IN THE SUPREME COURT OF ZAMBIA SCZ
Appeal No. 42/2019
HOLDEN AT LUSAKA (Criminal Jurisdiction)

BETWEE N:

MATIAS CHITIGWA MUGOGO APPELLANT

AND

THE PEOPLE RESPONDENT

Coram: Muyovwe, Hamaundu and Chinyama, JJS
on 2nd June, 2020 and 19th August, 2020

For the Appellant: Mrs. M.K. Liswaniso, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. M. Chipanta-Mwansa, Deputy Chief State Advocate

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JUDGMENT

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. Alex Njamba vs. The People Appeal No. 50/2010
2. Moonga and Moonga vs. The People Selected Judgment No. 7 of 2019
3. Chipango and Others vs. The People (1978) Z.R. 204
4. Jackson Kayuni and Another vs. The People Appeal No. 251 and 252 of 2011

5. Simon Chooka vs. The People (1976) Z.R. 243
6. Wilson Mwenya vs. The People (1990-1992) Z.R. 24
7. Bernard Chisha vs. The People (1980) Z.R. 36
8. Boniface Chanda Chola and Others vs. The People (1988-89) Z.R. 163
9. George Musupi vs. The People (1978) Z.R. 271
10. Yokoniya Mwale vs. The People SCZ Appeal No. 285 of 2014
11. Kambeja vs. The People SCZ Appeal No. 22 of 2009
12. Kambarage Kaunda vs. The People (1990-92) Z.R. 215
13. Machobane v The People (1972) Z.R. 101
14. Phiri (E) and Ors. v The People (1978) Z. R. 79
15. David Chitika and Lawrence Kaunda vs. The People SCZ Appeal No. 619,620 of 2013
16. Nsofu v The People (1973) Z.R. 287
17. Haonga v The People (1976) Z.R. 200
18. Ivess Mukonde vs. The People (2011) Z.R. 134, Vol. 2

Legislation referred to:

1. Section 12 of the Supreme Court Rules, Cap. 25 of the Laws of Zambia
2. Section 122 of the Juveniles Act Cap. 53 of the Laws of Zambia

This is an appeal against conviction. The appellant was tried and convicted of the offence of murder by Ngulube J (now in the Court of Appeal) sitting at Kasarna High Court. It was alleged that on the 3 rd October, 2011 at Nakonde the appellant murdered Daudi Silungwe, (hereinafter referred to as "the deceased"). In a judgment delivered on the 14 th June, 2013 the trial judge found no extenuating circumstances and sentenced the appellant to death.

The background to this appeal is that two months prior to the attack on the deceased, the appellant had proposed love to PW 1 the wife to the deceased. At the time, PW 1 was 14 years old. According to PW 1, she rejected the appellant's proposal as she was already married to the deceased, a disabled person who used to walk on his knees and hands. She stated that she reported this matter to the headman due to the appellant's persistence.

On the material day around 21:00 hours while PW 1 and the deceased were in their house, the appellant in the company of an unknown person forcibly entered the house. At the time, the deceased was very drunk. PW 1 was able to identify the appellant whom she had known for two months because of the lighting from a candle. The appellant and the unknown person started assaulting the deceased who could not fight back because he was drunk and because he was disabled. The appellant even pulled the deceased's manhood. With the help of the unknown person, the appellant strangled the deceased until he died in full view of PW 1. The two then put a rope around the deceased's neck which they tied to the roof and placed a 20 litre container underneath to make it appear like a suicide.

According to PW 1, the appellant was in the house from 21:00 hours to 24:00 hours. The appellant threatened to kill her if she shouted for help and ordered her to stay indoors and so she stayed

with the deceased's body until morning. In the company of PW2, PW 1 went to report the matter to the police. The report was to the effect that the deceased had committed suicide.

According to the arresting officer (PW5), on visiting the scene, they suspected foul play looking at the deceased's height and the nature of his disability. PW5 stated that when queried further, PW 1 revealed that the deceased was murdered by the appellant with the aid of one Lassie. The arresting officer stated that PW 1 was kept in the cells for her own well-being as she was traumatized. PW 1 told the police that she had not told the truth in her earlier statement because of the appellant's threats on her life.

A Postmortem examination conducted on the body of the deceased confirmed that the death was not a suicide. The cause of death was asphyxia secondary to strangulation.

The appellant was apprehended and during trial, he elected to remain silent and did not call any witnesses.

In her judgment, the learned judge was alive to the fact that PW 1 may have had a possible interest of her own to serve but ruled out this possibility. The learned judge accepted that PW 1 knew the appellant prior to the gruesome attack on her husband and that she had time to observe the appellant as there was light in the room. She accepted PW I's testimony that the appellant and his colleague attacked the deceased, strangled him and hang him to make it look like a suicide. The learned judge also accepted that PW 1 who was only 14 years at the time of the incident initially gave a different version of what had transpired because the appellant and his accomplice had threatened her.

The learned judge also found that the postmortem report corroborated PW 1 's testimony that the deceased was assaulted and strangled. She found that the appellant acted with malice aforethought in assaulting and strangling the deceased and she convicted him of murder and sentenced him to the mandatory death sentence having found no extenuating circumstances.

On the 3rd March, 2020 the appellant filed his lone ground of appeal with heads of argument.

Mrs. Chipanta-Mwansa the learned, Deputy Chief State Advocate raised a preliminary issue to the effect that this appeal is incompetent and must be dismissed. This is due to the fact that the appellant invoked the powers of the Executive leading to the commutation of his death sentence to life imprisonment. In a nutshell, Counsel for the State submitted that the appellant did not file any notice of appeal and neither did he file leave to appeal out of time in accordance with Rule 12 of the Supreme Court Rules. Counsel contended that this case can be distinguished from the case of Alex Njamba vs. The People [1] where we proceeded to hear the appellant's appeal on the ground that the appeal was pending before us. That this is not the case in this appeal, and it should be dismissed for being incompetent.

In response to the preliminary issue, Counsel for the appellant submitted that the appellant lodged his appeal on two occasions, the first instance being at Kasama immediately after conviction and secondly when he was transferred to the Maximum Prison. In addition, it was argued that it is a practice that anyone facing the death penalty is granted an automatic appeal to this court. On the

commutation of his sentence from death to life, it was submitted that at no point did the appellant apply to the Executive for the Prerogative of Mercy. Counsel contended that the Executive exercised its Prerogative of Mercy on everyone on death roll from the 13th to 17th July, 2015 and that was how the appellant was affected. It was submitted that, therefore, the appeal was properly before this Court.

We have considered the submissions by learned Counsel on this preliminary issue. We have had occasion to pronounce ourselves on this issue recently in the case of Moonga and Moonga vs. The People[2] and Alex Njamba vs. The People. [1] In the case of Alex Njamba vs. The People [1] the appellant lodged his appeal in this Court and before we could conclude his appeal, the Executive exercised its prerogative of mercy and commuted his death sentence to life imprisonment. When the matter came before us, the State raised a preliminary issue on the same ground as they have done in this appeal. Learned Counsel for the appellant insisted that his client's appeal was pending before us and that the Executive erred when it exercised its prerogative of mercy in favour of the appellant before he could exhaust the appeal process. We agreed with

Counsel for the appellant and we dismissed the preliminary issue raised by the State and we proceeded to hear the appeal on the merits.

In the case in casu, the judgment was delivered by the lower court on the 13th July, 2013. According to the State, the appellant's sentence was commuted to life on the 3rd July, 2015. We take judicial notice of the fact that this is an automatic appeal which means the appellant has been waiting for the hearing of his appeal since conviction. And the appeal was only cause listed in March, 2020 hence the lone ground of appeal and heads of argument filed on the 3rd April, 2020, almost seven years after conviction.

Although the State has raised the preliminary issue, we have not been furnished with documentation to show that the appellant did make an application to the Prerogative of Mercy Committee. We say so because we are aware and take judicial notice of the fact that the Executive has from time to time given a blanket commutation of death sentences to life. This is how Alex Njamba [1] found himself with an unsolicited sentence of life imprisonment not by application but by proclamation. The criminal justice system envisages a situation where an appellant should exhaust the appeal process

before approaching the Executive to exercise prerogative of mercy in his/her favour. Once again, we implore the Executive to follow the law in order to avoid colliding with the Judiciary as it carries out its core function as provided under the Constitution.

Having made the above observations, we find that the preliminary issue has no merit and it is dismissed. We shall proceed to hear the appeal on its merits.

In his lone ground of appeal, Counsel for the appellant contends that the learned trial judge erred in law and fact when she convicted the appellant on the uncorroborated evidence of PW 1, a suspect witness. Relying on the cases of Chipango and Others vs. The People,[3] Jackson Kayuni and Another vs. The People[4] and Simon Chooka vs. The People[S] Counsel argued that PW 1 the main witness in this case was a suspect witness because she initially informed the police that her husband had committed suicide. Counsel submitted that it was only after the police visited the scene, carried out investigations and detained PW 1 that she changed her version and implicated the appellant. We were referred to the case of Wilson Mwenya vs. The People[6] where we stated that the evidence of a witness who has been detained in connection with the

offence under investigation needs corroboration. Counsel argued that, clearly, PW 1 was a suspect and an accomplice whose evidence required corroboration. Further, that PW 1 narrated the events that took place in a manner that exonerated her involvement in the murder.

