

IN THE HIGH COURT OF ZAMBIA

HN/13/2011

HOLDEN AT MANSA

(Criminal Jurisdiction)

THE PEOPLE

V

FRED MWELWA

CORAM: SIAVWAPA J.

FOR THE STATE: MESSRS J. AKAPELWA AND S.K. NKANDU; STATE
ADVOCATES

FOR THE DEFENCE: MR. P. CHAVULA; LEGAL AID COUNSEL

J U D G M E N T

AUTHORITIES REFERRED TO:

1. Abel Banda V the People (1986) Z.R. 105 (SC)
2. Chisoni Banda V the People (1990 – 1992) Z.R. 70
3. Dallison V Caffrey [1964]2 All E.R. 610
4. Patson Simbalula V the People (1991 – 1992) Z.R. 136
5. Shamwana and 7 others V the People (1985) Z.R. 41
6. The People V John Ng'uni (1977) Z.R. 376
7. Woolmington V the Director of Public Prosecutions [1935] A.C. 462

Accused was by information charged with MURDER contrary to section 200 of the Penal Code chapter 87 of the Laws of Zambia. The particulars of the offence are that between the 23rd and 27th day of April 2010 at Mwense in the Mwense District of the Luapula Province of the Republic of Zambia, accused did murder Maggie Seline Mwila.

PW1 testified that on 24th April 2010, a Saturday, she was told by her neighbours that her mother was sick and that she should go and see her. She went to see her the following day on Sunday around 10:00 hours. She found her in bed and when she asked her what the matter was, she replied that it was Mrs. Soko's son. She then took her to her home and gave her some food but that she developed diarrhoea soon after eating the food. She later took her to PW2's home and left her there and a few days later heard that she had died.

PW2 testified that on 23rd April 2010 someone told her that her sister was very sick. She went to see her and found her in bed. She asked her what the problem was and she told her that a young man by the name of Mwelwa had raped her. She said that she went back to her home leaving her sister who had refused to come with her to her home but that the following day PW1 took her to her home. She said that when she bathed her, she noticed that she had deep cuts on her private parts.

She further testified that later, PW4 visited her and her sister explained to him in her presence that accused had locked her in the house and raped her as a result of which she was experiencing a lot of pain on her private parts. The following morning, PW4 picked her up in a police vehicle and

took her to the hospital and after interviewing her, PW4 left promising to return to take them back home. She said that her sister however, died soon after PW4 had left. It was further her testimony that her sister suffered from a mental illness but that she could recognize people.

In cross-examination she said that her sister's neighbours were Mrs. Kabunda to the right and Mrs. Zulu in front and that Mrs. Kabunda's house was about 10 metres away while Mrs. Zulu's house was about 20 metres away. She said that her sister had been mentally ill for a long time but denied suggestions that she was violent at times.

PW3 was Peter Samuel Phiri, a consultant surgeon at Mansa General Hospital. His testimony was to the effect that he conducted a post-mortem examination on Maggie Mwila Matanda in 2010 and prepared a report thereof exhibit P1 which he identified. He explained that his findings were that the deceased was an elderly woman who appeared to have been fairly nourished. He also found that she had large bruises on her right knee and that the lining of her vagina was rough and purple as opposed to the normal smooth texture and pink colour. He further observed a laceration about half a centimetre deep at the entrance to the vagina. He formed the opinion that the same could have been caused by trauma due to application of external force.

As regards internal findings, he said that there was an accumulation of about 300 millilitres of pus in the peritoneal cavity due to pelvic peritonitis/inflammation. It was further his finding that the cause of death was the said pelvic peritonitis.

As to the cause of the pelvic peritonitis, he said he could not say but that the condition was common in women. He further said that the same can occur without any external cause as much as it could be part of a sexually transmitted infection.

As to whether rape could be the cause of the condition, he said that since it took a week or more for the condition to develop, rape may or may not be the cause depending on when it took place.

PW4 testified that on 25th April 2010 he received information from an anonymous caller to the effect that the deceased had been raped by accused. He visited the victim around 17:30 hours of the same day. She complained of severe pain on her vagina and named accused as the person who had raped her. On 26th April 2010, he picked her up around 12:00 hours and took her to the hospital and whilst at the hospital he recorded a statement from her and issued her with a medical report form. He returned to the police station and about 20 minutes later he heard that the victim had died. He then handed over the case to PW5.

In cross-examination he said that to date he did not know the identity of the person who had called him. He said that he interviewed the deceased in the presence of her sister, PW2. He also said that he did not find the suspect because he was awaiting the medical report and did not know that the victim would die.

PW5 was the arresting officer. He testified that on 27th April 2010 he took over the docket relating to this case. He said that he attended a post-mortem examination conducted by PW3 at Mansa General Hospital after

which PW3 told him that the cause of death was accumulation of pus in the pelvic area.

