

THE PEOPLE
v
MWENDAWELI NYAMBE

HIGH COURT.
DR. MATIBINI, SC, J.
25th JUNE, 2010.
HT/17/2010.

[1] Criminal law - Murder - Defence of provocation - Whether defence of provocation was available.

The accused was charged with the offence of murder contrary to section 200 of the Penal Code. The particulars of the offence were that the accused murdered his wife.

Held:

1. If a person kills another in consequence of reacting to sudden provocation, and he so kills in the heat of passion, and before there is time for passion to cool, he is guilty of manslaughter only.
2. The person's mode of resentment must bear a reasonable relationship to the provocation. If the mode is out of proportion to the provocation, then the defence of provocation is not available.
3. A wrongful act or insult is not provocation unless it is such as would deprive an ordinary person of the community to which the person who kills belongs to, the power of self-control, and induce him to assault the person who does the wrongful act or utters the insult.
4. Once the issue of provocation is raised, there is no burden on the accused to establish it. The burden is on the prosecution to negative it, and moreover to negative it so convincingly that the Court can be sure beyond reasonable doubt that the accused was not provoked in the manner spelt of by the Penal Code.
5. The test for provocation is an objective, and not subjective one.
6. In sum, provocation in law consists mainly of three elements, the act of provocation; the loss of self-control; and reasonable retaliation proportional to the provocation.
7. To be found in adultery has always been considered one of the gravest forms of provocation.
8. A confession of adultery has been held to be equivalent at being found in adultery, and to be grave and sudden provocation.

9. The retaliation by the accused did not bear a reasonable relationship to the provocation.

Cases referred to:

1. Holmes v DPP [1946] A.C. 588.
2. Chibeka v R (1959) R.N.C.R. of 16.
3. Greyson v R (1961) R and N 337.
4. Kalinda v The People (1966) Z.R. 29.
5. The People v Njovu (1968) Z.R. 132.
6. Phillips v R [1969] 53 Cr. App. R 132.
7. Walker v R [1969] 53 Cr. App. 195.
8. Makomela v The People (1974) Z.R. 54.
9. Liyumbi v The People (1978) Z.R. 25.

Legislation referred to:

1. Penal Code cap 87, ss. 200, 201, 202, 204, 205, and 206.

M. K. Chitundu (Mrs.) State Advocate in the Director of Public Prosecutions chambers.

O. Ngoma, Senior Legal Counsel, Legal Aid Board.

DR. MATIBINI, SC, J.: The accused is charged with the offence of murder contrary to section 200 of the Penal Code, chapter 87 of the laws of Zambia. The particulars of the offence are that the accused on 4th September, 2009, at Namayula village in the Mongu District of the Western Province of the Republic of Zambia did murder his wife, one Edina Nyambe Sinonge.

The prosecution called four witnesses. The gravamen of the testimony of the prosecution witnesses is that on 4th September, 2009, around 23 00 hours, the accused person and the deceased person had been fighting. In the course of the fight, the accused axed the deceased to death. Thereafter, the accused pulled the body of the deceased to a nearby stream, where the body was eventually discovered. At that point, the accused had disappeared from his home.

PW1, Kamona Njimba, and the mother to the deceased testified that after they discovered the body, they returned to the house of the accused, and found two handwritten notes by the accused.

The first note written by the accused was couched in the following terms:

“NOTICE TO THE PUBLIC”

You know the issue of adultery is the real case which happened. It is not a false one. I have children with my wife, and she is aware of the issue of adultery. But unfortunately, the mother incited her not to agree to say she was caught committing adultery. That is why I have killed Edna because of

the issue which happened. So don't get worried the mother to Nawa because that is what you wanted that she should die. Now I am telling you to take care of my children. In the first place when I spoke to your daughter how she knew Mundia she agreed. But you incited her to refuse. Now you live well with my children especially the baby. Take care of her, or take the baby to the father who you know yourself since you gave him power. The sin is yours, the mother to Nawa to die with. May God bless you for inciting your daughter not to bear me witness to Mwendaweli Nyambe. I am the one who killed Nyambe Sinonge because of the case of Mundia. Keep my children properly take all my children since you are the causer because you did not like me. Your daughter is dead. We are going to see how Mundia is going to marry her. Me and Edna we are together in Heaven. If you did not come from Kaoma our case was going to end in a proper way. A person i caught in my house you yourself you are saying you deny.”

