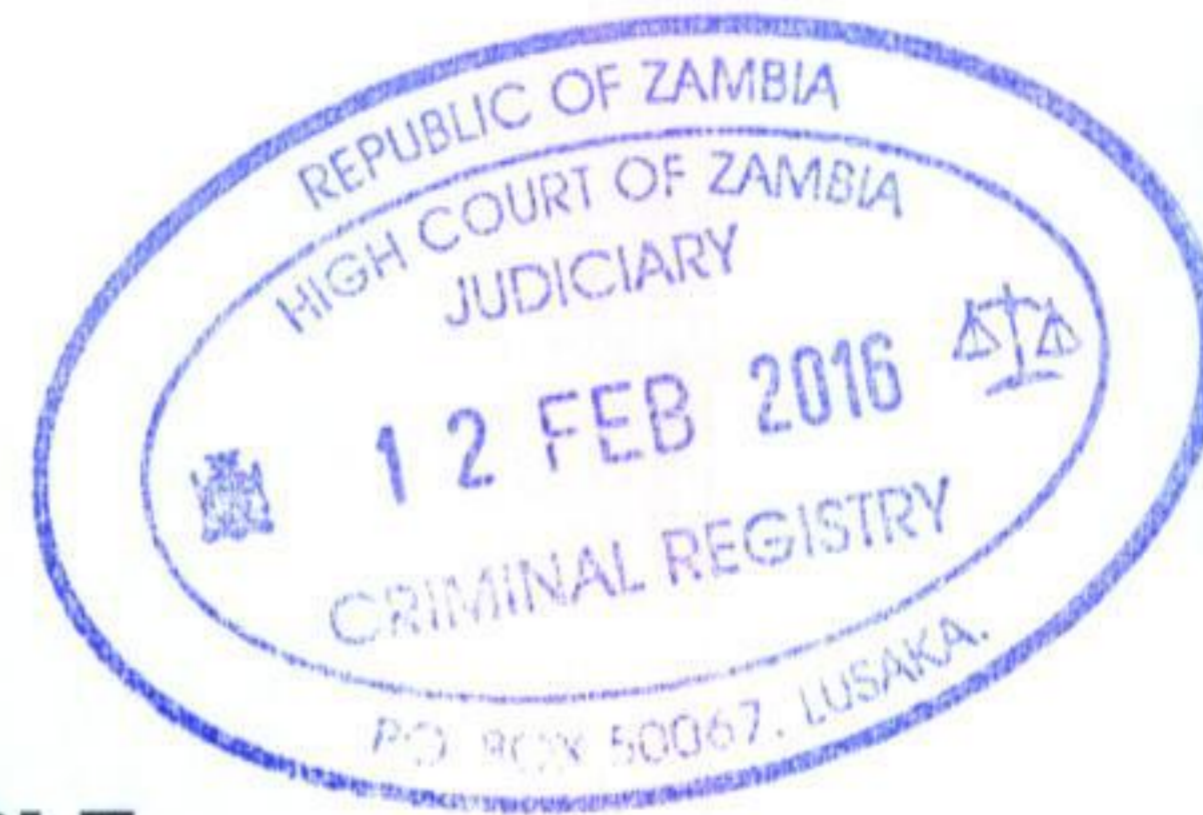


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)**

HP/204/2015



BETWEEN:

**THE PEOPLE
vs
SHADRECK BANDA ACCUSED**

Before Hon. Mrs. Justice M.S. Mulenga on the 12th day of February, 2016

FOR THE PEOPLE	:	MS KACHAKA, STATE ADVOCATE- NATIONAL PROSECUTIONS AUTHORITY
FOR THE ACCUSED P	:	MRS W. MUNDIA, LEGAL AID COUNSEL - LEGAL AID BOARD

J U D G M E N T

Cases cited:

1. **Chimbini v The People (1973) ZR 191**
2. **Mutale and Phiri v The People (1995/97) ZR 227 (SC)**
3. **R v Hochman, Vokey and Peables (1956) 113 CCC 319 (CAN)**

Shadreck Banda, the accused, stands charged with one count of murder contrary to section 200 of the Penal Code Chapter 87 of the laws of Zambia. The particulars of the offence are that the accused on the 10th day of June, 2015 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did murder Beatrice Zulu (the deceased).

