

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA AND KABWE
(Criminal Jurisdiction)

CAZ Appeal No. 159/160/2017

BETWEEN:

TEDDY MUNTANGA

ENOCK MPELEMBE BANDA

AND

THE PEOPLE



APPEALANT

APPELLANT

RESPONDENT

Coram: Mchenga, DJP, Mulongoti and Sichinga JJA

On 14th November 2017 and 23rd May 2018

For the Appellant: K. Muzenga, Deputy Director, Legal Aid Board

For the Respondent: G. Zimba, Principal State Advocate, National Prosecution
Authority

JUDGMENT

Mchenga, DJP, delivered the Judgment of the court

Cases referred to:

1. Elias Kunda v The People [1980] Z.R. 100
2. David Zulu v The People [1977] Z.R. 151
3. Bwalya v The People [1975] Z.R. 125
4. R v Exall and Others [1866] ALL ER 850
5. Webster Kayi Lumbwe v The People [1986] Z.R. 93
6. Paul Musole Wasa-Munu v The People [1978] Z.R. 143
7. David Zulu v The People [1977] Z.R. 151
8. Maseka v The People [1972] Z.R. 9

Legislation referred to:

1. The Penal Code Chapter 87 of the Laws of Zambia

Teddy Muntanga, the 1st appellant, and Enock Pelembe Banda, the 2nd appellant, appeared before the High Court on an information containing one count of the offence of murder contrary to **section 200 of the Penal Code**. The allegation in the particulars of the offence was that between the 8th and 9th August 2016, at Chipata, jointly and whilst acting together, they murdered Rose Phiri. They both denied the charge and the matter proceeded to trial.

According to the prosecution evidence, on 8th August 2016, in the night, the appellants turned up at Kwamutonyo Bar, a bar which is along Malawi Road, in Chipata, in the company of Rose Phiri. They initially parked their motor vehicle in front of the bar but it was later moved to the back, where the 2nd appellant and Rose Phiri, spent some time together. At that time, the 1st appellant told the patrons that the 2nd appellant was having sexual intercourse with Rose Phiri. The 1st appellant also spent some time with Rose Phiri at the back of the bar. During their stay at the bar, the trio consumed alcoholic beverages.

The appellants and Rose Phiri left the bar before midnight and just as they were about to join the main road, the motor vehicle stopped. They all came out and they started pulling and pushing each other. They only got back into the motor vehicle and drove off after intervention from a guard who worked at the bar. He persuaded the appellants not to leave Rose Phiri behind.

The following morning, on 9th August 2016, around 06:00 hours, Detective Inspector Njobvu, a Scenes of Crime Officer from Chipata Central Police Station, received

information from members of the public that a body was lying in Chipata's Mchini Compound. He went there and retrieved the body of a female person which was subsequently identified to be that of Rose Phiri, she had suffered a cut on the head. A postmortem examination found the cause of her death to be a fracture of the occipital bone. The pathologist also observed a deep cut on the labia majora, bruises on both hands and in the uterus.

The matter was investigated by Detective Chief Inspector Chihana. He apprehended the appellants after receiving information that they were seen with Rose Phiri the night before she was found dead. He told the court that upon questioning them, the appellants led him to a point where they claimed they had dropped Rose Phiri. They also told him that they spent a night at the 1st appellant's house after dropping her. He told the court that he came across information that a relative of Rose Phiri lived near where the appellants said they dropped her.

In their defence, the appellants admitted being with Rose Phiri the evening before she was found dead but denied inflicting the injuries that caused her death. They also denied assaulting Rose Phiri at Kwamutonyo bar as they left. They said what appeared to be an altercation was in fact Rose Phiri expressing joy because she was dumb and deaf. It was also their evidence that after leaving the bar, they took her to Mature Night Club on Devil's Street. They had picked her from there earlier that evening. When they were about to leave, some of the prostitutes on that street told them that Rose Phiri lived around the Chadiza turn off area. They

picked her and dropped her there at around 2200 hours. They then went and spent the night at the 1st appellant's house.

After considering all the evidence before her, the trial judge found that the appellants took turns having sexual intercourse with Rose Phiri, a prostitute, at the bar and had a disagreement with her as they left. They disagreed because the appellants failed to pay her for the sexual services she provided them. She also found that the appellants could probably not recall this because they were drunk.

The trial judge rejected the appellants' evidence that they took Rose Phiri back to the night club on Devil's Street. She found it to be a fabrication and afterthought, reasoning that had it been the case, the 1st appellant would have easily called one of the prostitutes they spoke with to corroborate their evidence.

The trial judge also found that the injuries suffered by Rose Phiri on her hands, were consistent with the struggle she had with the appellants at the bar. She also found that the injuries she suffered on her labia majora and uterus were as a result of the sexual intercourse the appellants had with her. In the face of this evidence, she found it inconceivable that they could have dropped her alive near her home.

Finally, the trial judge found that the appellants failed to account for their whereabouts between 23:00 hours on 8th August and 06:00 hours, on 9th August 2016. The failure of the appellants to call any household member to support their claim that they spent the night in the 1st appellant's house, led her to draw the

inference that they did not go back home because they did not want anyone "to witness their crime".

She found that the only inference that could be drawn from these strands of evidence was that the appellants murdered Rose Phiri. The appellants were convicted of the offence of murder and sentenced to 25 years imprisonment after the trial judge found that there were extenuating circumstances on account of their being drunk.

The appellants have attacked their convictions on the ground that an inference that they killed Rose Phiri, is not the only one that can be drawn on the evidence that was before the trial court.

The first issue Mr. Muzenga raised was that the prosecution evidence did not satisfactorily prove that Rose Phiri is the same person that the appellants turned up with at the bar. He argued that none of the witnesses who were at the bar testified that the body that was recovered was that of the lady the appellants came with to the bar the previous night. He also submitted that it was wrong for the trial judge to find that the appellants' testimonies that they had dropped off Rose Phiri near the Chadiza turnoff was an afterthought. This is because they were consistent on that point and they told the investigating officer the same story on their apprehension.

Mr. Muzenga then referred to the case of **David Zulu v The People**¹ and he argued that it was on "all fours" with the case at hand. He pointed out that in that case,

the appellant was last seen at midnight with the deceased person whose body was found at 06:00 hours the following morning. The Supreme Court found that it was possible that they could have parted company and someone else attacked her. He urged us to make a similar finding in this case, pointing out that Rose Phiri was found dead after 06:00 hours in the morning, having last been seen with the appellants before midnight, the previous day.

Finally, Mr. Muzenga submitted that the trial judge took the wrong approach when she appeared to place the burden of proving their defence on the appellants. Her view that they should have called witnesses to support their explanations, was against the established principles on the issue. He referred to the case of **Elias Kunda v The People**² and submitted that all the appellants were required to do was to give an explanation that could reasonably be true, which they did. He concluded by submitting that the burden was on the prosecution to rebut or disapprove their explanations. He urged us to uphold the appeal and set aside the convictions.

In response, Mr. Zimba submitted that the case of **David Zulu v The People**¹ is not on "all fours" with the case at hand because in that case, the environment was calm when the appellant was last seen with the deceased person. In this case, there was a scuffle between the appellants and Rose Phiri the last time they were seen together.

He also submitted that the postmortem report supports the testimonies of the prosecution witnesses that 2nd appellant had sex with the Rose Phiri. He argued that the mere fact that she was a prostitute should not lead to an inference that she could have had sex with some other men. In fact, there is no evidence that someone else other than the appellants had sexual intercourse with her.

Mr. Zimba also submitted that the trial judge did not shift the burden of proof to the appellants, she only found that their explanations were an afterthought and was of the view that they should have called evidence to support their claim that they picked Rose Phiri from a night club and dropped her somewhere else. He submitted that the appellants' claim that they talked to some prostitutes before dropping Rose Phiri, would have been credible if they called them as witnesses or given the names of the prostitutes; he referred to the case of **Bwalya v The People**³ in support of that proposition. It was also his position that it was not sufficient for the appellants to say that they were given Rose Phiri's residential address by some prostitutes, they should have given the prostitutes names to the police and if they had done so, the state would have been duty bound to rebut that evidence.

