LUBENDAE v THE PEOPLE (1983) Z.R. 54 (S.C.)

SUPREME COURT
SILUNGWE ,C.J., GARDNER AND MOWO, J.J.S
7TH JUNE, AND 29TH DECEMBER, 1983
(S.C.Z. JUDGMENT NO. 23 OF 1983)
APPEAL NO.185 OF 1982

Flynote
Criminal Law and Procedure - Defence - Intoxication - Evidence of on charge of murder.
Criminal law and Procedure - Defence - Accident -Test Applicable.
Criminal Law and Procedure - Murder - Provocation - Availability of.

Headnote
The accused appealed against a, conviction of murder putting forward the defences of intoxication and accident.

Held:
(i) Evidence of heavy drinking, even to the extent affecting the co-ordination of reflexes insufficient in itself to raise question of intent unless the accused person's capacities were affected to the extent that he may not have been able to form the necessary intent.
(ii) An event occurs by accident if it is a consequence which is in fact unintended, unforeseen or such that person of ordinary prudence would not have taken precautions to prevent its occurrence and on a charge of murder, accident is no defence if the accused intended to kill, foresaw death as a likely result of his act, or if a reasonably prudent person in his position would have realised that death was likely resort of such act.
(iii) The defence of provocation is available only when the deceased was the provoker.

Cases cited:
(1) Tembo v The People (1972) Z.R. 220.
(2) Simutenda v The People (1975) Z.R. 294.
(3) Fenton v Thorley [1903] A.C. 443.
(4) Tembo v The People (1976) Z.R. 332.

Legislation referred to:
Penal Code, Cap.146, s. 9 (1).
Supreme Court Act, Cap. 52, s. 15 (1).

For the appellant: R. O. Okafor, Legal Aid Counsel.
For the respondent: R .G. Patel, Assistant Senior State Advocate.

Judgment

SILUNGWE ,C.J.: delivered the judgment of the court.

This is an appeal against conviction on a charge of murder.

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The facts of the case may briefly be stated. Edmond Chanda (hereinafter referred to as the deceased), the appellant and man called Kufekisa, were all soldiers in the Zambia Defence Forces at the material time.

On August 9, 1982, the appellant and Kufekisa were at a beer party drinking sipeso -a local brew - in the company of two girls, at Kalongola Village, in the Senanga District of the Western Province. When a girl her the name of Charity Kwaleyela arrived on the scene, she found the appellant and a woman beer vendor engaged in an exchange of words over an outstanding sum of fifty ngwee for beer sold to the appellant. Charity then played the role of a good Samaritan by settling the appellant's debt. At about that point in time, the deceased arrived and was immediately bought a cup of sipeso beer by Charity (the evidence is silent as to what kind of relationship existed between Charity and the deceased -they presumably were friends). But, as the deceased was apparently not interested in the beer, he passed it on to the appellant. Displeased by this, Charity relieved the appellant of the beer, complaining that she had not intended it for him as she had just been charitable to him, adding that there was no justification for him to get more beer from her. She then took the beer into a house but the appellant followed her there and retrieved it from her. This sparked off an altercation between the two. Four eye-witnesses saw the appellant pick up his semi-automatic assault rifle and cock it. In spite of pleas not to use the firearm, the appellant fired thrice at the deceased, killing him on the spot. At the appellant's invitation, his colleague, Kufekisa, returned with him to their camp where the appellant's superiors, on receiving a report from him, had him arrested for, and charged with murder.

Medical evidence showed that the deceased's death had been due to two bullet wounds to the frontal head bones which had completely perforated the brain tissue.

At his trial, the appellant unsuccessfully put forward the defences of drunkenness and accident. Both these defences have now been reiterated before us, Mr Okafor arguing, ore behalf of the appellant, that the trial Court was in error by its refusal to accept the defences aforesaid.

As to drunkenness, Mr Okafor submits that this was not adequately considered by the trial court. He draws attention to the provisions of section 13 (4) of the Penal Code which stipulates that:

> "13. (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

This subsection has been considered by this court may cases, including *Bicton Tembo v The People*, (1) and *Simutenda v The People*, (2). In the former case, we held, at page 224, lines 27- 44, that:

> ". . . evidence of drinking, even heavy drinking, is not sufficient in itself, nor is evidence that an accused person was under the

> influence of drink in the sense that his co-ordination of reflexes were affected. . . for the purpose of section 13 (4) there must be evidence that the accused person's capacity may have been affected to the extent that he may not have been able to form the necessary intents; only if the evidence goes as far as this does the question whether the accused did in fact have the intent fall to be considered and it is then for the prosecution to negative the possibility that he may not have had such intent."

In *Tembo*, (1), there was evidence that the appellant had been drinking, and perhaps for a long time; but there was no evidence whatsoever that his capacities may have been affected by drink, nor did he himself so suggest in his unsworn evidence. In consequence of that the defence of intoxication did not succeed.

In the present case, there is evidence that the appellant had been drinking from pout 1500 hours to about 1900 hours when the shooting incident occurred. Out of the seven prosecution witnesses present at the beer party, one only - a soldier called George Chibuye-the second prosecution witness testified as to the appellant's condition at the beer party. In examination-in-chief; George said of the appellant: "I observed he was drunk." When cross-examined however he deposed: "I remained drinking from 1500 hours to 1900 hours. I was not drunk. The accused and the other appeared drunk because they were making noise." The qualification made here is significant: the appellant appeared to be drunk because he was, inter alia, making a noise. This evidence is supportive of that given by the appellant himself. Nevertheless evidence of the appellant's drinking is not in itself beneficial to him as there is nothing in it to suggest that his capacities may have been affected to such an extent as to render him unable to form the necessary intent. This being so, and, subject to the trial court s misdirection (which we shall now discuss) the appellant would stand no chance whatsoever of succeeding on this ground.

It is not in dispute that the High Court misdirected itself by saying in its Judgment, that intoxication had not been pleaded as defence. Mr Patel on behalf of the respondent submits however that there was otherwise ample evidence to justify Conviction, and urges us to apply the proviso to section 15 (1) of the Supreme Court Act. In accepting Mr Patel's submission, we draw attention to the fact that, quite apart from lack of evidence to suggest that the appellant's capacities may have been so affected as to render him unable to form the necessary intent the trial court certainly gave consideration to the question of intoxication and relying on *Tembo* (1), came to the conclusion that that defence was not available to the appellant.

The only other ground raised on appeal is as to the defence of accident. This was initially raised at the appellant's trial, based on his evidence as follows:

> "... I picked up the gun intending to go to the camp. After leaving the courtyard gates about 3 to 4 metres, I felt somebody

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> getting hold of my gun. He started pulling it away from me. There was a scuffle. Later I heard a gunshot. The gun then fell on the ground."

Implicit in this quotation is the suggestion that the deceased caught hold of the appellant's gun and started to pull it away, thereby precipitating a scuffle between them. Although there is other evidence of a scuffle, that evidence points to the appellant and Charity as being the participants in the scuffle. Indeed, there is no other evidence to suggest that the deceased caught hold of the gun and started to pull it away. It is evident, therefore, that the appellant's version of events immediately before the firing occurred, stands alone.

According to Mr Okafor, the trial court failed to address itself to the allegation that the gun had gone off accidentally. This allegation is invalid because the record of proceeding clearly shows, at page 42, that the court so addressed itself. After considering, but discounting the question of self-defence, the trial court said in its judgment:

> "Did the gun go off accidentally? It did not. The accused cocked the gun before he was approached by the deceased.... I refuse to accept that the gun went off accidentally."

The quotation here speaks for itself and requires no amplification.

The question that should now be asked is whether the defence of accident should have prevailed.

It is trite law that, in any offence for which a particular mental element is required, it is a defence that, although the accused did the acts which would be criminal if done with intent, they were done by accident. It was held (per Lord Lindley) in *Fenton v Thornley*, (3), at page 453, that the word 'accident' is not a technical legal term with a clearly defined meaning.
Section 9 (1) of the Penal Code (omitting parts of it not strictly relevant to this case) reads:

> "9. (1). . . a person is not criminally responsible for . . ., an event which occurs by accident."

An 'event occurs, by accident', within the meaning of section 9 (1) of the Penal Code, if it is a consequence which is in fact unintended, unforeseen or such that a person of ordinary prudence would not have taken precautions to prevent its occurrence. This, in effect is an amalgam of the tests of subjective foresight and objective foreseeability. On a charge of murder, therefore, the killing of a person cannot be 'an event which occurs by accident' if the accused intended to kill, or foresaw death as a likely result of his act, or if a reasonably prudent person in his position would have realised that death was a likely result of such an act.

In this case, four eye-witnesses, that is, prosecution witnesses numbers 1, 2, 6 and 7 (herein referred to as PW(s)), all averred that they had seen the appellant pick up his gun (rifle) and cock it. It would appear that, at that stage, some people cried out in fear and/or ran away to

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safety, and that, on the deceased advising the appellant (per PW1) not to use the gun and then attempting to take it way from the appellant (per PW 1, 2 and 6), PW 1, 2, 6 and 7 all heard three gunshots which resulted in deceased's instant demise. Later PWl0, a forensic and ballistics expert, examined the gun-a military SKS assault rifle and found it to be in a normal and sound mechanical condition and, therefore, capable of firing. There was, moreover, a safety catch which "was working normally thereby preventing an accidental firing."

It is obvious that, had the appellant not released the safety catch and cocked the rifle, this case could not have risen at all. By cocking the rifle, following the alteration he had had with Charity, it is evident that the appellant either intended to kill a human being or cause grievous harm; or foresaw human death or grievous harm as a likely result of his act; further a reasonably prudent person in his position would have realised that death or grievous harm was a likely result of such an act. The fact that the rifle was semi-automatic merely served to render it more perilous.

Why, it may be asked, did the appellant behave in the manner that he did, at the material time? It seems to us that he was upset by Charity's refusal to allow him to drink the beer that she had bought for the deceased. It was that refusal that acted as a catalyst and led the appellant into the temptation of picking up his assault ride and cocking it. Faced with that precarious situation, the deceased took it upon himself to play the role of a peacemaker by endeavouring to remove the source of danger from the appellant but, being in no mood to allow himself to be dispossessed of the gun, the appellant opened fire at the deceased and killed him instantly.

We have considered whether the appellant may avail himself of provocation as a defence, but, on that authority of *Tembo v The People*, (4) such a defence can only succeed if the victim was the provoker. There is no evidence here to suggest that the deceased in any way provoked the appellant, let alone the question whether the provocation, if at all it was proportionate to the force used by the appellant. This defence cannot, therefore, succeed.

Strangely, it remains a mystery as to why the appellant chose to carry a loaded firearm to a beer party. As it is inherently dangerous for one to take with him a loaded firearm to a beer party, we would strongly urge all those in authority to ensure that personnel under their charge do not carry about firearms when they (i.e. the personnel) are at leisure or off-duty.

All in all, we are satisfied with the propriety of the end-result in the High Court. Having applied the proviso to section 15 (1) of the Supreme Court Act, we would dismiss the appeal against conviction.

Appeal dismissed