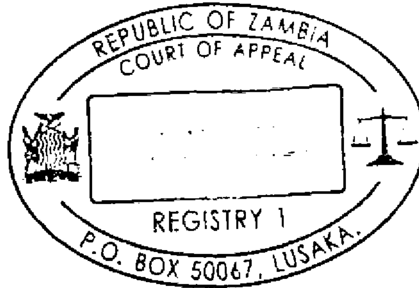
IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 18/2019**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

GEORGE PHIRI **APPELLANT**



AND

THE PEOPLE **RESPONDENT**

Coram: Chisanga, JP, Sichinga and Ngulube, JJA

On 16th June, 2020 and 25th August, 2020

For the Appellant: *Mr. K. Tembo – Legal Aid Counsel, Legal Aid Board*

For the Respondent: *Mr. F. M. Sikazwe – Principal State Advocate, National Prosecutions Authority*

JUDGMENT

Sichinga, JA, delivered the Judgment of the court.

Cases referred to:

1. ***Herman Mvula v. The People SCZ Judgment No. 6 of 1991***
2. ***Abel Banda v. The People (1986) ZR 105***
3. ***Mardon v. R (1962) R + N 298***
4. ***Zeka Chinyama and another v. The People (1977) ZR 426***
5. ***George Musongo v. The People (1978) ZR 266***
6. ***Ibrahim v. R (1914) AC 599***
7. ***R v. Rennie (1982) 1 WLR 64***
8. ***Callis v. Gunn (1964) 1 QB 495***

9. *Charles Lukolongo and Others v. The People (1986) ZR 115*

<u>**Legislation referred to:**</u>

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

<u>***Other works***</u>

1. ***Archbold Criminal Pleading, Evidence and Practice, John Fredrick Archbold, 35th edition, Sweet and Maxwell Limited***

1.0 Introduction

1.1 On 28th June, 2019, the appellant was convicted following a trial before Kaunda-Newa J in the High Court at Lusaka of the offence of Murder Contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. He was sentenced to death. His appeal is against conviction and sentence by the lower court.

2.0 Summary of evidence

2.1 The appellant and his girlfriend Eunice Chola (PW1) were estranged. They had a child together, the deceased, EP, who at the time of his death was aged two (2) years. At the material time PW1 stayed with her parents in John Howard compound. On 4th June, 2017 around 19:00 the appellant went to PW1's family home to pick his son up. After handing over the son to the appellant, PW1 left her parent's home to

spend a week at her sister's house. On her return, she found her father, Davies Chola (PW2) had also returned home from his stay at his farm. PW2 inquired about his grandson, EP. PW1 informed him that she would collect him from the appellant at Daso where he resided. On her way to Daso she met her elder brother, who offered to collect EP from Daso. He later informed PW1 that he neither found the child nor the appellant at Daso.

2.2 A month went by without seeing her child. PW1 kept asking the appellant about the whereabouts of their child. At some point she moved back with the appellant at Daso. His explanation of the missing child was that EP was at his aunt's house in Mandevu compound. When she insisted on going to Mandevu to collect the child, the appellant's response was that his aunt had taken EP to Siavonga for a holiday, and he would collect the child on their return.

2.3 In July, 2017, PW1 and the appellant went to Mandevu compound. The appellant pointed to a gate saying that was his aunt's house. When they got to the house, a young man met them and he denied knowing the person the appellant had asked for. They then went to the appellant's elder brother's house. There the appellant's elder brother denied knowing where their aunt had moved to. Two days later the appellant went to PW1's family home and informed her his brother had located their aunt's home. He promised to collect the child on a Saturday. On

the said Saturday, the appellant returned to PW1's home alone. PW1 inquired of their child's whereabouts. He did not respond. They were then joined by PW1's mother, Linda Mhango. The appellant explained to PW1 and her mother that his aunt had asked for forgiveness as EP had been ran over by a car and died. After further inquiry by Linda Mhango, the appellant explained that his aunt had the deceased buried at Chingwere Cemetery. The appellant informed them that he had reported his aunt to the police and she had since been apprehended. They were joined by PW1's aunt, Beatrice Mhango (PW3) and PW2. When PW3 asked the appellant if EP was dead, he did not respond. PW2 then demanded that he takes them to see his aunt. They did not go as it was dark, opting to go the following day on a Sunday. Before they set off to see the appellant's aunt, PW3 came to the house with a pastor, Linos Milota Sinfukwe (PW4). They persuaded the appellant to go with the pastor (PW4) to counsel him as he had many versions of what happened to the child.

