

SALUWEMA v THE PEOPLE (1965) ZR 4 (CA)

COURT OF APPEAL

CONROY CJ, BLAGDEN JA, CHARLES, J

17th February 1965

Flynote and Headnote

[1] Criminal Procedure - Charges - date of death in charge of manslaughter or murder:

In a case of manslaughter or murder, the charge should denote the date of death as the date of the crime.

[2] Evidence - Burden of proof - proof beyond reasonable doubt - 'reasonably possible':

If the accused's case is 'reasonably possible', although not probable, then a reasonable doubt exists, and the prosecution cannot be said to have discharged its burden of proof.

[3] Evidence - Weight - lying by accused, effect of:

Lying by the accused may render conclusive reliable evidence against him but cannot add weight to discreditable, conflicting or otherwise unreliable evidence.

Cases cited:

- (1) *R v Esau Zimba*, FSC Judgment [68] 1961 (mimeograph).
- (2) *R v Lujo*, 13 EALR 56.

Yousuf, for the appellant

Mitchell - Heggs, for the people

Judgment

Blagden J: . . . [The summary of facts and the weighing of conflicting testimony are largely omitted in this report, the prosecution alleged that the appellant caused the death of the deceased by kicking him in the head at a dance and beer drink on the evening of 22nd August, 1964.] . . .

After the fight was over it was obvious that the deceased was seriously injured. He was eventually taken to hospital, where he died on the 30th August, that is to say some eight days later. [1] I would interpose my summary of the facts at this point to observe that the information in this case was in error in charging the date of the murder as the 22nd of August, 1964. The correct date which should have been charged was the 30th August, the date on which the deceased actually died. As to this see *Archbold* (35th Edition) paragraph 2547. The matter is put succinctly in paragraph 6 (4) of Chapter 4 of the *Magistrates' Handbook* [Porter, Ed., Lusaka (1964)], at pages 12 - 13 in these terms:

'No crime of murder or manslaughter is committed until the death occurs, therefore to charge the date of the crime as the date of the injury, not the date of the death (where these occur on different dates) is considered illogical and wrong. In cases of murder and manslaughter, the practice set out in *Archbold* should therefore be followed and the date of death should be charged as the date of the murder or manslaughter. This practice was approved by the Federal Supreme Court in *R v Esau Zimba* FSC Judgment 68 of 1961, and the East African case of *R v Lujo* 13 EALR 56 should not be followed.'

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CONROY CJ

The learned trial judge expressed himself as satisfied beyond reasonable doubt that it was the kick which the appellant administered to the deceased on his head which fractured his skull and caused his death. He may have given consideration to the possibility of the fatal injury having been inflicted during the course of the first fight. If he did so he must certainly have rejected it. But nowhere in his judgment does he make any reference to this possibility....

Then it is clear that the deceased received at least two fist blows in the first fight and one or both of them was of sufficient force to knock him down. I have already referred to Dr Swain's evidence as to how the fatal blow might have been struck. She said: I would think it unlikely that the blow would be caused by a fist'. [2] I do not consider that that observation rules out the reasonable possibility that this was how the fatal blow was inflicted. It may not be probable, but if it is only reasonably possible, as I think it is here, then there must be a reasonable doubt as to whether it was the kick administered by the appellant which caused

the deceased's death. In these circumstances the prosecution cannot be said to have discharged the burden of proof upon it of proving the accused's guilt beyond reasonable doubt; and that is fatal to this conviction. It was for these reasons that I concurred in allowing this appeal.

Judgment

Conroy CJ: I agree.

Judgment

Charles J: My reasons for allowing the appeal are substantially those of the learned Justice of Appeal....

The fact that the appellant himself gave lying evidence as to his actions could not conclude the case against him. Such a fact is material when assessing the weight which is to be given to evidence against an accused which appears to be credible and probable in itself, and it may add such weight to such evidence as renders it conclusive against the accused. It cannot, however, add any weight to evidence which appears to be discreditable, conflicting or otherwise unreliable; the only addition the accused's lies can make to such evidence is to add to its confusion and uncertainty.