

## R. v. NOSIKU AND ANOTHER.

CRIMINAL REVIEW CASE No. 237 OF 1941.

*Circumstantial evidence—guide in deciding whether evidence is sufficient.*

The facts and the law appear in the judgment hereunder.

Robinson, A.C.J.: This case was tried by the learned Resident Magistrate, Livingstone. Both accused were charged with arson *contra* section 294 (a) Penal Code. No. 1 accused was acquitted and No. 2 was sentenced to five years I.H.L.-

The learned Resident Magistrate took great trouble with the case . . . . A hut in the Zambesi Sawmills Compound at Mulobezi was burnt down during the night of the 13th September, 1941. There was no direct evidence as to the setting alight at all, but the two accused who are brothers were suspected because (a) they both had a motive, (b) they both had arrived at Mulobezi that day on their way to Sesheke to appear before the Kuta on a charge of using insulting remarks to an induna, (c) the movements of No. 2 that night were not properly accounted for, and the Resident Magistrate was entitled to hold on the evidence that No. 2 had produced no alibi for the time immediately prior to the fire. No. 1 accused was acquitted because his alibi was believed. It will be seen, therefore, that the evidence was wholly circumstantial.

Circumstantial evidence can be very strong, quite as strong as direct evidence, but all the proved facts, taken together, must amount to such a body of evidence that the only irresistible presumption to be drawn is that the accused, and he only, is guilty of the crime. As WATERMEYER, J.A. said in the case of *Rex v. Blom* (1939) App. Div. (South Africa) at page 202, a case which is not binding on this Court but well worth citing for the wisdom of the words, "in reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

The facts proved in this case fall within the first proposition but they do not go nearly far enough, in my opinion, to say that they exclude every reasonable inference save the one sought to be drawn. I have come to the conclusion that there is much suspicion but an insufficiency of proof and therefore the conviction must be quashed and the prisoner set at liberty.

I would like to add that the record has been submitted to the Attorney-General who does not wish to support the conviction.