

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

APPEAL NO. 153 of 2017

BETWEEN:

DENNIS MAPILI

AND

THE PEOPLE



APPELLANT

RESPONDENT

Coram: *Mchenga, DJP, Mulongoti and Sichinga, JJA*
On the 27th day of March, 2018

For the Appellant: Mrs. M. Kapambwe – Chitundu – Deputy Chief State Advocate, Ms. E.I. Banda – Senior Legal Aid Counsel of Legal Aid Board

For the Respondent: Mr. G. Zimba – Principal State Advocate

JUDGMENT

SICHINGA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. *Mwewa Murolo v. The People* (2004) ZR 2007
2. *Barrow and Young v. The People* (1966) ZR 43 (H.C)
3. *Dorothy Mutale and Another v. The People* (1976) ZR 51 (SC)
4. *Attorney-General v. Marcus Kampumba Achiume* (1983) ZR 1

LEGISLATION REFERRED TO:

1. *Penal Code, Chapter 87 of the Laws of Zambia*
2. *Criminal Procedure Code Chapter 88 of the Laws of Zambia*

This is an appeal against conviction. The appellant was tried and convicted of murder contrary to Section 200 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of the offence alleged that on the 20th day of August, 2016 at Chipata in the Chipata District of the Eastern Province of the Republic of Zambia, he murdered Jason Mbewe. Upon conviction, he was sentenced to death.

The evidence before the trial court was that on the night of 20th August, 2016, PW1, PW2, PW3, the deceased and the appellant were at Mbwembwelele bar along with many other patrons who were drinking and playing pool. According to PW1, there was a power outage in the bar around 20:00 hours. The appellant who was with the deceased told the deceased that he would finish him as he had done his elder brother. The pair walked out together with the appellant holding the deceased by his right hand.

PW2 and PW3 saw the appellant attacking the deceased. They followed the deceased and the appellant outside the bar and saw the appellant taking the deceased to the tarmac road about 10 metres away from the bar. The appellant continued assaulting the deceased and took him across the road. There, the deceased lay on the ground facing up and the appellant was pushing and pulling the deceased up and down against the ground.

PW2 and PW3 drew nearer to the deceased and the appellant. PW2 then asked the appellant what he was doing, at which point the appellant ran away. It was also in PW2 and PW3's evidence that they did not restrain the appellant from assaulting the deceased because they were scared of him.

PW4 learnt of the deceased's death around 21:00 hours whilst at his home. He then went to the scene and found a lot of people viewing the body of the deceased. Thereafter, he went to the appellant's brother's home with a police officer and apprehended the appellant.

PW5 investigated the case by first attending to the mortuary to check the deceased's body. She observed that the deceased had an injury at the back of the head. She then visited Mbwembwelele bar in Mugubudu area and learnt that the deceased was last seen in the company of the appellant and others. She was led to a path way about 150 metres away from the bar where the deceased was allegedly dumped by the appellant. On 23rd August, 2016, PW5 attended a postmortem examination of the deceased's body. She produced in evidence a postmortem examination of the deceased's body. She produced in evidence a postmortem report of even date which indicates that the cause of death was head injury. Thereafter, she warned and cautioned the appellant before formally charging him with the subject offence.

The appellant's sworn evidence was that on the material day he had gone drinking at Bwandile market around lunch time. On his way home from the market, around 19:00 hours, he stopped over at Mbwembwelele bar where he bought two packets of chibuku shake shake beer, and tokens to play pool. He then sat to share his beer with his friends Japhet Banda and Sauso Mbewe. They also played

pool until around 20:00 hours when there was a power outage. Thereafter he went to his brother, Genesis Mapili's house and slept. He told the court that around 21:00 hours a lot of people came looking for him, and accused him of killing the deceased. They apprehended him and took him to Mugubudu Police Post.

Under cross-examination, the appellant admitted he knew the deceased but denied being related to him. He confirmed that he had been at Mwembwelele bar and that there were a lot of people there, many of whom he did not recognize.

He said it was possible for PW1 to overhear what customers were saying. The appellant denied that he had anything to do with the death of Jason Mbewe.

In his judgment, the learned trial Judge found that the prosecution evidence pointed to the appellant as the person responsible for the deceased's death. He found that the appellant had been at Mbwembelele bar on the night of the 20th August, 2016. That this was corroborated by PW1, PW2 and PW3. These witnesses also saw the deceased in the company of the appellant leaving the bar. The

learned trial Judge found that there was overwhelming evidence that the appellant was with the deceased in the bar and left with him after the power outage.

