SCZ Appeal No. 179/2011

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

JOSEPH CHOLOWA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Kabuka, JJJS
On the 7th June, 2016 and .....

For the Appellant: **Mr. H. M. Mweemba, Senior Legal Aid Counsel, Legal Aid Board.**

For the Respondent: **Mrs. M. H. Kayombo, State Advocate**

JUDGMENT

Phiri, JS, delivered the Judgment of the Court

Cases referred to:

1. **Jack Chanda and Kennedy Chanda vs. The People (2002) Z.R. 1224.**
2. **Whiteson Simusokwe vs. The People (2002) Z.R. 63.**
3. **Donald Fumbelo vs. The People SCZ Appeal No. 476/2013 (unreported).**
4. **John Lubozha vs. The People, SCZ Appeal No. 485/2013 (unreported).**

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5. Patrick Kabwe vs. The People, SCZ Appeal No. 621/2013 (unreported).

The appellant was sentenced to death by the Kabwe High Court following a charge of ***Murder contrary to Section 200 of the Penal Code.*** The particulars of the offence alleged that the appellant on the 1st September, 2002 at Kabwe in the Kabwe District of the Central Province of Zambia he did murder Jacqueline Banda.

The fact that the deceased was severely beaten and repeatedly stabbed to death was conclusively established by the prosecution evidence. The case for the prosecution centered on the evidence of PW1 and PW2 who were eyewitnesses. PW1 was Victoria Banda, the deceased's elder sister. She knew the appellant as a neighbour. Around 22.00 hours she was alerted about the appellant's violence at Zonde Bottle Store within Shamabanse compound where she lived. When she arrived at the scene, she found the appellant in the process of severely assaulting the deceased who lay on the ground at the bottle store. The deceased was bleeding from multiple injuries all over her body and she was unresponsive to the appellant's assault. According to PW1, the appellant assaulted the

deceased on the floor of the bottle store and outside the bottle store. He used broken bottles and a stone. She heard him threatening to kill the deceased and he used abusive language. PW1 made an attempt to rescue the deceased, but she was slapped and prevented. It was at that moment that PW1 reported the matter at Kabwe Central Police Station. The deceased was taken to Kabwe General Hospital where she died the following day. During cross-examination, PW1 denied that the appellant was the deceased's boyfriend

PW2, Obby Nkhoma was on his way walking home when he noticed people running in different directions at Zonde Bottle Store. He saw the appellant assaulting the deceased with broken bottles and a stone. He attempted to rescue the deceased, but the appellant hit him with an empty bottle and prevented him from assisting the deceased. He opted to stand at a safe distance and observe the events. He observed that the appellant was so violent that no one could dare stop him. Some people near the scene referred to him as "icipondo". He also heard the appellant declare that he was going to kill the deceased and he insulted her. PW2 had previously known

the appellant for about two years. He also knew the deceased. He denied that there was any amorous relationship between them.

The police officer who carried out the investigation was No. 5526, Inspector Musonda. This witness produced postmortem evidence which showed that the deceased died from multiple injuries all over her body.

In his defence, the appellant conceded that PW1 and PW2 were his neighbours. He stated that on the material day, he was at Zonde Bottle Store waiting for the deceased who was his girlfriend. The deceased came into the bottle store around 22.00 hours in the company of four men. This incensed him. He pushed her and slapped her once. He also claimed that one of the men hit him on his forehead with a broken bottle. He denied that he stabbed the deceased. He claimed that he drank beer before the deceased arrived and that he had reported his injuries to the police and to an unnamed Doctor. This claim was effectively denied by PW5 the Officer-in-Charge of Bwacha Police Station. PW5 produced the station Occurrence Book to prove that the appellant did not make any complaint at that station as he claimed.

The learned trial Judge accepted the evidence of PW1 and PW2 and found that apart from knowing the appellant as a neighbour, they had ample opportunity to observe the appellant at the material time. The learned trial Judge accepted that PW1 and PW2 saw the appellant assault the deceased with broken bottles and a stone thereby causing her multiple injuries from which she died a few hours later.

Mr. Mweemba filed written heads of argument which he supplemented by oral submissions based on one ground of appeal; namely, that the learned trial Judge erred both in law and in fact when he did not consider the failed defences of provocation and intoxication as extenuating circumstances.

The gist of Mr. Mweemba's criticism emerges from the following passage at page J11 of the Judgment of the lower Court:

> **"In my view the defence of intoxication cannot be availed to him in that he was able to remember what happened on that night and if there was any provocation at all, retaliation was not proportional to the provocation, if any, and there has been no self defence as the deceased never fought back".**

According to the learned Counsel, the afore-quoted passage shows that the learned trial Judge appreciated that intoxication and provocation were possible defences in this case. Therefore, the failure to consider them later as extenuating circumstances was a misdirection. In support of this submission, Mr. Mweemba cited the case of ***Jack Chanda and Kennedy Chanda vs. The People***[1] in which we held that "failed defence of provocation, evidence of witchcraft accusation, and evidence of drinking can amount to extenuating circumstances".

Mr. Mweemba submitted that there was evidence given by the appellant on the record of the appeal, that he had come to the Bottle Store to drink beer around 17.00 hours. According to Mr. Mweemba, the appellant's evidence of drinking beer was not rebutted in cross-examination. He urged us to follow what we held in the ***case of Jack Chanda***[1] and set aside the death sentence and substitute it with a lesser sentence.

In response to the appellant's written heads of arguments, Mrs. Kayombo on behalf of the people filed written heads of arguments the gist of which was that the Learned trial Judge rightfully

disregarded the issue of intoxication and provocation as extenuating circumstances when deciding the sentence because intoxication and provocation were neither proved nor put in issue during the cross-examination of PW1 and PW2 who were eyewitnesses to the crime. In support of this proposition, Mrs. Kayombo cited our decision in the case of ***Donald Fumbelo vs. The People***[3] where we said; among other things, that:

> **"In the case of a witness who is an accused person, it is indeed very important that he must cross-examine witnesses whose testimony contradicts his version on a particular issue. When an accused person raises his version for the first time only during his defence, it raises a very strong presumption that the version is an afterthought and, therefore, less weight will be attached to such version. Therefore in a contest of credibility against other witnesses, the accused is likely to be disbelieved".**

It was also contended that the evidence of drunkenness and provocation should be evidence based and in the absence of such evidence, the trial Court is not bound to consider them as extenuating circumstances. In aid of this submission, Mrs. Kayombo cited our decision in the case of ***John Lubozha vs. The People***[4] in which we dealt with the issue of drunkenness as an extenuating circumstance. In this case, we stated as follows:

"There was no evidence to establish the fact that the appellant was drinking such sachets of beer.....the defence of drunkenness was not established because he (appellant) exhibited his alertness and composure when he rode the bicycle to and from the crime scene.....Since there was no evidence of drinking, the appellant's claim that he was drunk was not evidence based and therefore, it should not have been considered as an extenuating circumstance".

We were also referred to our decision in the case of ***Patrick Kabwe vs. The People***[5] where we stated as follows:

> **"When considering the circumstances (that is, extenuating circumstances), the Court should look for evidence which should reasonably suggest reasons for the appellant's criminal behaviour; and why he should not be sentenced to death. All these factors require evidential basis".**

We have carefully considered the evidence on record, the judgment of the learned trial Judge, as well as Mr. Mweemba's submissions on behalf of the appellant. We have also considered the submissions made by Mrs. Kayombo on behalf of the people. As we stated earlier, the case for the prosecution and indeed the conviction of the appellant was based on eyewitness accounts given by PW1 and PW2 who saw the appellant take up empty bottles which he broke up and used to stab the deceased and beat her all over her body. They also saw the appellant, from their different

positions at the scene of crime, pick up a big stone which he rammed into the deceased's head. They also testified about how unruly the appellant had become, such that they were victims of his violence when they each attempted to rescue the deceased who was unresponsive. More importantly, they both heard the appellant pronounce that he was going to kill the deceased. None of these two eyewitnesses saw the appellant drink any beer to any extent that can either be described as light drinking or excessive drinking, and none of them was ostensibly cross-examined on the possibility of the appellant's state of drunkenness or provocation.

While we accept that the scene of the crime was at a bottle store, we do not accept the suggestion that intoxication or drunkenness was available to the appellant as a defence. We say so because to start with, there is no evidence on the record of the appeal to the effect that there was a quarrel followed by a fight between the deceased and the appellant. Secondly, there is no evidence on record, apart from mere mention by the appellant himself, to suggest that the appellant was in an intimate relationship with the deceased, such that provocation would have been generated by the deceased.

There was a suggestion by Mr. Mweemba, on behalf of the appellant, that he was incensed when the deceased, in the company of four men, came into the bar to join him. While we accept that evidence of intimate relationship and infidelity leading to an assault can amount to extenuating circumstances, we do not accept, in this case, that there was any evidence of intimate relationship and infidelity involved.

From the witnesses' accounts, the events begun inside Zonde bottle store which was open to members of the public. When the deceased attempted to escape from the appellant, he gave chase and continued his savage attack with broken bottles and a stone in full view of members of the public including PW1 and PW2 who he equally assaulted. The appellant was so violent that people ran away from the place in different directions and called him "icipondo". There was no evidence before the trial Court suggesting that the appellant accused the deceased of any wrong doing or infidelity. The only pronouncements he was heard to utter were threats to any person who attempted to intervene and his yelling at the deceased that he was going to kill her.

We wish, here, to repeat what we said about intimate relationships and infidelity in the case of ***Whiteson Simusokwe vs. The People***[2]***:***

> **".....use of excessive force immediately defeated any defence of provocation so that it is not possible to reduce this case to manslaughter ....However, we accept that a failed defence of provocation nonetheless affords the extenuation for murder charge. The intimate relationship and the alleged infidelity which led to the assault were therefore an extenuating circumstance".**

In the ***Simusokwe case***[2]**,** the brief facts were that the appellant employed the deceased, a female, as a farm worker who lived on the farmstead. He informed the trial Court that he had killed the deceased and claimed that the deceased had become his mistress. On the fateful day, he found her with another man in the act of intimacy. He fought the other man who ran away and then he turned on the deceased whom he beat with a stick. When she died, he secretly buried her and later led the police to the grave. The appellant had earlier cooperated with the Police and revealed his story whilst in their custody. In that case, we not only took the appellant's story to be valuable, we also held that if a man and woman who are not married are nonetheless in a stable relationship

of intimacy, they will be treated on the same footing as married persons. We accepted the appellant's argument that there was extenuation for the murder charge.

In the present case there simply was no evidence of any intimate relationship between the deceased and the appellant, save for his claim, at trial, that she was his girlfriend. He did not say this to the Police during the investigation. To the contrary, the Police evidence, through PW4 the police officer who investigated the case, was that the assault began when the deceased spurned the appellant's advances while in the bottle store. We do not accept that evidence of a man beating up a woman so violently that death results should be conclusive or suggestive of any stable relationship of intimacy between them. We cannot fault the learned trial Judge who did not find any extenuating circumstances. We find no merit in this appeal and we dismiss it.

G. S. Phiri
SUPREME COURT JUDGE

E. C. Muyovwe
SUPREME COURT JUDGE

J. K. Kabuka
SUPREME COURT JUDGE