WILSON MWENYA v THE PEOPLE (1990 - 1992) Z.R. 24 (S.C.)

SUPREME COURT
GARDNER, SAKALA AND CHIRWA, JJ.S.
7TH MARCH AND 19TH JUNE, 1990
(S.C.Z. JUDGMENT NO. 5 OF 1990)

Flynote
Criminal law and procedure - Corroboration - Witnesses with interest to serve - Mutual corroboration - Need for independent evidence of separate incidents.

Headnote
The evidence adduced for the prosecution was that the deceased was being carried by the appellant in a boat. At some stage in the journey the appellant demanded a payment for the journey which the deceased said he would make. The appellant then refused to allow the deceased to disembark and continued punting the boat saying the deceased had wasted his time. The appellant then pushed the deceased into the water and continued on the journey telling other passengers, who were witnesses, that the deceased was a thief. Passengers who gave evidence for the prosecution said the deceased attempted to swim to the shore.

The appellant in his defence admitted taking the deceased into his boat and asking him to pay the fare. The appellant noticed weeds in the engine and when he was bent tending to the engine the deceased fell into the water. One of the passengers, a key witness for the prosecution, told him the deceased had fallen into the water and the appellant agreed that he had said the deceased should be left to swim to the shore. The appellant said the witnesses for the

prosecution were lying in their evidence; the deceased jumped of his own will into the water.

Three key witnesses gave evidence for the prosecution, PW2, PW3 and PW5. Their evidence was that the appellant had pushed the deceased into the water. PW2 said he asked the appellant why he had pushed the deceased into the water and the appellant replied that the deceased was a thief. The witness said he saw the deceased trying to swim to the shore. None of the three witnesses reported the matter because the appellant told them not to do so. A few days after the incident, PW2 was arrested, but was released when the appellant was charged with the offence. PW3 was a relative of the deceased and PW5 was the wife of PW2.

The trial commissioner found that PW2 was not an accomplice because he did not help throw the deceased into the water; he found that the witness had an interest to serve because he was a suspect and had been detained and therefore his evidence required corroboration. He found that PW3 and PW5 were truthful witnesses, but that PW3 could have an interest to serve. PW5, he found, might possibly be biased, but he rejected the possibility because the appellant had never accused her of pushing the deceased into the water. The accused was convicted.

The appellant argued, *inter alia*, that PW2, PW3 and PW5 were accomplices who had failed to report the incident. Because PW2 had been detained, he had an interest to serve.

Held:

(i) Where a witness is detained in connection with the same incident or does not report the incident to the police, the evidence needs corroboration.

(ii) Accomplices can mutually corroborate each other where they give independent evidence of separate incidents.

Cases referred to:

(1) Simon Malambo Choka v The People (1978) Z.R. 243.
(2) Emmanuel Phiri v The People (1978) Z.R. 79.
(3) R v Baskerville [1916] 2 K.B. 658.
(4) Shamwana and Others v The People (1985) Z.R. 41.

For the appellant: S.K. Munthali, Senior Legal Aid Counsel.
For the respondent: R.O. Okafor, Acting Principle State Advocate.

Judgment

SAKALA, J.S.: delivered the judgment of the Court.

The appellant was convicted of murder. The particulars of the offence alleged that on 26th June, 1987 at Lake Mweru in the Nchelenge District of the Luapula Province of the Republic of Zambia, he murdered Aston Mwape. He was sentenced to death. He had appealed against the conviction.

The case for the prosecution centred on the evidence of PWs 2, 3 and 5. The evidence of these three witnesses was substantially similar. According to the prosecution case, the three witnesses and the deceased were on 26th June, 1987, travelling in a boat of which the appellant was a coxswain. They were travelling from Kashilu Island on Lake Mweru to Kashikishi via Isokwe Island. The prosecution evidence established that upon reaching Isokwe Island, the deceased disembarked. After some time he came back to the boat. The appellant then demanded K10,00 from the deceased as the fare from Kashilu to Isokwe. The prosecution evidence is that the deceased had stated that he had no money, but pointed to a house in front

where he suggested he should be taken to collect the K10.00 for the fare. The evidence of the prosecution further revealed that upon arrival at the place pointed at by the deceased the appellant refused to drop him saying he was taking him to Kasikishi because he had wasted his time. According to PW2, as they travelled on, the appellant pushed the deceased into the water using his right hand. PW2 denied in his evidence that the deceased had jumped into the water on his own because of K10.00. The evidence of PW2 also revealed that when he asked the appellant why he had pushed the deceased into the water, the appellant replied: 'Let's go, the young man is a thief.' According to PW2, when the deceased was thrown into the water he cried for help, but the appellant sped away from him accusing the deceased of being a crook. This witness testified that he saw the deceased trying to swim to the island which was more than 50 metres away.

The evidence of PW3, a relative of the appellant, was substantially the same as that of PW2. PW5 who was PW2's wife also narrated the same story. All the three witnesses did not report the incident to the police, alleging that the appellant warned them not to do so. According to PW2, after a day or so the appellant informed him that the man he had thrown in the lake had died. On 30th June, 1987, he, PW2, was arrested by the police. He was detained in cells for

five days only to be released after the appellant had been apprehended.

The appellant gave evidence on oath in his defence. In his evidence he did not dispute travelling with the three witnesses and the deceased up to Isokwe Island. He admitted asking the deceased to pay K10.00 as a fare. According to the appellant the deceased at Isokwe Island had told him that he was to give him the money at his place of destination. He explained that as they travelled he noticed weeds on the engine. He then bent over to remove the weeds. As he did so he heard PW2 saying that the boy had dropped into the water. The appellant explained that when he heard PW2 say that the deceased had dropped into the water, he said, 'Let him be, he will swim since it is not far from the shore.' The appellant denied throwing the deceased into the water but said that the deceased had jumped into the water on his own. He accused the prosecution witnesses of being liars, pointing out that at the material time PW3 was asleep while PW5 covered her head and therefore did not see what happened.

The learned trial commissioner having fully reviewed the evidence on record noted that the determination of the case rested on the evidence of PWs 2, 3 and 5. He found that the evidence of PW2 was plausible and convincing. He also found that PW2's evidence had not been discredited in cross-examination and that he did not contradict himself on any material issue. The trial commissioner attached great weight to PW2's evidence, as in his opinion he had told the Court what he saw. According to the trial commissioner, PW2 was not an accomplice in the legal sense of the word because he did not participate in throwing the deceased in the water. The trial commissioner, however, found that PW2 was a witness with an interest of his own to serve, because he was a suspect and had been detained in police cells pending the arrest of the appellant, and that in the circumstances PW2's evidence required corroboration. He warned himself against the danger of conviction on the uncorroborated evidence of PW2.

After citing the cases of *Simon Malambo Chokwe v The People* [1] and *Emmanuel Phiri v The People* [2], the trial commissioner observed that the two cases laid down as a general rule that the evidence of the suspect witness cannot be corroborated by the evidence of another suspect. The trial commissioner, however, noted that in an appropriate case the Court may treat the evidence of one suspect witness as corroboration of the evidence of the other suspect witness. He found this to be the position in the case before him. He found that the evidence of PWs 3 and 5 corroborated the evidence of PW2. He accepted the evidence of PWs 3 and 5 as being truthful although he held PW3 to be a witness with a possible interest of his own to serve; the interest being to exonerate himself from having taken part in drowning the deceased. In dealing with the evidence of PW5, the wife of PW2, the trial commissioner noted that, although a possibility for bias existed to save her neck or that of her husband, she was not biased, because the appellant never suggested that she pushed the deceased into the water. The trial commissioner found that the appellant's denial that he saw how the deceased fell into the water was false. According to the trial commissioner, if the appellant is not the man who threw the deceased into the water he would have stopped to find out who pushed the deceased into the water, or why the deceased had decided to jump into the water. This he did not do. The trial commissioner concluded that his failure to do so destroyed his innocence.

The appellant filed three written additional grounds of appeal. On behalf of the appellant Mr *Munthali* argued two grounds. The first one, which was quickly abandoned, was that there was no proper identification of the body of the deceased. The second ground, also covered in the appellant's grounds, was that malice aforethought had not been established. The

appellant's additional grounds can be summarised as follows:

(a) The trial commissioner erred in convicting the appellant on the evidence of PWs 2, 3 and 5, who were clearly found to be accomplices by reason of their failure to report the incident to the police;
(b) PW2 had been detained at the police station for five days pending the apprehension of the appellant; he was clearly a person with a possible interest of his own to serve whose evidence should not have been relied upon;
(c) The trial commissioner misdirected himself by finding and holding that the appellant was responsible for the deceased's death when evidence showed that the deceased had no money to pay his fare and therefore a possibility existed that he jumped into the water to swim to the shore to avoid payment of the fare; and
(d) The trial commissioner misdirected himself in finding that the prosecution had established malice aforethought when the evidence revealed that the deceased was unknown to the appellant and boarded the boat on his own.

