

**IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT NDOLA**

**SCZ APPEAL NO.
45/2017**

(Criminal Jurisdiction)

BETWEEN:

BOSWELL KAPEPE

APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Phiri, Muyovwe and Chinyama, JJS.

On 5th December, 2017 and on 11th December, 2017.

For the Appellants: Ms. E.I. Banda, Senior Legal Aid Counsel, Legal Aid Board

For the Respondents: Mrs. M.H. Kayombo, Senior State Advocate, National Prosecutions Authority

RULING

Chinyama, JS, delivered the Ruling of the Court.

The appellant was convicted by the High Court at Kitwe for the offences of Murder relating to the death of one Bowas Kyabene of

Solwezi between 1st and 2nd December, 2013 and Aggravated Robbery relating to the theft of a Toyota Sprinter Vintage motor vehicle registration number ACR 9871 and a sum of K1,650 on the same dates from the deceased during which violence was used in order to steal or retain the things stolen. The motor vehicle belonged to one Clifford Mulenga while the money was the property of the deceased.

The court below sentenced the appellant to the ultimate sentence of death on both counts.

The appellant appealed against both conviction and sentence on the two offences. At the hearing of the appeal on the 5th December, 2017, the appeal was abandoned. Upon perusing the record of appeal, we noted that the offence of Aggravated Robbery was charged contrary to **section 294(1) of the Penal Code**. Under this section a person found guilty of the offence, which requires the use of an offensive weapon or instrument or acting with one or more other persons, is liable on conviction to imprisonment for life.

The facts in this case, however, clearly established that the appellant used an axe in the macabre killing of the deceased which fits **subsection 2(b) of section 294 of the Penal Code**, which

requires the use of an offensive weapon or instrument which is not a firearm, but grievous harm is done to a person in the course of the offence subject, of course, to the qualification that the court finds that the accused neither contemplated nor could reasonably have contemplated that grievous harm might be inflicted in the course of the offence. The penalty under this section is death.

The learned trial judge in the court below should have explained that distinction so that it was clear that although the appellant had been charged under **section 294(1) of the Penal Code** the facts established had proved that the offence committed was under **section 294(2)(b)** thus justifying the ultimate penalty of death. The omission notwithstanding, however, we are satisfied that no miscarriage of justice occurred as the sentence imposed was the correct one in the circumstances of the case.

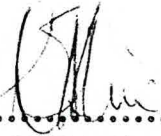
Before we conclude, we would take this opportunity to commend the police officers who investigated the matter for their thoroughness. We have in many cases lamented the dereliction by investigators in cases in which it is clear that much stood to be gained by obtaining whatever forensic evidence such as finger prints,

blood samples and other items of evidence that are found at the scene of or in connection with the crime.

In the case at hand the officers assigned to the case both at Chingola and Solwezi in collaboration with the Community Crime Prevention personnel at Muchinshi competently carried out their duties with the effect that the evidence against the appellant was overwhelming. As we pointed out at the hearing, the evidence showed that the wife to the appellant who travelled with him in the bloodied car from Solwezi to Muchinshi and helped wash it ought to have been jointly charged with her husband and tried as well. This notwithstanding the effort by the police is no less commendable.

As a measure of encouraging diligence we order that this ruling bearing the message of commendation be sent to the Inspector General of Police so that he takes note and possibly acts on it.

The appeal is otherwise dismissed on account of having been abandoned by the appellant.


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G.S. PHIRI
SUPREME COURT JUDGE


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E.N.C. MUYOVWE
SUPREME COURT JUDGE


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J. CHINYAMA
SUPREME COURT JUDGE