He later interviewed the suspect on 29th April 2010 and recorded a warn and caution statement from him. On visiting the scene, he found nothing. When he warned and cautioned the accused in cibemba the language he appeared to understand well, he gave a free and voluntary reply denying the charge.

In cross-examination he said that at the time he took over the matter, accused was still free but that he presented himself to the police on 27th April 2010. He said that he arrested accused for allegedly raping the deceased as per the statement taken from the deceased and those she had disclosed the information to.

In his defence, accused told the Court that in April 2010 a young man named Kamema went to his home and told him that some people had told him that he had sexual intercourse with his mother, the deceased. When he denied the allegation Kamema told him that he was going to report the matter to the neighbourhood watch.

Later, one member of the neighbourhood watch by the name of Kaunda Chimona approached him at his home over the same matter but that he still denied it. Later, the deceased was called and asked whether it was true that accused had raped her but that she denied the allegation in the presence of Kasongo's mother and accused's mother. He said that as a sign of his innocence, Kaunda Chimona sprinkled some mealie meal on his body. He said that when he suggested that they go to the police so that his

innocence could be declared in their presence, everybody present, including the deceased refused to go.

He said he was however, surprised to see police officers later who told him they had come to apprehend him following the death of the woman he had sexual intercourse with.

In cross-examination he said that he used to sell a locally made type of wine at his home but denied the suggestion that his mother had gone to his home in the company of the deceased to drink wine. He also pleaded ignorance of her mother having told the police that he had raped the deceased.

At the close of the case the State indicated that they would rely on the evidence on record while the defence tendered oral submissions.

In his submissions Mr. Chavula stated that the State had failed to prove the elements of the offence namely; that it was accused who, of malice aforethought, caused the death of the deceased. He also submitted that the state had failed to prove the alleged rape and referred the Court to the case of WOOLMINGTON V THE DIRECTOR OF PUBLIC PROSECUTIONS

It was further submitted that accused informed the arresting officer in the warn and caution statement that the deceased had in fact exonerated him from the allegation of rape at a meeting chaired by Mr. Chimona but that the arresting officer never followed the matter with Mr. Chimona to confirm its truthfulness or otherwise, which failure amounted to dereliction of duty.

He concluded by stating that there was no direct cause of death proved as per the evidence of PW3 who stated that pelvic peritonitis could result from causes other than rape.

This is the evidence I have received in this case and I must state at the outset that in order for the accused to be linked to the death of the deceased, there must be impeccable evidence that accused raped the deceased and that as a result, the deceased developed the condition that is said to have caused her death. If the two elements are proved, then section 204 of the Penal Code will fall to be interrogated to establish whether or not the prosecution has proved malice aforethought on the part of accused in raping or having carnal knowledge of the deceased.

The evidence before me is that accused was charged with murder solely on the basis of the statement taken from the deceased and other people who were told by the deceased that accused had raped her. Of those people, only PW2 and PW4 stood in the witness box. The evidence is that the rape took place on 23rd April 2010. PW2 visited her the following day on 24th April 2010 while PW1 visited her on 25th April 2010 and took her to her home before taking her to PW2's home the same day. PW4 visited her that same afternoon and took her to the hospital the following day, 26th April 2010 where she died the same day. This means that the deceased died within four days of being allegedly raped.

First and foremost, it is a fact that the deceased was taken ill on or about 24th April 2010. It is also a fact that the deceased died from a condition called pelvic peritonitis, which is the inflammation of the pelvic cavity

causing pus to accumulate in the area. According to PW3, the post-mortem examination did not reveal the cause of the condition. Most importantly though, it was his evidence that the condition could arise from various factors including internal ones. It is also noteworthy that although PW3 stated that rape is a possible cause of the condition that caused death, the procedures that he carried out on the deceased did not establish that the deceased was raped.

However, the findings of the post-mortem examination that the deceased had a half centimetre laceration on the vaginal entrance and rough vaginal walls present a strong case that some force was applied to her private parts. When this piece of medical evidence is considered together with that of PW2 and PW4, it points to only one inference, the inference that it was indeed accused who raped the deceased. In arriving at this conclusion, I take into consideration the fact that on 25th and 26th April 2010, when the deceased made the revelations of having been raped to PW2 and PW4, her condition was already serious such that the likelihood of her having lied to the two witnesses is very remote. In fact, she died within less than an hour of having given the statement to PW4.

