HAONGA AND OTHERS v THE PEOPLE (1976) ZR 200 (SC)
SUPREME COURT
BARON DCJ, GARDNER AND HUGHES JJS
27th, 29th APRIL 13th, 14th, 18th MAYand 21st SEPTEMBER 1976
SCZ Judgment No. 45 of 1976
Flynote
Criminal law - Common design to commit felony - Death resulting from act of one going beyond common design - Whether others guilty of offence arising from the death.
Criminal law - Common design to commit felony - Death resulting from kind of act which was within common design.
Criminal law - Two or more persons present at scene of offence - Offence committed by one, but no proof as to which one - No proof of common design - Whether all must be acquitted.
Criminal law - Evidence - Witness untruthful on material point - Weight to be attached to remainder of his evidence - Issue identical to issue on which witness found untruthful - Whether evidence on that issue can be accepted without good reason.

BARON DCJ
Criminal procedure - Minor offence - Conviction for - Proper test for exercise of court's discretion - Cognateness - Whether aspect of definition of "minor offence" or factor affecting exercise of discretion - Section 181 (2) of Criminal Procedure Code.
Criminal procedure - Minor offence - Conviction for - On charge of murder - When proper.
Criminal procedure - "Capital aggravated robbery" - Onus - Whether accused on charge of murder has had fair opportunity to discharge onus under section 294 (2) of Penal Code.
Headnote
The appellants were convicted of the murder of a farmer, who was shot and killed during an armed robbery carried out by five men. The appellants were identified by one witness as the occupants of a car which had been involved in an accident some three hours before the time of the murder; two of the appellants were identified, each by one witness, as having been among the five robbers, and a third was found some weeks later in possession of a firearm from which the fatal shots were proved to have been fired. The evidence as to who fired the shots was conflicting and the prosecution conceded that the case must proceed on the basis that it was not known who fired them.
The second, third, fourth and fifth appellants were alleged to have made confessions, to which objection was taken. The statement of the second appellant was excluded by the trial judge on the ground that it was extracted by beatings, but those of the other three, taken by substantially the same "team", were ruled to have been freely and voluntarily made and were admitted in evidence.
It was argued by the prosecution that even if the statements be excluded there was sufficient evidence to support the findings that the five robbers were the same men as the five occupants of the car involved in an accident three hours earlier; it was argued further that the trial judge was right in holding that the five robbers were shown to have a common purpose involving the carrying of a firearm, or alternatively that they were guilty of murder because they were engaged together in the commission of a felony in the course of which someone was killed.

Held:

(i) Where persons are engaged together in the commission of a felony and a death results from an act of one of those persons which goes beyond the common design to which the others were parties, those others cannot be convicted of the offence of which the one is guilty.

(ii) If a death results from the kind of act which was part of the common design then if the offence be murder in one then it is murder in all.

(iii) Where two or more persons are known to have been present at the scene of an offence and one of them must have committed it, but it is not known which one, they must all be acquitted of the offence unless it is proved that they acted with a common design.

BARON DCJ

(iv) Where a witness has been found to be untruthful on a material point the weight to be attached to the remainder of his evidence is reduced; although therefore it does not follow that a lie on a material point destroys the credibility of the witness on other points (if the evidence on the other points can stand alone) nevertheless there must be very good reason for accepting the evidence of such a witness on an issue identical to that on which he has been found to be untruthful in relation to another accused.

(v) Having just excluded a statement taken by substantially the same "team" and having held one of the principal witnesses on that team to be untruthful, and to have used force in extracting the statement in question, the trial judge had he approached the matter correctly must have excluded the other statement also.

(vi) An accused person may be convicted of a minor offence in terms of section 181 (2) of the Criminal Procedure Code provided he can reasonably be said to have had fair opportunity to meet the alternative charge; the question of cognateness or otherwise is not an aspect of the definition of the expression "minor offence" but a factor to be taken into account by the court in exercising its discretion.

