IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 216/2020
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

MABVUTO DAKA **1ST APPELLANT**

CHRISPINE PHIRI **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Majula and Muzenga JJA
On 18th August, 2021 and 16th November, 2021.

For the Appellant: Mr. B. Banda, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. B. Mwewa, Senior State Advocate, National Prosecution Authority

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J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Barrow and Young v The People (1966) ZR 43**
2. **Dorothy Mutale and Richard Phiri v The People (1995/1997) ZR 227**
3. **William Muzala Chipango and Others v The People (1978) ZR 304**

4. **David Zulu v The People (1977) ZR 157**
5. **Benson Phiri and Others v The People (2002) ZR 107**
6. **Emmanuel Phiri and Others v The People – SCZ Judgment No. 5 of 2011**
7. **Simon Malambo Choka v The People (1978) ZR 243**

Legislation referred to:

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

1.0 INTRODUCTION

1.1 The appellants were jointly charged with one count of the offence of murder contrary to **Section 200 of the Penal Code**[1]. The particulars of the offence alleged that between 9th and 10th of June, 2018, at Mpika, in the Mpika District of the Muchinga Province of the Republic of Zambia, Mabvuto Daka and Chrispine Phiri, jointly and whilst acting together, did murder one Moses Chibuye. The two were subsequently convicted and were sentenced to death by hanging until pronounced dead by the High Court presided over by Mr. Justice K. Limbani.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The appellants' conviction was based on the evidence of four prosecution witnesses namely, Leah Zyambo, Charles Chanda, Miyoba Malambo, and Chibuye Sidney. The summary of evidence adduced on behalf of the prosecution particularly from Leah Zyambo (PW1) was that in the

evening of 9th June, 2018 she was drinking beer at Dilemma Bar in the company of the first appellant, Zingani, Clint, the deceased, and Jennifer.

2.2 Around 20:00 hours, while at the said bar, Clint proposed love to her and the deceased quickly intervened claiming that PW1 was his girlfriend. A quarrel ensued and they all decided to go home. On their way to their respective homes, the quarrel continued, Clint threw a broom at the deceased, and a fight erupted. The deceased overpowered Clint. Mabvuto then joined in the fight, got a stick from his back and hit the deceased on the hand.

2.3 It was PW1's further testimony that Zingani also joined the fight and the trio took turns to beat the deceased until he stopped talking. PW1 testified that she tried to stop the fight in vain and decided to leave the scene with Jennifer. It was her further testimony that the following day it came to her attention that Moses who was beaten the previous night had died. In cross examination she told the trial court that the police, after badly beating her, told her to say that it was the appellants who beat the deceased to death.

2.4 She admitted having been drunk at the material time and that she was able to recount what happened as she observed it by the help of the moon light.

2.5 PW2 testified that on the material night as he was heading home and while in the company of two of his friends namely Benga and Given, he saw Clint, the first appellant, the deceased, PW1, Jennifer and others at the bar. The first appellant called Given and offered him some beer after which they proceeded home. It was his further testimony that the following day he heard that the deceased had died. He identified the first and second appellant as having been at the bar.

2.6 Detective Inspector Miyoba Malambo, the scene of crime officer, testified as PW3. His evidence was to the effect that while on duty on 10th June, 2018, a report was made to the police by members of the public that there was an unidentified body that was lying unconscious near Dilemma Bar. He went to the scene together with other officers. He preserved and barricaded the scene after which he took photographs of the unidentified body.

2.7 In his testimony he stated that an analysis of the scene revealed no struggle marks, an indication that the body was just dumped at the

scene. It was his further testimony that after analyzing the scene he moved on to inspect the body which was lying in a pool of blood. The body did not have observable injuries apart from the blood that was flowing from the nose and mouth and a swollen head. He again checked the surrounding area of the scene and recovered an axe handle near the bar. He proceeded to draw a sketch plan.

2.8 Sydney Chibuye, who testified as PW4, stated that on the 10th June, 2018 at around 10: 30 hours, he received a call that a person had died and that the police requested for members of the public to identify the body. He went to check on the body only to find that it was that of his 23 year old brother. PW5, the arresting officer, Inspector Medson Mpande, testified that while on duty on 10th June, 2018 he received information that there was a body lying in a pool of blood in Kapiri compound within Mpika District. He proceeded to the scene with other officers and found the unidentified person lying unconscious with his head swollen and blood coming out of his nose and mouth. He was rushed to the hospital and later died around 14:00 hours.

2.9 He told the court that his investigations led to the recovery of an axe handle about 500 meters from the place where the deceased body was

found. That a postmortem examination was conducted and the report thereof revealed that the deceased had several bruises on the body and a fractured skull which led to his demise. His further investigations led to the apprehension of the appellants. The two were later warned and cautioned, charged with offence of murder which they denied. He testified that a Mr. Clint who was together with the appellants is on the run. In cross examination he mentioned that his investigations led to the conclusion that the second appellant was at the bar on the fateful night.

3.0 DEFENCE

3.1 After considering the evidence of the prosecution witnesses, the court found each of the appellants with a *prima facie* case and they were placed on their defence.

3.2 In his defence, the first appellant stated that on the fateful day, he was at the bar drinking beer with the deceased who happened to be his best friend in the company of PW1 and many others. Later, he went home to sleep leaving the deceased behind. The following day he heard that his best friend had died and later in the day he was summoned by the police to confirm if he was with the deceased the previous night.

3.3 He was later apprehended, questioned and denied knowing anything to do with how the deceased died. He also told the police that the second appellant was not present at the bar on that fateful night. In cross examination he stated that he knew PW1 very well and that she only implicated him because she was beaten by the police.

3.4 The second appellant told the trial court that he did not know anything to do with the death of the deceased and that on the material day he was at his house with his wife. He also told the trial court that he did not hang out with the deceased and his friends. In cross examination he stated that on the material night he was not in Kapiri compound of Mpika but at his house in Deport area. He also stated that he did not know PW1 and PW2 and that he did not have any difference with them.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

4.1 The trial court considered the evidence and written submissions presented before it by both parties. The court found that there was overwhelming evidence that the two appellants together with another person beat and hit the deceased with an axe handle which led to his death. The appellants were subsequently convicted and sentenced to death.

5.0 GROUNDS OF APPEAL

5.1 The appellants filed three grounds of appeal couched as follows:

(a) That the learned trial Judge erred both in law and in fact by finding the appellants guilty of murder in the face of conflicting evidence of the prosecution witness.

(b) The learned trial Court erred both in law and in fact to convict the appellants on a charge of murder on uncorroborated evidence of an accomplice.

(c) The learned trial Court erred both in law and in fact to convict on circumstantial evidence that had not attained a degree of cogency upon which the court could feel safe to convict.

6.0 APPELLANT'S ARGUMENTS

6.1 In support of ground one of the appeal, it was submitted that the first prosecution witness gave two versions of testimonies both which were not resolved either in rebuttal or by the court in giving reasons why one position was preferred for another. It was submitted that the two conflicting testimony by the first prosecution witness created a doubt in the prosecution's case. The court was referred to **Barrow and Young v The People**[1] where the Supreme Court guided that:

> **"Where one prosecution witness gives evidence in favour of the defence, and one against, the court should resolve the doubt in favour of the accused in**

the absence of any good reason for preferring one witness's testimony."

