IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 135/2017**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

SHADRECK BANDA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: *Makungu, Mulongoti, Sichinga, JJA*
On the 27th day of March, 2018

For the Appellant: *Mrs. M. Kapambwe – Chitundu – Deputy Chief State Advocate, Mr. E. Mazyopa – Senior Legal Aid Counsel*
For the Respondent: *Ms. P. Nyangu – State Advocate*

JUDGMENT

Sichinga, JA, delivered the Judgment of the Court

Cases referred to:

1. *Mwewa Murono v. The People (2004) ZR 207*
2. *Kalebu Banda v. The People (1977) ZR 169*
3. *Joe Banda v. The People Appeal No. 183 of 2013, SC*
4. *David Zulu v. The People (1977) ZR 151*
5. *Ex-parte The Minister of Justice in Re R v. Jacobson and Levy (1931) AD 466*
6. *Elias Kunda v. The People (1980) ZR 100*
7. *Bwanausi v. The People (1976) ZR 103*
8. *Donald Fumbelo v. The People SCZ Appeal No. 476/2013*

9. *Kashenda Njunga v. The People (1988-89) ZR 1*

10. *Chitalu Musonda v. The People SCZ Appeal No. 138 of 2014*

11. *Mutale and Phiri v. The People (1995-97) ZR 227 (SC)*

12. *R v. Hochman, Vokey and Peable (1956) 113 CCC 319 (CAN)*

13. *Attorney-General v. Kakoma (!975) ZR 212 (SC)*

14. *Ilunga Kabala and John Masefu v. The People (1981) ZR 102 (SC)*

15. *Edward Sinyama v. The People (1993) SJ 15 (SC)*

16. *Nzala v. The People (1976) ZR 221*

This is an appeal against conviction and sentence arising from the Judgment of the High Court delivered on 12th February, 2016.

The appellant, Shadreck Banda, was convicted on one count of murder contrary to Section 200 of the Penal Code, Chapter 87 of the laws of Zambia, and sentenced to death. The particulars of the offence were that the appellant, on the 10th day of June, 2015 at Lusaka in the Lusaka District of Lusaka Province of the Republic of Zambia, did murder Beatrice Zulu (hereinafter referred to as the deceased).

The evidence adduced by the prosecution was that on a date unknown, around 21:00 hours, the appellant reported to his step-

daughter, PW1 that her mother, the deceased had been burnt. He returned to his house with PW1 and found the deceased crying. She had been burnt from head to abdomen, and her skin had peeled off. According to PW1, she asked her mother what had happened, but she did not respond. PW1, in the company of the appellant and others then took her mother to Chawama Clinic for treatment. The following day, she returned to her parents' home to check on the deceased. The appellant requested PW1 to take the deceased to Kabwe so that she could be nursed by her parents. At Kabwe, PW1 said her grandparents were surprised to see the deceased in that state. The deceased's mother called for the area chairman, PW3, to check the extent of her daughter's injuries. When PW3 arrived at the deceased's mother's home, the deceased was taken to him in the sitting room with the aid of others. He observed she was covered in chitenge cloth. She was uncovered for him to see her injuries. He said her whole face and body was burnt, and her skin had peeled off. PW3 asked the deceased what had happened to her. He said the deceased told him that the appellant, her husband, had poured beans on her after his disappointment at her failure to prepare a meal of nshima and roasted pork. That the

appellant found the deceased asleep and poured the beans on her. According to PW3, he encouraged the deceased to report the incident to the police. PW3 subsequently hired a vehicle which ferried the deceased and others to the police and the hospital.

PW2, the deceased's young sister, and PW4 the appellant's sister testified that they visited the deceased at Kabwe General Hospital. They met the appellant there and PW2 informed him that a medical report had been issued by the police to the deceased in which she implicated him. The appellant left the hospital and never returned until after the demise of the deceased. It was PW2's testimony that the deceased told her that the appellant poured a hot pot of beans on her because she did not prepare his preferred meal of nshima and roasted pork. PW4 confirmed PW3's testimony that the deceased said her husband had poured hot beans. All the witnesses testified that they observed severe burn wounds on the deceased on her face and body. The skin had peeled off except for the nipples.