On the question of whether or not the appellant did assault the deceased, the learned trial Judge accepted the evidence of PW2 and PW3 to the fact that they saw the appellant assaulting the deceased inside and outside the bar. The court found that PW2 and PW3 were credible and independent witnesses and had no interest of their own to serve. The learned trial Judge further found the evidence of PW2 and PW3 unassailable regarding what they saw. Further, the learned trial Judge accepted the testimony of PW5 regarding the head injuries sustained by the deceased. The trial court found that the testimony of PW5 was corroborated by the post-mortem examination report.

On the above evidence, the trial court convicted the appellant and sentenced him to death.

The appellant's appeal is based on the following grounds, namely:

1. **The learned court below erred in law and in fact when it convicted the appellant on the subject offence in the absence of proof beyond reasonable doubt given the nature and quality of the evidence.**
2. **The learned trial court erred in law and in fact when it relied heavily on evidence of PW2 and PW3 while disregarding the apparent inconsistencies of that evidence with that of PW1's.**

On behalf of the appellant, Ms. Banda, the learned Senior Legal Aid Counsel filed heads of argument which she relied on. The two grounds were argued together as they relate to more or less the same issue.

Ms. Banda submitted that in criminal cases, the burden of proving each element of the offence charged lay with the prosecution. She submitted that the standard of proof required was very high, namely, beyond reasonable doubt. For these propositions she relied on the provisions of **Section 206 of the Criminal Procedure Code**²

as well as the case of *Mwewa Muroho v. The People*¹ where the Supreme Court held *inter alia* that:

“In criminal cases, the rule is that the legal burden of proving every element of the offence charged and consequently the guilt of the accused lies from beginning to end on the prosecution. The standard of proof is high.”

Counsel submitted that the prosecution did not prove beyond all reasonable doubt that the appellant murdered Jason Mbewe. She argued that the evidence of the prosecution witnesses was, at best, contradictory and therefore unreliable. Ms. Banda pointed out that the evidence of PW2 was unreliable to the extent of his recollections that the appellant and deceased had been drinking at the bar before the power outage. That when the appellant returned to the bar after the power outage, he asked PW2 who had sat in front of him. Ms. Banda questioned the reliability of PW2's evidence on the whole.

Further, it is submitted that PW2's evidence was unreliable as to what he heard the appellant allegedly say. That PW2 heard the

appellant accused the deceased of being a wizard. However, PW3 who was said to be with PW2 at the time said the deceased and the appellant were arguing about farm land. Counsel submitted that this evidence by the prosecution was inconsistent. Ms. Banda argued that there were other inconsistencies in the stories told by PW2 and PW3. That both these witnesses stated that after the appellant had an argument with the deceased he proceeded to assault him. She submitted that it was surprising that PW1 who was also at the bar did not see this. Counsel argued that PW5, the arresting officer corroborates PW1 that the incidence did not occur in the bar.

Ms. Banda submitted, in a nutshell, that PW1 gave evidence that was favourable to the appellant. She argued that PW2 and PW3 highly exaggerated the evidence and could have made up the story to implicate the appellant. Counsel submitted that they both lied about the attack in the bar and the investigation of the arresting officer found no evidence of a fight in the bar. It is submitted that this fact alone ought to have put the court below on notice as to the credibility of PW2 and PW3 with the rest of their story. That the

fact that they contradicted themselves on some aspects also should have raised doubt in the court's mind. In this regard, we were referred to the case of ***Barrow and Young v. The People***² where it was stated *inter alia* that:

“Where one prosecution witness gives evidence in favour of the defence, and one against, the court should resolve the doubt in favour of the accused in the absence of any good reason for preferring one witness’ testimony.”

Ms. Banda submitted that in *casu*, the court below ought to have weighed the credibility of the remainder of the evidence given by PW2 and PW3 given that they lied about the assault in the bar. In sum, it is submitted that the court below failed to note the inconsistencies in the prosecution evidence and that had the learned trial Judge addressed his mind to these circumstances, he would not have found that the prosecution had proved the case against the appellant beyond all reasonable doubt.

Ultimately, Ms. Banda submits that the court did not have regard to the society of all the parties involved. That all the witnesses stated

there was drinking involved. Further that PW5 told the court that the deceased was drunk, and the appellant stated he had started drinking by lunch hour. Counsel submits that given the fact that the deceased was drunk it was reasonably possible that the deceased may have fallen and hit his head which would explain his injury. Counsel argues that the inference that the appellant caused the deceased's death is not the only reasonable inference to be drawn from the prosecution's evidence. She referred us to the case of **Dorothy Mutale and Another v. The People**³ which established that in criminal law, where there are two or more inferences, the court will adopt the one which is favourable to the accused person if there is nothing to exclude such inference. Ms. Banda submits that, in this case, had the court directed itself on the doubts it would have acquitted the appellant. She urged us to allow the appeal, quash the conviction and set the appellant at liberty.

