IN THE HIGH COURT OF ZAMBIA **HJ/06/2011**

AT THE CRIMINAL REGISTRY
HOLDEN AT CHIPATA
(Criminal Jurisdiction)

BETWEEN:

THE PEOPLE

V

DAUDI PHIRI AND TAMARA MILANZI

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 20th day of November, 2012.

For the People:	*C.C. Soko (Ms), State Advocate in the Director of Public Prosecutions chambers.*
For the Accused:	*B. S. Chirambo of Messrs Stembridge Chirambo and Company, with K. Banda and J. Phiri Legal Aid Counsel; Legal Aid Board.*

JUDGMENT

Cases referred to:

English cases:

1. *R v Mc Innes 55 Cr. App. R. 551.*
2. *Woolmington v Director of Public Prosecutions [1935] A.C. 462.*
3. *Mancini v Director of Public Prosecutions [1942] A.C. 1.*
4. *Holmes v Director of Public Prosecutions [1946] A.C. 588.*
5. *Duffy [1949] 1 ALL E.R. 932.*
6. *Davies v Director of Public Prosecutions [1954] 1 ALL E.R. 507.*
7. *Lee Chun-Chuen v R [1963] 1 ALL E.R. 73.*
8. *R v Lovesay, R v Peterson [1969] Z.R. 200.*
9. *R v Julien [1969] 2 ALL E.R. 856.*
10. *Palmer v R [1971] A.C. 814.*
11. *R v Howe and Others [1987] A.C. 41.*

Zambian cases.

1. *Mwale v R (1958) R and N 530.*
2. *Chibeka v R (1959) 1 R and N 476.*
3. *Greyson v R (1961) R and N 337.*
4. *Jackson v R (1962) R and N 157.*
5. *Nguila v The Queen (1963-1964) Z.R. 14.*
6. *Mutambo and Others v The People (1965) Z.R. 15.*
7. *Kalinda v The People (1966) Z.R. 29.*
8. *Munkala v The People (1966) Z.R. 12.*
9. *Mulenga v The People (1966) Z.R. 118*
10. *Tembo v The People (1972) Z.R. 220.*
11. *Makomela v The People (1974) Z.R. 254.*
12. *The People v Lewis (1975) Z.R. 43.*
13. *Mwape v The People (1976) Z.R. 160.*
14. *Zulu v The People (1977) Z.R. 151.*
15. *Liyumbi v The People (1978) Z.R. 25.*
16. *Tembo v The People (1980) Z.R. 209.*
17. *Zulu v The People (1981) Z.R. 341.*
18. *Mwiimbe v The People (1986) Z.R. 15.*
19. *Mpofu and Another v The People (1988) S.J.S.E. (unreported).*
20. *Sakala v The People (1987) Z.R. 23.*
21. *Kundiona v The People (1993-1994) Z.R. 59.*

Legislation referred to:

1. *Penal Code, cap 87, ss 16, 17, 200, 205, 206 and 397.*

Works referred to:

1. *P.J. Richardson, Archbold Criminal Pleading, Evidence and Practice, 2012, (Thomson Reuters (Professional) UK Limited, 2012).*
2. *J. C. Smith, Smith and Hogan Criminal Law, Eighth Edition, (London, Butterworths, 1996).*
3. *Michael J. Allen and Simon Cooper, Elliot and Woods, Cases and Materials on Criminal Law, 9th Edition, (London, Sweet and Maxwell, 2006).*
4. *Hale and Blackstone, Rules Pleas of the Crown, [1736] volume 1.*
5. *Blackstone Commentaries on the Laws of England, (1857) volume 4.*

The accused persons; Daudi Phiri, and Tamara Milanzi, (and I will continue to refer to them as the 1st and 2nd accused respectively), stand 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 between 5th and 6th November, 2009, at Chipata District of the Eastern Province of the Republic of Zambia, while acting together, did murder Sizzi Jere. And I will continue to refer to him as the deceased. The accused pleaded not guilty to the charge.

The trial of this action commenced on 16th February, 2011. And the evidence of the prosecution was led by three witnesses. The first prosecution witness was Moses Nyirongo. And I will continue to refer to him as PW1. PW1 recalled that on 5th November, 2009, he was with the deceased at his house. Present also, was Dingani Sakala. While at the deceased's house; around 21:00 hours, the deceased received a telephone call on his mobile phone from Tamara Milanzi; the 2nd accused, and the wife of Daudi Phiri; the 1st accused. The 2nd accused invited the deceased home. And intimated to him that the 1st accused was not at home; he had left home to guard a grader. The deceased went out into the night to visit the 2nd accused.

The following morning between 04:00 hours to 05:00 hours, somebody came to the deceased home, and enquired about the deceased's whereabouts. The stranger was prompted to make the enquiry because it was rumoured that the deceased may have been involved in a road accident. PW1 rushed to the road side; near Katuka lodge. And indeed found the body of the deceased lying on its back by the road side. And blood was still oozing from the head. Assisted by Dingani Sakala, and one Mulenga; a police officer, PW1 collected the body of the deceased and took it to Chipata Police Station. Later, the body was transferred to the mortuary.

Afterwards, PW1 and a police officer went to search for the 2nd accused. When they arrived at 2nd accused home, they were informed that she had gone to visit her father. PW1 and the police officer decided to station some police officers at the accused person's home. And followed the 2nd accused. However, when they arrived at the 2nd accused father's home, they did not find her.

In the meanwhile, the police officers that had been stationed at the accused's home called PW1, and informed him that the 2nd accused had since returned home. Thus, when PW1 and the officer returned to the accused's home, they found that the 2nd accused had already been arrested. Soon after her arrest, the 2nd accused was ordered to remove the bed sheet from the main bedroom. When the bed sheet was removed, PW1 observed that it was blood stained. And there was also a trail of blood from the verandah of the accused home, to the spot where they found the deceased lying in a pool of blood; a distance of about 400 to 500 metres from the accused home.

PW1 identified in Court both accused persons, as well as the blood stained bed sheet. PW1 was able to identify the 2nd accused because she used to visit the deceased's home.

The second prosecution witness was Dingani Henry Sakala. I will continue to refer to him as PW2. PW2 recalled that on 5th November, 2009, he was at the deceased home near Chipata Airport. Whilst having a supper around 21:00 hours, the deceased received a call on his mobile phone. When PW2 asked the deceased who the caller was, PW2 was informed that it was the 2nd accused. After they completed eating diner, the deceased changed into some warm clothing. And left home. PW2 retired to sleep in the sitting room.

The following day; very early in the morning, a stranger knocked on the door. And enquired whether or not the deceased was present in the house. PW2 replied in the negative. The stranger intimated to PW2 that it appeared that the deceased may have been knocked down by a car. And his body was lying by the road side. Thus in the company of PW1 and the stranger, PW2 went to the purported scene of accident. When they arrived at the scene, they indeed found the deceased lying on his back. And was bleeding from his head.

Whilst at the same scene, PW2 noticed the presence of the 2nd accused. PW2 confronted the 2nd accused, and asked her about the deceased, and the time he left her home, since she had earlier on been talking to him on the phone. The 2nd accused got very angry with PW2, and denied communicating with the deceased. For fear of causing commotion, PW2 decided not to press the matter with 2nd accused. Eventually, the deceased's body was initially taken to Chipata Central Police Station, and later transferred to the mortuary.

Whilst at the police station, PW2 recalled that he was asked by the police officers whether or not the deceased owned a phone. PW2 confirmed that he did. The phone was immediately retrieved from the deceased's pocket. At the material time it was switched off. The police officer switched on the phone. And rummaged through dialled, received, and missed calls. The police officer detected the last number that was called when the deceased left home.

During the post-mortem, PW2 identified the body. He observed two deep cuts on the back of the deceased head. He also witnessed the doctor remove the skin from the deceased head. Below the skin, PW2 observed that the scalp was broken. And blood was flowing into the chamber of the brain.

PW2 was also able to identify the 2nd accused in Court. And confirmed that he had known the 2nd accused for a period of about two months, owing to the fact that the deceased had a relationship with the 2nd accused.

The third prosecution witness was Detective Inspector Thomas Samanyika. And I will continue to refer to him as PW3. PW3 recalls that on 6th November, 2009, he received a report that there was a body lying along Gonda road, near Katuta lodge. PW3 immediately acted on the report. And went to the spot with the Scene of Crime Officer; Detective Sergeant Kafula. Upon arrival at the scene, they found the body of the deceased lying in a pool of blood. PW3 observed three deep cuts in the head of the deceased. On the head of the deceased, PW3 also noticed traces of a brown sack. The body of the deceased was half-dressed. That is, only had the trousers. And had no shirt. PW3 picked up the body, and took it to Chipata Central Hospital.

