MBOMENA MOOLA *v* THE PEOPLE

Supreme Court
Chirwa, Muzyamba and Chibesakunda, JJS
3rd October, 2000 and 17th October, 2000
(SCZ Judgment No. 35 OF 2000)

Flynote

Criminal law – Murder – Cause of death – Medical evidence – whether necessary in all cases.
Criminal law – Judges rules – Headman – Whether person in authority.
Criminal law – Witchcraft – whether extenuating circumstances.

Headnote

The appellant Mbomena Moola, was convicted on one account of murder, contrary to Section 200 of the Penal Code, Cap 87. The particulars of the offence were that the appellant on 24th November 1994, at Kaumpe Village, in the Kaoma District of the Western Province of the Republic of Zambia did murder one Kaumpe Moola. Upon his conviction, he was sentenced to death. He appealed against both conviction and sentence.

(i) It is not necessary in all cases for medical evidence to be called to support a conviction for causing death. Where there is evidence of assault followed by a death without the opportunity for a novus actus interveniens, a court is entitled to accept such evidence as an indication that the assault caused the death.

(ii) Judge's rules do not contemplate, as persons who should administer the warn and caution to suspects persons like village headmen because it is not their normal responsibility to investigate criminal cases.

(iii) Belief in witchcraft by many communities in Zambia is very prevalent and is held to be an extenuating circumstance.

Legislation referred to:

1. Registration and Development of Villages Act Cap 289, Section 6
2. Penal Code Cap 87, Section 200.

Cases referred to:

1. *Njunga and Others* v *The People* (1988-1989) Z.R 1.
2. *Vilongo* v *The People* (1977) Z.R 423.
3. *Banda* v *The People* (1986) Z.R 105.
4. *Chishimba* v *The People* Appeal No. 17 of 1999.
5. *Mwiya and Another* v *The People* (1968) Z.R 53.

M. P. Mvunga of Mvunga and Associates for the appellant.
V. A. L. Kabonga, Assistant Principal State Advocate for the respondent.

CHIRWA, JS delivered the judgment of the court.

The appellant, Mbomena Moola, was convicted on one count of murder, contrary to Section 200 of the Penal Code, Cap 87. The particulars of the offence were that the appellant on 24th November 1994, at Kaumpe Village in the Kaoma District of the Western Province of the Republic of Zambia, did murder one Kaumpe Moola. Upon his conviction he was sentenced to death. He is now appealing against both conviction and sentence.

The evidence of the prosecution was to the effect that the deceased was the father of the appellant, staying in the same village. On 24th November 1994, PW2 Namishaho, a wife to the deceased and a mother to the appellant brewed some sweet beer popularly known as Maheu or Munkoyo. Later that day, they received news of a funeral in the next village. Before she and the deceased left, they took some of this Maheu. The funeral was also attended by the appellant and by PW1 and PW3, both nephews to the appellant. After attending the funeral, they all returned to their village but not in the same group. On their way from the funeral, the appellant advised his nephews never to take any Maheu from their grandmother, i.e. the appellant's mother. On been questioned as to why they should not take any Maheu from their grandmother, the appellant is said to have told them that she was a witch. Meanwhile the deceased on arrival back home he decided to take some of the Maheu and after taking some he called his wife, PW2 and complained to her that it appeared the Maheu had been tampered with, probably poisoned. The wife, PW2, put a little bit of Maheu in her palm and tasted a bit. She noticed that the Maheu smelt of paraffin, she spat it but she had swallowed a bit of it. After this, PW2 left for her village where she normally resided as the deceased was in a polygamous marriage. At her village she fell sick and her relatives induced her to vomit by making her take milk and salt. Later that same day she heard that her husband had died. PW2 had no idea as to who had poisoned the Maheu but later the appellant confessed to a village committee that he had poisoned the Maheu. The alleged confession was to the effect that:-

"Yes, it is me, it is because my father is the one who has killed my children, but I apologised because I would have also killed my mother who is innocent."

It is also the prosecution evidence that the appellant always complained about the deceased that he was responsible for the deaths of his children and that the appellant always consulted witchdoctors.

The appellant in his defence denied having poisoned the Maheu. He did, however, confirm that the deceased gave him a lot of problems over the deceased's alleged witchcraft involving a lot of cases in which he had to pay on behalf of the deceased including losing his bicycle. On the confessions to the village committee and the Police, the appellant said he made the confessions because he was beaten and he feared for his life.

In arguing the appeal, Prof Mvunga had filed four (4) grounds of appeal and he also made a verbal alternative submission on sentence.

The first ground of appeal advanced by Prof Mvunga was that the learned trial Judge erred in law and fact in convicting the appellant on a charge on murder when there was no evidence on record as to the cause of death of the deceased. He amplified that there was no post mortem report or a report of a public analyst. On being shown

the public analyst report on the original record which was exhibit *"P1"* Prof Mvunga abandoned the second leg of the submission but concentrated on the lack of post mortem report to show the cause of death. He submitted that there was no conclusive scientific evidence to show the cause of death or that the purported drug could cause the death. He submitted that it was now late to cure the defect.

In reply to this first ground, Mr Kabonga the learned Assistant Principal State Advocate submitted that it is not in every case that lack of medical evidence is fatal. To support his submission, Mr Kabonga referred us to this Court's decision in *Njunga & Others* v *The People(1)* where we held that it was not necessary in all cases for medical evidence to be called to support a conviction for causing death. Except in borderline cases, laymen are quite capable of giving evidence that a person had died. Where there is evidence of assault followed by a death without the opportunity for a novus actus interveniens, a Court is entitled to accept such evidence as an indication that the assault caused the death.

We have considered this first ground of appeal and it cannot be adequately considered on its own. It is true there was no post mortem conducted on the deceased. However, there is the public analyst report as to what was contained in the Maheu. The report states that the drink contained MALATHION. Malathion is a toxic organo-phosphorus insecticide. To properly consider the first ground of appeal, it is important to determine how this insecticide found itself in the calabash of Maheu. There was no direct evidence as to who did it and we agree with Prof Mvunga that ground two is most important as it is only from the evidence which is challenged in this ground that the appellant is linked to poison in the Maheu.

The second ground of appeal is that the learned trial Judge erred in law in admitting and relying on the confession before the village committee by the appellant that he had caused the death of his father. The gist of Professor Mvunga's argument in this ground is that the village committee constitutes persons in authority and as such Judges' rules must apply, namely among others, that the suspect must be warned against the dangers of incriminating himself. It was argued that inducement that was made to the appellant by the village committee can be inferred from the evidence of PW2's testimony that the appellant after admission apologised and was fined one animal for compensation but having failed to pay was arrested. It was further submitted that the appellant in his evidence said that he confessed because of the heavy beating he got from one Firnott Mubanga and that even at that stage, a trial-within-a-trial ought to have been conducted. For these submissions, two authorities were quoted, namely *Mwiya & Another* v *The People* (5) and the case of *Vilongo* v *The People (2).*

In reply, Mr Kabonga submitted that a village committee is not composed of persons in authority and as such any confession made to the committee need not be subjected to the Judge's rules. For this he cited the case of *Banda* v *The People (*3).

In considering this ground of appeal, we have to consider whether the village committee is composed of men in authority. We have not had the benefit of any submission or evidence as on what authority these committees are formed. We will assume these are the 30-village productivity committees established under Section 6 of the Registration and Development of Villages Act, Cap. 289 and whose functions are as contained in the First Schedule to the said Act. If they are, we look at them having the background of the Judges' Rules on which voluntariness of confessions are based. As we said in the case of *Banda* v *The People* (4) at page 113 that:-

"Those rules were designed to guide Police Officers in dealing with suspects and prisoners in the course of investigating crime. This Court takes judicial notice that the training of Police Officers includes instructions in administering the warn and caution. There is no suggestion that these rules are intended to apply to persons other than those whose normal duties pertain to investigating crime. We are unaware of any law or convention which constitutes a village headman as an officer charged with responsibility of investigating crime. In practice, when a person suspected of committing a crime is reported to a village headman this is essentially for the purpose that the headman should use his good office to cause the suspect to be conveyed to the authority of the Police; he is the intermediary between the inhabitants of his village and the Police, sometimes through his chief, a typical headman therefore is a man who would not know, nor should he be expected to know what creature warn and caution is. On a careful review of the position we are satisfied that the Judges' Rules do not contemplate, as persons who should administer the warn and caution to suspects, persons like village headmen because it is not their normal responsibility to investigate criminal cases".

