IN THE HIGH COURT OF ZAMBIA **HP/44/2017**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

THE PEOPLE

V

OXFORD BANDA

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 5th DAY OF JUNE, 2017

For the State : *Ms M. Hakasenke, State Advocate, NPA*
For the Accused person : *Mr C. Siatwinda, Legal Aid Counsel, Legal Aid Board*

J U D G M E N T

CASES REFERRED TO:

1. ***Woolmington V DPP 1935 AC 462***
2. ***Sibande V The People 1975 ZR 101***
3. ***David Zulu V The People 1977 ZR 151***
4. ***Dorothy Mutale and Richard Phiri V The People 1997 SJ 51***
5. ***Winzy Sakala and Gerald Phiri V The People SCZ No 11 of 2009***

LEGISLATION REFERRED TO:

1. ***The Penal Code Chapter 87 of the Laws of Zambia***

The accused person in this matter stands charged with one count of murder contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that Oxford Banda on 18th January, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia did murder Davy Mwanza.

The accused person denied the charge, and the matter proceeded to trial. The onus is upon the state to prove the case beyond all reasonable doubt. The state called five witnesses, while the accused person gave his defence on oath, and called no witnesses.

The first witness was Beauty Tembo. Her evidence was that on 16th January, 2016 in the evening after 21:00 hours, the accused person had gone to her house, and asked her to go with him to his house. There he went into the house and came back with a drink and they proceeded back to her house. She testified that at her house the accused person had opened the drink and gave it to her and asked her to take a sip, and he asked her how it tasted. That she had told him that it was okay, and he then left.

PW1 testified that she thereafter slept, and the next morning their neighbor went and got her so that she could go and visit at her house. She stated that she was at the neighbour's house the whole day, and only went home in the night. That as she was full, she did not drink the tangy drink, and she slept. It was only the next morning that she got the tangy drink and started drinking it. PW1 told the court that her young brothers Ignatius and Davy went to her, and she poured some of the drink in cups for them to drink. She testified that after they finished drinking the tangy drink, she started cooking nshima.

Her testimony was that after that Davy went to the toilet twice, and that on the third trip there, he did not return. That when she finished cooking the nshima, she went to call Davy so that he could eat, and when she

called out him, he stated that he was failing to stand, and she went into the toilet and got him, and took him into the house. She further stated that Davy lost his strength and, she sent her other young brother to go and call their mother.

She explained that when her mother went home, she got Davy and took him to the clinic, and she remained at home, and she started feeling weak, and she fell down. PW1 stated that their neighbor got her and took her to the clinic, after she bought five eggs and made her drink them, and she vomited a little. The neighbor had then made her drink some charcoal remains and she vomited, and that is when she was taken to the clinic. From there she was taken to the University Teaching Hospital (UTH) where she was treated.

PW1 told the court that Davy started complaining of stomach ache around 12:00 hours, after he had taken the drink around 09:00 hours. That PW1 fell ill between 18:00 hours and 19:00 hours. Her testimony was that both Davy and herself were fine before they drank tangy drink. She also testified that between 16th January, 2016 and 18th January, 2016 she was living in the house with her younger brother.

Further in her testimony PW1 stated that Davy died after he was taken to the clinic. She testified that the accused person was her boyfriend and they had been getting along well, and that from the time he gave her the tangy drink, he was not seen. That the next time she saw him was at the police when he was asked if he is the person who had given her the tangy drink, and he had agreed. He had also stated that the pregnancy that PW1 was carrying may not have been his, but for someone else.

When cross examined PW1 testified that Oxford used to be her boyfriend, and that he used to give her presents. Therefore it was not strange that

he gave her the tangy drink that day. That she had failed to open the drink, and after it was opened she had drank some and slept. Further that she was fine after Davy got sick, and that Ignatius and herself ate nshima, but Davy did not. She agreed that she was pregnant when she drank the tangy drink, and she also agreed that her mother was not happy that she was pregnant. Her evidence was that she was happy about her pregnancy, but she was scared of her parents.

