IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 25 OF 2020

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

TEDDY MUKUKA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Chashi**, **Makungu and Lengalenga**, **JJA**

ON: **26th August and 2nd September**, **2020**

For the Appellant: *M. Marebesa (Ms.), Legal Aid Counsel, Legal Aid Board*

For the Respondent: *S. Simwaka, Senior State Advocate, National Prosecution Authority*

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court

Cases referred to:

1. **Phiri v The People (1970) SJ, 178**
2. **Kaambo v The People (1976) ZR, 122**
3. **Jutronich, Schutte, Lukin v The People (1965) ZR, 11**

4. **Adam Berejena v The People (1984) ZR, 19**
5. **Alubisho v The People (1976) ZR, 11**
6. **M.S. Syakalonga v The People (1977) ZR, 61**
7. **R v Ball (1951) 35 Cr. App, 164**
8. **Gideon Hammond Millard v The People – SCZ Judgment No. 10 of 1998**
9. **Micheal Coetzee v The People – SCZ Appeal No. 135 of 1995**
10. **Edom Lwela v The People – SCZ Appeal No. 124 of 2107**
11. **Kelvin Kabwe v The People – SCZ Appeal No. 123 of 2017**
12. **Francis Kafwa v The People – SCZ Appeal No. 125 of 2017**
13. **Probby Muniyati and 3 Others v The People – CAZ Appeal No. 126,127,128 and 129 of 2020**

Legislation referred to:

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

1.0 INTRODUCTION

1.1 This appeal emanates from the Judgment of the High Court, delivered by the Honourable Mrs. Justice A. N. Patel, on 15th August, 2019. By that Judgment, the Appellant was convicted on his own admission for the offence of manslaughter contrary to section 199 of **The Penal Code[1].**

He was subsequently sentenced to fifteen (15) years imprisonment with hard labour with effect from 8th September, 2018. The Appellant now appeals against sentence only.

2.0 CHARGE BEFORE THE TRIAL COURT

2.1 The Appellant was initially charged with the offence of murder, contrary to section 200 of **The Penal Code**[1]. However, the charge was amended and substituted with a lesser offence of manslaughter contrary to section 199 of **The Penal Code**[1]**.** The particulars of the offence alleged that, the Appellant, on a date unknown but between 5th and 6th September, 2018 at Lufwanyama in the Lufwanyama District of the Copperbelt Province of the Republic of Zambia did unlawfully cause the death of Agness Ng'andwe (the deceased).

3.0 EVIDENCE BEFORE THE TRIAL COURT

3.1 The brief facts of the case as can be ascertained from the statement of facts are that, the Appellant and the deceased were husband and wife who lived on a farm block in Lufwanyama District. The death of the deceased arose out of a squabble between the deceased and the Appellant.

3.2 The events preceding the incidence, are that on 5th September, 2018, around 18:00 hrs, the Appellant went to a tavern known as Bana Lona's tavern, where he found the deceased drinking beer with some men and he joined them. It was in the course of the said drinking activity, that an argument ensued between the Appellant and the deceased. The duo then left the said tavern and went home.

3.3 Whilst at home, the argument between the Appellant and the deceased escalated, resulting in a scuffle, during which, the Appellant hit the deceased with a bamboo stick on the head and legs. Thereafter, the scuffle came to an end and the duo went to bed. The next morning, on 6th September, 2018, around 06:00 hrs, the deceased died.

3.4 The matter was subsequently, reported to Kitwe District Police Headquarters and the body of the deceased deposited at Kitwe Teaching Hospital Mortuary, where a postmortem examination was conducted. The postmortem report revealed that the cause of death was intracranial hemorrhage with brain damage without fracture of the skull, forehead bruises and hemorrhage into the soft

tissue and bruises on the legs, close fracture of (L) wrist and wound 0.5 cm.

3.5 The police commenced investigations in the matter, which led to the apprehension of the Appellant. He was subsequently charged and arrested for the offence of murder contrary to section 200 of **The Penal Code**[1], which charge, as earlier indicated, was reduced to that of manslaughter contrary to section 199 of **The Penal Code**[1] which charge the Appellant readily admitted.

4.0 DECISION OF THE LOWER COURT

4.1 The lower court, upon being satisfied that the facts disclosed and proved the commission of the offence of manslaughter, coupled with the Appellants own plea of guilty and admission of the statement of facts, found that the prosecution had proved the offence of manslaughter beyond all reasonable doubt. It found the Appellant guilty and accordingly convicted him of the said offence.

4.2 After mitigation, in which, Counsel for the Appellant stated that the Appellant was a first offender, who readily admitted the offence, hence saving the court's time and that he was remorseful, the learned Judge sentenced the

Appellant to 15 years imprisonment with hard labour with effect from 8th September, 2018.

5.0 GROUNDS OF APPEAL

5.1 Dissatisfied with the sentence, the Appellant has appealed to this Court, advancing a sole ground of appeal couched as follows:

5.1.1 The sentencing court erred in law and fact when it sentenced the Appellant to the colossal term of 15 years with hard labour when he was a first offender deserving the leniency of the court.

6.0 ARGUMENTS IN SUPPORT OF APPEAL

6.1 Ms. Marebesa, Counsel for the Appellant, relied entirely on the filed heads of argument. In support of the sole ground of appeal, Counsel submitted that the Appellant was a first offender who readily pleaded guilty to the offence and thus did not waste the court's time. As such, the Appellant was deserving of the court's maximum leniency considering that the Appellant and the deceased were fighting after a drinking spree. In support of this position, Counsel called into aid the cases of **Phiri v The People[1], Kaambo v The**

People[2], **Jutronich, Schutte and Lukin v The People**[3] and **Adam Berejena v The People**[4].

6.2 According to Counsel, the sentence meted out by the trial Judge was based on emotions and that the Appellant received it with a sense of shock. We were, therefore, urged to interfere with the sentence.

7.0 ARGUMENTS OPPOSING THE APPEAL

7.1 On the part of the Respondent, Mr. Simwaka, equally relied on the filed heads of argument. Counsel submitted that, the trial court was on firm ground when it imposed a sentence of 15 years imprisonment. According to Counsel, the trial court has discretion when it comes to sentencing except where there is a prescribed minimum or mandatory sentence. In support thereof, we were referred to the case of **Alubisho v The People**[5].

7.2 Counsel further referred us to section 202 of **The Penal Code**[1] and argued that, there being no prescribed minimum or mandatory sentence in respect of the offence of manslaughter, the lower court acted within its powers and was on firm ground in exercising its discretion considering the prevailing circumstances of the case.

7.3 It was submitted that, in arriving at the sentence, the trial court took into account, inter alia; the prevalence of the crimes of violence against spouses, the need for deterrence and public interest. We were referred to the cases of **M.S. Syakalonga v The People**[6] and **R v Ball**[7].

7.4 Counsel, while relying on the case of **Adam Berejena v The People**[4], submitted that the sentence meted out by the trial court was not wrong in law, in fact or in principle and it was not so manifestly excessive or totally inadequate that it induced a sense of shock. Further, that there are no exceptional circumstances to justify an interference with the sentence. We were urged to dismiss the appeal and uphold the sentence of the lower court.

8.0 DECISION OF THE COURT

8.1 We have considered the evidence on record, the submissions by Counsel and the impugned Judgment. The issue for determination in this appeal is simply whether the sentence of 15 years imposed on the Appellant is appropriate in the circumstances of the case.

8.2 Counsel for the Appellant argues that, the Appellant being a first offender, deserves the leniency of the court and that the sentence of 15 years does not reflect the leniency accorded to a first offender. On the other hand, the Respondent argues that considering the prevailing circumstances of the case, the sentence meted out by the learned Judge was appropriate.

8.3 The principles guiding interference with sentencing by an appellate Court were properly set out in the case of **Jutronich, Schutte and Lukin v The People**[3] as follows:

> *"In dealing with appeals against sentence, the appellate court should ask itself these three questions:*
>
> *(1) Is the sentence wrong in principle?*
>
> *(2) Is the sentence so manifestly excessive as to induce state of shock?*
>
> *(3) Are there exceptional circumstances which would render it an injustice if the sentence was not reduced?*
>
> *Only if one or other of these questions can be answered in the affirmative should the appellate court interfere."*

8.4 Further, in the case of **Gideon Hammond Millard v The People**[8], the Supreme Court held as follows:

> *"An appellate court should not lightly interfere with the discretion of the trial court on question of sentence but that for the appellate court to decide to interfere with the sentence, it must come to it with a sense of shock."*

8.5 The question, therefore, is whether the sentence of 15 years in the circumstances of the present case, comes with a sense of shock?

8.6 In arriving at the sentence, the lower court took into consideration the prevalence of gender-based violence cases and the need to deter such behaviour and protect society at large. In essence, the learned Judge considered the objectives of sentencing, such as retribution, rehabilitation, deterrence and community protection, which it was entitled to do. However, in addition to the foregoing, the lower court proceeded to state as follows:

> "...We must stop treating incidences of domestic violence against women as if they were mundane traffic offences. Men should learn to walk away from

disappointments in their love life rather than resort to physically act out their anger. This egocentric and cowardly behaviour by men must stop. The court's sentence must send out a message which is loud and clear in deterrence. If the law is a living institution it must respond to these emerging challenges in a way to ensure society's confidence. With these factors in mind, I sentence you to 15 years imprisonment with hard labour from the date you were taken into custody..."

8.7 From a reading of the above sentiments by the lower court, it is clear that while considering the prevalence of the offence, the lower court, went further and considered irrelevant factors. In our view, personal views were high handed and were off on a tangent with principles guiding the imposition of sentence. The lower court, took into account extraneous factors, which influenced her decision.

8.8 It is also clear that the `lower court, in arriving at the sentence, did not take into account the fact that the Appellant was a first offender who had readily pleaded guilty to the offence. We, therefore, considered a number

of decisions by the Supreme Court dealing with first offenders who have pleaded guilty to the offence of manslaughter.

8.9 In the case of **Micheal Coetzee v The People**[9], the Supreme Court held as follows:

> *"We have taken note of the plea of leniency. Of course we do not lose sight of the fact that wife-beating should not be encouraged in this day and age and that as a general rule offenders can expect to be dealt with very harshly. However, in this particular case, we do not lose sight of the fact that the appellant pleaded guilty and so spared the court the need to hold a lengthy trial. That has always been good mitigation, although it has not been repeated before us. We have, as we say, considered all the circumstances of this case and we are satisfied that six years does not reflect the credit which was due for a plea of guilty to the offence and for the fact that the appellant was a first offender."*

8.10 In the case of **Edom Lwela v The People**[10], the Appellant pleaded guilty to one count of manslaughter and was sentenced by the trial court to life imprisonment. On appeal against sentence, the Supreme Court allowed the appeal and stated as follows:

> *"Stand up Appellant. We have reached a verdict. The Appellant pleaded guilty to manslaughter and sentenced to life imprisonment, which is a maximum sentence for that offence, in addition to life imprisonment was with hard labour. The victim of the homicide was his wife. The learned Deputy chief State Advocate has very correctly conceded to this Appeal against sentence only and has correctly observed that the award of the maximum sentence available for this offence was without reason. We accept the position taken by the State and accordingly, we allow the Appeal against sentence. We quash the sentence of life imprisonment with hard labour and in its place we impose a sentence of 7 years imprisonment with hard labour effective from the date the Appellant was arrested."*

