IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 45, 46/2020**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

LAMECK NAMUSHI **1st APPELLANT**

MUTONDO LUNETA NJONGOLO **2nd APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
On the 11th August, 2020 and 19th August, 2020

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

For the Respondent: Mrs. C.M. Hambayi, Deputy Chief State Advocate

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Dorothy Mutale and Another vs. The People (1997) Z.R. 51**
2. **David Zulu vs. The People (1977) Z.R. 15**
3. **Mbinga Nyambe vs. The People (SCZ Judgment No. 5 of 2011)**
4. **Chabala vs. The People (1976) Z.R. 14**
5. **Shamwana and 7 Others vs. The People (1985) Z.R. 41**
6. **Fawaz and Prosper Chelelwa vs. The People (1995-97) Z.R. 3**
7. **Maseka vs. The People (1972) Z.R. 9**
8. **Satpal Sinhg v. State of Haryana, https://www.vakilno1.com**

This is an appeal from the judgment of Bowa J sitting at the High Court in Mongu and delivered on the 22nd June, 2016 in which he convicted the appellants of the offence of murder and sentenced them to the mandatory death penalty. The learned judge found that the prosecution had proved beyond reasonable doubt that between 3rd and 4th September, 2015 at Kalabo in the Kalabo District of the Western Province of Zambia, jointly and whilst acting together, the appellants had murdered Chinyemba Mukoma, hereinafter referred to as the deceased.

The main issue in this appeal and which was before the lower court is whether the trial court could have drawn more than one inference from the facts before it. The trial court noted that this case was anchored on circumstantial evidence. The following is an excerpt from the judgment of the lower court in which the learned judge states the following:

"The basic facts that I find therefore are as follows:

1. **On the evening of 3rd September 2015 A1 went to the deceased parent's compound. He found the deceased, had a conversation with him and the two announced their departure to the deceased parents PW1 and PW3, for their fishing trip.**

2. **PW3 tried to persuade her son not to go for this trip albeit unsuccessfully and with the insistence of A1. This happened in the presence and hearing of PW3.**

3. **A1 and the deceased proceeded to A2's house later that night and the three then went to Lwanginga River.**

4. **The accused persons were the last to be with the deceased at the time of his death.**

5. **The body of the deceased was recovered from the Lwanginga River early the next morning on the 4th of September 2015 and taken to Kalabo Hospital for postmortem examination. The postmortem examination revealed that the cause of death was strangulation and trauma.**

6. **Blood was seen still oozing out of the nose and mouth with visible abrasions on the eye, neck and back of the body at the time of the recovery of the body and post-mortem examination.**

7. **Neither A1 nor A2 made any report to the police, community or the members of the family until they were both apprehended later that morning. ..."**

The learned trial judge continued as follows (and it is this conclusion, which Mrs. Liswaniso, Counsel for the appellants, has taken issue with in ground one of the appeal):

> **"...Taken cumulatively therefore, I am prepared to make an inference as I now do that the accused persons with malice aforethought caused the death of the deceased. I have no doubt**

that the circumstantial evidence is so clear in my mind to take the case out of the realm of the conjecture, leading to the only irresistible conclusion that it was the accused persons jointly and whilst acting together that killed the deceased. ..."

Mrs. Liswaniso has advanced two grounds of appeal. The first ground as we have stated above attacks the learned trial judge's finding that the only inference from the facts before him was that of guilt on the part of the appellants. In ground two, Counsel contends that the trial judge erred by finding that the defence advanced by the appellants was full of half-truths and not reasonably true.

At the hearing of the appeal, Mrs. Liswaniso relied entirely on her heads of argument filed in support of this appeal. In ground one, Counsel referred us to PW1's conversation with one Namushi Situkutuku, a week after the death of her son, the deceased herein. We will reproduce the contentious portion of the proceedings later in this judgment. Counsel contended that whatever Namushi Situkutuku told PW1 should have been considered in favour of the appellants in line with our guidance in the case of **Dorothy Mutale and Another vs. The People.**[1] In the case of **Dorothy Mutale** we held that:

Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such inference.

Mrs. Liswaniso disagreed with the learned trial judge's opinion that there was little value in the tale told to PW1 by Namushi Situkutuku and that it was a carefully rehearsed story between the appellants and Namushi Situkutuku. This was because Namushi Situkutuku informed PW1 that the owner of the paddling stick is the one who informed him of her son's demise. Counsel submitted that there was no basis for the trial court to dismiss what Namushi Situkutuku told PW1 about her son's demise.

Addressing specifically the issue of circumstantial evidence, Counsel referred us to the cases of **David Zulu vs. The People**[2] and **Mbinga Nyambe vs. The People.**[3] Counsel argued that the inference that the appellants killed the deceased was not the only inference. That, there was a possibility that the deceased was strangled and killed by the paddlers. Counsel contended that there is nothing to exclude the inference that the deceased was killed by the paddlers.

In support of ground two, it was submitted the appellants' story was reasonably true, and they were under no obligation to prove their explanation. She buttressed her argument with the case of **Chabala vs. The People**[4] where it was held that:

> **(ii) If explanation is given, because guilt is a matter of inference, there cannot be conviction if the explanation might reasonably be true, for then guilt is not the only reasonable inference. It is not correct to say that the accused must give satisfactory explanation.**
>
> **Dictum of Clayden, F.J., in R v Fanwell [1] cited with approval.**
>
> **(iii) There is no onus on an accused to prove his explanation.**
>
> **(iv) The court is required to consider whether the explanation might reasonably be true.**

It was submitted that, therefore, guilt was not the only reasonable inference in this case. Counsel prayed that we allow the appeal and set the appellants at liberty.

Mrs. Hambayi filed her heads of argument in response which she relied on.

In response to ground one, Mrs. Hambayi submitted, *inter alia,* that the cause of death of the deceased was strangulation which clearly shows that the deceased did not die of natural causes but

that his life was brutally terminated. Counsel submitted that the appellants' story that the deceased drowned was not supported by evidence. Counsel contended that the appellants were with the deceased when he met his death and there is no evidence that the deceased came into contact with anyone else apart from the appellants. The cause of death being strangulation, Counsel submitted that there can be no other inference than guilt on the part of the appellants.

Mrs. Hambayi pointed out that the appellants had knowledge that the deceased had died before the body was retrieved from the river. According to Counsel, this reveals that the appellants had peculiar knowledge of what had happened to the deceased leading to the irresistible conclusion that the appellants caused the death of the deceased. Basing her argument on the last seen theory that the appellant were the ones last seen with the deceased, Mrs. Hambayi submitted that the only inference is that of guilt on the part of the appellants.

It was contended that the appellants' attempt to rely on Namushi Situkutuku's tale to PW1 cannot succeed as it was

hearsay evidence and inadmissible. Counsel for the State urged us to dismiss the appeal on this ground alone.

Responding to ground two, it was contended that the trial court cannot be faulted for finding that the appellants defence was full of half-truths as they had different versions of what transpired and which could not amount to any explanation. It was pointed out that their version of the events leading to the death of the deceased was unbelievable looking at the undisputed findings of the post-mortem examination report that the deceased died of strangulation. It was submitted that the appellants' explanation was unreasonable and cannot be relied upon. Counsel urged us to dismiss this ground of appeal and the whole appeal in its entirety.

From the outset, we note that the two grounds of appeal are inter-related, and we will deal with the two grounds together.

A perusal of the judgment of the lower court reveals that the learned trial judge went to great lengths to consider the prosecution and defence evidence. Mrs. Liswaniso's argument is that the appellants' explanation of what happened on the fateful night might reasonably be true. The learned trial judge addressed his mind to

the appellants' defence which he literally dissected in the light of the prosecution evidence and he rightly found that the appellants had offered half-truths in their defence. The case of **Chabala vs. The People**[4] cited by Mrs. Liswaniso is instructive on how trial courts should deal with explanations offered by accused persons. In this case, as argued by Mrs. Hambayi the appellants' explanations were unbelievable looking at the post-mortem examination report which revealed that the deceased died of strangulation and not drowning as they wanted the trial court to believe.

In considering Mrs. Liswaniso's arguments regarding the learned trial judge's conclusion that the only inference to be drawn from the facts of this case is that of guilt on the part of the appellants, we start by examining the contentious portion of evidence on which her arguments are anchored. She reproduced this portion of evidence in her heads of argument. In the portion of evidence under scrutiny, Counsel for the appellants (in the court below) was cross-examining PW1, the mother to the deceased as follows:

Q. Was he explaining to you what transpired on the waters or how this person came about?

A. He was informing me that the person who was asking for a paddling stick was referring to a different Namushi as for Chinyemba is dead?

Q. Did Namushi Situkutuku explain to you how your son died?

A. He informed me that he had been informed what happened by the owner of the paddling stick. (Emphasis ours)

From the above excerpt of PW1's evidence, one would ask – what evidence is there which can be said to be favourable to the appellants? Nothing, in our view. In the words of PW1, Namushi Situkutuku informed her that the owner of the paddling stick informed him of what happened to her son – and PW1 did not disclose the information to the court. Whatever was discussed between Namushi Situkutuku and the owner of the paddling stick was hearsay and inadmissible and the learned trial judge cannot be faulted for dismissing it as a tale. (See the case of **Shamwana and 7 Others vs. The People**[5] in which the principle of hearsay was discussed by this court.) PW1 could not relate a story which Namushi Situkutuku was told by someone else. It is trite law that where a witness is not called by the prosecution, the defence is at liberty to call that witness. In the case of **Fawaz and Prosper**

Chelelwa vs. The People[6] we dealt with a similar situation and we stated that:

> **"...The next ground of appeal related to the proposition that the prosecution should have called the two coloured boys and Chalikuma to testify as to how and where they parted with the deceased and how they two boys came to be in possession of the car usually driven by the deceased. In the circumstances of this case, there was no duty on the police to call witnesses who did not support the prosecution case. There are circumstances where, the police being the only people who are in a position to obtain evidence from certain by-standers, it is the duty of the police to obtain such evidence and make it available to the court and the defence. There is, however, no property in a witness and the two-coloured boys and Mr. Chalikulima could have been interviewed by defence lawyers and, if necessary, called by the defence. Attorney General v Trollope (2). As the names of these witnesses were not on the list of the witnesses which the prosecution proposed to call, and as there was no evidence that they would be favourable to the defence, there was no duty on the prosecution to offer the witness or cross examination by defence counsel. This ground of appeal cannot succeed. ..."**

Our view is that the same applies in this case, that it was up to the appellants and their counsel to call Namushi Situkutuku whose whereabouts were well known to the prosecution and defence. According to the arresting officer, he was serving a jail term at the time of trial. Our considered view is that it is folly for

the appellants to cry foul at this stage when they had the opportunity to call him as a witness as it appears that they believe he had information favourable to their case.

We now turn to the issue of the paddlers, who according to Mrs. Liswaniso may have killed the deceased. Her argument is that there was nothing to exclude this inference. We note that the learned trial judge addressed his mind to the presence of the paddlers at the river on the night of the deceased's murder and he had this to say:

> **"...Furthermore, both accused testified that when they were on the river, they met some men on a boat full of reed mats which had positioned itself at the spot where they would ordinarily fish from. The men navigating it were asked to move which they graciously did. By their own testimony, this boat only moved a few metres away. A2 approximated this distance to be about 10 metres away. Curiously, at the time the boat capsized the mysterious occupants of this boat played no part beyond being passive observers. They were approached and acknowledged seeing the canoe capsize and only offered the accused a paddling stick to aid in their search for their missing friend. ..."**

From the appellants' testimony, it was evident to the trial judge that the paddlers' only involvement (if we can call it that) in the whole episode was to assist the appellants with a paddling stick

after the deceased allegedly drowned. And the appellants alluded to the fact that the paddlers saw what happened. The learned trial judge also noted in his judgment that the 2nd appellant claimed that one of the paddlers followed him to his house to demand for the paddling stick that the 1st appellant and himself had borrowed during the night before. This was strange because according to the 2nd appellant, when he left to go and inform the deceased's family of his demise, he left the 1st appellant at the river and it defies logic why one of the paddlers would follow him to his house at that stage. Since the 1st appellant remained at the river, the paddlers would have approached him over their paddling stick.

Having considered the evidence on record, we find that there was no evidence before the lower court that could lead to another inference – that the paddlers could have killed the deceased as argued by Mrs. Liswaniso.

Indeed, we find no difficulty in agreeing with the learned trial judge that the appellants' evidence lacked credibility as their evidence was inconsistent with their warn and caution statements and more importantly, with the post-mortem examination report which confirmed that the deceased was strangled to death and did

not drown as stated by the appellants. The appellants' conduct left much to be desired: They did not alert the deceased's relatives that he had drowned as they alleged and neither did they report the matter to the police. They only revealed that the deceased was missing after being apprehended and they informed the family that he had died of drowning before the body was retrieved from the river. In fact, when the 1st appellant was asked where the deceased was, he simply stated that he was somewhere on the premises (in the river).

We have also considered this case in the light of the last seen theory alluded to by Mrs. Hambayi. In the case of **Satpal Sinhg v. State of Haryana**[8] an Indian case delivered on 1st May, 2018 by the Supreme Court of India the Court, inter alia, made the following key observations to the effect that:

> **"...The last seen theory may be a weak kind of evidence by itself to found a conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time the accused owes an explanation ... with regard to the circumstances under which the death may have taken place.**

If the accused offers no explanation, or furnishes a wrong explanation, absconds, then the motive is established, and there is corroborative evidence available forming a chain of circumstances leading to the only inference for guilt of the accused. ..."

The appellants are definitely caught up in the last seen theory as there is no dispute that they were the last seen with the deceased. The last seen theory places the burden on the accused to explain what has happened to the deceased. In our jurisdiction, circumstantial evidence demands an explanation from the accused which if reasonably true can result in the acquittal of the accused as happened in the case of **David Zulu vs. The People**.

In this case, the learned trial judge in his judgment placed reliance on the case of **Maseka vs. The People**[7] decided by the Court of Appeal the predecessor of this Court. It was stated, *inter alia,* that an explanation which might reasonably be true entitles an accused to an acquittal even if the court does not believe it; an accused is not required to satisfy the court as to his innocence but simply to raise a reasonable doubt as to his guilt. In this case, the appellants' defence raised no reasonable doubt as to their guilt as the circumstantial evidence was cogent and satisfied the threshold

set in the cases of **David Zulu vs. The People** and **Mbinga Nyambe vs. The People**.

Applying the last seen principle elucidated in **Satpal Sinhg v. State of Haryana** and our own principles on circumstantial evidence, we find no plausible reason to disagree with the learned trial judge's conclusion that the appellants' evidence was full of half-truths which could not be relied on and we cannot fault him for finding them guilty as charged and convicting them for murder.

The two grounds of appeal fail. The end result is that the appeal has no merit and it is dismissed.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE