MBINGA NYAMBE
v
THE PEOPLE

SUPREME COURT
SAKALA C.J., CHIBESAKUNDA, AND CHIBOMBA, JJS.,
10th AUGUST, 2011
(S.C.Z. Judgment No. 5 of 2011)

[1] Criminal law and procedure - Evidence - Circumstantial evidence -Weakness or danger of erroneous inference.

[2] Criminal law - Evidence - Conclusion based on inference - When that inference may, be drawn - Examination of alternatives Whether speculation.

[3] Criminal law - Possession of recently stolen property - Inference from - Duty of Court to consider alternative inference.

[4] Criminal law - Evidence - Whether prosecution obliged to produce every possible witness.

The appellant was with two others who have since been acquitted, charged of murder contrary to section 200 of the Penal Code. After considering the evidence before him, the trial judge convicted the appellant on the basis of the items which went missing at the deceased's' premises the night he was shot dead, and were found with the appellant four days later. Dissatisfied with the conviction, the appellant appealed against the conviction.

Held:

1. Circumstantial evidence, or indirect evidence is evidence from which the judge May, infer the existence of the fact directly.
2. It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue, but rather is proof of facts not in issue. But relevant to the facts in issue and from which an inference of the fact in issue May, be drawn.
3. A trial judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture, so that it attains such a degree of cogency which can permit only an inference of guilt.
4. Where a conclusion is based purely on inference, that inference May, be drawn only if it is the only reasonable inference on the evidence; an examination of the alternative and a consideration of whether they or any of them May, be said to be reasonably possible cannot be condemned as speculation.
5. When a Court purports to draw an inference of guilt in a case of recent possession of

stolen property, it is necessary to consider what other inferences May, be drawn.

6. Although the evidence against the appellant was circumstantial, the totality of the evidence took the case out of the realm of conjecture, and allowed the Court to draw and inference of guilt.

7. The appellant was convicted of murder on the basis of strong circumstantial evidence of being found in possession of the bicycle, and the radio that went missing the night the deceased was shot dead.

8. In dealing with any appeal, the Court May,, if it thinks additional evidence to be necessary, either take such evidence itself or direct it to be taken by the trial Court, or by some other person as Commissioner.

9. It is not the duty of the Court, nor of the prosecution to call any person(s) that an accused mentioned in his evidence in Court.

Cases referred to:

1. Sikunyema v Queen (1963 - 1964) Z.N.R. L.R. 66.
2. Silungwe v The People (1974) Z.R. 130.
3. Bwanausi v The People (1976) Z.R. 103.
4. Zulu v The People (1977) Z.R. 151.
5. Kape v The People (1977) Z.R. 192.
6. R v Palmer [1980] 1 S.C.R .759.

Legislation referred to:

1. Penal Code, cap. 87, s. 200
2. Criminal Procedure Code, cap. 88 s. 207 (1) and (2).
3. Supreme Court Act, cap. 25, Rule 39

Work referred to:

1. Oxford Dictionary of Law 5th Edition

B. Bwalya of Messrs Nhari Mushemi and Associates for the appellant.
S.M. Kundachola, Senior State Advocate in the Director of Public Prosecutions Chambers.

CHIBOMBA, J.S.: delivered the judgment of the Court.

The appellant, Mbinga Nyambe and two others, who ha

ve since been acquitted, pleaded not guilty to one count of murder, contrary to section 200 of the Penal Code, chapter 87 of the laws of Zambia. They were alleged to have, on 20th November, 2006, at Kaoma in the Western Province of the Republic of Zambia, jointly and whilst acting together, murdered Gilbert Sitenu Kakoli.