(vii) The court's discretion should not be exercised lightly; in particular a person facing a charge of murder should not have his defence complicated by the possibility of a conviction for some other offence. But if the accused has quite clearly had a full opportunity to meet the other charge the court must not shirk its duty simply because the indictment is murder. Whether or not an accused has had fair opportunity to meet another charge will always depend on the facts of the particular case.

(viii) On a charge of "capital aggravated robbery", i.e. under section 294 (2) of the Penal Code the *onus* is on the accused to satisfy the court as to the matters therein set out, whereas on a charge of murder the *onus* is on the prosecution throughout, including the *onus* to establish common purpose where this is in issue. Hence on a charge of murder an accused has never been called upon to discharge the *onus* under section 294 (2) and he cannot therefore have had a fair opportunity to meet charge under that section.

Cases cited:

(1) *Davies v Director of* Public Prosecutions (1954) 1 All ER 507.

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

(3) *R v Richardson* (1785) 1 Lea. 387.

(4) *R v Borthwick* (1779) 1 Doug. KB 207.

(5) *Alick Kazembe and Another v The People* (1969) SJZ 48.

(6) *R v Jones* (1918) 1 KB 416.

(7) *Phiri (C) v The People* 1973 ZR 168.

BARON DCJ

Legislation referred to:

Penal Code, Cap. 146, ss. 204 (c), 294 (2).

Criminal Law Act 1967 (England), ss. 6 (2), 6 (3).
Criminal Procedure Code, Cap. 160, ss. 181 (1), 181 (2).
C U Osakwe Director of Legal Aid, 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 murder. Briefly the allegation was that PW1, a woman aged 27, was drinking at place some five miles from Lusaka when five men, including the first and second appellants, whom she knew, arrived in a motor car. She asked them for a lift and they proceeded towards Lusaka. On the way the car ran off the road into the bush. It is not clear whether anyone was injured, but certainly the witness was not; she left the car and proceeded on foot towards Lusaka. This was the last she saw of the appellants until identification parades were held some months later at which she identified the third, fourth and fifth appellants as having been the occupants of the car together with the first and second appellants. According to this witness the accident happened at about 1100 hours. Some three hours later there was an armed robbery at a farm in the course of which the farmer was shot and killed. One witness alleged to identify the first appellant at the scene and another witness the fifth appellant; third witness also alleged to identify the first appellant at the scene but his identification was uncertain. No witness alleged to place the second, third or fourth appellant at the scene.

The witnesses at the farm told the trial court that five men came on the day in question just before the deceased drove up. When the car stopped the deceased was pulled out and physically assaulted. A dog tried to come to his master's rescue and the evidence is that at this point one of the assailants pulled a firearm from his jacket and shot the dog; the deceased ran towards his house but was shot and killed. The evidence as to who fired the fatal shots is conflicting. After the murder the assailants succeeded in starting the car by pushing it and made good their escape.

Some weeks later the second appellant and other persons unknown attempted an armed robbery and the second appellant was apprehended; he was in possession of firearm. Ballistics tests were carried out and it was proved that this firearm was the weapon from which the shots were fired which had killed the deceased in the present case. The second appellant denied having been found in possession of this firearm, but the evidence in this regard is overwhelming and the denial was properly rejected.

Thus there was eye - witness evidence placing the first and fifth appellants at the scene of the murder and circumstantial evidence, namely the possession of the firearm which had fired the fatal shots together with the evidence that the second appellant was in the company

of the first and fifth appellants three hours before the murder, which places him also at the scene. Apart from alleged confessions there is however no evidence placing the third and fourth appellants at the scene save the inference to be drawn from the fact (assuming for this purpose that it was satisfactorily established) that they were in the company of the first, second and fifth appellants three hours earlier. It will be convenient to deal first with the alleged confessions.

The first appellant's statement to the police was a denial. The second appellant made a confession to which objection was taken on the ground that he had been forced by beatings to make it; a. trial - within - a - trial was held at the conclusion of which the learned trial judge gave a ruling in which the following passage appears:

"I have carefully considered the evidence given by PW8, PW12, and Supt. Siabwanda, PW13 and I have found In their evidence glaring discrepancies which fortify me to make an inference that the accused No. 2 made a statement after he had been beaten up . . ."

He ruled that the statement was inadmissible. The statement of the third appellant was recorded on the 1st February, 1974, the day after that on which the statement of the second appellant was recorded. The same police officers were involved but on this occasion the trial judge ruled that the statement was admissible. The statement of the fourth

appellant was recorded by a different officer also on the 1st February, 1974, but the principal prosecution witness, PW12, was present. No objection was taken by the defence to the statement of the fifth appellant and it was submitted by the learned Director of Legal Aid that the reason for this was that certain erroneous submissions had previously been made as to the necessity or otherwise of a trial - within - a - trial and that presumably counsel for the defence had felt that there was no purpose in taking objection again.

It must be said that the judgment in this case poses considerable difficulty so far as the State is concerned, and the treatment of these various alleged confessions is only one of those difficulties. On this issue the learned trial judge said:

"Having heard and seen PW1 to PW4 and the police officers who took the warn and caution statements from the accused persons in broad daylight I am satisfied beyond doubt that accused 3, accused 4 and accused 5 made the disputed warn and caution statements. I am very much aware that their stories of duress were not unlikely but the accused persons themselves were not impressive witnesses. In the cases of accused 4 and accused 5 even the learned defence counsel conceded he could not rely upon their instructions."

There are serious misdirections here. The comment that the "stories of duress were not unlikely" clearly indicates a doubt in the learned judge's mind as to voluntariness, and equally clearly this doubt was raised by the evidence given by the police officers concerned during the trial - within a - trial as to the admissibility of the statement made by the second

appellant. That statement was held to have been made after that appellant had been beaten up; it follows that the witnesses who denied those beatings must have been disbelieved. Yet the learned trial judge was able to resolve this doubt on the basis that the appellants in question were unimpressive witnesses and on certain comments by counsel, he relied also on statements to the police of other accused persons. And expressing himself to be satisfied beyond doubt that the three statements in question were made freely and voluntarily the learned trial judge did not advert at all to the fact that the principal prosecution witness in relation to all these statements, PW12, had been found to be an untruthful witness on this vital aspect of the case. It is trite that where a witness has been found to be untruthful on a material point the weight to be attached to the remainder of his evidence is reduced; although therefore it does not follow that a lie on a material point destroys the credibility of the witness on other points (if the evidence on the other points can stand alone) nevertheless there must be very good reason for accepting the evidence of such a witness on an issue identical to that on which he has been found to be untruthful in relation to another accused. Mr Kamalanathan, while conceding all these misdirections, asks this court to apply the *proviso* on this narrow issue of admissibility. We do not see how this can be done. It cannot in our view possibly be said that had the learned trial judge not misdirected himself in these various ways he must inevitably have admitted these statements; on the contrary, having just excluded a statement taken by substantially the same "team" and having held one of the principal witnesses on that team to be untruthful and to have used force in extracting the statement in question, far from applying the *proviso* it seems to us that the learned trial judge had he approached the matter correctly must have excluded the other statements also. Notwithstanding Mr Kamalanathan's valiant argument we are therefore satisfied that the statements of the third, fourth and fifth appellants should have been held to be inadmissible on the ground that they were not shown to have been voluntarily made.

Mr Kamalanathan submits that even if the three statements in question be excluded the convictions of all the appellants should be upheld on the following grounds: first, that the finding of fact by the learned trial judge that the five occupants of the car identified by PW1 were the same five people who were present at the scene of the murder was correct and should not be upset; second, that although there is no satisfactory evidence as to who fired the fatal shots the learned trial judge was correct in holding that the five appellants had a common purpose.