PW1 denied having put poison in the drink so that she could kill herself as she was afraid of her parents. She agreed that she kept the drink from 16th January, 2016 until 18th January, 2016, stating that on 16th January, 2016 she had just taken a sip of the drink.

Catherine Banda, the mother to PW1 was PW2. Her evidence was that on 17th January, 2016 she was at work when her son went to tell her that Davy was very sick at home. When she rushed home she had found Davy very sick, and she had taken him to Chipata clinic where she was told that he was already dead. When she explained what had happened, she was advised that the body had to be taken to UTH, after doing so she went home and found that PW1 and Ignatius were also seriously sick.

PW2 also narrated that when she went for work Davy had remained with PW1, and that he had been well. That when she went home, PW1 had told her that after they had drank the tangy drink given to her by the accused person, Davy had complained of stomach pains, and she had taken him to the toilet as he had developed diarrhoea, and later became weak. She stated that PW1 and the accused person were at the same school, and that she would find them together on many occasions, and when asked, PW1 would tell her that the accused person was helping her with her work.

That later PW1 became pregnant and informed PW2 that the accused person had impregnated her. PW1 had taken her to the accused person's house where she had found his mother and grandmother. She also testified that she had agreed with the accused person's mother that they sit to discuss the pregnancy, but the subsequent events had brought confusion, and they did not sit to discuss. That at present they do not even speak, and no one had been to see the child that PW1 had given birth to.

In cross examination PW2 told the court that she was at work when Davy died, and PW1 and Ignatius fell sick. She agreed that she was told that PW1 was given the tangy drink on 16th January, 2016, and she only drank it on 18th January, 2016.

The third witness was Moses Kamanga. He testified that the role he played in this matter was to identify the body of the late Davy Mwanza at UTH, and he stated that he had identified the body, and that the deceased wore the clothes that PW3 had bought for him. This witness was not cross examined.

The arresting officer Conrad Andeleki was PW4. PW4 testified that on 19th January, 2016 he was on duty at Garden police post when he was allocated a docket of murder in which Alice Banda reported that Davy Mwanza and two other persons, namely Beauty Tembo and Ignatius Phiri had taken tangy drink which contained poison, on 18th January, 2016. That Davy Mwanza had died on the way to the clinic, while the other two were hospitalized.

It was PW4's testimony that he went to the scene in Garden Compound where he picked up the tangy drink bottle, and the suspect Oxford Banda was apprehended with the help of members of the public.

Thereafter PW4 had recorded a statement from Beauty Tembo who was admitted to the maternity ward at UTH, and she had told him that the accused person had given her the tangy drink, and she had taken a sip of the drink and kept the rest. That she only drank the drink on 18th January, 2016, when she shared it with her cousins, and she found herself hospitalized after taking it.

PW4 further testified that he had attended the postmortem conducted on Davy Mwanza at UTH, and that the tangy bottle was sent to the Food and Drugs laboratory for toxicology tests. He identified the postmortem report and it was marked 'ID1', as well as the analyst report, and it was marked 'ID2'. They were produced and marked 'P1' and 'P2'. He also told the court that he charged and arrested the accused person, who under warn and caution in nyanja language, which he understood better, gave a free and voluntary reply denying the charge.

PW4 in cross examination stated that PW1 was given the drink by the accused person on 16th January, 2016, and it was only consumed on 18th January, 2016. His evidence was that he recovered the tangy drink bottle inside the house, and it had charcoal like black residue. He stated that Beauty was treated for poisoning from a pesticide, which pesticide was said to have been consumed by the deceased as well.

The last state witness was Richard Chomba, a public analyst at the Food and Drugs laboratory. He gave the court his qualifications, stating that he holds a bachelors' degree in pharmacy obtained from the University of Zambia, a certificate in best practices in forensic toxicology from the University of Cape Town, and is currently studying for his masters' degree in food safety at the University of Zambia.

With regard to his work experience, PW5 told the court that he had been a public analyst since 2013, and in terms of his duties, he stated that he carries out analysis in the lab, ensures the safe custody of samples, and that all instruments used are in working condition. That after conducting analysis he generates reports.

