WINFRED SAKALA v THE PEOPLE (1987) Z.R. 23 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, J.S., AND BWEUPE, AG .J.S.
6TH OCTOBER, AND 14TH DECEMBER, 1987
(S.C.Z. JUDGMENT NO. 26 OF 1987)

Flynote
Criminal Law and Procedure - Common unlawful purpose - Meaning thereof:

Headnote
The appellant was convicted of aggravated robbery whilst acting together with two other conspirators. In the process of the robbery a night watchman was hacked with an axe. On appeal the appellant told the court that the conspirators had specifically agreed that the night watchman would not be harmed and that the appellant had been assured that there would be no resistance from the watchman. It was therefore the appellants position that he had agreed to participate in a simple store breaking and theft in which there would be no resistance from, and no violence to the watchman.

Held:
Section 22 of the Penal Code clearly contemplates that liability will attach to an adventurer for the criminal acts of his confederates, which will be considered to be his acts also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common design.

Cases cited:
(1) Mwape v The people (1976) Z.R. 160
(2) Smith v Desmond and Anor [1965] 1 ALL E.R. 975

Legislation referred to:
Penal Code, Cap. 146, section 22.

For the appellant: H. Silweya, Silweya & Co.
For the respondent: K.C. Chanda, Senior State Advocate.

Judgment
NGULUBE, D.C.J.: delivered the judgment of the court.

The appellant was sentenced to undergo fifteen years imprisonment with had labour for aggravated robbery. The particulars being that on 1st October 1989, at Katete, he with two other persons unknown robbed the Eastern Co-operative Union of the money set out in the charge, after using or threatening to use actual violence to Isaac Banda, who was PW1.

The facts of the case were that on the night in question, Isaac Banda, a night watchman, was on duty guarding the shop premises and other property of the Eastern Co-operative Union when someone stole up to him, took his own axe, and struck him viciously on the head, causing severe

injuries and rendering him insentient. This assailant was one of the three individuals (who included the appellant) who had arranged to steal some money which was in the shop. The appellant had earlier in the day been present and seen PW2 put the money - amounting to over K16,000 - in the safe. The learned trial judge appears to have accepted the appellant's evidence that there was an arrangement between PW2 and the other three men - including the appellant - to steal the money; that the conspirators had discussed the presence of the

p24

night watchman and had specifically agreed that he should not be harmed since he was a relative of PW2; end that the was posted as lookout to alert the other two should any persons happen to come along. It was thus the other two confederates who went to steal the money and one of whom injured the watchman. The appellant gave evidence that, according to the plan, PW2 had already removed most of the money but that a sum of approximately K1,000 was left in the safe which the other three should go and steal after breaking into the store and breaking the safe. This store breaking and theft would also serve to cover up and account for the money already removed. Again, according to the appellant, not only was it agreed not to harm the watchman but PW2 had assured the robbers that they would not encounter any resistance. It is, therefore, the appellant's position that he had agreed to participate in a simple store breaking and then in which there would be no resistance from, and no violence to, the watchman.The issue at the trial was whether the appellant was guilty of store breaking and theft only or of aggravated robbery. The appellant relied on *Mwape v the people* (1), in which this court held to the effect that there could be cases where the terms of a joint venture involving the theft goods from a shop which was known to be guarded by a watchman specifically stipulated that the adventurers should avoid any contact with or detection by the watchman. We held in that case that the violence used by that appellant's confederates against the watchman was in breach of the common purpose to which he had agreed and that such violence was not a probable consequence of the prosecution of the common purpose to which that appellant was a party. The learned trial judge found that *Mwape* (1) could only be supported on its own peculiar facts and that he was not prepared to say in this case that The use of violence against the watchman in the concerted design to rob the Eastern Co-operative Union shop was not a probable consequence of the prosecution of the common purpose. As we recognised in the *Mwape* (1) case, it is necessary in a robbery that a person in charge of or responsible for the property concerned should either be subjected to violence or put in fear. A simple store breaking and theft involves no such encounter.

On behalf of the appellant, Mr Silweya argued to the effect that, since the learned trial judge appears to have accepted even the evidence of the appellant, then the facts must have been that the appellant was party to a common design of store breaking and theft only. It was submitted to the effect that the case of *Mwape* applied, so that the use of violence by the appellant's confederates was not a probable consequence of the common purpose which involved a specific agreement not to injure the watchman because he was a relative of PW2. That being the case, the appellant was not liable for the violence and should only be convicted of store breaking and theft. In reply, Mr Chanda argued to the effect that, as there was nothing in the evidence to suggest that the watchman was aware of the plan to rote the shop or that he was party to such plan, the appellant must have known that it might become necessary for his accomplices to use force to subdue the night watchman.

p25

We have carefully considered these submissions and the arguments on both sides. We wish to confirm that the case of *Mwape* (1) was concerned with a factual situation in which, on the particular facts, an assault on a watchmen was found to have gone beyond the common purpose to which that particular appellant had agreed. *Mwape* (1) did not introduce any new principles but in fact confirmed the law as it is stated in section 22 of the Penal Code which reads:

> "22. When two or more persons form a common intention to prosecute an unlawful purpose in conjuction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

In our considered view, the section clearly contemplates that liability will attach to an adventurer for the criminal acts of his confederates, which will be considered to be his acts also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common design. In this regard, liability will attach for any confederates' criminal act which is within the scope of the common unlawful purpose and this will be so whether the act was originally contemplated or not. Where the act was not originally contemplated, an adventurer will only be relieved of liability if the criminal act of his confederates falls wholly outside the common purpose. The argument in the present case was that the common purpose was to break in and to steal the money without causing injury to the watchman and that the brutal attack on the watchman fell outside the scope of such common purpose.

Of course, the question whether, on the facts, the act which is alleged to be wholly alien to the common purpose fell within or outside the scope of the unlawful common enterprise, must be answered upon an examination of the facts themselves. The evidence from the appellant himself was that the purpose of the exercise was to cover up the earlier theft by making it appear that the money stolen earlier had been stolen during a break - in at the premises. It was therefore necessary in order to put this plan into effect, to gain access to the premises whether or not the night watchman resisted. There was no evidence that he was a party to the scheme and, in the event, he obviously was not. It follows therefore that, although the appellant may well have been told that no harm would be done to the watchman, he must have realised that at least threats and possibly some force - such as tying up - would have to be used against the watchman if he discovered the intruders.This would have amounted to aggravated robbery and was within the contemplation of the appellant. The fact that the watchman was axed contrary to the alleged agreement does not absolve the appellant of guilty intention that some form of aggravated robbery should take place if necessitated by the watchman's possible vigilance. In this respect the facts of this case differ from those in *Mwape* (1). In that case it was accepted that the robbers, if, discovered by a watchman, might have decided to run away. In this case it was essential for the carrying out of the plan that access to the premises be attained regardless of any possible resistance by the watchman.

p26

The fact that he was actually assaulted and rendered incapable of preventing the theft, or raising an

alarm, did not take that act out of the scope of the common purpose but was clearly a probable consequence of deliberately setting out to steal property known to be under the immediate and personal care and protection of the watchman whose specific duty it was to prevent and to deter marauders of the appellant's ilk from taking the employers' property.

It follows from the foregoing that this appeal must fail and we accordingly dismiss the appeal against conviction. No appeal lies against the mandatory magnum Sentence.

Appeal dismissed