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THE CRIMINAL JUSTICE SYSTEM IN ZAMBIA
CASE COMMENT ON THE SUPREME COURT DECISION IN THE
KAMBARAGE KAUNDA CASE

BY

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DEDICATION

I dedicate this piece of work to my brother, Mr Francis M. Mulenga, who has been instrumental in my educational life, and I would really like to extend this dedication to my Supervisor Mr. Michael Musonda, who has helped me in moulding this work

I would also like to thank, HIS LORDSHIP, THE CHIEF JUSTICE himself, for his time in expressing his Legal Opinions on the Case under study. Special thanks also go to Mr. Claydon Hakasenke for his useful contribution on the same subject matter.

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CHAPTER 1

INTRODUCTION

It is a well known fact that, Overtime, an individual has lived in many different kinds of Societies, governed by several different Legal Rules. At whatever stage, any given society, of development, may reach, the Law would still regulate or govern, the conduct or behaviour of individual members of that particular society i.e. in accordance with the laid down rules of Law. Among, the many established Legal entities of society, is the Criminal Justice system, which forms the basis of this text. Inherent, in this system, are certain legal rules which must be adhered to by Officers granted the task or power of dispensing justice. It must be emphasised here that, Officers, in the judicial branch of government, should have the kind of integrity which should not be doubted by any body. Their verdict on any one particular case, should import in the system, public confidence.

It should be seen that, the Legal rules established under the Criminal Justice system, entail that, there should be equal treatment of all individuals in society regardless of status, so that, the notion of equality before the law" is not, in any way, defeated. No one class of persons should be seen to be above the Law.

Similarly, Judges should never be seen to over step or rather, become over zealous, to the extent of exceeding the

already, ordinarily, laid down procedures in the manner of execution of their duties. Judges should never allow themselves to add to, vary or 'tailor' their own legal rules which are inconsistent with the already laid down substantive Law, only for the purpose of justifying their decisions in particular cases. Court justices should guard against 'patching up' a crime or offence, only for the purpose of exciting a party appearing before them, as this may result in gross miscarriage of justice.

Prompted by the legal controversies and short comings of the Criminal Justice system in Zambia, as observed in the Supreme Court decision in the case of KAMBARAGE KAUNDA V THE PEOPLE SCZ Judgement No 1 of 1992, it has become impeirable to examine the case, and probably come up with a comprehensive literature which shall stand the test of time i.e., help to concretise the rules relating to Criminal adjudication. It should be emphasised here that, we as scholars of the law, can never allow, our Criminal Justice system to be put on trial.

In conclusion therefore, the aim of the essay is to examine, or rather, do a case comment on the Kambarage Kaunda Case.

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CHAPTER 1

The Law relating to evidence given by witnesses with a possible interest to serve - General approach.

Witnesses with an interest to serve are particular witness or a class of witnesses whose evidence cannot alone, be used to convict an accused person, unless corroborated in a material particular, implicating the accused, or confirming the disputed issues in a case. This is so, because, there is need to guard against the danger of concoction, designed to throw the blame on the accused.

It is important to state here that. Corroboration is independence evidence which supports the evidence of a witness in a material particular.

It has been held in the case of CHOKA V THE PEOPLE¹ that, a witness with a possible interest to serve should be treated as if he were an accomplice, to the extent that, his evidence requires corroboration of something more than a mere belief in the truth thereof, based simply on demeanour and the plausibility of his evidence. That, 'something more' must satisfy the court that, the danger that, the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness.

Similarly, in the case of CHIMBA V THE PEOPLE² It was

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pointed out that, the fact that the witness was the wife of the victim does not per se mean. She is a suspect witness, there must be something which should lead the judge to conclude that she is. Also in the case of DPP V BOARDMAN³ It was stated that, when the Jury (in the Zambian Case the Judge) is satisfied that, a given witness is telling the truth, they can, after a suitable warning convict without corroboration.

It should be noted in this respect that; what is important is a warning.

In DPP V. HESTER⁴, It was said that, there is no common law rule of general application, that, the evidence of a witness which is itself suspect for a reason which calls for a warning of the danger of convicting on it, unless it is corroborated, is incapable, in law of amounting to corroboration of the evidence of another witness, whose evidence is also suspect.

The term "accomplice" includes persons who are 'Participes Criminis' in respect of the actual crime charged or persons procuring or, aiding and abetting the commission of the crime.

It should be emphasised here that, there is no distinction between a witness either with a purpose of his own to serve and an accomplice: the accomplice may have such a purpose but the converse is not true a witness with a purpose of his own to serve is not necessarily an accomplice. But

this is an irrelevant distinction, the real question in every case is whether the danger of relying on the evidence of suspect witness is excluded.

It is firmly established as a rule of Law that, it is the duty of the judge as the trier of fact, to warn himself that, although he may convict on the evidence of an accomplice, it is dangerous to do so, unless it is corroborated.

It was stated in R V BASKERVILLE⁵ that.... the evidence,incorroboration must be independent testimony which affects the accused by connecting, or tending to connect him with the crime. In other words, it must be evidence which implicates him - evidence which confirms in some material particular, not only the evidence that, the crime has been committed, but also that the accused committed it.

