

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Criminal Jurisdiction)

APPEAL NO.57/2018

BETWEEN

CHANDA MULENGA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: CHASHI, LENGALENGA AND SIAVWAPA, JJA

On 21st August and 22nd November 2018

FOR THE APPELLANT: MISS M. MARABESA MWENYA, LEGAL AID
COUNSEL

FOR THE RESPONDENT: MISS C. SOKO, DEPUTY- CHIEF STATE
ADVOCATE

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. David Zulu v the People (1977) ZR 151

The Appellant was convicted of one count of Murder and sentenced to death. The undisputed facts of the case are that on the material date, the Appellant had booked the deceased, who was a taxi driver to take him to Chainda compound where he lived. This was late in

the night of 3rd October 2015. In the same night, the Appellant went to PW2's house and reported that he had been attacked. He showed PW2 a wound in his right palm allegedly caused by a knife. The Appellant then, in the company of PW2, went to report the matter to the police.

Thereafter, he in the company of PW2 and another went to the scene where they found the taxi which he had hired. The car was then driven to the police station on the instruction of the police. Later the Appellant went back to the scene in the company of police officers where the body of the deceased was found near the road covered with dry grass. Blood stains were found on the driver's seat and a knife in the back seat of the taxi.

The evidence before the court below was that PW1, a taxi driver who used to operate from town, lent the car he used to drive, Registration Number 7741, a Toyota Sprinter, to the deceased at a place called Break Point in Kabwata. This was in order to help the deceased to raise K100.00 while he watched football.

After the football match he went home and slept. The following morning, he went to the place where he used to park the car but he did not find it. He then called a person called Richard who confirmed seeing the deceased the previous night. He went to Break Point where he found a person called Pilato who also confirmed seeing the deceased the previous night. Searches at several police

stations yielded no results. The following day, he went to inquire from the University Teaching Hospital (UTH) in the wards and at the police post where he was informed that an unidentified body was delivered the previous day from Simon Mwansa Kapwepwe police station. He was taken to the mortuary where he identified the deceased's body with blood stains on the head. He then went to Simon Mwansa Kapwepwe Police Station where he found the vehicle in issue and he gave a statement to the police on how he had handed the vehicle to the deceased on Saturday night.

In cross-examination he said that it was not right to carry another person when in a taxi already booked by another.

PW2's testimony was that on 4th October 2015 while asleep around 02:00 hours, he heard a loud knock at the door and a voice saying someone was being killed outside. He went to the sitting room and when he peeped through the window, he saw the Appellant.

He opened the door upon which the Appellant narrated how he had gone to the Inter-City Bus Station to collect money from his sister and how he had booked a taxi with two people. The Appellant told him that when he asked the driver to drop him at Chainda Market the driver instead drove even faster until they reached Meanwood where the driver and the other passenger robbed him of his money.

After the Appellant had narrated his ordeal, the two of them went to Kelvin Chola's house and asked him to accompany them to the police station where the Appellant reported the matter. The police officer at the reception informed them that they had no transport but he gave his phone number to the Appellant and told him to call him if he came across any relevant information.

On the way from the police station the Appellant said that he had left his bag at the scene and he asked the taxi driver who was driving them to drive to the scene where they saw a stationary car from a distance.

He called the police officer and informed him that they had located the taxi. The officer told them to drive the vehicle to the police station. Kelvin Chola and the Appellant got into the abandoned taxi while he remained in the hired taxi after which they drove both cars to the police station.

At the police station the police inspected the abandoned taxi and recovered a knife with blood stains and a wallet inside. Thereafter they drove to the scene in a police vehicle where the Appellant narrated to the police how the driver of the taxi tried to stab him but that he managed to escape as the other passenger and the driver engaged in a tussle.

The police started searching for clues from the scene until dawn when the deceased's body was found. Both the Appellant and the deceased were driven to the police station.

According to this witness, he knew the Appellant through his brother who had since re-located to the Copperbelt and also because he worked in the market with the Appellant. The Appellant told him that he had booked a taxi with two people inside and that he sat in the front passenger's seat with the other person sitting in the back seat. He said that he did not know the Appellant's sister from Kitwe.

PW3, another taxi driver just confirmed that PW1 handed the car he was driving to the deceased and that he left the taxi rank around 02:00 hours when he drove a customer to Makeni and never returned to the taxi rank.