The accused pleaded not guilty and the prosecution called six (6) witnesses. PW1, Tisa Sakala, stated that on a date she could not

remember, at around 21:00 hours to 22:00 hours her father (the accused) went to her house and informed her that her mother (the deceased) had been burnt and she asked him how she was burnt but he did not answer. At their home, she asked the deceased how she got burnt but she did not answer but just started crying. She observed that the deceased was burnt from the head, half the face, the whole chest area all the way down to the stomach or abdomen and the skin had peeled. PW1, the accused and some of the accused's neighbours then took the deceased to Chawama clinic where she was given an injection and panado and they went back home. PW1 went to her house and the following day, she went to ask the accused if they could take the deceased to the hospital. The accused said he had no money to do so but would give her money to take the deceased to Kabwe as he was not going to be able to nurse her. That he would follow to Kabwe the following day. The accused gave PW1 K75.00 and PW1 and the deceased boarded transport at Heroes Stadium. She took the deceased to her grandmother place (deceased's mother) in Kabwe. Her grandmother was surprised that she had taken a burnt person to her and she called the chairman who discussed with the deceased inside the house while PW1 was outside. PW1 later left for Lusaka.

Under cross examination, PW1 said the accused appeared greatly concerned about what had happened to the deceased. That at the clinic she did not enter the treatment room when the deceased was being seen by the doctor and so did not hear the explanation that was given to the doctor. The clinic then referred them to University Teaching Hospital (UTH). At this point they

had no police report. That she was surprised that none of the neighbours came to testify on what had happened.

PW2, Felistus Zulu, the younger sister to the deceased, testified that she was called by her mother on 18th May, 2015. She asked the deceased how she got burnt and the deceased said in the presence of Simon Mumba (the Chairman) and Nosisia Hachamba that the accused requested her to cook him nshima with roasted pork but found she had cooked nshima with beans and the pot of beans was on the fire and they started fighting. She went to lie down and the accused then took the hot pot of beans and poured it on her. She observed that the deceased was burnt on her head, half the face, and then all over her body down to the legs. They then reported to the police and took her to the hospital. A few days later the accused went to see the deceased at the hospital. PW2 told him what the deceased had said that he burnt her and that they had obtained a police report. The accused appeared surprised and said that in that case he was going back and will not spend a night in Kabwe. The accused never went back until the deceased passed on. In cross examination PW2 said at the police the deceased was able to speak although the police did not record a statement from the deceased.

PW3 Simon Mumba testified that on 18th May, 2015 at around 07:00 hours, the mother of the deceased, known as Bana Mutisa, called for him as branch chairman and said her daughter had come burnt from Lusaka. The deceased was brought to the sitting room and he asked her what happened. He was with

Bana Mutisa and Hachamba. The deceased explained that her husband named Shadreck Banda had poured hot beans on her whilst she was lying down when he found that she had not cooked nshima with roasted pork as requested. He asked the deceased what assistance she wanted and she asked to be taken to the hospital. He explained to her that considering her explanation she needed a police report before she could be attended to at the hospital. He organised a taxi and they took her to Bwacha Police where she gave a statement and was given a medical report, P1, and later admitted at the hospital. She was in hospital from 18th May, 2015 to 10th June, 2015 when she died. He has never seen the deceased's husband and only heard his name from the deceased.

Under cross examination, PW3 said it was surprising to him that the accused was not in custody or beaten up by the neighbours. That the proof that the deceased gave a statement is that the police wrote in the Occurrence Book (OB) and the medical report she was given.