In response, Mr. Zimba, the learned Principal State Advocate submitted that the court below was on firm ground as the evidence proved beyond reasonable doubt that the appellant committed the offence. He contended that the inconsistencies referred to by the

appellant in ground two do not take anything away because there were witnesses who saw the assault both in the bar and at the tarmac. Mr. Zimba urged us to uphold the conviction and sentence of the lower court, and dismiss the appeal.

We have carefully considered the evidence before the trial court, the judgment by the learned trial Judge and the submissions by learned counsel for the parties.

The issue raised by the grounds of appeal is whether the only inference that can be drawn on the evidence against the appellant is one of guilt. We shall deal with the grounds of appeal as one ground.

The evidence, as it stands, is that the deceased was seen being assaulted by the appellant at the bar and at a tarmac road near the bar. He was soon thereafter found dead after his assailant fled. The medical evidence in the form of a postmortem report reveals that the cause of death was head injury with deep cut on the scalp and fractured occipital bone.

The appellant has submitted that there were inconsistencies between the testimony of PW2, who said that the appellant and the deceased had been drinking at the bar before the power outage; described the positions they sat; the appellant returned to the bar after power went; and the testimony of PW3, who said PW2 said nothing when he was asked by the appellant about the deceased.

In our considered view, after perusal of the record of appeal at page 22 and page 64, inconsistencies alleged between the testimonies of PW2 and PW3 relate to the fact of whether or not the appellant was at Mbembwelele bar before the power outage. The trial court resolved the conflicting prosecution evidence of PW2 and PW3 at page J7 when he stated:

“As admitted he was at Mwembelele bar that night until power went off. PW1, who was the bar man on the night, saw him in the bar drinking and playing pool, a fact that the accused confirms. PW1 also confirms the presence of PW2, PW3 and the deceased in the bar that night. Although PW1’s testimony does not implicate accused as

to assaulting the deceased both in and outside the bar, it corroborates that of PW2 and PW3 as to the accused having left the bar in the company of the deceased.”

.....The fact that the accused was in the bar and left with the deceased after power went off is a fact overwhelmingly supported by the evidence before me.”

Further, the appellant has submitted that the testimonies of PW2 and PW3 are inconsistent with the testimony of PW1. That PW2 and PW3 both stated that after the appellant had an argument with the deceased he proceeded to beat him up, and yet PW1 who was also at the bar and selling them drinks did not see this.

The court below cannot be faulted for having found the testimonies of PW2 and PW3 reliable on the issue of the assault because they were seated together and their testimonies corroborate each other as to what they saw. At page J8 the learned trial Judge had this to say about PW2 and PW3's testimonies:

“The next issue is whether or not accused in fact did assault the deceased and only PW2 and PW3 have

testified as to that fact. Could the two witnesses have just cooked up that evidence and if so what would be their motive?

Having already found the two witnesses truthful on the material evidence, I have no reason to doubt them on this one. The two were seated together and as such their testimonies corroborate each other because they are both direct witnesses of the assault on the deceased.”

We are of the view that the trial court correctly came to the findings he did because PW1's testimony was not supported by any witness present in the bar to the extent that there was no assault on the deceased in the bar.

The case for the prosecution and the conviction of the appellant was based largely on the evidence of PW2 and PW3. The death of Jason Mbewe was not in dispute. The appellant denied that he ever saw the deceased. He does not deny that he was at Mbembwelele bar on the material day. While we accept that they were some inconsistencies between the evidence of PW2 and PW3, such as the


sitting position of the appellant and the deceased in the bar, we are satisfied that this was not fatal to the prosecution's case. The evidence of PW2 and PW3 was that they knew both the appellant as well as the deceased. On the material day, they both saw the appellant assault the deceased in the bar and outside at the tarmac. PW2 and PW3 followed the appellant and the deceased to the tarmac. PW2 said he stood 5 metres from them, and asked the appellant what he was doing to the deceased. At this moment, the appellant ran away.

In the case of ***The Attorney-General v. Marcus Kampumba Achiume***,⁴ the Supreme Court held that an appellate court will not interfere with findings of fact made by a trial judge unless the findings are perverse or made on the wrong interpretation of the facts.

In *casu*, we are satisfied that PW2 and PW3 were properly held as credible witnesses. The issue that they could have made an honest mistaken identification did not arise. Further, the arresting officer, PW5 went to the mortuary and said she saw an injury at the back

of the deceased's head. That injury is consistent with what PW2 and PW3 saw. This finding further corroborates what was recorded in the postmortem report that the cause of death was head injuries. The postmortem report also records a deep cut on scalp and fractured occipital bone.

In the circumstances, we find it safe to uphold the conviction of murder against the appellant. We therefore dismiss the appeal against conviction forthwith and uphold the sentence of death.


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C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT


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J.Z. MULONGOTI
COURT OF APPEAL JUDGE


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D.Y. SICHINGA
COURT OF APPEAL JUDGE