The facts of this case are mainly to be found in the evidence of PW1 and these are that on the evening of 20th November, 2006, PW1 had left her husband, now the deceased, outside when she went

into the house. Whilst inside the house, PW1 heard two gun-shots and on going outside, she found their house burning. She ran away and came back with Kupinga. She and Kupinga found her husband lying down. They also found that the radio that had been playing outside and the bicycle were missing. She later saw the radio and the bicycle at the police station. These items were recovered from the appellant four days after the deceased was shot dead. A butt of a home-made gun was also found at the scene, while the barrel was found with the appellant. The evidence also showed that the deceased died from gun-shot wounds.

The appellant's explanation of the events before the trial Court was that the items that were found at his house were given to him two weeks before the incident by PW1, the deceased's wife, as payment for the traditional treatment that he had given to her.

After considering the evidence before him, the learned trial judge convicted the appellant on the basis of the items which went missing at the deceased's premises the night he was shot dead, and were found with the appellant four days later.

Dissatisfied with the conviction, the appellant has appealed to the Supreme Court advancing four grounds of appeal. These are that:-

"1. The lower Court erred in law and fact by convicting the appellant based on circumstantial evidence when it was clear that there was more than one reasonable inference to be drawn from the said circumstantial evidence.

2. The trial judge misdirected himself when he applied unsubstantiated and immaterial evidence of character with regard to admission of a statement by PW2.

3. The trial judge failed to appreciate the inconsistencies in the prosecution evidence and as such misdirected himself on a point of law and fact when he failed to apply such inconsistencies to the benefit of the appellant.

4. The trial judge misdirected himself on a point of law and fact when he failed to take into account the evidence of the three witnesses who were present when the appellant was given the bicycle and radio and that this Court should allow fresh evidence to be admitted in the interest of justice."

In support of this appeal, the learned counsel for the appellant, Mr. Bwalya, relied on the arguments in the appellant's heads of arguments which he augmented with oral submissions. Mr. Bwalya argued that the trial judge failed to note the inconsistencies in the prosecution evidence and that had the judge addressed his mind to these inconsistencies, he could not have found that the prosecution had proved the case against the appellant beyond all reasonable doubt.

On the radio and bicycle that were recovered from the appellant, and were alleged to have gone missing the night the deceased was shot dead, Mr. Bwalya argued that PW1 was the only witness who claimed to have seen these items on that date at the deceased's house. That, however, the appellant, at

whose house the items were recovered from on 24th September, 2006, claimed that the deceased's wife, PW1, gave him the items for treating her two weeks earlier. That there is a possibility that on the fateful night, the items were not at the deceased's residence, but that the trial judge, however, believed PW1's version purely on ground that a poor village woman ought to be trusted when this holding was not substantiated by evidence.

It was argued that the appellant, however, mentioned the names of the people who were present when PW1 gave him the items and also expressed surprise that those people were not called to testify. Counsel argued that had those people's evidence been adduced, the Court could probably have come to a different verdict. That failure to consider that evidence was, therefore, unsafe and raised a reasonable doubt which must be weighed in favour of the appellant.

In support of this submission, counsel cited the case of Sikunyema v The Queen (1) , in which the Court of appeal held that failure to take into account material evidence by the lower Court should weigh in favour of the appellant. In that case, the lower Court had failed to take into account the evidence of intoxication in a charge of murder as the defence counsel did not guide his client to adduce that evidence. The Court of Appeal observed that:-

"In the circumstances of this case, I am satisfied that there was some considerable evidence of intoxication on the part of the appellant. This should have been put forward by the defence to the Court, and the Court should have taken into account for the purpose of determining whether the appellant had an intention of doing grievous harm when he picked up the stick from the ground and struck the deceased a one handed blow in the chest. Had the question of intoxication been raised by defence counsel, then I think the judge May, well have come to the view that the Crown had failed to prove intent necessary to constitute malice foresight."

Counsel also cited the case of Silungwe v The People (2), in which the High Court stated that:-

"... though the prosecution has no duty to call every possible witness, failure to carry out proper investigations or to call a material witness, might cause serious doubt upon the fairness of the trial to such an extent that it would be unsafe to convict."