8.11 Further, in the case of **Kelvin Kabwe v The People**[11], the Appellant pleaded guilty to manslaughter and was sentenced by the trial court to forty (40) years imprisonment with hard labour. On appeal, the Supreme Court allowed the appeal and held as follows:

> *"We have reached a verdict. The Appellant was convicted on a reduced charge of manslaughter and sentenced to 40 years imprisonment with hard labour. The conviction was based on his own plea of guilty and admission of the statement of facts which were read out in the trial court. The facts disclosed, inter alia, that the fight took place at a drinking place amongst friends and that intoxication was involved. The learned trial Judge acknowledged this fact and also acknowledged that the Appellant was a first offender. This Appeal is against the sentence of 40 years imprisonment with hard labour. The learned Deputy Chief State Advocate supports the sentence and justifies it by stating that this was a fight in which many people would have been injured and that the Appellant was unruly. We do not think these are*

factors to consider when arriving at an appropriate sentence for a first offender to any felony involving violence. A first offender who pleads guilty must always be supported with leniency in sentencing and that is the acceptable principle of sentencing. We do not consider the sentence of 40 years imprisonment with hard labour as being appropriate in any way in this case. In our view, the Appeal succeeds. We quash the sentence of 40 years imprisonment with hard labour and in its place we impose a sentence of 4 years imprisonment with hard labour."

8.12 Further, in the case of **Francis Kafwa v The People**[12], the Supreme Court dealt with another case in which the Appellant readily pleaded guilty to the offence of manslaughter and was sentenced to fifteen (15) years imprisonment. The Supreme Court went on to discuss the **Edom Lwela**[10] and **Kelvin Kabwe**[11] case and the need for consistency in sentencing first offenders who plead guilty to manslaughter. The Supreme Court held that the fifteen (15) years sentence was too excessive considering the circumstances of the case. The appeal was allowed, and

the sentence was quashed and in its place, a sentence of 7 years imprisonment with hard labour was imposed.

8.13 Lastly, this Court had an opportunity to deal with a similar issue, in the case of **Probby Muniyati and 3 Others v The People**[13]. In that case, the Appellants were first offenders who pleaded guilty to the offence of manslaughter and were each sentenced to 12 years imprisonment with hard labour. They lodged an appeal before this Court against both conviction and sentence. With regard to the conviction, this Court found that the essential ingredients of the offence were proved by the facts of the case and that the pleas of guilty were properly recorded. Coming to the sentence, this Court, considered the circumstances under which the deceased met his demise. The court was of the view that, considering the level of violence that was inflicted on the deceased, the 12 years sentence did not induce a sense of shock and found that the Appellants were actually treated with a fairly high level of leniency.

8.14 It is very clear from the above cited authorities, that in cases where an accused person is a first offender who has

pleaded guilty, such person deserves leniency for saving the prosecution, courts, defence, witnesses and the victims, the time and cost of a lengthy trial.

8.15 In the present case, while the trial Judge was entitled to take into account the prevalence of the offence, it is clear that the Appellant, was not accorded any credit for being a first offender and pleading guilty to the offence. The sentence meted out by the trial court did not reflect the leniency accorded to first offenders and comes to us with a sense of shock.

8.16 We have considered the circumstances in which the offence was committed, the sentence meted out and the cited authorities dealing with first offenders and in our view, this is an appropriate case warranting interference. In our view, the appropriate sentence in the present case is 10 years imprisonment. We do hereby, set aside the sentence of 15 years imprisonment meted out by the trial court and in its place, we impose a sentence of 10 years imprisonment with hard labour effective from 8th September, 2018.

9.0 CONCLUSION

9.1 In conclusion this appeal is meritorious, to the extent that the sentence meted out by the trial Judge was excessive and comes with a sense of shock. Therefore, the sentence of 15 years is set aside and substituted with a sentence of 10 years imprisonment with hard labour.

J. CHASHI
COURT OF APPEAL JUDGE

C. K. MAKUNGU
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE