

IN THE COURT OF APPEAL OF ZAMBIA Appeal No.129b+c/2021
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

MICHAEL NYIMBILI
ARNOLD MUSEENDO



1ST APPELLANT
2ND APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: Mchenga DJP, Makungu and Muzenga, JJA

On: 23rd March 2022 and 26th April 2023

For the Appellant: S.C. Lukwesa, Acting Chief Legal Aid
Counsel, Legal Aid Board

For the Respondents: S. Mwamba-Besa, State Advocate,
National Prosecution Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia

Cases referred to:

1. Sakala v. The People [1987] Z.R. 239
2. Haonga and Others v. The People [1978] Z.R. 200
3. Ernest Mwaba, Chabaya Ndala, Simushi Manyima,
Wamunyima Walusiku and Erustus Kakumbi Banda v. The
People [1987] Z.R. 19

4. Edward Sinyama v. The People [1993-1994] Z.R. 16

5. David Zulu v. The People [1977] Z.R. 151

1. INTRODUCTION

1.1. The appellants, and one Samson Chola, appeared before the High Court (Chinyanwa-Zulu, J.) charged with the offence of murder contrary to **Section 200 of The Penal Code**.

1.2. They all denied the charge and the matter proceeded to trial.

1.3. In the course of the trial, Samson Chola entered into a plea agreement and pleaded guilty to a charge of manslaughter contrary to **Section 199 of The Penal Code**.

1.4. At the end of the trial, the appellants were convicted and both condemned to suffer capital punishment.

1.5. They have appealed against their convictions.

2. CASE BEFORE THE TRIAL JUDGE

2.1. On the 8th of April 2017, around 22:00 hours, a group of persons who included the appellants and Samson Chola, pursued Watson Tembo into a shop in Lusaka's George Compound.

- 2.2. They demanded that the shop keeper release him, failure to which they would enter the shop and beat him up. The shopkeeper released him and they dragged Mathias Tembo away.
- 2.3. Moments later, Mathias Tembo returned and informed Jackson Mbewe that he had been stabbed by Samson Chola and his friends. Jackson Mbewe went and informed Mathias Tembo's sister about the incident and later went to sit in a drinking place.
- 2.4. Not long thereafter, the two appellants in the company of Samson Chola and others, turned up at the same drinking place. When news came through that Mathias Tembo had died, the appellants, Samson Chola and the others all fled from that drinking place.
- 2.5. When placed on their defence, the two appellants elected to remain silent.
- 2.6. However, they called Samson Chola as their witness.
- 2.7. Samson Chola told the trial Judge that he was alone when he stabbed Mathias Tembo following a quarrel. He also told her that the two appellants were not present at the time.

3. FINDINGS BY THE TRIAL JUDGE

3.1. The trial Judge accepted Samson Chola's evidence that he inflicted the fatal stab. She however rejected his claim that the two appellant's were not present that night, because there was evidence from the shopkeeper and Jackson Tembo, that they were present at the time of the stabbing.

3.2. She also found the statement by Mathias Tembo that he had been stabbed by Samson Chola and his friends, was admissible in evidence as *res gestae*.

3.3. She convicted the appellants on the basis that even if it is only Samson Chola who stabbed Mathias Tembo, they had a common purpose with him because they were part of a group that chased Mathias Tembo.

4. GROUND OF APPEAL AND ARGUMENTS IN SUPPORT AND AGAINST

4.1. The sole ground of appeal is that the trial Judge's finding that the appellants and Samson Chola had a common purpose, was not supported by the evidence.

4.2. In support of the sole ground of appeal, Mrs. Lukwesa argued that since the post-mortem report showed that there was one stab wound, and Samson

Chola having taken responsibility for it, the appellants should not have been held responsible for the stabbing.

4.3. She also argued that there was no evidence that the others knew that Samson Chola had a knife and that he was likely to use it.

4.4. In response, Mrs. Mwamba-Besa referred to the cases of **Sakala v The People¹** and **Haonga and others v The People²**, and submitted that since members of the group that collected Mathias Tembo from the shop, had metal bars, they had an intention or purpose to kill him.

4.5. All members of that group had a common purpose as is set out in **Section 22 of the Penal Code.**

5. CONSIDERATION OF THE APPEAL AND DECISION OF THE COURT

5.1. The first issue we will deal with is the subject of common purpose.

5.2. The trial Judge found that the appellants had "common purposes" with Samson Chola because they were part of a group that carried metal bars just before Mathias Tembo was stabbed.

5.3. In the case of **Ernest Mwaba and Four Others v.**

The People³, the subject of common purpose was considered. The Supreme Court pointed out that:

"In our considered opinion, and in view of the law to which we shall be referring in a moment, once there was credible evidence that the appellants participated in a concerted enterprise of interrogating the deceased in an attempt to recover stolen property, and once the evidence showed that each appellant actively participated in the assault, then they were all *crimines participes*. The fact that other persons may have also assaulted the deceased at one stage or another can make no difference where the nature of the assaults was such that - as in this case - it was their cumulative effect which overcame the deceased. The evidence accepted by the trial court was that each appellant assaulted the deceased and at other times aided and abetted the others while trying to extract information concerning the whereabouts of the stolen property. A positive finding, therefore, that other villagers also participated in the assaults would not relieve the appellants of their own liability. As active participants in the venture, they would all be principal offenders within the meaning of section 21 of the Penal Code"

5.4. In this case, there is no evidence that when Mathias Tembo was taken away by the group that included the appellants, he suffered any injury at the hands of anyone other than Samson Chola.

5.5. The only evidence that appeared to link the appellants to the stabbing was Mathias Tembo's statement that was received as *res gestae*.

5.6. *Res gestae* as an exception to the rule against hearsay was considered in the case of **Edward Sinyama v. The People**⁴. The Supreme Court held that:

"A statement is not ineligible as part of the *res gestae* if a question has been asked and the victim has replied or if the victim has run for half a kilometre to make the report. If the statement has otherwise been made in conditions of approximate though not exact contemporaneity by a person so intensely involved and so in the throes of the event that there is no opportunity for concoction or distortion to the disadvantage of the defendant or the advantage of the maker, then the true test and the primary concern of the Court must be whether the possibility of concoction or distortion should be disregarded in the particular case"

5.7. While we have no difficulties with the trial Judge's finding that Mathias Tembo's statement that he had been stabbed by Samson Chola and his friends was hearsay evidence admissible as *res gestae*, we have issue with her finding that the statement incriminated the appellants.

5.8. In that statement, the appellants were not named or identified as being present or party to the

stabbing. In any case, there was no evidence that Matias Tembo suffered any injury other than the stab wound inflicted by Samson Chola.

5.9. It is our view that the mere fact that the appellants were in the company of Samson Chola moments before and after the stabbing, it does not follow that they should have acted in concert with him and therefore had a common purpose with him. This is more so that the only injury that Mathias Tembo suffered is the stab wound inflicted by Samson Chola.

5.10. We also take the view that the test set out in the case **David Zulu v. The People**⁵, that a conviction anchored on circumstantial evidence is only competent if the evidence is so cogent that the only inference that one can draw is an inference of guilt, was not met in this case.

5.11. For the reasons we have just outlined we find merit in this appeal.

6. VERDICT

6.1. We find that the conviction is unsafe. We allow the appeal and set aside the appellants' convictions and quash the sentences imposed on them.



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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



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C.K. Makungu
COURT OF APPEAL JUDGE



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K. Muzenga
COURT OF APPEAL JUDGE