IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

Appeal No. 219/2020

BETWEEN:

ELIAS MUKALA **1ST APPELLANT**

MAJOR SHINDANJI **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Majula and Muzenga JJA
On 26th August, 2021 and 16th November, 2021.

For the Appellant: Mrs. S. C. Lukwesa, Acting Deputy Director, Legal Aid Board

For the Respondent: Mr. C. K. Sakala, State Advocate, National Prosecution Authority

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J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Kanyanga v The People – SCZ Appeal No. 237 of 2011**
2. **Tembo v The People (1972) ZR 220 (CA)**

3. **Jose Antonio Golliadi v The People – SCZ Appeal No. 26 of 2017**

Legislation referred to:

1. **The Penal Code Chapter 87 of the Laws of Zambia.**

Other Works referred to:

1. **Black's Law Dictionary, Eighth Edition, Byan A. Garner**

1.0 INTRODUCTION

1.1 The appellants were convicted for the offence of murder contrary to **Section 200** of the **Penal Code**[1]. The particulars of offence were that on unknown dates but between the 30th December, 2016 and 26th of January, 2017 at Solwezi in the Solwezi District of the North-Western Province of the Republic of Zambia did murder one Frank Mutasa.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The evidence for the prosecution centred on three witnesses. PW1, an eye witness gave evidence to the effect that on 30th December, 2016, as he was asleep with his wife in their home, he heard someone shouting for help as some people wanted to kill him. Together with his wife, and with the aid of a torch, they went to see what was

happening. When they arrived at the scene where the voice was coming from, they found Mr. Frank Mutasa, the deceased, lying on the ground with two gentlemen who were taking turns beating him.

2.2 He identified the two gentlemen as the appellants herein. The two were using their feet to kick the deceased and at the same time used bricks to hit him. He tried to interfere so as to save the deceased but he got a good beating from the second appellant which caused his right ear to be blocked. He then quickly asked his wife to go and call for help. After help arrived, they managed to apprehend the second appellant while the first appellant was apprehended the following day. The police officers were called on the scene and later took the deceased to Solwezi General Hospital where he was admitted until his death. He told the trial court that the deceased's house had been broken. PW1 lived in the same community with the first and the second appellants and were people well known to him.

2.3 In cross-examination, PW1 told the trial court that the incident happened around 23:00 hours and that he had a torch which he used to light the scene. He also told the court that earlier in the night he was with the deceased who was on his way home from the market.

2.4 PW2 told the trial court that she stayed at the bedside of the deceased until his demise. According to her, the deceased was not talking, had a broken neck, a swollen head and a big wound on the left-hand side of his ribs. Constable Nanzaluka testified as PW3. His testimony was to the effect that on 31st December, 2016 while on duty, he received a report of assault occasioning actual bodily harm in which a male Jones Mbuluma, a community crime prevention member reported on behalf of Frank Mutasa that Frank Mutasa had been assaulted by the appellants causing him to sustain injuries. He said fists, kicks and unburnt bricks were used in the assault. The officer said acting on this report, he opened a docket of assault occasioning actual bodily harm and carried out investigations by visiting the scene of the crime, interviewing the witnesses and the suspects in the matter. He made up his mind to charge the suspects with the offence of assault occasioning actual bodily harm contrary to **Section 248** of the **Penal Code**[1]. The two duly appeared before the magistrate court and were convicted. Before they could be sentenced, their victim Frank Mutasa passed way. A postmortem examination was conducted, and its outcome was that the deceased succumbed to head injuries which

resulted in blood clots to the brain. Given the postmortem report and statement from the eye witness PW3 made up his mind to charge the appellants with the offence of murder contrary to **Section 200** of the **Penal Code**[1].

2.5 Under cross-examination PW3 told the trial court that according to his investigation, the conflict between the appellants and the deceased was as a result of beer and that the deceased's house fell because of the force used by the appellants as they were trying to get the deceased out of the house in the course of the fight. He told the court that he never got to talk to the deceased, as he was unconscious at the time they found him.

3.0 DEFENCE

3.1 In his defence, the first appellant told the trial court that on the fateful day around 17:00 hours, he was drinking beer with the second appellant and the deceased. As they drunk the beer, a quarrel ensued. They then decided to go to their respective homes. When they reached at the deceased house, the deceased held onto the carton of Chibuku and told the two appellants that they cannot go with all the beer. They got the beer from him and left him at his house as he was

drunk. It was the first appellant's further testimony that after a while the prosecution's first witness called him asking him why they had beaten the deceased. He denied beating the deceased and went his way. The following day he come to learn that the second appellant had been apprehended in connection with the beating of the deceased. He was also later apprehended. He told the court that on the fateful night he was very drunk and could not lift a brick to hit someone. He denied the allegation that he destroyed the deceased's house.

3.2 The second appellant gave evidence to the effect that on 26th December, 2016 he went to the bar to take some beer together with the first appellant. While at the bar, they were approached by the deceased who requested for beer from them. They refused to buy him beer as he was already drunk. A quarrel ensued and they all decided to go to their respective homes. The second appellant told the trial court that when they reached the deceased's house, the deceased decided to hold onto the carton of beer they had carried from the bar. The first and second appellant managed to get the beer away from him and left for their homes. He told the trial court that after he walked a short distance, C.C.P.U members apprehended him alleging that he

had beaten up the deceased. The C.C.P.U members called the police who later came and arrested him and took the deceased to Solwezi General Hospital. In cross-examination he denied having beaten the deceased.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

4.1 The court below analysed the evidence and found that the evidence of the appellants cannot stand in the face of the evidence of the first prosecution witness who clearly saw what transpired. The court reasoned that since the appellants gave an excellent account of what happened that evening at the bar and as they walked to their respective homes, there is no way they could have been very drunk as alleged. Further, the court noted that the claim that they were very drunk is a mere attempt to avoid the consequences of their actions.

4.2 The lower court further found that the nature of the injuries the deceased suffered at the hands of the appellants, and the weapons used (bricks), are such that the appellants had intentions to kill or cause grievous bodily harm to the deceased. The appellants were subsequently convicted and sentenced to death by hanging by the High Court presided over by Mr. Justice T. I. Katenekwa.

5.0 GROUND OF APPEAL

5.1 Unsettled by their conviction and sentence, the appellants filed one ground of appeal couched in the following terms:

(i) The learned trial court erred in law and fact when it arrived at the decision that there were no extenuating circumstances to necessitate a sentence rather than death despite there being evidence in support.

6.0 APPELLANTS' ARGUMENTS

6.1 In support of the ground of appeal it was submitted that in arriving at its decision, the trial court did agree that the appellants had drunk beer on the material day save that they did not reach the stage of incapacity to fail to appreciate what they were doing. It was submitted that in their defence, the appellants stated that they had been drinking from 17:00 hours up until 23:00 hours when they were found by the prosecution's first witness outside the deceased's house. That the whole scenario did not make logical sense, as such it can only be attributed to persons that were drunk, and that the appellants' degree of guilty was morally diminished.

6.2 Regarding the issue of extenuation circumstances, we were referred to **Section 201(2)** of the **Penal Code**[1] which states that –

> **"(a) An extenuation circumstance is any fact associated with the offence which would diminish morally the degree of the convicted person's guilt;**
>
> **(b) In deciding whether or not there are extenuating circumstances, the court shall consider the standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs."**

6.3 It was submitted that given the facts surrounding this matter, extenuating circumstances were present as the appellants were drinking beer, and that they were drunk, which set of facts did diminish morally the degree of their guilt. Further, it was submitted that with regards the standard of behaviour of an ordinary person in the appellants' class of community, that is, a community of drunk persons, it is reasonable for the appellants to qualify for extenuation circumstances.

6.4 We were referred to the case of **Kanyanga v The People**[1] where the Supreme Court guided that **Section 201** should be read with **Black's Law Dictionary Eighth Edition by Bryan A. Garner at p. 260,** which defines extenuation as:

> **"Mitigating circumstance, means a fact or situation that does not justify or excuse a wrongful act or offence, but**

that reduces the culpability and this may reduce punishment. A fact or situation that does not bear on the question of a defendant's guilt, but that is considered by the court in imposing punishment and especially in lessening severity of a sentence."

6.5 It was submitted that the facts in *casu* do reflect that the two appellants drunk from evening until the night. It could be inferred in favour of the appellants that they were indeed drunk which reduced their culpability and must thus reduce their punishment. That this does not excuse the wrong by the appellants but that it should lessen the severity of sentence and thus fall within the definition of extenuation.

6.6 On the basis of the foregoing submissions, we were called upon by counsel to allow the appeal and find that there were extenuating circumstances in the case at hand and thus sentence the appellants to a lesser sentence rather than death.

7.0 RESPONDENT'S ARGUMENTS

7.1 On behalf of the respondents, the learned counsel supported the conviction and sentence. In her written submissions, she argued that intoxication as both a defence and extenuating factor, does not suffice in this case. She reasoned that the defence of intoxication is not available to the appellants as they knew what they were doing and

consequences thereof. That the appellants went to drink on their own volition and no one forced them to drink and that from the evidence on the record, they were not so drunk as to affect their capacity to reason.

7.2 We were referred to the case of **Tembo v The People**[2] where the court held *inter alia* that:

> **"Evidence of drinking, even heavy drinking, is not sufficient in itself, nor is evidence that an accused person was under the influence of drink in the sense that his co-ordination or reflexes were affected. To constitute 'evidence fit to be left to a jury' 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."**

7.3 It was submitted that the appellants' actions took them out of the ambit of **Section 13** of the **Penal Code** and that is why the defence of intoxication cannot succeed as required by the said section.

7.4 It was contended that intoxication may not be argued as an extenuating circumstance no wonder the trial court did not consider it because the appellants' drinking did not affect his moral culpability or affect his reasoning to reduce culpability. It was argued that an extenuating circumstance is something which lessens or dilutes a

person's guilt because of a good excuse. It was contended that in the present case, there is nothing to dilute or lessen the appellants' guilt.

7.5 We were called upon to uphold the decision of the lower court.

8.0 HEARING OF APPEAL AND ARGUMENTS CANVASSED

8.1 At the hearing of the appeal, learned Counsel for the appellant Mrs. Lukwesa, the Acting Deputy Director and learned Counsel for the respondent, Mr. Sakala, State Advocate informed us that they would both place full reliance on the filed arguments. We are grateful for their submissions.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have carefully scrutinized the evidence on the record, the arguments by both counsel and the judgment of the lower court.

9.2 The issue seems to be whether intoxication in the circumstances of this case could afford the appellants extenuation.

9.3 The learned trial court considered the issue of the appellants having been drunk in his judgment. He had the following to say at page J15 (page 68 of the record):

> **"Clearly, that they were able to attempt to run away to my mind clearly shows that though they may have drunk beer they did not in any way reach a stage of incapacity**

or a stage where they could have failed to appreciate that which they were doing.
Am fortified in this conclusion by the answers given by the second accused person in cross-examination when he said he remembered everything which happened that evening how they walked from the bar and got to their homes. This shows that the attempt or rather the claim that they were drunk is nothing but a lie to try and avoid the consequences of their actions. And I accordingly dismiss it as such."

9.4 It is worth noting that the learned trial court found that the appellants were not drunk. The learned trial court convicted the appellants, proceeded to consider whether extenuating circumstances existed and found none.

9.5 We wish to point out that there is a difference between intoxication as a defence and intoxication as an extenuating factor. The threshold of evidence required to establish the defence of intoxication is higher and must meet the requirements under **Section 13** of the **Penal Code**.

9.6 Whereas intoxication as an extenuating circumstance may be available where there is evidence of general drinking or drunkenness even if it does not rise to the threshold of intoxication as a defence. The two must thus not be considered at the same level.

9.7 The appellants told the trial court that they had been drinking beer from 17:00 hours to about 23:00 hours. PW1 when asked during cross-examination if the appellants appeared drunk, responded that at the time he was separating the fight he smelt some beer. The learned trial court considered whether the appellants were drunk and he found that they were not. We find no reason to interfere with this finding.

9.8 In any case, it does not follow that whenever an accused drinks beer or takes part in drinking alcohol, then automatically extenuating circumstances avail to him or her. The Supreme Court in the case of **Jose Antonio Golliadi v The People[3], Supreme Court Appeal No. 26 of 2017** stated that:

> **"We must emphasize that trial courts must be wary of finding drunkenness as an extenuating circumstance in every case where the offence is committed at a drinking place or where the accused claims he was drinking or was drunk. It is important to consider the peculiar facts instead of applying drunkenness as an extenuating circumstance in every single case which would lead to injustice."**

9.9 In fact, the appellants in this case told the trial court that the reason they denied the deceased access to their tin of chibuku which they had was that he (the deceased) was drunk. This refusal was both at the

bar and at or near the deceased's house. This is what led to the misunderstanding. Their own evidence presupposes that they were in a better state than the deceased. It is strange that they later sought to claim that they were very drunk.

9.10 The learned trial court was on firm ground when he convicted the appellants and found that no extenuating circumstances existed.

9.11 We find no merit in the sole ground of appeal and we dismiss it accordingly. We confirm the convictions and sentences imposed on each of the appellants.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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B. M. MAJULA
COURT OF APPEAL JUDGE

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K. MUZENGA
COURT OF APPEAL JUDGE