2.4 It was agreed to take the appellant to PW4's church. PW4 took him to his church, and before his congregation, invited the appellant to point to the person he had handed over the child to. The appellant pointed to an elderly woman, whilst the pastor visualised he could see blood surrounding the deceased. After the service, PW3, PW1 and the appellant went to Daso where they were joined by PW2 and his brother-in-law, Joseph Mwangu (PW6). Whilst at Daso, the appellant was

queried by PW2, PW3, PW6 and Linda Mhango on where he had taken the child. At this point, the appellant asked for forgiveness. He confessed to killing the child and burying him behind Daso School. The appellant was apprehended and taken to Chawama Police Station.

2.5 At the police station the appellant agreed to lead Detective Constable Charles Litangi (PW7) and others to Daso School and showed him where the deceased was buried. The appellant also led the police to his house where he showed them a bottle containing some liquid which he said was doom and was given to the deceased to consume. PW7 attended the post-mortem examination conducted on the body of the deceased. The contents of the deceased's body were subjected to examination. PW1 tendered the analysis report – P1 and the post-mortem report – P2 as part of his evidence.

2.6 In his defence, the appellant did not deny the offence. He narrated that he had a tumultuous relationship with PW1, and that in her drunken state she constantly told him that the deceased was not his child. He said he became disturbed by this revelation and this led him to purchase a can of doom pesticide with the intention of committing suicide. He administered the doom to EP to consume as well, as they went to sleep. He discovered EP had died the following morning and he buried him behind a classroom around 06:00 hours. He did not tell PW1 what

happened as they were separated at the time and she was staying with her parents.

2.7 He restated in cross-examination that he intended to commit suicide when he learned that the child was not his son. He accepted that he knew if one took doom, one would die. He knew that the child would die if he consumed doom. He insisted he took the doom as well.

2.8 In re-examination, the appellant stated that he was disturbed when he went to collect the child, and after he regained his senses he knew what he did was bad.

3.0 The decision of the court below.

3.1 After considering the evidence before her, the learned judge found it not in contention that the appellant was alleged to have impregnated PW1 and she subsequently bore the child, EP. It was incontestable that the appellant, at the material time, was not living with PW1 and the deceased when he went to collect the child. The learned judge found it indisputable too that the deceased had died.

3.2 The trial judge considered, in the main, whether the state had proved its case beyond reasonable doubt that the appellant committed the offence of murder. She found the undisputed facts in the case that the appellant admitted to having given the deceased some supershake drink which he had laced with a pesticide, doom, and the deceased died. That it was

further not in dispute that the appellant buried the deceased at the school where he was employed as a caretaker and accommodated.

3.3 The trial court found that the appellant had malice aforethought as it was clear from the evidence that he was motivated to lace the drink by the fact that PW1 had told him that the child was not his. The appellant alleged that he became disturbed thereafter.

3.4 The appellant raised the defence of diminished responsibility as provided by **Section 12A of the Penal Code** *supra.* In discounting his defence the learned trial judge relied on the case of **Herman Mvula v. The People**[1] in which case it was held that the appellant failed to show that he was suffering from a condition of arrested or retarded development of mind or any inherent cases or which was induced by disease or injury which substantially impaired his mental responsibility.

3.5 *In casu,* the learned judge found that the defence failed given the planning that went into the act he committed and the disposal of the body. She found he was in control of his faculties. Therefore the appellant had not proved diminished responsibility on a balance of probabilities.