As regards the matter before court, the evidence of PW5 was that on 24th January, 2016 and 26th January, 2016, he had received samples from Dr Victor Telendiy of the UTH forensic department, and from Detective Sergeant Andeleki of Emmasdale police for toxicology analysis. That one specimen bottle contained blood labelled Davy Mwanza, a specimen bottle containing stomach contents also labelled Davy Mwanza, and an empty tangy drink bottle.

He stated that upon receipt of the samples he had prepared them in readiness for analysis using two methods. The first was the thin layer chromatography abbreviated as TLC, and the second, ultra violet spectrophotometry, a machine abbreviated as UV spec. He stated that the TLC uses movement of the samples on a TLC plate compared with a standard chemical, and is observed under ultra violet (uv) light.

That the second method involves use of ultraviolet rays, which are passed through the prepared sample, and gives absorption peats at specific wavelengths. He testified that after the analysis dimethoate, an organic phosphate and pesticide was detected in the samples. He thereafter prepared a report.

On the quality of the analysis, PW5 stated that he had ensured that the samples were in perfect analytical condition when he received them, and he had recorded them in a book and on the data base, and then stored them in a refrigerator at a temperature of 4 to 8 degrees, after putting

them in containers that are recommended for analysis. He further testified that the samples were stored in a room with restricted access. He identified and produced a copy of the report, which was marked 'P3'. He identified 'P2' as the original of 'P3'.

On the pesticide dimethoate, PW5 told the court that it is a chorinesterase inhibitor, that is, a neuro chemical transmitter found in the human body, and affected by the said chemical. That in the human body there are two principal chorinesterase, the first being acetyl chorinesterase found in the nervous tissues and erythrocytes, and secondly pseudo chorinesterase found in the liver and serum. That the chemical binds to the active sites of the enzymes which are phosphate radical, producing phosphoriated or diseased enzymes.

He further testified that blood with erythrocytes has red blood cells, and the erythrocytes transport haemoglobin, which in turn carries oxygen from the tissues to the lungs. That haemoglobin also makes it possible for the water in the blood to transport carbon dioxide, in the form of bicarbonate irons from the lungs to the tissues, where it is converted back to carbon dioxide, and expelled to the atmosphere, as a body waste product.

That the chemical dimethoate affects this thermal process by attaching itself with the phosphates, producing diseased enzymes, and the normal process is compromised. This leads to there being insufficient oxygen supply to various body organs like the brain, and the symptoms seen in affected persons include sweating, vomiting, diarrhea and salivating. Further that as the process of getting rid of carbon dioxide from the body is compromised, the carbon dioxide accumulates in the lungs and tissues, resulting in death due to respiratory failure.

PW5 also testified that the amount of dimethoate required to be consumed before a human being can die has not been ascertained by studies, but that studies conducted on rats and mice reveal that a lethal dose of 0.05 miligrams will result in death. That for human beings factors such the quantity consumed, the age of a person, sociological factors such as the person suffering from disease, affect the period within which a person dies on consuming dimethoate. He however stated that taking all the factors outlined into account, the effects are seen within twelve hours. It was the evidence of PW5 that children's physiological make up is different from adults, as they are still growing, and so are their body organs. Therefore the effects are pronounced in them, compared to adults.

In cross examination, PW5 stated that Detective Sergeant Andeleki took the bottle to him, and it was empty. PW5 stated that he would not know if the bottle was tampered with. He also told the court that dimethoate is commonly known as logo, and it has a pungent or unpleasant smell. He could not tell whether it can be smelt when put in a drink. He also told the court, that the bottle had no black residue in it, when taken to him.

PW5 further in cross examination stated that after analysis samples are kept for only six months, and thereafter disposed of, as the lab does not have adequate storage facilities. He maintained that symptoms of having ingested dimethoate will show within twelve hours, but that the various factors he had outlined in examination in chief varied the results.

He could not tell if the substance was in the drink when it was bought, and he stated that he was not aware that carbonated drinks contain the substance.

