MICHAEL NJOBVU
v
THE PEOPLE

SUPREME COURT
SAKALA, C.J., CHIBOMBA, AND MUSONDA, JJS.,
7th JUNE, 2011 and 4th OCTOBER, 2011.
(S.C.Z. Judgment No. 17 of 2011)

[1] Criminal Law - Murder - Cause of death - Whether it is necessary to call medical evidence to support a conviction for causing death.

The appellant was convicted of one count of murder contrary to section 200 of the Penal Code. He was, thereafter, sentenced to death. Dissatisfied with the conviction and sentence, the appellant appealed.

Held:

1. It is 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 has died.

2. Where there is evidence of assault, followed by 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.

3. A person is not deemed to have killed another if the death of that person does not take place within a year and the day of the cause of death.

4. In this case, the death was within a year and one day after the appellant was seen hitting the deceased. And there is no doubt that the deceased died as a result of the injuries that he sustained after a brutal assault by the appellant.

5. On the facts of this case, there are no extenuating circumstances to warrant the imposition of any other sentence other than the mandatory death penalty.

Cases referred to:

1. Njunga and Others v The People (1988-1989) Z.R. 1.
2. Chanda and Another v The People SCZ judgment Number 29 of 2002 (unreported).

Legislation referred to:

1. Penal Code, cap 81 ss. 200, 201 and 209(1).

H.M. Mweemba, Senior Legal Aid counsel of Legal Aid Board for the appellant.
P. Mutale, Acting Chief State advocate in the Director of Public Prosecutions Chambers for the respondent.

CHIBOMBA, J.S.: delivered judgment of the Court. The appellant, Michael Njobvu, was convicted of one count of murder, contrary to section 200 of the Penal Code. He was sentenced to death. The particulars of the offence were that:-

"Michael Njobvu, on 17th June, 2009, at Petauke in the Petauke District of the Eastern Province of the Republic of Zambia, did murder one, Mpangula Phiri."

The facts of this case are mainly to be found in the evidence of PW1 and these are that on the date in question, the appellant was seen by PW1 chasing the deceased. When the deceased fell down, PW1 saw the appellant hitting him with the sharp side of a slasher over an allegation that the deceased had tried to steal the appellant's chickens. That when PW1 tried to block the slasher, the appellant hit the deceased on the side of his body. PW1 testified that he observed that the deceased had two cuts on the head of about 2 centimetres long, and that he was failing to stand up. He also testified that the appellant was using a lot of force in hitting the deceased with the slasher.

In cross-examination, PW1 testified that he saw the appellant hit the deceased with a slasher twice and that there was no fight between them. That he saw the appellant chasing the deceased up to the point where he started hitting him with a slasher. And that he did not see the appellant hit the deceased on the hand and on the side of the body until the deceased fell down.

PW2's evidence was that upon learning from PW1 that the deceased had been injured, he went to Bauti's farm where he found the deceased sleeping, while the appellant was outside the house. That on inquiring from the appellant why he had injured the deceased, the appellant told him that he thought the deceased had stolen his chickens. PW2 testified that the deceased had two cuts on the head and three cuts on the left side and that his chest was swollen. That subsequently, the deceased was taken to the hospital where he was admitted for a day, and that on discharge, he accompanied the deceased to the Police Station and to the village. That however, the deceased was not well because his stomach hurt and his hands were swollen. And that he was purging and urinating blood and he was not eating. He nursed the deceased for a week until he died at his village. Thereafter, he reported the death to the police.

In cross-examination, PW2 told the trial Court that he had nursed the deceased for three weeks before he died, and that his condition did not improve and that although he was discharged, he was not well.

In re-examination, PW2 told the trial Court that the deceased's condition never improved until he died.

PW3, the arresting officer, testified to receiving a report of unlawful wounding concerning the deceased and he charged the appellant with unlawful wounding. That a few days later, the deceased passed away. That he received information that the deceased had died on 4th July, 2009. When the deceased came to the police station before his death, he observed that he had multiple cuts on his head, a cut on the ankle and on the left hand and that he had bruises. That after he learnt that the deceased had died, he charged the appellant with murder.

In cross-examination, PW3 told the trial Court that in his investigations, he learnt that at about 12:30 hours, the deceased was coming from his small garden and that he had passed near the appellant's house. That he did not count the number of cuts on the deceased because his head was covered with blood. That he established that the deceased only admitted to stealing chickens.

On the other hand, the appellant told the trial Court that he hit the deceased in defence of property as the deceased had gotten two chickens which he had in his hands. He denied hitting the deceased with a slasher. That he only discovered that the deceased had injured himself after he fell down and that it was in fact the deceased who was chasing him when he fell down.

Upon considering and evaluating the evidence before him, the learned trial judge came to the conclusion that the charge of murder had been proved against the appellant and convicted him as charged and sentenced him to death.

Dissatisfied with the conviction and sentence, the appellant has appealed to this Court raising two grounds of appeal as follows:-

"1. the learned trial judge misdirected himself in his failure to find extenuating circumstances so as to impose any other sentence other than the mandatory death penalty on the facts of this case; and

2. the learned trial judge erred both in law and in fact when he convicted without considering the fact that the cause of death was uncertain under the circumstances."

In support of this appeal, the learned counsel for the appellant, Mr. Mweemba, relied on the arguments advanced in the appellant's heads of arguments.

On the first ground of appeal, it was contended that the learned trial judge erred in law and in fact by failing to find extenuating circumstances so that he could have imposed any other penalty than death. That PW1's evidence was that he heard the appellant shouting: "thief," and that the appellant's testimony was that he found the deceased with two chickens which he later threw away. That the learned judge, at page 59, stated that there was a reasonable belief that the deceased was found with some chickens.

It was contended that this establishes that there was enough evidence of extenuating

circumstances which could have reduced the moral blameworthy of the appellant, to thereby, entitle him to any other sentence than the mandatory sentence of death.

It was contended that there was also clear evidence which showed the defence of self-defence. That self-defence cannot completely be itemized as separate from the provocation as one can only react in self- defence if one has actually been provoked. That therefore the trial Court should have considered the aspect of provocation even though it was not specifically pleaded, or argued in order for the Court to find extenuating circumstances. In support thereof, the case of Chanda and Another v The People (2), was cited in which we held that:

"i) Lack of expert evidence of a doctor as to the cause of death is not fatal where the evidence is so cogent that no rational hypothesis can be advanced to account for death of the deceased.

ii) Failed defence of provocation; evidence of witchcraft accusation and evidence of drinking can amount to extenuating circumstances."

It was contended that section 201 of the Penal Code, chapter 87 of the laws of Zambia is clear on what extenuating circumstances are. We were accordingly urged to so find and impose a different sentence other than death.

With respect to the second ground of appeal, it was argued that the learned trial judge should not have convicted the appellant without considering that the cause of death was uncertain under the circumstances. That although it was not in dispute that the appellant beat the deceased, PW2's evidence was that the deceased died some days after the beating. And that the arresting officer confirmed this aspect as he told the Court below that he received the report of unlawful wounding on 17th June, 2009, and that he only received the report of death on 10th July, 2009. That PW2 also told the Court below that the deceased started purging and urinating blood. It was contended that it is common knowledge that dysentery can kill and causes purging of blood and that bilharzia causes urinating of blood and can also kill.

It was contended that the learned judge applied the case of Njunga and Others v The People (1), to the disadvantage of the appellant as the purging and vomiting of blood was novus actus interveniens which indicate that the assault did not cause the death. That a postmortem should have been conducted to establish the cause of death. And that the learned trial judge should not therefore have concluded that the death was as a result of bodily injuries as several inferences could be drawn as to the cause of death in the absence of a postmortem result. That it is trite law that where more than one inference can be drawn from the facts of the case as to the cause of death, an inference which is favourable to the accused must be drawn.

Further, that since the deceased died some 23 days after the assault and discharge from the clinic, a postmortem could have revealed the cause of death since a person is only discharged from a clinic if he is feeling better. It was argued that if the deceased's condition had been serious, he could not have been discharged. That therefore the evidence of purging and urinating blood was a more probable cause of death.

We, were accordingly, urged to quash the conviction and to set aside the death sentence and to set the appellant at liberty.

On the other hand, the learned Acting Chief State advocate, Mr. Mutale, informed us that the State was supporting the conviction.

In response to the arguments pertaining to the first ground of appeal, Mr. Mutale contended that while it May, be true that the appellant could have been provoked in finding the deceased with his chickens as alleged, the retaliation of slashing the deceased with a slasher was not proportionate to the event. That the appellant did not argue, during trial, that he killed the deceased as a result of provocation. That therefore, this ground has no merit and should be dismissed.

In response to the second ground of appeal, Mr. Mutale submitted that there was clear evidence before the Court below that the deceased died in a matter of days after being severely assaulted using a slasher. And that on his body, there were a number of injuries including a swollen stomach and injuries on the head. Mr. Mutale argued that although it was conceded that after the deceased died, due to difficulties encountered, a postmortem was not conducted, the evidence presented before the trial Court was that the deceased was sick as a result of the injuries inflicted on his person. And that the purging and urinating of blood was connected to the condition that developed arising out of the sickness resulting from the injuries sustained contrary to what had been argued by the appellant that the deceased died from other illnesses evidenced by purging and urinating blood.

Mr. Mutale cited the case of Njunga and Others v The People (1), which he contended, establishes that even without a medical report, death as a result of injuries can be caused. He argued that there was no intermediate cause as no evidence to suggest this was adduced.

In reply, Mr. Mweemba submitted that he was pleased that the respondent had conceded that there were other conditions that caused or could have led to the deceased's death. And that it could have been different if the deceased had died immediately or a few days thereafter.

Counsel contended that it was clear from the evidence that the assault was reported on 10th June, 2009, while the death was on 17th July, 2009. And that the deceased who had been taken to hospital was discharged and that the discharge suggests that his condition was not critical. That therefore the issue of purging and urinating blood was different and needed a postmortem examination to rule out other causes of death.

Mr. Mweemba contended that the facts in ground one are clear in that the deceased was found with the appellant's property and in attempting to rescue the property, the deceased started to run away. That this act of provocation allowed the Court to find extenuating circumstances. counsel, accordingly, urged us to consider this argument.

We have seriously considered the submissions by the learned counsel for the appellant, and the

learned Acting Chief State advocate and the authorities cited. We have also considered the arguments in the appellant's heads of arguments, and the judgment by the Court below.

Although the first ground of appeal was argued first, we intend to begin with the second ground of appeal for obvious reasons. This is that should ground two succeed, then there will be no need for us to consider ground one.

The arguments on ground two were that the learned trial judge should not have convicted without considering that the cause of death was uncertain in the circumstances of this case, where a postmortem was not conducted to establish the cause of death. That it was not certain that the deceased died from the assault as he did not die immediately, or a few days after the assault, but some 23 days later. That there was a possibility that the deceased could have died from other causes and not the assault by the appellant as PW2's evidence was that the deceased was purging and urinating blood. That purging and urinating blood could have been a novus actus interveniens as illnesses such as dysentery and bilharzia can cause purging and urinating of blood and can also kill.

We have considered these arguments. In the case of Njunga vs The People (1), we stated authoritatively that we have on a number of occasions indicated that it is 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 has died. We also stated that 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 repeat this in the current case. The question, therefore, is whether there was an opportunity for a novus actus interveniens?

The evidence on record, does not at all support the suggestion that there was any opportunity of a novus actus interveniens.

Although PW2's evidence was that the deceased was purging and urinating blood, there was no evidence to show that this was caused by dysentery or bilharzia as was suggested by the learned counsel for the appellant. We can only attribute this suggestion to the ingenuity of the learned counsel for the appellant.

PW2 stated categorically in the Court below that although the deceased was discharged from hospital the day after he was admitted, he was still unwell and that his condition did not improve. PW2 also stated that the deceased had a swollen stomach and injuries on the head. PW1 testified that he saw the appellant hitting the deceased with the sharp side of a slasher using a lot of force.

Although it is a fact that death occurred some days later, the totality of the prosecution evidence was that after the beating and discharge from hospital, the deceased was unwell until he died. Our view is that a discharge does and did not mean that the patient was fine or that death cannot occur as a result of that same illness or injury sustained. We are fortified in this by the provision of section

209(1) of the Penal Code which states that:

"A person is not deemed to have killed another if the death of that person does not take place within a year and the day of the cause of death."

In this case, the death was within a year and one day after the appellant was seen hitting the deceased with the sharp side of the slasher using a lot of force to such an extent that the deceased was failing to stand up. The evidence was also that the deceased's chest was swollen and that even though he was discharged from the hospital the day after he was admitted, the deceased was not well because his stomach was hurting and his hands were swollen. And that the deceased was purging and urinating blood and that his condition never improved until his death.

In view of the above evidence, there can be no doubt that the deceased died as a result of the injuries that he sustained after a brutal assault by the appellant. Therefore, the learned judge was on firm ground when he convicted the appellant of murder on the basis of the principle in Njunga and Others v The People (1). We find no merit in the second ground of appeal and we dismiss it.

With respect to the first ground of appeal which raises the question whether or not there were extenuating circumstances, we wish to state that section 201(2) of the Penal Code defines what extenuating circumstances are. Although it was argued that the act of stealing the appellant's chickens and running away amounted to provocation which should have allowed the Court below to find extenuating circumstances, our view, however, is that since the issue of provocation was neither raised, nor established during trial, it cannot be raised now before us.

We are of the further view that the claim of defence of property is not available in this case as the appellant was seen hitting the deceased who had fallen down, using a lot of force, with the sharp side of the slasher, more than once. At this time the deceased did not have the chickens in his hand. Therefore, the appellant's act of hitting the deceased on the head with a slasher after he had fallen down was neither instantaneous to the alleged act of provocation, nor was it proportionate to the retaliation as the appellant claimed that it was the deceased who was chasing him when he fell down. The appellant must have known that hitting a person with the sharp side of a slasher, on the head, using a lot of force, can cause grievous bodily harm, or death.

In the circumstances, we do not find any extenuating circumstances. The first ground of appeal also fails.

The sum total is that this appeal has failed. We confirm both the conviction and the death sentence given by the Court below.

Appeal dismissed.