IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.17/2016**

HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

HENRY CHIWISA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Muyovwe, Hamaundu and Kabuka, JSS**
On10th May, 2016 and 24th January, 2017.

FOR THE APPELLANT: Mr. G. Lungu, Messrs. Muleza, Mwiimbu & Co.

FOR THE RESPONDENT: Mrs. F.N. Tembo, Senior State Advocate, National Prosecutions Authority.

JUDGMENT

Kabuka, JS, delivered the Judgment of the Court.

Cases referred to:

1. R v Smith [1959] 2 Q. B. 35.
2. R v Jordan [1956] 40 Cr. App. R. 152.
3. Mbomena Moola vs The People (2000) Z.R. 148.
4. Thandiwe Zulu vs The People (1981) Z.R. 341.
5. Jutronich, Shutte and Lukin vs The People (1965) Z.R. 9.
6. Tembo vs the People (1972) Z.R. 220.
7. Lubendae vs The People (1983) Z.R. 54.
8. The Attorney-General v Marcus Kampumba Achiume (1983) Z.R. 1.
9. Zitandala Nyendwa and Samilani Ngoma v The People (1978) Z.R. 399.

Legislation referred to:

1. The Penal Code Cap.87 SS. 200; 201;207;13 (4).

The appellant appeals against a judgment of the High Court at Lusaka, which convicted him of the offence of murder, with extenuating circumstances and sentenced him to 25 years Imprisonment with Hard Labour.

The record from the Court below shows the appellant was charged with the offence of murder, contrary to **section 200 of the Penal Code Cap. 87** of the Laws of Zambia. Particulars of the offence were that, on the 17th day of April, 2014, at Siavonga, he murdered **Allan Tendai Chimbola.**

According to the evidence adduced in the court below, the appellant, a police officer, was on duty at the Siavonga Police Check Point on the 15th of April, 2014. At around 20:00 hours one Josephat Bulungu, who testified as the first prosecution witness (PW1) at trial, passed through the Police Check Point. He had known the appellant for a period of five months as his neighbour and was carrying a 2.5 litres container of *mutete,* a local beer which they proceeded to drink with the appellant. After they finished, the appellant sent PW1 to buy some more and he bought two x 2.5 litres of the same beer. When they had finished taking this beer as well, the appellant suggested they look for

spirits from shops located at the market, but they found the shops closed.

On their way back from the shops, they met with the deceased who was carrying a 50kg sack of wild fruits locally known as *'mabuyu'* which he was selling at K15.00. The deceased asked the appellant to buy the fruits so that he could use the proceeds to buy some beer. When the appellant asked him where he would get this beer from the deceased led the appellant and PW1 to a place in the village where they found a local spirit known as *'kachasu'*, on sale. The appellant started buying this spirit which they drunk in a group of four. The appellant who was officially on duty had with him an AK 47 rifle containing 19 rounds of ammunition.

The group continued drinking until sometime around 04.00 hours when the deceased said he was leaving and requested the appellant to give him his money for the *mabuyu* but the appellant did not do so. An argument ensued between them and in the process, PW1 heard a gunshot following which he saw the deceased fall from where he was seated to the ground, whilst crying out that he had been hurt. When PW1 looked at the appellant he noticed that he was now pointing his firearm in their

direction. Shortly thereafter, the appellant left the scene of the incident.

PW1 then went to where the deceased had fallen down and observed that there was a bullet wound on the upper part of his chest. He was able to see it, as it was now almost dawn and there was light. He confirmed he did not see the appellant shoot the deceased but admitted that they were all very drunk at the time. PW1 however, denied that the deceased had at any time attempted to grab the firearm from the appellant.

PW2, Hamper Shabile, was the fourth person in the group that included the deceased, appellant and PW1. He testified that he had known the appellant as a Police Officer stationed at the Siavonga Police Check Point on guard duties for only 2 days, prior to the incident. On the day in issue, PW2 was with the deceased who was selling *mabuyu* at the market, when the appellant and PW1 came to them. After the appellant got a bag of *mabuyu* from the deceased which he did not pay for, they all proceeded to a house from where the appellant bought them *kachasu* which they drunk together.

At around 03.00 hours the deceased started asking for his money for the *mabuyu* but the appellant did not give it to him

which led to an argument between them. As a result, the owner of the house chased them away. When they left this place they went to the station located at the market where they all sat on a bench under a tree. As the deceased continued asking for his money for the *mabuyu*; PW2 saw the appellant stand up and using his firearm, shot at the deceased. The deceased fell to the ground whilst crying out that the appellant had killed him.

PW2 said he was able to see, as the time was now around 05.00 hours and it was light. In order to have a clearer view however, he lit a match stick and observed that there was some blood on the ground where the deceased was now rolling. The blood was oozing from the hip area. Upon seeing this, PW2 called back the appellant who had already started off but the appellant reacted by pointing his firearm at them, which forced PW2 to hide behind a tree. PW2 denied that the deceased had at any time attempted to grab the firearm from the appellant.

Ackim Siampule, (PW3), a Council police officer who was on duty with the appellant at the Police Check Point told the court below that, on the material day at around 20.00 hours, PW1, who was a friend to the appellant, came to the Police Check Point and the two started drinking beer together. Later, the appellant sent

PW1 to buy 2 more containers of beer. At around 22.00 hours the two left together, with the appellant carrying his official firearm which had 19 rounds of ammunition and PW3 identified it as exhibit 'P1' in the court below. This firearm was ordinarily kept at the Check Point for use by various Police Officers deployed there on duty. He said the appellant did not return until around 05.00-06.00 hours the following morning, the 16th of April, 2014. PW3 observed that the appellant appeared to be drunk and upon exchanging greetings with them, he immediately proceeded to go and sleep. Barely five minutes later, a man came looking for him claiming that the appellant had shot someone.

In his evidence, Chief Inspector Chibulo Chikwanda (PW7) said, at about 05.30 hours on the 16th April, 2014 he responded to a call of a shooting incident. He rushed to the scene where he found the deceased lying down. The appellant, was seated next to him with his hands tied and he was surrounded by a lot of villagers. Their Chief who was also present, helped them transport the deceased to the hospital while PW7 picked up the appellant. As the appellant did not have the official AK47 rifle he had been given on deployment, they drove to the Police Check point from where they retrieved it. It was found with 18 rounds of

ammunition. He said the appellant appeared drunk at the time they picked him up and he was not responding to any of their questions. This is the reason they decided to take him to hospital for an alcohol test and Dr. Falon Mwaba (PW6) conducted this test on the appellant using a breathalyser. The reading indicated 0.5 grams alcohol per litre of blood as against the normal of 0.08 grams.

Detective Chief Inspector, Billy Daka (PW8) who attended the post-mortem examination said he observed there was a wound on the left side of the deceased chest. The post-mortem report Exhibit 'P4' issued subsequently, stated the cause of death as gunshot wounds to the chest and abdomen.

The arresting officer, Detective Inspector Thomas Nyirenda, PW10, in his evidence said that, when he went to the scene of crime on 16th of April, 2014 the villagers informed him that an empty cartridge picked from there had been handed over to the Chief. This cartridge was later received and forwarded to the ballistics expert for examination, together with the firearm and the 18 rounds of ammunition. There were 16 rounds of ammunition received back from there and it was explained to him that 2 rounds had been used for testing the firearm.

Senior Superintendent Steven Mvula Zulu, (PW9), the forensic ballistics expert witness who examined the firearm in issue, the 18 rounds of ammunition and 1 spent cartridge, said he found the safety catch and trigger were working properly and ruled out any accidental firing. His findings also confirmed that, the empty cartridge which was recovered from the scene of crime, was fired from the same firearm.

