

**IN THE SUPREME COURT OF ZAMBIA**

**HOLDEN AT KABWE**

(Criminal Jurisdiction)

**BETWEEN:**

**SUSAN BANDA**

30 SEP 2020

**APPELLANT**

**AND**

**THE PEOPLE**

**RESPONDENT**

**CORAM; Phiri, Wanki and Muyovwe, JJS.**

On the 12<sup>th</sup> August, 2014 and 30<sup>th</sup> September, 2020

For the Appellants: Mr. N. Chanda-Nicholas Chanda and Associates.

Ms. B. L. Pizo-Senior Legal Aid Counsel.

For the Respondent: Mrs. M. S. Ziela-Deputy Chief State Advocate.

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**J U D G M E N T**

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**Phiri, JS: delivered the judgment of the Court.**

**Cases and other works referred to:**

1. Whiteson Simusokwe v The People (2002) ZR. 63
2. Ndongo v Moses Mulyango and Roostico Banda SCZ Judgment No. 4 of 2011
3. Archbold Criminal Pleadings, Evidence and Practice 2010 (London, Thomas Reuters (Legal) Limited 2010 at page 1928)

**Legislation referred to:**

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

The delay in delivering this judgment is deeply regretted. When we sat to hear this appeal, we were with the Hon. Mr. Justice M. E. Wanki who has since retired. This is therefore the majority judgment.

This is an appeal against the judgment of Lengalenga J. (as she then was). The appellant was tried and convicted of Murder contrary to **Section 200 of the Penal Code Chapter 87 of the laws of Zambia**. The particulars of the offence alleged that the appellant, on the 24<sup>th</sup> of July, 2008 at Lusaka did murder her boyfriend Mandomona Chikatula. Following the conviction, the appellant was sentenced to 30 years simple imprisonment on account of extenuating circumstances in the form of a failed defence of provocation.

The record shows that the evidence that was not in dispute established that the deceased, a tall well-built man, was the appellant's boyfriend. The brief facts are that on the material day during the night the deceased picked up the appellant to go out for drinks and leisure driving. Later during the night, the deceased's car

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was discovered abandoned off the road. In it was the dead body of the deceased locked in the back seat of his car and partly burnt. The body also had deep cuts on the head, forehead and on the torso. According to the medical evidence present to the trial court, the deceased suffered first and second degree burns in multiple areas, including the lungs which were found roasted. The body also exhibited injuries suggesting that the deceased could have been assaulted and burnt while he was still alive.

PW5 Detective Chief Inspector Killian Mele Mulenga who visited the scene of the abandoned car around 07:00hours on the 25<sup>th</sup> August, 2008 in Libala South, found that the car had a shattered rear windscreen; the petrol tank lid open and its front fender missing. PW5 also observed that there was a pool of blood about one kilometer from where the car was abandoned. There were also struggle marks around the pool of blood and half a pair of ladies slippers for the left foot were recovered.

The offence was committed on the 24<sup>th</sup> August, 2008 and the Appellant was arrested on the 25<sup>th</sup> February, 2009. When put on her defence, the appellant put herself at the scene of the crime but

claimed that the deceased violently attacked her and that she fought her way out of the car. She narrated that the deceased was angry that she was to get married to another man. She claimed that the deceased hit her and she fell in front of the car where she lost consciousness. When she regained her consciousness, she found herself at the back seat of the car and that the deceased had removed her under wear and sexually assaulted her. She then hit him with a bottle of beer before she escaped. After escaping, she reported the events to PW1 her friend. According to PW1, the appellant arrived at her home during the same night spotting a blood-stained jacket and dress and barefooted. The appellant then changed her clothes and the two of them went to hide the soiled clothes. During trial, PW1 identified the appellant's half pair of slippers and a blood-stained ring which were recovered by the Police (PW5) from the burnt-out car. According to PW1, these items belonged to the appellant.

In her defence the appellant pleaded provocation and self defence. The trial court considered the appellant's defences and discounted them on the grounds that her reaction was disproportionate to the alleged provocation and that her retaliation

displayed excessive force and the court rejected the appellant's allegations of both sexual and physical assault on grounds of lack of credibility. Having discounted the appellant's defences, the court found her guilty as charged and subsequently sentenced her to 30 years simple imprisonment. Before us is the appellant's appeal against conviction based on a single ground of appeal; namely, that the trial court erred in law and fact when it discounted the appellant's defences on the ground of disproportional reaction and excessive force.

Mr. Chanda, jointly with Ms. Pizo submitted that the deceased was so violent to the appellant that he even lit a fire next to the car and wanted both of them to die together; that the appellant had no choice but to use a beer bottle to hit the deceased and escape from him by breaking the rear windshield. According to learned Counsel, the appellant's use and degree of violence was no more than was necessary in the circumstances of this case to repel the unlawful attack. Learned Counsel referred us to **Section 17 of the Penal Code, Chapter 87 of the Laws of Zambia** and to authorities and cases where it was held that the right to private defence is a

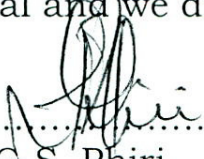
recognized right at common law. (See **Archbold Criminal Pleadings, Evidence and Practice 2010 (London, Thomas Reuters (Legal) Limited 2010 at page 1928)**)

In response to the appellant's argument, Mrs. Ziela strongly supported both the conviction and sentence and submitted that the trial court was on firm ground because the appellant's statement that she hit the deceased with a beer bottle was unsupported by the evidence on the record as no broken beer bottle pieces were recovered by the Police; strongly suggesting that the deceased was attacked using some other object; and there was no evidence supporting the appellant's claim that she was sexually and physically assaulted.

We have examined the judgment of the trial court as well as the evidence on the record. The trial court concluded that the appellant used excessive force; while the appellant claimed to have used a beer bottle. In so claiming, the appellant suggests that she did not use excessive force. In the case of **Whiteson Simusokwe v The People**<sup>(1)</sup> we discussed the principle of proportionality when considering retaliation. In that case we concluded that the defence of provocation and self defence failed on the ground of excessive force. This is a

similar conclusion to the one arrived at by the trial court in this case. We see some similarity between these two cases because the appellant's claim was not evidence based and was unsupported by the evidence of PW5 who visited the scene of crime. Therefore, the lower court's finding cannot be faulted for holding that the defence pleaded was unsupported. We wish to repeat that this court is not eager to interfere with decisions of the trial court made on the basis of findings of fact unless the appellant can demonstrate that the court's findings were perverse. This is what we discussed at length in the case of **Ndongo v Moses Mulyango and Roostico Banda** <sup>(2)</sup>

We do agree with the respondent's position that the evidence on record strongly suggests that another lethal object in addition to burning by fire were used as the murder weapon other than a bottle of beer that was never recovered from the scene of crime. We find no merit in the lone ground of appeal and we dismiss it.



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G.S. Phiri

**SUPREME COURT JUDGE**



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**SUPREME COURT JUDGE**