As we have said, PW1 knew the first and second appellants previously and this evidence is confirmed by these appellants themselves. She identified the third, fourth and fifth appellants at different identification parades and the reliability of her identification of the

fifth appellant is confirmed by the evidence of PW3 who placed that appellant at the scene and who also identified him at an identification parade. The learned Judge found that all five appellants were together in the car which ran into the bush some three hours before the murder; for the purposes of

BARON DCJ

this portion of Mr Kamalanathan's argument we will assume that this finding was justified as to all five appellants. Mr Kamalanathan argues that the first and fifth appellants having been placed by eye - witnesses at the scene (to which we would add the circumstantial evidence referred to above which placed the second appellant there also), and there being evidence that the first appellant had referred to having been involved in an accident, the only reasonable inference is that the five people at the scene of the murder were the same five people as were in the car.

What the first appellant is alleged to have said to PW2 is recorded in the following terms:

". . . he told me that he was involved in an accident and people had died and then I asked him how many people had died but he did not answer . . . the only thing he said was whether the white man was in the house."

There is no evidence as to the distance between the scene of the accident and the scene of the murder; the evidence is that there was an interval of some three hours between the two events. There is nothing to show what happened in that interval; it might well be that one or more of the original occupants of the car decided to abandon whatever activity they had embarked on and that the remaining occupants then recruited another person or persons to make up the numbers - perhaps the plan required five people. Or perhaps one or more of the occupants of the car had been injured in that accident so that it was necessary to replace them; the reference to people having been killed lends credence to this possibility, particularly since the remark was quite unnecessary. The inference that the five people at the scene of the murder were the same five people as were in the car is not therefore the only reasonable inference from the facts.

Apart from their statements there is no evidence placing the third and fourth appellants at the scene, and on this factual basis alone the appeals of those two appellants must be allowed and their convictions and sentences set aside.

The cases of the first, second and fifth appellants stand on a different footing; they turn on the question of common purpose. The learned Judge said:

". . . the evidence clearly establishes that all the five accused persons had gone on some illegal escapades armed."

If this were a correct statement of the evidence then common purpose would indeed be established; but there is no evidence that one of the robbers, whichever one that was, was known by the others to be armed. The learned trial judge found as a fact that the first appellant was the man who pulled the firearm from his jacket and shot and killed the deceased. He arrived at this conclusion on the basis of the statements to the police of the third, fourth and fifth appellants, which for the reasons we have already canvassed should not have been admitted in evidence. But in any event, even if those statements were properly admitted, the learned trial judge misdirected himself in using them as evidence against the first appellant; it is trite that an outside the Court statement

BARON DCJ

by one co - accused is not admissible as evidence against another. As we have indicated earlier, the evidence of the eye - witnesses as to who fired the fatal shots is conflicting and, Mr Kamalanathan concedes that the case must proceed on the basis that it is not known who fired the fatal shots; but, he submits, common purpose is to be inferred from the conduct of the five people at the scene. He submits that they set out to commit a felony and that at least when the first shot was fired which killed the dog the others should have abandoned the robbery. But the evidence is clear that there was an interval of only a second or two between the shooting of the dog and the murder of the farmer, and no inference can in these circumstances be drawn from the conduct of the four persons during such an interval.

Mr Kamalanathan argues in the alternative that the matter is covered by section 204 (c) of the Penal Code which reads:

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: . . .

(c) an intent to commit a felony;"

Mr Kamalanathan submits that once it is proved that five persons were engaged together in the commission of a felony and someone is killed then all are guilty of murder. We can see the force of this submission in a case where the death results from the kind of act which was part of the common design. Suppose for instance a gang in planning a robbery at a place where a night - watchman is known to be employed agree to incapacitate the watchman and to gag him in order to prevent his raising an alarm; and suppose that the watchman dies as a result. It seems to us that if this be murder in one then it is murder in all. But the authorities are clear that where death results from an act of one of a gang which went beyond the common design to which the others were parties those others cannot be convicted of the offence of which the one is guilty. Thus in *Davies v Director of Public Prosecutions* [1] a gang of six youths attacked four others; during the attack a knife was used and subsequently one of the second group of four youths died of wounds. It was proved that Davies used the knife, but since there was no evidence that any of the others knew he had it they were acquitted; they were subsequently arraigned on another charge. Again, in *R v Lovesey, R v Peterson* [2] Widgery, LJ, said:

"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."

There is no evidence in the present case that the other members of the gang, whoever they were, knew that a firearm was being carried by one of them. It was referred to as a sawn off .22 Magnum; there was evidence that it was produced from the pocket of one of the robbers, and this was feasible since the weapon was some eleven or twelve inches in overall

length. It was not therefore proved beyond reasonable doubt that the use of this firearm was part of the common design to which all the members of the gang were party.

Where two or more people are known to have been present at the scene of an offence and one of those people must have committed it but it is not known which one, they must all be acquitted of the offence unless it is proved that they acted with a common design. This has been the common law for centuries; see for instance *R v Richardson* [3] and R v Borthwick [4] - in this latter case the accused were members of a press gang acting illegally in pressing seamen without a warrant, and one such man was killed by a blow from one of the accused but it was not known from which one; there was no finding of one common illegal design and all were acquitted. To the same effect is *R v Lovesey, R v Peterson* [2] where Widgery, LJ, said:

"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 is in the present case insufficient evidence to establish a common design and no satisfactory evidence as to which of the appellants fired the fatal shots. The convictions for murder cannot therefore stand.

It remains to consider whether the first, second and fifth appellants should be convicted of some other offence which was within the common design to which they were clearly parties. Such a course is rare and so far as we know has never been adopted in England; for instance in *Davies v Director of Public Prosecutions* [1] those of the accused who were found not guilty of murder because of lack of proof of common design were acquitted and arraigned on a charge of common assault. On the other hand in *Alick Kazembe and Another v The People* [5] the Court of Appeal for Zambia substituted a conviction for unlawfully doing grievous harm with intent to do such harm contrary to what is now section 224 of the Penal Code. In that case the acts alleged were clearly proved, but it was not shown that the death resulted from the assault.

At common law a defendant could not be convicted of an offence of an entirely different character from that charged in the indictment; and on a charge of murder (save for manslaughter and certain statutory exceptions like infanticide) a conviction for a minor

offence was never entered even where that offence was of a similar character. No doubt the basis for this practice was the same consideration as prompted the Court of Criminal Appeal in *R v Jones* [6] to comment adversely on an indictment joining a count of murder and a count of robbery with violence, when the court said:

"We think that in a case of murder the indictment ought not to contain a count of such a character as robbery with violence. The charge of murder is too serious a matter to be complicated by having alternative counts inserted in the indictment. In the opinion of the Court the Indictments Act 1915 did not contemplate a joinder of counts of this kind. The proper course in a case like this

is to have two indictments so that the second charge may be subsequently tried if the charge of murder fails and if it is thought desirable to proceed upon the second charge."

A *fortiori*, this reasoning applies with even greater force to the concept of a conviction on a charge of murder for a minor offence which has not been charged.

The matter is now governed by the Criminal Law Act, 1967, which broadened the circumstances in which it is competent in England to convict of a minor offence. Section 6 (3) provides that save on a charge of treason or murder if "the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence" the accused may be found guilty of that other offence; (on an indictment for murder the Act provides in section 6 (2) that the accused may be found guilty of only those offences which are specifically set out or referred to). Our legislation is not so restrictive; section 181 of the Criminal Procedure Code reads as follows:

"181. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitute a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

It will be observed that subsection (1) deals broadly with the same area as section 6 (3) of the Criminal Law Act, 1967; whether or not the other offence can be said to be cognate to the offence charged a conviction therefor is competent if, in the words of the English legislation, the allegations in the original charge amount to or include an allegation of another offence or, in the words of our legislation, some of the particulars of the original charge constitute a complete minor offence. But the Criminal Law Act, 1967, does not appear to deal with the case covered by sub section (2) of section 181, nor does our legislation make any distinction between an indictment for murder and an indictment for some other offence.

As we ponted out in *Phiri (C.) v The People* [7], the two subsection of section 181 contemplate two different cases. The first is where the offence consists of several particulars and some of these particulars constituting a minor offence are proved; the second is where none of the particulars of the offence charged is proved but facts are proved which disclose a minor offence. That case dealt specifically with the question whether it was necessary for the minor offence to be cognate to the offence charged; we held that "minor offence" has the same meaning in both subsections, that the question of cognateness or otherwise is not an aspect of the definition of the expression but a factor to be taken into account by the court in exercising its discretion, and that the test under both subsections

is whether the accused can reasonably be said to have had a fair opportunity to meet the alternative charge. It is for this reason that the courts of Zambia have held that on a charge of robbery the accused may be convicted of an assault - result directly contrary to the English common law prior to statutory intervention. But as we stressed in *Phiri* (C.) [7], section 181 is permissive only and the question of cognateness may well be - and no doubt will be - an important factor in deciding whether or not the accused has had a fair opportunity to meet the other charge. The discretion should not be exercised lightly; courts should not be over zealous to find some other offence of which an accused person may be convicted. And in particular a person facing a charge of murder should not, as the court said in Jones [6], have his defence complicated by the possibility of a conviction for some other

offence. But these are merely factors, albeit weighty ones, which the court must take into account in exercising its discretion; if the accused has quite clearly had full opportunity to meet the other charge the court must not shirk its duty simply because the indictment is murder. Whether or not an accused has had a fair opportunity to meet another charge will always depend on the facts of the particular case; it is necessary therefore to consider the facts of this case and determine whether this test has been met.

We can deal very shortly with what may be termed capital aggravated robbery, namely aggravated robbery to which subsection (2) of section 294 of the Penal Code applies. On a charge of murder the *onus* is on the prosecution throughout, including the *onus* to establish common purpose where this is in issue, whereas on a charge of capital aggravated robbery the *onus* is on the accused to satisfy the court as to the matters therein set out. Hence evidence insufficient to support the former charge could nevertheless support the latter. No doubt it was precisely because of the difficulties in establishing common purpose that section 294 (2) was framed in that particular way; and it now behoves people who are minded to set out on an aggravated robbery to make very sure that none of their companions is armed. In view of the ability to charge under section 294 (2) it is difficult to understand why the prosecution should have chosen to charge murder; but this was the charge the appellants faced, and since they were never called upon to discharge the *onus* under section 294 (2) it cannot possibly be said that they have had a fair opportunity to meet a charge of capital aggravated robbery.

We turn then to consider "ordinary" aggravated robbery. The facts found by the learned trial judge, which cannot be upset, prove that the first, second and fifth appellants participated in such a robbery, namely theft of a motor car and the use in the process of violence on the owner. The evidence is overwhelming that to the extent that they used violence in the shape of an assault with fists all the members of the gang participated. Their defence to the charge of murder was simply that they were not there, and we are unable to see how on the facts of this case, had they been charged with aggravated robbery, they could have put forward any other defence. We are fully satisfied therefore that this is a proper case for the exercise of the court's discretion in terms of section 181 (2) of the Criminal Procedure Code. The appeals of the first, second and fifth

appellants will therefore be allowed to the extent that the convictions for murder and sentences of death will be set aside and convictions for aggravated robbery substituted.

Postea

(Mr Kamalanathan informed the court that there was nothing known against any of the appellants.)

For the same reasons as led us to find that common purpose had not been proved the possession and use of a firearm must be ignored; we must approach the question of sentence on the basis that the robbery was by five men who were not armed with any weapons. That being so there is nothing before us which would warrant the imposition of more than the minimum statutory sentence. Each of the appellants will therefore be sentenced to fifteen years' imprisonment with hard labour with effect from their respective dates of arrest, namely in the case of the first appellant the 5th March, 1974, in the case of the second appellant 27th February, 1974, and in the case of the fifth appellant the 3rd June, 1974.

Appeal allowed, sentence varied