YOTAM MANDA v THE PEOPLE (1989) S.J. (H.C.)

HIGH COURT
NGULUBE, AG.C.J., GARDNER, AG. D.C.J. AND CHAILA, J.S.
7TH MARCH, 1989
(S.C.Z. JUDGMENT NO 4 OF 1989)

Flynote

Evidence - effect of failure by court below to exclude less severe inferences against accused - when inference of guilt should be drawn

Headnote

The appellant and a co-accused were charged with murder. It was alleged that the two on 26th August, 1984 at Ndola murdered Lifasi Kapito. The evidence disclosed that the deceased had a shop where he was carrying on a tailoring business. On the night of 10th August he was set up by assailants, beaten up and robbed. The attire that he was wearing at the time was taken away and goods stolen from his shop. He was left naked and trussed up. Acting on the information received, the police apprehended the appellant on 29th August, 1984 and they found him to be in possession of some of the goods stolen from the shop. The appellant was interviewed and he led the police to Kitwe where the co-accused was found who had a wristwatch belonging to the deceased and which was stolen on the occasion of the murder and the theft of the property. The learned trial judge accepted that the only evidence linking the appellant to the offence was that he was found, eighteen days later, in possession of some of the property which was stolen. The appellant was sentenced to death for murder and he appealed.

Held:

(i) Unless there is something in the evidence which positively excludes the less severe inferences against the accused (such as that of receiving stolen property, rather than guilt on a major case such as aggravated robbery or murder), the court is bound to return a verdict on the less severe case

(ii) A court can only draw an inference of guilt if that is the only irresistible inference that can be drawn on the facts

Cases referred to:

(1) Chileshe v The People (1977) Z.R. 176
(2) Kape v The People (1977) Z.R. 192

For the appelllant: Mrs. I. Kunda, Legal Aid Counsel
For the Respondent: K. Lwali, State Advocate

Judgment

NGULUBE, AG.C.J.: delivered the judgment of the court.

The appellant was sentenced to death for murder. The particulars allege that he and one Teza Silungwe on 26th August, 1984 at Ndola murdered Lifasi Kapito. The evidence disclosed that the deceased had a shop where he was carrying on a tailoring business. On the night of 10th August he was set up by assailants, beaten up and robbed. The attire that he was wearing at the time was taken away and goods stolen from his shop. He was left naked and trussed up. Acting on the information received, the police apprehended the appellant on 29th August, 1984 and they found him to be in possession of some of the goods stolen from the shop. The appellant was interviewed and he led the police to Kitwe where the co-accused was found who had a wristwatch belonging to the deceased and which was stolen on the occasion of the murder and the theft of the property. The learned trial judge accepted that the only evidence linking the appellant to the offence was that he was found, eighteen days later, in possession of some of the property which was stolen.

On behalf of the appellant, Mrs. Kunda has argued to the effect that the learned judge misdirected himself by finding that there was a link between the theft from the shop and the murder. She has pointed out that the only evidence against the appellant came from PW. 3 and was to the effect that eighteen days later, the appellant was found in possession of stolen property. Mr. Lwali, the learned State advocate has argued that the inference of guilt on the capital charge was the only one possible on the facts of this case and in this regard he has argued that the cases of *Chileshe v The People* (1) and *Kape v The People* (2) cannot assist the appellant because he led the police to the co-accused who had the stolen watch and secondly because he had lied. Mr. Lwali's submissions were that the leading of the police to Kitwe indicated that the appellant was party to the crime and also the fact that he had given one explanation to the police and a different one to the court to the effect that he knew nothing at all about the watch recovered from Kitwe indicated that he could not have been a receiver of stolen property.

The two cases we have referred to and a host of similar decisions were decided by the court and lay down certain principles and guidelines. We have in those cases discussed the duty which rests upon the trial court to consider the various alternative inferences which can be drawn when the only evidence against an accused person is that he was in possession of stolen property. We have indicated in those cases that unless there is something in the evidence which positively excludes the less severe inferences against the accused (such as that of receiving stolen property, rather than guilt on amajor case such as aggravated robbery or murder), the court is bound to return a verdict on the less severe case. In this particular case we cannot accept Mr. Lwali's argument that because the appellant knew where the stolen wristwatch was to be found that indicated that he obtained the things and the ability lead the police to the persons from whom he obtained the goods would not lead the to inevitable conclusion that he was *crimines participes*. Mr. Lwali also argued that the appellant had lied on this issue by saying one thing to the police and another to the court.

We have in a number of cases drawn attention of the courts to the fact that accused persons frequently try to exculpate themselves on a dishonest basis: that, nonetheless, does not relieve the trial courts of their own obligations in the matter. In this regard the learned trial judge had said he would not consider the possibility of receiving because the appellant himself had not made that suggestion. This was a misdirection in accordance with the principles set out in *Chileshe* (1) and *Kape* (2) since the duty is that of the court. After all, the court would merely be drawing an inference from a set of facts before it and it is a general principle that a court can only draw an inference of guilt if that is the only irresistible inference that can be drawn on the facts. In this regard, and in accordance with the cases referred to, it is the responsibility of the courts to consider other alternatives and where those alternatives have not been excluded then guilt on the major change cannot then be said to be the only irresistible inference to be drawn.

We should perhaps point out that when a court is engaged in this exercise, the court is in no way leaning in favour of accused persons. The court is simply upholding the law which requires that the guilt of an accused person be established beyond reasonable doubt and a reasonable doubt is certainly not excluded where a number of possibilities arise, some of which are either more favourable or less advantageous to an accused person.

Having discussed this case in the terms aforesaid, we are satisfied that the learned trial judge had given a bad reason for discounting the possibility that the appellant was a guilty receiver of the property found in his possession. We, therefore, allow find that the possibility that the appellant was a receiver was not excluded. For that reason, we allow this appeal against the conviction on the charge of murder and substitute a conviction for receiving stolen property, contrary to section 318 of the Penal Code. The particulars will relate to the property that was found in his possession. With regard to the sentence, we should perhaps indicate immediately that we do not accept the argument that the appellant was a juvenile at the time. We have looked at the age that he gave at his trial and, by a simple calculation backwards to the time of the offence, it is clear that the appellant was above the age of eighteen years. If his submission that he is now twenty years old were to be believed, the appellant would be growing progressively younger as the years go along. For the offence which we have substituted, we sentence the appellant to five years imprisonment with hard labour with effect from 29th August, 1984, when he was taken into custody.

Appeal allowed.