JACK CHANDA AND KENNEDY CHANDA *v* THE PEOPLE

Supreme court.
Lewanika, DCJ, Mambilima and Chitengi JJS.
6TH August, 2002 and 3RD December 2002.
(SCZ Judgment No.29 of 2002.)

Flynote

Evidence – Absence of expert evidence – Whether fatal.
Sentence – Death Penalty – Extenuating circumstances – What constitutes.

Headnote

The two appellants were sentenced to death upon being convicted of murder by the High Court sitting at Kasama. The appellants appealed against the conviction, arguing that there was no postmortem conducted to establish the cause of death; the learned Judge erred in convicting the appellants in the absence of mens rea and in failing to find that there was an extenuating circumstance.

Held:

(i) Lack of expert evidence of a doctor as to the cause of death is not fatal where the evidence is so cogent that no rational hypothesis can be advanced to account for the death of the deceased.

(ii) Failed defence of provocation; evidence of witchcraft accusation; and evidence of drinking can amount to extenuating circumstances.

Legislation referred to:

Penal Code Cap. 87 ss. 201 (1) (b) and 204 (a).

Case referred to:

Sakala v *The People* (1980) Z.R. 205.

Captain F.B. Nanguzyambo Director of Legal Aid for the appellants.
M.M. Mukelabi Director of Public Prosecutions for the State.

Judgment

CHITENGI, JS delivered the Judgment of the Court.

The two appellants were sentenced to death upon being convicted of murder by the High Court sitting at Kasama.

The facts of this case can be briefly stated. On the day in question, Edward Pomwa (PW1) was at a beer party with his nephew Lackson Mumbi (PW2). Also present at the party were the two appellants and one Thomas Chokolo. PW1 did not stay long as he did not want to drink beer on an empty stomach. PW1 left for his house and told PW2 not to stay long because his (PW1) wife was preparing food. When (PW2) left the two appellants and one Thomas Chokolo followed and told him to stop, which he did. The second appellant then asked PW2 where he staying and when PW2 said he was staying with PW1, the second appellant said PW1 insulted him and he struck PW2 with a fist. Thereupon, PW2 ran to PW1's house hotly pursued by the two appellants and Thomas Chokolo. At PW1's house the two appellants and Thomas Chokolo first beat PW1 before beating the deceased with a paddling stick and other sticks. When the deceased lay on the ground the two appellants and Thomas Chokolo ran away.

Effect of the assault was disastrous. The deceased suffered broken jaws and injuries all over her body and on the third day she died while being taken to the hospital. No post mortem was conducted on the body of the deceased because there was no pathologist to conduct it.

The first appellant's version was that they had been drinking from 14.00 hours to 19.00 hours when he saw Thomas Chokolo beat PW2. At that time PW1 was at his home. After being ten, PW2 left and went to PW1's house while insulting. He followed and stood nearby. He heard PW1 ask PW2 as to what happened and later insult Thomas Chokolo. Thereupon, Thomas Chokolo attacked PW1. He intervened but Thomas Chokolo could not stop beating PW1 and in the process he (first appellant) was struck on the collarbone and he fell. He was carried to his home. On 20th August 1998, he traveled to Kasama for medical treatment. While Kasama he heard that the deceased had passed away. The second appellant did not give evidence or call witnesses. The court below found PW1 and PW2 as credible and honest witnesses whose evidence it accepted but disbelieved the first appellant. On the evidence of PW1 and PW2 the court below found as a fact that the first appellant took part in beating the deceased and inflicting on her the injuries which caused her death.

In respect of the second appellant the court below also found on the evidence of PW1 and PW2 that the second appellant took part in beating the deceased and causing the injuries she died of. e appellants have appealed against both conviction and sentence.

Capt. Nanguzyambo the Director of Legal Aid for the appellants filed written submissions with three grounds of appeal. The first ground of appeal was that the learned trial Judge erred in law and in fact in convicting the appellants of murder. In arguing this ground, Capt. Nanguzyambo submitted that there was no postmortem conducted to establish the cause of death. He said thing could have happened during the period of three days from the date of assault, to the date of the deceased's death which could have caused the deceased's death.

The second ground of appeal was that the learned trial Judge erred in law and fact in convicting the appellants in the absence of mens rea. With respect to this ground, Capt. Nanguzyambo submitted that there was a sudden and seemingly unprovoked fight. The paddling stick used picked in the course of the fight and both appellants had been drinking. It was Capt. Nanguzyambo's submission that these facts could not lead to the conclusion that there was intention to kill.

