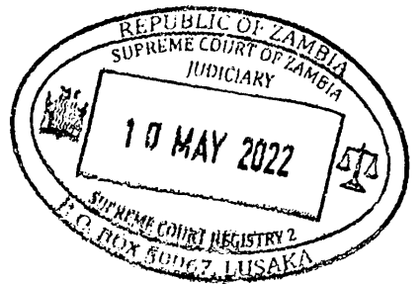
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 122/2021**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)



BETWEEN:

THOKOZANI JAMES MBEWE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Hamaundu, Kajimanga and Chinyama, JJS
On 10th August, 2021 and 10th May, 2022

For the Appellants: Ms K. Chitupila, Senior Legal Aid Counsel

For the State : Mrs A. K. Mwanza, Senior State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the judgment of the Court

Cases referred to:

1. **Kenmuir v Hatting (1974) ZR 162**
2. **Malawo v Bulk Carriers of Zambia Limited (1978) ZR 185**
3. **Whiteson Simusokwe v The People (2002) ZR 63**
4. **Jack Chanda & Another v The People (2002) ZR 124**
5. **Jose Antonio Golliadi v The People, Appeal No.26/2017**

The appellant appeals against conviction. He also appeals against the sentence of death that was imposed on him.

1.0 Proceedings in the High Court

1.1 *The Prosecution case*

Before the High Court, (presided over by Sharpe-Phiri, Jas she then was) the appellant was charged with one count of murder and one count of aggravated robbery.

1.1.1 The facts presented to the trial court were that at the material time the appellant and the deceased, Dean Mitchell, used to live in the same house, which also operated as a lodge, in Chipata. In the evening of the 5th July, 2015, the appellant and the deceased left the bar at the lodge, and went to the house to sleep.

1.1.2 Around 01:00 hours, the motor vehicle belonging to the deceased was seen by the watchman being driven out of the premises. The following morning, the deceased was found dead in the house. The appellant was nowhere to be seen. Also missing were the deceased's motor vehicle and some items from the house. The appellant was

apprehended more than two weeks later from Lundazi. The motor vehicle and other items were also retrieved.

1.2 *The case for the defence*

1.2.1 The appellant did not deny killing the deceased, but said that he did so in self-defence.

1.2.2 In his own words, in an unsworn statement that the appellant gave to the trial court, he said that he had met the deceased in February, 2015, at a night club in Chipata. The two became friends. The deceased employed him, and he started living in the same house as the deceased. The deceased disclosed to him that he was of the same sex orientation; and invited the appellant into a relationship with him, which invitation the latter declined. Nevertheless, the deceased did not approve of the appellant having girlfriends; and would become annoyed when girls phoned him.

1.2.3 It was the appellant's testimony that, on the material evening, his girlfriend phoned him; and that this infuriated the deceased so much that when they

retired to the house for the night he drew a gun on the appellant, threatening to shoot him if he did not tell the truth about the girl who had phoned.

1.2.4 The appellant explained that, in trying to escape, he pushed the deceased towards the stairs; that the latter fell over on his back and tumbled down the stairs to the living room. The deceased started bleeding from the mouth and the ears.

1.2.5 The appellant then went to Kapata Police station, with a view to report the incident, but grew cold feet when he reached there. He went back home, without reporting it.

1.2.6 The appellant further explained that when he reached home he found that the deceased had crawled back to the bedroom, and on to the bed, but his body was now twitching. He panicked and therefore grabbed all the items that the deceased had given to him. He then fled the scene in the deceased's vehicle. He said that, except for the vehicle, all the

things that he took from the house that night had been given to him by the deceased.

1.2.7 We note that the appellant's testimony in court was in many material aspects the same as the statement that he had given to the police when he was apprehended. The defence produced that statement through the arresting officer, PW6.

1.3 *The Judge's decision*

1.3.1 On the testimony of the prosecution witnesses and the appellant, the learned trial judge found that the evidence in total had proved that the appellant did cause the death of the deceased in an unlawful manner.

1.3.2 As to whether or not the appellant did so with malice aforethought, the trial judge examined the photographs that were taken at the scene, and also the testimony of the police officers who examined the scene. She observed; that there was blood in various parts of the house; that the house itself was in disarray, with clothes scattered on the floor and the bed while sofas were askew. The judge came

to the conclusion that there had been a violent struggle between the appellant and the deceased.

1.3.3 The trial judge then accepted the testimony of PW7, the officer who had taken the photographs and had said that the nature of the injuries were indicative of the use of a sharp object. According to the learned judge, this testimony was consistent with the amount of blood that was found almost everywhere, namely; on the mattress, on the floor, under the mattress and in several other parts of the house. With this observation, the judge discounted the appellant's explanation that he had merely pushed the deceased down the stairs.

1.3.4 The judge also addressed the appellant's conduct after he had injured the deceased. She noted that the appellant, knowing very well that the deceased was dead, or dying, went about collecting some items from the house with indifference, or lack of sympathy.

1.3.5 As for the appellant's testimony in his defence, the judge found that it had been seriously contradicted by the evidence of the photographs taken at the crime scene, as

well as the testimony of the witnesses who spoke about what they had observed at the scene. Some of the contradictions were with regard to the observations that we have outlined above, such as the fact that the body was found in the living room and not the bedroom.

1.3.6 The judge also rejected the appellant's testimony that the deceased had threatened to shoot him because no gun was found at the scene, and none of the witnesses who worked at the premises knew of any gun that the deceased may have possessed.

1.3.7 On these grounds, the learned judge found that malice aforethought had been proved. She convicted the appellant of murder.

1.3.8 As for the charge of aggravated robbery, the learned judge found, first, that the deceased had not given the appellant the items which he took from the house, and that this meant that the appellant stole them. However, the judge found that the violence that led to the death was not for the purpose of stealing the items; but that the appellant stole the items as an afterthought. For that

reason, the appellant was convicted of theft instead of aggravated robbery.

1.3.9 For the offence of murder, the appellant was sentenced to death while for that of theft he was sentenced to 5 years imprisonment.

2.0 The Appeal

2.1 There are three grounds of appeal filed. In the first one, the appellant contends that the trial judge was wrong to find that malice aforethought had been established when there was no evidence to support that finding. In the second ground the appellant contends that the trial judge was wrong to reject the appellant's explanation in defence because, in so doing, the judge omitted to consider the facts which established the availability of self-defence as a defence for the appellant. In the third ground, the appellant faults the judge for not having considered the appellant's intoxication as an extenuating circumstance.

2.2 Ground One

2.2.1 *The Appellant's argument*

2.2.1.1 The argument by the appellant in the first ground of

appeal is anchored on **section 204** of the **Penal Code, Chapter 87** of the **Laws of Zambia**. This section provides:

"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 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."

2.2.1.2 On behalf of the appellant, it has been argued that the facts of this case disclosed that the appellant had no intention to kill the deceased because the testimony revealed that the deceased and the appellant

could not have foreseen that pushing the deceased would lead to the latter's death.

2.2.2 *The Prosecutions argument*

2.2.2.1 On behalf of the prosecution, it has been argued that the evidence disclosed that the appellant used a sharp object to kill the deceased, which act is indicative of the presence of an intention to kill or cause grievous harm. It is counsel's argument that the calmness with which the appellant went about packing items from the house while the deceased lay dying also confirms the presence of malice aforethought in his actions.

2.2.3 *Our Decision*

2.2.3.1 Our position on this ground is this: the appellant was the only witness who gave to the court an eye witness account of what happened in the house that fateful night. The arguments that have been advanced on behalf of the appellant would be very valid if the appellant's account had been accepted and found as a fact by the judge. But to the contrary the trial judge

rejected that explanation. That obviously is an issue that goes to the credibility of the appellant. In the case of **Kenmuir v Hatting**[1] we held:

> **" where questions of credibility are involved an appellate court which has not had the advantage of seeing and hearing the witness will not interfere with the findings of fact made by the trial judge unless it is clearly shown that he had fallen into error".**

2.2.3.2 We have followed that rule in subsequent cases, one of which is **Malawo v Bulk Carriers of Zambia Limited**[2]. In this case it cannot be said that the learned judge fell into error when she rejected the appellant's version because she meticulously weighed that version as against the real evidence that was gathered at the scene of crime. She found that the latter evidence seriously contradicted the appellant's version of the events. For instance, in the appellant's version, the deceased was said to have pointed a gun at the appellant. Yet no gun was found at the scene, or in the whole of the house. The

appellant also said that he merely pushed the deceased, who then fell down the stairs and was injured. Yet an examination of the wounds on the deceased's body revealed that the deceased was assaulted with a very sharp object. These, among others, are the pieces of evidence upon which the learned judge rejected the appellant's version of events.

2.2.3.3. For the foregoing reasons we have no cause for interfering with her findings of fact. In our view, the first ground must fail.

2.3 Ground Two

2.3.1 *Our Decision*

2.3.1.1 The second ground is couched as follows;

> **"The learned trial court erred in law and in fact by neglecting to consider the defence of self-defence and also by rejecting the appellant's explanation as it could reasonably be true."**

2.3.1.2 In view of what we have said in the first ground of appeal, the second ground is bound to fail as well; and so we shall deal with it summarily. The reason that this

ground is doomed is because the issue of self-defence could only be sustained by the testimony of the appellant, which suggested that the deceased had pointed a gun at him and that he only pushed the appellant in order to escape. However, the real evidence gathered at the scene revealed a different position. We have said that the learned judge cannot be faulted regarding how she arrived at rejecting the appellant's explanation. So, once the trial judge rejected the appellant's explanation of the events, the defence put forward by the appellant had no leg to stand on. This ground, therefore, fails.

2.4 Ground Three

2.4.1 *The Appellant's argument*

2.4.1.1 In the third ground of appeal, the appellant's argument is that, notwithstanding that the appellant had not relied on intoxication as a defence, it was a fact that the appellant had been drinking before the incident. It has been argued that this should have

been treated by the learned judge as an extenuating circumstance. The case of **Whiteson Simusokwe v The People**[3] and **Jack Chanda & Another v The People**[4] were cited in support of this submission.

2.4.2 *The prosecution's argument*

2.4.2.1 On behalf of the State, learned counsel urges us to dismiss this ground because the facts of the case did not disclose any extenuating circumstances that could arise from drunkenness. To support that submission, counsel referred us to our decision in the case of **Jose Antonio Golliadi v The People**[5] and in particular to the following passage therein:

> **"We must emphasize that the trial courts must be wary of finding drunkenness in every case where the offence is committed at a drinking place or where the accused claims he was drinking or was drunk. It is important to consider peculiar facts instead of applying drunkenness as an extenuating circumstance in every single case, which would lead to injustice"**

2.4.2.2. Learned counsel referred us to the conduct of the appellant at the time of the commission of the

offence. She pointed out that the appellant used a sharp instrument to hit the deceased. She submitted further that, after the assault, the appellant exhibited total composure as he packed items from the house and left the scene of crime with the deceased's vehicle. It is counsel's argument that, in such circumstances, it would be an injustice to apply drunkenness as an extenuating circumstance.

2.4.1 *Our Decision*

2.4.1.1 We must first point out that the case of **Whiteson Simusokwe v The People**[3] lays down the principle that a person who is in a stable relationship of intimacy might have the benefit of the defence of provocation in instances of infidelity. The evidence in this case, including the testimony of the appellant, did not reveal any fact of infidelity which would provoke the appellant. In the circumstances we do not see the relevance of that authority to the facts of the case.

2.4.1.2 As regards the submission that the evidence of drinking should have availed the appellant an extenuating circumstance, we are greatly persuaded by the arguments by learned counsel for the state. Indeed, we reiterate what we said in the passage that counsel has referred us from the case of **Jose Antonio Golliadi v The People**, that whether or not drunkenness will provide extenuating circumstances must be determined from the peculiar facts of each case. The rationale behind the principle that drunkenness may in an appropriate case provide extenuating circumstances is that, in certain cases, it is clear to see from the evidence that the drunken circumstances surrounding the occasion may have partially impaired the reasoning of the people involved. That impairment may not be of the level that may afford an accused person a complete defence of intoxication, but it does reduce his moral culpability.

2.4.1.3 So, where the evidence reveals that, notwithstanding that alcohol has been consumed on a particular occasion, an accused person during the commission of the murder exhibits composure, alertness and presence of mind regarding his actions then it cannot be said that such person's reasoning has been impaired at all; and it cannot therefore be said that the evidence of drinking would constitute an extenuating circumstance.

2.4.1.4 In this case the composure which the appellant exhibited when he packed household items and left the scene is a fact which the learned trial judge noted; and was one of the reasons why she found that malice aforethought was present. That fact, in our view, negatives any suggestion that the appellant's reasoning may have been impaired by the alcohol that he had taken earlier that evening and, consequently, the question of drunkenness being an extenuating circumstance does not even arise. Ground three clearly, cannot succeed.

3.0 Conclusion

3.1 All in all, this appeal has no merit. We dismiss it.

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E.M. Hamaundu
SUPREME COURT JUDGE

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C. Kajimanga
SUPREME COURT JUDGE

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J. Chinyama
SUPREME COURT JUDGE