Another issue raised by Counsel was that PW 1 lied about not knowing Lassie the person who was allegedly in the company of the appellant on the night in question making her evidence highly unreliable. Counsel for the appellant alluded to the factor considered by the learned trial judge that at the time of the tragic incident PW 1 was 14 years old and was traumatized by the incident. In Counsel's view, this is the more reason why PW 1 's evidence required corroboration as it was suspect. Counsel also relied on the case of Bernard Chisha vs. The People[7] where we stated that a child due to immaturity of the mind is susceptible to influence by third parties and that as such their evidence requires corroboration.

JIO

Counsel also attacked the prosecution's alleged failure to investigate the alibi raised by the appellant and that this should

operate in the favour of the appellant. According to Counsel, the wife of the appellant confirmed to the arresting officer that the appellant went home after drinking and he was at home during the period when the offence is alleged to have been committed. It was submitted that, therefore, the failure by the appellant to offer an explanation was not fatal to his case. Counsel maintained that on the totality of the evidence, the trial judge should not have convicted the appellant and this appeal should be allowed and the appellant set at liberty forthwith.

In response to the lone ground of appeal, the learned Counsel for the State, Mrs. Chipanta-Mwansa, cited the cases of Boniface Chanda Chola vs. The People[8] and George Musupi vs. The People[9] and contended that PW 1 had no motive to falsely implicate the appellant. This is because PW 1 had rejected the appellant's love advances; the appellant had issued threats against the deceased and PW 1 had reported him to the headman.

Addressing the issue that PWI lied about the cause of death of the deceased, it was submitted that PW 1 did not testify about the cause of death of the deceased. Counsel acknowledged that PW 1 was in the company of PW2 when she made the report that the deceased committed suicide but that this did not make her evidence unreliable. According to Counsel for the State, although PW 1 had been detained by the police for a short period of time, the revelation that the appellant was the murderer was made before detention and at the earliest opportunity and this made her a credible and reliable witness. To support this argument, Counsel relied on the cases of Yokoniya Mwale vs. The People [10] and Kambenja vs. The People. 11

Counsel also submitted that the findings of the postmortem report corroborated the evidence of PW 1 that the deceased had not committed suicide.

Counsel argued that the appellant elected to remain silent and the trial court made its conclusions based on the evidence before it and it cannot be faulted. It was submitted that there is

overwhelming evidence against the appellant and his conviction should be sustained and the appeal dismissed.

We have considered the arguments by Counsel for the parties.

The main issue for our consideration in this appeal is whether the learned trial judge was on firm ground when she relied on the evidence of PW 1, the sole eyewitness, to convict the appellant. Counsel for the appellant raised the following issues within the sole ground of appeal: that PW 1 was a suspect witness whose evidence required corroboration especially in view of the fact that she was only 14 years old at the time of the incident; she made a false report to the police that the deceased had committed suicide; she told the arresting officer that the appellant had an accomplice by the name of Lassie but denied this in her evidence — all this pointed to the fact that her evidence was unreliable as it was suspect. Lastly, that the police failed to investigate the alibi raised by the appellant.

It is common cause that PW 1, the deceased's wife who at the time was aged 14 years, was alone with her husband when the gruesome murder took place. The appellant elected to remain silent leaving the learned trial judge with only the prosecution evidence to

consider. It is trite law that the burden of proof remained on the prosecution to prove their case beyond reasonable doubt.

First of all, we wish to deal with the issue raised by Counsel for the appellant that the age of PW 1 at the time of the incident affected her testimony during trial. Counsel's argument was that PW 1 's testimony should have been considered in light of her tender age of 14 years at the time of the incident. Following the amendment to Section 122 of the Juveniles Act in April, 2011 children aged 14 years and above are not necessarily considered children in that they are treated on the same footing as adult witnesses in terms of the reception of their evidence as there is no need for a voire dire to be conducted. The record shows that at the time of testifying PW 1 was 16 years old. Clearly, the learned trial judge treated PW 1 on the same footing as an adult as per the provisions of the law and she was subjected to cross-examination and her demeanour and credibility were rightly weighed by the trial court. Therefore, the issue of her being a child at the time of the commission of the offence cannot affect the veracity of her evidence.

PW 1 was the star witness to the murder of the deceased. The trial judge was alive to the fact that PW 1 was a suspect witness as she was a sole witness and the wife of the deceased. In Kambarage Kaunda vs. The People [12] we held that:

> (ii) That as the prosecution eye witnesses were relatives or friends of the deceased and could, therefore, well have had a possible bias against the appellant; and as they were the subject of the initial complaint by the appellant as having attacked him and his friends and, therefore, had a possible interest of their own to serve, failure by the learned trial judge to warn himself and specifically to deal with this issue was a misdirection;

We have pronounced ourselves on this issue in a plethora of cases such as George Musupi vs. The People[9] and Yokoniya Mwale vs. The People [10] and the guiding principle is that the danger of false implication must be eliminated.