The third ground of appeal was that the learned trial Judge erred in law by failing to find that there was an extenuating circumstance and should not have passed the death sentence in that convicts were young persons. Capt. Nanguzyambo found extenuating circumstances in the youthful age of the appellants and submitted that because of the young age of the appellants the death penalty should not have been imposed and urged the court to apply Section 201 (1) (b) of the Penal Code (1). As authority for this proposition Capt. Nanguzyambo referred us to recent decisions of this court which he did not name.

Mukelabai, the Director of Public Prosecutions, supported the conviction and submitted that the evidence that the appellants assaulted the deceased was overwhelming. He submitted that it was common cause that following the assault, the deceased suffered serious injuries all over the body including fractured upper and lower jaws. The nature of the brutal attack leads

to the inevitable conclusion that the intention of the appellants was to kill the deceased or at least cause her grievous bodily harm. It was Mr. Mukelabai's submission that the absence of medical evidence as to the cause of death was not fatal: *Patrick Sakala* v *The People (1)*. It as Mr. Mukelabai's submission that the deceased enjoyed very good health and she died immediately after the assault. He said the evidence was so cogent and compelling that no rational hypothesis could be advanced to account for deceased's death other than that she died from the injuries inflicted on her by the appellants.

We have considered the grounds of appeal and submission of counsel and we have looked at the judgment of the court below.We now deal with the grounds of appeal seriatim.

Although it is common cause that there was no postmortem conducted on the body of the deceased to determine the cause of death, we do not accept the submissions in ground one that in the instant case the absence of medical evidence as to the cause of death was fatal to the prosecution case. As the learned Director of Public Prosecutions rightly submitted, the evidence that the appellants brutally assaulted the deceased is overwhelming. It s clear to us on the evidence that from the time the appellants left the deceased lying on the ground after a savage assault on her, the deceased was never the same again until her death three days later. As we said in *Patrick Sakala* v *The People (1),* lack of expert evidence of a doctor as to the cause of death is not fatal where the evidence is so cogent and compelling that no rational hypothesis can be advanced to account for the deceased's death. On the evidence of this case the only reasonable hypothesis to account for the deceased's death is that the deceased died of the injuries inflicted upon her by the appellant. The submission that there could have been some other intervening factors is far fetched. This ground of appeal therefore, fails.

In ground two the complaint is that the evidence did not establish malice aforethought.

Leaving what is not directly relevant, Section 204 of the Penal Code (1) defines malice aforethought as:-

"Section 204

(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not.

(b)

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(c)

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(d)

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On the evidence that was before him, the learned trial Judge was on firm ground when he found that the appellants had an intention to do grievous harm. In our view, the evidence in fact shows that the appellants intended to cause the death of the deceased. The assault with a paddling stick and other sticks was very brutal. Malice aforethought was proved. In the event, this ground of appeals also fails.The third ground of appeal deals with the sentence. It was argued on behalf of the appellants that the learned trial judge misdirected himself when he held that there were no extenuating circumstances in this case. Capt. Nanguzyambo found extenuating circumstances in the youthful age of the appellants and as his authority for this proposition he referred to recent decision which he attributed to us where we have held that youthful age is an extenuating circumstance. We are bound to say that we found this submission startling. We have never decided any appeal; in which we have laid down the principle that young age or for that matter old age is an extenuating circumstance. What we have said is that failed defence of provocation, evidence of witchcraft accusation and evidence of drinking can amount to extenuating circumstances.

In this case there was evidence of drinking. The appellants had been drinking for about five hours. The learned trial Judge should have considered this evidence when deciding whether to impose the death sentences or a sentence other than death in terms of Section 201 (1) (b) of the Penal Code (1). Failure by the learned trial Judge to consider the evidence of drinking, which in fact was common cause, amounted to a misdirection. We must, therefore interfere with the sentence. The third ground of appeal succeeds, not for the reasons given by Capt. Nanguzyambo, but for the reasons we have given.

'We quash the death sentence imposed by the learned trial Judge and substitute it with one of 20 years imprisonment with hard labour effective from the date the appellants were taken into custody. To the extent that we have interfered with the sentence the appeal succeeds.

Appeal succeeds to the extent indicated.