Whilst at the police station, PW3 searched the pockets of the deceased. And retrieved a mobile phone. After rummaging through the phone, PW3, noticed that there was one number which was constantly recorded as a received, missed, or dialled number. And the same number was the last number recorded on the phone. PW3 called the number using his mobile phone. PW3's call was answered by a female voice. When PW3 asked the recipient of the call to identify herself, she replied that she was Tamara Milanzi; the 2nd accused.

Later, PW3 in the company of his colleagues, returned to the road side where they picked the body of the deceased. After examining the scene, PW3 noticed that there was a trail of blood drops leading to a nearby compound of houses. After making due inquiries, PW3 established that the trail of blood terminated at the accused home. At that juncture, PW3 called the 2nd

accused number again. The 2nd accused responded to the call, and informed PW3 that she was at her parents' home. PW3 assigned Detective Sergeant Kafula to follow up the 2nd accused at her parents' home, whilst he kept vigil at the accused home. In due course, PW3 saw the 2nd accused approach her home. When the 2nd accused finally reached her home, PW3 asked the 2nd accused if she was Tamara Milanzi. The 2nd accused replied in the affirmative. PW3 asked the 2nd accused about the drops of blood that were leading into their home. The 2nd accused failed to give any satisfactory explanation.

As a result PW3, decided to search the home. In the course of the search, PW3 discovered a blood stained bed sheet wrapped and shoved underneath the bed. The bed sheet also had some strands of human hair embedded in it. A close inspection of the house revealed to PW3 that that house had been recently mopped rather haphazardly. When PW3 asked the 2nd accused to account for the blood stained bed sheet, she replied that only her husband could do so. The 2nd accused was thereafter asked about the whereabouts of her husband. The 2nd accused disclosed that her husband had gone for work somewhere along Gonda Road; a road leading to Mfuwe. Eventually, PW3 was led by the 2nd accused to Daudi Phiri; the 1st accused. PW3 in due course cautioned the 1st accused over the subject matter offence they were investigating. And took him to Chipata Central Police Station for interrogation.

At the police station, the accused persons were interrogated separately. After the interrogation, PW3 was led by the accused persons to their home. Upon searching the home for the second time, PW3 discovered: a large metallic hammer which was blood stained; a pit latrine where the 2nd accused dumped some blood stained cloths which she had used to mop the house; and some remains of the brown sack. Further, in the course of the investigations, PW3 was led by the accused persons to a stream, about 500

metres away from their home, where PW3 recovered the brown sack which was drenched in blood. And was hidden under a tree.

When PW3 completed the investigations, he assembled the various exhibits, and took them to Chipata Central Police Station. At the police station, blood samples were collected from the exhibits. For the second time, PW3 interrogated the accused persons. Upon administering a warn and caution, the accused persons denied committing the murder in question. Later, PW3 arranged for the post-mortem. After the post-mortem, the body of the deceased was released for burial.

Towards the end of the testimony of PW3, the hammer, the brown sack, the chitenge material recovered from the pit latrine, and the post mortem-report where admitted in evidence.

At the close of the prosecution case, I formed the opinion that the prosecution had established a *prima facie* case against the accused persons. And I accordingly put them on their defence.

The 1st accused testified that he was employed by CGC Limited, as a general worker. He recalled that on 5th November, 2009, he confronted his wife, the 2nd accused person, and enquired from her about the rumours that were circulating that she was having a sexual affair with the deceased. And that each time he was away from home, the deceased would visit her. Initially, the 2nd accused denied the truth of the rumours. However, when the 1st accused threatened to beat her, she confessed being in a relationship with the deceased the previous two months.

After the confession, the 1st accused instructed the 2nd accused to call the deceased on her mobile phone. The deceased responded positively to the

call. And went to visit his paramour. When the deceased arrived, at the accused home, the 1st accused hid behind a door. And the deceased proceeded straight into the main bedroom. The 1st accused followed the deceased into the bedroom. Shortly after the deceased and the 2nd accused got into the bedroom, they took off their clothes. And started fondling each other. At that point, the 1st accused confronted the deceased, and asked him what he was doing in the bedroom. In response, the deceased is said to have struck the 1st accused with a blow, and a fight ensued. In the course of the fight, the 1st accused picked a heavy metallic hammer, and struck the deceased on his head. And the deceased collapsed and fell on the bed. Whilst lying on the bed, the 1st accused struck the deceased again. The deceased groaned in pain, and failed to collect himself. The 1st accused thereafter dragged him from the bedroom, and eventually deposited him by the road side near Katuta lodge. The following day he reported for work around 05:00 hours. At about 10:00 hours the same day, the 1st accused was arrested, and charged of the offence of murder.

The 2nd accused, in turn, recalled that on 5th November, 2009, after she retired to bed with her husband, she was asked whether she was in a relationship with the deceased. She denied being in a relationship. But when the 1st accused pressed, and threatened to beat her, the 2nd accused admitted that she was in a relationship with the deceased. In order to prove, the relationship, the 1st accused instructed the 2nd accused to call the deceased. She obliged. And the deceased responded positively to the call.

When the deceased arrived, he went straight into the main bedroom. The 2nd accused was then instructed by the 1st accused to follow the deceased in the bedroom. The 2nd accused followed the deceased and found him sitted on the bed. And had already started loosening his trousers. The 2nd accused joined the deceased. And also sat on the bed. The deceased started caressing her.

Shortly after, the 1st accused stormed into the bedroom. And asked the deceased what he was doing in the bedroom. The deceased pulled up his trousers, and struck the 1st accused with a blow. A fight immediately ensued between the deceased and the 1st accused. As the fight progressed, the 2nd accused ran away, and sought refuge in her father's house about 2 km away. The 2nd accused only returned home the following morning around 05:00hours. She did not find her husband home.

The 2nd accused later saw a crowd gather by the road side. And overheard a child say that it appeared that the deceased had been overrun by a vehicle. The 2nd accused also recalled that she was confronted by PW2, who sought to know what transpired. The 2nd accused denied having any knowledge about what transpired. The 2nd accused returned to her father's house. And only returned home after 07:00 hours the same day. When she returned home, she found police officers at her home. The police officers began searching her home. And in the course of the search, they found a blood stained bed sheet. When the police officers asked after her husband, the 2nd accused told them that he had reported for work along Mfuwe road. The police officers proceeded to arrest the 1st accused at his work place. And later took both of them to Chipata Central Police Station, where they were charged of the offence of murder.

On 5th August, 2011, Ms Soko filed final submissions on behalf of the prosecution. At the outset, Ms Soko submitted that in terms of *Woolmgton v Director of Public Prosecutions [1935] A.C. 462,* the onus was on the prosecution to prove the case beyond reasonable doubt. Ms Soko submitted that it is not in dispute that: the deceased died between 5th and 6th November, 2009, as a result of the head injuries. And on the night of 5th November, 2009, the deceased was invited by the 2nd accused person to her

matrimonial home. During that visit, the deceased was struck by the 1st accused with a hammer, and was found dead the following morning. According to the post-mortem report, the cause of death was consistent with the injuries sustained by the deceased.

The issues that fall to be determined, Ms Soko submitted, are twofold. First, whether the 1st accused killed the deceased with malice aforethought. And second, whether the 2nd accused was an accomplice. Ms Soko observed that it is apparent from the evidence of the 1st accused, that he raised the defence of provocation. And that it appears also from the evidence, that the 2nd accused had been coerced, and did not therefore actively participate in the killing of the deceased.

Ms Soko drew my attention to the case of *Lee Chun-Chuen v R [1963] 1 ALL E.R. 73,* where it is laid down at page 73 that: what is essential is that there should be produced either from as much of the accused's evidence as is acceptable, or from the evidence of other witnesses, or from a reasonable combination of both, a credible narrative of events disclosing materials that suggested provocation in law. If no such narrative is obtainable from the evidence, Ms Soko went on, the jury cannot be invited to construct one. Ms Soko submitted that this is the case for all defences.

Ms Soko further submitted that although from the evidence of the accused persons and the prosecution witnesses, the defence of provocation could be raised, in considering the defence, I should apply my mind to the novelty of this case, and the obvious element of entrapment in executing the killing. In so far as *mens rea* is concerned, Ms Soko submitted that the *mens rea* is based on circumstantial evidence. In this vein, Ms Soko drew my attention to the case of *Zulu v The People (1977) Z.R. 151,* where in a judgment delivered by Chomba, JS, the Supreme Court held at pages 152-153 that:

"It is therefore incumbent on a trial judge that he should guard against drawing wrong inferences from circumstantial evidence at his disposal before he can feel safe to convict. The judge in our view must, in order to feel safe to convict be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such degree of cogency which can permit only an inference of guilty."

Ms Soko stressed that it is not the strength of the evidence that matters, but rather that an inference of guilty is the only reasonable inference that can be drawn from the facts. Ms Soko pointed out that it is the accused testimony that the 2nd accused confessed to having been in an adulterous relationship with the deceased. The confession, Ms Soko went on, was conclusively corroborated by the evidence of both PW1 and PW2.