3.6 The trial judge found that it was not disputed that the appellant confessed to PW3 in the presence of PW1 and his uncle to killing the

deceased and he repeated the confession to PW2 and PW6 who were not persons in authority.

3.7 On the issue of the warn and caution statement not having been administered to the appellant, the learned judge found that it had not been established that the appellant was not in fact not warned and cautioned by the police before he led them to the scene. The learned judge found that by leading police to where the deceased was buried, the appellant had the guilty knowledge of the death of the deceased.

3.8 The court was of the view that the toxicology report – P1 showed that the deceased's stomach contents contained dichlorvos, which is a class of pesticides used in the control of household pests. That the evidence was that the appellant led the police to the recovery of the bottle of doom which was under his bed, as well as the bottle of supershake which had gone bad. The learned judge came to the conclusion that there was overwhelming evidence that the appellant killed the deceased. She accordingly convicted him and sentenced him to death.

4.0 The appeal

4.1 The appellant being dissatisfied with the lower court's judgment has appealed against the conviction and sentence.

4.2 The appellant had advanced one (1) ground of appeal, namely:

The trial court erred in law and in fact when it admitted a confession allegedly made to persons not in authority.

5.0 The appellant's submissions

5.1 Mr. Tembo, learned counsel for the appellant relied on the heads of argument filed at the hearing on 16th June, 2020. Mr. Tembo's submissions can be summarised as follows. The lower court through prosecution witnesses – PW1 to PW7 did not warn itself of any confession statements that they allegedly brought into court stating that the appellant had made the alleged confession. Counsel cited the following authorities and holdings:

- **Abel Banda v. The People**[2] where the Supreme Court held *inter alia*:

  "A village headman is not a person in authority for purposes of administering a warn and caution before interrogating a suspect, since his normal duties do not pertain to investigating crime."

- **Mardon v. R**[3] where it was held that:

  "Even though a court is satisfied that a statement was made voluntary, it nonetheless has discretion to exclude such statement if it were obtained in a manner unfair to the accused."

5.2 And the case of **Zeka Chinyama and another v. The People**[4] where it was held *inter alia*:

"The question of the discretion to exclude a confession made to a police officer falls to be considered when such confession has been held to have been voluntarily made, but there has been a breach of the Judges' rules or other unfair conduct surrounding the making of the confession, either on the part of a police officer or of some other person, which might indicate to a judge that there is danger of unfairness."

5.3 It was submitted that the prosecution witnesses were not people in authority for purposes of administering a warn and caution. That even the post-mortem report indicated that the cause of death was undetermined and as a result, the trial court should have resolved the case in favour of the appellant.

5.4 It was contended that the learned trial judge should have excluded the said alleged confession. We were therefore urged to quash the conviction and acquit the appellant.

6.0 The respondent's submissions

6.1 Mr. Sikazwe, Principal State Advocate relied on his written submissions equally filed on 16th June, 2020. It was submitted that the trial court was on firm ground when it admitted the confession as it was given as evidence by witnesses to whom the appellant confessed. That PW1, PW2 and PW3 were not persons in authority and the confession made to them

by the appellant was properly admitted by the trial court. He submitted that there is no provision for a person not in authority to administer a warn and caution statement. Counsel equally relied on the cases of **Abel Banda v. The People** *supra* and **Zeko Chinyama and another v. The People** *supra*.

6.2 He further referred us to the case of **George Musongo v. The People**[5] where the Supreme Court held *inter alia* that:

> *"(iii) however, the principles of fair conduct underlying the Judges' Rules are principles in their own right independently on those rules, and unfair or improper conduct on the part of people other than police officers can equally lead to the exclusion of evidence in the discretion of a court."*

6.3 It was submitted, on the basis of the authorities cited, that in an appropriate case the court could exercise its discretion to exclude the confessions made to persons not in authority. It was argued that the condition precedent for the exercise of such discretion to exclude a confession is unfairness and improper conduct. Counsel submitted that there was no unfairness or improper conduct in the circumstances in which the appellant confessed to the prosecution witnesses. The involvement of the pastor did not bring about unfairness as he encouraged the appellant to tell the truth. Counsel submitted that of interest to note was the appellant's testimony which confirmed the

testimonies of PW1, PW2 and PW3 so far as it related to the confession. That the appellant's own testimony provided evidence of how he administered doom to the deceased.

6.4 It was submitted that even if the trial court had exercised its discretion excluding the confession made to PW1, PW2 and PW3, there would still be overwhelming evidence to prove that the appellant caused the death of the deceased with malice aforethought as set out in **Sections 200 and 204 of the Penal Code** *supra.*

6.5 There is evidence to the effect that the appellant led PW7 to Daso, the place where the remains of the deceased were exhumed and a post-mortem examination conducted. It was submitted that the trial court was on firm ground when she found at J.23 of the judgment that:

> *"By leading the police to where he had buried the body, is evidence that the accused had guilty knowledge of the death of the deceased."*

6.6 Counsel contended that the appellant cannot ask this court to consider the post-mortem examination report in isolation. That this court must look at the medical evidence in totality. In doing so the court will observe that there is an endorsement on the post-mortem examination report by the state pathologist in the following terms:

"PENDING TOXICOLOGY."

6.7 And the public analyst report – P2 concluded with the wording:

> *"Dichlorvos an organophosphate was detected from the unknown liquid and the stomach contents."*

6.8 It was submitted that the appellant in his evidence testified that he gave the deceased doom which is a pesticide. He led PW7 to the recovery of the bottle of doom which was under the bed as well as the supershake which had gone bad. It was submitted that the learned trial judge was on firm ground when she found that:

> *"The evidence as found on 'P1' is in fact corroborated by the accused's own evidence, and therefore while 'P2' states that the manner of death was undetermined, the accused provided that evidence himself and it is supported by 'P1'. The evidence is overwhelming that the accused killed the deceased."*

6.9 On the defence of diminished responsibility counsel submitted that it was properly dismissed because the evidence from the appellant was that he knew that he would die if he took doom and he also knew that if the deceased takes doom he would die but still proceeded to give it to the deceased. That the evidence indicates that he was in control of his mental faculties and the trial court cannot be faulted for dismissing the defence.

6.10 At the hearing, Mr. Sikazwe made brief oral submissions which are covered in full by the written submissions.

6.11 Counsel urged us to dismiss the appeal and uphold the conviction and sentence imposed on the appellant.

7.0 The decision of the court

7.1 We have considered the sole ground of appeal, the record before us, as well as the submissions by counsel.

7.2 The issue, as we see it, is whether the confession statement by the appellant, that he had administered a pesticide, doom, in a drink of supershake which he gave to the deceased, and upon his death buried him behind a classroom, was properly admitted into evidence.

7.3 The historical statement of the common law rule as to the admissibility of confessions was that of Lord Sumner in ***Ibrahim v. R***[6] where he stated that:

> *"It has long been established....that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."*

7.4 In common parlance, the word *'voluntary'* could be easily understood as *'of one's own free will'*. The case of **R v. Rennie**[7] refers.

7.5 Lord Parker CJ in the case of ***Callis v. Gunn***[8] added to the test of voluntariness, as defined by Lord Sumner, by stating that a confession must not have been obtained in *'an oppressive manner'*. The **Judge's Rules**[1] applicable in Zambia do not suppress the principle test of voluntariness. In the case of ***Charles Lukolongo and others v. The People***[9] Chomba, JS stated that:

> *"We are mindful that Judges' Rules are rules of practice and therefore that they have no force of law. However, we are of the view that where the prejudicial effect of any given piece of evidence far outweighs its probative value, justice demands that such evidence must, per force, be excluded."*

7.6 *In casu*, the question we are called to determine is whether the confession statement made to PW1, PW2 and PW3 by the appellant is prejudicial in its effect such that the prejudice outweighs its evidential value. Mr. Sikazwe submitted that in an appropriate case, the court can exercise its discretion to exclude the confessions made to persons not in authority where there is unfairness and improper conduct. He cited the case of ***Zeko Chinyama and another v. The People*** *supra* to illustrate that it is not in every circumstance that the question of the exercise of a judge's discretion arises, however, it is only where conduct of unfairness

and impropriety is shown to have induced the confession so that it would not have been made but for the breach.

