DAVID ZULU v THE PEOPLE (1977) ZR 151 (SC)
SUPREME COURT
CHOMBA, GARDNER AND BRUCE - LYLE JJS
14th JUNE 1977
SCZ Judgment No.26 of 1977

Flynote

Criminal Law - Evidence - Circumstantial evidence - Weakness of - Danger of erroneous inference.

Headnote

The appellant was convicted of the murder of a woman in the course of a sexual assault; the injuries found on the body suggested that she had struggled with her assailant. The evidence established that the appellant and the deceased had been drinking beer together at a bar and were seen leaving the bar together at about midnight; between 0600 and 0700 hours the next day the deceased's partially undressed body was found. The appellant was traced and when arrested was found to have scratches on the neck and chest. He explained in evidence that the scratches were caused by flying pieces of iron at his place of work, an explanation which was not rebutted. The trial court without any evidence to support the finding said that the appellant had protective clothing at work and therefore that the flying particles of iron could not penetrate such clothing; the trial court consequently inferred that the scratches on the appellant were sustained during the struggle with the deceased.

Held :

(i) It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.

(ii) It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.

(iii) The appellant's explanation was a logical one and was not rebutted, and it was therefore an unwarranted inference that the scratches on the appellant's body were caused in the course of committing the offence at issue.

CHOMBA JS
R O Okafor, Legal Aid Counsel, for the appellant.
R E M Mwape, Senior State Advocate, for the respondent.

Judgment

Chomba JS: delivered the judgment of the court.

This is an appeal against conviction on a charge of murder, contrary to section 200 of the Penal Code. It was established before the learned commissioner who presided at the trial that on 8th May, 1976, the appellant was in Chisokone Bar in Ndola in the company of the deceased, Mailes Izeki Chisenga. The two of them were drinking beer together with a man called Sudan Siame who was PW1 at the trial. Another witness named Boston Kapenda, who is a nephew of the deceased, testified that when he went to Chisokone Bar and found the deceased, it being at night he asked the deceased how she would get back home, as it was a long way away. The deceased reportedly replied that she would be accompanied by the appellant.

There was also evidence at the trial that at about midnight on that day, the deceased, still in the company of the appellant, was seen leaving the bar. The next thing that happened was that at about 0600 or 0700 hours of 9th May, 1976, her partially undressed body was found in Kabushi Township. As a result of the investigations carried out by the police, the appellant was located and arrested for the murder of the deceased. The appellant

denied that he had anything to do with the death of the deceased. In his statement on arrest, he in fact gave an alibi to the effect that the only bar he visited on the material date was Chitupi Bar, where he drank beer up to 2130 hours when he went home to sleep. It was further established that when the appellant was arrested he was found to have scratches on the neck and chest. The learned commissioner found as a fact, and properly so, that the deceased was killed in the course of a sexual assault being committed on her and that the injuries found on the body suggested that she had struggled with her assailant. He then inferred that the scratches on the appellant were incurred during the struggle with her on the fateful night.

It is palpably clear that the evidence available at the trial was circumstantial evidence. It is competent for a court to convict on such evidence as it is to convict on any other types of admissible evidence. However, there is one weakness peculiar to circumstantial evidence; that weakness is that by its very nature circumstantial evidence is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn. As Professor Nokes states in the 2nd Edition of his book "An Introduction to Evidence" at p. 467:

"The possible defects in circumstantial evidence may . . . include not only those which occur in direct evidence such as falsehood, bias or mistake on the part of witnesses, but also the effect of erroneous inference."

It is therefore incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge in our view must, in order to

feel safe to convict, be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only of an inference of guilt.

As to the current case, in the first place while we accept the learned commissioner's finding that the appellant was with the deceased until midnight on the relevant date, it is by no means easy for us to agree with the inference that the appellant was the murderer. The time lag between midnight, when the appellant was last seen with the deceased and the discovery of the deceased's body was at least six hours. In that time it is quite possible that the appellant might have parted with the deceased and that while the deceased was alone on her way back home she was attacked and killed by unknown people.

Secondly, the learned commissioner inferred, as I have already mentioned, that the appellant's scratches on the neck and chest evidenced his involvement in the struggle resulting in the deceased's death. The appellant in his defence testified that the scratches were caused by flying pieces of iron at his place of work. This was a logical explanation of his injuries and if it was in any way doubted either the prosecution ought to have adduced evidence in rebuttal or the court exercising its powers should have called evidence from someone at the appellant's place of work to disprove the appellant's claim. Neither of these two alternatives was done. The commissioner purported to demolish this defence by stating that the appellant had protective clothing at work and therefore that the flying particles of iron could not go through such clothing. Nowhere in the record of the evidence at the trial is there any mention of protective clothing and we wonder why the commissioner referred to it. In the event it was an unwarranted inference that the scratches on the appellant's body were caused in the course of committing the offence at issue.

For the foregoing reasons, it is our considered opinion that the circumstantial evidence received at the trial did not succeed in taking this case out of the realm of conjecture, and we are of the further opinion that the danger of erroneous inference on the part of the learned commissioner has not been dispelled. We therefore find the conviction in this case to be unsafe and unsatisfactory and consequently we quash it. The sentence is set aside and we direct that the appellant be set at liberty forthwith.

Appeal allowed