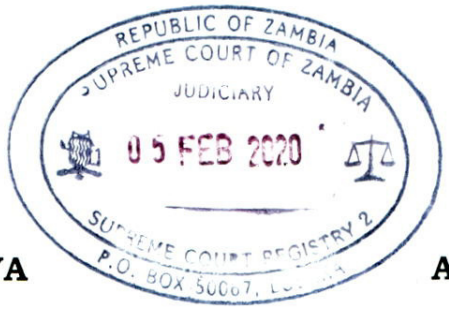
IN THE SUPREME COURT OF ZAMBIA **Appeal No.08/2019**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)



BETWEEN:

JEREMIAH MUNKONDYA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Mambilima, CJ, Hamaundu and Kajimanga JJS**
On 14th January 2020 and 5th February 2020

For the Appellant: Mrs. M. K. Liswaniso, Legal Aid Counsel

For the Respondent: Mr. K. Sifali, Senior State Advocate

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. **Jack Chanda and Kennedy Chanda v The People (2002) Z.R. 124**
2. **Justin Mumbi v The People (2004) Z.R. 106**
3. **Jutronich & Others v The People (1965) Z.R. 11**
4. **Kahale Kanyanga v The People - Appeal No. 145/2011**
5. **Simutenda v The People (1975) Z. R. 294**
6. **Broadhurst v R [1964] 1 ALL E. R. 1**
7. **Tembo v The People (1972) Z.R. 220**

Legislation referred to:

1. **Penal Code, Chapter 87 of the Laws of Zambia; section 13**

Introduction

[1] The appellant was convicted on a charge of murder and sentenced to death. The particulars allege that the appellant murdered Elika Simukondya Kaipanzi on 30th October 2014 at Ndola.

Evidence before the trial court

[2] The prosecution case in the court below was anchored on the evidence of PW1 and PW2. According to PW1 (Valentine Mutale), he was chatting with the appellant on the material day around 21:00 hours at his (appellant's) house where he used to stay with his mother (the deceased). After 21:30 hours, PW1 left the appellant's home which was two metres away. At the time he left, the deceased was sleeping and the appellant was the only person at the house with her. At 22:00 hours, PW1 heard some noise coming from the deceased's house and he went outside his home to see what was happening.

[3] PW1 later heard the deceased calling his father twice, saying that she was dying and thereafter she went quiet. PW1 then jumped over the fence into the deceased's yard. However, when he went around the house, he did not hear or see anything, and the lights in the house were off. PW1 then went back to his house and called his father who went with him to the deceased's house. PW1's father called on the appellant asking him what was happening and if he had killed his mother, but the appellant denied.

[4] Thereafter, PW1 and his brother, Chileshe went to the deceased's house and tried to open the door but failed. They then went to Kantolomba Compound and called the appellant's brother, Friday who came and forced the door open and they entered the house. Only the appellant and the deceased were in the house when the door was forced open. Friday fell down and fainted when he saw blood from his mother's body. The appellant tried to run away naked but he was apprehended.

[5] The testimony of PW2 (Benson Mutale), PW1's father disclosed that on the material day, PW2 and his wife were at home

sleeping when they heard a voice of a young man shouting. He ignored the noise because there was always some confusion at the deceased's home and that it was only after his son (PW1) came to wake him up that he went outside together with PW1. He then saw the appellant inside the deceased's house, peeping through a window. When PW2 asked the accused if he had killed his mother since she was not answering PW2's calls, he stated that he had killed a small dog. It was after this that PW1 and his brother, Chileshe jumped over the fence and when they told him that there was blood coming out of the deceased's house down the steps, he sent them to go and call the appellant's brother. When PW2 and police officers later went to the scene of crime and entered the house, they found the deceased's body lying naked in the sitting room in a pool of blood.

[6] The appellant's testimony was that on the material day, he was in Kantolomba drinking kachasu with four friends from around 09:30 hours to 19:30 hours. The kachasu was in a 750ml bottle. Thereafter, he went back home and sat outside the house listening to the radio whilst the deceased was also around. He

went to bed at 21:00 hours and around 22:00 hours, he woke up and wanted to go to the toilet. Afterwards, he did not know the devil that got into him because he felt confused and went into the sitting room where he found the deceased and started beating her. That he only came to hear that he had killed his mother when he was at the remand prison. The appellant denied having been with PW1 on 30th October 2014 because he was away the whole day. He admitted that he could not remember that he beat up his mother, and having used an angle bar to hit her on her head because he was in a state of confusion. Further, that his mother did not provoke him and that he did not know why he beat her.