PW4, Nosisia Hachamba Jere, narrated that on 17th May, 2015 at around 16:00 hours she was called by her in law Bana Mutisa to go and see the deceased who was sick. At 18:00 hours she found the deceased sleeping who said in a low voice that she was in pain and that PW4 should see her in the morning. On 18th May in the morning she went and saw the deceased and observed that she was burnt on her head, face, chest and back and her skin had peeled. The chairman then came, after being called, and asked the deceased what had happened and she responded that

her husband poured hot beans on her. PW4 went to the police with PW3, Bana Makoli, Bana Jenala and the deceased. The deceased explained to the police that she was burnt by her husband and was given a medical report. They were told to rush to the hospital and PW4 was given a phone number for one police officer to inform them of the ward in which the deceased would be admitted. She later relayed that message to the police. After some days, the deceased's husband came and PW2 told him what the deceased had reported to the police and he expressed shock that the deceased could say that. The accused did not even sit in the ward but unpacked the deceased's clothes that he had brought. He said he would no longer spend the night in Kabwe as earlier intended but return to Lusaka. He left K150.00 to be used at the hospital and got the phone numbers of PW4 and PW2. He would call PW4 from time to time to find out how the deceased was doing but never went back to see her until she died. This is despite their insistence that he should do so. At one time he sent K150.00 to PW4 through Zoonaa. She identified the medical report and the accused although she did not know his name.

Under cross examination, PW4 stated that she did not hear the full story from the deceased at home because she went outside to find someone to look after her baby so that she could take the deceased to the hospital and police. That she did not give a statement on what happened at the hospital when they confronted the accused as they did not ask her for the same. That the accused was surprised when PW2 told him what the deceased said and went with them to the ward but did not sit.

That if PW2 said the deceased did not go to the ward it should be because she might have forgotten. That the police did not arrest the accused at the hospital as they were not aware of his presence.

PW5, Woman Constable Diana Joyce Chirwa, testified that on 18th May, at around 09:40 hours whilst on her shift, the deceased reported that she sustained severe burns as a result of her husband pouring hot beans on her whilst in Lusaka. She observed burns on her face and body including the whole chest. That she was brought to Kabwe as she had no relatives in Lusaka. She gave her the medical report, P1, for assault occasioning actual bodily harm. The deceased was with three people, a man and two women, one of whom she remembered as Nosisia Hachamba. During the reporting, the deceased condition worsened and she stopped talking and PW5 advised that she be urgently taken to the hospital. That is why she did not record a statement. She did not visit the deceased in the hospital but handed her case over to the Victim Support Unit. In cross examination PW5 said she was not aware that it was the accused who told the daughter to take the deceased to Kabwe. She did not charge the accused for assault occasioning actual bodily harm as he was not in Kabwe. The deceased stopped talking at some point when she was recording the details and she did not know why the other witnesses did not say so. The deceased's condition became serious hence her advice to urgently take her to the police. No statement was taken from her during the time she was in hospital prior to her death.

PW6 Detective Constable Yotam Lutambo, the arresting officer testified that he was assigned the docket of murder on 14th July, 2015 after the case was referred from Kabwe. The allegation was that the accused poured hot beans on the deceased. He interviewed the accused who was already in custody. When he did not give him satisfactory answers, he charged and arrested him for murder which charge he denied. The post-mortem report done at Kabwe indicated that the deceased died due to burns. The matter was reported to his police station about two weeks prior to him being assigned the docket. He made efforts to interview the accused's neighbours but they were not willing to give statements and it was discovered that most of them were relatives of the accused. He learnt that the deceased opened up to her relatives in Kabwe. The medical report and post-mortem report were produced as P1 and P2. That the manner she got burnt would have attracted attention of the neighbours. The accused said he was not present when the incident happened as he was selling beer with George Matakala and Bwalya of the same compound when he was notified by a neighbour's child. PW6 did not make inquiries at Chawama clinic. He did not interview the people the accused mentioned. He know they were relatives and they were not cooperative.

This marked the close of the prosecution's case. The accused elected to give evidence on oath and called four (4) witnesses.