Ms Soko also submitted that it is settled law that a confession of adultery or intention to commit it in future, is a serious as being found *fragrante delicto*; thus forming the basis of a valid defence to murder. Ms Soko pointed out that this principle was comprehensively dealt with by the Court of Appeal in the case of *Kalinda v The People (1966) Z.R. 29,* where relying on the cases of *Greyson v R (1961) R and N 337*, and *Holmes v the Director of Public Prosecutions [1946] A.C. 588*, the Court of Appeal stated as follows at page 31:

"The implied admission in her words must have turned the suspicions into certainty, and revealed in a moment the anger that a long and sordid course of deceit, unfaithfulness, insult and injustice had not so far caused to boil ever. Whether or not deceased was "taken in adultery," as described in Holmes v DPP (2) is immaterial. The wrongful act detected, and coloured by previous matters, and the insult were together provocation both sudden and very grave."

Ms Soko argued that the 1st accused testified during cross-examination that the 2nd accused confessed the adultery around 20:00 hours. The confession was made voluntarily. And without fear of her life. The 1st accused was angry at the time. Yet he did nothing to his wife. But instead requested her to invite

the deceased to their home so that he could confirm the confession of the 2nd accused. Ms Soko also pointed out that the 1st accused testified in cross-examination that the 2nd accused voluntarily and without fear, called her paramour to their home. And the 2nd accused was then instructed to do what she and her lover would normally do when the 1st accused was away from home. The 2nd accused obliged.

Ms Soko submitted that in order for the defence of provocation to succeed, three elements must be present. Thus in the case of *Liyumbi v The People (1978) Z.R. 25,* the Supreme Court set out these three elements as follows: the act of provocation; the loss of self-control; both actual and reasonable, and the retaliation proportionate to the provocation. This approach was later adopted and followed in *Mwiimbe v The People (1986) Z.R. 15*. Ms Soko argued that it is obvious from the evidence that the 1st accused embarked on a course of action which was dispassionate and deliberate. And certainly not in the heat of passion upon a sudden provocation. To that extent, Ms Soko argued that this case is distinguishable from the decided cases on provocation, because the 1st accused was not met by a sudden act of provocation. Rather he was the architect. It is also clear from the evidence that some months prior to the confession, the 1st accused had learnt of his wife's adulterous lifestyle from his sister. In any event, there was a time lapse between the 2nd accused's confession, and the deceased's arrival at the accused's home. That time lapse would have obviously given the 1st accused ample time to cool off, if not for his morbid intention to see his wife nude with her paramour. Further, Ms Soko submitted that the test for provocation is objective. And that it is fair to assert that any reasonable man would lose his cool, and assault another, if he found him naked with his wife in the matrimonial home. But in this case, the 1st accused should have foreseen the consequences of his action. And as such, should be barred from pleading a defence which he instigated.

Ms Soko also contended that PW3's evidence which was not in any way discredited in cross-examination, shows clearly the explicit roles each of the accused played. PW3's evidence showed that the accused persons were initially suspected because of the trail of blood which ran from the road side, to their home. In the course of the investigations, the 2nd accused led PW3, and his team into the main bedroom, where PW3 recovered a blood stained bed sheet, with human hair on it. Ms. Soko also noted that PW3 testified that in the course of the investigations, the 1st accused assisted him recover the brown sack which was drenched in blood. And was hidden under a tree, on the banks of *Lunkwakwa* stream.

In turn, the 2nd accused led PW3 to a pit latrine where he recovered a blood stained chitenge material. Further, the 1st accused assisted PW3 recover a heavy metallic hammer which was concealed in a blood stained bucket under the kitchen sink. The discovery of all these items, Ms Soko argued, pointed to the guilt of the accused persons. To reinforce this submission, Ms Soko drew my attention to the case of *Mpofu and Another v The People (1988) S.J. (SC) (unreported).* Ms Soko submitted that the *Mpofu case* (supra) laid down the principle that evidence of a suspect leading the police to a piece of incriminating evidence is an indication of guilty of knowledge. Thus, Ms Soko submitted that on the facts of this case, the only reasonable inference that can be made is that the accused struck the deceased with the hammer. And later deposited his body by the roadside. And thereafter attempted to conceal the incriminating evidence. Ms Soko argued that in this case, the circumstantial evidence has taken the case out of the realm of conjecture, owing to its cogent nature. Thus Ms Soko pressed that the 1st accused killed the deceased with malice aforethought.

As regards, the 2nd accused, Ms Soko drew my attention to sections 16 and 397 (2) of the Penal Code.

Section 397 provide as follows:

"(1) Any person who receives or assists another who is to his knowledge guilty of an offence, in order to enable him to escape punishment is said to become an accessory after the fact to the offence."

Subsection 2 of section 397 goes on to provide that:

"(2) A wife does not become an accessory after the fact to an offence of which her husband is guilty by receiving or assisting him in order to enable him to escape punishment; or by receiving or assisting in her husband's presence and by his authority, another person who is guilty of an offence in the commission of which her husband has taken part, in order to enable that other person to escape punishment, nor does a husband become accessory after the fact to an offence of which his wife is guilty by receiving or assisting her in order to enable her to escape punishment."

Ms Soko submitted that it is clear that in terms of section 16 of the Penal Code, the defence of coercion is not available to a charge of murder. In support of this submission, Ms Soko drew my attention to the case of *Kundiona v The People (1993-1994) Z.R. 59,* in which the Supreme Court referred to and relied on the dicta from the case of *R v Howe and Others [1987] A.C. 41.* In view of the foregoing, Ms Soko submitted that the 1st accused should be found to have murdered the deceased with malice aforethought, and convicted accordingly.

As regards the 2nd accused, Ms Soko reiterated the sentiments stated above.

On 19th December, 2010, Mr. Chirambo filed into Court the final submissions for the defence. Mr. Chirambo submitted that the facts of the case raises the defences of self-defence and defence to property. Mr. Chirambo pointed out that: the 2nd accused confessed that she had an affair with the deceased. And the confession was supported by the evidence of PW1 and PW2.

After reciting the events preceding the killing of the deceased, Mr. Chirambo argued that the 1st accused had nowhere to run to, but to defend himself, his wife and property. Thus, when the 1st accused felt overpowered by the

deceased, he picked the nearest weapon; the hammer, and struck the deceased to death. Mr. Chirambo maintained that 1st accused killed the deceased in self-defence; defence of his property, and children as provided for under section 17 of the Penal Code. I will revert to section 17 in due course.

Mr. Chirambo pressed that: the 1st accused feared for his life; the force he used to kill the deceased was reasonable; and that if he had not killed the deceased, the deceased could have possibly killed him instead. Mr. Chirambo also invoked the defence of provocation as provided for under section 205 of the Penal Code. I will revert to section 205 in due course. In light of the provisions of section 205 of the Penal Code, Mr. Chirambo submitted that the sight of the deceased fondling his wife; the 2nd accused, ignited the rage in the 1st accused. The rage was also exacerbated by the attack that was launched by the deceased against the 1st accused. Both events, Mr. Chirambo argued, culminated in a full fledged fight, and the eventual death of the deceased. Mr. Chirambo submitted that the defence of self-defence entitles the 1st accused to an acquittal. And thus he urged me to acquit the 1st accused. In the alternative, Mr. Chirambo submitted that I should reduce the charge from murder to manslaughter on the basis of the defence of provocation.

As regards, the 2nd accused, Mr. Chirambo submitted that she acted under duress. And he urged me to acquit her. Mr. Chirambo also pointed out that section 397(2) of the Penal Code does not apply to the 2nd accused.

I am indebted to counsel for their well researched submissions, and arguments. It is common ground that the 1st accused killed the deceased. What is dispute however is whether or not the killing was lawful or justifiable. Before I deal with the evidence, it is necessary to consider the following defences: and issue; provocation; self-defence; duress; and common purpose or design.

PROVOCATION

In deciding whether the 1st accused intended to cause death or grievous bodily harm, it is necessary to consider the evidence and submissions relating to provocation. The common law rule relating to provocation was stated by Devlin J in what the Court of Criminal Appeal described as a classic direction in the following terms:

"Provocation is some act or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control rendering the accused so subject to passion as to make him or her for the moment not master of his mind."

Section 205 of the Penal Code provides for provocation in these words:

"205 (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 causes the death in the heat of passion, caused by sudden provocation as defined, and before there is time for his passion to cool, he is guilty of manslaughter only."

Section 206 goes on to define the term provocation in these terms:

"206 (1) The term "provocation means and includes, except as hereafter stated, any wrongful act or insult of such nature as to be likely, when done or 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 stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, 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. 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, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any 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 which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault."

In *Holmes v Director of Public Prosecutions [1946] A.C. 588,* Viscount Simon elucidated the doctrine of provocation in these words:

"The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very exception has been recognised, viz, the actual finding of a spouse in an act of adultery. This has always been treated as an exception to the general rule."

