IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 31/2017**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

JUSTINE SOKO **APPELLANT**

AND

THE PEOPLE **RESPONDENTS**

CORAM: Phiri, Muyovwe and Chinyama, JJS.
On 3rd October, 2017 and on 7th August, 2018.

For the Appellant:	*Mrs. S.C. Lukwesa, Senior Legal Aid Counsel, Legal Aid Board.*
For the Respondent:	*Ms G. Nyalugwe, Deputy Chief State Advocate, National Prosecutions Authority.*

J U D G M E N T

Chinyama, **JS** delivered the Judgment of the Court.

Cases referred to:

1. **Sakala v The People (1980) ZR 205.**
2. **Chuba v the People (1976) Z.R 272.**
3. **Saluwema v The People (1965) ZR 4.**
4. **David Zulu v The People (1977) Z.R. 151.**
5. **Shawaz Fawaz and Prosper Chelelwa v The People (1995-1997) ZR 36**

Statutes referred to:

1. **The Penal Code, Chapter 87, Laws of Zambia, sections 200, 201.**

The appellant was convicted by the Kitwe High Court on one count of murder contrary to section 200 of the **Penal Code** in that, he on a date unknown but between 14th and 15th November, 2011 at Kalulushi, murdered his wife named Prescovia Chama. He was sentenced to death. The appeal is against conviction and sentence.

The evidence on which the appellant was convicted was that on the night of 14th November, 2011 the appellant and his wife went to sleep around 21:00 hours in their two roomed accommodation. On 15th November, 2011 around 05:00 hours the appellant raised an alarm that his wife had committed suicide by hanging herself from the rafters in the roof in their bedroom. People who rushed there, including the police found the body of the deceased hanging by the neck on a small wire or rope with the feet trailing 15 cm from the floor. PW2 who was among the first people to arrive at the scene particularly stated that the rope was on the chin and not in the neck. He stated also that he left the appellant crying when he went to report the matter to the police. The height of the room was stated to be 3.5m.

There was evidence from the deceased's grandmother (PW1) that the appellant used to beat the deceased; that they used to differ because the appellant was a womaniser.

Dr Olga (PW4), the pathologist at Kitwe Central Hospital who examined the deceased's body, found that the cause of death was intracranial haemorrhage with brain damage. Her testimony went as follows:

> ***"Before I examined the body first, I saw strangulation marks on the neck. After post-mortem, I found dotted blood in vessels in the lungs air, aedema and lungs were red in colour. ... The upper part of neck and lower jaw, strangulation marks without fracture of air pipe (trachea) without hemorrhage in soft tissue. Main cause is intracranial haemorrhage with brain damage. The rope was not given for investigation, I just found marks on the neck. Intracranial haemorrhage was caused by beating and when person was already dead, somebody put her into the rope. That is why I emphasised I found air in lungs and aedema. And no fracture of trachea, no haemorrhage in neck where I found strangulation marks. This was not suicide but murder .... If suicide no air in lungs, aedema in lungs. Strangulation marks must be completely different also no haemorrhage into soft tissue of the neck and no intracranial haemorrhage.***
>
> ***I concluded it was haemorrhage was centre and temporal area, a person can't sustain those kind of injuries on their own."*** (Underlining supplied for emphasis)

She was not cross-examined.

In his defence, the appellant said that on the night of 14th November, 2011 he returned home around 19:00 hours. He was feeling sick. As he entered the bedroom the deceased woke up. They then both slept. Around 04:55 hours he was awakened by the baby who was crying. He stated that he found that the deceased had hanged herself with a chitenge. He alerted other people. He denied beating or killing the deceased.

In cross-examination, the appellant said that he assumed that the deceased tied a wire around the neck which she in turn tied to the rafters holding the roof before she slipped off the washing basket (on which she had climbed). He replied that he never heard any noise but was awakened by the baby crying. He suggested that the rafters may have caused the head injuries. He denied that he had a history of fighting with his late wife but that she had problems with her relatives and had previously tried to commit suicide.

The learned trial judge in the court below accepted Dr Olga's opinion that the deceased could not have committed suicide based on the cause of death but was killed before being hanged. The

learned judge took into account the fact that the deceased had suffered a head injury (before her death) which she could not have inflicted on herself. She noted that the appellant was with the deceased in the bedroom and had the opportunity to commit the offence. She did not accept that the deceased could have strangled herself in the bedroom next to the bed without attracting the appellant's attention. The learned judge took into account the case of **Sakala v The People**[1]. In that case, the appellant had beaten the mother of the deceased boy such that she became unconscious for about eight hours. On regaining consciousness, the mother found the boy and her suitcase missing. The dead boy's body was discovered later. This court found the circumstantial evidence so cogent and compelling that no rational hypothesis other than murder could be reached on the facts.

The learned judge took the position that there was strong circumstantial evidence in the present case and that the appellant inflicted the head injury on the deceased which resulted in her death with malice aforethought.

The learned judge also took into account the evidence of PW1, the deceased's grandmother who testified that the couple used to fight a lot as further fortifying her conclusion.

The appeal is on two grounds: (1) that the trial court erred in law and fact when it failed to find the appellant's explanation in court to be reasonably possible and, therefore, cast reasonable doubt on the prosecution evidence; and (2) that the court below erred by not taking into consideration another inference to be drawn in the matter rather than the inference that the accused caused the deceased's death.

The thrust of the submissions on behalf of the appellant on both grounds of appeal which were argued as one is to the effect that Dr Olga's opinion should not have been relied upon because her examination of the deceased's body did not rule out other causes which could have led to the deceased's death such as injury to the spinal cord which could arise in suicide by hanging cases. Reference was made to a lengthy online treatise by one William Errnoehazy Jr (MD) at http:emedscape./Article.826704. Relying on our decision in the case of **Chuba v The People**[2], it was contended to the effect that

the court below was still duty bound to come to its own conclusion albeit taking into account the opinion of the expert witness. It was alternatively, argued in relation to the head injury which Dr Olga found to have caused the deceased's death that the deceased might have accidentally inflicted it on herself by hitting her head on a rafter (referred to as "capros") after tying the wire around her neck before she slipped off whatever had been supporting her weight. That this was a reasonable account of what could have caused the deceased's death even before the effects of the hanging were manifested. On this basis and citing the case of **Saluwema v The People**[3], it was submitted that a doubt was created and the appellant should have been acquitted. That the appellant's distressed condition attested to by PW3, who said he left him crying when he went to report the matter to the police, indicated that the appellant could not have killed his wife.

It was also argued that the testimony of PW1 did not add any credit to the prosecution's case bearing in mind that being related to the deceased, her testimony was suspect.

There was an alternative submission that if we believe that on the fateful day there was a fight leading to the appellant causing the deceased's death as found by the trial court, the fight qualifies as an extenuating circumstance warranting a sentence other than the death penalty.

In response to the foregoing submissions, it was submitted on behalf of the respondents in respect of the two grounds of appeal that the trial court was on firm ground in finding that the explanation given by the appellant was neither probable nor reasonably possible on the facts of the case; that the court did not misdirect itself at law or in fact when it convicted the appellant on circumstantial evidence as the inference of guilt was the only reasonable one that could be drawn from the facts of the case. Counsel relied on the cases of **David Zulu v The People**[4] and **Sakala v The People**[1] to support the submissions. It was counsel's submission that the trial court properly accepted PW1's evidence that the appellant used to beat the deceased during the marriage and the evidence of PW4 which ruled out suicide but confirmed that the deceased was already dead before she was hanged. In doing so the trial court found that the danger of

false implication by PW1 had been removed by the fact, as we understood the submission, that even though the witness wanted the appellant to be punished, she was aware that it was up to the court to decide.

As for PW4 it was pointed out that the evidence of this witness was never challenged during the trial; therefore, that the reference to the online article by William Errnoehazy is misplaced and an irregular attempt to challenge the veracity of PW4's evidence. Counsel agreed with the trial court's conclusion that the appellant's explanation of what transpired was incredulous and neither reasonably possible nor probable. According to counsel, the explanation was illogical and rebutted by PW1's evidence which alluded to the probability that the appellant who used to beat the deceased during the marriage must have beaten her up on the occasion; further that the evidence of PW4 showed that the deceased was already dead when she was hanged. Counsel also pointed out the fact that in disregarding the explanation by the appellant, the lower court was not impressed by the appellant's demeanour and

described his testimony as "verbose, calculated and well thought out".

Counsel also discounted the suggestion that the deceased could have hit her head in the rafters after hanging herself on the basis of the evidence of PW2 that the rope from which the deceased was hanging was placed around the chin which in turn confirmed PW4's evidence that someone must have placed the rope around the deceased's neck after killing her.

Counsel did not address the alternative argument raised on behalf of the appellant that should we find that there was a fight between the couple on the fateful night, we must then find that to amount to extenuating circumstances. On the basis of the foregoing, we were urged to dismiss the appeal and confirm the conviction and the sentence.

We have considered the evidence and the judgment of the lower court as well as the submissions by the respective advocates. The question indeed is whether the deceased committed suicide as stated by the appellant or was killed before she was hanged as opined by Dr. Olga. The basis for the pathologists opinion was the head injury,

the air in the lungs and the dotted blood which she said should not have been there if the case was a suicide. In the case of **Shawaz Fawaz and Prosper Chelelwa v The People**[5] this court said the following about the evidence of an expert witness such as a pathologist:

> ***"When dealing with the evidence of an expert witness, a court should always bear in mind that the opinion of an expert is his own opinion only and it is the duty of the court to come to its own conclusion based on the findings of the expert witness... It can only be used to guide, albeit a very strong guide, to the court in arriving at its own conclusion on the evidence before it..."***

We reiterate this statement of the law. We would also add that where on the facts, the conclusion reached by the expert is inescapable or the only reasonable one, a court has little option but to accept the conclusion. In the case before us, the pathologist gave reasons why she thought that the deceased was killed before being hanged to give the impression of a suicide. The reasons are scientific and quite compelling. It is also notable that the pathologist was not cross-examined on her assertions. The suggestions by the appellant and his advocate that the deceased might have hit her head in the rafters or might have died as a result of the hanging based on William

Errnoehazy's article are based on assumption and do not displace the reasons given by the pathologist and her conclusion that the deceased was already dead before the noose was put around her neck. From our lay understanding of the argument, if the deceased had died from the hanging the findings by the pathologist should have been consistent with that circumstance. The findings, however, led to the conclusion that the deceased was already dead before she was hanged. The issues whether or not the couple used to fight or that the appellant cried in the presence of those who came to his home are, in our view, not important in this matter. What is important is that the appellant was, besides the baby, the only one in the room with the deceased who died in the manner explained by the pathologist.

As we said in the case of **Sakala v The People**[1] where the circumstantial evidence is so cogent and compelling that no other rational hypothesis, on the facts available could be reached, there is no option but to accept the conclusion that in the circumstances of the case it is the accused who inflicted the fatal injury that led to the death of the deceased. On the facts of this case, we agree with the

trial judge's finding that the only reasonable conclusion is that the appellant is the one who inflicted the fatal injury that led to the death of the deceased. We find no evidence to show that a conclusion other than the one reached by the pathologist should have been arrived at. In the light of the cause of death as found by the pathologist the trial court properly imputed that the appellant had the requisite malice aforethought and convicted him for the offence of murder. The appeal against conviction has no merit.

It was suggested on behalf of the appellant that should we find that the couple fought on the fateful night then we should regard this as amounting to extenuating circumstances which would entitle the appellant to any sentence other than that of death in terms of section 201 of the **Penal Code**. The appellant did not say that he fought with his wife that night. PW1's evidence was not about what happened that night but about the appellant's alleged tendency to beat his wife in the course of their marriage. PW4 is the only one who alluded to the deceased being beaten but this is not synonymous with a fight. A fight suggests a physically violent contest which there is no evidence of in this case. We are unable, therefore, to find that there was a fight

between the couple that night. But even if there had been a fight, we would not find the existence of extenuating circumstances without more. We, accordingly, find nothing in the evidence on record that amounts to extenuating circumstances to mitigate the sentence of death imposed. We find no merit in the appeal against sentence.

The entire appeal is accordingly dismissed and the conviction and sentence are upheld.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE