DICKSON SEMBAUKE CHANGWE AND IFELLOW HAMUCHANJE v THE PEOPLE (1988 - 1989) Z.R. 144 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., CHAILA AND LAWRENCE, JJ.S.
8TH AUGUST AND 2ND OCTOBER, 1989
(S.C.Z. JUDGMENT NO. 8 OF 1989)

Flynote

Criminal law and procedure - Murder - Grievous harm - Intention to commit or indifference as whether caused - Effect of.

Headnote

The appellants, railway police officers, when carrying out their duties found a passenger travelling without a ticket. After questioning the passenger the police officers manhandled him and led him away to another compartment where they accused him of stealing a ride. The passenger called the appellants a derogatory name and tried to humiliate them whereupon the appellants picked him up bodily and threw him out of the carriage whilst the train was moving fast. Soon afterwards the train was stopped and reversed and a search made for the passenger. The time was dark and the passenger was not then found but was found the next day but later he died in hospital. The appellants were charged with and convicted of murder. They appealed.

The appellants argued they had no malice aforethought. Murder requires a specific intent and they had no intention to kill.

Held:

It is a question of fact whether a reasonable person must know or foresee that serious harm is a natural and probable consequence of throwing someone out of a moving train. If, armed with this realisation and foresight, and knowing that serious harm could result, an intent founded on knowledge of the probable consequences will be evident and will be sufficient to satisfy section 204 of the Penal Code.

Cases referred to:

(1) Simutenda v The People (1975) Z.R. 294
(2) R. v Hancock and Another [1986] 1 All E.R.641

Legislation referred to:

1. Penal Code, Cap .146
2. Criminal Procedure Code, Cap. 160

For the appellants: E.S. Silwamba and D.N.Kafunda, of Kafunda and Company.
For the respondent: G.S. Phiri, Senior State Advocate.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the Court.

The appellants appeal against their conviction on a charge of murder for which they were sentenced to undergo the extreme penalty.

The particulars of the offence were that they on 23rd April,1987, at Mpika, in the Mpika District of the Northern Province, jointly and whilst acting together murdered one Martin Chilimboyi. The date stated in the particulars was of course the date of death, since the incident leading to such death took place on the night of 12th April,1987. The prosecution

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case was that on 11th April, 1987, the deceased and two female relations were travelling from Mpika to Lusaka for their school holidays. The deceased purchased a single railway ticket from Tazara on which all three travellers were listed. The part of the train for which they held the ticket was filled to capacity with the result that the girls sat in one coach while the deceased went to sit in another, leaving the ticket with the girls. The deceased settled down to sleep. Meanwhile in the early hours of 12th April, PWs 6 and 7 were engaged in checking the passengers' tickets and they were accompanied by the appellants who were police officers on duty with Tazara Railways. The first appellant was an inspector and the second was a sergeant. They came upon the deceased; woke him up and demanded to see his ticket. According to PWs 4 and 5 who were fellow passengers, the deceased explained that he was covered by a ticket which was with a relative in another coach but that the appellants did not believe this and started to beat him and to manhandle him, as they led him away. According to PWs 6 and 7 supported by PW 8, the deceased was abusive. He insulted the officers and pushed them whereupon they led him away. PW8 was the prosecution's star witness. He stated to the effect that, after the deceased had called the appellants a derogatory name, the appellants assaulted the deceased and led him away in such a violent manner that he decided to follow to see what would happen. The appellants led the deceased to a coach reserved for their use where he was asked about the ticket and gave the same explanation. The appellants accused him of stealing a free ride while the deceased continued to call them by a derogatory description and boasted that he had more money than they had. According to PW8, the first appellant said that, as the child was too cheeky, he should be thrown out, whereupon the first appellant got hold of the deceased's hands while the second appellant got hold of his legs. They then tossed him out of the window of the moving train. PW8 exclaimed that the child was dead, whereupon the second appellant immediately confronted him and asserted that the child had jumped out of the window. According to PW7, the first appellant told him the same thing. This was the story which soon spread throughout the train which was later stopped and reversed. A search for the deceased that night proved fruitless. He was found the next day in a critical condition and nearby a police beret which was said to belong to the second appellant. The deceased was hospitalised but died from subdural haematoma.

The learned trial judge considered the story that the deceased had jumped out of the moving train and found it, in the circumstances to have been improbable. He accepted the evidence of PW8 and found that the act of throwing the deceased out of the fast moving train showed that the appellants had the necessary malice aforethought and were guilty of murder.

The major ground of appeal alleged error on the part of the learned trial judge in finding that the

prosecution witnesses who gave evidence adverse to the appellants, were credible. In particular, both Mr *Silwamba* and Mr *Kafunda* argued that the star witness, PW8, should not have been believed having regard to certain inconsistencies and discrepancies in the fabric of the prosecution case. According to the submissions, there was a doubt whether the train had an empty coach for the use of the Police, as

testified by PW8. It was not in dispute that the appellants were leading the deceased somewhere and we note that even PW7, in his very last answer under cross-examination, confirmed the fact that there was such a coach. This submission on this point was without support from the record. As counsel for the appellants fully appreciated, the actual fall from the train was witnessed by only three persons: the appellants on one hand and PW8 on the other, and only the latter gave evidence. The appellants elected to remain silent, which factor cannot be held against them. The prosecution have to prove their case and an accused who remains silent is, nonetheless, entitled to have any defence, which he sought to introduce during cross-examination or otherwise duly considered. Furthermore, an accused person in these circumstances is entitled to show by examination of the circumstances adduced by the prosecution that he ought not to be convicted of the charge against him. However, as we pointed out in *Simutenda v The People* (1), though an accused is not obliged to testify, the court will then not speculate as to the possible explanation for the event in question, its duty will be to draw the proper inferences or conclusions from the evidence it has before it. The submissions based on credibility ask this court to find that the prosecution evidence, especially that from PW8, was not credible and the case ought to have fallen of its own inanition. In this regard, the other submission was that the story that the deceased had jumped out of the train should have been accepted. There was no evidence to this effect and the learned trial judge dealt with this theory at some length and discounted it. It is a theory which stands in the same category as the further suggestion that the deceased might have accidentally slipped and fallen out while he was struggling with the appellants. The learned trial judge, could not properly indulge in speculation of this nature when there was neither evidence nor any suggestion put to any of the witnesses that this was the case. There was a further submission that only PW8 had stated that the train was reversed in order to conduct a search for the deceased; but this submission was in the teeth of evidence from PW3 who had said the same thing. Another line of attack against the credibility of PW8 centered on the discrepancies between his evidence in court and the statement which he had made to the investigating officers; while PW8 had told the court that he made the statement at a friend's house, the statement indicated that it was taken at Tazara; while he told the court that he spoke to the second appellant when they got to Kapiri Mposhi Police Station, his earlier statement simply stated that he spoke to a sergeant without specifying that he meant the second appellant; while he told the court that he had stayed in Mufulira for three months, the statement indicated he had stayed there for three weeks. The short answer to these submissions was given by Mr *Phiri*, for the State, when he argued that they were minor and did not go to the root of PW8's credibility.

We agree with Mr *Phiri*. Even the learned trial judge found that these were minor discrepancies and in this he did not misdirect himself. For discrepancies and inconsistences to reduce or obliterate the weight to be attached to the evidence of a witness, they must be such as to lead the court to entertain doubts on his reliability or veracity either generally or on particular points. To show that PW8 had given evidence which differed

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so insignificantly from his statement to the police or to show, as counsel endeavoured to do, that there were some items of the inconsequential detail which were given or omitted on one or other of the occasions does not assist and cannot result in the court holding in effect that PW8 is not credible and had probably made up the whole story against the appellants. The learned trial judge was not in error when he found that PW8 - whom he had the advantage of seeing and hearing at first hand - was a credible witness who had not been discredited in cross-examination and whose evidence was in substance the same as the statement which he gave to the police. As Mr Phiri pointed out, this was a witness the earlier portion of whose evidence agreed in all material particulars with the evidence given by PWs 4, 6 and 7. The appellants did question the deceased whom they woke up; there was a scuffle and they led him away. The deceased left the moving train when the appellants were with him and the only evidence before the court was that the appellants threw him out. The ground of appeal based on an issue of credibility fails.