On 18th May, 2015, PW5, a police officer recorded a complaint from the deceased that she had beans poured on her by her husband, Shadreck Banda. PW5 observed that the deceased had severe burns on her face and body. She did not record a statement from her because her condition worsened whilst at the station and she had difficulty in speaking. PW5 issued her with a medical report and allowed her to be rushed to Kabwe General Hospital where she was admitted, and on 10th June, 2015 PW5 learnt of the deceased's demise.

In his defence, the appellant denied having been with the deceased when she was burnt on 16th May, 2015. He stated that on the material day around 17:00 hours, he was at his work, at a makeshift stand which was far from his home. He was in the company of his friends, DW3 Bwalya, DW2 Matangala George, and his young brother, Borniface Banda. Around 18:00 hours a young child, DW4 Aggie, from the neighbourhood informed him that his wife was drinking beer whilst she was cooking beans and when she went in the house to check on the beans, she shouted that she was burnt. According to the appellant, the child only heard the deceased

scream that she had been burnt and she told the child to call him. The appellant stated that he left his shop later to check on the deceased in the company of his friends and brother. According to DW2 the appellant returned 8 minutes later after he went with the child. DW2 could not remember other events as he was drunk. DW3 said the appellant returned to the shop to inform his friends that there had been an accident at his home. The appellant stated that he found his wife in agony, screaming that she was dying. He took off her blouse and poured water on her. He also smeared eggs and aloe vera on her. After that he went to inform his daughter, PW1, that there had been an accident at his home. In the company of PW1 and others he took the deceased to Chawama Clinic where the deceased informed the doctor that she felt dizzy after drinking beer and she fell on the pot of beans. The appellant stated that the doctor did not initially give her any medication because she appeared drunk. After he pleaded with the doctors, they administered an injection and gave the deceased panadol. The deceased was referred to UTH but the appellant did not take her there as he did not have any money. On the advice of his mother-in-law, he sent her to Kabwe with PW1. He further narrated that he

visited his wife in Kabwe and she was able to speak. He insisted that the deceased told him that she had been drinking and fell on the pot of beans which was on a brazier. He added that he had been happily married to the deceased for 27 years although they had no children together.

According to DW4, she was seated on the veranda of her home when she heard the deceased calling out for help that she had been burnt. DW4 then went to call the appellant to attend to his wife, and the appellant did so in the company of his friends DW3 and George. She followed them but remained outside the appellant's house.

DW5, a neighbour to the appellant, and mother to DW4 returned home around 21:00 hours and found a lot of people gathered around the appellant's house. She learnt of what had happened to the deceased and followed the appellant and others as they took the deceased to the clinic. Whilst at the clinic, she said the deceased informed the doctor that she fell on the fire as she was drunk.

In her judgment, the learned trial Judge noted that there were no eye witnesses who saw how the deceased got burnt. She found that the prosecution's case rested on circumstantial evidence. The court warned itself against drawing wrong inferences from the circumstantial evidence. The court determined that PW5, (the police officer) and PW3, (the neighbourhood chairman) were independent witnesses, and as such accepted their testimony to the extent that the deceased told them that she was burnt by the appellant, who poured hot beans on her after she failed to prepare his preferred meal of nshima and roasted pork.

The learned trial judge considered the appellant's defence that the deceased was burnt when she fell on the pot of beans which she was cooking as she was drunk, and dismissed it as an afterthought. The court found that the deceased's burns were consistent with the fact that hot beans were poured on her. The learned judge found that the appellant's evidence was inconsistent with that of DW4 to the extent of the position in which the deceased was in after she was discovered burnt.

The court further considered the defence of *alibi* as raised by the appellant that he was with DW2, DW3 and his younger brother who were drinking at his makeshift stand from 06:00 hours up to the time that the appellant was called by DW4 around 18:00 hours. The court found that the testimonies of DW2 and DW3 were contrary to the appellant's version. The learned trial Judge thus found that the appellant had the opportunity to go to his home and return to his shop after assaulting the deceased because it was nearby. Further because DW2, who said he had been with the appellant from 10:00 hours till he was called by DW4 could not remember if the appellant had left his shop at the material time. The court found inconsistences between the appellant and his witnesses regarding the time DW4 had called him to attend to the deceased.

