IN THE SUPREME COURT OF ZAMBIA SCZ Appeal Nos. 75-77 of 1993

HOLDEN AT NDOLA

(Criminal Jurisdiction)

1. MULENGA KAMPINDA
2. MWANSA MPUNDU Appellants
3. CHRISTOPHER MPUNDU

VS

THE PEOPLE Respondent

CORAM: Sakala, Chaila and Chirwa JJJ.S.

8th September 1993 and 08/12/93

For the Appellant : Mr. S.K. Munthali, Principal Legal Aid Counsel
For the Respondent : Mr. S.S. Twumasi, Assistant Senior State Advocate

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J U D G M E N T

Chaila, J.S. delivered the judgment of the court.

The appellants were prosecuted on four counts of murder and were convicted. Initially they were charged with five more others who were acquitted.

The particulars of the first count were that they murdered Bernard Makonkaulwa in Luanshya on 10th September 1991. The particulars of the second count were that they murdered on 11th September, 1991 in Luanshya Danny Kalunga. The particulars of the third count were that on 12th day of September 1931 at Luanshya murdered Dason Lukonde. The particulars of the fourth count were that they murdered on 13th September 1991 Edward Hamainde. They were sentenced to death on all four counts.

Briefly the prosecution's case was that between 10th and 13th September 1991 at Luanshya on the Copperbelt, the deceased persons mentioned in the particulars of the offence had disappeared. The relatives made reports to the police. The investigations revealed that the deceased had been killed and had been buried in the house in Walale compound. The investigations proved that the

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house was being occupied by the appellants and the bodies of the deceased persons were exhumed from that house. Investigations further revealed that the clothes and some items belonging to the deceased persons were recovered either from the house or farm and other places with the help of the appellants. After a lengthy trial the learned trial judge found that the prosecution had proved the case against the appellants. He found that the prosecution case was weak in respect of the other five accused and he acquitted the other five. He convicted the three accused persons and imposed a mandatory death sentence.

The appellants have appealed against both convictions and sentences. Mr. Munthali on behalf of the appellants has submitted one major ground of appeal. The ground is that the learned trial judge misdirected himself in convicting the appellants by drawing inference of guilty from the circumstantial evidence which was manifestly weak. The counsel has argued that the appellants were convicted on murder basically on circumstantial evidence. There was no evidence according to his argument to show where, when and by whose hands the deceased met their deaths. He has argued that the prosecution did particularise the dates when the deceased persons died but there was no evidence on the dates of deaths. He has argued that the evidence did not show how and when the appellants killed the deceased persons. He has further attacked the conclusion of the learned trial judge that the three appellants were in occupation of the house number 436 of Walale compound. He has argued that the learned trial judge erred in drawing the inference that since the three appellants were in occupation of the house they were all guilty of the offence. The counsel has submitted that the learned trial judge on occupation of the house relied on the evidence of PWs 1, 3 and 9. He has submitted that the evidence of all three witnesses on the occupation of the house was very weak and that it was wrong for the learned trial judge to rely on that evidence since PW1 never made any mention of the number of the house. The counsel further submitted that PW1 himself had said in his evidence that he had not been taken to the named house before. The learned counsel wondered how the learned trial judge could rely on the evidence of such a witness. The learned counsel submitted that PW3 did not mention the number of the

/3...house.

house. Mr. Munthali further submitted that PW9 did not mention the number of the house. Mr. Munthali has argued that in his judgment the learned trial judge partially relied on the evidence of the witnesses PWs 5 and 9. In his judgment the learned trial judge rejected some of their evidence in respect of some of the accused persons who were acquitted. He submitted that it was dangerous for the learned trial judge to rely on their evidence which implicated the three appellants. The learned counsel further submitted that the appellants in their defence have denied occupying that house. He has argued that A2 was staying at the farm, she used only to come to the house occasionally. Mr. Munthali argued that it was wrong for any trial judge to accept that the three appellants were occuping the house. It was wrong further for information to talk about specific dates since there was no evidence that the appellants were in occupation of the house. Mr. Munthali then dealt with specific appellants. He started with the third appellant.

He has argued that the third appellant was convicted on the ground that he was seen pushing a wheelbarrow and that he was putting on shoes of one of the deceased Mr. Chikonde. He has argued that that contradictory evidence of the recovery of the wheelbarrow came from PW5 and PW7. He has argued that they were talking about the wheelbarrow which was found out side the house. On the shoes Mr. Munthali submitted that the shoes were too small for him and he was asked to try them on in court and were found to be too small. It was therefore wrong for the learned trial judge to have drawn the inference of guilt from those facts.

As regards the second appellant Mr. Munthali talking on the evidence of PWs 8 and 12 whose evidence on which the learned trial judge based his conviction, the evidence was that PW8 and PW12 had gone to Chitwi farm with A1 and A2 where some property was recovered. The appellant denied having accompanied PW8 and PW12. He has argued that the appellant maintained that it was Bernard Lesa who took the police to Chitwi farm. He has argued that the evidence linking A2 and A3 was very shaky for the learned trial judge to draw an inference of guilt. He has argued that evidence of PW4 ought to have been dismissed. He further argued that the evidence of PW9 should have been totally disagreed with by the

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learned trial judge. He further argued that the prosecution failed in its duty in not holding the identification parade. Mr. Munthali further argued that the learned trial judge should have not relied on the evidence of PW12 on the recovery of the items and should have not drawn the inference of guilt from the evidence of PW12 in respect of A1 and A2.