In the *Lee Chun-Huen v R [1963] 1 ALL E.R. 73,* Lord Devlin explained (at page 79) that provocation in law consist mainly of three elements: the act of provocation; the loss of self-control, both actual and reasonable; and the retaliation proportionate to the provocation. Lord Devlin pointed out that: these elements are not detached. Their relationship to each other___ particularly in point of time, whether there was time for passion to cool__ is of first importance. The point that was stressed in the *Lee Chun Chuen* (supra) is not provocation in law means something more than a provocative incident.

The analysis of provocation by L.J. Devlin in the *Lee-Chun Chuen case* (supra) referred to above was adopted by the Supreme Court in one of the leading cases on provocation; the case of *Liyumbi v The People (1978) Z.R. 25.* In a judgment delivered by Chomba, JS; after adverting to the statutory provisions relating to provocation in the Penal Code-now in sections 205 and 206, the Supreme Court observed (at page 28), that the following 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 his guilt 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 de 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.

In *Chibeka v R (1959) 1 R and N 476*, the Federal Supreme Court counselled that:

"One must consider the whole of the provocation given and the whole of the accused's reaction to it, including the weapon, if any, used, the way it came to hand, the way it was used, and every other relevant factor, and must finally decide whether an ordinary man of the accused community – with his ordinary allowance of human wickedness – might have done what the accused did."

It must be pointed out from the outset that it is not of course for the defence to make out a *prima facie* case of provocation. It is for the prosecution to prove that the killing was unprovoked. All that the defence need to do is to point to the material which would induce a reasonable doubt. (See *Lee – Chun Chuen v R* (Supra) (at page 77) per Lord Devlin). The classic statement of this aspect of the law was made by Viscount Simon in *Holmes v Director of Public Prosecutions* (supra) at page 126 as follows:

"If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death, it is the duty of the judge as a matter of law to direct the jury that the evidence does not support a

verdict of manslaughter. If on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal, results and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts, manslaughter or murder is the appropriate verdict."

LOSS OF SELF-CONTROL.

One of the key elements of the defence of provocation is the sudden and temporary loss of self-control that deprives an accused person of the leverage of his mind. In order to appreciate this element, I will discuss briefly below two decided cases. The first is the case of *Makomela v The People (1974) Z.R. 254.* The facts of the case were as follows: the appellant, a headman of a village was convicted of murder. On a previous occasion, the deceased who was the appellant's nephew had stolen some money from the appellant, but he had not reported the matter to the police because the deceased parents had warned him that if he did so, the deceased would kill him. On the day the deceased was killed, the appellant, on returning to his house after an absence of a few minutes had seen the deceased coming out of it; he warned the deceased not to enter his house and told him that if his money was missing, he would hold the deceased responsible. Later, he went into the house and found the money missing. He went out and called the deceased and accused him of having taken the money.

The deceased armed himself with a stick and threatened to beat up the appellant. The appellant ran away, and picked up a gun which was in the bush. He then called the deceased's mother and told her that he was going to kill her son because she had prevented the appellant from taking him to the police station and he wanted to kill the deceased on account of his money. The appellant then shot the deceased and went to the police station and reported the matter.

Baron D.C.J., in delivering the judgment of the Supreme Court observed (at page 257), that the Supreme Court had difficulty in understanding the basis on which the trial judge held that the appellant acted under provocation. Because the evidence seems overwhelming that there was plenty of time for his passion to cool and that after the provocation was offered he did act with coolness and deliberation. On this account alone, the Supreme Court found that there was not room for finding that the appellant acted under stress of provocation. The Supreme Court went on to observe (at page 258), that it is important not to overlook that the question is not merely whether an accused was provoked into losing self-control, but also whether a reasonable man would have lost his self-control, and having done so would have acted as the accused did. The Supreme Court held that loss of self control is not absolute; it is a matter of degree. Thus a person who completely loses his temper on some trivial provocation reacts with gross and savage violence cannot hope for a verdict of manslaughter on the ground of provocation.

On the facts of the *Makomela case* (supra), the Supreme Court found that there was no room for finding that the appellant had been provoked because there was plenty of time for his “passion to cool”, and after the provocation was offered, he did in fact act with coolness and deliberation.

The second case to be considered is the case of *Mwiimbe v The People (1986) Z.R. 15.* The appellant was convicted of the murder of her husband and sentenced to death. She appealed claiming cumulative and immediate provocation on the basis of the couple’s unhappy marital history. The Supreme Court, in a judgment delivered by Ngulube, D.C.J., held that evidence of cumulative provocation in the absence of immediate provocation cannot suffice to establish the three vital elements of the defence to stand. Wit, the act of provocation, the loss of self-control, and the appropriate retaliation. But more importantly, the Supreme Court observed (at page 21), that the evidence far from suggesting any provocation or any loss of self-control, indicated that the appellant embarked on a course of action which

was dispassionate and deliberate. And certainly not in the heat of the passion upon a sudden provocation. Thus on the test laid down in the *Liyumbi case* (supra), the defence failed on account of the absence of all the three elements. It must be stressed that for provocation to reduce murder to manslaughter, it must be sudden. (See *Munkala v The People (1966) Z.R, 12)*.

REASONABLE RETALIATION.

It is a requirement of the defence of provocation that the retaliation must be proportionate. The English case of *Mancini v the Director of Public Prosecutions [1942] A.C. 1*, points to the importance of considering the nature of the weapon used in retort. In the case of *Mancini* (supra), Mc Naghten, J, was held to be justified in excluding the possibility of mere manslaughter, when a dagger was employed in resentment to a blow aimed at the accused with a fist; for the mode of resentment must bear a reasonable relationship to provocation if the offence is to be reduced to manslaughter.

Be that as it may, it is noteworthy that in the *Tembo v the People (1972) Z.R. 220,* in a judgment delivered by Baron, JP, the Court of Appeal observed (at page 227), that the Courts in the common law countries have always been slow to apply over fine tests to actions taken and weapons used in the heat of the moment. The facts of the case in the *Tembo case* (supra) were that the appellant and the deceased fought during an argument in a bar. And the appellant stabbed the deceased with a knife. He was convicted of murder. In setting aside the conviction, the Court of Appeal observed (at page 227), that the position would have been quite different had the appellant gone away to fetch the knife. But that was not the situation. And on the facts, the Court of Appeal posited that a trial Court might not have regarded the

retaliation as excessive to the extent of bringing the matter within the provisions of section 205 (2) of the Penal Code.

ADULTERY; GRAVEST FORM OF PROVOCATION.

The doctrine that provocation may reduce murder to manslaughter seldom applies. Only one exception has been recognised; finding a spouse in *flagrante delicto,* or in an act of adultery. A case in point is *Kalinda v The People (1966) Z.R. 29*. The facts of the case are that the appellant was convicted of murder. His defence at the trial was insanity and sudden provocation. On appeal to the Court of Appeal, the grounds of appeal solely related to insanity. But the Court considered that the question of sudden provocation should also be argued, and therefore gave leave for that to be done.

The facts put forward at trial by the appellant and his witnesses were that appellant had been living happily for many years with his wife and seven children. Early in 1964, his wife started running around with other men. This caused the appellant, who was a church elder a great deal of distress. Appellant did not actually find his wife in *flagrante delicto*. But in July, 1964, she admitted that she had committed adultery with a certain man and on number of occasions appellant had observed physical signs which heightened his suspicions as to his wife's behaviour.

On 13th May, 1964, appellant found his wife packing her belongings and adjusting her bicycle. She then told appellant that she was leaving to marry another man and that she would take the children with her. Appellant became enraged, lost his senses, and shot her twice with a shotgun.

In delivering the judgment of the Court of Appeal, Doyle, JA, made the following observation at page 30:

"To be found in adultery has in the English 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 the equivalent of being found in adultery and to be grave and sudden provocation. There is a difference but little distinction between confessing to past adultery and stating that one is about to commit it."

Ultimately, the Court of Appeal allowed the appeal, quashed the conviction for murder, and substituted a conviction for manslaughter with a sentence of five years imprisonment.

WHEN EXCESSIVE FORCE CAN REDUCE MURDER TO MANSLAUGHTER

Where an accused person is motivated not by a revengeful desire to cause grievous harm, but rather by a lawful intention and applies excessive force in the process, the resulting death is not murder, but is manslaughter. To illustrate this principle, I will refer to the case of *Mulenga v The People (1966) Z.R. 118*; a case decided by the Court of Appeal. The facts of the case were as follows: the appellant was a night watchman at a farm at Choma. Early on the morning of 3rd October, 1965, the appellant was awakened by his own chickens making noise. He went outside with a loaded shotgun, and saw the deceased hiding in the chicken run. The appellant shouted for assistance. The deceased tried to escape. And the appellant went to the door of the building and fired a shot in the air. The deceased then tried to escape through a window. And the appellant aimed at his legs, and shot him at a range of about ten feet. The deceased ran a few yards and fell. He had suffered gunshot wounds in both thighs from which he bled to death in a few minutes.

The trial judge went on to find that the:

a) appellant could have grappled with the deceased or struck him with the gun and that he had used unnecessary force to effect the arrest;
b) appellant's intention was to maim the deceased;

c) appellant's intention was to do serious harm to the deceased;
d) appellant knew that shooting the deceased at short range would probably cause grievous harm; and
e) appellant had no intention of killing the deceased.

Ultimately, the trial judge found that malice aforethought had been proved in satisfaction of paragraphs (a) and (b) of the definition in section 180 of the Penal Code, and found the appellant guilty of murder.

The appeal that ensued was directed to three issues, that:

a) the appellant had no malice aforethought;
b) the appellant was entitled to arrest the deceased and used only necessary or at least excusable force; and
c) even if unnecessary force was used, the offence only amounted to manslaughter.

In a judgment delivered by Doyle, JA, the Court of Appeal observed (at page 120), that the legal effect of the use of excessive force was considered in the Australian case of *R v Howe 100 C.L.R. 448; H.L.J. R. 212*. In that case, the prisoner had shot a man whom he alleged had made a sexual assault on him. One of his defences was self-defence to protect himself from further assault. The trial judge directed the jury that if the force was excessive i.e. greater than was necessary for mere defence, the defence of self-defence was not maintainable, and the resulting crime was murder. In the end, he was convicted of murder.

On appeal, the Supreme Court of South Australia sitting as a Court of Criminal Appeal held that the direction was erroneous and that the law was that a person who is subjected to violent and felonious attack and who in endeavouring by way of self-defence to prevent the consummation of that attack by force exercises more force than a reasonable man would consider necessary, but no more than he honestly believes to be necessary in the

circumstances, is guilty of manslaughter not murder. On further appeal by the Crown, the High Court of Australia after an exhaustive review of English, Canadian, and United States decisions, upheld the ruling of the Supreme Court.

In the *Mulenga* case (supra), the Court of Appeal also recalled that in *Jackson v R 1962, R and N 157,* the Federal Supreme Court came to the same conclusion. The judgment of the Court was delivered by Briggs, F.J, and was largely based on *R v Howe* (supra). A number of East African cases were also considered. And the substance of the judgment is summed up in the following passage at page 166:

"In cases where all other necessary conditions for a defence of self-defence exist, but more force than is necessary or proper is used and death is caused, I think the true principle of English law must be similar to that of the Scottish or the Roman Dutch law. I would say that, because the assault is prima facie a lawful, no unlawful act, malice aforethought is not ordinarily to be inferred from an intent to cause grievous harm, or even in some cases to kill. It must be shown either from collateral circumstances, such as an antecedent expression of an intention or taking up an offensive weapon before the attack is anticipated or from so gross a dispiratity between the attack and means of retaliation as to show an intention not to defend oneself, but to take a violent and murderous revenge..."

The Court of Appeal went on to observe as follows at page 122:

"Where the force was grossly excessive it would be strong evidence that the acts were not done in good faith, but in the earlier words of Briggs F.J; showed an intention to take violent and murderous revenge."

The Court of Appeal observed that on the facts of the *Mulenga case* (supra), and the trial judge's findings showed that the appellant was moved not by a vengeful desire to cause grievous harm, but his lawful intention to arrest the deceased. In the circumstances, the Court of Appeal held that appellant's honest though mistaken use of excessive force did not result in murder. Accordingly, the Court allowed the appeal, substituted a verdict of

manslaughter, and sentenced appellant to two years imprisonment with hard labour.

SELF-DEFENCE

Self-defence or private defence, as it is sometimes referred to, is said to be a matter of justification and not merely a matter of mercy to a defender.

Thus section 17 of the Penal Code enacts that:

"17 subject to any other provisions of this Code or another law for the time being in force, a person shall not be criminally responsible for the use of force in repelling an unlawful attack upon his person or property; or the person or property of any other person if the means he uses and the degree of force he employees in doing so are no more than is necessary in the circumstances to repel the unlawful attack."

According to Michael J Allen and Simon Cooper, in Elliot and Woods, Cases and Materials on Criminal Law, Ninth Edition, (London, Sweet and Maxwell 2006) at page 337, if the choice is between injury to an aggressor and injury to a defender, it is better that the injury be suffered by the aggressor for two reasons. First, it is the aggressor who is the prime cause of the mischief. Second, a rule allowing defensive action tend to inhibit aggression or at least to restrain its continuance, as a rule forbiding defensive action would tend to promote it. The learned authors go on to state that it follows that if a person acts against a wrong doer in the actual necessity of a private defence, no one who assists him should be guilty as bringing about a wrongful act, whatever may have been reason why he lent his resistance.

J.C. Smith, in Smith and Hogan, Criminal Law, Eighth Edition, (London, Butterworths, 1996) states at page 259, that force causing personal injury, damage to property, or even death may be justified because the force was reasonably used in the defence of certain public or private interests. A

question that may arise therefore is this: When is the use of force reasonable? The learned author of Smith and Hogan Criminal Law, (supra) state (at page 261) that the Court in considering what was reasonable force would take into account all the circumstances, including in particular the nature and degree of force used, the seriousness of the evil to be prevented, and the possibility of preventing it by other means. Thus the learned author of Smith and Hogan, Criminal Law (supra), state (at page 262), that it cannot be reasonable to cause harm unless:

(i) it was necessary to do so in order to prevent a crime or effect an arrest, and

(ii) the evil that would follow from failure to prevent the crime or effect the arrest is so great that a reasonable man might think himself justified in causing that harm to avert that evil.

The learned author of Smith and Hogan on Criminal law (supra)goes on to, postulate at (page 262), that it is likely therefore that even killing will be justifiable to prevent unlawful killing or grievous bodily harm, or to arrest a man where there is an imminent risk of his causing death or grievous bodily harm if left at liberty.

PRINCIPLE

According to P.J. Richardson, Archbold Criminal Pleading, Evidence and Practice, 2012 (Thomson Reuters (Professional) UK Limited), in paragraph 19 – 41a at page 1868, the classic pronouncement upon the law relating to self-defence is that of the Privy Council in *Palmer v R [1971] A.C. 814,* approved and followed by the Court of Appeal in *R v Mc Innes 55 Cr App. R. 551* as follows:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstance... It may in some case be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be, if there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. Of all these matters the good sense of the jury will be the arbiter. There are no prescribed words which must be employed... in summing up."

The learned author of Archbold Criminal Pleading, Evidence and Practice, 2012, (supra) goes on the state in the same paragraph 19-4, at page 1868, that:

"All that is needed is a clear exposition in relation to the particular facts of the case, of the concept of necessary self-defence. If there has been an attack so that defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action: If the jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken... The defence of self-defence either succeeds so as to result in acquittal or it is disapproved in which case as a defence it is rejected. Per Lord Morris, at page 831 – 832."

In order to appreciate the application of the defence of self-defence, I will pass to consider a line of Zambian cases. The first case I will advert to, is the case of *The People v Lewis (1975) Z.R. 43;* a High Court judgment delivered by Cullinan, J, but was cited with approval by the Supreme Court in the case of *Mwiimbe v The People (1986) Z.R. 15* at page 20. In the *Lewis case* (supra), it was common cause with the prosecution and the defence that the

accused caused the death of the deceased. The defence was however that the accused acted in self-defence, and failing that under provocation.

Cullinan, J, observed (at page 49), that in considering the defence of self-defence, two aspects arise: The first is the question of retreat. And the second the degree of retaliation. Cullinan, J, referred to, and adopted the passage from *R v Mc Innes* (supra) referred to above, at pages 300-1, that a failure to retreat is only an element in the considerations on which the reasonableness of an accused's conduct is to be judged. Or simply a fact to be taken into account in deciding whether it was necessary to use force. And whether the force used was reasonable. Cullinan, J, opined that the law relating to the defence of self-defence was accurately set out in *R v Julien [1969] 2 ALL E.R. 856,* by Wildgery, L.J, in the following terms:

"It is not, as we understand it, the law that a person threatened must take to his heals and run in the dramatic way suggested by counsel for the appellant, but what is necessary is that he should demonstrate by his actions that he is prepared to temporise and disengage, and perhaps to make some physical withdrawal, and to the extent that is necessary as a feature of the justification of self-defence, it is true in our opinion, whether the charge is a homicide charge or something less serious."

Cullinan J, observed (at page 50) that the preceding passage seemed to resonate with a passage in the judgment of Tredgold, J, in *Mwale v R (1958) R and N 530* as follows:

"We consider that in this application of the law to the facts of the case, the learned judge did not make sufficient allowance for the extremity of the situation in which the appellant found himself when a man is the object of a murderous assault, it is too much to expect a nice discrimination in the methods he chooses to defend himself. In calm restrospect other alternatives may appear, but it must always be remembered that in such circumstances a man acts under stress of the moment. He has to act swiftly and decisively, and the reasonableness of the course he adopts must be judged accordingly. The obligation on man so assailed to retreat rather than to strike down his assailant is not absolute. If by retreating he enhances rather than avoids the danger to himself and it is easy to envisage circumstances in which this would be the case, it would not be reasonable to expect him to retreat. For example, a man threatened in open country with a firearm is not obliged to

run away. To do so would be merely foolish and if the retreat is determined and he can shoot first he would be fully entitled to do so. The situation should not be judged by rule, but on the particular facts of each case and there is no better approach than that the trier of the same issue should imagine himself in the position of the accused and ask how he would himself have acted."

On the facts of the *Lewis* case (supra) judge Cullinan observed (at page 52) that his was the case of: "a w*oman lying prone, trapped in her bed, facing a heavy man weighing almost fourteen stone, admittedly her husband, but nonetheless a man of moody and aggressive habits, who had beaten her on a number of occasions before and so recently that still bore the marks of the last beating, and who now brandished a curving knife threatening to kill her*."

Thus, by killing her husband, judge Cullinan held that the accused acted in reasonable self-defence, and the defence was therefore available. Accordingly, the accused was acquitted.

In *Mwiimbe v The People* (supra) referred to above, Ngulube D.C.J. noted (at page 9), that principles governing the defence of self-defence as provided for under section 17 of the Penal Code have normally not been the subject of controversy. It is usually the application of those principles to the facts in any given case that difficulties are encountered. Ngulube, D.C.J., went on to observe at page 19 as follows:

"In our view the authorities make it abundantly clear that the facts of any particular case will show whether or not the situation which the accused found himself, including the nature of the attack upon himself or the gravity of imminent peril was such that it was both reasonable and necessary to take the particular action which has caused death in order to preserve his own life or to prevent grave danger to himself. Or another."

Earlier on, in *Makomela v The People* (supra) referred to above, Baron D.C.J. observed (at page 256), that as regards the question of self-defence, the trial judge had posed the following question: was the appellant's life in immediate danger. Or were there reasonable grounds to believe? In response to these questions, the trial judge expressed himself to be satisfied on the facts that the appellant's life could not have been in immediate danger when he shot

the deceased. And that the appellant had no reasonable grounds so to believe. Baron, D.C.J, observed (at page 257) that the approach of the trial judge on the issue was impeccable, and his findings could not be disturbed.

Another seminal case, on the defence of self-defence, is *Tembo v The People (1980) Z.R. 209*; a decision of the Supreme Court. The facts of the case were that there was a disturbance in the appellant's chicken run, and the deceased a servant from next door went unarmed into the chicken run to find out the cause. In so doing, he presumably frightened away a former intruder who was the fully dressed man seen running away behind the servants quarters by the appellant. Having seen one man run away, the appellant went back to his house and obtained a pistol which he fired into the air as a warning. When he received no reply to his challenge, of who is there, he walked away about forty-five metres towards the chicken run until he saw a dark figure inside the run at which he fired. The trial judge found that the shooting of the deceased was a use of force wholly out of proportion to the necessities of the situation. He convicted the appellant, and sentence him to three years imprisonment with hard labour for manslaughter.

On appeal, in a judgment delivered by Gardner, Ag D.C.J., the Supreme Court made the following observation at page 214: the defence of self-defence is absolute. If a person is charged with murder and raises the defence, he must either be acquitted, if the force he used was reasonable, or convicted of murder if the force used was unreasonable. The Supreme Court went on to observe (at page 217) that: in considering whether the appellant was reasonable in assuming that he was in danger to such an extent that it was necessary to shoot at the figure, the Court was bound to take into account the difference between a person who is attacked and has to decide how to defend himself in anguish of the moment, and a person who has heard a disturbance in an outbuilding sixty-five metres away from his house; who has seen a person run away, and who had the presence of mind to go into his house obtain a pistol; and fire a warning shot in the air to accompany his

challenge to the intruder. The Supreme Court concluded that in the circumstances in which the appellant found himself, the Court was bound to hold that he was not faced with a moment of unexpected anguish as would be experienced by a person subjected to a direct assault. Thus, the Court held that it was unreasonable for the appellant to believe that the intruders in the chicken run were armed robbers likely to attack him. Ultimately, the Supreme Court held that the appellant's belief that the intruder was armed was quite unreasonable, and his shooting of the deceased therefore amounted to an excessive use of force, which warranted conviction.

The last case I will consider in this line of cases is *Zulu v The People (1981) Z.R. 341;* another Supreme Court decision. The facts of the case were that the appellant was convicted of murder of her husband. The trial judge found, *inter alia*, that during the marriage of the parties, 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 when the incident occurred, the appellant had an argument with the deceased where upon the latter loaded a pistol in the presence of the appellant after remarking:

"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 dressed herself, and prepared to go out when the deceased called her. She went into the bathroom, and found her husband naked in the bath with soap on his face. The deceased then made an attempt to the gun from top of the toilet cistern saying: *"you think I cannot kill you."* The appellant 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 there was no provocation because the assaults by the deceased upon the appellant in the past were remote and had ceased; and that once the appellant had seized the gun, she had every possibility of retreat and there was no need whatsoever to use the gun.

On appeal, in a judgment delivered by Gardner, Ag D.C.J.; the Supreme Court observed at page 343 that: the trial judge properly advised himself that in accordance with the case of *R v Mc Innes*, (supra) referred to above, the possibility of retreat must be taken into account, and in all cases of this nature the possibility of provocation must be considered. The Supreme Court went on to observe that the immediate attempt by the deceased to seize the gun when the appellant entered the bathroom was itself an act of grave provocation, apart altogether from the cumulative aspect of the severe provocation experienced over the years and the appeal on that ground would be bound to result in a finding of provocation.

As regards the defence of self-defence, the Supreme Court observed that the trial judge found that after the appellant had seized the gun, she was *"near the bathroom door;"* and that it was therefore possible for her to escape. The Supreme Court criticised this finding by the trial judge. And observed (at page 343), that the trial judge failed to appreciate that when both parties were close to the gun, the deceased who had shown by his past behaviour that he was capable of extreme violence, was so close to the appellant, that he was capable of attacking her, and that at that stage, 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 use the weapon first.

The Supreme Court also recalled the observation of the Court of Appeal in *Tembo v The People* (supra) (at page 227) referred to above, that the Courts in the common law countries have always been slow to apply over fine tests to actions taken and weapons used in the heat of the moment. The Supreme Court went on to observe (at page 343-344), that it was a moment of

unexpected anguish for the appellant. And therefore found it extremely difficult to gauge what would have been reasonable retaliation by the appellant. This difficulty, the Supreme Court noted, was enhanced by the very fact that the appellant was a member of the physically weaker sex. Overall, the Supreme Court was satisfied that had the trial judge considered all these aspects, he would not have convicted the appellant. The appeal was therefore allowed, the conviction quashed, and the sentence set aside.

DURESS

According to the learned author of Smith and Hogan Criminal Law, (supra) (at page 237), for centuries the law was recognised a defence of duress by threats. The defence is explained in these terms: where D is told, *"Do this [an act which would be a crime if there were no defence of duress]-or you will be killed,"* and, fearing for life, he does the required act.

The learned author points out (at page 237), that quite recently the law has recognised another form of duress; duress of circumstances. This is explained in these words: again, D does the act alleged to constitute the crime out of fear, but this time no one is demanding that he do it. He does it because his life is threatened and his only escape is to do the act, which, but for the duress would be a crime. The compulsion on D to do the act, is exactly the same whether the threat comes from someone demanding that he does it, or from an aggressor, or other circumstances. His moral culpability or lack of it, is exactly the same.

In order to appreciate the defence of duress fully, I will advert to the case of *Kundiona v The People (1993-1994) Z.R. 59*; a Supreme Court decision. The facts of the case were that the appellant was convicted of two accounts of contempt and sentenced to two terms of six months imprisonment to run concurrently. He appealed against both convictions and sentence. On appeal, he raised the defence of duress.

In delivering the judgment of the Supreme Court, erstwhile Chief Justice Ngulube, observed at page 64, that the defence of duress is provided for under section 16 of the Penal Code as amended by Act Number 3 of 1990; which repealed and replaced the old section 16. Section 16 now reads as follows:

"16(1) Except as provided in this section, a person shall not be guilty of an offence if he does or omits to do any act under duress or coercion.

(2) For the purpose of this section a person shall be regarded as having done or omitted to do any act under duress if he was induced to do or about to do the act by any threat of death or grievous harm to himself or another and if at the time when he did or omitted to do the act he believed (whether or not on reasonable grounds).

a) that harm threatened was death or grievous injury;

b) that the threat would be carried out__

(i) immediately; or

(ii) before he could have any real opportunity to seek official protection; if he did not do or omit to do the act in question; and

c) that there was no way of avoiding or preventing the harm threatened.

3) In this section "official protection" means that protection of the police or any other authority managing any prison or other custodial institution or any other authority concerned with the maintenance of law and order."