The accused, Shadreck Banda, DW1, testified that on 16th May, 2015 at around 18:00 hours he was at his makeshift stand selling beer and was with his friends Bwalya, Matangala, George

and his younger brother Boniface Banda when he saw Aggie, a neighbour's child, come running. She told him that her aunty, meaning the deceased, had burnt herself with beans when she went inside the house to check and that prior to that she was drinking beer. That the deceased screamed that she was burnt and asked Aggie (DW4) to call the accused. That Aggie used to call the deceased "aunty" and the accused "uncle" but they were not related and were only neighbours. The accused then left for home with the mentioned three friends and brother. The deceased was screaming and he took eggs and aloe vera and smeared on her. He then went to tell the deceased's daughter Tisa (PW1) and they all with some other neighbours including mother to Noria and DW4's mother went in a minibus to Chawama clinic. The doctor asked the deceased how she got burnt as she was smelling of beer. The deceased acknowledged that she had drunk beer and had felt dizzy and that is how she fell on the pot of beans. This was said in the presence of the accused, Bwalya, George, the Chairman's wife and everyone else they were with. The doctor said that since she appeared drunk, he would not give her medicine but after the accused pleaded she was given an injection and panadol and they were referred to UTH. He could not take her to UTH as he had no money. Whilst home in the night the deceased's mother called and said he should not take the deceased to UTH as they had no relatives in Lusaka but send PW1 to take the deceased to Kabwe. He did this by taking them to Heroes Stadium and gave PW1 K150.00. He went to Kabwe the following day at 16:00 hours with his brother Boniface and found his mother in law at the bedside. The

deceased told him that her mother was a liar and had told the chairman who interviewed her that the accused burnt her and her mother and the chairman then reported the matter to the police. That her mother said the deceased loved the accused too much and would not say that he burnt her. He was arrested on 4th July, 2015. He denied the prosecution evidence that his neighbours were relatives. He could not recall the name of the CIO who told him that statements had been taken from his witnesses.

Under cross examination, the accused stated that he was happily married to the deceased for 27 years but they had no child together. The deceased was cooking beans on a brazier inside the house and the brazier was on a table with blocks and was about one (1) meter high. The deceased was burnt on her cheeks, chest, back and front left arm but was not burnt on the head. That he arrived at the scene shortly after and found the deceased lying near where there was beans and fire. She was sitting and screaming that she had been burnt. That if he had burnt her his neighbours would have taken him to the police. That PW1 lied because he could have nursed the deceased as he loved her and PW3 lied on what the deceased stated. That he was with the mentioned three friends and brother from the time he opened his store at 06:00 hours to the time he was informed of the deceased getting burnt. In re-examination he stated that his mother in law requested for the deceased to be taken to Kabwe and this was made in the presence of the accused's chairman.

DW2 Fred Matangala, the accused's neighbour, testified that on 16th May, 2015, he went to drink beer at the accused's makeshift stand. He was drinking beer from around 10:00 hours to 18:00 hours in the company of the accused, Bwalya, George and younger brother to the accused. After the beer finished at the makeshift stand they went to another bar within John Laign. Around 20:00 hours to 21:00 hours a young girl came running calling the accused "grandfather" and told him that the grandmother was screaming in the house. The accused left with the young girl and then returned after about 8 minutes and informed them that his wife had got burnt. They then went with him to see.

Under cross examination DW2 stated that they were drinking from 10:00 hours until the girl came. That by this time they were drunk and that is why he could not tell all the people they were with. He could not remember if the accused left the place at some point and later came back. That according to what he saw, the accused first went alone with the girl before they accompanied to his house the second time. That if one said they all went the first time with the girl then the person would be lying.

DW3 Collins Bwalya testified that the accused was his best friend. That sometime on 16th May, 2016 whilst drinking at the accused's bar, a girl named Aggie, went to call the accused stating that "*uncle come, you are being called at home*". The accused then left with the girl. He later came back and that is how they accompanied him and assisted him to organise

transport. At the clinic they remained outside while the deceased was escorted by the ladies including Aggie's mother to be attended to by the doctor. When the accused was apprehended, he was called as one of the people present and he went with Alick, Aggie and Aggie's mother but nothing happened at the police.