It was further stated in this case that, the uncorroborated evidence of an accomplice is admissible in law. But it has long been a rule of practice at Common Law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice in the absence of such a warning by the judge, the conviction must be quashed.

It was also stated in the case of PRATER⁶ that "it is desirable.... and I emphasise the word 'desirable'... in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given."

In the case of MACHOBANE V THE PEOPLE⁷ The accused has been convicted on the evidence of a Father and Son both of whom were specifically held by the learned trial judge to be witnesses with a possible motive to exculpate themselves by putting the blame on the accused.

The learned judge then said: Having seen the witnesses I accept Jullius and Son as witnesses of truth. They both seemed to me to be honest. The accused did not impress me at all. On appeal; it was held that; an accused should not be convicted on the uncorroborated testimony of a witness with a possible interest. In the present case, there was nothing save the evidence of the suspect witnesses, and therefore it was insufficient for a conviction simply to believe the suspect witnesses for the same reasons as apply to any ordinary witness. Similarly in PHIRI V THE PEOPLE⁸ The appellants were convicted of aggravated robbery. It was alleged that, two of them, both wearing stocking masks, robbed a securicor guard of a large sum of money at gun point and the sole issue was whether the appellants were proved to have been the robbers. The only evidence against them was that, of two accomplices.

The trial judge stated".... it would be highly dangerous to convict the accused upon the uncorroborated evidence of accomplices. However, this court can so convict if fully convinced that, they are telling the truth.

The main ground of appeal was that, the trial judge erred

in convicting on the uncorroborated evidence of accomplices, and in the absence of any special and compelling grounds. On appeal, it was held that; where there was nothing save the uncorroborated evidence of the suspect witness the court must acquit, but where, there was something more, though not constituting corroboration, which satisfied the court that, the dangers of convicting without corroboration had been excluded, it could convict. This is the meaning of special and compelling grounds (Appeal dismissed).

The law relating to suspect testimony can thus be summarised as follows:

- (a) A judge (or Magistrate) sitting alone or with assessors must direct himself, and the assessors, if any, as to the dangers of convicting on the uncorroborated evidence of accomplices with the same care as he would direct a Jury and his judgment must show that he has done so. No particular form of words is necessary for such a direction. What is necessary is that, the judgement show that, the judge had applied his mind to the particular danger raised... and the facts of the particular case before him.
- (b) The judge should then examine the evidence and consider whether in the circumstances of the case those dangers have been precluded. The judge should set out the reasons for his conclusions; his mind upon the matter should be clearly revealed.
- (c) As a matter of law, those reasons must consist in

something more than a belief in the truth of the evidence of the accomplices based simply on their demeanour and the plausibility of other evidence - considerations which apply to any witness. If there is nothing more, the court must acquit.

- (d) The 'something more' must be circumstances, though, not constituting corroboration as a matter of strict law, yet satisfy the court that the danger that, the accused is being falsely implicated has been excluded, and that, it is safe to rely on the evidence of the accomplice implicating the accused. This is what is meant by 'special and compelling grounds as used in Machobane'
- (e) These circumstance, do not lend themselves to close description: the nature and sufficiency of the evidence in questions will depend on the nature, and the facts of a particular case. As a principle, however, the evidence will be in the nature of confirm, in that, it must of necessity support or corroboration, in that, it may fall short of being corroboration as a matter of strict law only because of some technicality in the existing law of corroboration; or the evidence may be of circumstances which negative any motive for false implication.

It follows from this, therefore, that, a judge whose faith in the truthfulness of the accomplices was supported by nothing save their demeanour and the plausibility of their evidence must be held to have misdirected himself.

REFERENCES/END NOTES

1. [1978] ZR 243
2. [1982] ZR 30
3. [1975] AC 421
4. [1973] Cr. app. Rep. 214
5. [1916] 2KB 658
6. [1960] 2 QB 464
7. [1972] ZR 101
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CHAPTER 2

The Kambarage Case stated; both at High Court and Supreme Court Levels.

This Chapter seeks to state the Kambarage Kaunda Case, both at High Court and Supreme Court levels, bringing out the decisions of the two courts.

A brief recall of the events leading to the decisions just alluded to is necessary to keep us afloat over the ebb and tide of judicial opinion in those days.

The Kambarage case was pregnant with controversy from the moment rumours started circulating that one of former President Kaunda's sons had been implicated in a murder. It took a lot of time and efforts for police to effect the arrest of the suspect. During an inquest, the then Director of Public Prosecutions (D.P.P.) publicly announced that, the suspect would not be prosecuted because he shot in self-defence.

Subsequently a new D.P.P. had been appointed, who in exercise of the powers conferred on him by Article 56 of the Constitution of Zambia to institute, undertake, takeover or discontinue any Criminal Proceedings against any person, announced that, the accused be tried on a charge of manslaughter. This followed the coroner's ruling that, the accused be tried on a charge of murder.

The facts of the case are too fresh to be narrated fully. The accused was driving a car through one of the law-cost areas of Lusaka (Kamanga Township) after midnight on 3rd

September 1989. He drove past a group of people who were walking in the same direction and stopped immediately after them. One of the passengers in the car got out and fired four shots in the air, the accused then got out and fired four shots in the air with a pistol followed by three more shots close and above the heads of the people, so that, one shot killed the deceased, Tabeth Mwanza.

The evidence of the accused was to the effect that people in the groups were slow to give way, and the accused drove slowly past them. Whilst he was doing so, there was a bang on the rear passenger window, and another on the rear windscreen. This caused the accused to swerve the car to the left and the car came to a stop because there was a slight embankment fearing that they were being attacked, one Ruffick Mulla, a passenger in the car got out and fired one shot in the air and fired four in the air. The then D.P.P. after examining the police docket, ruled that, Kaunda had no case to answer "since he had shot in self-defence."

Kaunda and Mulla appeared before the Lusaka Coroner at an inquest into the death of the deceased. At the conclusion of the Proceedings, the coroner ruled that Kaunda be arrested and be tried summarily by the High Court for Murder.

In the course of time, the then D.P.P. died and his successor decided to re-open the case and the accused was subsequently charged with manslaughter.

At the conclusion of the case for the prosecution, the learned trial judge (Musumali J.) held that, evidence adduced by the prosecution established a murder charge. He

consequently amended the charge from manslaughter to murder. At the conclusion of the trial. Kambarage was found guilty of murder and sentenced to death. The defence of self-defence was rejected. In rejecting this defence, the learned trial judge stated that, the accused was justified when he fired the first four shots with an intention to scare the people in the crowd, but as soon as he lowered his gun and fired close and above the heads of the people in the group, the intention changed, "as a man who had been trained to handle guns, the accused knew that, by lowering his gun he would probably kill someone or seriously injure someone," and thus, there was no justification in the firing of the next three shots. The trial judge found that, because there were no dents on the car, the accused was in no danger at all.

As to whether or not the D.P.P. had lost the power to re-open prosecution, the trial judge (having regard to the Kenyan Case of GITHUNGURI V THE PEOPLE¹⁰ which case had been cited by counsel for the accused and so heavily relied upon by the supreme court) held that, because the Githunguri Case had been decided on the basis that the documents or evidence in favour of the appellant might well have been lost or destroyed, the same consideration did not apply in this case- the Kambarage Case

At the trial, Counsel for the accused drew the attention of the judge to the fact that, the prosecution eye witnesses were either friends or relatives of the deceased and therefore

could have a bias against the accused and that, they were selves the subject of the initial complaint by accused, and as such had a possible interest of their own to serve.

The learned trial judge held that, although he agreed that the prosecution witnesses had told alot of untruths, that did not adversely affect their credibility because, although there were certain issues on which most of them had been disbelieved, there were equally other issues on which they gave credible testimony, which either established common-cause facts or were agreed to by the accused and his friends.

THE SUPREME COURT DECISION

On appeal, Counsel for the appellant raised two questions of procedure. firstly whether or not the Director of Public Prosecutions (D.P.P.) was right in instituting criminal charges against the appellant despite the fact that, his predecessor had publicly announced that, the appellant would not be prosecuted, because he acted in self-defence. Secondly, whether the trial judge was right to put the appellant on his defence on a charge of murder rather than manslaughter.

On the first question, the court held that, the coroner had acted within his powers because it was with in his statutory powers duly to name any person whom he considered should be prosecuted for any homicide offence.

The also court held that, the D.P.P. had an absolute discretion whether or not to prosecute and was not bound by

any coroner's decision.

On the question of re-opening prosecution, having regard to the Githunguri Case, it was said that, the Kenyan Court had found that, there were two vital reasons for their decision. Firstly that, the documents or evidence would have been lost or destroyed, secondly that in the absence of any fresh evidence, the right had been lost. Relying on the words of Acting Chief Justice, Madan in the Githunguri Case.

"We are of the opinion that two indefeasible reasons make it imperative that this application must succeed. Firstly, as a consequence of what had transpired and also being led to believe that there would be no prosecution, the appellant may well have destroyed or lost the evidence in his favour. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the appellant having been publicly informed that he will not be prosecuted and property restored to him.

It is for these reasons that, the appellant will not receive a square deal as explained and envisaged in section 77(1) of the constitution. This prosecution will therefore be an abuse of the process of the court, oppressive and vexatious..."

The Supreme Court stated that, in the absence of fresh evidence in the kambarage Case, the right to re-open the prosecution had been lost. The court further held that, there might be some other reasons which could alter the circumstances in which the decision to prosecute might not be

lost, for instance, if a mistake of fact or law on some obscure issue had been in the first instance overlooked, this might render it necessary for the prosecution to take place for justice to be done. No such circumstances existed in this case. The D.P.P. had no fresh evidence to charge Kaunda with murder. The Court opined that because the late D.P.P. had publicly issued a statement that Kambarage would not be prosecuted, that in all fairness was a sign that the appellant was not guilty of any offence and that, the appellant's rights had been violated when the coroner ruled that, he be charged with murder.