The following day he heard how the deceased did not return home the previous night. After a search with friends they found the deceased's body in the mortuary at UTH. It was his testimony that he saw a stab wound at the back of the deceased's neck.

PW4, a police officer who visited the scene, saw stab wounds on the left chest and at the back of the neck. He took the body to the mortuary. At the police station he inspected the motor vehicle and saw that it had blood stains on the driver's seat and a knife was on

the back seat with blood stains. He also recovered a brown wallet in the front passenger's seat and a National Registration Card in the name of Jack Chishimba.

The Appellant's evidence before the lower court was that on 3rd October 2015, his sister Lesa Mulenga, phoned him and told him to go to Inter-City Bus Station to collect some money from her.

He went to the bus stop around 19:00 hours and waited until her sister arrived from Kitwe and gave him K720.00 after which she told him to book a taxi and go to Chainda. This was around 01 in the morning. He took a taxi from the rank for K100.00 after negotiating with the driver. He said that he sat in the front passenger's seat and along Bwinjimfumu road, the driver picked up another person.

He said that when they reached the point he was to drop off, he told the driver to stop but that he could see through the rear view mirror the passenger in the back seat shaking as he moved behind him and produced a black knife and tried to stab him while the vehicle was still moving. He then wrestled with him. The vehicle stopped and the driver came out and opened the back door and pulled him out.

The driver and the other man then starting wrestling after which the driver screamed that he had been stabbed and he fell down. It was at that point that he ran to PW2's house.

In cross-examination he said that the deceased did not know the person he had picked up along Bwinjimfumu road. He accused PW2 of lying in his testimony that he told him of what had happened. He further said that his testimony before court was different from what he had told his lawyer because he did not know that he needed to tell the lawyer the truth. He said that blood stains were on the back seat and that PW2 had lied about not knowing his sister. He concluded by stating that the driver and the other man did not attack him.

In her Judgement the learned trial Judge relied on the circumstantial evidence to found a conviction in the absence of direct evidence. After considering the case of *David Zulu v the People*¹ which warns of the inherent dangers of circumstantial evidence, the learned trial Judge found that PW2's evidence was more reliable as he had no reason to lie to the court in view of the finding of fact that the Appellant had given a different version to PW2 and the police officers from that he gave in court. The learned Judge also found it odd that the car was found lodged in the sand if the struggle was between the Appellant and the person in the back seat as testified by the Appellant. She concluded that had the fight been between the Appellant and a third person, the deceased would have managed to stop and park the car properly.

She concluded that the driver was the one attacked as a result of which he lost control and the vehicle veered off the road and lodged in the sand. The learned trial Judge also explained the two stab wounds on the deceased and the blood stains on the driver's seat as being consistent with the Appellant's position in the front passenger's seat as it placed him in a better position to inflict those wounds while the deceased was still in the driver's seat.

We have considered the arguments in support of the appeal which seek to assail the learned trial Judge for the reason that she should not have convicted with the doubt raised by the defence.

It was also submitted that the learned trial Judge should not have accepted the evidence given by the prosecution witnesses without commenting on their demeanour. The issue of there being two possible inferences was also raised namely, an attack by a third person and an attack by the Appellant.

In the alternative it was submitted that having found that there was a fight between the Appellant and the deceased, the learned trial Judge should have considered that as an extenuating circumstance.

In opposing the appeal, the Respondent has submitted that in convicting the Appellant, the learned trial Judge considered a couple of odd coincidences namely, why the Appellant's sister would

travel all the way from Kitwe by night to just give the Appellant K750 and why the Appellant would be at the bus stop from 19:00 hrs to 01:00 hour the following morning. It was also submitted that it was unusual that the Appellant, was attacked by two people but managed to flee as two people would have easily over powered one or if the third person was the aggressive one he and the driver would have over powered him.

On extenuation it was submitted that the evidence before the court below did not reveal any extenuating circumstances.

In her findings of fact, the learned trial Judge considered the several factors linking the Appellant to the commission of the offence as already noted in our Judgement.

In our view, the key factor is the undisputed fact that it was the Appellant who hired the deceased in the early hours of 4th October 2015 to driver him to Chainda. In short, he was the last person known to have been in the deceased's company before he died.