The second note reads as follows:

“NOTICE TO THE PUBLIC AND FRIENDS”

“Mundia is the cause and the mother to my wife because they were not faithful. Now look after my children since that is what you wanted, and that is what you agreed upon. You have fulfilled your plan, but my thought was to follow the truthfulness and end the case amicably so that Mundia could avoid my wife. I am Mwendaweli Nyambe. There is no one but it is me.”

During cross-examination, PW1 confirmed that the accused and the deceased had a troubled marital relationship. The cause of the troubled marital relationship, is that the accused found the deceased committing adultery with one Mundia Munyinda.

The second witness for the prosecution, - PW 2 was Meebelo Mukelabai. He was the step father to the deceased. In the main, he narrated more or less the same testimony as PW1. It is therefore unnecessary to refer to it in any detail. The third prosecution witness, - PW3 was Nyambe Nyambe, a son of the accused, and deceased. Similarly, PW3 in the main narrated the events of 24th September, 2009, leading to the demise of the deceased.

The fourth prosecution witness PW4 was Morrison Siampule. PW4 is a Police Detective Sergeant stationed at Mongu Central Police Station. PW4 recalled that on the material date, he received a phone call from a Mr. Mwanza, the Chairperson of the Neighbourhood Watch in the Tungi area, where the homicide under discussion, took place. Mr. Mwanza informed PW4, that between the night of 3rd and 4th September, 2009, a person by the name of Edna Nyambe was killed by her husband. Upon receipt of this information, PW4 and other officers went to the scene of the crime, and found the body of the deceased in a pool of blood. PW4 and other officers collected the body and brought it to Mongu. PW4 testified that the following day, the accused was apprehended by members of the public, and was brought to the Police. PW4 testified that the accused was complaining of injuries on his private parts. PW4 testified that at the material time, the accused was in possession of a knife. According to the members of the public, it is believed that the suspect used the knife to inflict injuries on his private

parts. PW4 testified that the knife had blood stains. And the injuries sustained by the accused were still fresh. PW4 testified that since the injuries were still fresh and serious, PW4 decided to rush the accused to the hospital. Members of the public suspected that the accused may have made an attempt to kill himself by cutting his private parts, and thereby die from excessive bleeding. PW4 testified that the persons who apprehended the accused found him cutting his private parts. During cross-examination, PW4 confirmed that he did not record any statements from members of the public that apprehended the accused. The reason why PW4 did not record any statements is because members of the public refused to co-operate with the Police.

In his defence, the accused elected to give unsworn testimony. The accused recalled that on 22nd July, 2009, around 18 00hours, he informed his wife that he was going fishing. During the course of the fishing in the night, his fishing net got torn. As a result, he decided to return home. When he returned home, and entered the bedroom; he lit a light and noticed that there were two persons sleeping on the bed. Thereupon, he asked his wife with whom she was sleeping with. The deceased replied that she was sleeping with Munalula Simataa; her elder sister.

However, when the person sleeping with his wife woke up, he turned out to be Mundia Munyinda. In response, Mundia Munyinda got a stick from the chair, and hit the accused on the arm. Thereafter, a vicious fight ensued between him and Mundia Munyinda. He overpowered Mundia Munyinda, and gave him a severe beating with a pounding stick; considering that he had been flirting with his wife since 2007. During the fight, his wife fled from the house.

