IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

SCZ No. 12 of 2004
Appeal No. 218/2003

B E T W E E N:

JUSTIN MUMBI — **Appellant**

AND

THE PEOPLE — **Respondent**

Coram: Sakala, CJ. Chibesakunda and Chitengi JJs

4th March and 1st June, 2004

For the Appellant, Mr. D. B. Mupeta, Senior Legal Aid Counsel
For the State, Mrs. J. C. Kaumba, Deputy Chief State Advocate

JUDGMENT

Sakala, CJ., delivered the Judgment of the Court

Case referred to:

1. **Bwalya V. The People [1995/1997] ZR 168**

The appellant was tried and convicted for the offence of murder contrary to Section 200 of the Penal Code, Cap 87 of the Laws of Zambia. The particulars of the offence alleged that, the appellant, on 14th May 2002, at Mufulira, in the Mufulira District of the Copperbelt Province of the Republic of Zambia, murdered Elias Kapolowe. He was sentenced to suffer the mandatory penalty of death.

(170)

The fact that the deceased died from gun shot wounds was not in dispute. The evidence connecting the appellant to the offence was adduced from PW3, who was the eyewitness to the incident. PW3's evidence was that on 14th May 2002, he was at PW2's house waiting to be paid for the work he had done for PW2. While at the house, the appellant demanded a pair of shoes from PW2, his uncle. PW2 refused to give him the pair of shoes. Thereafter, the appellant disappeared but only to reappear later armed with a gun, which he pointed at his uncle, PW2. On seeing this, PW2 ran away. The appellant then pointed the gun at PW3. Upon seeing the appellant pointing the gun at PW3, the deceased panicked. He stood up and moved towards the appellant. The appellant then shot the deceased three times. The evidence of PW6 was that he was the owner of the gun in issue. It had been stolen from his house after it had been broken into.

In his defence, the appellant elected to remain silent. On behalf of the appellant, Mr. Mupeta advanced arguments only in support of the appeal against sentence. He pointed out that there was evidence that the appellant had been drinking. Mr. Mupeta urged us to consider extenuating circumstances and impose an appropriate sentence. He specifically drew the attention of the court to page 15 of the record where it is recorded that ***"He was smelling beer when I apprehended him. He appeared to be drunk at the time".*** Mr. Mupeta also referred us to page 13 of the record where it is recorded that ***"When Justin arrived, he was given some beer and he drunk."*** Counsel submitted that this evidence supported the state of mind of a drunken person.

In response, Mrs. Kaumba informed the court that the state supported the conviction. She pointed out that the appellant had elected to remain silent and

the court believed, in total, the evidence of PW3, the eyewitness. On sentence, Mrs. Kaumba agreed that the evidence of the appellant's drunkenness amounted to extenuating circumstances.

On the evidence of PW3, which the trial court accepted, we are satisfied that the appellant shot the deceased and that the deceased died from gunshot wounds. The appeal against conviction has no chance of success. It is accordingly dismissed.

On sentence, both learned counsel agreed that the evidence of drunkenness amounted to extenuating circumstances. Before sentencing the appellant the learned trial Judge had this to say:

> ***"I have taken into account the fact that the convict is a first offender who is very young and I have also considered what the learned defence counsel has submitted in mitigation. However, in the light of the evidence before this court where the convict even went to the extent of breaking into someone's house just to secure a gun in order to commit a felony, I find that drunkenness would not suffice as an extenuating circumstance for this court not to impose the mandatory sentence for the offence of Murder. Furthermore drunkenness was not pleaded as a defence but accidental shooting was what was alluded to. Therefore, in the circumstances I have no option but to impose the mandatory statutory death sentence, which is for the convict to be hanged by the neck until he is dead."***

We are unable to criticize the learned trial Judge for taking this approach and rejecting drunkenness as an extenuating circumstance. In the case of **Bwalya V. The People,** [(1)] the evidence revealed that there was general drunkenness prevailing whereby the appellant picked a quarrel with several people, one after the other, when he suddenly picked up a pounding stick and

(172)

smote the deceased on the head. The deceased died suddenly. This court said when dealing with sentence:

> ***"--- We consider that the drunken circumstances generally attending upon the occasion sufficiently reduced the amount of moral culpability so that there was extenuation."***

We set aside the death sentence in that case and replaced it with a sentence of 10 years imprisonment with hard labour.

The evidence accepted in the case now before us was that the appellant demanded for a pair of shoes from his uncle. When his uncle did not attend to his demand, he disappeared but only to return later armed with a gun. He aimed this gun at his uncle who ran away, but subsequently shot the deceased. Further evidence revealed that the gun in issue had actually been stolen after the house of PW6 had been broken into.

On this evidence, we find no extenuation. The appeal against the death sentence is also dismissed.

.....

E.L. Sakala
CHIEF JUSTICE

.....

L.P. Chibesakunda
SUPREME COURT JUDGE

.....

P. Chitengi
SUPREME COURT JUDGE