When cross examined, DW3 said he went to the accused's bar to drink beer after sunset and was there present when Aggie came to call the accused. That this was not at another bar. He could not remember who else entered the doctor's room when the deceased was being attended to apart from Aggie's mother.

DW4, Agness Moonga, narrated that on 16th May, 2016 around 19:00 hours, she was sitted at her veranda which was about 7 meters from the accused's house. The accused was at his makeshift stand. She heard the deceased call out to her whilst in the house that she had been burnt and that PW4 should go and call the accused. PW4 went and called the accused and she left together with the accused, George and Bwalya. That on an unknown date she went with George, Bwalya and her mother to the police and narrated to them her testimony. Under cross examination DW4 stated that she saw the accused go to his makeshift stand in the morning. That she left the veranda at some point and it was possible for the accused to come back to his house while she was not around.

DW5, Mirriam Moonga, the mother of DW4 stated that on 16th May, 2015 she came back home at around 21:00 hours from selling sausages. She found a lot of people at the accused's

house and she went to find out what was happening. The people outside told her that the deceased got burnt when she fell by the pot of beans she was cooking. She followed the accused, Bwalya, George and another lady to take the deceased to the clinic. She entered the doctor's room with the accused and the accused told the deceased to explain what had happened. The deceased said she fell by the fire and agreed that she was drunk. She was given an injection and panadol and referred to UTH. Accused said he had no money to take her to UTH that day and they went back home around 22:00 hours. DW5 recalled going to the police station with Bwalya and the accused's brother during which DW4 gave a statement. When cross examined she said she had stayed with the accused as a neighbour for three (3) years. DW5 did not give a statement to the police.

This marked the close of the trial and both parties relied on the evidence on record. The prosecution has to prove the offence of murder against the accused beyond reasonable doubt. Section 200 of the Penal Code provides that:

“Any person who with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

Section 204 defines malice aforethought as:

“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.**

The prosecution thus has to prove that the accused caused the death of the deceased by an unlawful act with malice aforethought. Malice aforethought is proved if it is shown that the accused had intention to cause death or do grievous harm and the act or omission was such that it would probably cause death or grievous harm whether or not there was indifference or a wish that the same should not be caused.

From the evidence on record, I find that the deceased got severely burnt on 16th May, 2016 and died on 10th June, 2016. The cause of death as stated in the post-mortem report is burns and the significant findings are indicated as *“burns of 15-20% of the skin surface, 2-3 degree. Infected wound surface, sepsis, bilateral purulent pneumonia, lung edema.”* The post-mortem report further lists the external injuries as burn wounds of chest, neck, back, shoulders and left arm. The witnesses who saw the burns sustained by the deceased, including PW5 the police officer who issued the medical report, stated that the deceased had burns on the head, one side of the face, neck, chest, back and up to her legs. The accused confirmed this state of affairs but denied the fact that the wounds were also on the head.

This is no eye witness on how the deceased got burnt and so the evidence against the accused is circumstantial evidence. In the case of **Chimbini v The People (1973) ZR 191** it was held that:

“Where the evidence against an accused person is purely circumstantial and his guilty entirely a matter of inference, an inference of guilty may not be drawn unless it is the only inference drawn from the facts”

The court thus has to guard against drawing wrong inferences from the circumstantial evidence in order to feel safe to convict. I have therefore considered the totality of the evidence adduced above in determining whether the circumstantial evidence is cogent as to permit only an inference of guilt.

In this case the accused used to live with the deceased and there was no third person living with them. The prosecution evidence including that of PW5 and PW3, the chairman, as independent witnesses, is that the deceased herself told them that she was burnt by the accused who poured hot beans on her when he found that she had not cooked nshima and roasted pork which he had requested for. The accused's evidence is that the deceased was burnt when she fell on the pot of beans which she was cooking as she was drunk. DW5 mentioned that at the hospital, when the accused told the deceased to narrate what happened to her, the deceased said she fell on the fire and agreed that she was drunk. Apart from this there is no evidence of the accused being seen drinking or drunk even by PW1. The defence did not question PW1 on this aspect showing that it was an afterthought. Even if it is taken that the deceased was drunk, the explanation given by the accused is not reasonably plausible or possible given the extent of the burns. If one was to fall by the pot of beans accidentally, one would not be burnt from the head, face, neck, shoulders, chest and back. The burns are consistent with the fact that the hot beans was poured on her. The accused was also inconsistent in stating the position in which he found the deceased when called by DW4. In one vein he stated that she

was lying down near where there was beans and the fire and in another vein stated that he found her sitted and screaming.