Consideration of the matter by the Trial Court

[7] After hearing the witnesses and evaluating the evidence before her, the trial judge (Mulanda, J) found that the appellant was in control of all his senses and knew what he was doing at the time of assaulting the deceased. On the defence of intoxication raised by the appellant, the trial judge expressed doubt that the

appellant was very drunk on the material day as both PW1 and PW2 testified that the appellant was sober and that PW1 was in fact chatting with the appellant.

[8] She also reasoned that the appellant had the intention to kill the deceased because he used an iron bar to hit her and actually targeted her head and caused severe head injuries which led to her death within the house.

[9] The trial judge concluded that the prosecution had proved their case against the appellant beyond all reasonable doubt and there being no extenuating circumstances, she found him guilty of the offence of murder. She convicted him accordingly and sentenced him to death.

Ground of appeal to this Court

[10] Aggrieved with this decision, the appellant now appeals to this court advancing one ground of appeal, namely, that the learned trial judge erred in law and fact when she found that there were no extenuating circumstances in this case and sentenced the appellant to death.

The arguments presented by the parties

[11] Both parties filed brief heads of argument which were briefly augmented orally at the hearing. We find it unnecessary to reproduce these arguments here as they were in the main, a repetition of the written heads of argument. In the appellant's heads of argument, it was submitted that there was evidence on record of the appellant drinking kachasu from around 09:30 hours to 19:30 hours and that the trial judge should have considered this evidence when deciding to impose the death penalty. Counsel relied on the case of **Jack Chanda and Kennedy Chanda v The People**[1], where it was held that:

> **"A failed defence of provocation; evidence of witchcraft accusation; and evidence of drinking can amount to extenuating circumstances."**

[12] We were also referred to the case of **Justin Mumbi v The People**[2] where this court held as follows:

> **"Drunken circumstances generally attending upon the occasion sufficiently reduce the amount of moral culpability, so that there is extenuation."**

[13] It was argued that the drunken circumstances as alleged by the appellant reduced the amount of moral culpability on the part

of the appellant so that there was extenuation in this case. Furthermore, drunkenness was pleaded as a defence by the appellant. Our attention was drawn to the case of **Jutronich & Others v The People**[3], in which Blagden C. J observed that:

> **"In dealing with an appeal against sentence, the appellate court should ask itself 3 questions.**
>
> 1. **Is the sentence wrong in principle?**
> 2. **Is it manifestly excessive so that it induces a sense of shock?**
> 3. **Are there any exceptional circumstances that would render it an injustice if the sentence was not reduced?**

[14] Counsel concluded by submitting that since there were extenuating circumstances, the death penalty imposed by the trial judge was an injustice occasioned on the appellant. She accordingly prayed that the appeal be allowed and that the court should impose any sentence other than the death penalty.

[15] In response, the learned counsel for the respondent submitted that in order for extenuating circumstances to be available, there must be evidence of drinking. She distinguished the **Jack Chanda**[1] case (supra) from the present case arguing that in the former, there was evidence of drinking for about five hours. Whereas in the present case, there is no evidence of drinking on

the part of the appellant and that there is only the appellant's claim that he was drunk when he inflicted injuries on the deceased.

[16] Counsel contended that PW1 who was chatting with the appellant before he retired to bed disputes the fact that the appellant took beer that night. Further, that PW2 confirms the fact that the appellant was sober on the fateful night. As such, counsel argued, the learned trial judge was on firm ground when she found that even if the appellant used to drink a lot as stated by the prosecution witnesses, on the fateful night, according to PW1 and PW2, the appellant was sober and very clear as to what happened. Further, that as found by the court below, it cannot be possible for the appellant to remember all that he narrated as having happened on that day and the only thing he could not remember was when he beat the deceased to death. Consequently, according to counsel, the trial court was on firm ground when she did not find extenuating circumstances in this case.

[17] We were referred to the case of **Kahale Kanyanga v The**

People[4], where this court held as follows:

> **"In Jack Chanda and Kennedy Chanda v The People supra, what we meant was that each case must be treated on its peculiar facts. It does not necessarily follow that if the appellant had been drinking, then that amounts to extenuating circumstances. In Jack Chanda and Kennedy Chanda, the appellants had been drinking for five hours, there was a beer drinking party, their colleagues went to eat, as they did not want to drink on an empty stomach. These are the factors we took into account when we said the trial judge ought to have found that, there were extenuating circumstances."**

[18] It was, therefore, submitted that the appellant did not adduce sufficient evidence to justify the circumstances of the case to be considered extenuating as envisaged in the **Jack Chanda**[1] case and that the sentence imposed on him is not wrong in principle. We were accordingly urged to dismiss the appeal and uphold the death sentence imposed by the trial court.

Consideration of the appeal and decision by this Court

[19] We have considered the evidence in the court below, the judgment appealed against, the oral and written arguments advanced by the learned counsel for the parties.

[20] The appellant's grievance against the judgment of the lower court in his sole ground of appeal is that the learned trial judge

erred when she found that there were no extenuating circumstances in this case, resulting in the appellant being sentenced to death.

[21] The contention of the appellant is that since there was evidence of drinking on his part, and that drunkenness was pleaded as a defence by him, the same reduced his moral culpability so that there was extenuation in this case.

[22] The respondent on the other hand contends that the appellant did not adduce sufficient evidence to justify the circumstances of the case to be considered extenuating and that there was no evidence of drinking by the appellant, save for his claim that he was drunk when he inflicted injuries on the deceased.

[23] Section 13 of the Penal Code Chapter 97 of the Laws of Zambia deals with the defence of intoxication. It enacts in relevant part as follows:

> **"13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**
>
> **(2) Intoxication shall be a defence to any criminal charge if, by reason thereof, the person charged at the time of the act or omission complained of did not know that such**

act or omission was wrong or did not know what he was doing and-

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged, and in a case falling under paragraph (b) the provisions of section one hundred and sixty-seven of the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

[24] Case authorities on the defence of intoxication abound, some of which have been cited by counsel in this judgment. Another notable case is **Simutenda v The People**[5] where we expressed ourselves in the following terms:

> **"As was made clear in Broadhust v R[6] in a passage cited by the learned judge and adopted also by this court in Tembo v The People[7], evidence of drinking, even heavy drinking, is not sufficient for intoxication to provide a defence under section 13(4) of the Penal Code; the evidence as a whole, including that of intoxication, must be such as to leave the court in doubt as**

to whether the accused actually had the necessary intent, namely in this case the intent to kill or to do grievous harm." [Emphasis added]

[25] In **Tembo v The People**[7], it was held (reading from headnotes) that:

> **"(i) A court is not called upon to consider intoxication for purposes of s. 13(4) of the Penal Code unless there is evidence of intoxication fit to be left to a jury.**
>
> **(ii) 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 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."** [Emphasis added]

[26] After reviewing the evidence before her, the trial judge found that the defence of intoxication as defined by section 13 of the Penal Code was not available to the appellant. In her opinion, the appellant was not so drunk as not to know what he was doing at the material time.

[27] We cannot fault the trial judge in concluding as she did because her findings were supported by the evidence. Starting with the appellant's own testimony, he said that five of them were

drinking Kachasu from a 750ml bottle. That they drank this one bottle from about 09:30 to 19:30 hours, a duration of ten hours. At the hearing, Mrs. Liswanso argued with emotional intensity that this evidence of drinking should have been taken into account by the trial court when meting out the sentence. We do not agree. Even if the appellant's evidence that he was drinking was to be accepted, it is inconceivable even by any stretch of imagination, that a 750ml bottle of kachasu shared among five people and consumed from about 09:30 to 19:30 hours could have made the appellant to be temporarily insane by reason of intoxication and not to know what he was doing when he committed the illegal act at 22:00 hours. As aptly opined by the trial judge, this evidence was an afterthought on the part of the appellant.

[28] According to **Simutenda v The People**[5] and **Tembo v The People**[7], it is not enough that the accused person was drinking beer for him to benefit from the defence of intoxication under section 13(4) of the Penal Code; there must be evidence showing that as a result of such drinking, the accused person's capabilities were so affected that he may not have been able to

form the intent to kill or cause grievous harm. We do not find this evidence from the drunken circumstances alleged by the appellant.

[29] In addition to what we have said in paragraph 27 above, there is also evidence of PW1 that the appellant was his neighbour and they were chatting at 21:30 hours at the appellant's home after which they both went to sleep. Under cross-examination, PW1 was asked whether the appellant had taken some alcohol on that particular night. His response was: "No my Lady, he did not take any alcohol." And the evidence of PW2, PW1's father was that although the appellant used to drink alcohol excessively, he did not take any on the material day as he saw him at the appellant's home for 24 hours. According to PW1's evidence which was not disputed by the appellant, their houses were about two metres apart.

[30] In the view that we take, the appellant could not have engaged in chatting with PW1 or listening to the radio from the time he purportedly arrived home up to the time he went to sleep after 21:30 hours if he had no control of his mental faculties as a

result of intoxication. We therefore find that the learned trial judge was on firm ground when she held that there were not extenuating circumstances in this case. Consequently, the death sentence imposed by the trial court was, on the facts of this case, not wrong in principle and we uphold it.

[31] In the net result, we find no merit in this appeal and it is accordingly dismissed.

I. C. MAMBILIMA
CHIEF JUSTICE

E. M. HAMAUNDU
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE