LEMMY BWALYA SHULA v THE PEOPLE (1996) S.J. (S.C.)

SUPREME COURT
M.M.S.W NGULUBE C. J., SAKALA AND CHIRWA, JJ.S.
2ND APRIL AND 7TH MAY, 1996.
(S.C.Z. JUDGMENT NO. 6 of 1996)

Flynote

Evidence – Credibility of witness- Resolving a conflict between two conflicting stories in favour of one of the parties

Headnote

The appellant was tried and convicted of a charge of murder. The prosecution case was that on the material day, PW3 was selling home brewed beer at her house. The deceased- who was her elder sister- was with her. Four men came to buy the last of the beer and sat down to drink. The appellant came along and joined the four men; he picked a quarrel with one of the four men; the man left. The appellant then picked a quarrel with the other of the three men who also left. Since there was no further business, the deceased and PW3 went to sit in a shelter where there was a fire and the appellant who had not gone away with everybody else went to join them. The ladies extinguished the fire in the hope that the appellant would go away. The deceased asked him to leave and as PW3 and the deceased were about to retire into their house, the appellant suddenly picked up a pounding stick and smote the deceased on the head. The deceased died instantly from the head injury sustained. The foregoing was the version from the prosecution as deposed to by PW3. Her evidence conflicted with that of the accused who claimed that when he was attacked by the four men drinking beer at PW3's home, the deceased tried to stop the fight and was killed during the riotous fighting and that the accused was not aware who hit the deceased. The High Court sentenced him to death. On appeal, the Supreme Court dismissed the appeal against conviction but allowed the appeal against sentence.

Held:

(i) An adverse finding as to credit is very different on an issue of credibility i.e. resolving a conflict between two stories in favour of one of the parties. An adverse finding as to credit is a finding that the witness is not to be believed; such a finding is in turn one of the factors which will influence the court in its decision as to which of the two conflicting versions of an affair it will accept.

(ii) It is not valid to hold a witness to be untruthful for no other reason than the existence of the very conflict which the court is called upon to resolve; such an approach would be purposeless and circular.

Case referred to:

(1) Chizonde v The People (1975) Z.R. 66

For the Appellant: Mr.. V. A. Kabongo, Director of Legal Aid
For the Respondent: Mrs. E. M. Chipande, Senior State Advocate

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Judgment

M. M. S. W. NGULUBE, C.J.: delivered the judgment of the court.

The appellant was tried and convicted of a charge of murder. The particulars alleged that on 30th July, 1994 at Ndola he murdered Lister Kamwengo. He was sentenced to death. When we heard the appeal on 2nd April we dismissed the appeal against conviction. However, we allowed the appeal against sentence; found that there were extenuating circumstances and imposed a sentence of 10 years I H. L. with effect from 31st July, 1994, the day the appellant was taken into custody. We said we would give our reasons later and this we now do.

The prosecution case was that on the material day, PW3 was selling home brewed beer at her house. The deceased- who was her elder sister- was with her. Four men came to buy the last of the beer and sat to drink. The appellant came along and joined the four men; he picked a quarrel with one of the four men; the man left. The appellant then picked a quarrel with the other three men who also left. Since there was no further business, the deceased and PW3 went to sit in a shelter where there was a fire and the appellant who had not gone away with everybody else went to join them. The ladies extinguished the fire in the hope that the appellant would go away. The deceased asked him to leave and as PW3 and the deceased were about to retire into their house, the appellant suddenly picked up a pounding stick and smote the deceased on the head. As the learned trial commissioner observed, the appellant must have felt snubbed. The deceased died instantly from the head injury sustained. The foregoing was the version from the prosecution, as deposed by PW3 who was believed.

The appellant's version, which was not believed, was that a fight had erupted between him and the other four men, which some by-standers stopped. A short while later as he was about to drink a cup of beer given him by one Kunda, the son of PW3, the latter (i.e. PW3) attacked him; grabbed the cup, poured the beer on the appellant and slapped him. Thereafter the other four men came with sticks and started to beat the appellant who was felled to the ground. According to the appellant, the situation was extremely confused – "some sort of riot" is how he had put it. The deceased had tried to stop the fight and the appellant does not know who hit the deceased or how the deceased got injured in the melee. All he knew was that PW3's son Kunda had immediately accused him of causing the injury; whereupon he was apprehended and tied up.

On behalf of the appellant, the learned Director of Legal Aid has advanced two grounds of appeal. The first was that the learned trial Commissioner erred in rejecting the appellant's version and in accepting that of PW3 on grounds of credibility. It was pointed out that while PW3 had stated that the appellant did not drink any beer at her house, the investigating officer had stated that he had learnt that the appellant had consumed some beer at PW3's place. What the investigating officer said he had heard tallied with the appellant's account. It was argued that because of this discrepancy, PW3 had lied on this point and the remainder of her evidence should not have been preferred to that of the appellant. We were referred to *Chizonde v The People* (1975) Z.R. 66.

The learned Senior State Advocate urged us to accept that the issue of credibility had been properly handled and that PW3 ought not to be held to have been untruthful on the basis of the hearsay evidence of the investigation officer. We have considered the *Chizonde* case and do not regard it as being helpful to the appellant in the manner proposed by the learned Director. We believe it will suffice simply to quote head notes (I) and (ii) which read:

“Held:

(i) An adverse finding as to credit is very different from a decision on an issue of credibility, i.e. resolving a conflict between two stories in favour of one of the parties. An adverse finding as to credit is a finding that the witness is not to be believed; such a finding is in turn one of the factors which will influence the court in its decision as to which of the two conflicting versions of an affair it will accept.

(ii) It is not valid to hold a witness to be untruthful for no other reason than the existence of the very conflict which the court is called upon to resolve; such an approach would be purposeless and circular.''

Applying the dicta in that case to the facts at hand, it would be strange to hold PW3 to be untruthful on account of the existence of the conflict which the trial court had to resolve. The truth is that the learned trial commissioner had addressed the issue most carefully and he came to the conclusion that PW3 was to be believed and the appellant disbelieved. In any event, whether the appellant had drunk some of the beer brewed by PW3 or not could not affect the outcome of this case on the question of liability. The real conflict to be resolved was whether the appellant smote the deceased as explained by PW3 or if someone unknown injured her during a riotous fight as suggested by the appellant. The court below had the advantage of seeing and hearing the witnesses at first hand and we as an appellant court must not reverse a finding on credibility unless it is clearly demonstrated that the trial court fell into error or failed to take proper advantage of seeing and hearing the witnesses. There is no ground for interfering.

The second ground alleged error in the rejection of the defence of self-defence. The defence alleged would only have arisen if the appellant’s version of a free-for-all fight had been accepted so that the deceased was killed per infortunium while attempting to separate the combatants who were using sticks. Since the appellant was not believed and we have said the court below was not in error, this ground could not succeed either.

Turning to the sentence, we considered that the drunken circumstances generally attending upon the occasion sufficiently reduced the amount of moral culpability so that there was extenuation. It was for the foregoing reasons that we had determined this appeal as earlier indicated.

Appeal on conviction dismissed
Appeal on sentence allowed and sentence reduced
