

IN THE HIGH COURT FOR ZAMBIA  
AT PRINCIPAL REGISTRY  
LUSAKA

HP/64/2016

(Criminal Jurisdiction)

THE PEOPLE

AND



PAUL PANDALA BANDA

Before Honourable Mr. Justice C.F.R. Mchenga SC

For the People: R. Nkonde-Khuzwayo, Chief State Advocate, National Prosecution Authority  
For the Accused Person: M. Haimbe, Sinkamba Legal Practitioners with V.A.L. Kabonga, Paul  
Pandala Banda and Company

---

## J U D G M E N T

---

Cases referred to:

1. Woolmington v DPP [1935] A.C. 462
2. Mwewa Murono v The People [2004] Z.R. 207
3. David Zulu v The People [1977] Z.R. 151
4. Mbinga Nyambe v The People [2011] 1 Z.R. 246
5. Kalonga v The People S.C.Z. No. 25 of 1988
6. Wiljohn Chizonde v The People [1975] Z.R. 66
7. Saluwema v The People [1965] Z.R. 4
8. Kezzy Ngulube v The People S.C.Z. No. 10 of 2009
9. Justin Mumbi v The People [2004] Z.R. 106
10. Jack Chanda and Kennedy Chanda v The People SCZ Judgment 29  
of 2002

Legislation referred to:

1. **The Penal Code, Chapter 87 of the laws of Zambia**

Works referred to:

1. **Forensic Medicine, London, J. & A. Churchill, 1955**

Paul Pandala Banda, the accused person, stands charged with the offence of Murder contrary to **Section 200 of The Penal Code**. The particulars of offence allege that on 27<sup>th</sup> October 2015, at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia, he murdered Vivian Mulako Ilukena Banda. He denied the charge and the matter proceeded to trial.

The first prosecution witness was Ilukena Mate (Pw1). Vivian Mulako Ilukena Banda was his sister; she was also the accused person's wife. His evidence was that on 27<sup>th</sup> October 2015, in the afternoon, he was at the accused person's house. Also present was the accused person, his wife and their children, Chilive (Pw3), Pandala (Pw2), Mulako and Limpo. He was instructed to light a brazier because they did not have electricity. The accused person and his wife did some cooking on the veranda and they were taking Castle Lager beer as they were doing so.

Around 21:00 hours, supper was served and they retired to bed around 22:00 hours. A few minutes after retiring, he heard a gunshot. All the

children rushed to their parent's bedroom and when he attempted to join them, he was instructed to switch the generator on. At the time he heard the gunshot, the only people in the bedroom were the accused person and his wife.

When he entered the bedroom, he saw blood and his sister, who was still breathing, was on the bed. The accused person was on the ground and had been beaten by his son. He saw blood on his sister's stomach as they lifted her. She was put in a motor vehicle and taken to Levy Mwanawasa General Hospital. At the hospital, she was examined but a few minutes later, they were informed that she had died. They took her body to the University Teaching Hospital.

Pw1 said he did not know how much beer the accused person and his wife took but the atmosphere was good and they did not quarrel. He did not hear any quarrel before the gunshot.

When he was cross-examined, Pw1 said when he entered the bedroom, the accused person was not doing anything. He did not pay a lot of attention to him because he had to switch the generator on. He did not pay attention to where the firearm was. He was not in the bedroom when he heard the gunshot and he did not know the circumstances in which the firearm was discharged. He maintained that at the time the firearm



was discharged, the only people in the bedroom were the accused person and his wife.

Paul Pandala Banda Junior was the second prosecution witness (Pw2). His evidence was that 27<sup>th</sup> October 2015, was his mother's birthday and they had a drink at home to celebrate it. He was at home with his siblings and parents. His father, the accused person, and his mother, Vivian Mulako Ilukena Banda, did some cooking on the veranda and he went to bed between 22:00 and 23:00 hours after having supper. Soon after falling asleep, he heard a gunshot. He also heard a scream. He jumped out of bed and broke the door to his parent's bedroom. He found his mother on the bed and she was bleeding on the right side of the belly.

