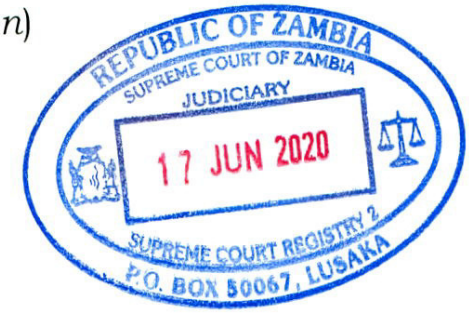
IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 221/2017**
HOLDEN AT NDOLA
(*Criminal Jurisdiction*)



BETWEEN:

JOSIAS PHIRI **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJS.
On 2nd April, 2019 and on 17th June, 2020

For the Appellant: *Mr C. Siatwinda, Legal Aid Counsel, Legal Aid Board.*

For the Respondent: *Mr C. K. Sakala, 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 Pelete Banda (1977)Z.R. 363***
2. ***The People v Mudewa (1973) Z.R. 147***
3. ***Mike Nedic Miloslav v The People, Appeal No. 49 of 2013***
4. ***Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172***
5. ***Khupe Kafunda v The People (2005) Z.R. 31***

The appellant was convicted in the High Court at Chipata (Mulenga J., as she then was presiding) for the murder, on 30th July, 2013, of Patrick Phiri (the deceased), a taxi driver, at Chipata and was sentenced to life imprisonment on the basis that there were extenuating circumstances which mitigated the imposition of the death penalty. The appeal is against the conviction.

It is common cause in this case that the appellant was a caretaker living in a room at the New Apostolic Church, Namuseche Congregation in Kalongwezi in Chipata, Eastern Province at the material time. His job was to look after church property. The deceased was, prior to his death employed as a taxi driver by PW2, Patricia Phiri. The deceased's body was recovered from a well on the 2nd August, 2013 with an injury on the head which was found, upon post mortem examination, to be the cause of death. The injury was described in the post-mortem report as "a deep cut and compound fracture of the occipital bone".

The evidence given by the prosecution was that on 31st July, 2013 PW1, Thomas Mbewe, a church official in the congregation

holding the rank of Evangelist, with other members, were preparing to receive church Elders at the church. In the course of the preparations, they went to the appellant's room at the church to collect materials used for Holy Communion but did not find the appellant. Instead, they found blood splattered on some chairs in the appellant's room as well as spots of blood outside. Fearing the worst - that the appellant may have been killed, the matter was reported to police. Two days later the appellant reappeared unscathed but looking tired and recounted his encounter with the deceased to PW1.

The substance of the story was that the appellant and the deceased had previously done some piece work together digging a foundation for a house. He was later paid for the work that they did but did not share the money with the deceased. On the 30th July, 2013 the two met at Kaumbwe market within Chipata. The deceased was driving PW2's taxi car. Upon seeing the appellant, who was in the company of a child, the deceased demanded for his share of the money. They ended up at the appellant's home at the church. The deceased took a bag containing various items including Holy

Communion and a bible, from the house, all belonging to the church and put it in the boot of the car with the intention of going away with them as security until the appellant paid him his share of the money. The appellant tried unsuccessfully to stop the deceased from taking the bag. According to PW1, the appellant told him that the deceased was not satisfied with the bag and its contents and picked up a stack of some plastic chairs as well. A scuffle ensued and in the process of trying to stop the deceased from taking the chairs, the appellant got a steel [metal] bar and hit the deceased on the head. The appellant became scared, got his child and fled to his wife's village. After he re-appeared the appellant was taken to the Chipata Central Police Station where he was detained.

Further evidence was that on the morning of 30th July, 2013 the deceased had taken the taxi from PW2's home to go and work with it. He never took the taxi back or return to his home from that day. The disappearance of the deceased and the taxi were reported to police. PW2 was later informed of a car parked along the Chadiza – Chipata road. She went to see it and found that it was her taxi car and she informed police. They went to check it and found blood beneath a

blanket in the back seat. There were also some clothes and a pair of shoes in the car as well. A bag containing several items was also retrieved from the boot. PW1, who was later shown the items, identified the bag and its contents which included Holy Communion and a bible as the property of the church. He also identified a shirt, amongst the clothes as belonging to the appellant. PW3, Layson Lungu, father to the deceased and PW4, Esther Jere, wife to the deceased, identified a trousers which had a green belt and the pair of shoes as the property of the deceased. It was PW4's evidence that the deceased had been wearing the very trousers and shoes when he left home for work on 30th July, 2013.

An attempt was made unsuccessfully to look for the deceased in the area where PW2's car was found. PW5, Inspector Njobvu, a Scenes of Crime Officer stated that the appellant, who was already in police custody, disclosed that he had put the body of the deceased in the back seat of the taxi and drove it some 10 kilometres to a point where he removed it and dragged it for about 50 metres into a maize field up to the well. PW3, PW5 and PW7, Detective Inspector Felix Mulenga, the arresting officer, stated that in the company of others,

the appellant led them to the well or as PW3 put it, the "*man-hole*" where the body of the deceased was retrieved. The body was naked except for socks and a pant.

The appellant's evidence in defence as alluded to earlier, mostly confirmed what PW1 said he was told by the appellant when they met. The only difference related to how the fatal injury was inflicted. According to the appellant, he struggled with the deceased over the chairs outside the house. In the process the deceased twisted his left arm to a point where it dislocated at the elbow. While he was on the ground, he seized the metal bar used to lock the door and hit the deceased on the head. The deceased let go of the appellant and fell to the ground. The appellant stated that the blood splattered when the deceased hit his head on a chair as he fell after he was hit with the metal bar. The appellant put the chairs back in the house and closed the door and left.

The appellant denied the suggestion that he hit the deceased with the metal bar as the latter was walking away to the car with the bag. He also denied dumping the deceased's body in the well or leading police to recover the body. He stated also that upon returning

home from his wife's village, he found his clothes and the NRC missing.

The learned trial judge rejected the appellant's defence. She noted that the deceased was not stealing the items or going to sell them but merely intended to keep them as security for the debt owed. The learned judge rejected the appellant's explanation that he was overpowered and his arm twisted until it was dislocated on the ground that if this was so the appellant could not have managed to hit the deceased on the spot on the head where the injury was found. She also found, based on the evidence of PW5, that the appellant was the one who took the deceased away from the church premises and dumped him in the well. The learned judge wondered how the appellant could have managed to handle the deceased's body if his arm was dislocated. She found that the appellant was not in any imminent danger or moment of unexpected anguish when he struck the deceased with the metal bar. She found the force used to be manifestly excessive in the circumstances thus defeating the defence of defence of property or self. She convicted the appellant and sentenced him to life imprisonment as it were.

There is one ground of appeal which is that the trial court erred in law and fact when it rejected the appellant's defence of both property and self, contrary to the evidence on record.

The substance of Mr Siatwinda's arguments in support of the ground of appeal was that the appellant's unchallenged evidence was that the scuffle arose from the efforts to prevent the deceased from taking church property which he was employed to safe-guard. It was submitted that the deceased had no right to take church property to secure a debt owed by the appellant. That the deceased exercised maximum restraint by not assaulting the deceased until the deceased inflicted excruciating pain from twisting the arm which dislocated. It was only at that point that the appellant in an endeavour to free himself picked the nearest available object which turned out to be the metal bar and hit the appellant with it. It was argued that there was no premeditation on the part of the appellant but that he reacted in a moment of unexpected anguish. There was neither time to retreat as he was held firmly by the appellant nor was there time to measure what kind of force was necessary to inflict on the deceased in order to free himself from the grip. Reliance was placed on the High Court

cases of **The People v Pelete Banda**[1] and **The People v Mudewa**[2] regarding the test for the defence of self-defence. It was contended that the reaction by the appellant was proportional to the danger posed by the deceased.

It was also pointed out that what the appellant did afterwards (alluding to the dumping of the body in the well or the man-hole) had no bearing on the appellant's action in defending himself. We were urged to find that the trial court erred in rejecting the defence of defence of property or self; that we should quash the conviction, uphold the appeal and acquit the appellant.

In response to the submissions on behalf of the appellant, Mr Sakala submitted that the trial court was on firm ground when it rejected the defence raised owing to the circumstances of the case. It was contended that the appellant was the aggressor because he ran after the deceased in an attempt to prevent him from getting the chairs. It was argued that the learned judge properly discounted the appellant's explanation that he struck the deceased while on the ground after his arm was twisted because from that position it would have been very difficult to hit the deceased on the spot where the

injury was inflicted as shown in the medical report. Therefore that the trial judge was on firm ground in concluding that the appellant was not in imminent danger or in a moment of unexpected anguish when he struck the deceased. Citing the case of **Mike Nedic Miloslav v The People**[3], it was contended that there was nothing in the appellant's case to make any other inferences besides those drawn by the trial court.

It was submitted that the appellant did not have reasonable apprehension that he was in danger of death or serious bodily harm. It was learned counsel's prayer that we uphold the conviction.

We have carefully considered the arguments in this appeal. It is not in dispute that the appellant struck the deceased with a metal bar on the head and the deceased died as a result of that blow. The issue to resolve is whether the appellant acted in self-defence or in defence of church property when he fatally struck the deceased with the metal bar. It is notable that the defence is premised on the explanation made by the appellant that the deceased had dislocated his left arm at the elbow after twisting it in the course of the pair struggling over the church seats that the deceased was trying to get.

The learned trial judge took into account the appellant's demonstration in court of what transpired. The fact that the demonstration was made by the appellant was captured at the trial in the following terms, at pages 82 to 83 of the record of appeal-

> **"Q. What happened after he twisted your arm?**
>
> **A. I fell down at that time he was still holding the same arm. When I saw that he was not releasing my arm that is when I got hold of the iron bar that I use to lock the door.**
>
> **Q. Is it the iron bar that was brought to this court?**
>
> **A. Yes.**
>
> **Q. What did you do with that iron bar?**
>
> **A. I hit him on the head.**
>
> **Q. On what position was he when you were heating him?**
>
> Witness shows the court."

Based on the demonstration made by the appellant, the learned judge found that from his position on the ground, the appellant could not have managed to hit the appellant on the spot on the head where the injury was found. He, therefore, concluded that the appellant's action was "manifestly excessive in the circumstances" and that it defeated the defence of defence to property or self.

The learned judge was clearly entitled to take into account all available evidence including the demonstration re-enacting what had transpired in assessing the veracity of the defence put up by the appellant. The finding that the appellant could not have managed to hit the deceased on the spot where he was injured was based on the demonstration made by the appellant in court. It was a finding of fact. In order to displace that finding it had to be demonstrated that it was perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that it was a finding which on a proper view of the evidence no trial court, acting correctly, could make as held by this court in the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[4]. The learned trial judge took into account the demonstration made by the appellant himself on the basis of which she concluded that the appellant was not in imminent danger or in a moment of unexpected anguish when he fatally struck the deceased. Her conclusion implies that the appellant was not repelling an unlawful attack on him as he portrayed but that he deliberately hit at the deceased. We do not see how the learned judge can be faulted.

Mr Siatwiinda had submitted that what the appellant did after the fatal assault has no bearing on the defence put up. We do not agree. We are of the view that the appellant's conduct after his encounter with the deceased has everything to do with the veracity of his defence. For instance if his explanation that after the fight with the deceased he travelled to his village is found to be true, it might confirm that the deceased might have been attacked by others who transported him to where his body was eventually recovered. On the evidence, however, this possibility is not there. The evidence of PW5, the police scenes of crime officer, was that the appellant disclosed that he had put the body of the deceased in the back seat of the taxi and drove it some 10 kilometres to a point where he removed it and dragged it for about 50 metres into a maize field up to the well. This confession was not challenged. But even if it is discounted on the basis that its voluntariness was not ascertained, which we are satisfied is not in issue in this case, the evidence of PW3, PW5 and PW7, Detective Inspector Felix Mulenga, the arresting officer, confirms that it is the appellant who led to the recovery of the deceased's body in the "*man-hole*". This was after fruitless searches by relatives and the police. In the case of **Khupe Kafunda v The**

People[5] in which prior fruitless searches were made before the appellant led police to the recovery of the deceased, we commented thus-

> **"Several searches by the farm workers and subsequently by a contingent of police officers never found the deceased. PW 7, a police officer, testified that the appellant led them to a shallow grave in the bush from where the body of the deceased was discovered. It is quite clear on the evidence on record that without the appellant leading the police, the body of the deceased could not have been discovered."**

Similarly, in the case before us, the body of the deceased could not have been found at the time it was recovered if the appellant had not led police to it. This evidence confirms all that was alleged that after realising that the deceased had died, the appellant put the deceased in the taxi and went to dump the body in the disused well. It cannot therefore, be true that the appellant left the deceased in the church premises and went to his wife's village. He went there after he had gotten rid of the body. Now, the appellant's non-disclosure of what had transpired is not consistent with innocent conduct. We are satisfied that he took the action that he did after he had killed the deceased because he had no defence. We find that the defence raised

has no legs to stand on. Therefore, we find no merit in the appeal. We dismiss the appeal and uphold the conviction.

We have considered the sentence imposed by the trial court based on our jurisdiction arising from section 15 (4) of the Supreme Court of Zambia Act. The trial judge was of the view that the fight between the appellant and the deceased and the particular circumstances [of the case] fitted the definition of extenuating circumstances in section 201 (1) (a) of the Penal Code. We are equally satisfied that, having regard to the circumstances in which the appellant committed the offence and the standard of behaviour of an ordinary person of the class of the community to which the appellant belonged, bearing in mind that his role as caretaker was to safeguard church property which the deceased was in the process of taking away, the court below properly found that there were extenuating

circumstances. The sentence imposed of life imprisonment does not come to us with any sense of shock. We uphold the sentence.

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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