The accused further testified that shortly after the fight with Mundia Munyinda, he was summoned by the Police, arrested, detained briefly, and charged with assaulting Mundia Munyinda. Later, the accused was granted Police bond. The assault case was scheduled for hearing on 3rd September, 2009. On the material date, the matter was adjourned to 8th September, 2009. After the adjournment the accused returned home.

In the night of 3rd September, 2009, around 22:00 hours, the accused's wife returned home, and confessed having committed adultery with Mundia Munyinda. The accused testified that his wife told him that if he was a 'real man', she was not going to bring another man in the house. The preceding statement was repeated several times. The statement infuriated the accused, and a fight ensued. In the process, his wife got hold of his testicles, and injured his private parts with a knife. At the height of the fight, the accused got an axe handle and hit his wife on the head, and killed her instantly. After he killed his wife, he pulled the body to a nearby stream and deposited it there. He then proceeded to write the two incriminatory notes referred to above. During the trial, the accused was shown the two notes and confirmed that he was the author.

The accused stands charged of the offence of murder contrary to section 200 of the Penal Code, chapter 87 of the laws of Zambia. Section 200 is expressed the following terms:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

Section 201 goes on to provide that:

(1) Any person convicted of murder shall be sentenced:

(a) To death or

(b) Where there are extenuating circumstances to any sentence other than death.

Provided that paragraph (b) of this subsection shall not apply to murder committed in the course of aggravated robbery with a firearm under section two hundred and ninety four.

Extenuating circumstances are defined as follows:

(2) For the purpose of this section

(a) An extenuating circumstances is any fact associated with the offence which would diminish morally the degree of the convicted persons' guilty;

(b) In deciding whether or not there are extenuating circumstances, the Court shall consider the standard of behavior of an ordinary person of a class of the community to which the convicted person belongs."

Section 204 defines malice aforethought in the following terms:

"204. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

(a) An intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) Knowledge that the act or omission causing the death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death, grievous bodily harm is caused or not, or by a wish that it may not be caused

(c) An intent to commit a felony;

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed to commit a felony."

The burden of proof is on the prosecution to establish that charge against the accused, and the standard of proof which must be attained before there can be a conviction is such standard as satisfies the Court of the accused's guilt beyond reasonable doubt, so that the Court can be sure that the accused did murder the deceased. (See *The People v Njovu* (5)).

In accordance with the definition of murder set out above in section 200 of the Penal Code, in order to obtain a conviction of murder, it is necessary for the prosecution to prove to the standard described above.

It is clear from the definition of murder that the following elements make up the crime of murder with which the accused is charged. Namely, that:

(i) the accused caused the death of the deceased;

(ii) by an unlawful act; and

- (iii) with malice aforethought.

In so far as the present case is concerned there is no contest on the cause of the death of Edna Nyambe Sinonge. The accused expressly and unreservedly accepted responsibility for causing the death of the deceased. In so doing, the accused through the notes referred to above, put forward an explanation and justification for the act. Similarly, Mr. Ngoma, defence counsel in this matter, has not challenged the fact that the death of the deceased was caused by the accused. Instead, by his written submissions dated 18th June, 2010, Mr. Ngoma has canvassed the defence of provocation, which in the main calls to be considered in this matter.

The statutory law on provocation is set out in sections 205 and 206 of the Penal Code, chapter 87 of the laws of Zambia.

Section 205 provides that;

(1) When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder does the act which caused death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for passion to cool, is guilty of manslaughter only.

(2) The provision of this section shall not apply unless the Court is satisfied that the act which causes death bears a reasonable relationship to the provocation.

The term provocation is defined as follows in section 206 of the Penal Code:

(1) The term provocation means and includes, except as hereunder stated, any wrongful act or insult of such nature as to be likely when done offered to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care or to whom he stand in conjugal, parental, filial, or fraternal relation, or in the relation of master or servant to deprive him of self-control and to induce him to assault the person whom the act or insult is done or offered. For the purposes of this section, "an ordinary person" shall mean an ordinary person of the community to which the accused belongs.