The second ground of appeal raised questions of identification. It was argued that PW8 may have made an honest mistake and should, in any case, have attended at the identification parade. We observe that there were other witnesses, including officials on the train, all of whom stated that it was the appellants who led the deceased away. Thus, PW8 was not alone in identifying the appellants and indeed PW8 was so public spirited that he too went to Kapiri Mposhi Police Station where the second appellant warned him not to get involved in this matter. Without his intervention, the story that the deceased jumped might have gained credence. The other submission under this ground concerned the finding of the second appellant's beret next to the deceased when eventually he was found lying critically ill along the railway line. Counsel argued that there was insufficient evidence to enable the court to find, as it did, that the beret belonged to the second appellant. We consider this argument to have been without merit since there was evidence from PW14, a very senior police office, that the second appellant had acknowledged and confirmed to him that it was his beret. The learned trial judge properly used this piece of evidence as supportive of the prosecution case and as one of the items of evidence against the story that the deceased had jumped. The final ground alleged a misdirection regarding the reception of the post-mortem report without calling the doctor to give viva voce evidence. The report was admitted without objection under the relevant section of the Criminal Procedure Code and it was open to the defence to request the court to call the doctor. No such request was made and the non-calling of the doctor can not conceivably be evidence of any propensity on the part of the learned trial judge to shift the burden of proof, as counsel suggested. In any case, we do not agree that the report - which was type-written - contained glaring mistakes, such as to have prejudiced the appellants. One such 'mistake' consisted in the fact that the doctor had corrected, by hand, the spelling of the word 'haematema', the other 'mistake' consisted of the fact that two dates – 29th April 1987 and 24th April 1987 - were typed in as the date when the autopsy was conducted. There was undisputed evidence from PW1, the father of the

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deceased, that the post-mortem examination was conducted on 24th April,1987. The alleged failure to call the doctor to clarify these two minor details could not have prejudiced the appellants and could not conceivably affect the basis of their conviction.

In conclusion and in the alternative, it was argued on behalf of the appellants that there was no malice afore thought. It was submitted that the necessary intent could not be as sumed from the speed of the train, as the learned trial judge suggested and that, in any case, it was the first appellant who caused the train to be stopped in order to look for the deceased. This indicated that there was no malice aforethought and the appellants may have intended no more than to eject the deceased and leave him behind. Mr. Phiri countered these submissions by arguing that there was malice aforethought when on the evidence, the train was fast and had to be reversed when they still failed to locate the deceased. He pointed out that, in fact, there was evidence from a prosecution witness that it was that witness who requested the appellants to stop the train so as to look for the deceased. The learned trial judge had determined that the appellants knew that the act of throwing the deceased out of a fast moving train would cause death or grievous harm and they had the necessary malice aforethought in terms of Section 204 of the Penal Code.

It was unquestionably unlawful to throw the deceased out of a moving train and the issue raised by the alternative argument is whether this was murder or manslaughter. As Sections 200 and 204 of the Penal Code show, murder is a crime which requires a specific intent or a specific frame of mind and it is for the prosecution to adduce evidence which will satisfy this requirement. We do not gather from the facts of this case that there was a deliberate or an obvious intention to kill. If, therefore, the verdict of murder is to be sustained, this can only be on the basis that the appellants intended to cause grievous harm in terms of paragraph (a) or that they knew that their act would probably cause death or grievous harm in terms of paragraph (b) of Section 204 of the Penal Code, in which event it would be immaterial if the appellants were indifferent whether serious harm was caused or not, or whether they wished no harm to befall the deceased. The learned trial judge convicted on the basis that the appellants had knowledge of the possibility of grievous harm in terms of paragraph (b) although he mistakenly cited paragraph (a) of Section 204. We have perused the case of *R. v Hancock and another* (2) in which both the court of Appeal and the House of Lords in England addressed a similar issue and we find that the observations therein are of persuasive value. Thus, it is a question of fact whether a reasonable person must know or foresee that serious harm is a natural and probable consequence of throwing someone out of a moving train. If, armed with this realisation and foresight, and knowing that serious harm could result, an accused proceeds as the appellants did, an intent founded on knowledge of the probable consequence will be evident and it will be sufficient to satisfy the section. As a matter of fact, therefore, can the appellants argue that they did not know that the act of tossing the deceased out of a moving train would probably result in serious injury to the deceased? We think not. They had displayed cruelty and little regard for the safety of the deceased. They had fetched the deceased by the legs and arms and tossed

him out regardless where or how he would land, since this was from a moving train and at night. In our considered view, the appellants cannot now argue that they did not have the necessary knowledge and realisation that the deceased might sustain serious harm, as in consequence he did do. The Penal Code provisions on malice aforethought, founded on the knowledge an accused must have had from the proven facts of any given case, were satisfied in this case. Indeed the possibility and probability of harm of a serious nature was very high in this case and the fact that the appellants knew or reasonably ought to have known and foreseen that consequence, makes it

clear that the consequence was intended or that, at any rate, they had the necessary specific mental attitude to satisfy paragraph (b) of Section 204 of the Penal Code. This being the case, the alternative argument designed to reduce the charge cannot succeed.

For the foregoing reasons the appeals fail and they are dismissed.
Appeals dismissed.
