

SAILOTA KUNENGWA LUNGU v THE QUEEN (1963 - 1964) Z and NRLR 130 (CA)

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COURT OF APPEAL

[Before the Honourable the Chief Justice, SIR DIARMAID CONROY, the Honourable Mr. Justice BLAGDEN, and the Honourable Mr. Justice CHARLES on the 18th August, 1964.]

Flynote

Duty of counsel to his client and the court - no apparent grounds of appeal.

Headnote

The appellant was convicted of murder. On the hearing of his appeal, his counsel intimated that he had perused the record with care and could find no grounds of fact or law on which to support the appeal.

Held:

- (a) Counsel had taken a perfectly proper course.
- (b) Counsel owe a duty to the court as well as to their clients.

Appeal dismissed.

D A O'Connor, Crown Counsel for the Crown

J E McLellan - Shields for the appellant

Judgment

Conroy CJ: This is an appeal against a conviction for murder.

The particulars of the offence are that on the 22nd December last year the accused murdered a man called Willis Phiri at Kapata Location in the Fort Jameson District.

The evidence before the learned judge was that an African National Congress meeting had been held at Mpezeni Park in Fort Jameson, at which the accused was present, on 22nd December, 1963. At about 5 o'clock in the evening the meeting finished and a number of the audience went to the African National Congress offices in 8th Street in the Kapata Location. About half an hour later a number of United National Independence Party supporters arrived at that office and started throwing stones at it. The A.N.C. members retaliated and the U.N.I.P. members dispersed. A short while later the deceased walked across 8th Street towards the A.N.C. office shouting "I am U.N.I.P.". A man called Nester Phiri (who was an A.N.C. supporter) told the deceased to go away. The accused then came up and hit the deceased on the back of the head with an axe, knocking him down. The deceased got up and the accused again hit him with an axe after he had run a short distance. Some hours later that night the police found the deceased's body and a postmortem disclosed that he had died from the injuries to his head.

The accused said at his trial that he had not been at the scene of the crime but at Magazine Village and he called his wife to support this alibi. Her evidence collapsed and the judge rejected it. He accepted the account of the prosecution eye witnesses' evidence of the actual killing by the accused. There was no doubt as to the identity of the accused as the man who struck the fatal blows. The accused elected not to give evidence, or to make a sworn statement.

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CONROY CJ

I have been through the record myself with great care. Learned counsel, Mr. McLellan - Shields, who appears for the appellant, has informed the court this morning that he too has perused the record with care and he can find no ground of criticism, on fact or law, which he can put forward in support of an appeal against conviction. As some criticism has recently been made in public of counsel who have taken this course, I take the opportunity to reiterate what is the settled practice as to the duty of counsel in such cases. The action taken by Mr. McLellan - Shields was perfectly proper and in accordance with the traditions of the Bar. No other course was open to him. The duty of counsel is to go through the record with the greatest care. If he is unable to find any ground which can be argued before the court of appeal it is his duty to say so. It is his duty to attend in court and to assist the court if the court wishes to raise any matter. It is not the duty of counsel to invent points, or put forward points which he knows are frivolous or will not bear examination. What Mr. McLellan - Shields has done this morning is the proper course for counsel to follow.

Mr. McLellan - Shields went on to suggest that if the court thinks fit he would give up his brief and it could be allocated to another counsel, or that the appellant should be allowed to appeal to argue his appeal himself. That course seems to me to be wrong. The appellant here put in no grounds of appeal, he said " Against conviction the grounds of appeal are such grounds as may be submitted by my counsel at a later date. I did not commit this crime ". Counsel having been assigned, and a counsel in this case with much experience in this type of case, the court must rely upon him, and the court also relies upon its own examination of the record. On the merits there is absolutely nothing that can be urged on behalf of the appellant. This was a murder committed in broad daylight before eye - witnesses. The appellant remained silent in face of the most cogent Crown evidence. I would dismiss this appeal.

Judgment

Blagden JA: I agree.

Judgment

Charles J: I agree.