IN THE SUPREME COURT OF ZAMBIA Appeal No. 71/1983

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

B E T W E E N:

FICKSON MUMBA Appellant

-v-

THE PEOPLE Respondent

CORAM: Ngulube, D.C.J., Gardner and Sakala, JJ.S.
15th July, 1987

For the Appellant : Mr. C. P. Sakala, Acting Director of Legal Aid

For the Respondent : Mr. F.M. Mwiinga, Director of Public Prosecutions

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J U D G M E N T

Ngulube, D.C.J., delivered the judgment of the court.

Case referred to:

(1) Liyumbi -v- The People (1978) ZR 25

The appellant was sentenced to death for murder. The particulars were that on the 1st July, 1981 at Lusaka, the appellant murdered Abayasiri Ananda. The brief facts of the case were that on 1st July, 1981 early in the morning, the appellant-who was the deceased's servant-reported for work and demanded to be paid his wages for the previous month. The deceased was unable to oblige at that early hour of the morning but the appellant persisted with his demand. The deceased a Srilankan-was living in a flat and, at the time, there were only the deceased and the appellant in the said flat. There was evidence from PW6, a neighbour, that she heard screams emanating from the flat as well as sounds suggesting that a struggle was in progress. At some stage in the proceedings PW6 heard someone in the flat calling PW5's name saying "Island, I am dying, Island, I am dying!" Island was PW5 the deceased's former servant who had at that point in time come to knock at the flat after a month long absence due to mental illness. Island came to ask for his unpaid wages and for his job back. The appellant told PW5 that the deceased was not around, which was not true. PW6 had also heard some screams in Bemba calling "mayo! mayo!" which the learned trial judge said might still have been the Sri-lankan deceased calling out. The appellant in his own evidence said it was he who was screaming in Bemba.

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It was common ground in this case that the appellant had killed the deceased by stabbing him at least twelve times, according to the medical evidence. It is also common ground that the appellant came out of the flat with broken teeth and a swollen face. The appellant raised a defence of self-defence in which he alleged that it was the deceased who, after objecting to the appellant's demand to be paid, pushed and punched the appellant. There ensued a pitched fight in the course of which the deceased collected a knife and attempted to stab the appellant but the appellant got hold of the knife and stabbed the deceased twice only in self-defence. The learned trial judge correctly recited the law and directed himself on the principles of self-defence. He then turned to facts of the case. He contrasted what the appellant said in evidence with what was contained in a warn and caution statement as translated in English and found that the appellant had made inconsistent statements, that he had lied about his length of service as well as about the presence of the deceased in the flat when PWs 5 and 6 confronted him. The learned trial judge found that, because of these inconsistencies and lies, the sworn evidence of the appellant was not to be accepted. He found that the appellant was not in immediate danger and was not justified to use a knife and that the appellant himself must have been injured when the deceased was trying to protect himself. The appellant also pleaded provocation which the learned trial judge found to have consisted of the refusal or the failure by the deceased to pay the wages. He found that such provocation could not justify the assault on the deceased.

On behalf of the appellant, Mr. Sakala, the Acting Director of Legal Aid, has advanced three grounds of appeal. The first alleges a misdirection in the finding that there was malice aforethought. The argument was that the attack was lawful because it was in self-defence. Since this ground is related to the one on self-defence, we propose to consider them together. Mr. Sakala has submitted that the appellant in his defence had given evidence which showed that there was reasonable self-defence when the deceased fetched the knife and after being disarmed by the appellant still managed to get it back and tried to stab the appellant. The argument on this ground was that the appellant was justified in thinking that, unless he stabbed the deceased, the latter would still retake the knife and use it against him. In opposing the submissions under this head, the learned Director of Public Prosecutions, Mr. Mwiinga has argued that at the time when the appellant had the knife in his possession and was attacking the deceased with it, he could not

reasonably be regarded as having been then acting in self-defence. Mr. Mwiinga has argued further that, in any case, the infliction of twelve wounds was excessive even in self-defence. It was pointed out that, even on the appellant's own account, once he had paralysed the deceased with the second stabbing, the infliction of numerous subsequent injuries could not have supported self-defence.

We have considered this ground of appeal and have no doubt in our minds that the learned trial judge was on firm ground when he rejected the defence of self-defence. We agree with Mr. Mwiinga that, once the appellant had already disarmed the deceased person, he could not have been in mortal peril of his life and the possibility suggested by the learned Acting Director of Legal Aid that the appellant feared that the deceased might retake the knife, is not supported by the facts. That ground of appeal fails.

Mr. Sakala has also argued in the alternative that the defence of provocation ought to have been allowed. He critises the finding by the learned trial judge that the provocation consisted of the failure to pay wages. If we understood the learned Director of Public Prosecutions correctly, he conceded that there was a misdirection in this respect. Quite clearly the appellant in his testimony was alleging that what provoked him and what led to the fight was that the deceased pushed him around and punched him. The appellant's position was that it was the deceased who started the fight in the course of which the appellant had four of his front teeth broken. Further, the appellant's position was that it was the deceased who went and fetched the knife and attempted to use such knife against him. That, in our view, was clearly the provocation which the appellant was contending for and not simply that the deceased failed to pay wages.

It has been argued on behalf of the State that even on that basis the retaliation on the part of the appellant was out of proportion to the provocation. We are in some difficulty in this matter, since, quite clearly it is impossible for this court to say what the learned trial judge would have found had he considered the actual provocation which was canvassed before him. It is quite possible that the provocation described by the appellant, including the loss of teeth and the introduction of the knife by the deceased, would not have been considered as trivial so as to conclude that the use of a knife-which was to hand and which was introduced by the deceased himself-was unreasonable in the circumstances.

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We are, of course, fully aware of the authorities on the question of provocation, including our own decisions in such cases as Liyumbi -v- The People (1) in which we said that there are three conditions to this defence which must exist at the same time for it to succeed. Briefly, these are the act of provocation both actual and reasonable, the loss of self-control and retaliation which should be proprtionate to the provocation. On the facts of this case, as we have already indicated, we are in some doubt whether the retaliation adopted by the appellant in using the knife introduced by the deceased was so disproportionate as to disentitle him to the defence. We resolve the doubt in favour of the appellant and uphold this ground of appeal. It follows, therefore, that we allow the appeal against conviction on the charge of murder and in its place we substitute a conviction of manslaughter contrary to section 199 of the Penal Code.

We have considered most anxiously the facts of this case and the fact that there was an unnecessary loss of life. We bear in mind also that manslaughter is a serious offence, though of course, each accused person should be sentenced in accordance with the facts of the particular case. In this case we consider that a sentence of ten years imprisonment with hard labour is adequate to serve the ends of justice. This sentence will take effect from 2nd July, 1981, when the appellant was taken into custody.

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M. S. Ngulube
DEPUTY CHIEF JUSTICE

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B. T. Gardner
SUPREME COURT JUDGE

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E. L. Sakala
SUPREME COURT JUDGE