7.7 In the course of the judgment the learned trial judge summed up the aspect of the confession statements to the prosecution witnesses in the following terms:

> *"It is on record that indeed the accused was taken to church where PW4 is a pastor, who prayed for the accused in front of the whole congregation and asked him to say something over the deceased. PW4 told the accused that he would confess by 15:00 hours that day. The evidence that is not disputed is that after that church service, the accused did confess to PW3 that he had killed the deceased in the presence of PW1 and his uncle, and he repeated this to PW2 and PW6. It is trite that the police are guided by the Judges' Rules in the manner that they question persons suspected to have committed offences.*
>
> In the case of ***George Musongo v. The People***[1] it was held that:
>
> *"(ii) The Judges' Rules were formulated for the guidance of police officers, they put police officers on guard with regard to what type of conduct on their part will, or will not, be regarded by judges as improper or unfair vis-à-vis a person suspected of having committed a crime.*

(iii) However, the principles of fair conduct underlying the Judges' Rules are principles in their own right independently of those rules, and unfair or improper conduct on the part of people other than police officers can equally lead to exclusion of evidence in the discretion of a court.

(iv) Whereas failure on the part of a police officer to administer a caution constitutes an impropriety in respect of which a trial court may exercise its discretion in favour of the accused, similar failure on the part of any other person in authority (or indeed anybody else) does not necessarily amount to an impropriety as it cannot reasonably be expected that a person, other than a police officer, should of necessity appreciate the niceties of what should, and should not be done in such circumstances."

Therefore, going by the case, in an appropriate case, I can exercise the discretion to exclude the confession statement that the accused made to PW3, PW2 and PW6 who are not police officers and who ordinarily are not aware of the Judges' Rules."

7.8 In this case, the record shows that the appellant gave several versions to account for the deceased's disappearance. After several weeks of the child's disappearance he was persuaded by PW3 to go with the pastor –

PW4 who encouraged him to reveal who he had handed the child to. After the church service PW4 left, and the appellant told PW3, PW2 and others that he would not waste their time and fuel by taking them to where the child was staying. Instead he opted to confess telling PW3, PW2, PW1 and PW6 that he had killed the deceased and buried him behind a classroom. The appellant neither challenged this testimony for being unfair nor improper. In turn he corroborated PW1, PW2 and PW3's testimonies by telling the court below in examination-in-chief that he had administered a pesticide, doom, to the deceased before retiring to sleep. The following morning he found the child had died and he buried him behind a classroom at Daso School where he worked.

7.9 In our view, his own testimony left the trial judge without option but to admit the testimonies of the prosecution witnesses as he admitted the confession evidence. The evidence passed the test of voluntariness as it was not obtained in circumstances that could be said to be unfair and improper. We therefore reject the contention by the appellant that the trial court erred in admitting the appellant's confession made to the prosecution witnesses who were not persons in authority. His evidence was taken as confirmation that he had in fact killed the deceased.

It is worth of note that even if the confession statement been excluded, the damning evidence of leading to the dead body of the deceased child would still have inevitably led to a conviction.

7.10 It is for these reasons that we have come to the conclusion that there was no misdirection on the part of the learned trial judge and that the conviction is indeed safe.

7.11 We therefore uphold the learned trial judge in the court below and dismiss the appeal accordingly.

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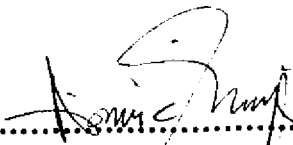
F.M. Chisanga
JUDGE PRESIDENT



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D.L.Y. Sichinga
COURT OF APPEAL JUDGE

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P.C.M Ngulube
COURT OF APPEAL JUDGE