The learned trial Judge found the appellant's version that the deceased told him that her mother had lied by reporting that the appellant had burnt her. The Judge reasoned that this cannot reasonably be true in the light of evidence by PW2 and PW4 who had both told the court that the appellant did not stay for long

when he visited the deceased at Kabwe General Hospital, after he was told that the deceased had said he poured the hot beans on her.

The learned trial Judge further found it odd that the appellant did not visit his wife of 27 years, whom he proclaimed he loved, during the period of about a month when she was admitted into hospital. The court found that the evidence of PW1 was corroborated by that of DW5 to the extent that the appellant refused to take the deceased to UTH where she was referred on account that he had no money. However, he later sent PW1 to take the deceased to Kabwe. The court found that the appellant's statement that his mother-in-law had requested him to send the deceased to Kabwe instead of taking her to UTH to be not reasonably true.

The learned trial Judge concluded that she was satisfied that the circumstantial evidence was cogent to permit only an inference of guilt. She was satisfied that the prosecution had discharged its burden of proof beyond any reasonable doubt. She found the appellant guilty of murder and that there were no extenuating

circumstances to entitle the appellant to a custodial sentence other than the mandatory death sentence, which she passed.

Dissatisfied with the Judgment of the court below, the appellant now appeals against the conviction. One ground of appeal has been advanced by the appellant, set out as follows:

> *"The learned trial Judge misdirected herself in law and fact when she convicted the appellant on circumstantial evidence when the inference of guilt was not the only reasonable inference which could possibly be drawn from the facts."*

Both counsel filed in written heads of argument which they briefly orally augmented.

In his filed submissions, Mr. Mazyopa, learned counsel for the appellant submitted that the evidence in this matter was clearly circumstantial. That there were two stories on record as to how the deceased was burnt. The first, he stated, was that when the deceased was found with burns, she was rushed to Chawama clinic by the appellant and some neighbours. At the clinic she told the

doctor, after she was questioned about her injuries, that she had fallen and come into contact with a pot of beans which was on a brazier placed one metre high on a table. The brazier and the pot fell on her and the hot beans burnt her causing the serious burns.

The second story is that, the deceased told her mother and the area chairman, that the accused poured some hot beans on her thereby causing her to sustain serious burns. He submitted that since no one saw the appellant in the act of pouring the hot beans onto the deceased, the case clearly rested on circumstantial evidence. Counsel relied on the case of ***Mwewa Murono v. The People***[1] where the Supreme Court held:

> ***"In criminal cases the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from beginning to end on the prosecution. The standard of proof must be beyond all reasonable doubt."***

Counsel argued that it was clear from the record that the deceased gave an explanation to the doctor at Chawama Clinic that she felt dizzy and fell, in the process hit onto a pot of hot beans which was

cooking on a brazier as a result of which the hot beans poured onto her and burnt her. It is submitted that the appellant was not home when the deceased got burnt but was at his makeshift shop with others. That this evidence by the appellant was corroborated by DW4 who told the court that the deceased sent her to fetch the appellant to come to her aid. He further submitted that it was surprising that the arresting officer (PW6) did not extend his investigations to Chawama clinic to interview the doctor that attended to the deceased. This would have assisted the case because the referral note from the clinic to the University Teaching Hospital (UTH) would have been retrieved, and PW6 would have learnt from the doctor, if indeed he had refused to attend to the deceased because she was drunk.

With regard to the evidence relating to the appellant's alibi, Mr. Mazyopa submitted that PW6 ought to have also visited the people that were with the appellant when he said he spoke to the deceased whilst she was hospitalised in Kabwe.