6.2 It was submitted that the statements by the first prosecution witness were internally self-conflicting thereby created a doubt which doubt should have been resolved in favour of the appellants in the absence of any good reasons given by the trial court for preferring the one favouring the prosecution. It was counsel's further submission that in light of conflicting evidence, the prosecution cannot be said to have discharged its burden of proof beyond all reasonable doubt. The court was further referred to the case of **Dorothy Mutale and Richard Phiri v The People**[2] where it was held that:

> **"Where two or more inferences are possible, it has always been a cardinal principal of criminal law that the court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such inferences. The factors urged by Mr. Malama were valid. It is, of course, quite possible and the suspicion in this regard is very strong that – as Mr. Mukelabai suggested – the incidents at the market and on Bombesheni Road were related. However, there is that lingering doubt on account of the various matters herein discussed and we are required by the criminal law to resolve such doubts in favour of the accused since the conviction is then rendered unsafe and unsatisfactory."**

6.3 In support of ground two, counsel submitted that the evidence of PW1 regarding the commission of the crime should have been corroborated as she was an accomplice and had an interest of her own to serve. We were referred to the case of **William Muzala Chipango and Others v The People**[3] where the Supreme Court held that:

> **"Where because of the category into which a witness falls or because of the circumstances of the case he may be a suspect witness that possibility in itself determines how one approaches his evidence. Once a witness may be an accomplice or have an interest, there must be corroboration or support for his evidence before the danger of false implication can be said to be excluded."**

6.4 In arguing ground three, counsel submitted that the evidence of an axe handle found near the scene of crime and the deceased having been alleged to have been last seen with the two accused was not proved beyond reasonable doubt. That from the evidence on the record, it is not clear who was the last person seen with the deceased and the axe handle was not found with the appellants. Further no forensic examination was carried out on the axe handle. He submitted that the evidence connecting the appellants to the crime is all circumstantial evidence and that by merely bringing an axe handle found in the bush as the weapon used in the commission of the subject offence does not take this case out of the

realm of conjecture as to attain only an inference if guilty when there are other possible inferences that the court could have drawn. To this end we were referred to the case of **David Zulu v The People**[4] where it was held that:

> **"It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn. It is incumbent on a trial judge that he should 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 guilty."**

6.5 In conclusion we were called upon by counsel to allow the appeal, set aside the convictions and sentences and free the appellants.

7.0 RESPONDENT'S ARGUMENTS

7.1 On behalf of the State, the learned Senior State Advocate, Mr. Bob Mwewa supported the convictions and sentences. In responding to ground one, in his written submissions he argued that the statement made by PW1 was a minor inconsistency and that it was corroborated by the evidence of the rest of the prosecution witnesses. In support

of this, the court was referred to the case of **Benson Phiri and Others v The People**[5] where the Supreme Court stated that:

> **"While we accept that there were inconsistencies in the evidence of PW2, like where the actual stabbing was done, we are satisfied that the inconsistencies were not fatal to the prosecution case."**

7.2 He stated that the evidence of PW1 is consistent with all the remaining evidence on record including the postmortem report."

7.3 In relation to ground two, counsel argued that the evidence of PW3 and PW5 corroborated the evidence of PW1. In the alternative, he submitted that where uncorroborated evidence of an accomplice is proffered, the Court can still convict on that evidence if special circumstances or evidence of something more exists. Further, the court was referred to the case of **Emmanuel Phiri and Others v The People**[6] where it was held that the something more must be circumstances which, though not constituting corroboration as a matter of strict law, yet satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the accomplice implicating the accused. It was submitted that even if it could be held that the evidence of PW2, PW3 and PW5 that supported the evidence of PW1 fell short to be

classified as corroboration, they still amount to being evidence of something more which could be relied upon by the court making it safe to convict on the evidence of PW1.

7.4 In relation to ground three, it was argued that the evidence proffered in this case is not circumstantial evidence. It was argued that PW1 was an eye witness and gave evidence of the things she perceived. We were called upon to uphold the decision of the lower court.

8.0 HEARING OF APPEAL AND ARGUMENTS CANVASSED

8.1 At the hearing of the appeal, both counsel placed full reliance on the documents filed and we are grateful for their submissions.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have carefully considered the evidence on the record, the judgment of the court below and the arguments by both parties.