On the evidence of PW3 which was that when the appellant arrived at his house on 23rd September, 2006, he had with him a bicycle, a radio and a chicken; Mr. Bwalya argued that PW3 did not mention the barrel of a hand-made gun. And that the issue of the chicken confirms the appellant's testimony that PW1 gave him the items after he treated her using a chicken.

Further, that only PW4 (the Arresting Officer), mentioned the barrel of the hand-made gun which was allegedly found at the appellant's house; but that the appellant denied having possession of the barrel. Further, that this is between PW4's word and that of the appellant. Mr. Bwalya raised the question as to why the Court would believe PW3's version when it was not without reasonable doubt, and why finger prints were not lifted from the barrel to show whether the appellant touched it or not? counsel argued that on the basis of the absence of finger prints, a reasonable doubt was raised as to whether the appellant had possession of that barrel.

On the evidence of PW5, Mr. Bwalya argued that since his evidence was that the gun disintegrates every time it is fired and that it cannot be fired twice, then his evidence was contradicted by that of PW1 and PW4 as PW1 testified to hearing two gun-shots, while PW5 said the deceased had gun-shot wounds in the neck and face. Counsel argued that if two gun-shots were heard and the deceased had two gun-shot wounds, then the question is: Where did the two gun shots come from, if it is presumed that after firing the first shot, the hand-made gun disintegrated? That there is therefore a possibility that two guns were used, or that it was not even a hand-made gun that was used.

Counsel went on to suggest that if two guns were used, why is it that the Police only found one barrel with the appellant? That this raises a reasonable doubt as to whether the appellant was involved in the crime or not. Further, that even if the barrel was found with the appellant, there is still a reasonable doubt as to whether it was the actual gun used to kill the deceased. That as a result of these inconsistencies, reasonable doubt was raised.

Mr. Bwalya then drew our attention to Rule 39 of the Supreme Court Rules (SCR), which provides that: in dealing with any appeal the Court May,, if it thinks additional evidence to be necessary, either take such evidence itself or direct it to be taken by the trial Court or by the Master or by some other person as commissioner.

Counsel, accordingly, urged us to pursuant to this rule, order those people who were present when PW1 is alleged to have given the items to the appellant to come and testify so as to avoid a miscarriage of justice.

In support of this argument, Mr. Bwalya cited the case of R v Palmer (6), in which the Supreme Court of Canada stated, inter alia, that:-

"The evidence must be relevant in that it bears upon a decisive or potentially decisive issue in that trial; the evidence must be credible in the sense that it reasonably is capable of belief; and it must be such that it would reasonably, when taken with the other evidence adduced at trial, be expected to have affected the trial."

Mr. Bwalya submitted that the learned trial judge misdirected himself when he failed to appreciate the principle that the appellant had no obligation to prove his innocence as the burden was on the prosecution, but that the prosecution failed to discharge this burden as no finger prints were uplifted from the barrel. Counsel accordingly, urged us to set aside the conviction and to quash the sentence.

On the other hand, the learned Senior State Advocate, Ms. Kundachola, informed the Court that the state was supporting the conviction of the appellant by the trial Court. She argued that the trial Court was on firm ground as the judge properly applied the doctrine of possession of recent stolen property. That PW1 told the trial Court that her husband was killed on 20th November, 2006, and that the radio which had been playing outside and the bicycle were stolen. And that the brother to the appellant, PW3, told the trial Court that he saw the appellant with two bicycles and two radios when he

was coming from Kaposhi and that in the morning, he again saw the items. She submitted that the police recovered these items on 24th November, 2006, from the appellant.

On the argument that PW1 gave the items to the appellant in the presence of the three other people, Ms. Kundachola contended that the appellant did not tell the Police about this and that at page 10 of the record, PW4 said the appellant did not tell him that the items recovered from him were for payment as alleged.

