KABONGO AND OTHERS v THE PEOPLE (1974) ZR 84 (SC)
SUPREME COURT
BARON DCJ, GARDNER AND HUGHES JJS
21st MAY 1974
(Appeal Nos 166, 165, 167 of 1973)

Flynote

Criminal law - Murder - Escape from prison - Common design.

Headnote

The appellants were convicted of the murder of a prison warder in the course of an escape from a prison. The evidence accepted by the trial court proved that the third appellant stabbed the deceased with a knife and that immediately thereafter the three appellants broke into the prison armoury and armed themselves with guns which they used. It was argued on behalf of the first and second appellants that even if they were engaged in a preconceived plan to escape there was insufficient evidence to prove that they were a party to the killing, that it was not proved that they agreed to or at least contemplated the use of whatever force might be necessary to effect their escape even if this involved killing or the infliction of grievous harm; it was argued that the use by the third appellant of the knife went beyond the common design to which the first and second appellants were parties.

Held:

(i) The escape could not be divided into compartments; the whole escape was part of the *res gestae* in the course of which the deceased was killed.

(ii) The whole sequence of events must be looked to in order to draw the correct conclusions as to the state of mind of the appellants at all relevant times including the commencement.

(iii) The plan to escape includes the acquisition of guns and the use of such guns if necessary; the only possible conclusion on the evidence was that all these appellants contemplated that it might be necessary to kill or to inflict grievous harm.

Case cited:

(1) *R v Lovesey, R v Peterson* (1969) 2 All ER 1077.

Legislation referred to:

Penal Code, Cap. 146, s. 204.

B C Willombe, Legal Aid Counsel, for the appellants.

V K C Kamalanathan, State Advocate, for the respondent.

Judgment

Baron DCJ: delivered the judgment of the court: The appellants were convicted of the murder of a prison warder, Cpl Ackson Chingombe. It is alleged that in the course of a planned escape from Mukobeko Prison the third appellant stabbed the deceased, who died shortly afterwards.

BARON DCJ

It appears from the evidence that there were at this prison three gates some ten metres apart which we will call, respectively, the outer, the middle and the inner gate, the outer gate being the first one through which one passes when coming from the outside world. After passing through the inner gate one comes to a football ground and at the time in question (on a Sunday afternoon) there was a football match in progress which was being watched by a number of prisoners. P.W.2, a nineteen year - old prisoner who was serving a five - year sentence for store-breaking imposed in 1972, told the court that in prison he was an office cleaner and on the afternoon in question was carrying bed sheets from the laundry in order to make beds for the officers. In order to get to the officers' quarters it was necessary for him to pass through the inner gate from the football ground side. When he arrived at the gate the second and third appellants were on either side of it while the first appellant was about ten paces away near the goal posts. The witness spoke to the deceased, who was of course on the other side of the gate, who then unlocked it; as the witness was passing through he was tripped from behind and fell forward. When he

looked up he saw the second appellant holding the deceased round the neck with his right arm while the third appellant pulled out a knife from under his shirt and the first appellant grabbed the deceased's legs. While the deceased was falling the third appellant stabbed him in the chest. The witness got up and ran back through the gate in the direction of the football ground. He found some prison warders and then heard whistles blowing and alarms and also gunshots.

In cross - examination it was put to this witness that the deceased had produced the knife and aimed a blow at the second appellant. The witness was quite adamant that it was the third appellant who produced the knife from under his shirt. He described the knife as similar to those made in the prison blacksmith workshop.

These events were witnessed by another prisoner, a thirty - five - year - old man serving a long sentence for a succession of house - breaking offences. This witness was standing close to the gate and heard the conversation between the deceased and the office cleaner. He told the court that he knew the second and third appellants well because he lived with them in the same ward, but did not know the first appellant well as he was a new prisoner who had arrived only about two weeks earlier.

The witness saw the deceased open the gate and as the office cleaner went through the second appellant pushed him and at the same time the first and third appellants went through. The witness saw the second appellant hold the deceased round the neck with his right arm and saw the third appellant take out a knife from under his prison uniform. He described the knife as different from the kind of knife bought from a store; it was similar to the knives made in the prison workshop. The witness described how the first appellant closed and locked the gate after the office cleaner had run out and he described also how the third appellant stabbed the deceased on the left side of the chest. There is a slight difference here between the evidence given by these two witnesses. The office cleaner said that the first appellant had grabbed the deceased's

legs at the time when he, the witness, was tripped; the other prisoner said that the third appellant caught hold of the deceased's legs after he had locked the gate and when the deceased struggled to his feet after having fallen as a result of the stabbing. We do not regard this as a serious discrepancy, and certainly not such a discrepancy as could found an attack on the credibility of either of the witnesses. The evidence of these two witnesses is substantially consistent.

The witness then described how he shouted for help and two prison warders came. Then a third warder, Cpl Mubita, came, and the three appellants ran to the middle gate and unlocked it, passed through and locked it again; they then entered the armoury which is in the area between the middle and outer gates. In the meantime Cpl Mubita unlocked the inner gate. The witness says that he climbed up a tower and sounded the alarm and while he was doing so the third appellant fired a gun at him; he also saw the other two appellants armed with guns. The witness came down from the tower and saw the first appellant fire at Cpl Mubita and hit him on the right upper arm.

Cpl Mubita gave evidence confirming the foregoing account to the extent that he himself was present, save for one discrepancy. According to Cpl Mubita he and the prisoner climbed up into the tower together and he, Cpl Mubita, sounded the alarm. Once again we regard this as a very minor discrepancy.

The only other material evidence was given by another warder, James Phiri, whose duty it was to drive a Land - Rover. He described how the second appellant tried to stab him with a knife but he evaded the blow and ran away. However, the appellants overtook him and forced him to hand over the keys; they were all carrying guns and they threatened to kill him if he refused to surrender the keys.

The appellants all gave evidence; the first appellant gave evidence on oath while the others made unsworn statements. They all alleged that there was no pre-arranged plan to escape. Each of them said that they were watching the football match and suddenly saw a struggle going on at the inner gate and on the spur of the moment decided to take the

opportunity and attempt to escape. The third appellant denied that he pulled a knife from under his prison clothes and said that it was the deceased who produced the knife from his pocket. None of them had any idea how the deceased came to be stabbed.
The learned trial judge in a carefully reasoned judgment rejected the evidence of the appellants and found that the escape was the result of a pre-arranged plan. In our view this was the only conclusion to which he could come. Obviously as a matter of logic one of the three appellants must have been lying when he said that he decided to attempt to escape only on the spur of the moment when he saw a struggle going on at the open inner gate; at best, from the appellants' point of view one of them must have been responsible for that initial scuffle. But even accepting as a theoretical possibility that two of them were telling the truth, this

BARON DCJ
possibility disappears in the face of the evidence of the two prisoners, whose descriptions of the events show that the three appellants pushed through the gate virtually simultaneously. Timing of this kind could only be the result of careful planing.
The evidence is clear also that the third appellant produced the knife from under his prison uniform and delivered the fatal blow, the learned judge so found and once again on the evidence no other finding was possible.
Mr Willombe argues on behalf of the first and second appellants that, even accepting that they engaged in a preconceived plan to escape, there is insufficient evidence to prove that they were a party to the killing of the deceased; he argues that before they can be convicted of murder it must be shown that they agreed to, or at least contemplated the use of, whatever force might be necessary to effect their escape even if this involved killing or the infliction of grievous harm. Mr Willombe argues that the use by the third appellant of the knife went beyond the common design to which they were parties. Had the evidence stopped at the point when the deceased was stabbed - in other words, had there been no evidence of the three appellants proceeding to the armoury and arming themselves with guns and of the second appellant attempting to stab Warder Phiri - such a submission might perhaps have been arguable, although we would observe that its force is very considerably weakened by the appellants putting forward a completely different defence. It is clear, however, that the whole escape was part of a carefully prepared plan, and that this plan included the acquisition of guns and the use of such guns should this prove necessary to effect the escape. One cannot divide the escape into compartments; the whole escape was part of the *res gestae* in the course of which the deceased was killed, and one must look to the whole sequence of events in order to draw the correct conclusions as to the state of mind of the appellants at all relevant times including the commencement. The evidence is overwhelming that all three appellants planned to escape, in the words of the learned trial judge, "come what may". We agree with his finding when he said that this was not a case where something completely outside the contemplation of the parties was done by one of the assailants, and we agree also with his final conclusion that malice aforethought has been proved within the provisions of section 204 of the Penal Code:

"... because I find that the only reasonable inference possible, on the proven facts, is that it was in the contemplation of all the accused to incapacitate the deceased by killing or at least doing him grievous harm in order to escape."

In *R v Lovesey, R v Peterson* [1] the two appellants had robbed a jeweller, whom they had handcuffed to a railing in the basement of his premises and who was found a few minutes after the robbery with severe head injuries from which he later died. The Court of Appeal held that the learned trial judge misdirected the jury on one important point and was compelled to quash the conviction for murder. However, Widgery, L J, as he then was, had this to say:

BARON DCJ
"As neither appellant's part in the affair could be identified, neither could be convicted of an offence which went beyond the common design to which he was a party. There was clearly a common design to rob but that would not suffice to convict of murder unless the common design included the use of whatever force was necessary to achieve the robbers' object (or to permit escape without fear of subsequent identification), even if this involved killing, or the infliction of grievous bodily harm on the victim. If the scope of the common design had been left to

the jury in this way they might still have concluded that it extended to the use of extreme force. It is clear that the plan envisaged that the victim's resistance should be rapidly overcome. The attack bears the hallmark of desperate men who knew that they had to act quickly, and the jury may have thought it utterly unreal that such men would make a pact to treat the victim gently however much he struggled and however long it might take to subdue him. The jury had also had the advantage of seeing the appellants in the witness box and may have formed their own views whether the appellants would have scruples of this character. There must, in our view, be many cases of this kind where the jury feel driven to the conclusion that the raiders' common design extended to everything which in fact occurred in the course of the raid . . ."

These remarks seem to us to be very much in point on the facts before us. The learned trial judge clearly concluded that it was utterly unreal that the first and second appellants did not contemplate that it might be necessary in order to effect their escape to kill or to inflict grievous harm, and in our view this was the only possible conclusion on the evidence.

In the result the appeals of all three appellants are dismissed.

Appeals dismissed