

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

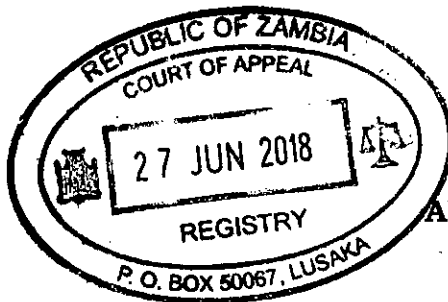
APPEAL NO. 192/2017

BETWEEN:

CHRISTOPHER ZIMBA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: CHASHI, SIAVWAPA AND NGULUBE, JJA

On 27th March 2018 and 26th June 2018

FOR THE APPELLANT:

**MR. H. M. MWEEMBA, PRINCIPAL LEGAL AID
COUNSEL WITH MRS. G. K. IMBWAEE OF DOVE
CHAMBERS**

FOR THE RESPONDENT:

**MR. K. WALUZIMBA, 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 (SC)**
- 2. *Woolmington v the Director of Public Prosecutions* (1935) AC1**
- 3. *Lumangwe Wakilaba v the People* (1979) ZR 74 (SC)**
- 4. *Mbinga Nyambe v the People* (2011) ZR 246 (SC)**
- 5. *Bwanausi v the People* (1976) ZR 103 (SC)**

6. *Kape v the People* (1977) ZR 192 (SC)

7. *Kezzy Ngulube v the People* (2009) ZR 91 (SC)

This is an appeal against both conviction and sentence arising out of a Judgment of the High Court delivered on 22nd February 2017 at Kabwe.

The Appellant, in this case, was jointly charged with murder and aggravated robbery along with two others. The other two were subsequently acquitted while he was found guilty and convicted in both counts and sentenced to death.

The facts before the court below were that on 24th November 2008, PW1 received information that her shop had been broken into and the guard on duty murdered. When she reached the scene, she saw a large crowd of people and observed that the doors of the shop were wide open. The body of the guard was also found lying within the premises.

The crime is believed to have been committed in the night of 23rd and 24th November 2008. One witness, PW6, testified that, one night, sometime towards the end of November 2008, around 20:00 hours, on his way home, he passed close to the shopping centre where PW1's shop was located and saw Kangwa and Alfe standing in an uncompleted building. The following morning he heard that the person who was guarding the shops had been killed.

There were also two witnesses PW3 and PW4 who testified that sometime in November 2008, the Appellant in the company of another, went to their stands at the market and sold them some chickens. In her evidence PW1 had indicated that among the items stolen from her shop were dressed chickens.

PW7 the arresting officer testified that after carrying out investigations he apprehended the Appellant who confessed and led to the apprehension of his co-accused. The Appellant however, contested the confession and a trial within trial was opened but the state abandoned it mid-stream.

In his Judgment the learned trial Judge found that the Appellant was guilty of both counts on the basis of the evidence tendered by PW3 and PW4, the two women who allegedly bought chickens from him and some aspects of PW7's testimony of what he had learnt from the Appellant.

The Appellant raised one ground of appeal that;

“The learned Judge in the court below erred both in law and in fact when he convicted on circumstantial evidence which did not lead to the only inference of guilty”.

It is not in dispute that the evidence before the lower court was wholly circumstantial as none of the witnesses was at the scene

“The point to note is that PW7’s testimony has certain aspects of what he learned from A3 (Appellant) in the course of the interview, which aspects were received in evidence without any objection from the defence and formed part of the record”.

The Appellant referred us to the case of Lumangwe Wakilaba v the People³ in which the Supreme Court of Zambia held that;

1. ***“It is the duty of the court to inquire where a point is reached at which a witness is about to depose as to the contents of a statement, whether the defence has any objections to that evidence being led”.***
- 2 ***“It was mandatory for the trial Magistrate after the issue of voluntariness had been raised to conduct a trial within a trial notwithstanding that the prosecution had already closed its case”.***

The Appellant has also argued that since he was apprehended for a different offence, it was unusual for him to confess an offence other than the one he had been apprehended for in the absence of torture.

It is accordingly submitted that since the defence Counsel in this case went to sleep and failed to object to the evidence of confession

being placed on the record, the learned trial Judge had a duty to ask the defence if they had any objection to the evidence.

We note that the state did not support the conviction and as such we relied on the record.

Having considered the record of appeal and the arguments advanced in support of the sole ground of appeal, we note that only the evidence of PW3 and PW4 was relevant in the court below for providing some kind of a link between the Appellant and the commission of the two offences he was charged with.

The evidence of PW7, was only relevant in so far as it sought to reply on the alleged confession by the Appellant. In his Judgment at page 124 line one of the record of the appeal, the learned Judge poses the question;

“Who murdered Banwell Phiri and carried out the aggravated robber?”

This question is so pertinent that it seeks to establish whether or not on the evidence, it can be stated with certainty that it was the Appellant who committed the two offences.

In answering the question the learned Judge had the following to say at page 126 lines 5 to 13 of the record of appeal;

“With regard to the 3rd accused (Appellant) though his confession was not received, I am satisfied that he led PW7 and his team to the scene. I have considered this accused person’s story that the police took him to several places as opposed to him leading them and I find that it does not make sense and indeed his story PW3 and PW4 having been threatened by the police not to be supported by these who stated that he sold them chickens. I accordingly dismiss the 3rd accused’s story as a mere creation, and find that contrary to his assertion he led the police to various places, and to people who admitted he sold them chickens. A3 told PW7 were part of what was stolen in the aggravated robbery”.

The above statement by the learned trial Judge shows how largely he relied on the evidence of PW7 and the two witnesses who allegedly bought chickens from the Appellant. Having acknowledged that he had not received the confession statement, the only portion of PW7’s evidence that persuaded him was that of the Appellant having led PW7 to the scene and to PW3 and PW4. The learned Judge further believed the evidence of PW3 and PW4 that the Appellant sold chickens to them.

We note however, that in accepting that evidence, the learned Judge did not take into account that evidence of an accused leading police officers to a known scene avails nothing and delivers no evidential

probative value. In fact, at page 85 line 8 of the record of appeal, the Appellant denied leading the police around but that it was the police that took him to the market. So clearly, it was misdirection for the learned Judge to place reliance on PW7's evidence of being led to the scene by the Appellant when the police already knew the location of the market.

But even assuming that the Appellant led the police to the scene and the market that still does not link the Appellant to the murder and the aggravated robbery.

Regarding the evidence of the two witnesses to whom the Appellant is alleged to have sold chickens, the fact that he did so, still does not link the Appellant to the offences he was convicted of. The learned Judge was not presented with any evidence linking the said chickens to those stolen during the aggravated robbery.

This evidence is further weakened by the passage of time and the none-recovery of the said chickens. The learned Judge should have taken into account that chickens when dressed are highly identical and can change hands very quickly.

In any case, no chickens were found in the possession of the Appellant to link him to the aggravated robbery and murder considering the amount of time that had passed between the commission of the crime and the arrest.

We also earlier noted the learned Judge's reliance on 'certain aspects' of what PW7 learned from A3 in the course of the interview. Although the learned judge did not disclose the relevant aspects, it seems to us that those aspects are related to the confession. We say so because, it will be noted from the record of appeal at page 39 that PW7 was on the stand and talking about how a confession statement was recorded from the Appellant before he led the police to PW3 and PW4 who also confessed to buying chickens from the Appellants.

When defence Counsel rose to object to the production of the confession statement for non-voluntariness; a trial within a trial was called and after PW2 had testified, the prosecution abandoned it and the Court reverted to the main trial with PW7 recalled to the stand. Upon resumption the record of appeal shows at page 58 that PW7 reverted to issues touching on the inadmissible confession. In line 22 PW7 states;

"Thereafter he led us to Makululu where he sold dressed chickens which were stolen from the shop they broke into".

This portion of PW7's evidence is based on the assumption that the Appellant had admitted breaking into the shop and stealing chickens which he later sold to PW3 and PW4. However, with the confession statement not being admitted, there is no evidence on

record to that effect and the learned trial Judge ought to have asked the defence whether it was comfortable with PW7, recounting what the Appellant had told him when recording a warn and caution statement.

Having failed to do that, the learned Judge should not have been influenced by that statement from PW7, as it should not have been on the record.

It was therefore, misdirection by the learned Judge to have taken solace in the fact that the defence did not object to the averment of that statement as he had a duty to prompt the defence Counsel who seemingly did not realize that part of the confession statement was being subtly sneaked into evidence.

With all the above factors properly taken into account, we are of the view, that the learned trial Judge made wrong inferences of guilty on the Appellant.

There was insufficient circumstantial evidence to link the Appellant to the robbery and the murder of the deceased. Selling chickens which have not been recovered and properly identified by the owner, a month after the robbery cannot be the basis for a conviction.

In the case of Mbinga Nyambe v the People,⁴ the Supreme Court of Zambia, after considering the cases of Bwanausi v the People⁵ and Kape v the People,⁶ made the following statement;

“Applying the above principles to the facts of this case, we are satisfied that although the evidence against the Appellant was circumstantial, the totality of this evidence took this case out of the realm of conjecture, and allowed the court to draw an inference of guilt. This evidence is that the items that went missing from the deceased’s house the night he was shot dead were recovered from the appellant four days later and in addition, a barrel of a home-made gun was recovered from the appellant’s house. There is also evidence that the deceased died from gun-shot wounds and that the home-made gun was capable of firing once and that it was capable of causing death or injury to a person.”

Although the facts of the Mbinga Nyambe⁴ case and this case are not quite similar, we drew from it the factors that would take circumstantial evidence out of the realm of conjecture to attain a level of cogency to permit only an inference of guilt.

In the case before us, as earlier noted, the linking chickens were never recovered, nobody saw the Appellant at the scene of the crime in the night it was committed. When we compare the factors of the

circumstantial evidence upon which the Supreme Court upheld the conviction in the Mbinga-Nyambe⁴ case and those in this case, we find a huge disparity such that we do not find any basis upon which to uphold the lower court's decision.

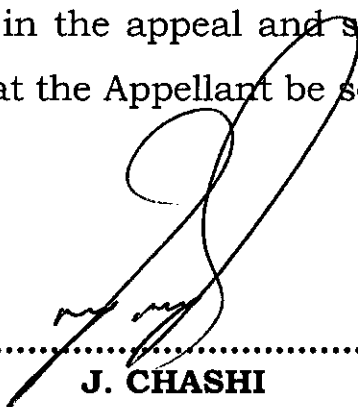
Another case that shows how clear the link should be between the alleged offence and the accused for circumstantial evidence to lead to a conviction is that of Kezzy Ngulube v the People⁷ in which the Supreme Court stated as follows;

***“The circumstantial evidence, in its entirety shows, that it was the appellant who put the poisonous rogor in the cup of the deceased. He was alone when the deceased went to the toilet and therefore, he had the opportunity to put the rogor into the wine and cause harm to the deceased.....
We have, therefore, no doubt in our minds that the circumstantial evidence is so clear as to take the case out of the realm of conjecture, leading to the only irresistible conclusion that it was the appellant who killed the deceased.”***

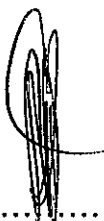
In this case, there is no such clear connection between the Appellant and the two offences for which he was convicted to have made the learned Judge in the court below to come to the

irresistible conclusion that it was the Appellant who committed the offence of aggravated robbery and killed the deceased.


We therefore find merit in the appeal and set aside the conviction. We accordingly order that the Appellant be set at liberty forthwith.



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J. CHASHI
COURT OF APPEAL JUDGE



.....
M. J. SIAVWAPA
COURT OF APPEAL JUDGE



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P. C. M. NGULUBE
COURT OF APPEAL JUDGE