On the second questions to whether the trial judge was procedurally right to amend the charge at "the no case to answer stage," the court held that, the Criminal Procedure Code, Cap 160 entitles the judge on his own motion, to amend a defective charge: that following English Law on the point, the charge was defective and consequently the trial judge was empowered to up grade the charge from manslaughter to murder.

On the question whether the trial judge erred when he rejected the defence of self-defence. The trial judge accepted and believed the prosecution witnesses who said that, they had taken no aggressive action against or towards the car and its occupants, and had given no reason for the appellant and his friend to use firearms.

However, the Supreme Court observed that, the learned trial judge did not deal with the evidence of the prosecution witnesses which was in dispute i.e. where there was no common-cause. In the court's opinion, this was precisely the

evidence which should have been dealt with by the trial judge.

The Court analysed the findings of the trial judge relating to the credibility of the appellant and his witness, and found errors or unfairness in each of them. The Court held that, the trial judge, by dealing with the question of credibility as he did, misdirected himself.

In considering which of the two sets of witnesses were more likely to be telling the truth, the Supreme Court held that, there was no explanation for having stopped the car as they did, unless they were simply out to make mischief. This could be ruled out because of their sobriety, and the fact that they had a female passenger in their car.

There was no evidence that any person in the group let alone, the deceased herself was known to the appellant and his friends, and there was no reason of any personal animosity by the appellant against any of them. In contrast, there was the fact that, most of the prosecution. Witnesses had been found to be lying about the quantity of alcohol they had consumed, and there was evidence that some of them had consumed a great deal.

Accordingly, the Supreme Court found that, the appellant had acted in the reasonable belief that, he and his friends were in danger to the extent that, he was justified in firing the last three shots close and above the heads of the people in the crowd with the intention of frightening them away, and thus acted in self-defence.

However, it is this Supreme Court decision that has prompted this case comment, which shall seek to state what the

judgement should have been. For curiosity's sake, we may state here that, soon after the Supreme Court decision, the then Minister of Legal Affairs, Dr. Rodger Chongwe, State Counsel and an eminent Lawyer, a past President of the Commonwealth Bar Association, Publicly dismissed the verdict as "utter rubbish" while the Kaunda Family praised the decision as a "triumph for Justice," Public opinion was seemingly unanimous in condemning it as a 'monstrous miscarriage of justice' (may be with out really understanding why). Indeed on 26th March, 1992 members of the ruling movement for Multi-Party Democracy (M.M.D) marched to State House - Official residence of the Zambian President, protesting the continued stay of the Chief Justice on the bench and calling for justice to "be seen to be done" addressing protestors at State House, President Chiluba said that, he was thankful that residents carried out a peaceful demonstration to register their feelings about the judgement. He pointed out that Officers in the Legislative, Executive and Judicial branches should have the kind of integrity which should not be doubted by anybody.¹¹ May be, we should point out here that, implicit in President Chiluba's statement is the view that, the verdict of the Supreme Court has far reaching implication for the independence of the judiciary, and for public confidence in the system.

Meanwhile, in an unprecedented move, a High Court judge wrote to the press publicly criticising the verdict. To compound matters, the Supreme Court took the unheard of step

of issuing a statement to the press to justify its ruling.¹² One wonders, (from the Supreme Court's "unheard of step") whether the decision was really fair and worth relying upon. The Supreme Court, as the highest appellate body in the Court, system, should be proud of their decisions.

It must be emphasised that, this comment, i.e. case study has further been prompted by the Supreme Court's failure to deal critically with the issue of self-defence as this is provided for under section 17 of the Penal Code Chapter 146 of the Laws of Zambia, the question therefore left to the Court, is one of interpretation and application.

We also detect certain legal flaws in the application of evidence rules relating to suspect witnesses by the Supreme Court, where it merely dismissed evidence from the relatives and friends of the deceased simply on the ground that, they were close to the deceased.

We should further want to deal with the issue of distinguishing the Kenyan authority, heavily relied upon by the Supreme Court, in dealing with the issue of the Director of Public Prosecutions' power to re-open prosecution, from the Kambarage Case. The authority relied upon is the Githunguri Case, cited earlier.

It should be pointed out that the above observations shall constitute our next Chapter in which we intend to specifically analyse the case bringing out what should have been the decision.

REFERENCES/END NOTES

10. [Miscellaneous Application No. 271 of 1985; Nairobi Law Monthly; October, 1987]
11. The Weekly Post - Issue No. 38 of March 27 April 2 of 1992.
12. Ibid.

CHAPTER 3

An analysis of the Kambarage kaunda Case:-

Now that the dust that preceded and immediately followed the final disposition of the Kambarage Kaunda Case has settled down, the story of Legal argument that raged over the sea of adjudication calmed down, it seems not unwise for a citizen whose curiosity was caused by the proceedings to set alight the flickering flame of the 'battle' with reflections, questions and comments.

It is clear that an equally worrying aspect of the criminal justice system in Zambia which the Kambarage Case has thrown into sharp relief is the quality of Legal reasoning embodied in most decisions. Most judgments are far too brief and lacking in intellectual vigour or rigour. The failure of the Courts to elucidate legal principles and apply them to factual situations in a Lucid, articulate and reasoned manner is certainly one of the glaring weaknesses in the judicial system. The situation, it should be emphasised, does not inspire much public confidence, when the same criticism can be levelled at, or against the highest appellate court.✕

Maybe it should be pointed out here that, it is important to compare and contrast the Kambarage Case with earlier decided Zambian cases in which the defence of self-defence was successfully pleaded.

In the Case of LEMBELANI MWALE V R¹³

The appellant was charged in the High Court of Northern

Rhodesia with the murder of one John Mwale. His defence was self-defence. alternatively, provocation. It appeared that, the appellant, while alone in his hut after dark, was visited there by the deceased, and one Jonah Chudu. They were probably, under the influence of liquor and were certainly in the most truculent frame of the mind. Jonah Chudu entered the hut and urinated there, and when, the appellant protested, Chudu, was offensive and threatening. He armed himself with a stick and was joined by the deceased. The two, attacked the appellant who retaliated. The deceased drew a knife. In endeavouring to disarm him, the appellant was slightly cut. He escaped, apparently leaving the deceased in possession of the knife, and ran into the bush. It would seem that, he was pursued there, and made his way back to the hut of one Akim Nkhoma. He was still pursued, there by his two assailants, who then made an attack on Akim's hut. The appellant escaped from Akim's hut, and again ran away to his own hut, and the deceased closely pursued him there. The appellant, thereupon armed himself with an axe, and turned upon, the deceased. The deceased then, tried to run away, but the appellant followed him a few paces and struck him on the head, felling him to the ground, before striking him another five blows with the axe, all on the head and neck, and most, being severe. The result was that, the appellant killed the deceased. Jonah Chudu, then intervened with a stick, and the appellant killed him also.

The trial court rejected, the defence self-defence in substance, because, the appellant had not retreated or run

away from the deceased as he might, or should have done before he turned and assaulted him.

On appeal, the Federal Supreme Court annunciated the principle applicable to a plea of self-defence. On the facts given, TREDGOLD C.J., who delivered the opinion of the court held.

"the trial court did not make sufficient allowance for the extremity of the situation in which the appellant found himself, for when a man is the object of a murderous attack, it is too much to expect that he will exhibit a nice discrimination in regard to the method he uses to defend himself. In calm retrospect. other alternatives may appear but, it must always be remembered that, in such circumstances, a man acts under the stress of the moment. He has to act swiftly and decisively, and the reasonableness of the course he adopts must be judged accordingly."

On the question of whether, the person attacked or menaced was under a duty to retreat rather than to turn upon his assailant, the Federal Chief Justice held that, there was no absolute duty to retreat, if he reasonably supposed that, by retreating he would enhance rather than avoid the danger to him himself.

Applying these principles to the facts of the case, the chief Justice ruled that, the defence of self-defence was available to the accused and a verdict of manslaughter was substituted.

In ATTORNEY GENERAL FOR NYASALAND V JACKSON¹⁴

The Federal Supreme Court laid down the essentials of self-defence. Here, the accused believing that his life was in imminent peril as the result of a spell cast or about to be cast upon him by the deceased, an elderly female, killed her in the belief that by so doing he could save his life. He was charged with murder but was acquitted on the grounds that, the killing was in self-defence and constituted excusable homicide. The Attorney-General of Nyasaland appealed on a number of grounds. On the question of self-defence:-

LEWEY, F.CJ., held that, the essence of self-defence is the repelling of force by force in the defence of the person and as there had been no assault, the defence must fail and that a threat of witchcraft could never constitute a physical threat, and that, applying objectively the test of the reasonable man, the accused's belief that he was going to die by witchcraft, however genuinely sustained by him, could never be, in law, a reasonable belief.

CLAYDEN, F.J., held that in regard to self-defence, the law required that the person acting in self-defence should have an honest and reasonable belief that there was immediate danger.

It must be seen that, subsequent cases have shown that self-defence is subject to a number of further qualifications firstly, the courts have insisted that, the right to self defence extends no further than doing what was reasonably necessary to repel the attack. The question is whether, there

was an immediacy of danger to the accused. Secondly, the court has to consider the degree of retaliation and whether the force used was reasonable in the circumstances. The test is not "purely" objective, For as we have already seen in the Mwale Case, the trial court must always remember that force will commonly be used in a moment of crisis.

In the case of THE PEOPLE V NJOVU¹⁵

The accused was charged with the murder of his wife. According to the accused, immediately prior to the stabbing, his wife slapped him twice in the face, seized him by the throat and dragged him or attempted to drag him from the bedroom into the sitting room. Counsel for the accused "suggested" that, if evidence was accepted then there was an element of self-defence in the accused' action, at least sufficient to reduce the charge from murder to manslaughter.

BLADGEN, C.J., held that, the right to self-defence extended no further than doing what was necessary to repel the attack.

It is clear from this case that, the court must take into account the degree of retaliation so that, for instance, if an accused person resorted to the use of a lethal weapon, in the heat of the moment in response to a verbal assault, the defence of self-defence will not be available.

The Court have emphasised that it is always a question of fact, rather than of law, whether violence done by way of self-defence is proportionate to warding off the harm which is

threatened. Regard must be had to the circumstances of the case, such as the nature and extent of the danger, and the time and place of the assault. Whether the mode of retaliation was the only means of avoiding the danger, and the victim's own turpitude in the sense that, he "asked for it" by making the initial assault. Against this background, the courts have also been reluctant to prescribe water-light tests as regards the modes and degree of retaliation.

The Case of ZULU V THE PEOPLE¹⁴ is opposite on the question of immediacy of the danger of death or serious bodily harm. The trial judge found that during the currency of the marriage, the deceased had consistently used extreme violence against the appellant to the extent that on occasions she had to go to hospital. On the morning in question, the appellant had an argument with the deceased whereupon, the latter loaded a pistol in her presence saying, "I am a hard-hearted man, I will kill you" The deceased then went into the bathroom and placed the loaded pistol on top of the toilet cistern.

The appellant got dressed and prepared to go out when the deceased called her. She went into the bathroom. The deceased then made an attempt to get the gun from the top of the toilet cistern saying, "you think I cannot kill you." on seeing that, the appellant, who thought that the deceased intended to shoot her, seized the gun first and fired six shots at the deceased. four of which hit him, as a result of which he died. The trial judge held that, she had every possibility of retreat and that, there was no need whatsoever

to use the gun.

On appeal, the Supreme Court held that, the immediate attempt by the deceased to seize the gun when the appellant entered the bathroom was itself an act of grave provocation. Bearing in mind that, the deceased was a person capable of extreme violence, the appellant was justified in believing that she would be assaulted, and the gun taken from her and used against her if she did not first use the weapon.

The Court reiterated the view that, as regards the degree of retaliation, the courts should be slow to apply over-fine tests of actions taken and weapons used in the heat of the moment on the question of duty to report, the Court in Zambia have followed the lead of the English Courts to the effect that there is no absolute duty on the victim to retreat before using force. Failure to retreat is now simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force was reasonable. if the only reasonable course is to retreat, then it would appear that to stand and fight must be to use unreasonable force. What is necessary is that the accused "should demonstrate that he/she does not want to fight and is prepared to temporize and disengage and perhaps to make some physical withdrawal"¹⁷

At this point, it may be necessary to state that, it is both starting and significant that the Supreme Court in the Kambarage Case, failed to consider any of there authorities. This it is now necessary to consider whether the Supreme Court was right in holding that the defence of self-defence was

available to the accused (Kambarage). In deciding this question, a number of factors must be emphasised:-

- (a) the incident took place at night
- (b) the alleged assailants were unarmed pedestrians while Kambarage and one of his passengers were armed with lethal weapons.
- (c) there had been no assault and no suggestion of immediate physical threat upon the accused or his passenger save for the alleged bangs on the car windows (unlike in the Mwale Case where the appellant was subjected to a savage and murderous attack); and,
- (d) there was no attempt on the part of the appellant, to temporise or withdraw even though the road was not blocked. Although he was not obliged to retreat, failure to do so, was a legitimate factor in deciding whether his conduct was reasonable in the circumstances.

It is therefore argued that, the Supreme Court erred in holding that the defence of self-defence was available to the appellant for the following reasons:- first, although the incident took place late at night, the mode and degree of retaliation was grossly out of proportion to the alleged assault. To reply with a shotgun, and a pistol to (at most) fist bangs on the car by unarmed pedestrians exceeded what was reasonably necessary to deal with the exigencies of the situation secondly, the appellant's failure to disengage or reverse the car and seek to retreat from the "mob" was unreasonable in the circumstance and precipitated the tragedy.

All in all, it appears that, the trial judge was right in

convincing Kambarage of the Crime of murder. If there were any other factors negating mens rea, then Kambarage should have been convicted of manslaughter and punished accordingly as was the case with the Mwale Case cited earlier.

On the issue of the Director of Public Prosecution's (D.P.P.) loss of right to re-open the prosecution, it is submitted that, the reasoning of the Supreme Court, in reliance on the words of acting Chief Justice Madan in the case of GITHUNGURI V THE PEOPLE,¹⁸ [on which the Supreme Court heavily relied,] was that, there was no proof of any fresh evidence which could have affected the earlier or first decision in the matter even though, in this particular case, there was no evidence that any documentary or other evidence was either lost or destroyed.

In the Githunguri Case, the Attorney-General in Kenya, whose powers are apparently equivalent to those of the D.P.P. in Zambia, told the accused person and later made a statement in parliament, that he would not be prosecuted for the alleged exchange control offences. The appellant had alleged committed the offences some nine(9) years previously, and five(5) years later, the Attorney-General made the said statement. One year there after, (4) of the original twenty charges were resurrected by a new Attorney General and a division of the court of Kenya granted an order of prohibition preventing the prosecution from continuing. In the course of delivering the judgement of the court acting Chief Justice madan said:

"We are of the opinion that, two indefeasible reasons make it imperative that this application must succeed.

First, as a consequence of what had transpired and also being led to believe that there would be no prosecution, the appellant may well have destroyed or lost the evidence in his favour. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute had been lost in this case, the appellant having been publicly informed that he will not be prosecuted and property restored to him.

It is for these reasons that the appellant will not receive a square deal as explained and envisaged in section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the court, oppressive and vexatious...."

As stated in the preamble or proposal of this text, we shall seek legal opinions from practising lawyers, and any other competent legal personnel. According to one lawyer's legal opinion on the issue of re-opening the prosecution; Mr C. Hakasenke, a past Lecturer in the School of Law, at the University of Zambia, main Campus states that, "prima facie, the Githunguri Case, on which the Supreme Court relied so heavily is distinguishable from the Kambarage Case. First, an exchange control offence in the Githunguri Case necessarily involved documents and over a period of nine years, those documents may have been lost or destroyed especially after the Attorney-General made the statement. The Kambarage Case on the other hand, had involved no such documents and the period

was just from 3rd September, 1989 when the shooting incident occurred, and 9th August, 1990 when the appellant was arrested by police, and the D.P.P. having made the statement somewhere in between the two dates.

Secondly, in the Kambarage Case, an inquest was held subsequent to the making of the statement.

According to section 28 of the Inquests Act, the proceedings and evidence at an inquest are directed to ascertaining who the deceased was; how, when and where the deceased came by his death; the persons if any, to be charged with the subject offence and the particulars for the time being required by any written law to be registered concerning the death. In ascertaining these details, according to the law, and afterwards naming the persons to be charged with murder, it is my view that, this Constituted fresh evidence"¹⁹ We agree in total with these comprehensive legal assertions. It is important also to state here that, nowhere in the facts of the Githunguri Case was there any suggestion or indication that there was an inquiry similar to an inquest in the Kambarage Case, subsequent to the Attorney-General's statement, and it follows therefore that, in that case (Githunguri Case) a finding by the Kenyan Court that there was no fresh evidence was justified.

Mr Hakasenke is also of the view that, "while it is appreciated that, the right to re-open a prosecution may well be lost where there is no fresh evidence, and where the lapse of time since the making of the statement is such that

documents or other evidence may be lost or destroyed, our view and contention is that the Kambarage Case did not fall in this category as the time was within the bounds of reasonable time and the coroner's findings constituted fresh evidence."

On the issue of assessment of the credibility of the prosecution witnesses, the law in this regard is very clear. Where, a witness has a possible interest in a matter, whether as a friend, Spouse or relative or even an accomplice, the court must warn itself of the possibility of bias and specifically deal with this issue, and particularly treat the testimony of such a witness as one which should be corroborated.

Although, there are no particular forms of words for a judge sitting alone to direct himself as to the dangers of convicting on the uncorroborated evidence of a suspect witness (as noted earlier, in Chapter one) mere pronouncements that, a judge did not believe the story or evidence of the accused amounts in law, to a misdirection on his part.

In CHOKA V THE PEOPLE²⁰

It has been held that, a witness with a possible interest to serve should be treated as if he were an accomplice, to the extent that his evidence requires corroboration or 'something more' than a mere belief in the truth thereof based simply on demeanour and the plausibility of his evidence. That 'something more' must satisfy the court that the danger that the accused is being falsely implicated has been excluded, and that, it is safe to rely on the evidence of the suspect

witness

The learned trial judge in the High Court rejected the evidence of the accused and believed the evidence given by the prosecution witnesses. He held that, although he agreed that the prosecution witnesses had told a lot of untruths, that did not adversely affected their credibility, because although there were certain issues on which most of them had been disbelieved, there were other issues on which they gave credible testimony which either established common-cause facts, or were agreed to by the accused. It is submitted that, a mere belief in the truth of the prosecution witness' testimony, is not enough to eliminate or exclude the danger of falsely implicating the accused, and therefore, this was a misdirection on the part of the trial judge. We seem to agree with the Supreme Court when it observed that, the learned trial judge did not deal with the evidence of the prosecution witnesses which was in dispute i.e where there was no common cause. In the court's opinion, this was precisely the evidence which should have been dealt with by the trial judge. The court analysed the findings of the trial judge relating to the credibility of the appellant and his witness, and found errors or unfairness in each of them. The court held that, the trial judge by, dealing with the question of credibility as he did, misdirected him self.

Also in R V BASKERVILLE²¹

It was stated that, the evidence in corroboration must be independent testimony which affects the accused by connecting,

or tending to connect him with the crime. In other words, it must be evidence which implicates him.

It is however, doubtful, that, the evidence of relatives, friends or a spouse, could be treated as independent evidence. It must be 'something more,' and that 'something more' must exclude the dangers of convicting on the uncorroborated evidence of suspect witnesses.

The Supreme Court in the Kambarage Case reiterated the principles governing witnesses with a possible interest to serve and quashed the conviction on the ground of failure by a trial judge to warn himself of the possibility of bias by witnesses with a possible interest to serve coupled with the issue of whether or not such bias has on the facts of the case, been excluded.

The judge should further examine the evidence and consider whether in the circumstances of the case, those dangers have been eliminated or precluded. The judge should set out the reasons for his conclusions; his mind upon the matter should be clearly revealed.

There were no such considerations by the learned trial judge, hence a misdirection.

It is stated that, as a matter of law, the reason given by a judge for his conclusion must consist in some thing more than a belief in the truth of the evidence of the suspect witnesses. If there's nothing more, the court must acquit. The trial however, merely believed in the truths of the evidence of prosecution witnesses, which in law, amounted to a misdirection.

However, it is not very competent for a court to simply reject all the evidence given by the prosecution witnesses, merely on the ground that, they were relatives, or friends of the deceased. As noted earlier, the Supreme Court decision or verdict, was received by many citizens with outrage and astonishment. To the ordinary man in the streets, the judgement represents the worst miscarriage of justice in Zambia.

Curiously we may state here that, it was actually paradoxical for the Supreme Court to simply dismiss evidence of several prosecution witnesses on the ground that they were close to the deceased. While the Chief Justice was close to the Kaunda family, not only through his membership of the Kenneth kaunda's David Universal Temple; a mystic organisation ostensibly dedicated to peace, but also through marriage as well, since Silungwe's wife and the wife of Kambarage's brother, WAZAMAZAMA, are first Cousins.

Soon after, the trial judge sentenced Kambarage, the Chief Justice is said to have personally taken charge of the preparation of court records which was done at the offices of the appellants' counsel, instead of the High Court. This has raised questions as to the Chief Justice interest in the matter. It is submitted that, the Chief Justice should have rescued himself because of the impression given to the average person that, there was going to be a likelihood of bias arising from a familiar and personal relationship with the Kaunda family.

It is further submitted that, given the high profile of

the accused and emotions generated by the case, the court should have been seen to dispense justice without fear or favour. A full bench of, preferably, five(5) judges should be empanelled as has been the practice in all controversial cases. In a sense, the perceived failure of the court to rise to the occasion has lent credence to the view that, laws are like cobwebs where the 'small flies are caught and the big ones break through.

In conclusion therefore, we may state here that, the Supreme court erred in holding that, the Director of Public Prosecution (D.P.P.) had lost a right to re-open the prosecution for want of fresh evidence through heavy reliance on the East African Case of Githunguri.

The Supreme Court also erred, in holding that, the accused shot in self-defence, as the court did not deal adequately with the defence of self-defence.

The Supreme Court did was correct or right in holding that, the learned trial judge misdirected himself when he did not deal adequately with the issue of credibility of suspect witnesses.

The Supreme Court relied so much on the Githunguri Case, which case, Prima Facie is distinguishable from the Kambarage Case as the documents in the former case may have been lost or destroyed, the latter case involved no such documents, in relation to the period that had elapsed.

Also, in the Kambarage Case, an inquest was held subsequent to the making of the statement; there was no such inquest in the Githunguri Case.

It must be stated that, although we belong to the common law jurisdiction together with East African Countries, their cases cannot be binding on the Zambian Courts. Since, the Githunguri Case is distinguishable from the Kambarage case, it was, in the main, incompetent for the Supreme Court to rely so heavily on a case which is only of persuasive value to the Zambian Courts.

The facts proved in the Kambarage Case were that, there were two first bangs on the Car, which led to the accused swerve the car to stop on the other side of the road. After which he first shots at the alleged advancing group of people.

The further facts proved were that there were no dents on the car, and that there was no crack on the Windscreen to show the severity of the bang that could cause the appellant to swerve the car, and that the deceased was hit by a bullet in the back of her head showing she was not advancing towards the appellants and there was no evidence that anybody in the group was armed.

Applying the English Law on self-defence, which the Zambian Courts follow, of retreat and reasonableness of retaliation. The group is alleged to have banged the car, but there was no dent. On the facts, there was no evidence of any retreat on the part of the appellant, as he was driving a car and the group was walking, a retreat would not have been difficult or unreasonable, or unsafe for him, because all he should have done was to speed off and avoid a fight.

Although the appellant was not obliged to retreat, failure to do so was a legitimate factor in deciding whether

his conduct was reasonable in the circumstances. To reply with a shotgun and a pistol to fist bangs on the car by unarmed pedestrians, in our view fails to meet the retreat test as it was reasonable for him to speed off and avoid a confrontation with the group, and therefore exceed what was reasonably necessary to deal with the exigencies of the situation.

It is our view that, the circumstances of the Kambarage Case do not support the Supreme Court's decision that, the appellant acted in self-defence, and was therefore not guilty of murder. Rather, the facts of this case merit those of manslaughter for causing death unlawfully i.e. for using excessive force, or for failing to retreat or for causing death in negligently lowering the aim of the gun to "just above the head."

On the issue relating to evidence given by witnesses with a possible interest to serve, the Supreme Court. however, decided in accordance with the laid down rule of law relating to such witnesses.

All in all, Justice suffered in this case, as we may say that, it is incompetent for a court to simply dismiss evidence of prosecution witnesses, simply because they were close to the deceased.

It appears that, the trial judge was right in convicting Kambarage of the crime of murder, but, if there were any other factors negating mens rea., then Kambarage should have been convicted of manslaughter and punished accordingly.

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