His father was standing in the bedroom and when he saw him, he lost his mind and assaulted him. He directed his siblings to carry their mother to the hospital and remained behind. At the time he broke into his parent's bedroom, there were only three people in the room. His father, mother and his young brother's daughter aged about 1 year old.

Pw2 said they had two guns in the house and he saw one of them on the floor when he entered the bedroom. He identified it as being Exhibit P1.

When he was cross-examined, Pw2 said he was the first person to respond to the gunshot and he broke the door to his parent's bedroom. He found his mother lying on the bed and bleeding on the back. He did not hear any sound prior to the gunshot. He could not remember exactly where his father was but he must have been standing beside the bed. He did not ask him what happened, neither did he volunteer any information. He recalled beating him up.

The third prosecution witness was Chilive Banda (Pw3). She is the accused person's daughter and her evidence was that on 27<sup>th</sup> October 2015, after work, they sat on the veranda of her father's house. They had a few drinks and discussed the future of her father's law firm because of his failing health. Around 21:00 hours, dinner was served and they retired to bed around 22:00 hours.

A few minutes thereafter, she heard a gunshot and a scream from her mother. When she entered their bedroom, she found her mother on the bed. She had been shot in the back. At that time, her brother, Pw2, was beating the accused person. She did not remember seeing the firearm. She told Pw2 not to beat the accused person and took her mother to the hospital.



Her mother died at the hospital as they were preparing to take her to the theatre. The gunshot that injured her mother was from inside the house. There used to be a firearm in her parent's bedroom and she identified Exhibit P1 as being the firearm. She also said the discussion they had on the veranda that evening was cordial.

When she was cross-examined, Pw3 said her father was diabetic and hypertensive. She also said his memory started failing from as far back as 2013; he would easily forget things. He had previously discharged the firearm because they had suffered a number of thefts.

Detective Inspector Davis Kalembo Phiri, a Scenes of Crime officer, was the fourth prosecution witness (Pw4). His evidence was that on 28<sup>th</sup> October 2015, he was detailed to visit a crime scene in Meanwood Chamba Valley, Lusaka. He visited the scene and took photographs. He found that the body had been removed and taken to UTH. He attended post-mortem and pellets were removed from the body. Thereafter, he compiled a photographic album which was produced and admitted into evidence as Exhibit P2. He also identified the four pellets that were removed from the body, Exhibit P3, the cartridge casing, Exhibit P5, and the fragmented wad, Exhibits P4 and P6.

He did not find the firearm at the scene but at Kabwata Police Station. He took the firearm, Exhibit P1, to the ballistics expert for examination.

When he was cross-examined, Pw4 said the house was in disarray when he visited it. The butt of the firearm, Exhibit P1, was cracked because it was used to hit the accused person but it is possible that it could have also cracked after falling. He said the blackened skin around the wound in the photograph numbered 18 in the photographic album, suggests that the firearm was placed on the skin when it was discharged. It could not have discharged as a result of falling but only after the trigger had been pulled. He confirmed not carrying out any test to confirm what the black substance on the skin in the photograph numbered 18 was, but maintained that it was gunpowder. The 4 pellets were recovered from the stomach and the firearm that was used was a 12 gauge shotgun. Only the 4 pellets were recovered and the others should have remained in the body.

The fifth prosecution witness (Pw5) was Senior Superintendent Stephen Mvula Zulu, a Forensic Ballistics expert. His evidence was that on 2<sup>nd</sup> November 2015, he received a firearm, Exhibit P1, a cartridge casing, Exhibit P5, a damaged wad, Exhibits P4 and P6, and 4 pellets, Exhibit P3, for examination from Pw4. He test fired the firearm and examined

the exhibits that he received. He thereafter prepared a report, Exhibit P7.

