

IN THE SUPREME COURT FOR ZAMBIA Appeal No.103/2013

HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

ISAAC ZIMBA MTONGA

APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: MUMBA A/DCJ, MUYOVWE JS and LISIMBA A/JS
On the 4th June, 2013, and 3rd September, 2013.

For the Appellant: Mr. H.M. Mweemba, Senior Legal Aid Counsel,
Legal Aid Board

For the Respondent: M. M.C. Mwansa, Assistant Senior State
Advocate, National Prosecution Authority

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

- 1. David Zulu v. The People (1977) Z.R. 151**
- 2. Saluwema v. The People (1965) Z.R. 4**
- 3. Crispin Nsondo v. The People (1981) Z.R. 302**
- 4. George Nswana v. The People (1988/1989) Z.R. 174**
- 5. Mbinga Nyambe v. The People (2011) Z.R. 246**
- 6. Kape v. The People (1977) Z.R. 192**

The appellant was sentenced to death by the Lusaka High Court on two counts of murder and aggravated robbery respectively. In the 1st count of murder contrary to **Section 200 of the Penal Code Cap 87 of the Laws of Zambia**, the particulars alleged that on the 26th January, 2010 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia he did murder one Kamlesh Misra (hereinafter called “the deceased”).

In the 2nd Count relating to the offence of aggravated robbery contrary to **Section 294 (1) of the Penal Code**, the particulars alleged that the appellant on the 26th January, 2010 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together with other persons unknown and being armed with a knife did steal from Kamlesh Misra K200 million and at or immediately before or immediately after the time of such stealing, did use actual violence to the said Kamlesh Misra in order to obtain or prevent or overcome resistance to the said property from being stolen.

The summary of the prosecution evidence is that the deceased was murdered in cold blood in her house between 1300 hours and 1400 hours on the material day. During the robbery, the only thing that was stolen was K200 million cash in K50,000 Kwacha notes. At the time of the robbery and murder, the deceased was alone in the house and the maid (PW1) had not reported for work. It is clear from the evidence that there was a guard on duty on the premises which was a busy business premises. The facts show that the guard was stationed at the front of the entrance but the back entrance was not guarded. PW1 found the deceased in the house in a pool of blood and reported to the police and investigations ensued which culminated into the arrest of the appellant. It was PW8's evidence that the appellant had worked for him and the deceased for about three years. That after the appellant stopped working, he used to request for some piece work time and again and he did so before the incident. Notably PW1, stated that although she had seen a former employee coming to see the deceased, that person was not in Court. She was detained for seven days in connection with this offence.

The prosecution evidence was that the appellant, shortly after the death of the deceased arrived in the village where he gave his father (PW2) K10 million out of which the appellant bought, amongst other things, cattle, pigs and a motor cycle. After spending some of the cash, PW2 hid the balance of the money in the bush and the same was recovered by the police. The appellant bought cattle from PW4 and PW5 for the sum of K2.7m and K1m respectively. There was evidence that the appellant spent money lavishly buying cattle, bicycles, groceries and pigs and all for cash. According to PW2 and PW3 the appellant ran away from the village in Lundazi into Malawi. PW3 stumbled on him when he went to Kasungu in Malawi and he showed him where he was staying. PW3 later led the police to the appellant who was apprehended. The police recovered K3,550,000 in K50 notes and Malawian Kwacha as well as assorted groceries in cartons such as sugar, cooking oil and soap which were found in the appellant's house in Kasungu, Malawi. The appellant led the police to PW2 where the cash hidden in the bush mentioned herein was recovered as well as to the persons

he had bought livestock from. All in all, the police only recovered K6 million out of the K200 million that was stolen.

In his defence, the appellant denied any knowledge of the charges. He admitted that he worked for the couple from January 2008 to October 2008. That he started his business in October 2009 using proceeds from his benefits paid to him by Trade Kings where he worked from 2003 to 2008, he was paid benefits on 14th October, 2008. His explanation as regards the money he spent lavishly was that he was doing business and that by March, 2010 he had accumulated K27 million. He denied ever visiting the couple's house after he left employment as his business was successful, or that he led the police to the deceased's house as he had worked there. He denied buying a motor cycle as alleged by PW3, his brother.

On this evidence, the learned trial Judge convicted the appellant on the two counts and sentenced him to suffer the death penalty.

