IN THE SUPREME COURT OF ZAMBIA **SCZ APPEAL NO. 158, 159, 160/2021**

HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

SILIWA SITALI **1ST APPELLANT**
LIKANDO SITALI **2ND APPELLANT**
JOHN SITALI **3RD APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Hamaundu, Kabuka and Chinyama, JJS.
On 2nd November, 2021 and on 5th April 2023.

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

For the Respondent : *Mr. B. Mwewa, Senior 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. *DPP v Lukwosha (1966) ZR 14*
2. *Gerrison Zulu v ZESCO Limited (2005) ZR 39 (SC)*
3. *John Mkandawire and Others v The People (1978) ZR 46 (SC)*
4. *Major Isaac Masonga v The People SCZ Judgment No.24 of 2009*
5. *Mbomena Moola v The People SCZ Judgment No.35 of 2000*
6. *Chiyovu Kasumu v The People (1978) ZR 252 (SC)*
7. *Jones v National Coal Board [1957] 2 QB 55*

Legislation referred to:

1. *Penal Code, Chapter 87 of the Laws of Zambia, S.22*
2. *Criminal Procedure Code, Chapter 88 of the Laws of Zambia*

1. The 1st appellant and his two sons, the 2nd and 3rd appellants were convicted and sentenced to death by Sikazwe J in the Mongu High Court for the offence of murder contrary to section 200 of the Penal Code. Particulars of the offence were that the three appellants, on a date unknown but between 2nd and 5th January 2015, at Senanga in the Western Province of Zambia, jointly and whilst acting together murdered Jaime Sinsinda (hereafter, "the deceased").
2. The appeals are largely against conviction, the issue of sentence arising only by virtue of the arguments relating to the first ground of appeal where the ultimate contention is that the appellants should have been and ought to be convicted for the lesser offence of manslaughter and consequently must suffer any sentence other than death.
3. The evidence given in the High Court on behalf of the State showed that the deceased used to be the husband to the 1st appellant's daughter, Sililo Sitali, who testified as PW1. In

the night on 1st January, 2015, PW1 had called out to her father for help on account of the deceased, with whom she was estranged, who had entered her hut and threatened to beat her because she had opted for another man. The 1st appellant, who was in his hut nearby, heard the call and dashed to the aid of his daughter but did not find the deceased who had by then escaped.

4. In the morning on 2nd January, 2015 the 1st appellant mobilized his two sons, the 2nd and 3rd appellants and they went to look for the deceased. They found him near a communal village water point and pounced on him. A scuffle ensued which was witnessed by PW2 (Mahongo Kangombe) and PW3 (Kalyata Mahongo Joseph) and PW4 (Kasweka Liato) who were attracted to the scene, among other onlookers.

5. PW2 testified that when he reached the scene, he found the appellants beating the deceased, who was on the ground, with fists and slaps. When the witness asked the appellants what the deceased had done, they told him that they were tired of being troubled by him. They tied his hands behind

his back and announced that they were taking him to his father and onwards to the police station.

6. PW3's evidence was that he found the deceased tied with a rope around his neck and the three appellants were beating him with fists while he was lying on the ground. There were shouts that someone was being killed by the appellants. The rope was later removed and it was used to tie the deceased's hands behind his back. The witness stated that the deceased's face was swollen. When asked why the appellants were treating the deceased in that manner, the 1st appellant responded that the deceased had done something in the night at their place; that they were taking him to his father and then to the police station. They went away with the deceased. The 2nd appellant had a spear while the 3rd appellant had an iron bar.
7. PW4 gave evidence that she found the three appellants beating the deceased who was pinned to the ground. The face was swollen. A rope was tied around his neck and he was bleeding from the mouth. The witness stated that the 1st appellant, in response to a question, stated that the deceased was troubling them. The rope was eventually

removed from the neck and was used to tie the deceased's hands behind his back. The appellants then left, apparently headed for the deceased's father's village. The 2nd appellant carried a spear and the 3rd appellant had an iron bar.

8. PW1 did also testify that later in the afternoon, while she was in her field tilling the land, she heard her husband, the deceased crying at a distance of about 150 meters away but she did not go to see him.

9. PW5, Anthony Salumaho, the father to the deceased, testified that on the same day, he heard about the apprehension of his son by the 1st appellant. He met the three appellants the next morning. They told him that they had released the deceased who went to his village. Not satisfied with the explanation, he reported the matter at Senanga Police Station. The police picked up the three appellants and upon being interrogated, the 1st appellant led police to where the deceased's body was recovered in the bush. It was found covered with grass and thorny branches. The body was taken to Senanga District Hospital mortuary. It was buried the following day. PW5 stated that his son had once been married to PW1 but that they had divorced.

10. We should mention at this juncture, in view of the issue contended in the second ground of appeal, that the record of appeal did not have the verbatim recording of the evidence of PWs 1, 2, 3, 4 and 5. We, therefore, relied on the summary of these witnesses' evidence contained in the judgment of the trial Court. Whether it will be necessary to deal with this issue which is the basis of ground two in the appeal will depend on the outcome of ground one.

11. PW6, Constable Maxwell Sokoni confirmed PW5's report to the police and that the three appellants were apprehended. He also confirmed that upon interrogation, the 1st appellant led police to where the deceased's body was hidden covered with grass and thorny branches. Because of the state of decomposition, a postmortem could not be conducted. The body was buried. When warned and cautioned, all three appellants denied killing the deceased. The witness stated, however, that the 2nd appellant told him that it was the 1st appellant that hit the deceased on the head and he lost a lot of blood.

12. In defence, all three appellants gave evidence on oath and did not call any witnesses.

13. The 1st appellant denied assaulting the deceased. He stated that after apprehending the deceased they took him to his father's (PW5's) village but they did not find PW5. They then proceeded to their own village. On the way the 1st appellant noticed that the deceased was becoming weak and was failing to walk. He told his children to get an ox-cart but abandoned the idea. The 1st appellant then left his children behind and proceeded alone with the deceased. The deceased died along the way and he dumped his body at the place where it was subsequently recovered. In cross-examination, the 1st appellant admitted to have done something wrong to the deceased which caused him to die.

14. Both the 2nd and 3rd appellants testified that their father, the 1st appellant, enlisted them to look for the deceased. When they found him, he resisted being apprehended. According to the 2nd appellant, the deceased beat them with his fists until villagers intervened. He admitted hearing the villagers tell the appellants that they were "killing somebody". He, however, explained that this was because the deceased was sitting on the 3rd appellant whom he was beating. This caused the 1st and 2nd

appellants to attack the deceased to rescue the 3rd appellant. The 3rd appellant stated that the 2nd appellant struggled with the deceased until they apprehended him. They tied the deceased's hands behind his back with a rope. It was the two appellants' evidence that they remained at their village while the 1st appellant proceeded alone with the deceased. The two appellants also confirmed that it was their father that led the police to where the deceased's body was found. The 2nd appellant stated that though he had a spear he never used it on the deceased. He also denied telling police that his father hit the deceased with a log on the head. The 3rd appellant also denied that he used the iron bar on the deceased.

15. In his judgment, the learned trial Judge found that the appellants fought with the deceased while apprehending him; that the appellants used the iron bar, a log and a spear that they had when they set out to look for him, on the appellant; that the appellant sustained a swollen face and was even failing to walk which made the appellants to consider carrying him in an ox cart. The learned Judge found that all three appellants participated in assaulting the

deceased. He took the view that the appellants had knowledge that their actions would probably cause the death of the deceased or do him grievous harm. The Judge concluded that the appellants caused the death of the deceased with malice aforethought. He found the case proved and convicted the appellants.

16. Dissatisfied with the outcome, the appellants launched the appeal to this Court on two grounds viz-

i. **The trial Court misdirected itself in law and in fact when it held that the appellants caused the death of the deceased with malice aforethought.**

ii. **The trial Court erred in law and in fact when it used its discretion wrongly by inserting itself into the substantive questioning during trial which prejudiced the appellants' right to fair trial.**

17. Mr Mankinka relied wholly on the heads of argument filed at the hearing of the appeal whose gist, in relation to the first ground of appeal, is that the three appellants set out with the lawful common intention of apprehending the deceased (for his perceived transgression of the previous night in PW1's hut) and that they apprehended him. Counsel submitted that any injuries sustained by the

deceased may not have been intentionally inflicted but came about as a result of the struggle while apprehending him. Further, that there was no evidence whatsoever to support the learned Judge's finding that the appellants must have assaulted the deceased with the spear, a log and the iron rod in their possession. Therefore, that there was no intention or knowledge by the appellants which constituted malice aforethought. The case of **DPP v Lukwosha**[1] was cited for the principle that it is for the prosecution to prove that there existed in the accused the intention or knowledge which constitute malice aforethought through the accused's action(s). It was submitted that there was nothing in the evidence of the prosecution witnesses to suggest that from the outset the appellants' intention was to beat up the deceased. Therefore, that the facts of the case reveal the lesser offence of manslaughter contrary to section 199 of the Penal Code which we should substitute for the offence of murder contrary to section 200 of the Penal Code for which the appellants were convicted.

18. In relation to the second ground, Mr Mankinka's grievance related to the interventions made by the learned

Judge during trial when the Judge asked the witnesses (mostly the accused persons, now the appellants) certain questions. It was submitted that these questions which occurred more than 71 times on the record went beyond the normal boundaries of clarifying points. Counsel noted that there may have been other instances disclosed had the record been complete with the testimony of the other witnesses who were omitted. The case of **Gerrison Zulu v ZESCO Limited**[2] was cited in which it was held that-

> **Although the trial judge has a discretion to ask questions during the trial, he should not use his discretion to insert himself into the substantive questioning during the trial. The trial judge should ask questions only to clear a point. The learned Judge in this case went beyond the normal intervention.**

Counsel's view was that the interventions by the Court prejudiced the appellants' right to a fair trial.

19. It was pointed out that no where in the record did the Court give the parties an opportunity to clarify on the matters the Court questioned the witnesses upon. We were referred to the case of **John Mkandawire and Others v The people**[3] where it was held that-

> **When the Court after the completion of the cross-examination and re-examination asks the witness certain questions the proper procedure is to give an opportunity to**

each side to examine such witness in the ordinary way if it so wishes.

20. Based on the foregoing case, it was submitted that the Court below did not guarantee procedural protection and, therefore, the fairness of the trial was compromised. Consequently, the appellants were prejudiced and put at a disadvantage. According to Counsel, the trial Court assisted the prosecution in prosecuting the appellants which is against the principle in adversarial proceedings. The case of **Major Isaac Masonga v The People**[4] was cited where it was held, inter alia, that the Courts have a Constitutional duty to administer justice and be seen to guarantee all procedural protection to all persons. The Court also stated that-

> **The notion of equality of arms is an essential feature of a fair trial and is an expression of the balance that must exist between prosecution and defence and also respect for the principle of adversarial proceedings.**

It was submitted that the Court below abrogated its duty to guarantee a fair trial. That this brings into question the appellants' conviction. Counsel urged us to allow the second ground of appeal.

21. Mr Mwewa, on behalf of the State filed heads of argument in response to the appeal at the hearing of the

appeal on which he relied. The learned Senior State Advocate supported both the convictions of the appellants and the sentences imposed on them.

22. Regarding ground one and the supporting arguments, Mr Mwewa submitted that the appellants' position that they were on a lawful purpose of apprehending the deceased that ended tragically flies in the teeth of the evidence on record. Learned Counsel submitted that the trial Court was on firm ground when it found that the appellants jointly and whilst acting together abducted and harassed the deceased; that the appellants were armed with a rope and a spear. There was nothing lawful that was going to be executed by the appellants in these circumstances but that their intention was to kill or cause grievous harm to the deceased. Counsel pointed out that PW's 2 to 4 gave 'gory' details of the deceased's assault and his abduction. Counsel submitted that the appellants attacked the deceased, hitting him with slaps, fists and kicks. They then kidnapped him to their village to answer to unknown crimes (following which he turned up dead). It was submitted that in the circumstances, the appellants are guilty of the offence

charged. The case of **Mbomena Moola v The People**[5] was referred to in which it was held that-

> **Where there is evidence of assault followed by death without the opportunity for a *novus actus interviniens*, a Court is entitled to accept such evidence as an indication that the assault caused the death.**

23. In respect of the second ground of appeal, Mr Mwewa submitted that it is a well-established rule that a trial Court has discretion to put questions to a witness to clarify issues. The case of **Chiyovu Kasumu v The People**[6] was cited in which it was held-

> **Whilst there is no objection to a trial court asking questions during the course of an examination in chief or cross-examination for the purposes of clarification or where an important question on a particular point appears to have been overlooked, counsel should not normally be interrupted in the course of cross-examination, particularly in the course of a challenge on credibility, unless the particular question or line of questioning appears to the court to be improper.**

It was submitted that in the case at hand, the trial Court's interventions were aimed at clarifying issues that would lead to the proper administration of justice. That the record shows that the Judge gave opportunity to Counsel to question the witnesses on his interventions. That the evidence in the case was received through an interpreter and it was prudent for the Judge to seek clarity where he

was not clear. Counsel referred to the case of **Jones v National Coal Board**[7] where Lord Green MR held-

> **A Judge's part is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies.**

24. Mr Mwewa submitted that the learned trial Judge made interventions and found the truth accordingly. This concluded the learned advocates' submissions. Suffice to state that we are grateful for Counsels' exertions in favour of and against the appeal.

25. There are two issues to resolve in the first ground of appeal firstly, whether the appellants caused the death of the deceased and secondly, whether they did so with malice aforethought.

26. Regarding the first issue, it is clear from the judgment that the learned Judge attributed the deceased's death to the confrontation that he had with the appellants during which, according to the learned Judge, the appellants used an iron bar, a log and a spear on the deceased. We agree

with Mr Mankinka that the view held by the trial Judge that the appellants used an iron bar, a log and a spear on the deceased is not supported by the evidence. None of the witnesses who testified to what they saw stated that the appellants used the implements on the deceased. Further, there was no postmortem examination of the deceased's body after it was recovered due to the state of decomposition. Had an examination been conducted, it may have assisted in establishing or ruling out whether any of the stated implements were used on the deceased. In the absence of such or other confirming evidence we find that the trial Judge misdirected himself in taking the view that the appellants used the implements on the deceased.

27. There is, however, no doubt that the deceased was assaulted and sustained a swollen face and even bled. By the appellants' own testimony, the deceased had difficulty in walking leading to the 1st appellant to contemplate carrying the deceased in an ox-cart. Having displaced the finding that the appellants assaulted the deceased using the implements that they had, the only evidence that remains is that of the three prosecution witnesses that the appellants

hit the deceased with fists and slaps. Not to mention the 1st appellant's admission when cross examined, that he had done something wrong to the deceased which killed him. Given the condition in which the deceased was, we are in no doubt that the appellants assaulted the deceased in the manner explained by the witnesses, particularly taking into account the exclamation by the onlookers that the appellants were going to kill the deceased. This utterance confirmed the evidence of PW2, PW3 and PW4 that when they arrived at the scene, the appellants were in fact beating the deceased. The evidence of these three independent witnesses was never displaced. The impression we are left with is, therefore, that there was no fight as such between the deceased and the appellants. The deceased was being beaten before he had his hands tied and taken away. We agree with Mr Mwewa that the notion propagated by the appellants that there was a fight is misleading. The fact that the deceased was at the mercy of the appellants is borne out by the evidence that the witnesses found the deceased tied with a rope around his neck which was removed only after

the onlookers intervened. The question, however, remains: did the appellants cause the deceased's death?

28. It is a fact that the deceased died while in the custody of, at least, the 1st appellant. Further, in relation to the 2nd and 3rd appellants, their defence was that they had already parted with the 1st appellant who continued going with the deceased and, therefore, could not account for the deceased's death. The trial Judge, obviously, did not accept the explanation and we think that he was entitled to do that. His view was certainly that the beating by the appellants was an operative cause.

29. We side with the learned judge. According to the evidence of the 1st appellant, which was not contested by the other appellants, the deceased had difficulties in walking and became weak until he died. This condition can be attributed to the fact that he had recently been assaulted by the three appellants. As held in the case of **Mbomena Moola v The People** cited by Mr Mwewa, evidence of assault followed by death without a new occurrence intervening entitles the Court to accept that the death was caused by the assault.

