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

Appeal No. 121/122/ 123/2015

B E T W E E N :

HUMPHREY MANYONGA	**1ST APPELLANT**
BRIAN CHUNGWE	**2ND APPELLANT**
STEPHEN KAFULA KANGWA	**3RD APPELLANT**

AND

THE PEOPLE	**RESPONDENT**

Coram: **Wanki, Hamaundu and Malila, JJS**
On 11th August, 2015 and 4th November, 2015

For the Appellants	:	Mr. A. Ngulube, Director, Legal Aid Board
For the Respondent	:	Mrs. M. T. Mumba, Deputy Chief State Advocate

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J U D G M E N T

Malila JS, delivered the judgment of the Court.

Cases referred to:

1. *Haonga and Other v. The People (1976) ZR 200*
2. *R v. Clarkson (1971) 55 Cr. App. 445*
3. *R v. Coney (1882) 8QBD 534*
4. *R v. Allan and Others (1965) 1QB 130*
5. *R v. Smith (Wesley)(1963) 3ALL ER 597*
6. *Chisulo and 2 Others v. R (1961) R&N. 116.*
7. *R v. Powell (1999) 1AC 1*

8. *R v. Anderson and Morris (1966) 2QB 110*
9. *R. V. Wakely, McAuliffe v. R (1995) 130 ALR*
10. *Francis Mayaba v. The People (1999) ZR 44*
11. *Ernest Mwaba and Others v. The People (1987) ZR 19*
12. *Dickson Sembauke and Another v. The People (1988-89) ZR 144*
13. *Mushemi v. The People (1982) ZR 71*
14. *Miloslav v. The People (Appeal No. 049/2013), SCZ Judgment No. 26 of 2014*
15. *Mohamed v. Attorney-General (1982) ZR 49*
16. *Mutamba and Others v. The People*
17. *The People v. Njovu (1968) ZR 13*
18. *Jack Chanda and Kennedy Chanda v. The People, SCZ Judgment No. 29 of 2002*
19. *Mwanamwenge v. The People, SCZ Appeal No. 13 of 2011*
20. *Bwalya v. The People (1995/ 1997) ZR 168*

The Hon. Mr. Justice Wanki was part of the panel that heard this appeal. Although he agreed with the findings in this judgment, he has since proceeded on retirement. The judgment may now be treated as one by majority.

The three appellants were charged with one count of murder contrary to Section 200 of the Penal Code. The particulars of the offence were that the appellants did, on the 5th September, 2013 at Kapiri Mposhi in the Kapiri Mposhi District of the Central Province of the Republic of Zambia, jointly and whilst acting together, murder Justin Kunda. The appellants pleaded not guilty.

The sequence of events culminating into the deceased's death was narrated to the trial court by four prosecution witnesses as follows. The 3rd appellant offered to sell a tent to the 1st appellant. The 1st appellant in turn gave the tent to the deceased to sell it on his behalf. The deceased had not, as at the time of his death accounted to the 1st appellant on the sale of tent in question.

On the material day the three appellants, as early as 09:30 hours, congregated at Tusheni Bar to imbibe some alcoholic beverages. Between 11:00 and 12:00 hours, the deceased and Happy Mwandila (PW3), desiring to play a game of pool, appeared at Tusheni Bar. The 3rd appellant then asked the deceased to account for the proceeds of the sale of his tent. Following the deceased's failure to offer a satisfactory explanation to the inquirer, a painful altercation ensued between the 1st and 3rd appellant on one hand, and the deceased on the other. A ruction involving the two mentioned appellants and the deceased occurred in which the deceased was violently assaulted.

In the process of the assault fists, kicks, a wooden object, a brick and a knife were used to inflict pain and injury on the deceased. After the initial attack of the deceased at Tusheni Bar, and prompted by the deceased's intimation that a replacement tent was available at a place named by the deceased as the Turn Off, the appellants then got the deceased, bundled him into a taxi and conveyed him to the so called Turn Off.

As it turned out the search for the tent there proved fruitless. At a place in Zambia Compound near the Nationalist Church, the assault on the deceased continued. Later that day, the police picked up the body of the deceased from the spot where the last installment of the assault allegedly took place. An autopsy was subsequently conducted on the deceased's body. It revealed that the deceased had sustained head injuries and a deep cut on the right leg behind the knee. This led to excessive bleeding, resulting in death.

After hearing the four prosecution witnesses, and the three appellants having given evidence on oath on their own behalf, the learned trial judge, found all the appellants guilty of the murder of

the deceased, and convicted them accordingly. Reasoning that heavy beer drinking by the persons involved in the attack constituted extenuating circumstances, the learned judge sentenced each of the appellants to twenty years imprisonment with hard labour.

Dissatisfied with the judgment the three appellants launched this appeal and formulated three grounds as follows:

"Ground one

The trial court misdirected itself by failing to assess the evidence of both the prosecution witnesses and defence witness which was inconsistent and to make a finding thereon.

Ground two

The trial court erred in fact and in law by finding that the 2nd appellant had engaged in a joint unlawful enterprise with the 1st appellant and the 3rd appellant to murder the deceased with malice aforethought.

Ground three

The trial court erred in fact and in law by finding that the 3rd appellant had engaged in joint unlawful enterprise with the 1st appellant and the 2nd appellant and/or just the 1st appellant to murder the deceased with malice aforethought."

On behalf of the appellants, Mr. Ngulube, learned Director of Legal Aid, filed in and relied on copious heads of argument as well as

arguments in reply to those of the respondent. Ms. Mumba, learned Deputy Chief State Advocate, on behalf of the people, equally filled in animated heads of argument against the appeal.

As regards ground one, the main point taken by Mr. Ngulube was that the learned trial judge did not properly address her mind to the inconsistencies in the evidence of the prosecution witnesses, particularly that of PW1, Melody Chisulo, and PW3, Happy Mwandila, both of whom witnessed part one and/or part two of the attack on the deceased. According to the learned Director of Legal Aid, the learned judge failed to properly address the question of credibility of the witnesses which inevitably arose from the inconsistencies so evident in the testimonies of the two witnesses. After specifically pointing out what he perceived to have been untruths in PW1's evidence, the learned counsel submitted that the trial judge should have assessed the evidence and made her findings, stating why she preferred the evidence of one and not the other witness(s). This failure to assess the evidence, according to the learned Director of Legal Aid, was a misdirection.

Mr. Ngulube further argued that PW1's evidence ought to have been discounted by the trial court as she was untruthful in several material respects. We were referred to our judgment in the case of **Haonga and Other v. The People**[1] where we stated, among other things, that where a witness has been found to be untruthful on a material point, the weight to be attached to the remainder of the evidence is reduced. We were urged to discount the evidence of PW1 in preference to the evidence of PW3, that of the 2nd appellant and the 3rd appellant.

The learned Director of Legal Aid then argued ground two. He started by faulting the trial judge in the manner in which she dealt with the issue of common purpose or (joint unlawful enterprise). It was his contention that section 21 and 22 of the Penal Code, Chapter 87 of the Laws of Zambia, upon which the learned trial judge relied to hold that there was a common purpose, was wrongly invoked. According to Mr. Ngulube, sections 21 and 22 deal with situations where more than one person is involved in the commission of the crime. In this instance, argued Mr. Ngulube, crime is a group activity.

The learned counsel further submitted that the mere presence of a person when a crime is committed does not implicate that person in the crime. We were referred to the persuasive English authority of **R v. Clarkson**[2] where it was held that the mere presence of the accused person when the victim was raped in an army barrack, did not render him guilty of aiding and abetting. It must have been proved that he intended to give encouragement, and that he willfully encouraged the rapist.

Applying the *dictum* in **R v. Clarkson**[2] to the present case, Mr. Ngulube argued that the 2nd appellant was present at the bar where the first installment of the attack took place but did not participate in the melee. He referred us to the evidence of PW3, that of the 1st appellant and the testimony of the 2nd appellant himself, all of whom testified to the same effect in regard to the 2nd appellant, namely that he did not participate in assaulting the deceased. He also referred us to the evidence of the 3rd appellant who did not say he saw the 2nd appellant engaged in the fight.

According to Mr. Ngulube, there was no evidence that the 2nd appellant willfully encouraged the 1st or 3rd appellant to assault the deceased. When the affray moved from the bar to the site near the Nationalist Church, there was still no evidence that the 2nd appellant participated in the beating or stabbing of the deceased, and therefore, according to Mr. Ngulube, the 2nd appellant's mere presence at the scene of crime cannot implicate him in the homicide. To further buttress this submission, the learned counsel referred us to the case of **R v. Coney**[3] where Hawkins J, stated at page 557 that:

> **"...it is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime."**

The case of **R v. Allan and Others**[4] was also cited to the same intent.

It was Mr. Ngulube's contention that in the present case there was no common intention either at the outset or arising spontaneously as far as the 2nd appellant is concerned. The learned counsel distinguished the present case from that of **R v. Smith (Wesley)**[5] and that of **Chisulo and 2 Others v. R**[6]. The former case, Smith was an active participant and "had almost gone berserk

himself, and had left the public house only to get bricks to tear up the joint", while in **Chisulo**[6] the appeal was dismissed because the court found that the 2nd appellant was an active participant in the assault on the deceased though he did not deliver the fatal blow and he did not disassociate himself from the unlawful enterprise.

In regard to the 3rd appellant, it was Mr. Ngulube's submission that he and the 1st appellant fell within the provisions of section 22 of the Penal Code when they assaulted the deceased at the bar. He went on to argue that the *actus reus* that caused the death of the deceased was not performed at the bar, but at a different place (near the church). At that point, according to Mr. Ngulube, the 3rd appellant was not involved in the beating or indeed the stabbing of the deceased's left leg behind the knee. On the evidence, argued the learned counsel, the principle of common purpose or joint enterprise did not arise.

Even assuming that there was any common purpose between the 1st and 3rd appellant to execute an unlawful enterprise, the stabbing of the deceased was not within the contemplation of the enterprise. In Mr. Ngulube's estimation, there was no evidence that

the 3rd appellant knew that the 1st appellant had a knife, and it is indeed possible that the knife may have been with the deceased. He submitted that where two parties embark on a joint enterprise to commit a crime and one party foresees that in the course of the enterprise the other party may carry out, with the requisite *mens rea*, an act constituting another crime, the former is liable for that crime if committed by the latter in the course of the enterprise. The cases of ***R* v. Powell**[7], **R v. Anderson and Morris**[8] **and R. V. Wakely, McAuliffe v. R**[9] and other authorities from outside this jurisdiction were cited in aid of this submission.

As regards ground three, Mr. Ngulube submitted that the trial court erred in convicting the 1st appellant for murder rather than manslaughter as on the evidence available before the court, there was no malice aforethought discernable. He contended that the prosecution failed to prove the requisite *mens rea* for murder beyond reasonable doubt. This being the case, Mr. Ngulube submitted that the 1st appellant should have been convicted for manslaughter rather than murder. Furthermore, there was according to Mr. Ngulube, both provocation and drunkenness

which negatived the *mens rea*. The 1st appellant and the other appellants started drinking alcohol in the morning around 10:00 hours and continued until about 16:00 hours. The deceased engaged in provocative acts by failing to account for the proceeds of the sale of the tent and taking the appellants on a fruitless errand to the Turn Off in search of a replacement tent, and that he made an insulting referenced to the 3rd appellant's parents. Citing the case of **Francis Mayaba v. The People**[10], as authority, Mr. Ngulube submitted that where, as in the present case, the facts of the case do not support conviction on a charge of murder, the court should convict on the lesser offence if that is what the evidence before it can support.

Ms. Mumba in response to the submissions on behalf of the appellant, countered the arguments made by Mr. Ngulube and supported the holding of the trial court.

In regard to ground one, it was her submission that that PW1 and PW3 were reliable witnesses whose evidence was substantially consistent with each other. In particular, Ms. Mumba pointed out that PW1 was present during the assault at the bar and near the

church where the lifeless body of the deceased was later found. The evidence of PW1, according to Ms. Mumba, was consistent with that of PW4 (the arresting officer) and confirmed by exhibit 'P1' (the autopsy report). PW1's evidence of the fight and the objects used in the attack was also materially corroborated.

As regards the alleged inconsistencies between the evidence of PW1 and PW3, which Mr. Ngulube argued was not addressed by the learned trial judge, Ms. Mumba argued that the court did in fact address its mind to the inconsistencies. She referred us to page J11 (from line 4) in the record of appeal where the trial court agreed with the evidence of PW3 and the 1st and 3rd appellant when she made the finding that the 1st and 3rd appellant beat up the deceased using fists and kicks while the 2nd appellant was just watching. The court, however, found that the 2nd appellant also participated in the commission of the offence "when putting the deceased into the vehicle."

The learned counsel also made the point about the absence of a motive on the part of PW1 to falsely implicate the appellants in her evidence. She ended her submission on this ground by citing

the case of **Haonga and Others v. The people**[1] where we stated among, other things that:

> **"...it does not follow that a lie on a material point destroys the credibility of the witness on other points (if the evidence on the other points can stand alone)..."**

From this submission, Ms. Mumba sought to drive home two points namely; (1) that the fact that PW1 may have contradicted herself in some aspects of her evidence does not mean that she lied, and (2) the fact that the learned trial judge did not specifically state in her judgment as to why she believed the evidence of PW1 and not that of the appellants is not fatal to the prosecutions case since the material evidence of PW1 was corroborated anyway. We were urged to confirm the trial court's findings and dismiss ground one.

In relation to ground two, Ms. Mumba supported the holding of the trial court that the 2nd appellant had engaged in a joint unlawful enterprise with the 1st and the 3rd appellant. She based this support on her understanding of the provisions of Section 21(b) of the Penal Code. According to Ms. Mumba, by helping to put the deceased into the taxi where the beating of the deceased allegedly continued, the 2nd appellant was aiding the 1st and 3rd appellant in

committing the offence. Even if it could be inferred that the 2nd appellant did not actively participate in assaulting the deceased, he was, according to the learned counsel, actively involved in assisting the 1st and 3rd appellant as the trial court found and was, in accordance with the *dictum* in **Chisulo v. R**[6], guilty of the offence for which he was charged as he did not sufficiently disassociate himself from the malefactions of his two colleagues. The learned counsel also quoted from the holding of the court in the case of **Ernest Mwaba and Others v. The People**[11] that:

> **"...where the evidence shows that each person actively participated in an assault then they were all crime participants. The fact that other persons may have also assaulted the deceased at one stage can make no difference where the nature of the assaults was such that their cumulative effect overcame the deceased."**

In the present case, counsel submitted, as PW1 testified that the appellants continued beating the deceased after he was lodged in the taxi for purposes of conveyance to the Turn Off, the 2nd appellant became an active participate in the commission of the offence and was thus jointly liable. It was on this basis that Ms. Mumba implored us to dismiss ground two of the appeal.

In ground three, Ms. Mumba maintained that the holding of the trial court that the appellants had the necessary *mens rea* for the offence for which they were convicted, cannot be faulted. According to the learned counsel, the evidence on record is that in assaulting the deceased, the appellants used fists, a stick and a brick. This evinces an intention to cause death or grievous harm and constitutes the necessary mental element for the offence as provided for under Section 204 of the Penal Code, Chapter 87 of the Laws of Zambia. Furthermore, from the injuries sustained by the deceased as shown by exhibit 'P1' the appellants intended to kill or cause grievous harm to the deceased or ought to have known that their conduct would lead to death or grievous harm. The case of **Dickson Sembauke and Another v. The People**[12] was relied upon to support this submission.

We were beseeched to dismiss this ground of appeal as well, and uphold the trial judge's decision.

As we indicated at the outset, Mr. Ngulube did file in heads of argument in reply. Those heads of argument do no more than rehash the submissions already made.

We have carefully considered the evidence on the record of appeal, as well as the judgment of the trial court. Amidst the clashes of argument by the learned counsel for the parties, we have to determine whether the learned trial judge made a proper evaluation of the circumstances and the evidence before her to come to the conclusion that she did.

As regards ground one whether or not the learned judge failed to assess the evidence of the witnesses in a manner that would have given her a different conclusion, we have carefully examined the evidence of the witnesses as well as the judgment or the trial court. The evidence of PW1 and that of the other witnesses, particularly PW3 differ significantly though they relate to the same event, witnessed at the time and from roughly the same area. PW1, for example, claimed that the 2nd appellant was involved in the assault of the deceased together with the 1st and 3rd appellant. DW3 on the other hand positively asserted that the 2nd appellant did not participate in the assault. This latter position was confirmed by the evidence of PW3, that of 2nd appellant himself and that of the 1st appellant. This contradiction in the evidence is undeniable. The

trial court was duty bound to assess this evidence and offer some explanation as to why she preferred the evidence of one and not the other witness. In **Mushemi v. The People**[13] we stated that:

> **"The judgment of any trial court faced with conflicting evidence should show on the face of it the reason why a witness who has been seriously contradicted by others is believed in preference to those others."**

We reiterated this position in the case of **Miloslav v. The People**[14]. In that case, we went further and stated that:

> **"where a trial court has omitted to resolve a dispute of fact and there is sufficient evidence for the appellate court to do so, the appellate court may draw its own inferences from the evidence."**

A perusal of the transcript of proceedings clearly shows that the evidence preferred by the witnesses, particularly PW1 and the rest of the witnesses, was contradictory. The judgment, subject of the present appeal, does not record expressly the judge's misgivings of any of the witnesses. We cannot but agree with Mr. Ngulube that this omission by the trial court was incongruous, and was therefore, a misdirection.

Mindful of what we stated in **Miloslav v. The people**[14] as we have quoted it above and the statement we made in the civil case of **Mohamed v. Attorney-General**[15] that:

> **"the appellate court may draw its own inferences in opposition to those drawn by the trial court although it may not lightly reverse the findings of fact..."**

we must now determine the consequences of the lower court's omission.

Although we agree with Mr. Ngulube's submissions that the learned judge did not indicate in her judgment that the conflicting evidence was a matter of no little concern to her, it is inferable from the findings that she made that, as to the 2nd appellant's involvement, she disbelieved PW1 and preferred instead to accept the evidence of the 1st appellant, 2nd appellant and PW3. Ms. Mumba rightly pointed to J11 of judgment where the judge stated as follows:

> **"From the facts of the case at hand, it can be seen that Steven Kafula (A3) started beating the deceased and Humphrey Mayonga (A1) also joined. It is on record that the duo beat up the deceased with fists and kicks. At this stage Brian Chungwe (A2) was just watching."**

Up to this point, we agree with the findings of the trial court which implies that she believed the evidence of the 1st appellant, 2nd appellant and PW3 and not that of PW1. As we have stated earlier, she ought to have given her reasons for that preference. Yet the judge did not leave matters there. She proceeded to find that:

> **"However, when putting the deceased into the vehicle, Brian Chungwe (A2) also participated."**

This finding is not borne out of the evidence of any of the witnesses, not even that of PW1. It was a perverse finding.

