawa submitted that there was overwhelming circumstantial evidence to support their convictions. That circumstantial evidence, according to the learned Deputy Chief State Advocate, safely took the case out of the realm of conjecture and attained a degree of cogency as envisaged in the case of **Naweji v. The People**[5]. It was Mrs. Nawa's

further contention that the trial court appropriately warned itself of the nature of circumstantial evidence as we stated in **David Zulu v. The People**[1] and proceeded to evaluate that circumstantial evidence before convicting the three appellants. Mrs. Nawa, specified the circumstances that justified the conviction of the third, fourth and fifth appellants as follows: PW3, Emmanuel Mwale, testified as regards the third appellant that he demanded money and PW3 heard him make the demand given that he knew his voice which had a peculiar accent of a mixture of Nyanja and a dialect of a Mozambican language. PW3 claimed that he knew the third appellant fairly well for about a year and that they used to drink together. According to Mrs. Nawa, the evidence of PW3 was reliable and that in the circumstances voice identification of the third appellant was sufficient to prove the case beyond reasonable doubt.

The fourth and fifth appellants were, according to Mrs. Nawa, implicated by the evidence of the Ballistic Officer and the Arresting Officer. She submitted that the fifth appellant led the police to the fourth appellant who in turn led the police to the recovery of the gun. It was, according to Mrs. Nawa, an odd coincidence and very

strong evidence against the fourth and fifth appellants, and their conviction was, therefore, legally sound. We were urged to uphold the conviction and sentence of the third, fourth and fifth appellants.

We have carefully considered the evidence on record, the judgment of the trial court as well as the arguments of the parties' respective learned counsel relative to the solitary ground of appeal.

We must begin by stating what we have stated many times before, namely that the fact that the State does not support a conviction on appeal because they agree with the grievances that have been raised against the trial judge, or indeed for any other reason, does not, without more, entitle the appellant to an acquittal. We are obliged to review the evidence on record and assess the judgment of the lower court against such evidence to ascertain whether the allegations of error or misdirection on the part of the lower court, are indeed justifiable. While we appreciate the position taken by the State in this matter, we have nonetheless to make our own assessment to come to a judicious position.

It is common cause that the evidence in the present case is substantially circumstantial. None of the prosecution's eight witnesses testified to positively seeing the appellants or any of them commit the criminal acts. The learned trial judge quite correctly warned himself of the dangers of convicting on circumstantial evidence. He, as a matter of fact, reproduced our often cited *dictum* in **David Zulu v. The People**[1] regarding the dangers of relying on circumstantial evidence.

We have repeatedly stated that in order to convict on the basis of circumstantial evidence, the evidence must be such that no other inference may be drawn other than that of the prisoner's guilt (inculpatory facts must be incompatible with the innocence of the accused person and must be incapable of explanation upon any other hypothesis than that of the guilt of the accused). In the case of **Saidi Banda v. The People**[6] we cited with approval the statement of Lord Heward, Chief Justice of England in **P.L. Taylor and Others v. R**[7] where at page 21 he stated that:

> **"It has been said that the evidence against the applicants is circumstantial; so it is but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by**

undesigned coincidences, is capable of proving a proposition with the accuracy of mathematics."

We explained in the **Saidi Banda**(6) case that where the prosecution's case depends wholly or in part on circumstantial evidence, the court is, in effect being called upon to reason in a staged approach. In this regard, the court ought, as a matter of course, to first find that the prosecution evidence has established certain basic facts. Those facts do not have to be proved beyond reasonable doubt. Therefore, taken by themselves, those facts cannot prove the guilt of the accused person. Next, the court should then infer or conclude from those basic facts or a combination of them, that a further fact or facts exist. The court should then satisfy itself that, that further fact or facts implicate the accused person in a manner that points to nothing else but the guilt of the accused person. As we stated in the **Saidi Banda**(6) case:

"drawing conclusions from one set of established facts to find that another fact or facts are proved, clearly involves a logical rational process of reasoning. It is not a matter of casting any onus on the accused person, but a conclusion of guilt a court is entitled to draw from the weight of circumstantial evidence adduced before it."

In the present case therefore, we have to ascertain whether the learned trial judge did employ the reasoning we have explained earlier on, and whether the test which we have already alluded to, namely, that the circumstances from which the inference of guilt was drawn was cogently and firmly established and whether the circumstances taken cumulatively formed a complete chain that the conclusion is inevitable, that within all human probability the crimes were committed by the appellants and no one else.

A perusal of the judgment of the learned trial judge shows that the judge's approach except in two or three instances, avoided, entirely, making any findings of fact. It is difficult, therefore, to see what facts the learned judge found as proved on a lower standard and upon which he had to make an inference of further facts pointing to the guilt of the appellants.

What we discern from the evidence on record, however, is the following: the deceased and his wife were attacked by a group of armed men on the material day. The deceased was shot twice by a firearm and died in the process. Under threats of violence, one of the assailants demanded money from the deceased's wife soon after

the shooting. The deceased's wife handed the assailant K1,200,000.00 (non-rebased) in response. The third appellant was heard by PW1 and PW3 demanding for money from PW1. The assailants intended to cause the death of, or grievous bodily harm to the deceased when they shot. Spent cartridges were found at the scene of the shooting. These were subject to ballistic examination.

In the course of investigations the police were alerted by a member of the public that James 'Renamo' Phiri, who is the fifth appellant brought the firearm that was used in the murder and aggravated robbery into Zambia from Mozambique. James 'Renamo' Phiri revealed that the gun used to kill the deceased was in the possession of Jonathan Banda, the fourth appellant, who led the police to the recovery of an AK 47 rifle about fifty metres from his house. An examination of the firearm and the empty cartridges by a ballistic expert confirmed that the spent cartridges that were found on the scene of the shooting were, in fact, fired from the AK 47 rifle that the police recovered. These, in our view, are basic facts that were established by the prosecution evidence. On the basis of these facts, further inferences should be made, which inferences

materially connect the appellants and make their guilt an inescapable inference.

PW3, Cosmas Mwale, claims to have heard the third appellant demand money from the deceased's wife on the material day. His accent which blended Nyanja and a foreign language gave him away.

The further facts that could be inferred were these. The firearm that was used to stage the murder and the robbery was known by the fifth appellant to have been in the fourth appellant's possession. The fourth appellant led the police to the recovery of the AK 47 rifle, which in turn was proved by a ballistic expert to be the one from which the empty cartridges found at the crime scene were discharged.

The normal inference to make on the evidence is that the fourth appellant and the fifth appellant knew about the whereabouts of the gun that was used to commit the crimes. Clear evidence of where the gun was, was furnished to the police. This

knowledge cannot be explained on any other hypothesis than that the, duo were involved in the crimes as principle participants or as accessories.

As regards the third appellant, evidence that he was heard demanding for money came from PW3. This placed the third appellant at the scene of the crime. The only logical inference to be drawn from his presence at the crime scene is that he was a participant in the commission of the two crimes.

Concerning the first and second appellants, the evidence connecting them to the crime came from PW4, who is said to have heard them quarrelling about sharing some money. There was also evidence from the village headman, PW5 who heard them make incriminatory statements about other crimes that they may have been involved in or were planning, but nothing connecting them to the crime for which they were convicted.

In our considered view, the circumstantial evidence in respect of the first and second appellant was not sufficiently compelling as to justify an inference of guilt on their part for the offences for

which they stood charged. In this regard, we agree with Mrs. Nawa, that the learned trial judge's basis for convicting the first and second appellants was wrong. The circumstantial evidence was not cogent enough to lead to only one conclusion that the money they were haggling over was from the robbery that occurred some two days earlier and that, therefore, they were participants in the crimes. We also agree with Mr. Mweemba, that their quarrel over sharing money, whose source PW4 testified she did not hear them mention, left open other inferences as to where such money may have been sourced, and by extension, their connection to the crimes.

For the reasons we have given, we are inclined to confirm the conviction and sentence of the third, fourth and fifth appellants. Their appeal fails. We uphold the first and second appellants' appeal and acquit them forthwith.

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G. S. Phiri
SUPREME COURT JUDGE

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E. C. N. Muyovwe
SUPREME COURT JUDGE

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M. Malila, SC
SUPREME COURT JUDGE