(2) When such an act or insult is done or offered by one person to another in the presence of another to a person who is under the immediate care of the other or to whom the latter stands in such relation as aforesaid, the former is said to give the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act to which a person does in consequence of incitement given by another person in order to induce him to the act and thereby to furnish an excuse for committing an assault is not provocation to that other person to person for an assault.

(5) An arrest which is lawful is not necessarily provocation to a person who knows of the illegality.

In construing sections 205 and 206 of the Penal Code in the case of *Liyumbi v The People* (9), Justice Chomba in delivering the judgment of the Supreme Court observed at page 28, that the following main principles emerge from these sections:

(1) If a man kills another in consequence of reacting to sudden provocation, and he so kills

in the heat of passion, and before there is time for his passion to cool, he is guilty of manslaughter only;

(2) His mode of resentment must bear a reasonable relationship to the provocation. If the mode is out of proportion to the provocation, then the principle in (1) above is not available to him; and

(3) A wrongful act or insult is not provocation unless it is such as would deprive an ordinary person (of the community to which the man who kills belongs) of the power of self-control and induce him to assault the person who does the wrongful act or utters the insult.

There are a legion of cases which illustrate the application of the preceding principles. I only propose to cite a few.

(a) In *Phillips v R* (6) Lord Diplock had this to say:

“...What the jury have to consider, once they have reached the conclusion that the person charged was in fact provoked to lose his self-control, is not necessary whether in their opinion the provocation would have made a reasonable man lose self-control, but also whether, having lost his self-control he would have retaliated in the same way as the person charged in fact did.”

(b) In *Waller v R* (7) Fenton Atkinson L.J., said:

“It has never been the law that the man who completely loses his temper on some trivial provocation and reacts with gross and savage violence which kills his victim can hope for a jury to find a verdict of manslaughter on grounds of provocation.”

(c) Back at home it was stated in *Mokomelo v The People* (8) at p. 54 that:

“It is important not to overlook that the question is not merely whether an accused person was provoked into losing his self-control, and having done so would have reacted as the accused did.”

In the case of *The People v Njovu* (5), Blagden, C.J., sitting in the High Court summarised at page 135, the conditions which have to be satisfied as follows:

(a) the provocation must be some wrongful act or insult of such nature as to be likely, when done or uttered to ordinary person of the community to which the accused belongs to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.

(b) the assault so induced must be committed before there is time for the accused's passion aroused by the provocation to cool and

(c) the character and nature of the assault so induced must bear a reasonable relationship to the provocation suffered.

It is important to note that once the issue of provocation is raised there is no burden on the accused to establish it, the burden is on the prosecution to negative it, and moreover to negative it so convincingly that the Court can be sure beyond reasonable doubt that the accused was not provoked in the manner spelt out in section 206 of the Penal Code. (See *The People v Njovu* (5.))

Furthermore, it is also important to note that the test for provocation is an objective and not

subjective one. The issue or question in this regard is whether the provocation was of such nature as to be likely to deprive an ordinary person of the community to which the accused belongs of his power of self-control. In summary, provocation in law consists mainly of three elements, the act of provocation, the loss of self-control, and reasonable retaliation proportionate to the provocation.

On the facts of this case, Mrs. M. K. Chitundu, State Advocate, submitted that the alleged act of provocation, namely the adultery was committed on 22nd July, 2009, and the accused killed the deceased on 4th September, 2009. In the circumstances, the accused could not claim that he had lost self-control over such period of time. I agree with Mrs Chitundu that the accused cannot claim to still have lost his self-control over such a period of time. Therefore, in those circumstances the loss of self-control could not conceivably be based on the adultery committed on the 22nd July, 2009.

However, Mr. Ngoma has submitted on behalf of the accused that when the deceased re-appeared on 3rd September, 2009, at around 22 00 hours, she confessed the adultery she committed with Mundia Munyinda, and is also said to have told the accused that the reason why she committed the adultery was because his is not a 'real man'. It is this confession, Mr. Ngoma submits, that infuriated the accused and led to the loss of self-control on the fateful day. In advancing this submission, Mr. Ngoma relied on a passage in the case of *Kalinda v The People* (4) where Doyle J. A. delivering the judgment of the Court of Appeal made the following observation:

“To be found in adultery has in the English in common law always been considered one of the gravest forms of provocation. In Zambia and other African territories a confession of adultery has been held to be equivalent of being found in adultery, and to be grave and sudden provocation.”

In the *Kalinda* case, (supra) Doyle J. A. relied on the case of *Greyson v R* (3). The facts were that the appellant had been having marital trouble with his wife; the deceased. She had at one time left him for another man. On the night of the crime, the appellant and his wife went to bed peacefully together. He awoke and heard his wife talking to a man outside. He went out but saw no one but his wife. He spoke to her and replied, 'Are you a man at all? I started long ago to tell you I did not want you. Do you mean that I should not carry on with other men?' Appellant then attacked her with a knife, and inflicted six or eight wounds from which she subsequently died of haemorrhage. Appellant was convicted of murder. On appeal to the Federal Supreme Court, Briggs, F.J. delivered the leading judgment with which the other judges concurred. He dealt with the gravity of the provocation in the following passage:

'In assessing the gravity of the provocation it seems that there are three elements to be considered, the direct insult to the appellant's virility, which must have been unjustified unless the deceased's child was a bastard, the fact (if it was such) of an immediately recent adulterous association with a man believed to be Maloya, and the whole of the antecedent history. In view of that history, it seems to me that before the deceased spoke to the appellant, had good reason to suspect that she had left his hut to commit adultery, and either was about to do so or had just done so when he came out. The implied admission in her words must have turned that suspicion into certainty, and revived in a moment the anger that a long and sordid course of deceit, unfaithfulness, insult and injustice had not so far caused to boil over. Whether or not the deceased was “taken in adultery”, as described in *Holmes v DPP* (1), is immaterial under the law of Nyasaland. The wrongful act detected, and coloured by previous

maters, and the insult were together provocation both sudden and very grave.'

In view of the foregoing authorities, I agree with the submission by Mr. Ngoma that the confession of the adultery on the fateful date constituted provocation. In view of this finding, nothing significant turns around the issue whether it was the deceased who inflicted injuries on the accused's private parts or the injuries were self-inflicted.

However, the matter does not rest there. There is a further requirement in section 204(2) of the Penal Code that the act which causes death should bear a reasonable relationship to the provocation. As pointed out earlier on, section 205(2) of the Penal Code, requires that for a killing to be reduced from murder to manslaughter on the ground of provocation, the act which causes the death should bear a reasonable relationship to the provocation. In order to assess whether the action of the accused has a reasonable relationship to the provocation, it is necessary to review briefly some judicial precedents as follows:

(a) In *Chibeka v R* (2), the appellant had inflicted some twenty three wounds on his wife and it was held that such attack did not bear reasonable relationship in the particular community to the provocation offered;

(b) In *Greyson v R* (3), the appellant had inflicted some six to eight stab wounds on his wife and a trial judge recorded such attack as disproportionate, the appeal in that case was only allowed on the ground that the provocation itself was not correctly measured; and

(c) In *Kalinda v The People* (4), the appeal was allowed where the appellant killed the wife by shooting at her twice with a shotgun on the ground that the trial judge did not direct himself correctly on the measure of provocation.

On the basis of the authorities referred to above, I find that the retaliation by the accused did not bear a reasonable relationship to the provocation. Accordingly, the defence of provocation fails, and I find the accused guilty of murder, contrary to section 200 of the Penal Code.

Accused convicted of murder.