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SCZ JUDGMENT NO. 5 OF 2007

**IN THE SUPREME OF ZAMBIA SCZ APPEAL NO. 87,88/06**  
**HOLDEN AT KABWE AND LUSAKA**  
**(Criminal Jurisdiction)**

**ZICO KASHWEKA**

**1<sup>st</sup> APPELLANT**

**LAWRENCE MUNGUNDA CHIMBINDE**

**2<sup>ND</sup> APPELLANT**

**VS**

**THE PEOPLE**

**RESPONDENT**

**Coram: Sakala, CJ., Chibesakunda and Chitengi JJS**  
**7<sup>th</sup> November, 2006 and 6<sup>th</sup> February, 2007**

*Approved  
the  
8/2/2007*  
**For the Appellants:**

**Mr. A.S. Nkausu, Principal Legal  
Aid Counsel**

**For the State:**

**Mr. P. Mutale, Principal State  
Advocate.**

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**J U D G M E N T**

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**Sakala, CJ., delivered the Judgment of the Court.**

**Cases referred to:**

- 1. Phiri and Others V The People (1978)ZR.79**
- 2. Machobane V The People (1972) ZR 101**
- 3. Mhango and Others V The People (1975) ZR 275.**
- 4. R. Birch 18 Cr. App.R.26**

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When we heard this appeal at Kabwe, we announced our decision that the appeal was allowed. The convictions of both the Appellants were quashed and sentences set aside. The Appellants were, accordingly, acquitted. We stated then that we shall give our reasons in a written Judgment. We now give those reasons.

The two Appellants were convicted of murder contrary to Section 200 of the Penal Code, Cap 87 of the Laws of Zambia. The particulars of the offence alleged that the Appellants, on 8<sup>th</sup> September 1996, at Samungulu Harbour, in the Kalabo District of the Western Province of the Republic of Zambia, jointly and whilst acting together did murder Shadrick Mooka Mushoke.

On account of their ages, 26 years and 30 years, respectively, at the time they committed the offence; and on account that some of the people involved in the murder had gone scot free, the court considered the two factors as extenuating

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circumstances and sentenced each Appellant to 25 years Imprisonment with Hard Labour. The Appellants appealed against both convictions and sentences. Both learned counsel, correctly so in our view, indicated that they did not support the convictions in these appeals.

These appeals, as we see them, raise two legal issues, namely: evidential value of the testimony of a hostile witness and corroboration of accomplice evidence; and what amounts to extenuating circumstances to justify a custodial sentence upon a conviction for murder, instead of the mandatory death penalty. It is, therefore, not necessary to delve into the facts leading to the unfortunate death into great detail; moreso that the death of the deceased is not in dispute.

The case for the prosecution centred on the evidence of PWs 1,2,4 and 5. In the course of giving her evidence in chief, PW1 testified, among other things, that she did not see the Appellants and others beat the deceased; that there were

many people at the scene and that she was beaten hence, she pointed at the people. While still giving that evidence in chief, the prosecution applied that the witness be declared hostile. Instead of granting the application, the court stated:

***“Will this help the prosecution in any way. Perhaps I give the State time to talk to the witness.”***

The court then adjourned the matter. After the adjournment, the State Advocate informed the court as follows:

***“The witness is prepared to tell the court what she knows.”***

PW1 proceeded to give her evidence in chief in which she now incriminated the Appellants that they beat the deceased with others; and that after beating him, they threw his body into the river and told them not to reveal what happened. In cross-examination, she conceded that she had changed her story; that the police to give them a statement as per her evidence had beaten her.

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In case of PW2, the court granted the prosecution an application to treat her as a hostile witness. Suffice it to mention that this witness had, before being declared a hostile witness, testified that the boat in which she was ferrying the deceased capsized and the deceased drowned as he did not know how to swim. This witness collapsed when being cross-examined by the defence counsel, after being declared hostile.

The evidence of PW4 was to the effect that he assisted the Appellants to remove the deceased's body from the harbour to where it was hidden.

PW5, the wife to PW4, testified that she heard the Appellants requesting her husband, PW4, to go and assist them to hide the deceased's body. She saw her husband, PW4, and the Appellants removing the deceased's body. She also testified that the two Appellants and another paddled the boat, while PW4, her husband, held the deceased's body.

The Appellants, in their defence, testified that they did not know anything about the death of the deceased; that they had nothing to do with his death; and that they were not at the scene.

After reviewing the evidence, the learned trial Judge set out the following questions for determination:

- (i) How did the deceased meet with his death?**
- (ii) If he was assaulted, was he assaulted by the accused?**
- (iii) Did such assault cause his death?**
- (iv) Was the assault with malice aforethought?**

The trial Judge identified the key witnesses in the case to be PWs 1 and 2. As for PW1, the court noted that she was nearly declared a hostile witness; but that after being talked to by the State Advocate after a short adjournment, she testified as to how the deceased was ferried across the river by PW2; that She further testified how they assaulted him and threw his body into the river.

The court observed that PW2, who had been declared a hostile witness, when cross-examined by the Defence counsel, collapsed. The court found that PWs 1 and 2 implicated PW4 and others not before court.