The learned Assistant Senior State Advocate Mr. Twumasi supported the convictions on the ground that the evidence against the three appellants was overwhelming. On the house in Walale compound the learned counsel submitted that it was clear that the three appellants were in occupation. The evidence to that effect was provided by PWs 1, 3, 7, and 8. The evidence of these witnesses in a nut shell was that they knew the occupants of the house in question and that the appellants were staying in that house and were known by the witnesses. Mr. Twumasi submitted that the evidence of PW9 a neighbour, knew the occupants of the house since he had stayed with the second appellant for three years. Mr. Twumasi further submitted that when the incident happened the witness knew which house they were talking about, even if they did not mention the house number. The witnesses spoke only about one house in Walale compound from where the bodies were exhumed.

Mr. Twumasi then dealt with individual appellants. As regards A1 the learned counsel argued that the appellant was at the house where the bodies were exhumed. The first appellant went round and picked the keys to the room where the bodies were exhumed. He picked the keys which used to open the house. The counsel wondered if he was not staying at the house, how was he going to know where the keys were being kept. There was further evidence on the behaviour of the first appellant when he was asked by the police about conducting a search in the house. The first appellant knew that there was something wrong in the house. He knew there was something terrible which had taken place inside the house. The first appellant's behaviour, the learned counsel argued, clearly showed that A1 knew what was inside the house. The learned Counsel referred to the question of leading the police to the farm. Mr. Twumasi argued that the first appellant led the police to the farm where properties which belonged to the deceased persons were recovered.

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As regards the second appellant, Mr. Twumasi submitted that the evidence was very clear. The second appellant was the owner of the house where the bodies were exhumed. In addition the second appellant was found hiding at the farm, later she led the police to the recovery of the items particulary the identity card. Mr. Twumasi further argued that it was not true that the police were led to the farm by a person called Osea. The police were led to the farm by A1 and A2. On A3 Mr. Twumasi argued that the evidence which connected the third appellant was the question of shoes and wheelbarrow. A3 was seen coming with a wheelbarrow carrying a 25kg bag. That wheelbarrow was identified as belonging to one of the deceased persons. Mr. Twumasi submitted that PW12 had testified in the lower court that it was A3 who was coming with the wheelbarrow. That wheelbarrow was exhibited. It was the wheelbarrow which was seen with A3. On the shoes Mr. Twumasi argued that A3 was seen with the shoes although they were tight. He submitted further that there was a pair of khakhi trousers found with A3, these trousers belonged to one of the deceased persons. Mr. Twumasi in his final submission urged the court not to dismiss the evidence of PW4. He maintained that the evidence of PW4 which was not challenged clearly brought out more mode of what the appellants were doing. Mr. Twumasi maintained that the evidence of PW4 clearly made circumstantial evidence very strong. The evidence showed that the deceased persons were strangled. The postmortem reports showed that the deceased persons were strangled. That is what PW4's evidence showed.

We have considered the evidence in the court below. We have considered the submissions of both the Principal Legal Aid Counsel Mr. Munthali and the Assistant Senior State Advocate Mr. S.G. Twumasi. We have further considered the judgment of the learned trial judge. Mr. Munthali has complained that the prosecution had not particularised the dates when the deceased persons died. He has argued that there was no evidence to show the dates on which deaths occurred. The prosecution led evidence on how the deceased persons mentioned in the four counts disappeared. Reports were made to the police. After the police made investigations the deceased bodies were found buried in a house in Kalale. The bodies

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were exhumed and were identified later by the relatives. The medical reports showed that those deceased persons died as a result of being strangled. The evidence was not in dispute that those people had gone missing and were found buried in the house. The bodies were exhumed. The postmortem reports proved that they had been strangled. The prosecution therefore proved that the deceased persons suffered violent deaths after disappearing from their homes and their deaths were not natural. Mr. Munthali's argument therefore fails. The dates when the deceased persons disappeared were known and their bodies were finally exhumed from the house in Walale compound and the medical reports proved that they had died of violent deaths. The prosecution evidence further proved that the house where bodies were exhumed belonged to A2 and that A2 and A3 were persons who had been staying there. The prosecution witnesses who testified about the house in Walale compound had known the three appellants for a long time and had seen them staying in the house where bodies were exhumed. Mr. Munthali argued that none of the witnesses mentioned the number of the house, but the evidence of the prosecution witnesses showed that there were only talking about one house where the bodies were exhumed and that house was occupied by A1, A2 and A3. Apart from the occupation of the house there is evidance connecting each of the appellants. The first appellant when confronted by the police knew where the keys were. He picked the keys to the house and to the room where the bodies were exhumed. When the police wanted to search the house the behaviour of A1 showed that he knew that there was something wrong in the house. There is the evidence of him leading the police to the farm where some properties belonging to the deceased persons were recovered. As regards A2 the evidence proved that the house belonged to A2. She led the police to recover some items including a national registration card belonging to one of the deceased persons. There was also evidence of A2 leading the police to the farm where some goods belonging to the deceased persons were recovered. There was evidence in the lower court to connect A3. He was seen carrying a wheelbarrow belonging to one of the deceased persons. He was further seen wearing shoes although they were proved to be tight which belonged to one of the deceased persons. He was further

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found with a pair of trousers belonging to one of the deceased persons.

Considering all the pieces of evidence, we are satisfied that the circumstantial evidence adduced by the state had only produced one inference and this inference is that the three appellants were part of the people who committed the crime. The circumstantial evidence is so strong that it has taken the matter out of mere conjecture and has left us to draw only one inference of guilt. The learned trial judge considered the circumstantial evidence before him and he concluded that the three appellants were guilt of the offence. We agree with his conclusion. The appeals gainst conviction are dismissed.

As regards sentences there were no mitigating circumstances. The appeals against sentences are hereby dismissed.

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E.L. Sakala
SUPREME COURT JUDGE

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M.S. Chaila
SUPREME COURT JUDGE

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D.K. Chirwa
SUPREME COURT JUDGE