After reciting the amended section 16 of the Penal Code, Ngulube, C.J., observed (at page 65), that before the amendment of 1990, section 16 of the Penal Code read as follows:

"A person is not criminally responsible for any offence if it is committed by two or more offenders, and if the act done or omitted only because during the whole of the time which is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill or do him grievous bodily harm. If he refuses; but threats of future injury do not excuse any offence."

Ngulube, C.J., went on to observe as follows:

"It seems to us that the new section introduced a number of new elements which should have been taken into account. It is no longer a requirement that the offender pleading duress was jointly engaged in committing an offence with the person or persons who throughout the duration of the commission of that offence compelled him to participate by threat of immediate serious physical harm or death. That was the state of the law when Nguila v The Queen (1963-1964) Z.N.R. 14., was decided in which the defence was not of immediate danger to life or limb, but consisted of threats to burn the reluctant offenders own houses if they did not participate in a politically inspired orgy of arson against opponents houses."

Ngulube, C.J., continued at page 66:

"It seems to us that under the new section, it suffices for a reluctant offender to show that he believed (apparently even on grounds which may not be reported as reasonable when considered objectively) the harm threatened was death or grievous injury. Next, he had to show that he believed the threat would be carried out immediately or before he could have any real opportunity to seek official protection as defined, and there was no way of avoiding or preventing the harm threatened. The prosecution would have the burden of disproving these."

In sum, Ngulube, C.J., observed (at page 67), that duress is supposed to be a complete defence in certain circumstances and the law appears to have introduced it as a merciful concession to human frailty. Thus the offender is to be taken as having acted under duress if was induced to take the action by any threat of harm to himself or another at the time he took it, he believed, whether or not on reasonable grounds that:

a) the harm threatened was death or serious personal injury;
b) the threat would be carried out immediately if he did not take the action in question or if not immediately before he could have any real opportunity of seeking official protection; and

c) there was no other way of avoiding or preventing the harm threatened; provided, however, that in all circumstances of the case he could not reasonably have been expected to resist the threat.

I hasten to add that while duress is a defence to all crimes, it would hardly ever be available to a person charged with murder. (See *R v Howe and Others [1987] A.C. 417; and Kundiona v The People* (supra) at page 66). The defence is also not available to a person charged with murder as an aider, abbetter, counsellor, or procurer, (see Archbold, Criminal Pleading, Evidence and Practice, 2012 (supra) paragraph 17-119, at page 1835, and also *R v Howe [1987] A.C. 417).*

The rationale for not extending the defence of self-defence to murder was explained in these words in Hale and Blackstone; Rules Pleas of the Crown (1736), volume 1, at page 51:

"If a man be desperately assaulted and in peril of death, and cannot otherwise escape unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will to acquit him of the crime and punishment of murder if he commit the fact, for he ought rather to die himself than kill an innocent..."

Blackstone Commentaries on the Laws of England (1857), volume 4, wrote to the same effect at page 28. Namely, that a man under duress: *"ought rather to die himself, than escape by the murder of an innocent."*

I will now proceed to consider the doctrine of common purpose.

COMMON PURPOSE

The doctrine of common purpose or design entails that a participation in the commission of crime which is the result of a common purpose or concerted design to commit a specific offence is sufficient to render the participant a principal. To this end section 22 of the Penal Code enacts as follows:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of

such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

In order to comprehend the import of the preceding provision, it is necessary to consider a line of Zambian cases. The first case be considered is the case of *Mutambo and Others v The People (1965) Z.R. 15*. This was a murder case in which the Court of Appeal considered, *inter alia*, the import of section 22 of the Penal Code.

In a judgment delivered by Charles J, the Court of Appeal observed (at pages 25-26), that to bring an appellant within section 22 as being guilty of murder, the following facts must have been proved against him beyond reasonable doubt:

i) that two or more persons, of whom the appellant was one, each formed an intention to prosecute common purpose in conjunction with the other or others;
ii) that the common purpose was unlawful;
iii) that the parties, or some of them, including the appellant; commenced or joined in the prosecution of the common purpose;
iv) that, in the course of prosecuting the common purpose, one or more of the participants murdered a person; and
v) that the commission of the murder was a probable consequence of the prosecution of the common purpose.

The Court of Appeal pointed out (at page 26), that it would seem that a probable consequence is that which a person of average competence and knowledge might be expected to foresee as likely to follow upon the prosecution of the particular purpose; though it may be that the particular consequence was not intended or foreseen by the appellant.

The Court of Appeal further pointed out (at page 26), that two points need to be noted in the application of section 22. First, that the formation of the common purpose does not have to be by express agreement or otherwise premidated; it is sufficient if two or more person join together in the prosecution of a purpose which is common to him and other or others, and each does so with the intention of participating in that prosecution with the other or others.

Second, it is the offence which was actually committed in the course of prosecuting the common purpose which must be a probable consequence of the prosecution of the common purpose. If a different offence to that committed was a probable consequence, an accused cannot be convicted under the section. Thus if the offence actually committed was murder, but the offence which was a probable consequence was manslaughter, the section does not apply.

The second case that will be considered is *Haonga and Others v The People (1976) Z.R. 200;* a Supreme Court decision. The facts of the case were that the appellants were convicted of the murder of a farmer who was shot and killed during an armed robbery carried out by five men. The appellants were identified by one witness as the occupants of a car which had been involved in an accident some three hours before the time of the murder. Two of the appellants were identified each by one witness, as having been among the five robbers, and a third was found some weeks later in possession of a firearm from which the fatal shots were proved to have been fired. The evidence as to who fired the shots was conflicting, and the prosecution conceded that the case must proceed on the basis that it was not known who fired them.

It was argued on appeal by the respondent that once it is proved that a group of persons were engaged together in the commission of a felony, and

someone is killed, then all are guilty of murder. In a judgment delivered by Baron, D.C.J., the Supreme Court recognised the force in the submission in a case where the death results from the kind of act which was part of the common design. The Supreme Court went on to observe at page 207 that:

"Suppose for instance a gang in planning a robbery at a place where a night-watchman is known to be employed agree to incapacitate the watchman and to gag him in order to prevent his raising an alarm; and suppose that the watchman dies as a result. It seems to us that if this be murder in one, then it is murder in all. But the authorities are clear that where death results from an act of one of a gang which went beyond the common design to which the others were parties, those others cannot be convicted of the offence of which one is guilty."

In aid of the preceding dictum, the Supreme Court relied on the English case of *Davies v Director of Public Prosecution [1954] 1 ALL E.R. 507*. The facts of the case were that a gang of six youths attacked four others. During the attack a knife was used and subsequently one of the second group of four youths died of wounds. It was proved that Davies used the knife, but since there was no evidence that any of the others knew he had it, they were acquitted; they were subsequently arraigned on another charge.

Again, in the *Haonga case* (supra) the Supreme Court referred to and relied on *R v Lovesay, R v Peterson [1969] 2 ALL E.R. 1077*. The facts of the case were that the appellants were charged with robbery with violence and murder arising out of an incident in which a jeweller was found handcuffed to a railing in the basement of his shop suffering from severe head injuries from which he died. The appellants were convicted on both accounts. There was no direct evidence of how many men had been involved in the crime or of their individual roles. On appeal against the conviction of murder, the appeals were allowed because the offences did not necessarily stand together.

In the course of the judgment of the Court Appeal, the following instructive observation was made by Widgery L.J., at page 1079:

"There was clearly a common design to rob, but that would not suffice to convict of murder unless the common design included the use of whatever force necessary to achieve the robbers objects (or to permit escape without fear or subsequent identification), even if this involved killing or the infliction of grievous bodily harm on the victim."

On the facts of the *Haonga case* (supra), the Supreme Court held that there was no evidence that the other members of the gang whoever they were, knew that a firearm was been carried by one of them. As a consequence, it was not proved beyond reasonable doubt that the use of the firearm was part of the common design to which all the members of the gang were party.

The third case that will be considered in this line of cases is *Mwape v The People (1976) Z.R. 160*. The facts of the case were that the appellant was convicted of robbery and received the mandatory minimum sentence. He had jointly been charged with another man together with others persons unknown, the allegation being that while, acting together, they robbed a Zambia Consumer Buying Corporation (ZCBC) shop at Mporokoso of a large sum of money and a large quantity of merchandise. And that at or immediately after such robbery, they used or threatened violence to a night watchman. However, paucity of evidence to connect the appellant's co-accused, with the offence charged, resulted in his acquittal, at the close of the case for the defence. The night watchman had been stabbed in the leg, generally assaulted, tied up, and then carried a distance of about 170 metres from the shop where he was kept under guard by one man. The only fatal evidence again the appellant was his own confession which was properly admitted in evidence following a trial within a trial.