9.2 We shall firstly deal with ground three and then deal with grounds one and two.

9.3 In ground three, learned counsel for the appellant, Mr. Banda, contends that the evidence against the appellants is circumstantial and that it was not strong enough to warrant the convictions.

9.4 The evidence in this case rests mainly on the testimony of PW1. It basically constitutes of what the witness perceived with her senses. We are at pains to understand the premise on which learned counsel for the appellant contends that the evidence is circumstantial. We agree with the submission by counsel for the respondent that the evidence consists of direct evidence. We find no merit in ground three and we dismiss it accordingly.

9.5 In respect to ground one, learned counsel for the appellant argues that there were inconsistencies in the evidence of PW1 which the trial court failed to consider and give reasons for preferring one statement over the other. It was argued that the inconsistency lay in the fact that PW1 during examination in chief told the trial court that the 1st appellant got a stick and hit the deceased with it and then the 2nd appellant joined in beating the deceased. Whereas during cross examination, PW1 told the trial court that it was the police who told her to say that it was the 1st and 2nd appellant who beat the deceased.

9.6 We do not see what PW1 said to be inconsistent to what she said in chief. She merely provided further evidence of the circumstances under which she gave the statement implicating the appellants. To that extent, we find ground two to have no merit. We shall however revert to the effect

of what PW1 said later when considering the arguments relating to ground two.

9.7 In respect to ground two, learned counsel for appellant contends that PW1 is an accomplice whose evidence requires corroboration. Learned counsel for the respondent appeared to agree that the evidence of PW1 requires corroboration but contended that the evidence of PW2, PW3 and PW5 provided the requisite corroboration or indeed evidence of something more.

9.8 To begin with, we have found nothing on the record which could make us conclude that PW1 was an accomplice. An accomplice is a person who takes part in the commission of an offence; abets, counsels, aids or procures the commission of an offence; an accessory before or after the fact; or any other person similarly circumstanced. There's nothing on the record which suggests any of the foregoing in respect of PW1.

9.9 The evidence however shows that when PW1 was approached by the police two days after the incident, she told the police that she knew nothing about the deceased. Close to two months later after being badly beaten by the police, she told the police the account which narrated in the court below. She further stated that it was the police who told PW1 to say that the appellants are the ones who beat up the deceased. It is

our considered view that these circumstances clearly make PW1 a witness with a possible interest to serve (See the case of **Chipango and Others v The People** *supra*).

9.10 Although there is a distinction between an accomplice and a witness with a possible interest to serve, for purposes of the way their evidence is treated or approached, the distinction is a matter of nomenclature.

9.11 The Supreme Court in the case of **Simon Malambo Choka v The People**[7] held that:

> **"A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanor and the plausibility of his evidence. That "something more" must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness."**

9.12 It is thus trite that the evidence of PW1 requires corroboration, as rightly acknowledged by both counsel, in order to be believed. Learned counsel for the respondent argued that the evidence of PW2, PW3 and PW5 provided the requisite support or corroboration.

9.13 We have looked at the evidence of PW2, PW3 and PW5 and have not found it to corroborate what PW1 told the trial court to effect that it was the appellants who beat up the deceased.

9.14 We therefore find no corroborative evidence or evidence of something more which would effectively rule out the danger of false implication. Had the trial judge properly directed himself in respect of the evidence of PW1, he would have found her to be a witness with a possible interest and treated her evidence as such. We find that the failure by the trial court to do so was a serious misdirection.

9.15 Having found no corroborative evidence, the evidence of PW1 cannot be relied on and has to be discounted entirely. In the absence of the evidence of PW1, there is no other evidence on which the convictions can be based.

9.16 We allow the appeals, quash the convictions, set aside the sentences of death and set the appellants at liberty.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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B. M. MAJULA
COURT OF APPEAL JUDGE

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K. MUZENGA
COURT OF APPEAL JUDGE