APPEAL No.167/2017

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

FRANCIS MUSANKA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM; Phiri, Muyovwe, and Chinyama, JJS.

On 6th November, 2018 and 30th September,2020

For the Appellants: Mr. H.M. Mweemba-Legal Aid Board.

For the Respondent: Mr. C. K. Sakala-National Prosecutions Authority.

J U D G M E N T

Phiri, JS: delivered the judgment of the court.

Cases referred to:

1. **Joe Banda-v-The People, SCZ Appeal No.183 of 2013**

Legislation referred to:

The Penal Code, Cap. 87, s.200 s.201 (b)

The Criminal Procedure Code, Cap. 88, s.210

This is an appeal against the judgment of Chawatama. J. delivered on the 4th February, 2016. The Appellant was tried and convicted of Murder Contrary to **Section 200 of the Penal Code, Cap 87 of the Laws of Zambia**. He was given a mandatory death sentence. The particulars of the offence alleged that the appellant on 17th May,2015 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with others unknown, did murder John Chansa (hereinafter referred to as "the Deceased").

The case for the prosecution rested on the evidence of five (5) witnesses namely: Davies Chibwe (PW1), John Lumbwe (PW2), Daniel Zimba (PW3), Misozi Jere (PW4) and Detective inspector Kennedy Mukangisa (PW5). The brief facts of this case were that on 18th May, 2015, PW1 went to Ziko Ni Bantu Bar, after he knocked off from work. He met and joined his friend the deceased. The duo drank some wine before moving to another Bar namely; Zelosi Bar, where they continued drinking. According to PW1, while at Zelosi Bar, he decided to go and relieve himself. However, upon his return, he found the deceased being beaten by six (6) people. He then saw the appellant, whom he knew as Mike, hit the deceased with a shovel.PW1 came to learn that the actual name of the appellant was Franco. PW1 narrated that he saw the

appellant because he was approximately 4 metres from where the fight was taking place and the area was illuminated by an electric bulb. This witness first came into contact with the appellant, when this bar was just opened. The appellant was earlier employed as a Bar man. PW1 and the deceased used to frequent this bar almost on a daily basis. After assaulting the deceased, the appellant attempted to run away but he was apprehended by a mob of people who, in turn, handed him over to the police that were patrolling in the area. PW1 then helped to take the deceased to his relatives who took him to the police station. The deceased was later admitted to the University Teaching Hospital because he had suffered a deep cut on his head. Unfortunately, after one month, the deceased died of cerebral contusion due to the traumatic head injury.

Upon the police investigations, following the death of the deceased, PW1 was able to identify the shovel that was allegedly used by the appellant to assault the deceased. In fact, it was PW1 who led the police to the place where the shovel was recovered.

PW3 was one of the police officers who apprehended the appellant after a mob of people handed him over to the State police. The appellant was later charged with the offence of murder.

When he was put on his defence, the appellant denied the charge. He argued that the deceased fell into a drainage as the appellant was trying to restrain him from entering the toilet for the ladies. In the process, the two exchanged some punches before the police arrived. The appellant claimed that he fought with another man and not the deceased as alleged. Besides, he argued that he was apprehended on 17th April, 2015 and by 18th April, 2015 he was already locked up in the police cells and as such, it was not possible that he could have fought with the deceased. He also denied knowing PW1 and claimed that he knew nothing about the shovel.

The disputed date of arrest caused the prosecution to make an application to call evidence in rebuttal. Detective Inspector Kennedy Mukangisa (PW5) produced the Arrested Prisoners and Property Book (APP book), which showed that the appellant was arrested on 18th April, 2015 at 21:25 hours.

The learned trial Judge considered the evidence on both sides and believed the evidence given by PW1 as an eye witness who saw the appellant assault the deceased with a shovel. The Court concluded that the grievous harm inflicted on the deceased's head resulted into his death and this was sufficient to constitute malice aforethought. The Court ruled out the issue of mistaken identity and affirmed that this was a case of recognition since the appellant was not a stranger to PW1. In addition, the Court also pointed out that the endorsement in the APP book appeared genuine and showed that the appellant was arrested on 18th April, 2015. Therefore, on the basis of the totality of the evidence, the lower Court convicted the appellant as charged.