According to Victor Felendy (PW11) the pathologist who conducted the post-mortem on the body of the deceased, his external examination revealed 5 wounds. The 1st wound which was on the chest, was the entrance of the bullet and was smaller. Wound 3 the exit of the bullet, was much larger while wounds 2, 4 and 5, all on different parts of the chest, were caused as a result of the doctors' intervention measures to try and save the deceased' life. This was done in order to enable them remove blood or other liquids such as faeces from the intestines, which had penetrated into the abdominal cavity and created infection. It was the pathologist conclusion, that the deceased suffered death from pleura pneumonia peritonitis or infestation of the chest cavity, lung and also of the abdominal cavity caused by the gunshot wounds.

He said the entry point of the bullet and the route it took to exit, made him conclude the person fired the shot from a higher position, in relation to where the deceased was. That although he was unable to tell whether the operation was properly conducted he still maintained his findings, that what caused the death were the gunshot wounds and not the operation.

In an unsworn statement given in his defence, the appellant confirmed, he was on the 12th of April, 2014 deployed to work at the Siavonga Police Check Point and took over the AK47 rifle Exhibit 'P1' from another Police officer, together with 19 rounds of ammunition. On the 15th of April, 2015 at around 18.30 hours he was visited by PW1 who used to assist Police Officers. Around 22.30 hours when the appellant decided to go and patrol the market where the shops are located, PW1 accompanied him, as he was not very familiar with the area. Whilst there, they heard noise coming from the direction of a nearby village. On querying PW1 about the noise, he said he suspected it was from a beer gathering. That is how they went there and upon reaching the place, they found 7 people including the one selling and the appellant ordered all of them to leave.

One of these people however, refused to go while another came to the appellant and held the barrel of his firearm. They struggled until the appellant was hit on the right knee and fell whilst holding on to his firearm. This is what caused the safety catch to unlock and the firearm went off when this person tried to grab it from him. The sound of the gunshot made every one scamper away in different directions following which he too left the place and went back to the Police Check Point, without knowing what had really happened.

After considering this evidence, the learned trial judge in the court below found, it was not in dispute that the appellant had shot the deceased. The only question was whether the firearm discharged accidentally as the deceased was trying to grab it from the appellant or that the appellant shot him intentionally, after the deceased demanded to be paid for the fruits he had sold to him. The trial judge considered the evidence of PW1 and PW2 who were present and testified that the deceased was in fact seated at the time he was shot. He found, this evidence was corroborated by the findings of the pathologist, that from the position of the bullet wounds, he was able to tell that the deceased was shot from the top.

The learned trial judge observed that, both wounds caused by the entry and exit points of the bullet were on the front part of the deceased body. That if the appellant's story suggesting the firearm went off when the deceased tried to grab it from him were to be accepted, the entry point would have been in the front part of the body while the exit would have been at the back. As that was not the case, the trial judge rejected the appellant's claim that the firearm accidentally discharged when the deceased attempted to grab it from him. The court found that, although all the witnesses who were at the scene of the incident including the appellant had consumed substantial amounts of alcohol, their perception of the events was not in any way impaired or clouded.

The trial judge went on to take judicial notice of the fact that, all police officers who work with firearms are trained on how to use them and know that when discharged they can cause injury or death. He also considered that there was no direct evidence as to the reason the appellant fired at the deceased except for the fact that, it followed an argument. The trial judge was satisfied that the appellant knew the discharge of the firearm into the chest of the deceased was likely to cause death or grievous injury; and accordingly found, intention to kill or malice

aforethought as an ingredient of the offence of murder under **section 204 of the Penal Code** had been satisfied.

The trial judge further considered submissions made by the defence, that the deceased would not have died had he received prompt medical treatment. He referred to **section 207 of the Penal Code** which defines causing death, the relevant part of which in relation to the facts of the present case is subsection (a) and provides that:

> **"207. A person is deemed to have caused the death of another person although his act is not the immediate or sole cause of death in any of the following cases:**
>
> **(a) If he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case, it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;"**

The trial judge further referred to the cases of **R v Smith (1)** and **R v Jordan (2)** both of which are to the effect that, a person may not be found guilty of murder, if there is an intervening factor to the original injury, which then becomes the operating and substantial cause of the victim's death. The court noted that

the appellant in this case could only escape liability if it were established that the pleura pneumonia and peritonitis the deceased suffered, was not due to gunshot wounds but brought about by an injury or infection not connected to the shooting. On the strength of pathologist evidence, that the infections were as a result of the gunshot wounds, the judge found there was no break in the chain of causation. That evidence in this case did not show, that the deceased died as a result of the surgical or medical treatment he received.

His conclusion was that, the evidence had established the case of murder charged against the appellant beyond reasonable doubt and convicted him, accordingly. Upon considering whether there were any extenuating circumstances as required by **section 201**, the court referred to the appellant's 8 hour trail of drinking, starting from 20.00 hours on the 15th of April, 2014 until 04.00 hours the following morning, the 16th of April, 2015.

The trial judge also took into account findings of the medical test which confirmed that the alcohol levels found in the appellant's system were well above normal. He accordingly found that, although the appellant tried to deny it, evidence of excessive drinking on his part was overwhelming, and the judge proceeded

to accept it as an extenuating factor, citing as authority, our decision in the case of **Mbomena v The People (3).** Further, the court considered the appellant's conduct of going around drinking with a firearm whilst on duty as an aggravating factor and accordingly sentenced him to 25 years Imprisonment with Hard Labour. It is against this judgment that the appellant filed his appeal to this court on a single ground, against conviction only.

When the matter came up for hearing of the appeal, learned Counsel for the appellant applied for leave to file an additional ground of appeal against sentence and the appellant's heads of argument, out of time, which we granted. The appeal accordingly proceeded on two grounds stated as follows:

1. **That the trial Court erred both in law and in fact when it convicted the appellant for murder in the presence of enough evidence that the deceased provoked the appellant and that the shooting occurred accidentally. In the alternative,**
2. **That the Court below erred in law and fact when it sentenced the appellant to twenty-five (25) years Imprisonment with Hard Labour when the Appellant is a first offender and in the presence of extenuating circumstances.**

The gist of the arguments by learned counsel for the appellant on ground 1 were that, at the material time that the

offence was committed, the appellant was intoxicated, he was provoked by the deceased and killed him by accident.

Regarding the defence of intoxication, counsel referred to common cause evidence that the appellant had been drinking from 20.00 hours to about 03.00-04.00 hours when the offence was committed. He pointed to the evidence on record showing that, between 22.00-04.00 hours, the appellant was taking *kachasu* which he argued, is a very potent local spirit. He specifically highlighted the evidence of the Investigations Officer, (PW7), who testified that, at the time he picked the appellant up from the scene of crime, he looked drunk and was not saying anything in response to his questions.

Counsel submitted, this was clear testimony that the appellant was highly intoxicated. It is for that reason counsel contended that, the appellant's coordination or reflexes was so impaired that he could not form any necessary intent to murder the deceased person. Counsel went on to submit that, the whole shooting occurred accidentally. That as stated by the ballistics expert in cross-examination at the trial of the matter in the court below; although the safety catch could not unlock on its own, it could do so when tampered with and the appellant in his

evidence said it unlocked during the struggle between himself and the deceased. Thereafter, the gun fired but it is not known who pulled the trigger. He ended his submission on the point, by re-iterating that the shooting was purely accidental.

Counsel's submission on the defence of provocation, was anchored on evidence on record showing that the appellant was on duty and armed. That the deceased started asking for payment for his *mabuyu* fruits late in the night from a drunken person, with a firearm which was loaded. By further proceeding to take hold of the firearm in such circumstances, the deceased, according to Counsel, provoked the appellant. In aid of the submissions counsel referred to the case of **Rosalyn Thandiwe Zulu vs The People (4)** where we held that:

> **"the immediate attempt by the deceased to seize the gun when the Appellant entered the bathroom was itself an act of grave provocation."**

Counsel concluded his submissions on ground 1 by contending that, it had been demonstrated the appellant had no malice aforethought as the deceased was accidentally shot. He accordingly urged us, on that basis alone, to quash the conviction and set the appellant at liberty.

Ground 2 which is against the sentence, was argued in the alternative. The thrust of the arguments were that, the appellant is a first offender, aged a youthful 34 years and the trial court found there were extenuating circumstances. We were referred to the decision of this court in **Jutronich, Shutte and Lukin v The People (5)** where the factors an appellate court should generally, consider in an appeal against sentence were considered and were stated to be: whether the sentence is wrong in principle; or so manifestly excessive as to induce a sense of shock; or that there are exceptional circumstances which would render it an injustice if the sentence was not reduced.

Counsel acknowledged the sentence imposed by the trial court was perfectly correct in principle. He however, submitted, it was manifestly excessive as to induce a sense of shock and further, that it was a grave injustice for the judge to impose a sentence of 25 years on the appellant, in the presence of extenuating circumstances. We were accordingly urged to reduce the sentence and in his oral submissions made at the hearing of the appeal, counsel further urged us to consider a sentence of between three to five years, but cited no authority for the proposition.

The learned State advocate who responded orally, indicated she was supporting both the conviction and the sentence imposed by the trial court. In reaction to the appellant's argument that the shooting happened by accident on account of the appellant's drunkenness at the time and as such, not being in control of his reflexes, the submission was that, the trial court dispelled this evidence of the appellant and found, evidence of PW1 and PW2, that the deceased was shot at whilst he was seated, was supported by medical evidence from the pathologist. Counsel further referred to the case of **Tembo v the People (6)** where we held to the effect that, evidence of drinking, even heavy drinking, is not sufficient in itself to constitute the defence of intoxication, nor is evidence that an accused person was under the influence of drink in the sense that his co-ordination or reflexes were affected. That for the defence of intoxication to succeed, the evidence must show the accused was so much affected that he was unable to form the necessary intent.

It was counsel's submission that, there was neither evidence on record to suggest that, at the time the deceased was shot at, the appellant was not in control of his senses, nor was there any evidence that he was so much affected that he was unable to

form the necessary intent. The learned State advocate pointed to evidence on record showing that the appellant stood up, aimed the firearm at the deceased and then shot him. She argued that, this evidence proved intent and the trial court was on firm ground when it found the prosecution had proved malice aforethought.

Counsel further noted that, as a police officer the appellant ought to have known and in fact did know, that aiming and firing a loaded gun at another person would cause death or grievous bodily harm and this court's holding in the case of **Lubendae v The People (7)** was apt, on the facts and should not be distinguished from the present case, as argued by the appellant.

On ground 2 the learned State advocate's submissions were that, looking at the circumstances of this case and the trial court having found there was extenuation, the sentence was neither wrong in principle nor was it manifestly excessive as to induce a sense of shock. That there were equally no exceptional circumstances which could render it unjust for the appellant to serve the 25 years custodial sentence imposed by the trial court.

In his brief reply, learned counsel for the appellant maintained, that on account of intoxication, the appellant did not

know what he was doing. And, if there was no provocation on the part of the deceased, the appellant would not have reacted and there would not have been the accidental shooting.

These were the arguments, submissions, case law and legislation to which we were referred by counsel on both sides in support of their respective client's cases. We have given the issues raised all our due consideration and will now proceed to deal with the two grounds of appeal.

Starting with ground 1, we note that this ground of appeal attacks findings of fact made by the trial court, that the appellant was not provoked by the deceased; and that the shooting did not occur accidentally, by arguing that there was in fact, intoxication, provocation and accidental shooting. We have perused the record which discloses that, the findings are actually supported by evidence of prosecution witnesses on record, from PW's 1 and 2, both of whom were eye witnesses to the incident. The substance of this evidence was to the effect that, when the deceased wanted to leave, he asked the appellant to give him his money for the *mabuyu* fruits he had earlier in the day bought from him, and an argument erupted between the two. Thereafter, it was the appellant who from a standing position, shot the deceased who

was then seated and the deceased fell to the ground, whilst crying out that he had been killed.

The appellant in his evidence did not deny that the shot that killed the deceased discharged from the official firearm he was carrying. His only claims in defence were that, he was intoxicated, the firearm discharged when the deceased tried to grab it from him, which conduct was according to him, not only provocative but also resulted in the accidental shooting. The trial court in its judgment considered this evidence of the appellant, but discounted it and gave as the reason for doing so, *'that if the accused' (appellant) story were to be accepted, suggesting the firearm went off when the deceased tried to grab it from him. Then, the entry point would have been in the front part of the body while the exit would have been at the back.'*

We here digress a little, to comment on the appellant's attempt to rely on the case of *Rosalyn Thandiwe Zulu v The People* in arguing that the action of the deceased' alleged grabbing of the gun, had provoked the appellant to shoot him. The facts in the aforementioned case were that, the appellant had a long history of being subjected to extreme abuse by the

deceased who was her husband. On the day in question, the appellant had an argument with the deceased who had threatened to kill her and who then, had in his possession, a loaded pistol. Shortly, he went to take a bath and he called the appellant into the bathroom where he again threatened to kill her. As he reached out for the pistol that he had earlier placed on top of the toilet cistern, the appellant managed to grab the firearm before the deceased could get to it and fired 6 shots in succession, 4 of which hit the deceased and killed him. On appeal to this court, we found that the attempt by the deceased to seize the gun in the circumstances, was in itself an act of grave provocation to the appellant, apart from the cumulative severe provocation she had suffered over the years at his hands. It is clear that the provocation in the *Rosalyn Thandiwe Zulu* case was extremely grave taking into account the deceased past and persistent provocations whilst in the present case, the drunken deceased 'irritating' act of demanding a paltry sum of K15.00 for

his *mabuyu* from the appellant, whom he had just met, cannot in any way be said to have been provocative. The two cases are thus distinguishable on the facts and the quotation relied on by counsel was clearly, 'plucked' out of context.

In proceeding further on the issue of provocation, we note that, the trial court below preferred the evidence of PW1 and PW2, which it found was more credible and was supported by the medical evidence from the pathologist whose findings from the post-mortem conducted on the deceased body established that, both the entry point of the bullet as well as the exit, were on the front part of the body. This location of the wounds was only consistent with the fact that, the person who shot the deceased did so from an elevated position to that of the deceased; which in turn, confirmed the evidence of PW1 and PW2, who both testified that, the appellant who was standing, shot deceased from where he was seated. This was a finding of fact made by the trial court which had the advantage of seeing, hearing and assessing the

witnesses. As we stated in the case of **The Attorney General v Achiume (8):**

> **" The appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make."**

In the face of the evidence of PW's 1 and 2 that the killing was intentional which we find was properly accepted by the trial court, the ingenious argument by learned counsel for the appellant that the firearm discharged accidentally when the deceased was trying to grab it from the appellant, is clearly one that cannot be sustained. It is neither supported by the evidence of the said eye witnesses nor consistent with the post-mortem findings. The evidence that one was standing while the other was seated, further dispels the argument that there could have been any physical contact between the appellant and the deceased, thus leaving only a verbal altercation as the only possible discourse the two could have engaged in.

Even if, for argument's sake, we were to accept that the verbal altercation initiated by the deceased's request for his money for the *mabuyu* fruit he sold to appellant was provocative,

it would still fall short of availing him of this defence. As we stated in the case of **Zitandala Nyendwa and Samilani Ngoma v The People (9)** the offence committed must bear a reasonable and proportionate relationship to the provocation offered. We in that case made the following observation:

> **"The law of this country is that provocation consists of three elements: the act of provocation, the loss of self-control, both actual and reasonable and the retaliation proportionate to the provocation.......In considering whether the retaliation bears a reasonable relationship to the provocation this court in Makomela v the People (1974) ZR 254, accepted that there were degrees of reaction to provocation referred to in Phillips v R [1969] 53 Cr. App. R. 132, where Lord Diplock said, at p. 135, "the average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly, if the provocation is gross and there is a dangerous weapon to hand, with that weapon."** (underlining for emphasis supplied)

On the evidence that was established in the present case, confirming there was only a verbal altercation, we are unable to accept that the ensuing shooting of the deceased who was drunk and unarmed could have constituted either a reasonable or proportionate retaliation to such provocation.

Regarding the further submission of learned counsel for the appellant on ground 1 of the appeal, that at the time the deceased was shot at, the appellant was not in control of his senses on account of intoxication and was therefore unable to form the necessary intent; needless to re-state the settled legal

position that, it is not every evidence of drinking that will constitute the defence of intoxication. The law as provided by **section 13 (4) of the Penal Code** and construed by this court in the case of *Tembo v the People,* also relied on by the learned State advocate is that, in order to constitute evidence of intoxication for the purposes of S.13 (4):

> " **......there must be evidence that an accused person's capacities may have been affected to the extent that he may not have been able to form the necessary intent."**

The above position of the law is aptly put by learned authors of **ARCHIBOLD, Criminal Pleading, Evidence and Practice, 37th Edition, Sweet and Maxwell 1969 parag. 44** where in contrasting the degree of drunkenness which constitutes the defence of intoxication from that which does not, they state as follows:

> **"Apart from a man being in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead a man to attack another in a manner in which no reasonable man would do cannot assist to make out a defence of provocation and cannot be pleaded as an excuse reducing the crime from murder to manslaughter if death results."** (underlining for emphasis supplied)

From that backdrop of the law, we accept the State submission, that whereas there was evidence of drinking on the part of the appellant in this case, this evidence in itself, is insufficient to establish the defence of intoxication, at law.

In the premises, the arguments that: the appellant was provoked by the deceased, leading to the accidental discharge of the firearm and that he was unable to form the necessary intent to commit the offence by reason of intoxication, are clearly not supported by the evidence on record. We accordingly, find no basis on which to fault the trial court for having found, that by shooting the deceased in the chest, the appellant who is a Police officer trained in the use of firearms intended him grievous harm or death. That he was thus guilty of murdering the deceased and he was properly convicted, as charged. It is for these reasons that we find no merit in ground 1 of the appeal.

Coming to ground 2, we have noted that in their submissions, both parties admitted that the sentence was not wrong in principle. We agree. On the appellant's argument that the sentence was nonetheless, manifestly excessive and thus requiring that we interfere. Our view of the facts of this case is that they reveal the circumstances in which the offence was committed arose from self-granted liberty on the part of the appellant, a police officer, to drink with impunity whilst on duty. That he could do so without restraint by totally abandoning his place of work, undoubtedly constitutes an aggravating factor, as

properly found by the learned trial judge. We are alive to the notorious fact of which we take judicial notice, that such conduct is not uncommon to hear of and more so in in recent times. It is for this reason that we do not agree with the submissions of learned counsel for the appellant, that the sentence of 25 years imprisonment with hard labour is manifestly excessive, on the particular facts of this case. It certainly is not one that has visited us with any sense of shock, at all. A clear message needs to be sent to law enforcement officers whose line of duty involves the use of firearms, that the courts will deal most sternly with criminal acts that are committed on account of drinking, whilst on duty. Ground 2 of the appeal must equally fail.

Both grounds of appeal having been unsuccessful, this appeal is dismissed for being one devoid of any merit.

E.N.C. MUYOVWE
SUPREME COURT JUDGE

E.M. HAMAUNDU
SUPREME COURT JUDGE

J.K. KABUKA
SUPREME COURT JUDGE