We are satisfied, therefore, that the criticism made by the appellants against the trial judge's treatment of the conflicting evidence was correct. The inference we make from the record of appeal is that the evidence of PW1 was unreliable. We note that the trial court, without stating so, did not rely on it. We allow ground one of the appeal to this extent.

The question that however remains to be answered is whether, if the trial court had assessed the conflicting evidence in the manner expected of her, she would have come to a different result.

We have already stated that implicitly the judge took the position that we take, namely that as regards the participation of the 2nd appellant at the first scene of the assault, the testimony of PW1 was to be disbelieved. We do not think, therefore, that she would have come to a different position had she made a proper assessment. It remains to reason, however, why the judge came to the conclusion that the 2nd appellant participated in the assault that took place after the deceased was put in a taxi. There is no evidence on the record other than that of PW1 suggesting that the 2nd appellant was involved in the assault. The credibility of this witness has been impeached. We entirely agree with the submission of Mr. Ngulube that the 2nd appellant's presence throughout the deceased's attack did not of itself make him a participant in the crime. We see the force in Mr. Ngulube's submission in this connection.

The part of the ground of appeal which relates to common purpose, of course, calls for a closer consideration of section 22 of the Penal Code. That section provides that:

> **"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

The question is whether on the evidence before the lower court, the three appellants could fairly be said to have had a common intention to prosecute an unlawful purpose in conjunction with one another. Charles J, in the Court of Appeal judgment in the case of **Mutamba and Others v. The People**[16] stated that:

> **"[t]he formation of a common purpose does not have to be by express agreement or otherwise premeditated; it is sufficient if two or more persons join together in the prosecution of a purpose which is common to him and the others, and each does so with the intention of participating in the prosecution with the other or others."**

In the present case, therefore, it did not have to be proved that the three appellants had an agreement to execute a common unlawful purpose for the conviction to be safe. It is sufficient if the evidence adduced showed that they worked together in prosecuting an unlawful purpose.

We have examined the evidence on record. As we have stated, we are not satisfied that the 2nd appellant participated in assaulting the deceased. We, therefore, accept Mr. Ngulube's submission that, on the evidence, the principle of common purpose or joint enterprise did not apply between the 1st appellant and the 2nd appellant, or between the 2nd appellant and the 3rd appellant, or indeed between the 2nd appellant and the 1st and 3rd appellant.

In his argument Mr. Ngulube sought to draw a distinction between the situation of the 2nd appellant and the other two appellants. While he argued that the provisions of section 22 of the Penal Code could well apply to the 2nd and the 3rd appellant the *actus reus* and the *mens rea* did not coincide. The stabbing of the deceased by the 1st appellant happened near the church in circumstances that were not in the contemplation of the 2nd appellant.

We have difficulty appreciating Mr. Ngulube's submission that the common purpose which the 1st and the 3rd appellant had formed, ended when the deceased was allegedly stabbed by the 1st appellant near the church. In our view, the common intention was

formed when the assault of the appellant started at the bar. It continued through out till the deceased died. The deceased suffered a serious attack with a brick, a wooden object and a knife used in the process. From the evidence, it was not improbable that the deceased could have died at the bar had he not been taken to the place near the church. We accept the submission of Ms. Mumba on this ground to the extent that the joint enterprise between the 1st appellant and the 3rd appellant cannot be said to have started and ended at some point before the deceased's death. We also accept what was stated in the case of **Ernest Mwaba and Others v. The People**[11] to which Ms. Mumba referred. In that case, as pointed out, the court stated that:

> **"where the evidence shows that each person actively participated in an assault then they were all crime participants. The fact that the other persons may have also assaulted the deceased at one stage can make no difference where the nature of the assault was such that their cumulative effect overcame the deceased..."**

We reaffirm this position. In the present case, the suggestion is that the deceased died due to loss of blood attributable to the stab wound that he sustained during the final assault on him near the church. That assault was perpetrated purely by PW1.

According to the evidence of PW4, the deceased sustained head injuries and had a deep cut on the right leg behind the knee. According to the pathologist, the deceased died of excessive bleeding. The cross-examination of PW4 elicited the response that the bleeding was from the cut on the head and the knee.

In our considered view, therefore, the 1st and 3rd appellants executed a common unlawful purpose. The learned judge in the court below cannot be faulted on this account.

In ground three, the contention of the learned counsel for the appellants was that the prosecution failed to prove the *mens rea* for murder in respect of the 1st appellant. He further submitted, and we assume that this was in the alternative, that the circumstances surrounding the fateful event did not suggest any intention to kill on the part of the appellants; that drunkenness and provocation animated the events culminating in the death of the deceased and thereby negatived the *mens area.* Given that what has been raised is the issue of absence of malice aforethought, recourse must be had to section 204 of the Penal Code, Chapter 87 of the Laws of Zambia. It provides as follows:

"Malice aforethought shall be deemed to be established by evidence proving anyone of the following circumstances:

(a) Any intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.

(b) Knowledge that the act or omission causing death would probably cause death or grievous harm to someone, whether such person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused..."

In **The People v. Njovu**[17], we held that to establish malice aforethought, the prosecution must prove either that the accused had an actual intention to kill or to cause grievous harm to the deceased, or that the accused knew that his actions would be likely to cause death or grievous harm to someone.

In the present case the uncontroverted evidence was that fists, kicks, a brick, a wooden object and a knife were all used to assault the deceased. We have no trepidation in holding that the 1st and 3rd appellant had the necessary *animus* for the offence of murder. At the very least, the malice aforethought present could be the imputed type under section 204 of the Penal Code. The two

appellants knew, or ought to have known, that unleashing a block at, and stabbing the deceased would, at the very least, result in grievous injury being caused to the deceased. Ground three is without merit. It is dismissed.

As regards the argument on behalf of the appellants that there was provocation and a general drunken atmosphere constituting extenuation, so that the appellants should never have been convicted of murder, but the lesser offence of manslaughter, we do not find any provocation in the present case as defined in section 206 of the Penal Code. A clear intention to harm the deceased had been formed from the time the appellant was seen at Tusheni Bar, if not earlier. By the time the deceased had been taken on what the appellants regarded as a fruitless expedition in search of the tent, they had already started inflicting injury on the deceased. Failure to find the tent could not amount to provocation, as it occurred after the deceased had already been assaulted.

The learned judge sentenced the appellants to twenty years each on account of extenuating circumstances brought about by the drunken environment in which the crime occurred. We agree

that the appellants had been drinking from around 09:30 hours in the morning and the whole ordeal was excited, in part at least, by their drunken stupor.

In **Jack Chanda and Kennedy Chanda v. The People**[18], we held that a failed defence of provocation, and evidence of drinking can amount to extenuating circumstances. This position was confirmed in **Mwanamwenge v. The People**[19]. In **Bwalya v. The People**[20] we stated that:

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

We agree with the learned trial judge that the drunken environment in which the whole incidence occurred extenuated the murder of the deceased. The appellants were, therefore, entitled to be given a sentence short of the death sentence for murder. We, however, find the sentence handed out of 20 years imprisonment with hard labour on each of the appellants rather inadequate having regard to the brutal manner in which the homicide was executed. It comes to us with a sense of shock. We set it aside and

in its place impose a sentence of 35 years imprisonment with hard labour.

The net result is that the appeal by the 2nd appellant succeeds. He is set free forthwith. The appeal in respect of the 1st and 3rd appellant fails on all grounds. The conviction is confirmed. The sentence is varied by the substitution of the twenty-year jail term imposed by the High Court for a thirty-five years jail term with hard labour.

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M. E. Wanki (Rtd)
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

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M. Malila, SC
SUPREME COURT JUDGE