At the outset we would like to indicate that we have no difficulties in holding that PW2 was a person with a possible interest of his own to serve for the simple reason that he had been detained in connection with the same incident and did not earlier on report the incident to the police.

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When reviewing this witness's evidence the trial commissioner had this to say:

> ''But when further cross-examined this witness, PW3, said he did not see the actual pushing of the deceased by the accused. But that since the deceased was very close to the accused he assumed it was the accused who threw the deceased into the water. He denied that the deceased jumped into the water on his own. The witness changed his stance again and said he did see the accused push the dead man into the water. He pushed him by the chest. PW3 denied that he was dozing, but was looking around and saw what was happening and that it was not dark. It was clear that one was able even to see the colours of shirts and other garments passengers were wearing, the witness said.''

A careful examination of PW3's evidence on record as taken down by Court does not support the above message as set out in the judgment. Further in his judgment the trial commissioner had this to say:

> ''PW3 Frank Mwape is a relative of the accused. He, like PW2, also stated that he saw the accused push the deceased into the lake after the deceased failed to pay the K10 fare from Kashilu to Isokwe Island. There were no discrepancies in his evidence and he testified in a cool manner and remained unshaken under cross-examination.''

Further on the same page the learned trial commissioner said:

> ''PW3, like PW2, could be said to be witnesses with a possible interest of his own to serve. The interest being to exonerate himself from suspicion that he took part in drowning the deceased or that he was the sole culprit. That suspicion, if it ever existed at all, has been removed by the evidence of PWs 2 and 5 which I accept as truthful. In turn this evidence of PW3 exonerates PWs 2 and 5. Thus PW3's evidence is not suspect or manifestly unreliable. I accept it to be true and I rely on it.''

We have great difficulty in following what was going on in the mind of the trial commissioner as regards PW3's evidence. But from the record we can safely, but without disrespect, say that there was some confusion. In our view, for the reason already stated, namely, failure to report the incident, PW3 was a witness with an interest of his own to serve. His evidence also required corroboration. And if we accept, which we are inclined to do, that he was discredited in cross-examination, then his evidence becomes unreliable.

PW5, the wife of PW2, also did not report the incident. When cross-examined she had this to say:

> ''I was not happy to see my husband locked up for the death of the deceased because he had no hand to play.''

This was the witness who was said to have contradicted her statement to the police. We have no difficulty in holding her a biased witness. Her evidence also required corroboration. According to the trial commissioner these witnesses corroborated each other.

We do not propose to define what constitutes corroboration in great detail, but the words of Lord Reading D.J. in the classic case of *R v Baskerville* [3], at page 667, are very instructive. He said:

> ''We hold that evidence in corroboration must be independent testimony which

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> affects the accused by connecting or tending to connect him with the crime. In other words, it may be evidence which implicates him, that is, which confirms in some material particular not the evidence that the crime has been committed, but also that the prisoner committed it.''

In *Shamwana v The People* [4] we said at page 127:

> ''Corroboration or supporting evidence is a requirement that seeks to guard against danger of deliberate false implication by singly or jointly fabricating a story against the accused. In *Phiri (E) and others* (81). A less technical approach to what is corroboration as matter of law, was recognised. We indicated there, at page 107, lines 14 to 18, it was enough to adduce evidence of 'something more' namely circumstances which though not constituting corroboration as a matter of strict law, yet satisfy the Court that the accused is being falsely implicated, has been excluded and that it is safe to rely on evidence of the accomplice implicating the accused. As the learned authors of Phipson have indicated in para 320-17: "The whole point of looking for corroboration of 'suspect' evidence is to see whether it is to be believed.''

In the same *Shamwana* case this Court held, *inter alia*, that;

> ''In some cases, accomplices of a class may be mutually corroborative where they give independent evidence of separate incidents and where the circumstances are such as to exclude the danger of jointly fabricated story.''

From the authorities cited above, we are satisfied that PWs 2, 3 and 5 do not fall in a class of

accomplices who may be mutually corroborative because they do not give independent evidence of separate incidents. The danger of jointly fabricated story in this case has not been excluded. We find no independent evidence on record corroborating the evidence of PWs 2, 3 and 5. On their evidence we are unable to say the appellant pushed the deceased into the lake and failed to rescue the deceased as alleged by the witnesses. We find it unsafe to uphold this conviction; the conviction is quashed; the sentence is set aside and the appellant stands acquitted.

Appeal allowed.