It cannot be seriously disputed that PW 1 was a witness whose testimony needed to be received with caution; not just because she was the wife of the deceased, but mainly because of her initial concealment of the real cause of death: this omission could lead one to conclude that she was, at least, an accomplice in the murder of the deceased. Even if the issue of her detention is discounted, this last factor alone placed her in the category of witnesses whose testimony

is suspect. Therefore, for her testimony to be relied upon, the court needed to be satisfied that the danger that she was falsely implicating the appellant had been excluded. For that to be achieved, there ought to be present; either some other evidence or testimony which corroborated that of PW 1; or some special and compelling grounds (something more) which, although other corroborative evidence or testimony was not present, yet satisfied the court that the danger that PW 1 was falsely implicating the appellant had been eliminated.

These propositions of law have been expounded in cases such as Machobane v The People [13] and Phiri (E) and Ors. v The People. 14

In this case, in ruling out the possibility that PW 1 may have had an interest of her own to serve, the learned trial judge only went as far as warning herself against the danger of false implication: she did not set out what corroborative evidence, or what special and compelling grounds had satisfied her that the danger that PW 1 was falsely implicating the appellant had been excluded. We, however, note that her position was influenced by two factors: first, the learned trial judge observed that PW 1 was only fourteen years old

at the time of the incident. Secondly, the judge took note of PW 1 's testimony that the appellant and his fellow assailant had threatened to kill her if she revealed to anyone what she had seen.

We accept that PW 1, being a child of only fourteen years at the time, would easily be terrified by the threat from the appellant. We, therefore, understand the implied acceptance by the learned trial judge that this explained why PW 1 initially tried to conceal the murder. In David Chitika and Lawrence Kaunda v The People, [15] a similar situation arose: A maid had earlier concealed a murder and explained it as a suicide. Later, however, she disclosed the truth and explained her earlier lie as having been motivated by the appellant's threat of death to her. The learned judge accepted the explanation and believed her second version of the story. We upheld the judge on that position.

So, in this case, we accept that those two factors constituted special and compelling grounds for the learned judge to be satisfied that the danger of false implication had been excluded.

At this point we wish to cite one of our holdings in Nsofu v The People [16] which states that:

> “(VIN) Where the evidence of a witness requires to be corroborated it is nonetheless the evidence of the witness on which the conviction is based; the corroborative evidence only serves to satisfy the court that it is safe to rely on that of the witness."

This means that once the court is satisfied that the danger of false implication is absent, the testimony of such witness is treated like that of any other witness; hence, as with other witnesses, the only consideration is the weight to be attached to that testimony. This involves the assessment of the reliability of the testimony when matched against the other evidence. Once the testimony passes those tests, it is competent to convict on that evidence alone.

In this case, having felt assured that PW 1 was not falsely implicating the appellant, the learned trial judge was perfectly entitled to rely on her (PW 1 's) testimony. The judge only needed to satisfy herself that PW 1 's testimony carried sufficient weight as to be reliable: And this leads us to the other argument raised by counsel for the appellant.

The argument is that PW 1 's testimony was unreliable because, in her evidence, she had denied any knowledge of the appellant's accomplice; and yet the arresting officer who testified later told the

court that it was PW 1 who had told her that the name of the appellant's accomplice was Lassie. In Haonga v The People [17] we held that, where a witness has been found to be untruthful on a material point, the weight to be attached to the remainder of his evidence is reduced. We also held, in the same case, that it does not follow that a lie on a material point destroys the credibility of a witness on other points if the evidence on the other points can stand alone.

In this case the arresting officer's testimony was that PW 1 only knew the appellant's accomplice as Lassie because he had dreadlocked hair. This is an indication that PW 1 had seen that man prior to the night of the incident and yet she told the court that she saw him for the first time on that night. However, we do not think that that lie can affect the credibility of PW 1 's testimony as against the appellant, which testimony was unshaken even in crossexamination. We therefore hold that the learned judge cannot be faulted for relying on it.

In this appeal, counsel for the appellant did not, quite properly in our view, raise any issue on identification. There is, however, a

submission that the police failed to investigate the appellant's alibi. This submission cannot stand because the arresting officer, PW5, told the court that the alibi was investigated and that it was found that the club at which the appellant had been drinking beer was within the deceased's neighbourhood meaning that the opportunity for the appellant to commit the murder was still present. See Ivess Mukonde vs. The People.18 Hence the judge cannot be faulted for not considering the alibi.

In conclusion, we find no merit in this appeal, and it is dismissed.

E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHIN AMA
SUPREME COURT JUDGE