IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 165/2017**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

SHADRECK MALISENI BIYEMBA NJOBVU **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS.
On 2nd October, 2018 and 17th June, 2020.

For the Appellant: *Mr M. Mankinka, Legal Aid Counsel - Legal Aid Board.*

For the Respondents: *Mrs A. N. Sitali, Deputy Chief State Advocate - National Prosecutions Authority.*

J U D G M E N T

Chinyama, JS, delivered the Judgment of the Court.

Cases referred to:

1. **The People v Lewis (1975) Z.R. 43**
2. **Ndumba v The People (1975) Z.R. 93**
3. **Tembo v The People (1972) Z.R. 220**
4. **Jack Chanda and Kennedy Chanda v The People, SCZ Judgment No. 29 of 2002**
5. **Nyambe Mubukwanu Liyumbi v The People (1978) Z.R. 25**
6. **Whiteson Simusokwe v The People, SCZ Judgment No. 15 of 2002**

7. **Shamwana v The People (1985) ZR 41**
8. **R v Barnes; R v Richards [1940] 2 ALL ER 229**
9. **Esther Mwiinde v The People (1986) ZR 15**

Legislation referred to:

1. **Penal Code, Chapter 87, Laws of Zambia, sections 17, 200, 205, 206**

Other works referred to:

1. **Archbold Criminal Pleading, Evidence and Practice, Thomson Reuters (Legal) Limited, 2010, paragraphs 19 – 42**

The appellant was convicted by the High Court at Chipata (Zulu J., presiding) on one count of murder contrary to section 200 of the Penal Code. Particulars of offence were that on 6th January, 2016 at Petauke, the appellant killed one Kelson Daka (the deceased). He was sentenced to suffer death for the crime.

It is not in dispute in this case that the appellant caused the death of the deceased whom he stabbed with a knife. There is also no dispute that the stabbing took place at a toilet away from the sight of any one of the prosecution witnesses so that the only witness of fact as to what transpired is the appellant himself. What is in dispute is that the Appellant did so with malice aforethought.

The evidence adduced by the witnesses called on behalf of the prosecution was that on 6th January, 2016, the deceased person was with the appellant and PW2, John Watson Banda at PW1, Maureen

Zulu's home in Kalasau village in Chief Mwanjabantu's area in Petauke district. PW2 had gone there to collect his K15 change from PW1. The appellant arrived later upon which he boasted that he was Francisco, referring to a man by that name who had, not long ago, killed another man with an axe in the area and fled to Mozambique from where he was apprehended. After collecting the change, the deceased proposed to the others that they leave PW1's place. The appellant interjected that the deceased, whom he called a dog, would not go with him and PW2. This annoyed the deceased who grabbed the appellant by his shoulders. PW1 and PW2 intervened and the scuffle seemingly ended. The trio chatted about the drought. Moments later, the deceased left the group headed for the toilet and was, soon followed by the appellant. Shortly after, PW1 and PW2 heard the deceased cry out from the direction of the toilet where he and the appellant had gone that the appellant had stabbed him. The two witnesses dashed there and found the deceased lying on the ground and bleeding from a stab wound in the chest. They also saw the appellant running away. The deceased was taken to a clinic where he eventually died. A postmortem conducted on the deceased's body later confirmed the stab wound to be the cause of death.

The appellant's defence was that on the day at issue he was drinking illicit beer called "kachasu" with PW2 and the deceased at PW1's house. They had drunk two bottles of the illicit brew when the deceased told him to go away so that he (deceased) could remain drinking with PW2. He responded that the deceased should wait for him to finish the beer that he, the appellant, had bought. The deceased became incensed. He insulted the appellant's mother and punched the appellant on the head. A scuffle ensued between them and PW2 and PW1's husband intervened and pacified them. They sat down and started talking about the rains.

According to the appellant he is the one who went to the toilet first and the deceased followed him there. The deceased told him that he was looking for him and challenged him to a fight. They started fighting. While fighting the deceased produced a knife which the appellant grabbed from him and stabbed the deceased with it in the heat of the moment to protect himself. He acknowledged that the deceased no longer posed a danger after he had grabbed the knife from him. He, however, stated that he was not reasoning properly at that time. When he saw PW2 and PW1's husband approaching he ran

away and went to Mozambique because he was afraid. He stated that they had drunk 3 x 750 mls of the illicit kachasu brew before the stabbing incident. The appellant denied having earlier boasted that he was Francisco.

The learned trial judge rejected the appellant's version of the events at the toilet on the basis that the appellant was a "*suspect witness*" with "*his own interest to serve*" and that his evidence was not "*corroborated.*" The learned judge accepted the evidence of the prosecution that the deceased was the first one to go to the toilet and that the appellant followed him there. The learned judge noted that when asked, in cross-examination, the appellant acknowledged that the deceased was no longer a danger to him after he had dispossessed him of the knife. On this basis, the learned judge found the existence of malice aforethought on the part of the appellant.

In sentencing the appellant, the trial judge did not find any extenuating circumstances to justify a sentence other than death. He convicted the appellant and sentenced him to the ultimate death penalty.

Disconsolate with the outcome, the appellant launched the appeal based on the following two grounds-

1. **The learned Court below erred in law and fact when it failed to appreciate that the appellant acted in self-defence failing which he acted under provocation.**
2. **The learned trial judge misdirected himself in his failure to find extenuating circumstances so as to impose any other sentence other than the mandatory death penalty on the facts of this case.**

In support of ground one, Mr Mankinka made his submissions regarding the defence of self-defence based on his view that the deceased was the one who followed the appellant to the toilet where he attacked him with a knife which the appellant grabbed and stabbed the deceased with. It was submitted that the appellant had reasonable apprehension that he was in danger of serious bodily harm. He, therefore, used reasonable force to defend himself; that if he had not done so the appellant could have easily injured him instead. He cited the High Court case of **The People v Lewis**[1] which highlighted two aspects to the defence of self-defence, being (1) the question of retreat and (2) the degree of retaliation. It was submitted that a failure to retreat is only an element in considering the

reasonableness or otherwise of the accused's conduct; and that it is not the law that a person threatened must [always] take to his heels. We were reminded that it was the appellant who was attacked and felt threatened by the knife; that the appellant was [still] enraged by the deceased's insult.

Learned Counsel also cited from **Archbold Criminal Pleading, Evidence and Practice, Thomson Reuters (Legal) Limited, 2010**, paragraph 19-42 where it is amplified that-

> ***"There is no rule of law that a man must wait until he is struck before striking in self-defence. If another strikes at him he is entitled to get his blow in first if it is reasonably necessary to do so in self-defence ... And the mere fact the defendant was the initial aggressor does not of itself render self-defence unavailable as a defence to what he does in any ensuing violence; availability must depend on all circumstances, and allow for the possibility that the initial aggression may have resulted in a response by the victim which was out of proportion so as to give rise to an honest belief on the part of the defendant that it was necessary for him to defend himself, with the amount of force used for that purpose being reasonable: R v Rushford [2006] Crim. L.R. 547 CA".***

Turning to the alternative defence of provocation, Mr. Mankinka submitted to the effect that the conditions precedent to the defence as defined in sections 205 and 206 of the Penal Code have been met in this case. Counsel submitted that the provocation was both

cumulative and actual in that the deceased had insulted the appellant's mother at the time of the initial scuffle; then the appellant had gone on to produce the knife during the fight at the toilet. The case of **Ndumba v The People**[2] was cited to strengthen this last point. In that case it was held that:

> ***"if in the heat of a fist fight the deceased produces a knife and the opponent snatches it and uses it on the deceased, the fight and the production of the knife can constitute provocation."***

In the same case, it was also held that:

> ***"The fact that the appellant was the original aggressor in the fist fight does not destroy the availability of the defence of provocation."***

It was also submitted that the retaliation in this case was reasonable and proportionate to the provocative act of producing a knife. The case of **Tembo v The People**[3] was cited for the adjunct that:

> ***"The courts in the Common Law Countries have always been very slow to apply over fine tests to actions taken and weapons used in the heat of the moment."***

Counsel's prayer was that we allow this ground of appeal, set aside the conviction and the sentence and free the appellant.

With respect to the alternative argument in the second ground of appeal, the submission was that the court should have found the existence of extenuating circumstances on the ground that the defence of provocation had failed. It was pointed out that the trial court may have been misled by the mistaken belief that an accused is a suspect witness whose evidence requires corroboration and failed to consider the defence properly. It was pointed out that in the case of **Jack Chanda and Kennedy Chanda v The People**[4], it was held that:

> ***"[a] Failed defence of provocation ... can amount to extenuating circumstances."***

We were urged to allow the appeal, set aside the death sentence and impose a sentence commensurate with the facts of the case.

Reacting to the submissions in the first ground of appeal, Mrs Sitali contended that the appellant did not act in self defence when he stabbed the deceased and the facts do not fall within section 17 of the Penal Code. Counsel submitted that there was no fight at the

toilet as there is no plausible reason why the deceased could have attacked the appellant. She argued that it was the appellant who was in the mood to fight having likened himself to Francisco and did in fact live out his fantasy when he followed the deceased to the toilet, stabbed him and fled to Mozambique. Counsel submitted that the allegation that the deceased started the fight and produced a knife was an afterthought and that on the facts of the case, the appellant stabbed the deceased to settle an old score from the earlier altercation between them.

Regarding the question of provocation, it was submitted that the facts of the case do not disclose that the deceased provoked the appellant. The case of **Nyambe Mubukwanu Liyumbi v The People**[5] was cited in which the elements of the defence were highlighted as follows:

> ***"There are three inseparable elements to the defence of provocation – the act of provocation, the loss of self-control both actual and reasonable, and the retaliation proportionate to the provocation. All three elements must be present before the defence is available."***

It was contended that the three elements were not satisfied as there was no fight between the appellant and the deceased.

Alternatively, it was argued that if we accept that there was a fight, then we must find that the force employed by the appellant was excessive and unreasonable in the circumstances, taking into account the holding in **Whiteson Simusokwe v The People**[6] that:

> ***"In a claim of provocation, the reaction of the accused person must be proportionate with the result that any evidence of excessive force defeats the defence."***

It was accordingly submitted that if the appellant's story that he dispossessed the deceased of the knife is true, then there was no longer immediate or imminent danger that the deceased would cause him grievous bodily harm if left alone. The stabbing of the deceased with a knife in this case amounted to excessive force which defeated the defence of provocation. It also established malice aforethought on the part of the appellant. Provocation could not, therefore, suffice in the circumstances. We were urged to dismiss ground one of the appeal and uphold the conviction.

Mrs. Sitali conceded to ground two of the appeal, noting that the defence of provocation raised by the appellant had failed but amounted to extenuation. This, according to the submission, is based on the appellant's evidence at the trial that the deceased

started the fight and later on produced a knife as decided in the case of **Whiteson Simusokwe[6].**

We are indebted to both Counsel for their eloquent submissions. We have considered the appeal. The issue for decision is whether the killing of the deceased was with the requisite malice aforethought or that this element is negated by the defence of self-defence to exonerate the accused from the offence or that of provocation which would justify a conviction for the reduced offence of manslaughter; or whether in the event that the defence of provocation fails, the circumstances are of such a nature as to extenuate the crime thus entitling the appellant to a sentence other than that of death within the terms of section 201(1) (2) of the Penal Code.

The learned trial judge rejected the appellant's defence on the basis that he was a "suspect witness" whose evidence was not corroborated. This was a misdirection on the part of the learned judge. As correctly submitted by Mr Mankinka, an accused, when giving evidence in his own behalf, is not "a suspect witness" in the sense in which the term is used in the law of evidence. He may be properly regarded "a suspect witness" when he gives evidence which

implicates a co-accused. This is because such evidence stands on the same footing as accomplice evidence. Thus in the case of **Shamwana v The People**[7], we held that-

> **"(xvi) The evidence of an accused person who testifies as such in his own defence which is against the co-accused should only be taken into account as against the co-accused if it is corroborated or supported by something more."**

In the English case of **R v Barnes; R v Richards**[8], the following observations were made on a related matter-

> **"There is also the ground ... that in this case there ought to have been a direction to the jury that the evidence of the two women prisoners required corroboration.**
>
> **... one cannot help thinking that there is some confusion of thought in the contention that in this case it was the duty of the judge to direct the jury that here they were dealing with the evidence of accomplices, and that that evidence must not be accepted in the absence of corroboration.**
>
> **The witnesses whose evidence, it is said, needed corroboration are the two women prisoners. They were not called as witnesses for the prosecution. They went into the witness-box to give evidence, and they gave evidence on their own behalf. The rule with regard to corroboration of accomplices does not seem to apply to such a case."**
> (at pages 231 to 232)

An accused person cannot, therefore, be a "suspect witness" for purposes of supplying evidence in his/her own defence. The

misdirection, notwithstanding, the question is whether the learned trial judge properly decided that the appellant stabbed the deceased with malice aforethought based on the evidence. In other words are the defences raised in this appeal available to the appellant?

It is clear that the decision to convict the appellant was based on the appellant's own evidence that he stabbed the deceased after he had grabbed the knife from him. It was contended on behalf of the appellant, however, that he stabbed the deceased because he was in reasonable apprehension that he was in danger of serious bodily harm. In the case of **Esther Mwiinde v The People**[9], cited by Mr. Mankinka in relation to the defence of provocation, the erstwhile Ngulube, DCJ, as he then was, noted that-

> **"the facts of any particular case will show whether or not the situation in which the accused found himself, including the nature of the attack upon himself or the gravity of imminent peril was such that it was both reasonable and necessary to take the particular action which has caused death in order to preserve his own life or to prevent grave danger to himself or another."**

The question, therefore, is whether, it was reasonable and necessary for the appellant, having grabbed the knife from the deceased to stab the deceased as he did and claim that he acted in self-defence. The

evidence given by the appellant is that after disarming the deceased, the deceased was left with nothing and as found by the learned trial judge, the appellant was no longer in danger.

In relation to the defence of self-defence, section 17 of the Penal Code as well as the authorities cited by Mr. Mankinka, the victim of an unlawful attack, who is in no position to escape the attack, is permitted to strike at the attacker with a degree of force which is no more than is necessary to repel the unlawful attack or prevent harm or more harm from being inflicted. The victim is permitted to throw in his blow as long as the attack is on-going or the danger is imminent. Based on the facts asserted by the appellant, he had clearly overpowered the deceased. There was no longer any fight or imminent danger from the deceased. In these circumstances, we are unable to agree that it was reasonable or necessary for the appellant to stab or strike at the deceased who was clearly overpowered. Given the attendant facts the learned trial judge was well disposed to find the existence of malice aforethought in the appellant's conduct. More so that the learned judge took into account the evidence and accepted that it is the appellant who followed the deceased to the toilet. This

conclusion is amply supported by the evidence of PW1 and PW2 who were not challenged.

The appellant's claim that he was the one who first went to the toilet was clearly an improvisation meant to give credence to the claim that the deceased was the aggressor who attacked the appellant. We are inclined to agree with Mrs Sitali's submission that consistent with his earlier combative mood during which he likened himself to the infamous Francisco and went on to pick a quarrel with the deceased, the appellant followed the deceased to settle an old score. We are satisfied that in the circumstances, self-defence is not available to the appellant. The defence fails.

Turning to the defence of provocation, it was argued that the appellant acted out of cumulative provocation arising from the insults to his mother by the deceased and the production of a knife during the fight. We note that the claim that the deceased did insult the appellant's mother during the initial difference between the appellant and the deceased was being made for the first time by the appellant only in his defence. It was not raised or put to any of the prosecution witnesses, particularly PW1 and PW2 during their

testimony. The two witnesses' unchallenged evidence was that it is the appellant who called the deceased a dog, when the latter proposed that they leave PW1's place after PW2 had collected his K15 from her. This led to the physical scuffle between the deceased and the appellant which ended only when others intervened. There is clearly no evidence that the deceased had insulted the appellant's mother. The claim appears to us to be another improvisation meant to consolidate the appellant's defence. We are satisfied that the deceased never insulted the appellant's mother as alleged by the appellant. This leaves the claim that the appellant was provoked by the deceased producing the knife during the fight.

Mrs Sitali's contention is, however, that there was no fight at all as there was no evidence to support it. She pointed out that PW1 and PW2 did not hear of any commotion in the direction of the toilet where the duo had gone but only heard of the deceased's cry that he had been stabbed soon after the appellant had gone there. Learned Counsel argued in the alternative that if we find that there was a fight at all, then the defence must be defeated by the fact that the stabbing of the deceased was excessively disproportionate to the amount of

force required to dispel the attack bearing in mind that the appellant had dispossessed the deceased of the knife. While we are mindful that the appellant was the only witness to what actually transpired at the toilet where he had followed the deceased, we are quite persuaded by the evidence that PW1 and PW2 heard the deceased's cry that he had been stabbed within so short a time as to negative the possibility that a fight did take place between the appellant and the deceased. The foregoing notwithstanding, the appellant's evidence that he had dispossessed the deceased of the knife so that there was no longer any threat defeats the availability of the defence. As alluded to in the passage by Ngulube DCJ we have recited it was not reasonable or necessary for the appellant to stab the deceased in the circumstances. The defence of provocation also fails. All in all, we find no merit in ground one of the appeal and we dismiss it.

In the second ground of appeal, the State did concede that the defence of provocation having failed, this amounts to extenuating circumstances. We are in agreement with the learned advocates and find merit in the second ground of appeal. On this basis we set aside the penalty of death imposed on the appellant and in its stead

sentence the appellant to life imprisonment bearing in mind his violent conduct and the need to keep him away from the community.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE