IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(CRIMINAL JURISDICTION)

SCZ JUDGMENT NO. 5 OF 1996
APPEAL NO. 127 of 1995

B E T W E E N:

JOSEPH MWANDAMA — Appellant

-VS-

THE PEOPLE — Respondent

Coram: Ngulube, C.J, Sakala and Chirwa JJs
on 5th March and 7th May 1996

For the appellant - Miss W.L. Henriques, Deputy Director of Legal Aid

For the respondent - Mr. R.O. Okafor, Principal State Advocate

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J U D G M E N T

Ngulube, C.J, delivered the Judgment of the Court.

On 5th March 1996 when we heard this case, we dismissed the appeal against conviction but allowed the appeal against the sentence; we held that there were extenuating circumstances. Accordingly, we quashed the death sentence and in its place substituted a term of 15 (fifteen) years imprisonment with hard labour, with effect from 16th November, 1993, the date of arrest. We said we would give our reasons later and this we now do.

The appellant was sentenced to suffer death for the murder of one Phillimon Banda on 13th November 1993 at Ndola. The evidence disclosed that the deceased and the appellant were both police officers and at the material time both had been sent out to go on patrol duties in the Misundu area of Ndola. They decided to drink the powerful moonshine known as Kachasu and went to PW1's place from where they dispatched two bottles

of the brew. It was not in dispute that on their return journey, the two quarrelled and fought and the deceased died as a result of a gunshot wound inflicted by the appellant. The postmortem report revealed that the deceased was shot through the mouth; the jaw had two fractures only one of which was attributable to the bullet wound; and there were three cuts (one on the neck and two on the broken jaw) consistent with a sharp instrument having been used. The evidence of the appellant and his warned and cautioned statement to the investigating officer showed that in the course of the fight, each had used the rifle in his possession as a battering rod. There was no eyewitness other than the accused who deposed at the trial that the deceased had overpowered him and would have shot him as he lay on the ground if he had not shot him first. The learned judge did not accept that the deceased had recocked his gun as the appellant was on the ground and dismissed all the defences canvassed.

Miss Henriques advanced two grounds of appeal which were argued together. We also considered the written grounds put forward by the appellant himself. The major ground alleged a misdirection in the finding that the appellant had shot the deceased with the necessary intent required by the law to sustain a capital conviction. The submission in this respect was that the appellant had fired in self defence. The essence of self-defence is that the accused in fact acts quite deliberately to preserve his own life or to prevent grave harm to himself. It is inconsistent with a defence of accident and learned counsel's attempt to fuse self defence and accident in this case could not be sustained. The submission made was that the appellant fired in self defence but that he did not intend to shoot the deceased; he fired aimlessly to scare the deceased. In the same breath, it was submitted that the appellant reasonably feared that the deceased might shoot him and so shot him first. These submissions only served to confuse issues. The learned trial judge, on the other hand, decided to consider each possible defence in turn. He discounted all of them. Drunkeness was not available as a defence since there was nothing

to suggest that the appellant's capacity was affected. Self defence was discounted on a consideration of the appellant's evidence when viewed against his earlier warn and caution statement to the police in which there was no mention of the deceased recocking his gun to shoot the appellant. In addition, the evidence showed that the deceased had already sustained very serious injuries in the form of a fractured jaw and three cuts. At the hearing of the appeal, it was suggested we might also consider the defence of provocation. The appellant's own account of the incident and the use of a deadly weapon preclude the availability of provocation.

It should be noted, for the record, that where, as here, the evidence shows both parties to have been willing combatants, it would be very strange to hold that the killing was justified or excusable so as to avoid liability. In such cases, and where the evidence so suggests, the offender participating in an affray would still be guilty, at the very least, of the lesser charge of manslaughter. The position in this instant case is that there was nothing to justify or to excuse the killing and nothing to reduce the charge. We did not see any misdirection ourselves in the finding that the use of the firearm was unjustified. In the circumstances, we found no ground upon which to interfere with the conviction.

With regard to the sentence, the evidence which did not support the defences advanced nonetheless established circumstances which amounted to extenuation. The evidence of fighting by both parties was equally relevant, as was the youthfulness of the appellant who was only 23 years old. We considered that the circumstances when taken cumulatively, warranted a finding that there was extenuation. It was for the foregoing reasons that we dismissed the appeal against the conviction but substituted the sentence of imprisonment.

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M.M.S.W. NGULUBE
CHIEF JUSTICE

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E.L. SAKALA
SUPREME COURT JUDGE

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D.K. CHIRWA
SUPREME COURT JUDGE