Counsel argued that whilst PW5 told the court that the deceased reported to the police at Bwacha Police Station in Kabwe that the appellant had poured beans on her, and that her situation worsened after that, PW5 never made any effort to see the deceased in hospital. If it was true that the deceased had stopped talking whilst at Bwacha Police Station, then PW5 ought to have made a follow up by recording a statement from the deceased at the hospital. He argued that it was not on record that the deceased never spoke from Bwacha Police Station to the hospital until she died.

It is thus submitted that PW6's failure to carry out investigations at Chawama clinic and his failure to investigate the alibi, as well as PW5's failure to visit the deceased at the hospital in an effort to record a statement from her, amounts to dereliction of duty. For this proposition he cited the case of ***Kalebu Banda v. The People.***[2]

With regard to the trial court's findings that there was no evidence that the deceased was seen drinking or was drunk, and that the

appellant's evidence to that effect was an afterthought, Mr. Mazyopa submitted that the appellant was entitled to bring before the court below any relevant evidence in his defence. His defence therefore, was not an afterthought. For this he referred us to the case of ***Joe Banda v. The People.***[3]

Counsel argued that it could not be said that the circumstantial evidence before the court below had proved the case against appellant beyond reasonable doubt in line with the case of ***David Zulu v. The People.***[4]

Counsel submitted that whilst the court had indicated that since the appellant's makeshift shop was near his home, it was possible for him to go home and commit the crime, what remained hard to understand was how the deceased sent DW4 to the appellant to come to attend to her. He argued that there was no recovery of any roasted pork in the house apart from the beans which burnt the deceased.

Counsel argued further that whilst the deceased said the appellant poured the hot beans on her where she was lying, it had not been

shown through evidence whether the beans were found in bed or where exactly in the house she was lying. He further submitted that the prosecution did not prove the case against the appellant beyond reasonable doubt. Counsel relied on the cases of ***Ex Parte The Minister of Justice in Re R v. Jacobson and Levy,***[5] ***Elias Kunda v. The People***[6] and ***Bwanausi v. The People***[7] to buttress the position that the plea of guilty was not the only reasonable inference that could be drawn from the evidence on record. Counsel thus urged us to quash the conviction, set aside the sentence and acquit the appellant.

In response, Ms. Nyangu, learned counsel for the respondent, contended that the trial court was on firm ground when it convicted the appellant as an inference of guilt was the only possible inference that could be drawn from the facts. She pointed out that the appellant's assertion that the failure by PW6 to go to Chawama clinic to investigate the *alibi* and also PW5's failure to visit the deceased at the hospital to try and record a statement from her amounts to a dereliction of duty, was incorrect as there was no

dereliction of duty as the police presented all the obtainable and available evidence before the court.

She submitted that it could be noted from the record of proceedings and the impugned judgment that the appellant only referred to the deceased having been taken to Chawama clinic at defence stage and therefore no questions were put to the prosecution witnesses to challenge this piece of evidence. Counsel submitted that the appellant's assertion was therefore an afterthought and carried very little weight in accordance with the case of ***Donald Fumbelo vs. The People.***[8]

Ms. Nyangu, further submitted that the holding in the case of ***Kalebu Banda v. The People (supra)*** requires that the evidence be "available" and "obtainable" for PW6's failure to amount to dereliction of duty. Counsel submitted that the evidence in *casu* was neither available nor obtainable by the police as information was not availed to the police during investigations.

In respect of PW5's failure to record a statement from the deceased at the hospital, it was argued that her inaction did not amount to a dereliction of duty as the deceased stopped talking in the course of telling PW5 what had happened to her, and therefore it is an unreasonable expectation that PW5 should have returned to the hospital and recorded a statement from her as such an effort would have proved futile. Counsel concluded that the trial court was on firm ground to convict the appellant for the offence of murder as the evidence, though circumstantial in nature, was so cogent that the only possible inference that could be drawn from the facts was that the appellant poured hot beans on the deceased thereby causing the burn wounds, leading to her death. She urged us to dismiss the appeal for lack of merit.

In her oral submissions, Ms. Nyangu submitted that the circumstantial evidence was such that there was a time frame within which the appellant could have returned to the house in light of the fact that time was not accounted for by the defence witnesses. She contended that there was sufficient evidence that the appellant returned to the house and burnt the deceased. She

submitted that it was highly probable that it was true. Counsel pointed out that the appellant said in the same breath that the deceased was found sitting and that she was lying down.

Counsel submitted that the deceased suffered burns on her head, chest, arms and back which was inconsistent with the appellant's assertion. That PW4 also observed that the deceased had been burnt on her head, face, chest and back. Counsel conceded that the post-mortem report was inconsistent with burns sustained as a result of a fall. She submitted further that it was not necessary to call a pathologist in this case given the circumstances and the timeframe. To fortify this she relied on the case of ***Kashenda Njunga v. The People.***[9]

As regards the credibility of DW4, counsel submitted that she had a possible interest to serve because she was a neighbour to the appellant.

In his brief oral response, Mr. Mazyopa submitted that the state had not proven the case beyond reasonable doubt. He argued that it was on record that the deceased was lying down when she was

burnt. However, it was not resolved as to whether the beans were found on the bed or elsewhere.

Counsel urged us to interfere with the finding of fact that the deceased was poured with hot beans as there was doubt as to how the burns were sustained.

We have considered the Judgment of the lower court and the submissions of learned counsel for both parties, as well as the authorities cited regarding the sole ground of appeal. This court is, in effect, being called upon to determine firstly whether, on the evidence before the trial court, the prosecution did prove the offence of murder pursuant to section 200 of the Penal Code. Secondly whether the circumstantial evidence takes the case out of the realm of conjecture so as to attain such a degree of cogency which permits only an inference of guilt?

It is common cause that on the 16th May, 2015, the deceased, Beatrice Zulu sustained serious burns on her body. She was subsequently hospitalised at Kabwe General Hospital where she died on the 10th June, 2015. According to the post-mortem report,

the cause of death was stated as ***burns of 15-20% of the skin surface, 2-3 degree. Infected wound surface, sepsis, bilateral purulent pneumonia, lung edema.*** It is further not in dispute that there were no eye witnesses who saw how she was burnt. The learned trial Judge relied on circumstantial evidence. In this regard, we wish to restate the position that the Supreme Court has taken with regard to circumstantial evidence. In ***David Zulu v. The People (supra)*** the Supreme Court stated as follows:

> ***"It is incumbent upon a trial judge to 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."***

In the case of ***Chitalu Musonda v. The People***[10] the Supreme Court had this to say:

> ***"It is pertinent to recall that where the evidence against the accused is purely circumstantial, and his guilt is entirely a matter of inference, an inference of guilt may***

not be drawn, unless it is the only inference which can reasonably be drawn from the facts."

On the facts of this case, we find that the learned trial court correctly assessed the conflicting evidence before her and cannot be faulted. In the case of ***Attorney-General v. Kakoma***[13] the Supreme Court stated thus:

"A court is entitled to make a finding of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it and having seen and heard the witnesses giving that evidence."

In our judgment the trial judge rightly rejected the appellant's version of what transpired and correctly held that the circumstantial evidence was cogent and connecting the appellant to the offence. We note at page J92 of the Judgment that the court below considered the evidence by DW5 who testified to the effect that the deceased said she fell on the fire and agreed that she was drunk. The trial Judge discounted that version of events because

DW5's evidence like that of the appellant was not consistent with the injuries that the deceased sustained.

We also agree with the court below that there were other instances which were odd. It is common ground that the deceased suffered severe burns which required urgent treatment. The appellant in his evidence, said she was referred to UTH. However, he could not take her to UTH as he had no money. It was odd that the following day on 17th May, 2015 he found K75 and directed PW1 to take her to Kabwe.

Further, the trial Judge properly considered that the appellant, though stating that he was happily married to the deceased for 27 years only visited her once and left abruptly after PW2 and PW4 informed him that she made a report to the police in which she implicated him for her burns. His failure to visit his wife was such an odd coincidence as contemplated in the case of ***Ilunga Kabala and John Masefu v. The People*** [14] where the Supreme Court had this to say:

"It is trite law that odd coincidences, if unexplained, may be supporting evidence. In our view, an explanation which cannot reasonably be true is, in this connection, no explanation."

We cannot fault the learned trial Judge for finding the appellant's explanations untrue. The explanations the appellant gave for not taking his wife to UTH, or for not visiting her in hospital were not probable and reasonable. The Judge was on firm ground that his version of events is one that cannot reasonably be true.

In relying on the evidence of PW3 and PW5 whom the trial Judge found to independent, we opine that the learned trial Judge erroneously took into account what was said to them by the deceased as *res gestae*. In the case of ***Edward Sinyama v. The People,*** [15] the Supreme Court said:

"In matters of res gestae, if the statement has been made in conditions of approximate, though not exact, contemporaneity by a person so intensely involved and so in the throes of the event that there is no opportunity for concoction or distortion to the disadvantage of the defendant or the advantage of the maker, then the true

test and the primary concern of the court must be whether the possibility of concoction or distortion should actually be disregarded in the particular case."

In *casu*, the statement was not made in conditions of approximate and there was time and opportunity for the possibility of concoction and thus the statement was not *res gestae*. Thus the testimony of PW3 and PW5 is inadmissible hearsay to the extent of what was said to them by the deceased.

DW4, was a witness under the age of fourteen. Section 122 of the Juveniles Act, Amendment No. 3 of 2011 is clear that:

"Where in any criminal or civil proceedings against any person, a child below the age of fourteen is called as a witness, the court shall receive the evidence, on oath, of the child if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and understands the duty of speaking the truth."

We note that the trial court did not conduct a *voire dire* before accepting the testimony of DW4. The effect of not conducting a *voire dire* is that DW4's testimony has to be discounted altogether.

However, on the facts and evidence before the trial Judge, we agree with her that the circumstantial evidence has taken the case out of the realm of conjecture so as to attain such a degree of cogency which can permit only an inference of guilt. ***Zulu v. The People supra***, followed.

The trial Judge found that the appellant's makeshift bar was near to his house, page 15 of the record of appeal refers. Furthermore, his witnesses DW2 and DW3 testified that when he left with DW4, he was back at the stand in 8 minutes. The trial Judge reasoned that since it was not in dispute that the makeshift bar was near the appellant's home he had an opportunity to go to his home and assault the deceased and get back to the bar; and DW2 who was with him for a longer period could not remember if he had left at some point and went back.

Further, the Judge reasoned that the wounds were not consistent with a fall as suggested by the appellant.

Regarding the defence of alibi and dereliction of duty as argued by Mr. Mazyopa, the learned trial Judge considered the appellant's

alibi and found that the evidence of DW2 and DW3 showed that the appellant's alibi of being at his makeshift bar the whole time from 07:00 hours to 21:00 hours when he was called, was not solid as the possibility and opportunity was there for him to go to his home and assault the deceased. In the case of ***Nzala v. The People,***[16] it was held, *inter alia*, that:

> ***"Where an accused person on apprehension or arrest puts forward an alibi and gives the police detailed information as to the witnesses who could support that alibi, it is the duty of the police to investigate it."***

It therefore follows, that whilst the burden of disproving the alibi is on the prosecution, the accused person must avail the evidence on which the alibi is dependent. In this case, the evidence of the alibi was not cogent as found by the learned trial Judge because both DW2 and DW3 could not vouch for the appellant that he had been with them at the material time. Therefore the learned trial Judge cannot be faulted for rejecting the alibi. The failure by the police to investigate the alibi does not negate the fact that there were other cogent evidence which implicates the appellant.

From the foregoing, we find that the trial court was on firm ground when it found that the circumstantial evidence was strong and compelling to justify the conviction of the appellant. The finding that he was guilty of murder is supported by such strong circumstantial evidence that no rational hypothesis other than the inference that the appellant committed the offence can be drawn. The net result is that we find the appeal devoid of merit, and dismiss it accordingly. The sentence of death is upheld.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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J.Z. MULONGOTI
COURT OF APPEAL JUDGE

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D.Y. SICHINGA
COURT OF APPEAL JUDGE