SCZ Appeal No. 70 of 1993

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

B E T W E E N :

MUKUNKUTI MUYAMBUTA	Appellant
vs	
THE PEOPLE	Respondent

Coram: Bweupe, D.C.J., Muzyamba and Musumali, JJ.S.

13th July, 1993 and 24th August, 1993

For the Appellant: Mr. M. H. A. Samad, Senior Legal Aid Counsel
For the Respondent: Mrs E. Chipande, State Advocate

J U D G M E N T

Bweupe, D.C.J., delivered the judgment of the court.

Cases referred to:

(1) Kalebu Banda (1977) ZR 169.

(2) Kashenda Njunga and 4 others SCZ No. 20 of 1988

The appellant Mukunkuti Muyambuta, was charged with an information containing one count of murder contrary to Section 200 of the Penal Code, the particulars of the offence alleging that he on the 2nd of January, 1992 at Mongu did murder Mayambuta Mukunkuti. He was convicted and sentenced to suffer death. He has now appealed to this court against both conviction and sentence.

The facts of this case were simply these: PW1, Sepiso Mubita and PW2, Walubita Mayambuta, both sisters-in-law of the appellant, were at home when the appellant arrived from some beer party on 1st January, 1992. On arrival they heard the appellant utter the following words:-

2/... "To day

"To-day I am going to kill a wizard who killed Ndalama. You also killed Samuyebela. I have been telling you always and to day I am going to kill you for being a wizard."

The appellant was referring to his father and he was then carrying a spear. On hearing those words the appellant's father, now the deceased, went into his house but the appellant threatened to set the house on fire saying, "I am talking and you go into your house. I am going to burn you in the house." The appellant in fact got some grass and lit it so that he could set the house on fire. The deceased came out of the house and tried to run away but the appellant pursued him and it the deceased on the legs with a paddle. The deceased fell down and then the appellant stabbed him with a spear on the right side of the throat. On seeing this PW1 and PW2 shouted, "you have killed our father." The appellant then ran away into the bush. The deceased died during the early hours of 2nd January, 1992.

The appellant gave evidence on oath. He said that on 1st January, 1992 there was beer party in his home village. When he came back from where he had gone he was informed that his parents had a domestic dispute and as a result his mother had run away into the bush threatening to commit suicide. He went to bring her back and advised both parents to live peacefully. Then the deceased said to the appellant, "you nearly killed me over Mulonda and you side with people with whom I have had land dispute. I am now going to kill you over the illness that had inflicted me and now I am well." The deceased then went into his house and came back armed with a spear. The appellant ran away but the deceased followed him. PW1, PW2 and his mother ran into the bush. The deceased ran after the appellant until the appellant got tired. The appellant held the spear and managed to grab it from the deceased. The appellant then stabbed the deceased with the said spear on the neck as he tried to throw it away whilst they struggled for it. He said he acted in self-defence in that he stabbed the deceased after he, the appellant, grabbed the spear from the deceased.

On behalf of the appellant Mr. Samad, Senior Legal Aid Counsel has advanced three grounds of appeal relating to conviction and one

3/...relating to

relating to sentence. The first ground argued was that PW1, and PW2 had an interest of their own to serve in that they were promised by the appellant's brother a head of cattle if PW1 and PW2 helped them to concoct the evidence against the appellant. The second was to the effect that the appellant was grossly provoked by his father when the former was accused of siding with those people the latter had land dispute with. Thirdly that the appellant acted in self-defence or that the killing was accidental as it happened when the deceased was stabbed as the appellant struggled to grat the spear and throw it away. He, Mr. Samad further argued that in the absence of a post mortem report it can not be said positively that the deceased died as a result of being stabbed. He referred the Court to the case of KALEBU BANDA (1). On sentence Mr. Samad argued that as the appellant came from a beer party he must be taken to have been drunk. In those circumstances he said the appellant would not be responsible for whatever he did in a drunken state.

The learned State Advocate, Mrs Chipande, argued that the issue is whether the killing was murder, self-defence or accidental. She said PW1's evidence was corroborated by that of PW2 and PW3. There is no evidence the killing was accidental or committed in self-defence. The absence of a post mortem report does not alter the situation as there is evidence of assault upon which the court can find the death was caused by the assault.

In his judgment the learned judge carefully and meticulously analysed the evidence adduced by both parties; the documents admitted and the submissions made and came to the final conclusion that PW1 and PW2 who were the eye-witnesses to this unhappy event were not witnesses with their own interest to serve. He found that the appellant's assertion that PW1 and PW2 had been promised a head of cattle each was just disclosed when the appellant was giving evidence and that there was no attempt to cross-examine both PW1 and PW2 when they gave evidence.

We agree with the learned judge's findings on this issue and we have no reason to find otherwise. The submission on that point would not hold water and the appeal based on that argument would not succeed.

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The second ground raised was that of provocation. The learned defence counsel argued that the appellant was grossly provoked when his father, the deceased, accused him of siding with the people he had land dispute with. We note from the record that at the time of his apprehension and indeed later on in his warn and caution statement the appellant never raised provocation as a defence to his action. The evidence of PW1 and PW2 which the judge described as clear and straightforward with no slightest flavour of concoction as evidence of witnesses who were present throughout the fatal incident, did not show that there was a dispute between the appellant's parents which made the appellant's mother run into the bush threatening to commit suicide. We are unable to be persuaded that the appellant was in anyway provoked by the deceased's accusation that the appellant sided with those the deceased had land dispute with.

The question whether the appellant acted in self-defence or that the killing was accidental has not been supported by evidence on record. The evidence which the judge accepted was that of PW1 and PW2 both of whom said that when the appellant came from where he had gone the appellant threatened "to kill a wizard who had killed Ndalama and Samuyebela" and when the deceased went into his house the appellant threatened to set the house on fire saying "I am talking and you go into your house. I am going to burn you in the house." At that time the appellant had a spear and when the deceased ran out of the house the appellant chased him and hit him with a paddle on his legs and then when the deceased fell down the appellant stabbed him with a spear. We do not see how self-defence can arise in these circumstances. Neither do we find on the evidence that the killing was accidental. If anything this was a premeditated killing. We are unable to trace facts that would make us find faults in the judgment on the arguments presented.

The appellant's fourth argument is that in the absence of the post mortem report it can not be said positively that the stabbing of the deceased by the appellant caused the death. Mr. Samad argued that when the deceased was stabbed other people poured water on his head and it could well be that the deceased's throat was choked and that could have caused the death. We have considered this argument. True there was no postmortem report in this unhappy incident but

5/... there is

there is ample evidence by PW1 and PW2 that the appellant stabbed the deceased with a spear in the afternoon of 1st January, 1992 and he died in the early morning of 2nd January, 1992. There was also evidence from PW4 that when they poured water on the deceased after having been stabbed the deceased who was unconscious became conscious. We have held before that where there is evidence of assault the court can rightly find that the assault caused the death. In this case that evidence was ample. There is no evidence on record that the water was poured through the deceased's throat. In KASHENDA AND 4 OTHERS (2) it was held by this court that "where there is evidence of assault followed by a death without the opportunity for a novus actus interverveniens a court is entitled to accept such evidence as an indication that the assault caused the death.

We find no other reason why we should interfere with the learned trial judge's finding and the appeal against conviction can not succeed. Accordingly the appeal against conviction is dismissed.

As regard sentence Mr. samad has argued that as the appellant came from a beer party he can be presumed that he had taken some beer which impaire his mental falculty. The appellant was represented at the trial and the question of drunkenness was not raised. What was raised is that as the appellant believed in witchcraft his case fell under the ambit of Section 201 of Act 3 of 1990 which mitigating factor was summarily dismissed by the learned judge.

The evidence which the learned Judge accepted as being the reason why the appellant killed his father was that the appellant believed that his father was a wizard who had killed Ndalama and Samuyebela. We have held in a number of cases that belief in witchcraft would provide strong externuating circumstances to fall within the ambit of Section 201 of Act 3 of 1990 taking into account the community in which the appellant lived. Under Section 201 referred to death sentence in matters of this type of murder is no longer mandatory. It is only mandatory in murder cases committed in course of aggravated robbery with use of a firearm. This offence was committed after Act 3 of 1990 came into operation. We are of the view that the appellant should have been accorded the benefit of that Act. We, therefore, set aside the sentence of death. We order

6/... and direct

and direct that this appellant should suffer a prison term of fifteen (15) years with hard labour with effect from 3rd January, 1992. we would allow the appeal against sentence to that extent only.

B. K. BWEUPE
DEPUTY CHIEF JUSTICE

W. W. MUZYAMBA
SUPREME COURT JUDGE

C. M. MUSUMALI
SUPREME COURT JUDGE