ROBERSON KALONGA v THE PEOPLE (1988 - 1989) Z.R. 90 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, J.S., AND CHAILA, AG. J.S.
25TH AUGUST 1988
(S.C.Z. JUDGMENT NO. 25 OF 1988)

Flynote

Criminal law and procedure - Charges - Disclosure of particulars of offence charged.
Evidence - Identification - When necessary to corroborate.
Evidence - Finger-prints - Presumption where not obtained - Rebuttability of.

Headnote

The appellant was convicted of aggravated robbery and sentenced to death. He was not charged with armed robbery. The grounds of appeal indicated that the identification evidence was poor and the police neglected their duty to lift fingerprints from the scene of the crime, raising a presumption that fingerprints at the scene did not belong to the appellant.

Held:

(i) It is essential when there is an allegation of armed robbery that an accused be notified that he stands charged with such an offence.

(ii) Poor identification evidence requires corroboration such as a finding of recent possession of stolen property. 25

(iii) Failure to lift fingerprints is a dereliction of duty by police which raises a presumption that such fingerprints as there were, did not belong to the accused. The presumption is rebuttable by overwhelming evidence of identification.

Case referred to:

(1) Emmanuel Phiri and Ors v The People (1978) Z.R. 79

Legislation referred to:

Penal Code, Cap.146, s .294 (2)

For the appellant: C. P. Sakala, Director of Legal Aid.
For the respondent: N. B. Mutti, Assistant Senior State Advocate.

Judgment

GARDNER, J.S.: delivered the judgment of the Court.

The appellant was convicted of the offence of aggravated robbery and was sentenced to death; the particulars of the offence were that on 14th September 1984, at Choma the appellant jointly and together with other persons unknown, stole a large quantity of goods from one Bernard Namatama, and at the time of such stealing used violence.

The learned Director of Legal Aid on behalf of the appellant has drawn the attention of this Court to

the fact that the appellant was not charged with the offence of armed robbery in accordance with section 294(2) of the Penal Code. Neither did the particulars of the charge allege the use of a gun.

We agree with the learned Director that it is essential when there is an allegation of armed robbery that an accused must be notified that he stands charged with an offence. In this particular case there was no notification

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to the appellant and therefore, as we will say later in this judgment, he will not be subjected to the death sentence.

In further argument on behalf of the appellant the learned Director of Legal Aid argued that there was no evidence supporting a conviction for using violence. The learned Director argued that there was no evidence that the complainant in this case was afraid of his attackers. We have examined the record in this case and we note that there was evidence that the complainant and PW2 in particular had his hands to the people who committed this robbery. We are satisfied that the tying of hands is factual evidence of the use of violence. This ground of appeal therefore cannot succeed.

The learned Director further argued that the only identification of the appellant in this case took place in Court. We have in the past criticised the production of evidence of identification only by identification in Court. However, in this case, there is clear evidence that the possible identifying witness had an opportunity to see the appellant before there was any chance of holding an identification parade. This is a situation that cannot be helped, and, when it does occur, a trial Judge in any such case can only look for corroborating evidence of what is admittedly poor evidence of identification. In this particular case the learned trial Judge did look for this corroborating evidence and he found such evidence in the fact that the appellant was found in possession of stolen property shortly after the offence. We would emphasize that the appellant was not convicted on evidence of being in recent possession of stolen property, in which connection the learned Director drew our attention to the fact that the appellant gave an explanation which might reasonably be true. This argument was irrelevant. The appellant was convicted because he was identified and the identification evidence was corroborated by the fact that he was found in possession of stolen property. This ground of appeal therefore cannot succeed.

The learned Director further argued that as no fingerprints were taken at the scene of the robbery, the police were in dereliction of duty. As we have said in the past, it is the duty of the police to lift fingerprints if available, and as we said in the case of *Emmanuel Phiri & others v The People* (1) where fingerprints are not lifted there is a rebuttable presumption that such fingerprints as there were, did not belong to the accused. However, we emphasize that the presumption is rebuttable, and in this case the learned trial Judge dealt with the matter quite properly when he found that there was overwhelming evidence of identification, supported by corroboration, to convict the appellant despite the dereliction of duty by the police in failing to lift fingerprints.

For the reasons which we have given the appeal against conviction is dismissed.

The appeal against sentence is allowed, and the sentence of the death penalty is set aside. In its

place, having regard to the fact that it was found that there was a gang which took part in this robbery and violence was used, we substitute a sentence of twenty years imprisonment with hard labour with effect from 31st October 1984.

Appeal allowed in part.
