IN THE COURT OF APPEAL OF ZAMBIA **APPEAL No. 126/2020**

HOLDEN AT LUSAKA AND KABWE

(Criminal Jurisdiction)

BETWEEN:

PETER BANDA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Chishimba and Sichinga, JJA.

On 24th March 2021 and 21st October 2021

For the Appellant: M. Kapukutula, Legal Aid Counsel, Legal Aid Board

For the Respondent: C.A. Bauleni, State Advocate, National Prosecutions Authority

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J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

CASES REFERRED TO:

1. Joseph Mutaba Tobo v The People [1990-1992] Z.R. 140
2. Mushanga v The People S.C.Z. Judgment No. 18 of 1983.
3. Lupupa v The People [1977] Z.R. 38
4. Mbomena v The People [1967] Z.R. 89
5. R v Byrne 44 Cr. App.R.246

LEGISLATION REFERRED TO:

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The Homicide Act of 1957
3. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia
4. The Court of Appeal Act, No.7 of 2016

WORKS REFERRED TO:

1. Archbold Criminal Pleading, Evidence and Practice 1997, London, Sweet & Maxwell.

1.0 INTRODUCTION

1.1 The appellant appeared before the High Court (Chawatama J.), on an information containing two counts of the offence of murder contrary to **section 200 of The Penal Code.**

1.2 The allegations against him were that on 26th November 2015, at Chipata, he murdered Mwaninyanya Phiri and Ruth Banda.

1.3 He denied both charges and the matter proceeded to trial.

1.4 At the conclusion of the trial, he was found guilty of committing both offences and condemned to suffer capital punishment.

1.5 He has now appealed against the convictions.

1.6 The sole ground of appeal is that the trial judge erred when she convicted the appellant for the offence of murder in the absence of evidence that he had the requisite *malice aforethought*.

2.0 CASE BEFORE THE TRIAL COURT

2.1 The fact that the appellant axed Mwaninyanya Phiri, his former wife and Ruth Banda, his daughter, to death, in the night of 26th November 2015, was established by the evidence that was before the trial judge.

2.2 However, what appears contentious or unresolved are the circumstances surrounding the attack, in particular, the state of the appellant's mind at the time of the attack.

2.3 Just before the close of the prosecution's case, the appellant was examined by a psychiatrist, at his instance, to determine the state of his mind at the time the offences were committed.

2.4 The psychiatrist who examined him presented a report. It was not contested.

2.5 In that report, the psychiatrist arrived at the following conclusion:

> **"In the light of the above information, observations and findings, Peter Banda has currently no evidence of mental illness. There is however history confirmed by the father that he had fits in childhood. As he grew up into adulthood he had sudden episodes of restlessness, bizarre behaviour which included aggression and wandering at large in an amnestic state. These brief psychotic episodes are epileptiform in nature and it is known that in adulthood can be precipitated by extreme emotions and psychosocial stressors.**
>
> **The strong family history of epilepsy and mental illness is significant.**
>
> **Peter Banda clinically has an atypical seizure disorder which is not per se a mental illness. It is my opinion that at the time of the alleged**

> **offence he behaved in the manner he did because of his predisposition to this condition coupled with an extreme emotional environment. It is further my opinion that he is currently fit to make a plea, stand trial and follow proceedings of the Court. Peter Banda will need continued use of anti-epileptics which are available in most hospitals and health centres."**

2.6 In his defence, the appellant did not raise or attempt to rely on the defence of insanity. He simply told the trial judge that he had no recollection of what happened that night.

2.7 The trial judge, considered the availability of the defence of insanity. After reviewing the decisions in the cases of **Joseph Mutaba Tobo v The People**[1] and **Mushanga v The People**[2], she took the following view:

> **"Before me, there is no other evidence of the accused's condition to justify his actions other than the doctor's report. The medical history given to Dr. Msoni was that of epilepsy, without any evidence of the manifestations which could justify the actions as in this case of killing his Mwininyanya and her daughter. In fact the doctor's report is**

that the accused is not suffering from any mental illness. In addition, I do not accept the accused's testimony that he does not remember anything about the killing, his apprehension and the court proceedings, except being referred to Chainama. The condition of the accused can best be described as selective amnesia.

In view of the foregoing, I find that the accused was at the commission of the offence was of sound mind to appreciate what he was doing and that he did malice aforethought cause the deaths of Mwaninyanya Phiri and Ruth Banda. I find the accused guilty of two counts of murder as charged and convict him accordingly."

3.0 CONSIDERATION OF APPEAL AND DECISION OF THE COURT

3.1 The issue that this appeal raises, as we see it, is whether the trial judge's assessment of the medical evidence was correct and whether any defence, other than the defence of insanity, was available to the appellant.

3.2 After reviewing the cases of **Joseph Mutaba Tobo v The People**[1] and **Mushanga v The People**[2], the trial judge appears to have taken the view that the appellant's mental state could not be

determined on the medical evidence only. There was need for him to provide additional evidence.

3.3 Our understanding of the combined import of the two cases, is that, where a doctor's opinion on the state of the offender's mind is founded on logical inferences based on evidence, it can be relied on.

3.4 In fact, in the case of **Joseph Mutaba Tobo v The People**[1], Sakala, JS., as he then was, delivering the judgment of the Supreme Court, opined as follows:

> **'The doctor had access to the test carried out on the appellant by other doctors and clinical psychiatrists apart from what he himself carried out. The doctor's evidence was also to the effect that the appellant was likely to have been mentally disturbed at the time of committing the offence. On the material that was before him, the doctor said: "In my opinion Mr Joseph M. Tobo suffers from 'Psychiatric illness".**
>
> **On the material that was before the doctor we are unable to say that his opinion, or his report for that matter, lacked logical inferences. There is nothing wrong or unacceptable for a**

> **doctor to take into account what a patient has told him in forming his opinion, let alone what other doctors have recorded about a patient.**
>
> **In our view the learned trial commissioner seriously misdirected himself in his analysis of the doctor's evidence and his opinion in relation to the defence of insanity.**
> **In the instant appeal the finding that the opinion of the doctor was vacant was not supported by the evidence, particularly nothing that the prosecution did not challenge his opinion. We agree with the submissions on behalf of the appellant that on the balance of probabilities the defence had proved that the appellant was suffering from a disease of the mind at the time of the commission of the offence.'**

3.5 While it is our view that the trial judge rightly found that the defence of insanity was not available to the appellant, it is also our view that she did not correctly assess the evidential value of the psychiatrist's report.

3.6 We are not suggesting that whenever medical evidence is presented to a court, the court, must, without question, admit and rely on it.

3.7 The Editors of **Archbold Criminal Pleading Evidence and Practice,** in paragraph 17-76, indicate that a court can decide not to place reliance on medical evidence or the opinion of a medical expert, if there are facts entitling it to reject or differ with the opinion. This approach was confirmed in the case of **Lupupa v The People**[3].

3.8 Since there was no other evidence, either prosecution or defence, on the circumstances surrounding the appellant's axing of his wife and daughter, the trial judge should not have proceeded to outrightly reject the medical evidence.

3.9 We now turn to the point whether there were any other defences available to the appellant.

3.10 There was uncontested evidence from the psychiatrist that the appellant suffered from an 'atypical seizure disorder' which was not a mental illness. His conclusion was that the

disorder must have influenced his extreme behaviour when he was committing the offence.

3.11 In the case of **Mbomena v The People**[4], the Court of Appeal, the forerunner to the current Supreme Court, pointed out that:

> **"Where there is evidence supporting a defence not raised by the accused, that defence must be considered by the trial court."**

3.12 To that effect, it is our view that the trial judge should have considered whether the defence of diminished responsibility was available to the appellant. There was evidence before her pointing at the possible availability of the defence.

3.13 **Section 12A of the Penal Code,** provides for the defence of diminished responsibility. It reads as follows:

> **(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or is induced by disease or**

> **injury) which has substantially impaired his mental responsibility for his acts or omissions in doing or being party to the killing.**
> **(2) The provisions of subsection (2) of section thirteen shall apply with necessary modifications to the defence of diminished responsibility under this section:**
>
> **Provided that the transient effect of intoxication as described in that subsection shall be deemed not to amount to disease or injury for purposes of this section.**
> **(3) On a charge of murder, it shall be for the defence to prove the defence of diminished responsibility and the burden of proof shall be on a balance of probabilities.**
> **(4) Where the defence of diminished responsibility is proved in accordance with this section, a person charged with murder shall be liable to be convicted of manslaughter or any other offence which is less than murder.**

3.14 In the case of **R v Byrne**[4], the term "abnormality of the mind", as is set out in the defence of diminished responsibility in **section 2 of The Homicide Act of 1957** was considered. That provision is nearly word for word, the same

with the defence of diminished responsibility, under **section 12A of The Penal Code.**

3.15 The term 'abnormality of the mind' was defined as follows:

> **" … a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the minds activities in all its aspects, not only the perception of physical acts and matters, and the ability to form rational judgment whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment. The expression 'mental responsibility for his acts' points to consideration of the extent to which the accused's mind is answerable for his physical acts, which must include consideration of the extent of his ability to exercise will power to control this physical acts."**

3.16 We are persuaded to adopt this interpretation.

3.17 From the foregoing, it is clear that even if epilepsy is not a mental illness, an epileptic patient whose perception of matters and ability to rationally judge whether an act is right or

wrong is affected by the disease, can be said to suffer from an abnormality of the mind.

3.18 **Section 12A (3) of The Penal Code** provides that the burden of raising the defence of diminished responsibility rests on the offender and the standard of proof is a balance of probability.

3.19 It is our view that the appellant met the threshold.

3.20 The uncontested report shows that the time he attacked his wife and daughter, he behaved in the manner he did, because of his predisposition to that condition.

3.21 Even if the report was only introduced into evidence after the appellant had been found with a case to answer, the prosecution had the opportunity to contest it by summoning the psychiatrist who prepared it, pursuant to **section 191A of The Criminal Procedure Code,** for clarification or cross-examination. They did not.

3.22 They also had the opportunity to call evidence in reply, using **section 294 of The Criminal Procedure Code,** they did not.

3.23 It is our view that properly directing herself, the trial judge would have found that the defence of diminished responsibility was available to the appellant.

3.24 She would have then convicted him for the offence of Manslaughter and not murder, as is provided for in **section 12A (4) of The Penal Code.**

4.0 VERDICT

4.1 We set aside his conviction for the offence of Murder and quash the sentence imposed on him.

4.2 In exercise of the powers vested in us by virtue of **section 16(4) of The Court of Appeal Act**, he is convicted of the lesser offence on manslaughter **contrary to section 199 of The Penal code.**

4.3 As regards the sentence, we note that he is a first offender, two people died and an offensive weapon was used.

4.4 The appellant is sentenced to 20 years imprisonment with hard labour on each count. The sentences, which will run from the 4th of December 2015, shall run concurrently.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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F.M. Chishimba
COURT OF APPEAL JUDGE

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D.L.Y. Sichinga
COURT OF APPEAL JUDGE