There is abundance of authorities both local and foreign on the question whether a statement made by a person not called as a witness himself, should be treated as hearsay and ruled inadmissible or as an exception to the rule against hearsay and admitted in evidence. In this country, the case of THE PEOPLE V JONH NGUNI, a decision of the High Court, is a leading case which has received approval from the Supreme Court in many of its decisions such as the case of CHISONI BANDA V THE PEOPLE .The

principal factor for consideration as determined in those cases seems to be that the statement should have been made in circumstances that exclude any possibility of concoction and fabrication for it to be admissible as res gestae. In order for such a statement to be admissible, it must be made in what are called; 'clear circumstances of spontaneity and involvement in the event to avoid the possibility of concoction.'

It is this factor that I wish to address now with regard to this case. Can a statement made three days after the event be said to have been made in circumstances of spontaneity and involvement by the deceased to rule out the possibility of concoction and fabrication? Proximity in time between the occurrence of the event and the making of the statement is a cardinal consideration but it obviously differs from case to case and provided it can be established that it was made while the event was still operating on the mind of the maker, it will meet the test.

In this case there is evidence that at the earliest opportunity when PW2 visited her, the deceased disclosed to her that accused had raped her. The discovery of cuts on her private parts the following day confirmed what the deceased had told her the previous day. These are circumstances that meet the test of spontaneity requiring that any possibility of concoction, fabrication and distortion be disregarded. To crown it all the post-mortem report confirms the cut or laceration on the deceased's vaginal entrance. With such cogency in the evidence, there is no chance that the deceased fabricated what she told PW2 and PW4.

Although accused put up a spirited fight in his defence mainly seeking to rely on an alleged meeting called by a Mr. Chimona from the neighbourhood watch at which the deceased allegedly exonerated him from having raped her, it looks highly unlikely that such a meeting ever took place. This is in the light of the shortness of the time between the event and the demise of the deceased. There is no space that can possibly accommodate the alleged meeting given that the deceased was bed ridden during all the days after the event until her death. In his submission, Mr. Chavula has also suggested that the arresting officer was in dereliction of his duty when he failed to follow up accused's report in his warn and caution statement that the deceased had cleared him of the allegation at a meeting called by Mr. Chimona.

The correct position is that it is not dereliction of duty if the prosecution does not call a person whom an accused purports to have evidence which is favourable to the defence. It is instead, open to the defence to call any person they believe is credible and whose evidence supports their case. The question whether or not it is dereliction of duty for the prosecution not to call a witness whom they know would be favourable to the defence has been discussed in many cases both local and foreign. For instance, in the case of ABEL BANDA V THE PEOPLE, the Supreme Court held that;

"A prosecutor is under no duty to place before the court all the evidence known to him, however, where he knows of a credible witness whose evidence supports the accused's innocence, he should inform the defence about him"

This holding of the Supreme Court was in approval of Lord Denning's statement in the case of DALLISON V CAFFERY in which he said that;

"The duty of a prosecution counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of credible witness, but a witness who he does not accept as credible, he should tell the defence about him so that they can call him if they so wish."

In the same case, Lord Wilberforce had this to say at page 622;

"The contention seems to me to be based on the erroneous proposition that it is the duty of the prosecutor to place before the court all the evidence known to him; whether or not it is probative of the guilt of the accused person. A prosecutor is under no such duty. His duty is to prosecute, not to defend. If he happens to have information from a credible witness which is inconsistent with the guilt of the accused, or although not inconsistent with his guilt is helpful to the accused, the prosecutor should make such witness available to the defence."

So the issue to me seems not to be whether or not the prosecution has failed to call a witness they know to be credible and helpful to the defence, but whether the availability of such a witness has been made known to the defence or not.

In this case, a person called Chimona, whom the accused has alleged to have called and chaired a meeting at which the deceased cleared him of the rape allegation, is undoubtedly favourable to the defence. The difference however, between this case and the situations envisaged by the statement by their Lordships in the above cited cases is that in this case; this witness is known to the defence. Because this witness' evidence would be favourable to the defence, the prosecution had no duty to call him because the defence knew about his availability and were at liberty to call him if they so wished.

I therefore, find no dereliction of duty on the part of the prosecution when they did not call Chimona for they had no duty to do so.

Having found that the accused did in fact rape the deceased, does the evidence on record establish any or more of the circumstances described in section 204 of the Penal Code to establish malice aforethought on the part of the accused? The easier response to the question is in the affirmative because one of the circumstances establishing malice aforethought is intent to commit a felony under section 204 (c). It is not debatable that rape is a felony and accused intended to commit the felony and did in fact commit the felony of rape.

It is however, clear that the circumstances enumerated in section 204 are to be construed in the light of section 200 which creates the offence of murder and also provides the ingredients to be proved. What section 200 creates is a situation where a person, whose state of mind satisfies one or more of the circumstances described in section 204 does an unlawful act or omission, which causes the death of another person. It is therefore, cardinal that not only should the prosecution prove that the accused committed an unlawful act or omission with malice aforethought but also that the said act or omission caused the death of the deceased. It follows therefore, that if a clear link between the unlawful act or omission and the death is not established, then the offence has not been proved.

In the case at hand, the post-mortem report gives the cause of death as pelvic peritonitis or, according to PW3, Dr. Phiri who conducted the post mortem, inflammation of the pelvic cavity causing pus to accumulate

therein. When this witness was asked to give the most probable cause of the condition, he said that the examination he conducted on the deceased did not establish that fact. He however, indicated that the condition was common in women and could arise without external factors, although external factors were equally a common cause.

This explanation leaves a serious question as to what was the real cause of the condition that caused the death of the deceased. I have also taken into consideration PW3's evidence that pelvic peritonitis would take about a week or more to manifest itself after the event causing it occurs. This means that if the deceased was raped on 23rd April 2010 as the evidence seems to suggest, then the condition would begin to manifest itself on or about 30th April 2010. In this case however, by 24th April 2010, when PW2 went to visit the deceased, she was already ill. This makes it highly improbable that the condition was as a result of her being raped by accused on 23rd April 2010.

As to the common law doctrine of causation, it is a requirement that the evidence established an unbroken link between the unlawful act or omission and the immediate cause of death for murder to be established. In the case of PATSON SIMBALULA V THE PEOPLE, the Supreme Court had this to say;

"Where a person inflicts an injury and the injured person later dies of a cause not directly created by the original injury, but caused by it, the requirement of causation is satisfied. Where the cause of death can be traced back in a clear chain to the actions of the person causing the injury, it is not always necessary for direct evidence to be led that the injured person received proper medical treatment."

The import of this holding is that even if the immediate cause of the death is not the original injury or unlawful act or omission as the case may be, the immediate cause of the death should have been caused by the original injury. This clearly establishes the chain of causation and the accused cannot escape liability.

As stated earlier in this judgment, the felony of rape proved against the accused has not been established as the direct or indirect cause of death. In fact I take the liberty to state here that rape per se is not a known cause of death to the victims. So it must follow that for a conviction of murder to be sustained, it must be proved beyond all reasonable doubt that the act of rape was either the direct or latent cause of the deceased's death.

On the whole of the evidence before me and taking all the circumstances of the case into consideration, I find that the prosecution has failed to prove beyond reasonable doubt that accused caused the death of the deceased person and I find him not guilty of murder contrary to section 200 of the Penal Code and I acquit him of the said charge.

Having arrived at the verdict of not guilty, I addressed my mind to section 181 of the Criminal Procedure Code to determine whether this is a proper case in which its provisions can be invoked. Firstly, I considered sub section (1) which allows a conviction for a minor offence upon proof of a combination of some but not all of the particulars of the charge which constitute a complete minor offence. This is however, only possible where the charge itself consists of several particulars. There is no doubt that rape

is a minor offence to murder but the question is whether the charge of murder can be said to consist of several particulars to fall within the ambit of section 181(1) of the Criminal Procedure Code. In this case, in order to bring the charge within the ambit of section 181 (1), the particulars relating to rape must be part of the charge. The particulars of the charge in this case are set out in the following terms;

"FRED MWELWA, between the 23rd and the 26th day of April, 2010 at Mwense in the Mwense District of the Luapula Province of the Republic of Zambia, did murder MAGGIE SELINE MWILA"

In so far as the offence is concerned, the only particular disclosed is that accused murdered the deceased and as such, this charge cannot be said to consist of several particulars to fall within the ambit of section 181(1). This leaves me with sub section (2) which states;

"When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it"

The import of this sub section is that where on the facts found to be proved, a minor offence is constituted, then, the court has the discretion to convict the accused person of that minor offence. However, the catch word is 'reduce' implying that the minor offence established by the proved facts must be cognate to the one with which the accused was originally charged. This point was lucidly stated in the case of SHAMWANA AND 7 OTHERS V THE PEOPLE. In that case, the Supreme Court went further to state that sub sections (1) and (2) are intended to cater for different circumstances in that whereas the cognateness of the minor offence is not a factor in sub section one, it is, in sub section (2). The proper construction of sub section (2) therefore, seems to be that the facts proved in evidence should be such

as to prove an offence of the same family as the original one which nonetheless, carries a lighter penalty than the original offence.

That being the case, I am not permitted to find the accused person guilty of rape although the facts have proved that he committed that offence because although it is minor to the offence of murder, it is not cognate to it.

The resultant effect is that accused will regain his freedom and I accordingly order his immediate release.

DELIVERED THE 18TH DAY OF MARCH 2011 IN OPEN COURT

**J.M. SIAVWAPA
JUDGE**