The firearm, Exhibit P1, with serial number is 01008071, is a Bikal Shotgun which is Russian made. It is 18 millimetres, 12 bore and can discharge ammunition of the same specification. The safely catch and hammer are in good working order and can prevent accidental firing. He said the wad and the pellets are components of the bullet. He also found that the cartridge casing, Exhibit P5, was of the calibre 18.5 mm and it had a "pin hole" indicating that it had been loaded and fired from a shotgun of a similar calibre. He fired two bullets using Exhibit P1 and compared the firing pin marks on the cartridge casing (Exhibit P5) using the Automated Ballistics Identification System. His findings led him to the conclusion that the cartridge (Exhibit P5) was fired from the shotgun, Exhibit P1.

When he was cross-examined, Pw5 said the shotgun was in a good working condition and the cartridge casing that was presented to him was fired from it. Its chamber size is 18.5 mm and "12 bore" refers to weight of the lead used to produce the pellets. There are between 14 and 18 pellets in a shotgun bullet.



When a shotgun is fired the pellets travel together for a distance of up to 5 metres. After 5 metres, there will be many entry wounds because the pellets begin to spread out. If fired at a distance of less than one metre, the wad can enter a body. There is a single wound if the firearm is discharged when it is against the body.

When he was referred to the photograph numbered 18 in the photographic album, he said there was no body contact when the firearm was discharged but it was fired at a distance of less than 5 metres. He found the firearm to be a good working order which eliminated the possibility accidental firing.

When he was re-examined, Pw5 said on contact with body, gunpowder turns into a gas and becomes smoke. It is the smoke that remains on the wound and is greyish in colour.

Detective Inspector Edwin Chikalula of Ngombe Police Post was the sixth prosecution witness (Pw6). His evidence was that on 31<sup>st</sup> October 2015, he was allocated a docket of murder in which it was alleged that the accused person had killed his wife Vivian Mulako. At the time, the accused person was admitted at University Teaching Hospital and on his discharge, on 11<sup>th</sup> November 2015, he decided to record a statement under warn and caution. The accused person elected to remain silent.

Thereafter, he charged him with the offence of murder. He visited the scene of the crime when the body and the firearm had already been removed. He was handed over a post-mortem report which was admitted into evidence as Exhibit P9.

When he was cross-examined, Pw6 said the accused person opted to remain silent but did not say why. He remembered interviewing the accused person's children. They told him that on the material day, there was a party and that a few minutes after they retired to bed, they heard a shotgun. None of them witnessed what happened, they just heard a gunshot.

He could not recall which one of the children was the first on the scene. At the time they heard the gunshot, only the accused person, his wife and a baby were in the bedroom. He was not aware of the lifting of fingerprints or collection gunpowder residue samples. He did not know why the scenes of crime officer did collect the samples. He looked at the firearm and confirmed that the butt was broken but he could not tell how it broke.

The bedroom was in disarray when the Scenes of Crime officer visited the house and he believed it was on account of the accused person's children's conduct. Vivian Mulako Ilukena Banda was shot in the back

but he did not know the circumstances in which the firearm was discharged. All he could say was that only the accused person and his wife were in the bedroom at the time. He was not familiar with sympathetic detonation.

The last prosecution witness was Dr. Victor Telendiy, a forensic pathologist (Pw7). His evidence was that he conducted post-mortem on the body of Vivian Mulako Ilukena Banda. Thereafter, he prepared the post-mortem report, Exhibit P9. He noticed a 2.5cm x 2.5cm gun wound in the small back. He found six exit wounds of 0.5cm x 0.5cm in the left sub costal and left iliac area. He also found blood in the abdominal cavity. The intestines, liver, spleen and left kidney were perforated. The cause of her death was haemorrhagic shock due to these injuries. He recovered some pellets during the post-mortem.

When he was referred to photograph number 18 in the photographic album, which shows a wound on Vivian Mulako Ilukena Banda's back, he said it was the entry point because of the gunpowder from the barrel of the gun. The gunpowder indicates that the barrel was very close or in contact with the skin when the firearm was discharged. The abrasion of the skin indicates that the barrel scratched the skin. He could not remove all the pellets because they had no x-ray machine in the mortuary.