30. In the case before us, the deceased was in the custody at least the 1st appellant until he died. There is no evidence that something else happened to the deceased after leaving the scene of the assault which could have caused his death. It is clear that there was no new act intervening. We are satisfied that the deceased's death was attributable to that assault. It, therefore, does not matter either that the 1st appellant parted with his sons or that they went together after the assault. What is crucial is that the appellants were together when they assaulted the deceased. Going by their mission to apprehend the deceased and the evidence of the prosecution witnesses, the assault was a joint effort involving all three appellants. We, accordingly, reiterate and agree with the trial judge's finding that the appellants caused the death of the deceased notwithstanding our finding that the assault was by means of hitting the deceased with fists and slaps and not the implements that they had.

31. Regarding the second issue of whether the appellants caused the deceased's death with malice aforethought, it was suggested by Mr Mankinka that the appellants had no

specific intent from which murder could be imputed. That theirs was the common purpose of lawfully apprehending the deceased with no elements indicating malice aforethought in the execution of their mission. Therefore, that the proved facts only reveal the lesser offence of manslaughter under section 199 of the Penal Code, Chapter 87, Laws of Zambia. To the contrary, Mr Mwewa contends that the appellants beat up the deceased causing him to sustain a swollen face and bleeding from the mouth. They also tied him with a rope around his neck indicating an intention to strangle him. These actions caused grievous harm to the deceased.

32. Referring to section 204 of the Penal Code which defines malice aforethought, the trial judge took into account the actions of the appellants regarding how they mobilized and apprehended the deceased. He concluded that the appellants caused the death of the deceased with malice aforethought.

33. We think that the position taken by the learned judge is consistent with the facts of the case. As summed up by the trial judge, in terms of section 204 of the Penal Code, a

person is deemed to have killed the deceased with malice aforethought if it is shown, among other things, that the person intended to cause the death of or grievous harm to the deceased; or had knowledge that his act or omission would probably cause the death of or grievous harm to the deceased. Establishing that the accused had the intention or knew that he was going to kill or cause the death of the deceased or cause grievous harm to the deceased must necessarily be a matter of inference from the conduct of the accused as stated in the case of **DPP v Lukwosha**[1] cited earlier by Mr Mankinka, where it was held-

> **It is for the prosecution to prove that there existed in the accused the intention or knowledge which constitute malice aforethought. Intention and knowledge are not susceptible of direct proof. It is not possible to look into a man's mind and see the intention and knowledge therein. Sometimes a man may declare his intentions or state his knowledge. That is about as near as one can get to direct evidence of intention and knowledge. More usually intention and knowledge are matters of inference to be drawn from proved conduct and actions. There is a presumption that a man intends the natural and probable consequences of his acts. It is a presumption of good sense; but, of course, it is readily rebuttable.**

34. The fact that the appellants beat up the deceased severely is beyond question. He sustained a swollen face, bled and had difficulty in walking arising from the assault. The injuries sustained in the beating were so serious that

not long after, the deceased died. Surely, the appellants who were three, ganging up against the appellant who was alone and beating him up to a point where he had difficulty, in walking ought to have realized or known that their actions would result in the death of the deceased or the infliction of serious injuries on him. We are in no doubt that the injuries sustained by the deceased amounted to grievous harm as defined in section 4 of the Penal Code, which states-

> **"grevious harm" means any harm which endangers life or which amounts to a maim or which seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense ....**

These circumstances indicate and the Court was entitled to infer that the appellants had the requisite malice aforethought both in terms of the intention and knowledge stated above. We find no merit in ground one of the appeal and we dismiss it.

35. Having dismissed ground one of the appeal, a consideration of the second ground of appeal becomes academic and redundant. This is because once it was proved that the appellants killed the deceased with malice aforethought, their conviction for the offence of murder is

confirmed. There is nothing left to discuss which will benefit the appellants with regard to their culpability. Given the overwhelming evidence of assault, the judge's interventions though inappropriate, did not amount to a substantial miscarriage of justice as per section 15 (2) of the Supreme Court Act, Chapter 25. On the foregoing basis, we resile from considering the ground.

36. The result of the foregoing is that we find no merit in the entire appeal and we dismiss it. We accordingly, uphold the convictions and sentences.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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J. K. KABUKA
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE