IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

SCZ APPEAL NO. 52 OF 1995.

JOB KASONDA KAPITA — Appellant

Vs

THE PEOPLE — Respondent

Coram: Ngulube, Chief Justice, Sakala and Chirwa JJS.
5th March, 1996.

For the appellant, Mr. G.L. Chilandu & Company.
For the respondent, Mr. R.O. Okafor, Principle State Advocate.

J U D G M E N T

Sakala JS delivered the judgment of the court.

The appellant was convicted of murder contrary to section 200 of the Penal Code Cap 146 of the laws of Zambia. The particulars of the offence were that, Job Kasonda Kapita, the appellant, on the 4th of October, 1994 at Ndola, in the Ndola District of the Copperbelt Province of the Republic of Zambia did murder John Mufune. He was sentenced to death after the learned trial commissioner found no extenuating circumstances in his favour. He has appealed against both conviction and sentence.

The facts of the case as accepted by the learned trial commissioner were that at about 22 hours on 4th October 1994, after some beer drinking, the deceased and his three colleagues were proceeding home when shortly after by passing a police post, they were stopped by the appellant, who was then on duty, for allegedly making noise. The deceased and his colleagues denied making noise. Thereupon the appellant singled out the deceased for detention. After the appellant recorded the deceased's name in the occurance book, the deceased refused to remove his belt and his shoes contending that he had not committed any offence. The appellant then decided to take the deceased to the cells. At the cells the deceased resisted to be put into the cells. According to the evidence of PW1 the deceased refused to enter into the cells saying that they were meant for people who had committed an offence and that he was innocent. Further, according to the evidence of PW1, the appellant then said, "in that case, I will kill you, I have killed many people before." Then the deceased said he was ready to die as he had committed no offence. The appellant, at that point, is said to have fired into the air. The deceased

then faced the wall of the cells with his back to the appellant and said; "Then kill me." PW1 testified further that they pleaded with the appellant but he advised them to go home. The appellant fired into the back of the deceased. Thereafter the deceased,according to the evidence, turned and faced his colleagues and said, "Youngmen, I am now dying, go home and tell the people." According to PW1 the deceased then fell to the ground. The appellant left the scene. After a short while the witness and his friend also left the scene and reported the matter. The incident was witnessed by PWs 1 and 2 and another person. PW1, who knew the appellant before, denied that the shooting was accidental but that it was deliberate.

The gist of the appellant's defence on oath was that the shooting was accidental as the firearm went off in the process of taking the deceased into the cells as he was resisting an arrest. On the evidence before him, the learned trial commissioner found as a fact that the deceased died as a result of a gun shot. He rejected the defence of shooting in the course of effecting a lawful arrest. He further rejected the defence of accidental shooting as well as the defence of provocation and convicted the appellant of murder and sentenced him to hang by the neck until he was dead.

On behalf of the appellant Mr. Chilandu argued one ground of appeal before us namely, that the learned trial commissioner misdirected himself in holding that the appellant, in the circumstances of the case, had no right to use the firearm in effecting the arrest of the deceased. Counsel contended that under section 24(1)(c) of the Zambia Police Act the appellant was entitled to use force to effect a lawful arrest on the ground that the deceased displayed drunken conduct and refused to provide his true name and address as requested of him in terms of section 29 of the Criminal Procedure Code.

It was further the contention of Mr. Chilandu that there was ample evidence that the deceased and his companions, PWs 1 and 2, had gone on a drinking spree from 19.00 hours to 22.00 hours. Mr. Chilandu pointed out that PW2 in his evidence conceded that they were very very drunk and that the appellant questioned them as to why they were conducting themselves in that fashion. He submitted that the appellant had a right to inquire of them to satisfy himself that their conduct would not lead to breach of peace. Mr. Chilandu further argued that the appellant had testified that he had asked for the particulars of the deceased namely; his name and his residence but that the

deceased never gave the proper names and the residential address. He submitted that the learned trial commissioner preferred the evidence of PWs 1 and 2 to that of the appellant contending that this was a misdrection. He further submitted that there were sufficient reasons for the learned trial commissioner to have doubted the evidence of PWs 1 and 2 as they were drunk and in their evidence must have set out to avenge the death of their friend, a fact demonstrated by their embellished evidence which contained details which were not in their statements to the police. Mr. Chilandu submitted that the evidence of PWs 1 and 2 was an after thought. He urged the court to reverse the finding of the learned trial commissioner in relation to the evidence of PWs 1 and 2 as that evidence was not credible as compared to that of the appellant. Mr. Chilandu also contended that if the court accepted his submissions then the court must accept that the appellant's evidence was that he had made up his mind to detain the deceased for the offence of disorderly conduct and that the appellant was entitled to carry out further investigations in relation to the illegal petrol sales.

On sentence Mr. Chilandu has drawn our attention to the fact that the conduct of the deceased might have provoked the appellant and that the appellant had been performing a duty although it may have been carried out in a misguided fashion but that the appellant acted in a moment generated by the situation. He also pointed out that the appellant was 26 years old at the time of the incident and had served the police for four years and that he had been given a responsibility of manning a station at such a youthful age without supervision and hence the unfortunate incident.

Finally Mr. Chilandu submitted that section 24 of the Police Act entitled the appellant to apprehend the deceased when he refused to surrender himself and resisted the lawful arrest.

On behalf of the respondent Mr. Okafor informed the court that he supported the conviction. He pointed out that this was a very bad case for the appellant. He submitted that PWs 1 and 2 were witnesses who were seen by the learned trial commissioner. He believed their evidence as to what happened. He also pointed out that it is not correct to argue that the deceased did not give his residential address. Mr. Okafor argued that the appellant never told the deceased the offence he had committed and that the appellant had no reason to behave as he did arguing that there was no evidence

of disorderly conduct and if anything the evidence was that it was the appellant who behaved in a disorderly manner. Counsel submitted that the learned trial commissioner was very careful in the manner he handled the case and that the appellant never gave any explanation as to how the firearm went off. He urged the court to dismiss the appeal.

We have carefully examined the judgment of the learned trial commissioner and we have also very carefully considered the evidence on record as well as the submissions by both learned counsel. We accept that while the evidence of PWs 1 and 2 does give an explanation as to how the deceased was shot, the evidence of the appellant does not advance any explanation as to how the deceased was shot. The court had the opportunity of seeing PWs 1 and 2. The court accepted their evidence. We are unable to find any misdirection. If on the other hand the explanation given by the appellant as to how the gun went off was correct then we find no plausible explanation of how the gun could have shot the deceased in the manner as indicated by the injuries found on the body of the deceased by the doctor who conducted the postmortem examination. In our considered opinion this was a cold blooded shooting. The evidence in support of the conviction was overwhelming. We find no merit in the appeal against conviction. The appeal against conviction is dismissed. As to sentence we take note of the spirited arguments advanced by Mr.Chilandu in support of what he described as extenuating circumstances. We agree that in a proper case the court may consider the fact that an appellant was performing his duties but perhaps in a misguided manner. This, however, is not a proper case in which that factor established extenuating circumstances because the conduct of the deceased did not invite the appellant to perform any duty at all. The appeal against sentence is also dismissed.

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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