The Appellant is the one who led to the recovery of the car which was positively identified as the one the deceased was driving and his body was found concealed near the place the car was found.

The learned trial Judge also considered the positioning of the Appellant in the front passenger's seat and the location of the stab

wounds suffered by the deceased as only capable of being inflicted by the Appellant and not someone seated in the back seat.

There is no evidence that the third person attacked the deceased whilst in the car as the Appellant who was the only witness never said or alluded to that. His evidence is that the third person and the deceased only engaged in a tussle outside the car.

We also find that the Appellant's evidence that he saw the third person moving behind him through the rear back view mirror in the car is false because we take judicial notice of the fact that the incident took place at night when it is not possible to see what is happening in the back seat of a car through the back view mirror.

The learned trial Judge was justified in accepting the evidence adduced by PW2 who, as a friend to the Appellant, had no motivation to tender false evidence against him. Besides, there is nothing from his testimony that can be said to be implicating the Appellant. The learned trial Judge however, accepted PW2's testimony in view of the Appellant's admission that he had given a different account to PW2 and the police officer from his open court testimony.

That, in the Judgment of the court below, rendered PW2's testimony more credible than that of the Appellant and we accept the learned trial Judge's position in that regard.

Further, upon evaluating the evidence rendered by the Respondent the learned trial Judge found that it did not raise any reasonable doubt in her mind because she found her story odd and not reasonably possible.

Further, she found it puzzling how the sister, having heard that her brother, to whom she had travelled all the way by night to give some money had been arrested, would choose not to testify as a witness of the fact that she indeed travelled and gave him some money even when he was facing a capital offence.

That notwithstanding, the key issue is whether or not the circumstantial evidence before the trial court was such as to take the case out of the realm of conjecture with such degree of cogency as to permit only an inference of guilt as per the case of David Zulu v the People.

We agree with the learned trial Judge's finding on that score because having been with the deceased just before he died, and with the alleged third person not established, only the Appellant could have murdered the deceased. It is only the Appellant who is known to have had the opportunity to murder the deceased.

We are unable to see any other inference that could be drawn from the evidence because as the trial judge found, the story of a third person is mere fiction.

In any case, the learned trial Judge was entitled to dismiss the evidence of a third person because the testimonies of PW1 and PW3, both of whom are taxi drivers was to the effect that a taxi driver who is already booked by a customer would not pick up another passenger for safety more so in the night.

The Appellant's story therefore, flew in the teeth of what the taxi drivers said, more so that he maintained in his testimony that the deceased and the third person did not know each other. The said story could not reasonably be possible and the learned judge rejected it and rightly so.

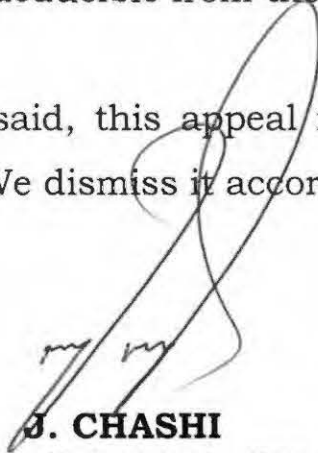
The knife wounds on the Appellant's palm also led to the learned trial Judge coming to the conclusion that the Appellant wrestled with the deceased for the knife. We therefore find no fault in the learned Judge's findings and her application of the law to find that the Appellant did murder the deceased.

On the issue of extenuation, due to a fight, the same was not established and neither did the Appellant raise it. The Appellant's testimony was that he was attacked by the fictitious third person and not the deceased.

His evidence at page 45 of the Record of Appeal is that the man in the back seat moved to where he sat and produced a knife at which point he struggled with him until the driver stopped the car and opened the back door and threw him out after which the third man started wrestling with deceased.

Clearly, no fight was suggested to have taken place between the Appellant and the deceased and as such, no extenuation may be considered if not raised or deducible from the Appellant's evidence.

In view of what we have said, this appeal must fail both against conviction and sentence. We dismiss it accordingly.



J. CHASHI
COURT OF APPEAL JUDGE



F. M. LENGALENGA
COURT OF APPEAL JUDGE



M. J. SIAVWAPA
COURT OF APPEAL JUDGE