

DOROTHY MUTALE AND RICHARD PHIRI v THE PEOPLE (1997) S.J. 51 (S.C.)

SUPREME COURT

M.M.S. W. NGULUBE, C.J, SAKALA AND MUZYAMBA, JJ.S.

6TH MAY AND 12TH AUGUST, 1997

S.C.Z. JUDGMENT NO. 11 OF 1997

Flynote

Criminal law - Inferences to be drawn - Inference drawn where nothing to exclude that inference - Where doubt exists it must be resolved in favour of accused.

Headnote

Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the Court will adopt the one that is more favourable or less favourable to an accused if there is nothing to C exclude that inference. Where there are lingering doubts, the Court is required to resolve such doubts in favour of the accused.

Held:

- (i) Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favorable to an accused if there is nothing in the case to exclude such inference
- (ii) There was nothing in this case to exclude an inference favourable to the accused

For the appellant's: Mr. S. Malama, of Jaques and Partners

For the respondent: Mr. M .Mukelabai, Senior State Advocate

Judgment

NGULUBE, C.J.: delivered the judgment of the Court

The first appellant received a sentence of five years; three of them suspended, for manslaughter. The second appellant who was a juvenile at the time was sent to a reformatory for the same offence. In addition, the first appellant was fined for an assault. The prosecution case was that on 21st April 1994, the deceased Charles Musonda and one Ogily Sinyangwe were at Kansenshi Market in Ndola when the first appellant came with the second appellant and two other men. The deceased and his companion were accused of earlier on having tried to steal a motor vehicle from the appellant. The appellants and two other men started beating the deceased. Marketers tried to stop the beating and to suggest that the suspects be taken to the police, the first appellant is said to have refused to do so. In the process, the appellant's group is said to have assaulted the bystander who tried to intervene and the first appellant tore PW6's skipper and struck her on the head with a bunch of keys, causing an injury.

It was the prosecution's case that the appellant put the suspects in the first appellant's car and drove away with them and that shortly afterwards, the deceased died from further beatings meted out on Bombesheni Road near the first appellant's residence. Some of the marketers, such as PWs 1 and 2, claimed that when news of the death reached them, they went to Bombesheni Road and saw that the deceased was one of the suspects earlier beaten up by the

appellants at the market. Other marketers, such as PW6, deposed that in fact none of them went to the scene. There was evidence also that the first appellant went with her husband to the police where the husband reported that members of the public had beaten up two criminals who wanted to snatch a motor vehicle from his wife who had shouted for help and that one of the criminals was lying unconscious on Bombesheni Road. There was also evidence from Ogily Inyangwe's wife who was PW2, that he was unwilling to come to testify against the appellant.

A major issue at the trial concerned the identity of the deceased and the linkage between the assaults at the market and those on Bombesheni Road; that is to say, was the deceased one of the two men who were beaten up at the market? The learned trial Judge made a number of important findings. While the marketers stated that the incident at the market took place at 11:00 hours, PW8 stated that he had given a lift to the deceased and Ogily and that he had dropped them off at the market shortly after 12:30 hours. The learned trial Judge resolved the discrepancy in favour of PW8 on the ground that he was literate while the marketers were illiterate and making an uneducated guess. The defence were relying on the discrepancy as one of the grounds for the contention that there was no link between the suspects beaten up at the market at 11:00 hours and the deceased. The learned trial Judge made an important finding on the question of whether or not any of the marketers had gone to see the body on Bombesheni Road. He found as a fact that none of them had in fact gone to see the body. We will return to this finding a little later when we deal with the submissions and the consequence of the finding in effect that the witnesses had lied on a very major point for the remainder of their evidence.

The learned trial Judge found that there was ample circumstantial evidence supported by the testimony that the two suspects were thoroughly beaten up; that the first appellant led the group of assailants; and that all the marketer witnesses had said that the first appellant had openly declared the desire to kill the men or at least to give them a severe beating. The learned trial Judge was of the view that the only inference to be drawn on the evidence was that the appellants must have continued to assault the suspects until the deceased died and that there could not have been an instant justice mob as alleged by the first appellant's husband in his report to the police. Although the court accepted that there was no evidence from any witness linking the appellants to the deceased, the court found that - and we quote that last sentence in the Judgment below - "The first accused and her husband themselves connected the deceased with the first accused".

In his submissions, Mr Malama said that the grounds of appeal related mainly to the findings by the Court below on the identity of the deceased, pointing out that the obvious point to make was that there was no evidence whatsoever directly connecting the persons who were allegedly assaulted at the market and the one person who was eventually picked up in Bombesheni Road, who happened to be the deceased in this case. He argued that the quarrel against the findings by the trial Court hinged on the fact that the gap between the person assaulted at the market and the body eventually discovered was filled, not by direct evidence but by inferences made by the Court. It was the contention of the defence that the deceased in the case was not one of the two men who were assaulted at the market. In this regard, Mr. Malama drew attention to the evidence of virtually all the marketers who gave evidence and who placed the incident at the market at between 10:00 and 11:00 hours in the morning whereas the deceased and Ogily Sinyangwe were dropped off at the market by PW8 only at 12:30 hours. Counsel complained that the Judge below drew unsupported and unfavorable conclusions that all the marketers were illiterate and were all making uneducated guesses when they mentioned the time. It was pointed out that the person to provide the linkage should have been Ogily Sinyangwe, the deceased's companion, or any marketer who would have identified the body; but Sinyangwe was reluctant to testify and the learned trial Judge very properly rejected the evidence of PWs 1 and 2, the marketers who claimed to have gone to see the body when in actual fact - as found by the Court- that was not true. Counsel submitted to the effect that, in the absence of any link; it was wrong to draw an inference from

mere supposition that the first appellant must have driven the two persons to Bombesheni Road and there continued to beat them. Counsel drew attention to the serious wounds and other severe injuries suffered by the deceased which were inconsistent with the weaponless assaults on the two men at the market.

Mr. Malama concluded by submitting that it was unfair and wrong to find that the report by the first appellant's husband to the police dispelled doubts about the identity of the deceased or provided the linkage between the incident at the market and the death of the deceased. He argued that if the trial Judge had accepted the whole of the statement alleged to have been made by the husband, then it should have been accepted that there was a mob which beat up the deceased and the injuries would then have been entirely consistent with such an occurrence. This, it was submitted, would have had support from the evidence instead of the inferences that were drawn without any supporting evidence.

In response, Mr. Mukelabai agreed that there was no direct evidence to show that the body found on Bombasheni Road after 15:00 hours was of one of the two men who were assaulted at the market. However, he submitted that there was a strong circumstantial case when the marketeers testified that the appellants beat up two men and later drove away with them. He argued that the marketeers said the first appellant refused to take the suspects to the police and announced an intention to punish them herself so that it must be assumed that she took them to her home and continued to beat them. In respect of this submission, Mr. Mukelabai relied on the evidence of the same marketeers that were found to have lied on the major point of going to see the body. When a witness is shown to have lied on an important point, the weight to be attached to the rest of his evidence is considerably reduced. One of the marketeers PW2 even claimed that the first appellant had announced her residential address to the marketeers that:

"She was taking them to 18 Bombasheni Road where they wanted to steal and kill them there."

We find this piece of evidence from a discredited witness who was found to have lied about going to see the body to be inherently improbable and quite frankly incredible. Mr. Mukelabai submitted that there was an odd coincidence that an incident happened at the market and at Bombesheni Road and that this was probably what the learned trial Judge had in mind when he said that the first appellant's husband by making a report to the Police provided the link between the deceased and the appellants. The converse, of course, is that if the husband had not made any report or said anything, there would have been no linkage found. We are unable to accept this kind of inference. Mr. Mukelabai invited us to draw our own inferences and to apply the proviso. He invited us to ignore the discrepancies regarding the time and to find that it was the same pair of Ogily Sinyangwe and the deceased who were assaulted at the market and along Bombesheni Road.

The case rested on the drawing of inferences. Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favorable to an accused if there is nothing in the case to exclude such inference. The circumstantial case in this appeal did not exclude the more favorable references. The factors urged by Mr. Malama were all valid. It is, of course, quite possible and the suspicion in this regard is very strong that - as Mr. Mukelabai suggested - the incidents at the market and on Bombesheni Road were related. However, there is that lingering doubt on account of the various matters herein discussed and we are required by the criminal law to resolve such doubts in favour of the accused since the conviction is then rendered unsafe and unsatisfactory.

The appeals against conviction on the manslaughter charge are allowed and the respective

sentences quashed. We do not disturb the result on the assault charge.

Appeal allowed and sentences quashed.