The court accepted that the evidence of PWs 1 and 2 ought to be treated with caution on account of their inconsistency; and that the evidence of PW4 on the other hand ought to be treated as evidence from a person who had an interest of his own to serve since he was a suspect.

The court noted that PWs 1 and 2 had decided to be hostile at first because the suspects were their relatives; and that they were evasive in order not to implicate their relatives. The court noted further that the evidence of PWs 1,2 and 4 needed corroboration unless there could be evidence of "**something more**" as enunciated by this court in the case of *Phiri and Others V The People*<sup>1</sup> or that there be "**special and compelling circumstances**" as stated in the case of

***Machobane V The People*<sup>2</sup> and repeated in *Mhango and Others V The People*<sup>3</sup>.**

The court found that PW4, an accomplice, implicated the first Appellant and helped in concealing the deceased's body; and that the Appellants were seen by PW5, the wife of PW4, as the ones with others, who went to dump the body somewhere else. According to the learned trial Judge, PW5, though a wife to PW4, was an independent witness as she told the court only what she saw when she and others went to the river where the body was floating.

The learned trial Judge found that the two Appellants expressed ignorance as to how the deceased died. As for the first Appellant, the learned Judge noted that he testified that he was away when the deceased's body was discovered, raising the defence of alibi. As for the second Appellant, the court noted that his evidence was that he merely discovered the body floating in the river.



Having made the foregoing facts and observations, the learned Judge then stated as follows:-

***“So what is the truth of the matter? If the two men were innocent why should PW1 and PW2 implicate them including PW2’s father who has since died? The two accused are related to PW1 and PW2. I am convinced that they were not falsely implicated. Why should both of them together with PW4 have decided to go and dump the deceased’s body somewhere else instead of alerting the Police of the deceased’s death? I am sure these are special and compelling grounds for me to believe that the two accused men were among the people who assaulted the deceased and later threw his body into the water. I have no doubt that PW1 and PW2, though at one stage or the other had tried to hide the truth, told the court the truth. They did not falsely implicate the two accused who, as I said above, were their relatives. The answer to the second question is that the two accused were involved in the assault on the deceased. Their alibis which amounted to denials are therefore, dismissed. The two accused’s conduct when they dragged the deceased’s body through the water to go and dump it elsewhere***

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***corroborated PW1, PW2 and PW4's evidence. PW1 and PW2's inconsistencies have been rectified by the corroborative evidence of the accused's behaviour."***

As we shall be indicating later in this judgement, the foregoing passage is full of serious and fatal misdirections. The court then concluded that the deceased died as a result of an assault, possibly coupled with suffocation due to drowning after being thrown into the river; that the two Appellants, together with others unknown, assaulted the deceased and that the killing was with malice aforethought; and that the assault was committed for the purposes of stealing the deceased's property in the bag. The court found that the prosecution had proved its case beyond all reasonable doubt and convicted them accordingly. The court found that the Appellants' ages and others having gone scotch free were extenuating circumstances and sentenced the Appellant to 25 years Imprisonment with Hard Labour.

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The Appellant's grounds of appeal were: that the learned trial Judge misdirected himself by convicting them on the evidence of PWs 1 and 2, witnesses with and interest of their own to serve; and that the trial Judge misdirected himself by convicting them on the circumstantial evidence.

We have examined the evidence on record and critically combed the Judgment of the trial court.

We have no hesitation in holding that the learned trial Judge seriously misdirected himself: First, on the evidence of PW1, the record clearly shows that she was not only an accomplice but that she should have been declared a hostile witness or at least found as a witness with an interest of her own to serve. Secondly; PW2, having been declared a hostile witness her evidence had no evidential value and could therefore not be corroborated at all. The law is that sworn evidence of a witness declared hostile at trial is not evidence "*per se*" and it cannot be considered by the Court (see *R.V. Birch, 18 Cr.*

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**App.R.26<sup>4</sup>**] The conduct of the Appellants, which the court found as corroborative evidence, could not be corroboration because that conduct was testified to by a hostile witness whose evidence had no value and also testified to by an accomplice witness PW4. PW5 should have been found a witness with an interest to serve. Both PWs 4 and 5's evidence required corroboration.

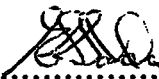
The issue in this case was not the credibility but reliability of the witnesses. There was no reliable evidence in this case; the witnesses were either hostile, thereby making their evidence valueless, or accomplices requiring corroboration which was not there.


On the question of extenuating circumstances, we have said in many cases that the age of an accused *per se* can never amount to an extenuating circumstance. The court, therefore, misdirected itself in finding that the age of the Appellants amounted to extenuating circumstances.

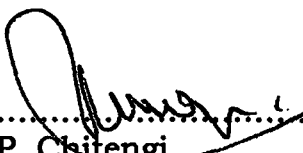
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Equally, the acquittal of a co-accused is never an extenuating circumstance. Thus, had the appeal against conviction not been successful, this court would have been bound to disturb the sentence. However, the appeal against conviction having been successful, the sentences was accordingly set aside.

It is for the foregoing reasons that the appeals were allowed; and the Appellants acquitted and set free.

  
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E. L. Sakala  
**CHIEF JUSTICE**

  
.....  
L.P. Chibesakunda  
**SUPREME COURT JUDGE**

  
.....  
P. Chitengi  
**SUPREME COURT JUDGE**

/rmc