Aggrieved with the decision of the Trial Court, the appellant has now appealed advancing two (2) Grounds of Appeal as follows:

1. **The learned Trial Judge erred both in law and in fact when she allowed evidence in reply to be adduced without complying to the provisions of section 210 of the Criminal Procedure Code.**

2. **The learned Trial Judge erred in law and in fact when she convicted the Appellant and sentenced him to death in the presence of evidence of a fight and mob beating.**

Mr. Mweemba, assailed the trial Court's decision in the manner

section 210 of the Criminal Procedure Code, Chapter 88 of the

Laws of Zambia was applied. Counsel requested this Court to set the law clearly on the application of **section 210** as to when the State should be allowed to call evidence in reply or rebuttal. The said **section 210** provides as follows:

> "**If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to contradict the said matter.**"

Mr. Mweemba submitted that the requirement starts at the point when the accused introduces evidence in his defence, which the State could not have reasonably foreseen. We were referred to the case of **Joe Banda-v-The People**[1] which suggested the parameters to be observed when dealing with **section 210 of Cap 88**.Counsel argued that it was procedurally irregular for the State to call for evidence in reply or rebuttal on a matter that is not contemplated in the section, as the issue of the APP book was well addressed by the defence in cross-examination of all the necessary witnesses. The suggestion by the appellant in cross-examination through the advocate was that he was apprehended on a different date from the one the prosecution was suggesting, which was a Friday the 17th April, 2015 and not 18th April,

2015, which appears in the APP book. The State therefore, had reasonably foreseen this and should, in Counsel's view, have called evidence to discount this fact before closing their case. Mr. Mweemba argued that the only reasonable conclusion for their failure to do so, is that at the time of these issues, the book in question, which shows the appellant to have been apprehended on the 18th April, 2015 did not exist and was merely fabricated to suit the prosecution's case. In this case, the learned Judge erred and wrongly allowed this evidence as this is not what **section 210 of Cap 88** envisages. He therefore requested this Court to expunge the evidence in reply from the record as it was wrongly obtained.

Counsel also suggested that we need to look at the evidence of PW1 as that of a single identifying witness. He pointed out that there is a suggestion that there was no mention of a shovel in his statement until almost after a month. It was also suggested that PW1 could have been drunk at the material time and could have taken a wrong perception of the facts. We were urged to consider the prosecution's evidence as lacking sufficiency to sustain the conviction.

He prayed that the appellant be acquitted forthwith and be set at liberty.

Arguing in the alternative, in respect of ground 2, Mr. Mweemba assailed the trial Court's decision to convict and sentence the appellant in the circumstances of evidence of a fight and mob beating, as only PW1 purportedly witnessed the fight while he was drinking together with the deceased on the date in question. Further that there was a fight during which more than 6 people were beating the deceased during the night under insufficient light from one electric bulb. Counsel submitted that it was common knowledge that the appellant in participating in the beating could not have intended to cause the death of the deceased. It is also likely that there was a reason provoking the appellant, which should have prompted the appellant to participate in beating up the deceased. Counsel's view was that this must take out the blameworthiness of the appellant's guilty mind to bring him squarely into the provisions of **section 201 (b) of the Penal Code, Chapter 87 of the Laws of Zambia** which provides for extenuating circumstances.

He submitted that on the totality of the evidence, the Court below should have considered any other sentence other than death. Counsel therefore urged this court to allow this ground of appeal and set aside the death sentence to be substituted with any other sentence.

Responding to the appellant's arguments in respect of both grounds, Mr. Sakala entirely agreed with the appellant to the extent that there was evidence of a fight and mob beating and so the appellant should not have been sentenced to death but that any other sentence should have been considered.

Mr. Sakala also agreed with the appellant to some extent, to the effect that the appellant introduced the issue of the day when he was apprehended early enough for the State to discern where his evidence was leading. However, the Judge went on to use her discretion to allow the reception of evidence in reply. On the other hand, Mr. Sakala submitted that even if the evidence in rebuttal was expunged from the record, a conviction could still stand because the appellant himself agreed that he was apprehended after fighting at the said bar. According to Counsel, it is highly probable that he mixed the date of the incident because he could not have been apprehended twice. It is

also possible that he just made it up to try and get himself off the hook of justice. He was apprehended immediately after the said fight by the same officer. This could only have been on the 18th April, 2015 and not otherwise. Mr. Sakala supported the appellant's conviction and left the sentence to the discretion of this court.

We have considered the grounds of the appeal and the evidence on record. In the first ground, learned Counsel for the appellant lamented that the learned trial Judge misapplied the provisions of **section 210 of the Criminal Procedure Code** when she allowed the production of the APP book in rebuttal in order to ascertain the date the appellant was arrested. **Section 210 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia** falls under part VI of the Criminal Procedure Code which exclusively deals with criminal trials before the Subordinate Courts. The appellant in this case was tried by the high Court whose criminal trials are guided under Part IX of the Criminal Procedure Code. Reliance on Section 210 of the Criminal Procedure Code was therefore a misdirected approach.

Further, although **section 294 under Part IX of the Criminal Procedure Code** is similarly worded to **section 210** regarding

evidence in rebuttal, it must be noted that the jurisdiction of the High Court is different from that of the Subordinate Court. Unlike the Subordinate Court, the High Court is a court of unlimited jurisdiction in which the trial Judges have wider discretion to inquire into any matter they consider relevant for the ascertainment of the truth. In our considered view the decision of the trial Judge to allow the production of the APP Book in order to determine the appellant's date of arrest was not really an issue worth determining because the appellant, in his own evidence placed himself at the scene of the crime where he was arrested as he tried to escape soon after he struck the deceased with a shovel to the head. Although he denied that he used the exhibited shovel to strike the deceased on his head, his claim that the deceased fell in a drainage as he restrained him from entering the ladies toilet room still firmly placed him at the scene of crime; such that even if the APP Book was disallowed, the totality of the evidence, including the appellant's own evidence, placed him at the scene of crime. Accordingly, we do not find any merit in the first ground of appeal.

In support of the second ground of appeal, Mr. Mweemba presented a number of speculative arguments about what could have happened at

the scene of crime and suggested that there were other people who participated in beating the deceased under insufficient light. Firstly, the evidence on record does not suggest that the electricity light at the scene of crime was insufficient.

Secondly, although there is evidence that there was a fight involving about six people, the medical evidence produced at the trial firmly supports PW1's testimony of a single source injury to the deceased's head as the cause of death. According to PW1, the deceased suffered this injury when the appellant struck him with a shovel to the head. This injury could not have been caused by mob beating.

Mr. Mweemba also suggested that PW1 was in the category of a single identifying witness. By so saying, it was suggested that evidence of identification was insufficient. We do not agree. The learned trial Judge rightly concluded that PW1's evidence of identification was by recognition. Indeed, the evidence which the appellant did not dispute established that the appellant was very well known to PW1 who was at the scene of crime. The learned trial Judge was on firm ground when she chose to believe the evidence of identification given by PW1. In our view, that evidence was thorough and conclusive.

The use of the shovel to the deceased's head was no doubt intended to kill or to cause grievous harm, as it indeed did. Hence the malice aforethought.

As for the suggestion that, PW1 and the deceased were drinking beer, we have not found any evidence of drunkenness as a defence on the part of the appellant. In our considered view, the appellant's conviction was well founded on the evidence on record. Regarding the sentence, we have not found any evidence of extenuating circumstances to warrant any lesser sentence. We find no merit in both grounds of appeal and we dismiss it.

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G.S. Phiri
SUPREME COURT JUDGE

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E. C. N. Muyovwe
SUPREME COURT JUDGE

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J. Chinyama
SUPREME COURT JUDGE