This decision reversed all our previous decisions in which we classified village headmen as men in authority. If a village headman is not a man in authority, is it possible that a village (productivity) committee can constitute persons in authority. We have no hesitation in answering in the negative. If the village committee to which the appellant is alleged to have made a confession is the village Productivity Committee under the Registration and Development of Villages Act, we have no hesitation also in holding that they are not men in authority. Their functions are as detailed in the First Schedule. The alleged confession of the appellant before the village committee was therefore properly received by the learned trial Judge.

Under this ground, there is also another small limb of argument that the confession was obtained because the appellant was beaten heavily by one Firnott Mubanga. If the fact of the beating was accepted by the learned trial Judge, this at the most, will be evidence obtained illegally and would only be accepted if it were relevant. But then that too applies to persons in authority and from the evidence of the appellant this Mubanga was a member of the Village Committee and therefore not a man in authority.

Having linked the appellant to the administration of malathion to the Maheu, we will now revert to the first ground of appeal that there was no evidence of cause of death before the learned trial Judge. It is true that no post mortem was conducted on the deceased. The public analyst report showed that the Maheu that the deceased drunk contained malathion and from the evidence this was administered by the appellant. We did take judicial notice in the *Banda* case (3) that a pesticide is harmful to man' health. The poison administered by the appellant in the Maheu was a pesticide and the facts do show that had PW2 taken a large quantity like the deceased and had she not taken first aid from her relatives who induced her to vomit, she too would have been a victim of the appellant's actions. There is no evidence of a novus actus interveniens from the time the deceased took the Maheu and started vomiting to his death, here even a lay man can say that the deceased died of poisoning, which poison was administered by the appellant. The appellant therefore caused the death of the deceased. We see no merits in grounds 1 and 2 and they are dismissed.

Coming to ground four (4) which is that there is no circumstantial evidence on record to point to the appellant's guilt as being the only inference that it is he who killed his father. We do not see much meat in this ground in view of what we have said with regards to grounds 1 and 2. We would agree with Mr Kabonga that the appellant had

the motive to kill his father. The appellant, according to PW2 had always accused his father of killing his children. The appellant in his evidence does confirm his father's alleged witchcraft activities and that the appellant had in the past paid fines on behalf of his father for his alleged activities. Further, the appellant knew of the fatalities that would result from drinking the laced Maheu hence he advised his nephews who were not involved in their grandfather's (deceased's) activities not to drink any Maheu from PW2's house. It is not a mere coincidence that he should warn his nephews not to drink Maheu from the calabash thereafter the deceased unfortunately dies. Here again we have the confession of the appellant of having poisoned the Maheu but regretted that he would have killed his mother, PW2, who was innocent. There is overwhelming evidence to support the conviction. The circumstantial evidence is supported by the appellant's confession.

We see no merit in the fourth ground of appeal and it is dismissed. The appeal against conviction is therefore dismissed.

The alternative ground was on sentence that should the Court find that the conviction was proper; the sentence should be disturbed in that there were extenuating circumstances in the case which would render the death sentence inappropriate, namely the appellant's belief that his father was a witch who had killed his children. The belief is confirmed in the evidence of PW2 and the appellant himself. We agree entirely that a belief in witchcraft, though unreasonable, is prevalent in our community and we have said in many cases like the case of *Chishimba* v *The People* (4), that such a belief is an extenuating factor in cases of murder. We said in that case:-

"This Court has said in many cases that a belief in witchcraft by many communities in Zambia, is very prevalent and must be held to be an extenuating circumstance."

As the killing here was done because of the belief in witchcraft, the learned trial Judge should have taken into account this factor and accepted as an extenuating factor. In this regard therefore, we set aside the death sentence and in its place we impose a sentence of 15 years imprisonment with hard labour with effect from 22nd February 1995, the date of the appellant's arrest. To this extent only the appeal succeeds.

Appeal against sentence allowed