When he was cross-examined, Pw7 said Vivian Mulako Ilukena Banda died from haemorrhagic shock which is loss of blood. He could not tell how long after the shooting she died. The entry had a single wound while there were several exit wounds. The exit wounds did not have gunpowder.

He admitted not carrying out a scientific test to determine that what was on the wound in the photograph numbered 18 in the photographic album was gunpowder but said it could not be an exit wound. He maintained that the firearm was discharged at close range. It was possible that the six wounds in front came from a shotgun fired in front. The discovery of all the pellets would not have changed his findings on the cause of death.

When a shotgun is fired from a distance of 1-2 meters, there would be single entry wound but no gunpowder. He was sure that there was contact with the body that is why there was gunpowder on the wound.

When he was re-examined, the pathologist said even at a distance of 2 or 4 metres there would be one big wound and several small ones. After 4 metres, the pellets enter the body separately but cannot go out together. The six wounds in the sub costal and iliac areas were all exit wounds.

After the close of the prosecution's case, I found the accused person with a case to answer and placed him on his defence. He decided to give evidence on oath and call one witness.

In his defence, the accused person testified that he is a retired Zambia Air Force officer. Initially, he was a pilot but he later studied law. At the time he was retiring, he was an advocate and he has continued practice as an advocate. He is also catholic by faith and chairman of the small Christian community in his neighbourhood.

He testified that on the fateful day, he had supper with his wife and they retired to bed. He placed the firearm, Exhibit P1, against the wall on the left side of the bedroom. He was in bed with his wife when she left to relieve herself, the firearm fell and discharged. He did not know whether this was because she touched it but that is what caused her death.

When the firearm discharged, his son came into the bedroom and hit him until he lost consciousness. This was because he thought he had shot his mother. He denied shooting her and said it was an accident. Because of the number of attacks, he kept a firearm in the bedroom, within reach and ready for use.

When he was cross-examined, the accused person said he had forgotten how old he was. His knowledge of the use of firearms is that of ordinary people because he was not taught how to use one when he was training with the Zambia Air Force. He owned more than two firearms and he used to fire them to scare thieves. He did not remember teaching his daughter how to use a firearm.

He placed the firearm next to the wall and it must have fallen off and discharged after his wife touched it. He could not tell exactly how it happened because he was sleeping. The safety catch was not on because it had to be ready for use. The firearm was on the left side of the room, where his wife slept while he slept, on the right side. No intruder came into the house that night. He confirmed that he was in the bedroom with his wife and a toddler.

When he was re-examined, the accused person said the safety catch was off because it had to be ready for use in the event of an intruder coming into the house.

Retired Brigadier General Aggrey Nkandu Chiluba (Dw1) gave evidence on behalf of the accused person. His evidence was that he served the Zambia Army for 37 years and had advanced training in bomb disposal.



He produced a certificate confirming his expertise and it was admitted into evidence at Exhibit D1.

His evidence was that ammunition can become unstable if not properly stored. It must be stored in a place that has the correct climatic conditions and where this is not done, when placed in the barrel of a firearm, any disturbance or impact can trigger sympathetic or accidental discharge of the ammunition.

When he was cross-examined, Dw1 said he did not know how the ammunition that was used in Exhibit P1 before it discharged was stored. He also admitted not testing the firearm after the incident. He said in addition to being a bomb disposal expert, he was trained and has expertise in ballistics. He maintained that a loaded firearm can discharge if it hits the ground.

When he was re-examined, he said no one approached him to examine the firearm. When a shotgun discharges, the pellets spread.

Both parties filed in written submissions.

Submitting on behalf of the accused person, counsel referred to the case of *Woolmington v DPP (1)* and argued that the prosecution has

failed to prove the case against the accused person beyond all reasonable doubt. Reference was also made to the case of **Mwewa Murono v The People (2)** and it was submitted that the burden is on the prosecution to prove each and every ingredient of the offence beyond all reasonable doubt. In this case, there is no direct evidence linking the accused person to the killing and the only evidence against him is that he was in the same room with his wife when she was shot. They submitted that the circumstantial evidence against the accused person falls short of evidence required to prove a charge of murder.