He conceded that there was no direct evidence that the lady the appellants were with the night before Rose Phiri's body was found, was Rose Phiri but argued that the clothes the lady the appellants turned up with at the bar, matched what Rose Phiri was wearing when her body was recovered. Mr. Zimba concluded by referring to the case of **R v Exall and Others**⁴ and submitting that when all the

strands of the circumstantial evidence in this case are put together, the only inference that can be drawn is that the appellants are guilty of murdering Rose Phiri. He urged us to uphold the convictions and dismiss the appeal.

We have considered the evidence on record and the submissions by counsel. It is common cause that the case against the appellants is anchored on circumstantial evidence. This being the case, their convictions can only be upheld if an inference of guilt is the only one that can be drawn on the evidence that was before the trial judge. However, before we consider whether it is the case, we will deal with Mr. Muzenga's submissions on the evidence proving that the appellants turned up with Rose Phiri at the bar and the trial judge's shifting of the burden of proof on to the appellants.

First of all, we agree with Mr. Muzenga's submission that proof that the lady the appellants turned up with at Kwamutonyo Bar was Rose Phiri, is important to the case against them. However, we do not agree with his view that the identity of the lady the appellants went with to the bar was not proved because none of the witnesses who were at the bar went and had a look at the body that Detective Inspector Njobvu recovered. Throughout the prosecution's case, the appellants did not dispute going to the bar with Rose Phiri. Further, in his defence, the 1st appellant admitted having gone with Rose Phiri to Kwamutonyo Bar on 8th August 2016. The evidence on record, does not in any way suggest any dispute on the identity of the body recovered on 9th August 2016, neither was the cause of her

death disputed. What was disputed was who inflicted the injuries that caused Rose Phiri's death. This being the case, it is our view that the evidence before the trial judge proved that the lady that the appellants turned up with at Kwamutonyo Bar on 8th August 2016, was Rose Phiri.

As regards the submission that the trial judge shifted the burden of proof on the appellants, we agree with Mr.imba's submission that she did not. As was pointed out by Mr.imba, the trial judge found the appellants' evidence that they dropped Rose Phiri at the Chadiza turn off and spent the night at the 1st appellant's house, to be an afterthought and not credible because they did not call witnesses to support the claims. Though we are of the view that the burden of proof was not shifted, we find that the evidence was not properly discounted.

There was evidence from detective Chief Inspector Chihana that following their apprehension, the appellants told him where they dropped Rose Phiri and they took him to Chadiza turn off. They also told him that after dropping her, they went to the 1st appellant's house. It cannot, in the circumstances, be said that the appellants' testimony in court on the same issues, was an afterthought. As rightly pointed by Mr. Muzenga, they were consistent on the issue.

In the case of **Webster Kayi Lumbwe v The People**⁴, the Supreme Court, considered the approach an appellate court should take when there is a challenge on findings based on credibility. It was held, *inter alia*, that:

"An appeal court will not interfere with a trial court's finding of fact, on the issue of credibility unless it is clearly shown that the finding was erroneous."

In addition, in the case of **Paul Musole Wasa-Munu v The People**⁵, they held that:

"where the question is purely one of inference from facts about which there is no dispute an appellate court has both the right and the duty to substitute its own views for those of the trial judge."

It is our view, that had the trial judge properly assessed the evidence before her, she would not have come to the conclusion that the appellants' evidence that they spent the night at the 1st appellant's house after dropping Rose Phiri at the Chadiza turn off, was an afterthought and therefore not credible. They were consistent on the issue and the credibility of their claims, should have been considered and decided, in the light of the other evidence before her and not dismissed outright.

Earlier on, we pointed out that the case against the appellant is anchored on circumstantial evidence. In the celebrated case of **David Zulu v The People**¹, it was held that:

- "(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.**
- (iii) The appellant's explanation was a logical one and was not rebutted, and it was therefore an unwarranted inference that the scratches on the appellant's body were caused in the course of committing the offence at issue."**

Mr. Muzenga submitted that the case against the appellants is on "all fours" with what obtained in **David Zulu v The People**¹. On the other hand, Mr. Zimba's position

is that it is not. He has argued that the appellants cannot rely on it because the circumstances were different.