The accused person in his defence told the court that on 14th January, 2016 he had knocked off from school when his girlfriend PW1 had sent her brother Abraham to call him, as her mother wanted to see him. That when he went there around 18:00 hours, he had found PW1 alone, as her mother had left. She told him to go back there the next day, and as they chatted PW1 had told him that she wanted a tangy drink. The next day a Friday he was busy with school work, and he did not see PW1.

It was only on Saturday that he managed to but the tangy drink after he got money from his uncle Dickson Tembo to buy air time. He stated that he took the tangy drink to PW1 around 18:30 hours that day, and that after she had finished cooking, she had asked him to open it, as she had failed to do so. That he had opened the sealed drink and PW1 drank some, leaving about half. He explained that he left PW1's house around 21:00 hours, after his mother sent him a message to go home, as it was late.

Further in his defence the accused person stated that next day a Sunday he went to church, and in the afternoon he had gone to repair his phone in Chipata compound. Whilst on the bus going home his uncle Dickson Tembo had phoned and asked him to hurry up and go home. When he arrived home he found his mother with his uncles Dickson Tembo and Gershom Chisenga, as well as his aunt Martha Mumba.

They told him that PW1 and her mother PW2. had gone to the house and informed that PW1 was pregnant with his child. He told them that he was aware of the pregnancy, and that he had met PW2 on several occasions, and she had not expressed any anger towards him. That the next day he had gone to town to buy a school bag, and thereafter went to

school. He was apprehended that day around 18:00 hours after PW1's relatives beat him saying that he had given a poisonous drink to PW1.

When taken to the police station he learnt that PW1's cousin had died after he drank some of the drink that he had bought for PW1. He denied having asked PW1 to taste the drink after he had given to her and opened it. He stated that he did not see any black particles in the drink. He further told the court that he had continued loving PW1 after she became pregnant, and they never quarreled. That he would buy her gifts, stating that she liked super shake.

When he was cross examined, the accused person agreed that PW1 was expecting his baby. He stated that he was just a pupil who had no source of income, but did piece works to raise money. He denied that he was not ready to have a child, and he testified that PW1 had lied when she had testified that the accused person had asked if she wanted the tangy drink. He denied that they went together to his house to get the drink, stating that he had taken it to her.

He did however agree that he was alone when he bought her the drink, and that PW1 had testified that he had told the police that he was not sure if the pregnancy she was carrying was his. He also agreed that his lawyer did not cross examine her on this.

I have considered the evidence in this matter. It is a fact that PW1 was pregnant, and that she has stated that the accused person was responsible for the pregnancy. It is also a fact on or about 16th January, 2016, the accused person had given PW1 a tangy drink, and that on 18th January, 2016, PW1 had drank some of that drink, and had given some to her cousins Ignatius Phiri and Davy Mwanza.

It is further a fact that Davy Mwanza fell ill on 18th January, 2016 after taking the drink, and was rushed to the clinic where he was pronounced dead. It is a fact that a postmortem was conducted on Davy Mwanza, and that blood and food specimens obtained from his body were tested toxicology, which revealed that he had consumed dimethoate, commonly known as logo, which caused his death. It is further a fact that PW1 and Ignatius Phiri also fell ill on the 18th January, 2016, and were admitted to the hospital.

The question is whether it has been proved beyond all reasonable doubt that the accused person is the person that killed Davy Mwanza? Murder is defined in Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia as;

> ***"any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder".***

Section 204 of the Penal Code sets out the instances in which malice aforethought may be deemed. It provides that;

> ***"204. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:***
>
> ***(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;***
>
> ***(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not,***

although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

In this case the allegation is that the accused person gave PW1 a drink laced with logo. Therefore the malice aforethought would have to be proved under Section 204 (b), as it is not PW1 who was given the drink alleged to have been poisoned that died, but her cousin Davy who consumed some of it.

The accused person denied having laced the drink with logo. PW1 in her testimony stated that when the accused person opened it for her, he had asked her to taste it, and that upon doing so she had stated that it was okay. It has been seen from the evidence that PW1 did not consume that drink when it was given it to her, but she did so two days later.

This she explained as being that on the night that it was taken to her, she had just eaten supper, and she was full. That the next day her neighbor had invited her to her house, and she left home in the morning, and only returned home in the evening after she had eaten, and therefore did not take the drink. It was the day after that she drank the said drink after having shared it with her two cousins. Her further evidence was that the late Davy Mwanza fell ill after complaining of stomach ache, and he had diarrhea. When he fell seriously ill, PW1 had asked her brother to go and call her mother from work. That PW1 and Ignatius fell ill around 18:00 hours that day.

The accused person disputed PW1 recount of events, stating that he had taken the drink to PW1, and he had not gone with her to his house to get it. He also denied that she took only a sip, when he took it to her, but rather drank half of it while he was with her. PW1 was not cross examined on her evidence that the she had gone with the accused person to his house to get the drink or on the fact she in fact consumed half of the drink, when she was with the accused person.

In the case of ***WINZY SAKALA AND GERALD PHIRI V THE PEOPLE SCZ No 11 of 2009*** where the appellants had on appeal challenged the evidence of identification by the complainant on the basis that she had prior to the identification parade being conducted, been exposed to them, the Supreme Court stated that,

> ***"the assertion by A1 and A2 that PW1 had earlier on seen them at the CID offices at the Lusaka Central Police Station was rejected by the learned trial judge, and rightly so, because it was an afterthought intended by the appellants to extricate themselves. If they were really seen by PW1 at the CID offices, why was she not cross-examined on this very important aspect of their evidence? To have not properly instructed counsel to raise the matter of prior and irregular identification, clearly means to us that nothing of the sort ever took place".***

Similarly in this matter the assertion by the accused person that PW1 consumed half of the drink when she was him at her house cannot stand, as she was never cross examined on this by the defence counsel, which assertion is very critical in this matter, as if she did consume half of the drink and it had been poisoned at the time, she would have shown

symptoms of having done so, in view of PW5's evidence that such symptoms manifest within twelve hours of consuming logo. The evidence in this matter is that after the drink was given to PW1 on 16th January 2016, she only took a sip that day and consumed it on 18th January, 2016.

From the evidence on record, it is not in dispute that Davy fell ill after he drank some of the tangy drink, and that PW1 and Ignatius also fell sick later than Davy, but on the same day, after they drank the drink. The defence in the submissions argues that the prosecution in this matter bear the burden of proving the offence beyond all reasonable doubt and rely on the case of ***WOOLMINGTON V DPP 1935 AC 462*** in support of this position.

It is further their argument that the evidence against the accused person in this matter is circumstantial. They have cited the case of ***DAVID ZULU V THE PEOPLE 1977 ZR 151*** to argue that the circumstantial evidence in this matter is weak, and cannot be relied upon, as there is more than one inference that can be drawn from the facts on record. They state these as, firstly that it is the accused person who put the poison in the drink, secondly that PW1 is the person who put the said poison in the drink, and lastly that PW1's brother who lived with her, could have put the poison in the drink.

The defence also rely on the case of ***DOROTHY MUTALE AND RICHARD PHIRI V THE PEOPLE 1997 SJ 51*** where it was held that;

"where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favorable to an accused if there is nothing in the case to exclude such inference", to argue that as there is more

than one inference that can be drawn from this case, and the accused person should be acquitted.

With regard to the submission that there is only circumstantial evidence linking the accused person to the commission of the offence, I agree. This is because there is no direct evidence on record to the effect that the accused person put the logo in the drink. What is clear is that the late Davy Mwanza, PW1 and Ignatius fell ill sometime after they drank the drink, and that the toxicology results show that all three had consumed logo.

In the ***DAVID ZULU V THE PEOPLE*** case cited above it was held that;

> ***" (i) it is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.***
>
> ***(ii) It is incumbent on a trial judge that he should guard against drawing; wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt".***

Arising from the decision in the above case the question is whether an inference of guilt is the only one that can be drawn from the facts of this case? While the defence argues that three inferences can possibly be drawn from the facts of this case, they have not go further to demonstrate these possibilities that they have just listed. I am alive to

the fact that the prosecution bears the burden of proving the guilt of the accused person in this matter beyond all reasonable doubt, but where an accused person pleads a defence it must be supported with evidence, in order for the court to consider it. It is pointless to just state a defence that is unsupported.

In the case of ***SIBANDE V THE PEOPLE 1975 ZR 101*** where the accused person had pleaded the defence of having married the girl under the age of sixteen years under customary law whom he was charged with having defiled, the court held that ***"the court cannot be called upon to consider, as being possibly the customary law on a particular issue, a purely speculative suggestion completely unsupported by evidence"***.

It was further held in that case that ***"if there is evidence fit to be left to a jury that the parties were married according to customary law the onus would be on the prosecution to negative that suggestion. But it is not enough for an accused simply to say "we are married" or even "we are married according to customary law"; he must at least say "we are married according to customary law because we did this and this", and it would then be for the prosecution to show that the events alleged (assuming they were accepted) did not constitute a valid marriage according to customary law".***

Having said so, a perusal of the evidence on record shows that an inference of guilt on the part of the accused person may be drawn on the basis that PW1 testified that after the accused person had opened the drink for her, he had asked her to taste it. This evidence was not challenged in cross examination, and is therefore credible, and goes to

show that the accused person was aware that there was logo in the drink.

Then there is the evidence that PW2 wanted to discuss with the accused person and his parents over PW1's pregnancy. Both PW1 and the accused person told the court that PW2 had requested to meet the accused and his family, and the accused person even acknowledged that PW1 and PW2 had gone to his house over the same. The accused person is just barely nineteen years, and is in school. The issue of fatherhood at such a young age obviously affected him, even though he did not testify to this effect. It is a possible motive for him to add logo to the drink with a view either to kill PW1 or terminate her pregnancy.

There is also the evidence of PW1 having kept the drink for almost two days before she consumed it with her cousins. Her explanation for having kept it as it that she had cooked and eaten on the day it was taken to her, and that the next day she had spent the whole day at her neighbour's house, and returned home in the night, and as she had again eaten, she did not take the drink.

The evidence shows that PW2 obviously wanted the issue of the pregnancy settled with the accused person and her family, and PW1 testified that PW2 had asked her if the accused person had accepted responsibility for the pregnancy, and she had taken PW2 to the accused person's house. It is therefore possible that PW1 would have wanted to get rid of the pregnancy, like the accused person, and that is why she kept it for two days pondering how she could use it, to get rid of the pregnancy that she was carrying.

There is also evidence from PW1 when she was cross examined that she had left the drink in the house, and had locked the door when she was at

her neighbour's house. However there is no evidence as to where if any her brother who she was living with was that day, as her evidence is that she only returned home in the night. Obviously the brother needed to access the house at one point either to rest or eat, and such an assertion that the house was locked the whole day was made by PW1 to exonerate herself from any wrong doing.

However one would shudder to imagine why she would give other people the drink that she knew contained poison.

The last possibly as advanced by the accused person in the submissions is that PW1's brother could have put the logo in the drink. There is no evidence on record to support such an assertion, and in my view it is not a reasonable inference that can be drawn from the facts of the case. This is a tragic case as an innocent life was lost due to people accessing dangerous substances so easily. However it is possible that between the accused person and PW1, anyone of them could have put the logo in the drink with view I suppose to terminate the pregnancy, no one inference can be drawn from the facts that would take the case out of the realm of conjecture, and an inference of guilt drawn. It is therefore my finding on that basis that more than one inference can be drawn from this case. As such the prosecution has failed to prove the case beyond all reasonable doubt that the accused person did intend to commit the offence of murder, and I find him **NOT GUILTY** and I **ACQUIT** him forthwith.

DATED THE 5th DAY OF JUNE, 2017

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S. KAUNDA NEWA
HIGH COURT JUDGE