They referred to the cases of **David Zulu v The People (3)** and **Mbinga Nyambe v The People (4)** and pointed out that the weaknesses of circumstantial evidence. They then submitted that the prosecution evidence in the matter, has not taken the case against the accused person out of the realm of conjecture.

Counsel also submitted that the prosecution evidence has not proved the essential element of *malice aforethought*. The evidence of Pw1, Pw2 and Pw3 shows that the atmosphere was friendly and peaceful before the shooting. The accused person did not show any aggression against his wife. The witnesses also pointed out that the accused person was in the habit of discharging the firearm to scare thieves; that rules out

the possibility that it could have been loaded with the aim of killing his wife.

Counsel submitted that the investigations were inconclusive and there was dereliction of duty. Reference was made to the case **Kalonga v The People (5)** and it was submitted that there was dereliction of duty when police officers failed to retrieve the 6 pellets that allegedly exited the body, failed to test for gunpowder residue and lift fingerprints. Pw6 also failed in his work when he did not establish how many people entered the room after the shooting and when the room was disarranged. This failure leads to a presumption that had the issues been attended to, evidence favourable to the accused person would have been found.

In the circumstances, the court should find that the accused person's defence is reasonably possible. Reference was made to the case of **Wiljohn Chizonde v The People (6)** and it was submitted that the accused person has given a credible account of how his wife was injured and in the absence of evidence that casts doubt on what he said, his explanation must be accepted. The evidence of Dw1 should be accepted and the court must find that it is possible that the firearm could have discharged accidentally. Further, having observed the



accused person's demeanour, the court must find his testimony to be credible and find that it is reasonably possible that the accused person did not cause the death of his wife.

Counsel submitted that going by the decision in the case of **Saluwema v The People (7)**, the court must find that the prosecution has not proved the charge of murder beyond all reasonable doubt and must acquit the accused person.

On behalf of the prosecution, counsel submitted that the prosecution have proved the charge against the accused person beyond all reasonable doubt. She pointed out that even though there was no eye witness, there is strong circumstantial evidence proving that the accused person committed the offence. The prosecution evidence, as is required by **Section 200 of the Penal Code**, has proved that Vivian Mulako Ilukena Banda died as a result of an unlawful act; she was shot and the evidence points at the fact that the shooting was unlawful.

The other limb of the evidence required to prove the charge, that the accused person had *malice aforethought*, has also been proved. The evidence of Pw4 and Pw7 has established that gunpowder was found around the wound Vivian Mulako Ilukena Banda suffered after being

shot. The ballistics expert confirmed that the firearm used was dangerous and could cause death and the court should find that the accused person, who was the only person with her when she was shot, is the one who shot her and intended to cause death or grievous harm.

The accused person is the only one who could have shot her because he had the opportunity and there is no evidence of any intruder entering the bedroom. She urged the court to dismiss the accused person's defence for not being credible. She said even if the accused person's claim that the safety catch was off, the ballistics expert's evidence has established that it could not discharge without the trigger being pulled. If his claim that the safety catch was off because he wanted the firearm to be immediately available for use, he could have placed it on his side and not on the side where his wife was sleeping.

She also submitted that the accused person failed to explain how the firearm discharged after his wife allegedly touched it. Though he under no obligation to prove his innocence, he has the evidential burden to prove any allegation that he makes. She also submitted the pellets entry point on the back of Vivian Mulako Ilukena Banda raises serious doubt on the claim that the firearm discharged after falling or being touched. She pointed out that the presence of gunpowder on

the wound confirms that the firearm was pressed on her back when it was discharged.

Counsel submitted that in the circumstances, the accused person's evidence should not be found to be credible. She urged the court to disregard Dw1's evidence on ground that it was speculative. He did not examine Exhibit P1 or the ammunition that was used in it to conclude that it could have accidentally discharged because it was poorly stored. She referred to the cases of **David Zulu v The People (3)** and **Kezzy Ngulube v The People (8)** and submitted that the only inference that can be drawn on the evidence before the court is one of guilt.

I am indebted to the counsels for their submissions and I have taken them into consideration in arriving at my decision.

It is common cause that on 27<sup>th</sup> October 2015, the accused person, his wife, Vivian Mulako Ilukena Banda, Pw1 and their children who included Pw2 and Pw3, between 21:00 and 22:00 hours, retired to bed after having supper at their house (30145 Meanwood, Chamba Valley in Lusaka). Earlier on, the accused person and his wife had taken some Castle Lager beer whilst cooking and discussing matters of concern to the accused person's law firm. The discussion was friendly and without incident.



Soon after retiring to bed, Vivian Mulako Ilukena Banda suffered a gunshot injury and was rushed to Levy Mwanawasa Hospital where she died. At the time she suffered the gunshot injury, she was in the bedroom with the accused person. Other than the two of them and a toddler, there was no other person in the room. It is also not in dispute that the firearm which inflicted the injury was fired from within the bedroom. Further, it is agreed that Pw1, Pw2 and Pw3, who were in the house at the time, did not hear any discussion or disagreement between the accused person and his wife before they heard the gunshot. It is also agreed that there was no "eye witness" to the shooting.

Further, I find that it is not disputed that Vivian Mulako Ilukena Banda died soon after reaching Levy Mwanawasa General Hospital. On 28<sup>th</sup> October 2015, Dr. Telendiy conducted a post-mortem on her body and he observed six 0.5 cm x 0.5 cm wounds on her belly and a 2.5 cm x 2.5 cm wound on her back. He found the cause of her death to be haemorrhagic shock due to bleeding. She bled because her intestines, spleen and kidney were perforated by shotgun pellets. The pathologist recovered 4 pellets, Exhibit P3, and a bullet wad, Exhibits P4 and P6, from her body.

It is also not in dispute that after the shooting, Exhibit P1, a shotgun belonging to the accused person and a bullet casing, Exhibit P5, were subjected to forensic examination. The casing was found to have been fired from the shotgun.

I accept the undisputed evidence I have set out in the last preceding paragraphs and find the facts therein, to have been proved.

There is a dispute on whether entry point of the pellets that caused the death Vivian Mulako Ilukena Banda, was the single injury on her back or the six wounds on her belly. The circumstances in which she was shot are also in dispute. Did she deliberately shoot herself? Was she shot after the firearm accidentally discharged? Was she shot by the accused person?

First of all, there is evidence from Pw4, the scenes of crime officer, that when he went to the accused person's house he did not find the firearm that was discharged in the bedroom. Exhibit P1 was retrieved from Kabwata Police Station and there is no evidence before me of how it got there. Similarly, there is no evidence of where Pw4 found the spent cartridge, Exhibit P5, which he later hand over Pw5. In the absence of evidence of where Exhibit P5 came from and found itself at Kabwata Police Station, I find that it cannot be linked to the

discharge of the accused person's firearm in his bedroom on the night of 27<sup>th</sup> October 2015.

However, I am satisfied that Exhibit P1 is the accused person's firearm and it was present in his bedroom soon after his wife was shot. Pw2, Pw3 and the accused person identified it as being the accused person's firearm. In addition, Pw2 confirmed having used it to assault the accused person soon after he entered the bedroom.

The pathologist's evidence was that when he opened Vivian Mulako Ilukena Banda's body, he recovered 4 pellets. It was also his evidence that he noticed a 2.5cm x 2.5cm wound "in the small" of her back, which is the area just above the buttocks. He also noticed six 0.5 cm x 0.5 cm wounds in the left iliac and subcostal area. In **Forensic Medicine**, the authors, at page 181, commenting on the type of injuries that are inflicted by a shotgun, point out that,

*"even at close range all the shot rarely pass through the body, and if they do exit is usually a ragged, torn hole in which individual shot wounds can be seen, and this appearance makes the distinction from entrance wounds comparatively simple"*

Notwithstanding, my finding that Exhibit P5 has not been linked to the scene of the crime, I find that there is sufficient evidence establishing that Vivian Mulako Ilukena Banda was shot at with a shotgun. The pellets recovered by the pathologist confirm that the



firearm used was a shotgun. So do the injuries she suffered, a single wound on one end and multiple wounds on the other end. In addition, I accept the pathologist's evidence and find that the wound on the back was the entry point whilst the 6 wounds in front, were the exit points.

I note the submission by defence counsel that there was dereliction of duty when the black stuff on Vivian Mulako Ilukena Banda's back was not tested for gunpowder residue. In *Forensic Medicine*, the authors, at page 180, commenting on the type of injuries inflicted by a shotgun, point out that,

*" if a shot gun is fired with the muzzle only a few inches from the body the gases produced by the explosion cause considerable laceration of the surface skin, destruction of the deeper tissues and often fragmentation of bone. The powder is driven into the wound, often very deep: and marks of burning and blackening and embedded particles of powder will be found in the wound principally and to a less extent around it.*

*Up to about a yard the charge of the shot will enter as one mass, making a hole with irregular edges about an inch in diameter, surrounded by a zone of blackening, burning, and tattooing from unburnt particles of powder. Scorching and dense blackening are more obvious within a few inches, the blackening gradually becoming less and the scorching disappearing as the distance increases. ....The wads enter with the projectile in near discharges, and may strike the body when fired from a distance of several yards"*

While I agree that it was desirable to examine for gunpowder residue, I find that the failure to do so did not prejudice the accused person in anyway. There is overwhelming evidence that the injuries she suffered were caused by a firearm and in particular, a shotgun.

In my view, the only issue affected by the failure to test the wound on the back for gunpowder residue is how far from her body the firearm was when it was discharged. It does not affect the question whether the wound was a gunshot wound or the entry or exit wound. In any case, the recovery of the wad, Exhibits P4 and P6, from Vivian Mulako Ilukena Banda's body confirms that the barrel was very close to her when the firearm was discharged. If it had not been the case, the wad would not have penetrated her body. I accept the pathologist's evidence that she was shot from a distance of less than 1 meter.

I have considered the possibility that Vivian Mulako Ilukena Banda shot herself. The finding of the pathologist, which I have accepted, is that she was shot in the back at very close range. I find that it is not possible that she could have turned the firearm on herself and shot herself in the back just above her waistline.

I have also considered the possibility that the firearm discharged by accident. I accept Dw1's evidence that ammunition that has been improperly stored can become unstable and can discharge without warning. Though there is no evidence before me of how the ammunition that was in the shotgun was stored, assuming that it exploded because of poor storage, would she have been shot in the back? The accused person's testimony was that his wife was shot after the shotgun which

he had placed against the wall fell and was discharged. He believes this was after she touched it. He demonstrated how he placed it and it was with its barrel facing upwards. But when pressed on how it actually happened, he said he could not tell because he was asleep. This suggests that he did not see what happened but thinks it discharged after being knocked. Notwithstanding, I will consider the claim.

Since the firearm was placed on the floor, against the wall and facing upwards, if it discharged after being touched, it would have fired upwards in a vertical direction. Vivian Mulako Ilukena Banda would have been shot either in the face or the front part of her body and not the back. This being the case, I find that the shot gun did not discharge as a result of being touched.

I have considered the possibility that the firearm discharged after being bumped and falling on the ground. Had that happened, she would have been shot in the feet and not in the back.

I have also considered the possibility that she bumped into it with her back. Had it been the case, it would have discharged while in an upright position and it would have fired upwards in either a vertical or diagonal direction. The post-mortem report indicates that she



suffered no injury to the lungs or chest area. She only suffered injury to parts that are horizontally opposite the entry wound. Consequently, I find that when the firearm was discharged, it was not on the ground but horizontally held less than a metre from her back. It totally rules out the possibility that the firearm discharged because the ammunition was not properly stored and it exploded on its own. I find that someone pulled the trigger and this finding is supported by the ballistics expert's evidence that the firearm was in good working order; it could not discharge accidentally.

I have found that other than the accused person, his wife and a toddler there was no other person in the room. The only person who could have pulled the trigger is the accused person. The toddler was aged about a year old and I have ruled out the possibility that it pulled the trigger because the firearm was not the ground when it was fired. The toddler could not have lifted and fired it from a horizontal position to cause the injuries seen during post-mortem. Neither is there any evidence of any intrusion into the room before the shooting.

In the circumstances, it cannot be said that the accused person's claim that his wife died after the firearm accidentally discharged is

credible and can reasonably be true. I find the claim to be devoid of any truth and I dismiss his testimony as being untruthful.

The offence of murder is set out in Section 200 of the Penal Code. It provides as follows:

*"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder"*

Section 204 of the Penal Code provides that *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 of 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.*

It is common cause that the evidence against the accused person is circumstantial and there is no direct evidence of why he shot his wife. In his evidence, the accused person said he used to discharge the firearm frequently to scare thieves. He also said his knowledge of firearms is that which an ordinary person has because he was not trained on how to use them. I don't believe his claim that because he was trained as a pilot, he was not trained on how to use a firearm.

However, even if it was the case, I am satisfied that being the owner of more than one firearm, he knew what a firearm could do when discharged. I find that when he fired on his wife he either intended to cause her death or to do grievous harm to her because he was aware that it she would either die or suffer injury. I am therefore satisfied that there is sufficient evidence of him having *malice aforethought* as is set out by **Section 204(a) of the Penal Code**.

I have already found that the injury inflicted by the accused person when he shot his wife caused her death. Coupled with my finding that he either intended to cause her death or grievous injury, I find that the prosecution has led compelling evidence proving both elements of the charge of murder. I am satisfied that it has been proved beyond all reasonable doubt that Paul Pandala Banda, on 27<sup>th</sup> October 2015, murdered Vivian Mulako Ilukena Banda. I find him guilty of the charge and I convict him for the offence of murder.

**Section 201 of the Penal Code** sets out the penalty in a case where one is convicted of the offence of murder. It provides as follows:

(1) *Any person convicted of murder shall be sentenced-*

(a) *to death; or*

(b) *where there are extenuating circumstances, to any sentence other than death:*

*Provided that paragraph (b) of this subsection shall not apply to murder committed in the course of aggravated robbery with a firearm under section two hundred and ninety-four.*



(2) For the purpose of this section-

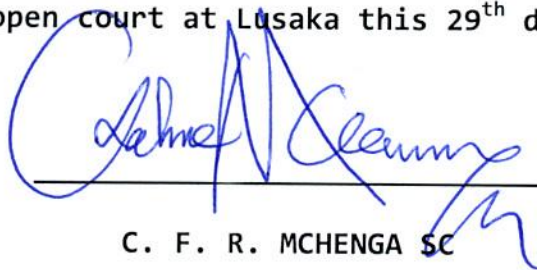
- (a) *an extenuating circumstance is any fact associated with the offence which would diminish morally the degree of the convicted person's guilt;*
- (b) *in deciding whether or not there are extenuating circumstances, the court shall consider the standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs.*

In the case of *Jack Chanda and Kennedy Chanda v The People (10)*, it was held that:

*"Failed defence of provocation; evidence of witchcraft accusation; and evidence of drinking can amount to extenuating circumstances"*

In this case, the accused person, even in the face of very compelling evidence, has denied shooting his wife. As a result, his reasons for killing her are unknown. Pw1, Pw2 and Pw3 all testified that before hearing the gunshot, they did not hear any quarrel between the accused person and his wife. However, they all testified that earlier that evening, he took some alcohol. From their evidence, it is apparent and I find that the amounts of alcohol he took were insignificant and incapable of affecting or influencing his judgement. Consequently, I find that the evidence before me does not establish any extenuating circumstances in favour of the accused person.

Delivered in open court at Lusaka this 29<sup>th</sup> day of July, 2016



C. F. R. MCHENGA SC

JUDGE