I have also considered the issue of alibi raised by the accused to the effect that he was with DW2, DW3 and his younger brother who were drinking at his makeshift stand from 06:00 hours up to the time he was called by DW4 at around 18:00 hours. DW2 said he was drinking at the accused's stand from 10:00 hours up to 18:00 hours and they then shifted to another bar and continued up to around 20:00 to 21:00 hours when DW4 came to call the accused, whom she referred to as grandfather. DW3 said he only started drinking beer at the accused's bar after sunset and was present when DW4 came to call the accused and referred to him as uncle. Both DW2 and DW3 stated that when DW4 called the accused, the accused first left with DW4 and later came back and that is when they accompanied him to his home and the clinic. This is contrary to the accused's evidence. DW2 who was with the accused for a longer time since 10:00 hours said he could not remember if the accused left the place at some point and came back. It is not in dispute that the accused's bar was near his home and thus he had opportunity to go to his home and back. DW4 also stated that it was possible for the accused to go to his house from his shop at different times and that she was not present at home the whole time. The evidence of DW2, DW3 and DW4 shows that the accused's alibi of being at the bar the whole time from 07:00 hours to 20:00 to 21:00 hours when he was called is not solid as the possibility and opportunity was there for him to go to his home and assault the deceased. The accused's

evidence that DW4 went to call him at 18:00 hours is inconsistent with that of his witnesses that it was between 20:00 to 21:00 hours. This later time is consistent with the evidence of PW1 on what time she was called by the accused.

The accused's further assertion is that when he went to visit the deceased at the hospital with his relation, the deceased told him that her mother had lied and reported that the accused burnt her. This however cannot reasonably be true in the light of the evidence by PW2 and PW4 that the accused did not stay for a reasonable time at the hospital and did not even sit in the ward but merely left the deceased's clothes and stated that he was going back to Lusaka. This was after PW2 and PW3 told him that the deceased said he had poured the hot beans on her.

It is also odd that the accused would not visit his wife of 27 years, whom he said he loved, during the period of about a month when she was admitted in hospital if indeed he was not responsible for her burns. I further find in line with the evidence of PW1 which is supported to some extent by that of DW5 that the accused refused to take the deceased to UTH where she was referred stating that he had no money and later sent PW1 take the deceased to Kabwe. I also find that the accused's statement that his mother in law asked him to send the deceased to Kabwe instead of taking her to UTH is not reasonably true.

I have considered the guidance in the case of **Mutale and Phiri v The People (1995/97) ZR 227 (SC)** that:

"Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the court will adopt the one which is more

favourable to the accused if there is nothing in the case to exclude such inference.”

I find that an inference that the deceased burnt herself when she fell on the pot of beans is not a reasonable inference in light of the facts of this case. The only reasonable inference is that the accused burnt the deceased by pouring the hot beans on her. The circumstantial evidence is thus cogent to permit only an inference of guilt. In the Canadian case of **R v Hochman, Vokey and Peables (1956) 113 CCC 319 (CAN)** it was stated that:

“Circumstantial evidence does not require establishment of guilty with mathematical certainty. All that is required is moral certainty that all the bits and pieces, if taken together into one coherent picture points to the guilt as the only reasonable inference, then conviction is entirely justified.”

I am thus satisfied, based on the cogent circumstantial evidence, that the prosecution has proved its case against the accused person beyond reasonable doubt.

I accordingly find the accused guilty and convict him of the offence of murder of the deceased, Beatrice Zulu, contrary to section 200 of the Penal Code.

IRA

Delivered on this 12th day of February, 2016



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M.S. MULENGA
HIGH COURT JUDGE