In our assessment, the case of **David Zulu v The People**¹ was not solely decided on the basis that the situation was calm when the accused person was last seen with the lady who was subsequently found dead. It was essentially decided on the basis that it was possible for someone else to have committed the offence, given the amount of time that lapsed from the time the accused person was last seen with the lady and the time her body was found. The time lapse in that case and in this case, are similar. In any case, the prosecution evidence shows that at the time the appellants were driving off, the situation had calmed down. It is no wonder that the guard persuaded the appellants not to leave Rose Phiri behind. The case would have been different if she had refused to go with them and they dragged her into the motor vehicle.

Mr. Zimba has submitted that the appellants' claim that they talked to some prostitutes on the street is not credible because they failed to give the police the names of the prostitutes. Even if they did not give names, we are of the view that in the absence of evidence that they actually knew the prostitutes they talked to by name, they could do no better than tell the police where they operated from. The fact that they did not give names cannot, in the circumstances, render their explanation not to be credible.

The questions that remain to be resolved are; can the appellants' claim that they dropped Rose Phiri on the street be reasonably true? and can it, in the circumstances of this case, be said that no one else other than the appellants could have inflicted the injuries that caused her death?

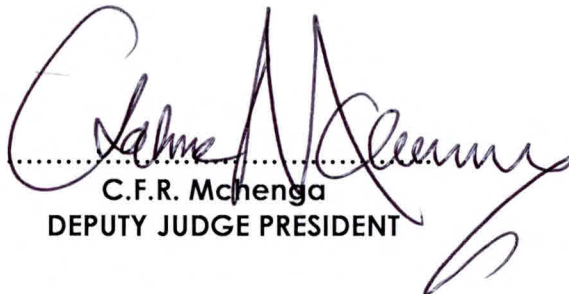
In the case of **Maseka v The People**⁶, the appellant, who was charged with the offence of store breaking, was implicated in the commission of the offence by his possession of stolen property. He gave an explanation of how he came into the possession of the property but was convicted after the court drew an inference of guilt on the facts before it. Commenting on when an inference of guilt could be drawn, Gardner JA, delivering the judgment of the court, at page 13, observed as follows:

"... and if explanation is given, because guilt is a matter of inference, there cannot be a conviction if the explanation might reasonably be true, for then guilt is not the only reasonable inference. It is not correct to say, as was said in this case, that the accused must give a satisfactory explanation. Absence of an explanation which can be regarded as reasonably possible is one of the facts on which the inference of guilt may be based."

In the face of evidence that Rose Phiri was a prostitute and that the appellants picked her from the street, it is our view that had the trial judge properly assessed the evidence before her, she could have found that it was probable for the appellants to have dropped her on the street as they claimed they did. She could have in turn found that their explanation could have reasonably been true. In the face of the explanation that the appellants gave, which explanation could reasonably have been true, we are of the view that an inference of guilt is not

the only one that can be drawn on the evidence that was before the trial court. It is possible that someone else could have picked Rose Phiri and inflicted the injuries that caused her death. The fact that the injuries to her private parts and on her hands, as were observed in the postmortem report, are consistent with the prosecution evidence that the appellants had sex with her and thereafter pulled and pushed her, is immaterial because these injuries did not cause her death.

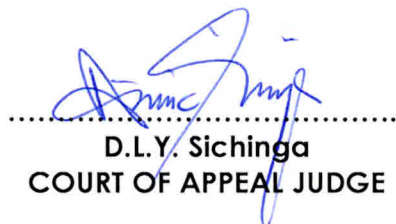
In the circumstances, we find that the appellants were convicted on evidence which is unsatisfactory. We allow their appeals, quash their convictions and set aside the sentences.



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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



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J. Z. Mulongoti
COURT OF APPEAL JUDGE



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D.L.Y. Sichinga
COURT OF APPEAL JUDGE