On behalf of the appellant, Mr. Mweemba the learned Senior Legal Aid Counsel advanced one ground of appeal which is that

the trial Court erred in law and fact when it convicted the appellant on circumstantial evidence which raised other inferences other than an inference of guilt.

Mr. Mweemba, relied on the filed heads of argument. It was submitted that in this case there was no eye witness to the murder of the deceased and that the case rested on circumstantial evidence. Counsel referred us to the evidence of PW1 whom he submitted, had an opportunity to observe the person who had visited the deceased's house four days before the murder. Mr. Mweemba pointed out that PW1 told the Court that the man she saw was not before Court. Counsel contended that this evidence clearly ruled out the fact that it was the appellant who went to the deceased's house to look for piece work as PW1 would have confirmed this in her evidence. It was submitted that the evidence of PW8 which was to the effect that the appellant used to go to look for piece work should not be believed especially in the light of his evidence that he went to his shop everyday. Counsel argued that this confirmed that PW8 was rarely at home and would not have known who was going to look for piece work from the deceased. He argued that the

circumstances in this case are inconclusive that the appellant was the only person who went to do piece work at the couple's home and that, therefore, another person could have attacked the deceased. He relied on the case of **David Zulu v. The People**¹ where we said:

“(i) 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 fact in issue and from which an inference of the fact in issue may be drawn.

(ii) 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 the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt”.

Counsel contended that it is not true that from the evidence on record, the only inference that can be drawn is that of guilt on the part of the appellant. It was submitted that there was evidence on record indicating that the deceased was last seen with Sharma who was not even suspected at all. That the guard was equally present and was also apprehended. Counsel submitted that, in his findings the learned Judge came to the conclusion that the appellant was the perpetrator of the offence

as he fled from Lusaka to Lundazi following the death of the deceased and disappearance of money.

That there is no evidence on record as to when the appellant was last seen in Lusaka. Counsel pointed out that the learned Judge found that during his stay in Lundazi and Malawi, the appellant had a lot of money to spend lavishly. Counsel submitted that the appellant in his defence explained how he acquired the money in question and that this evidence was not rebutted and the prosecution did nothing to refute the evidence of his benefits from Trade Kings. Counsel placed reliance on the case of **Saluwema v. The People**² where we said:

“If the accused’s case is ‘reasonably possible,’ although not probable, then a reasonable doubt exists, and the prosecution cannot be said to have discharged its burden of proof.”

It was argued that looking at the evidence, the appellant’s case was reasonably possible having regard to the burden of proof which required that the guilt of the appellant be proved beyond any reasonable doubt. Further, Counsel pointed out that the alleged contradictions contained in the evidence of PW2 and

the brother to the appellant as to when the appellant went to Lundazi should not have been used by the learned Judge to support the conviction of the appellant. According to Counsel, the fact that the appellant mentioned that he took some goods to Lundazi in 2008 whereas PW2 said it was in 2010, cannot be the basis for holding that the appellant was involved in the offence as he could have gone to Lundazi for business without seeing his relatives. Counsel referred us to the case of **Chrispin Nsondo v. The People**³ where we said:

“Even if an alibi was a deliberate lie on the part of the appellant the inference cannot be drawn that he did it because he had been involved in the offence. A man charged with an offence may well seek to exculpate himself on a dishonest basis even though he was not involved in the offence.”

In relation to the K200 million which was stolen during the robbery, Counsel argued that the amount found on the appellant made his story reasonably possible. It was submitted that there is a doubt as to the appellant’s participation in the offences especially in the light of the circumstantial evidence from which several inferences other than the inference of guilt could be

drawn. Counsel urged this Court to set aside both the conviction and sentence and set the appellant at liberty.

In response, Ms. Mwansa, the learned Assistant Senior State Advocate supported the conviction on both counts as there was sufficient evidence. She argued that although there was no eye witness in this case, there was overwhelming circumstantial evidence. She submitted that a few days after the money went missing and the deceased was found dead, the appellant was seen spending extravagant amounts of money and he handed out huge amounts of money to his relatives. That the record shows that the appellant failed to give a reasonable account of how he came into possession of huge sums of money which he was giving out in a short period of time. She argued that in the absence of the appellant's reasonable account, this Court should take it that the appellant was in possession of the money from the deceased's house. That the extravagant spending of money shortly after the demise of the deceased and his behavior of running away from Lusaka to Lundazi and finally to Malawi is the circumstantial evidence that takes this case out of the realm of conjecture and making it attain a degree of cogency which could

only permit an inference of guilt. She also relied on the **David Zulu**¹ case.

Ms. Mwansa further submitted that there is also the evidence of leading which was not challenged in the Court below. That according to PW9 the appellant led him and other Police Officers to the scene and that this evidence was corroborated by PW10, an independent witness. That according to PW10, he saw the appellant showing the police how he entered into the flat and that this showed that the appellant knew the design of the deceased's house. Further, that the opportunity was confirmed by PW8's statement that the appellant had worked for the deceased for over three years and Counsel contended that the period of three years was sufficient for the appellant to become conversant with the deceased's house and this is how he was able to stage the robbery at a time that he knew that only the deceased was at home.

It was submitted, in relation to the huge amounts of money spent by the appellant, that although he said he was given benefits of K8 million on 14th October 2009 and started his

business thereby attaining K27 million, the evidence before the Court was that he was handling huge sums of money in February and not March as he alleged. Ms. Mwansa contended that this confirmed the appellant's failure to account for the money and that, therefore, the case of **George Nswana vs. The People**⁸⁸ is applicable. She concluded that the only reasonable inference that could have been arrived at is that of guilt on the part of the appellant and she prayed that this Court upholds the well reasoned conviction and dismiss the appeal.

We have considered the evidence on record, the judgment appealed against and the submissions by learned Counsel for the parties.

From the outset, we must state that we agree that the evidence of PW1, the maid, did not connect the appellant to the two counts. We must also state that the evidence of the guard who was on duty on the material day and Sharma the nephew who had dropped the deceased at home that day would have perhaps shed more light in this matter. Certainly, it goes without saying that this whole case rests on circumstantial evidence. In

the case of **Mbinga Nyambe vs. The People**⁵ in which the case of **David Zulu vs. The**

People was also considered, it was held, inter alia, 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.”

Mr. Mweemba argued that the money the appellant was spending lavishly was from his benefits from Trade Kings and that the state did not challenge this. In our view, what is important to note from the judgment of the lower Court is that the credibility of the appellant was under scrutiny. The learned trial Judge did not believe that the money so lavishly spent by the appellant was from his business which he allegedly started using his benefits from Trade Kings. In this present economic dispensation can someone spend so lavishly his hard-earned cash at a fast rate as was the style of the appellant? We do not think so. A perusal of the evidence reveals a person who appears to have suddenly landed in Lundazi with cash and who went on a rampage of

buying items like cattle, pigs, a motorcycle and even paying K200,000 to his brother for teaching him how to ride it.

From PW3's evidence, it is clear that the appellant did not leave the village in a normal way but he fled. PW3 was told by his father that the appellant had fled because he had killed someone in Lusaka and the police were looking for him. It is clear that he fled upon hearing that police were looking for him. It was PW3 who met him in Kasungu and later led the police to the appellant. It is clear that the appellant was in hiding in Malawi. And why should he hide in Malawi; why should his father hide the money in the bush; why should the appellant deny that he bought a motor cycle? In our view, the behavior of the appellant implied that he had guilt knowledge. Further, PW8 categorically stated that the appellant used to go to his house to look for piece work after he stopped working for them. We are not surprised, therefore, that the appellant demonstrated how he gained entry into the couple's house. Apart from the police, PW10 also confirmed that he found the appellant at the scene as he demonstrated how he gained entry. Indeed, the appellant having worked for the couple knew how to gain entry into the house without detection. We say this

because from the evidence, it appears entry was gained from the back entrance of the premises. In the case of **Kape vs. The People**⁶ we said:

“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.”

The question, therefore, is whether the appellant gave a reasonable explanation as to how he found himself with so much money which he was lavishly spending. As the learned trial Judge found, the appellant’s evidence was contradictory and could not be believed as it was an afterthought. Taking all these factors into consideration, we find that we cannot fault the learned trial Judge when he arrived at the conclusion that the circumstantial evidence was cogent and convicted the appellant as charged. Certainly there was no other inference that the learned trial Judge could come to.

In the premises, we uphold the judgment of the Court below and dismiss the appeal.

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F.N.M. MUMBA
ACTING DEPUTY CHIEF JUSTICE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE
JUDGE

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M. LISIMBA
ACTING SUPREME COURT