It was Ms. Kundachola's further contention that at page 19 of the record of appeal, the Court found that there was sufficient evidence to put the appellant on his defence and that his rights were explained to him including the right to call any witnesses. That the appellant was also represented by counsel who led him in his evidence. She submitted that the appellant should have raised this issue at that time.

In reply, Mr. Bwalya submitted that the two authorities cited say that conviction is unsafe if counsel does not perform his duty properly.

We have seriously considered this appeal together with the arguments advanced in the appellant's heads of arguments and the authorities cited therein. We have also considered the oral submissions by the learned counsel for the appellant, and the learned Senior State Advocate on behalf of the respondent. We have also considered the judgment by the Court below.

In this case, we agree that the appellant was convicted of murder on the basis of the items that went missing from the deceased's house the night he was shot dead, and were recovered from the appellant four days later. We also agree that there is no direct evidence connecting the appellant to the murder of the deceased as the evidence is circumstantial.

Apart from these items, the Police also recovered a barrel of a hand-made gun from the appellant's house, while the butt was found near the deceased's house. The prosecution evidence was also that the deceased died from gun shot wounds on the neck and face.

On his part, the appellant did not dispute that the items were recovered from him. His explanation of how he came into possession of these items was that the deceased's wife, PW1, gave him the items two weeks before the deceased was shot dead as payment for the traditional treatment given to her. He also denied that the barrel was found at his house.

The trial judge believed the evidence of PW1 that the items went missing on the night her husband was shot dead and not the appellant's version that PW1 gave him the items two weeks earlier.

As to the legal position on circumstantial evidence, Oxford's Dictionary of Law, states that:-

“Circumstantial evidence (indirect evidence) evidence from which the judge or jury May, infer the existence of a fact in issue but which does not prove the existence of the fact directly. Case law has

described circumstantial evidence as evidence that is relevant (and, therefore, admissible) but that has little probative value."

In the case of Zulu v The People (4), the Court stated that:-

"It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue, but rather is proof of facts not in issue but relevant to the facts in issue and from which an inference of the fact in issue May, be drawn."

And that:-

"It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt."

In Bwanausi v The People (3), it was stated that:

"Where a conclusion is based purely on inference, that inference May, be drawn only if it is the only reasonable inference on the evidence; an examination of the alternative and a consideration of whether they or any of them May, be said to be reasonably possible cannot be condemned as speculation."In Kape v The People (5), the Court stated that:-

"When a Court purports to draw an inference of guilt in a case of recent possession of stolen property it is necessary to consider what other inferences might be drawn.

Applying the above principles to the facts of this case, we are satisfied that although the evidence against the appellant was circumstantial, the totality of this evidence took this case out of the realm of conjecture, and allowed the Court to draw an inference of guilt. This evidence is that the items that went missing from the deceased's house the night he was shot dead were recovered from the appellant four days later. And in addition, a barrel of a home-made gun was recovered from the appellant's house. There is also evidence that the deceased died from gun-shot wounds, and that the home-made gun was capable of firing once and that it was capable of causing death or injury to a person.

These pieces of evidence, though circumstantial, are so strong that it is irresistible to draw the inference of guilty. We do not at all regard this evidence to be inconsistent, nor do we find the appellant's explanation to be reasonable in the circumstances of this case, where the appellant did not challenge PW1's evidence that the items went missing the night her husband was shot dead, nor was she cross-examined on the claim that she gave the items to the appellant as alleged. The arresting officer's evidence was also that the appellant did not tell him that the items were for payment from a certain lady for cleansing her as was alleged.

Further, the question whether the items went missing the night the deceased was shot dead or whether PW1 gave the items to the appellant two weeks earlier as alleged is also a question of credibility. The trial judge was entitled to decide whom to believe between Pw1, or the appellant. We

do not therefore, accept the contention that there is a possibility that on the fateful night, the items were not at the deceased's house as was canvassed by the learned counsel for the appellant.

The question whether or not the appellant had a chicken with him when he came from Kaposhi with the two bicycles and two radios is immaterial as we do not regard this to be confirmation that PW1 gave the items to the appellant after he treated her using the chicken some two weeks earlier as alleged.

On the contention that only PW4, the arresting officer, mentioned that the barrel was recovered from the appellant's house, this again was a question of credibility. The trial judge cannot be faulted for believing PW4, and not the appellant.

On the issue raised concerning the failure by the police to up-lift finger prints from the barrel of the gun and the contention that a reasonable doubt was thereby raised, our view is that the appellant was convicted of murder on the basis of the rather strong circumstantial evidence of being found in possession of the bicycle, and the radio that went missing the night the deceased was shot dead.

The question was, therefore, whether in the circumstances of this case, a reasonable explanation was given by the appellant as to how he came to be in possession of those items a few days after the deceased was shot dead. As stated above, the trial judge found the appellant's explanation unreasonable and inferred guilt knowledge. He cannot be faulted for coming to this conclusion.

On the contention that there is a possibility that two guns were used since the hand-made gun disintegrates once it is fired, and PW1's evidence that she heard two gun shots while PW4's evidence was that the deceased had two gun shot wounds, it is our considered view that this argument has no basis as the question in this case is not whether the deceased was shot dead using one or two different guns; but that he met his death through two gun shot wounds in the neck and face. We do not, therefore, see any inconsistencies or contradictions in this respect as the totality of the ballistic expert's evidence was that although the home-made gun can only be fired once as it becomes dysfunctional, the gun was capable of causing death or serious injury to a person. The sum total is that we find no merit on these grounds of appeal.

With respect to Mr. Bwalya's alternative argument that pursuant to Rule 39 of the SCR, we should order that the people who were present when the appellant was allegedly given the items by PW1 to come and testify, our perusal of the record has shown that the appellant was represented by counsel in the Court below. The record, at page 19, also shows that the trial Court, upon putting the appellant on his defence, indicated that it had complied with the provisions of section 207(1) of the Criminal Procedure Code, (CPC). This section obliges the Court, to again explain to an accused, his rights including whether he has any witnesses to call.

The record also shows that the appellant's then counsel, informed the trial Court, that the appellant would give sworn evidence and that he had no witnesses to call.

In view of the above, our firm view is that it was at that stage that the appellant ought to have informed the trial Court that he wished to call those people whom he claimed to have been present when PW1 allegedly gave him the items. Therefore, as much as we agree that it is not the duty of the accused to prove his innocence, an accused has to avail himself of the provision of section 207(2) of the CPC by indicating to the Court, at the relevant time, during his trial that he has witnesses to call.

Once he does so, then the Court, will, if necessary, compel the attendance of such witnesses. The appellant, did not do this. He cannot now turn around and say that he was surprised that those people whom he alleged to have been present when PW1 gave him the items were not called.

As stated above, the appellant did not cross-examine PW1 over this allegation. PW4 told the trial judge that the appellant did not tell him that the items were given to him by a certain lady for cleansing her. We do not, therefore, accept that it was the duty of the Court, nor of the prosecution to call any person(s) that the appellant mentioned in his evidence in Court. We do not see any mis-trial to warrant ordering the taking of the evidence in the manner suggested by the learned counsel for the appellant. Rule 39 relied upon is very clear. The underlying words in that rule are:

"...the Court May, if it thinks necessary..."

In view of what we have stated above, we do not find it necessary in this case, to take this rather drastic step and order the taking of the evidence as has been suggested. Indeed, doing so would open a pandora box which would result in no end to litigation. We do not believe this is what Rule 39 was intended to achieve. The alternative ground of appeal also fails.

The sum total is that all the grounds of appeal have failed. We uphold the conviction of the appellant for the subject offence and confirm the death sentence.

Appeal dismissed.