The question that arose on appeal is this: whether the appellant and his associates had formed a common intention to commit the offence of aggravated robbery. Delivering judgment of the Supreme Court, erstwhile

Chief Justice Silungwe observed (at page 164), that in law a participation which is the result of a concerted design to commit a specific offence is sufficient to render the participant a principal. After reciting section 22 of the Penal Code referred to above, Silungwe C.J. went on to observe at page 165 as follows:

"As can be seen from the appellants confession, it is quite clear that the expedition was to break into the ZCBC shop and to steal property therefrom. That was obviously the common purpose to which the appellant was a party. The offence of violence against the watchman which was committed by the appellants was not a probable consequence of the prosecution of the common purpose."

The last case that will be considered in this line of cases is *Sakala v The People (1987) Z.R. 23;* a decision of the Supreme Court. The facts of the case were that the appellant was convicted of aggravated robbery whilst acting together with two other conspirators. In the process of the robbery, a night watchman was hacked with an axe. On appeal, the appellant told the Court that the conspirators had specifically agreed that the night watchman would not be harmed, and that the appellant had been assured that there would be no resistance from the watchman. It was therefore the appellant's contention that he had agreed to participate in a simple store breaking and theft in which there would be no resistance from, and no violence to the watchman.

In a judgment delivered by Ngulube D.C.J, the Supreme Court observed (at page 25), that section 22 clearly contemplates that liability will attach to an adventurer for the criminal acts of his confederates, which will be considered to be his act also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common design. In this regard, Ngulube D.C.J,. went on to observe that, liability will attach for a confederate's criminal act which is within the scope of the common unlawful purpose, and this will be so whether the act was originally contemplated or not. Ngulube D.C.J. went on to point out (at page 25), that where the act was not originally contemplated, an adventurer will only be relieved of liability, if

the criminal act of his confederate falls wholly outside the common purpose. Ngulube, D.C.J, was quick to add that the question whether on the facts, the act which is alleged to be wholly alien to the common purpose fell within or outside the scope of the unlawful common enterprise, must be answered upon an examination of the facts themselves.

On the facts of the *Sakala case* (supra), Ngulube, D.C.J; concluded that there was no evidence that the appellant was a party to the scheme. In the circumstances, it followed that although the appellant may well have been told that harm would be done to the watchman, he must have realised that at least threats and possibly some force__ such as tying up___ would have to be used against the watchman if he discovered the intruders. This would have amounted to aggravated robbery and was within the contemplation of the appellant. In the end, the Supreme Court held that the fact that the watchman was axed contrary to the alleged agreement did not absolve the appellant of guilty intention that some form of aggravated robbery would take place if necessitated by the watchman's possible vigilance. Thus the appeal failed, and was dismissed.

Having discussed in *extensio,* the relevant branches of the law relating to this case, I will now proceed to apply the law to the facts. It is common ground that the 1st accused killed the deceased. What is in dispute however is twofold. First, whether the 1st accused killed the deceased with malice aforethought. And second, whether the 2nd accused was an accomplice or participant in the killing of the deceased. In refuting that the 1st accused killed the deceased with malice aforethought, the 1st accused has raised two defences. Namely, the defences of provocation, and self-defence. I will consider these defences in that order. I have already stated that in order for the defence of provocation to succeed, three elements must be present, and proved simultaneously. Namely, the act of provocation; the loss of self-

control-both actual and reasonable; and retaliation proportionate to the provocation. In this regard, provocation has also been said to be the sudden and temporary loss of self-control rendering the accused so subject to passion as to make him or her for the moment not master of his mind. The point about the sudden and temporary loss of self-control really is that it negatives malice. It is also of first importance that for provocation to reduce murder to manslaughter, it must be sudden. I must also stress here that the point about the question of loss of self-control, is a matter of degree. Thus, it is said that a person who completely loses his temper on some trivial provocation, and reacts with gross and savage violence, cannot hope for a verdict of manslaughter on the ground of provocation.

Ms Soko submitted, and I agree with the submissions that first, it is obvious from the evidence that the 1st accused embarked on a course of action which was dispassionate and deliberate. And certainly not in the heat of passion upon a sudden provocation. Second, that the 1st accused was not met by a sudden act of provocation. As a matter of fact, he was the chief architect or author of the provocative situation. Thus, the 1st accused should be barred from pleading and relying on a provocative situation that he contrived, and instigated himself. Third, there was an interval or interlude between the 2nd accused's confession, and the deceased arrival at the accused's home; that time lapse should have in my opinion given the 1st accused sufficient time to cool off. In all this, the 1st accused appeared to have acted with coolness and deliberation.

It is also a cardinal requirement of the defence of provocation that the retaliation employed must be proportionate. That is, the mode of resentment must bear a reasonable relationship to the provocation; if the offence of murder is to be reduced to manslaughter. It has been said that it has never been the law that a person who completely loses his temper on some trivial

provocation, and reacts with gross and savage violence which kills his victim can hope for a verdict of manslaughter on the grounds of provocation. Therefore, in calibrating the proportionality of the retaliation, it is always important to bear in mind the nature of the weapon used in retort.

In this case, a heavy metallic hammer was employed to strike on the head of the deceased twice; in resentment to a blow aimed at the accused with a fist. The accused could have in my opinion grappled with the deceased. In the circumstance, I opine that the 1st accused used excessive force. The force used is not excusable. In view of the foregoing, I am unable to see how the 1st accused in ruthlessly striking at the deceased with a heavy metallic hammer in retaliation to a blow striked at him, can be said to be a reasonable retaliation to that retort.

The matter does not however end here. Mr. Chirambo submitted that the sight of the deceased fondling his wife; the 2nd accused, ignited the rage in the 1st accused, and was exacerbated by the attack that was launched by the deceased against the 1st accused. I have stated elsewhere in this judgment that the doctrine of provocation seldoms reduces murder to manslaughter. The only exception that has been recognised is finding a spouse in *flagrante delicto*; or in act of adultery. In fact, adultery is considered to be one of the gravest forms of provocation. To this extent, a confession of adultery as demonstrated above, has been said to be equivalent of being found in adultery. And to be grave and sudden provocation. It is also said that there is difference, but little distinction between confessing to past adultery, and stating that one is about to commit it.

It is also trite that when a person is motivated not by a vengeful desire to cause grievous harm, but rather by a lawful intention, say to effect an arrest,

and applies excessive force in the process, the resulting death is not murder but is manslaughter. However, there is an exception to this general rule. Where it is shown from collateral circumstances such as an antecedent expression of an intention or taking up an offensive weapon before the attack is anticipated, or from so gross a disparity between the attack, and a means of retaliation as not to show an intention to defend himself, but to take a violent and murderous revenge, then a person is said to be motivated by a vengeful desire to cause grievous harm or death. The resulting death is murder, and not manslaughter.

In this case, the 1st accused contrived the circumstances leading to the scuffle and eventual death of the deceased. The use of excessive force by the 1st accused is in my opinion strong evidence that the force was not employed in good faith. But rather showed an intention to take a violent and murderous revenge. The 1st accused was in my opinion not moved by a desire to defend himself, but rather a vengeful desire to cause grievous harm or death. Overall, I have difficulty in finding that the 1st accused acted under stress of provocation. In the premises, the defence of provocation therefore fails.

I will now pass to consider the defence of self-defence. A person is not criminally responsible for the use of force in repelling an unlawful attack as long as the means used, and the degree of force employed in doing so, is no more than is necessary to repel the unlawful attack. It is therefore both good law and good sense that a person who is attacked may defend himself. But may only do what is reasonably necessary to defend himself. The question that however often exercises the minds of the Courts in considering the defence is this: when is the use of the force reasonable? In considering the defence, two aspects emerge: the first is question of retreat. And the second,

is the degree of retaliation. A failure to retreat is an element which is employed to measure or judge the reasonableness of the conduct of the accused. The failure to retreat is also a factor to be taken into account in deciding whether it was necessary to use force, and whether the force used was reasonable. I must hasten to add that the obligation on a person attacked to retreat, rather to strike down his assailant is not absolute. A situation should therefore not be judged by rule. But rather on the particular facts.

Second, the Court in considering whether reasonable force was employed, would take into account all the circumstances, including in particular the

nature and degree of force used, the weapon used, the seriousness of the evil to be prevented, and the possibility of preventing it by other means. In sum, the authorities make it abundantly clear that the facts of any particular case will show whether or not the situation in which the accused found himself, including the nature of the attack upon himself, or the gravity of imminent peril was such that it was both reasonable and necessary to take the particular action which has caused death in order to preserve his own life or to prevent grave danger to himself or another.

In this case, the critical questions that may be asked are these: was the accused life in immediate and imminent danger? And where they reasonable grounds to believe so? Mr. Chirambo argued that, first; the 1st accused had nowhere to run to, but to defend himself, his wife, and property. Second, that when the 1st accused felt overpowered by the deceased, he picked the nearest weapon; the heavy hammer, and struck the deceased twice in self-defence; defence of his property, and the children. Third, the 1st accused feared for his life; the force used to kill the deceased was reasonable; and

that if he had not killed the deceased, the deceased could have instead killed him.

I have carefully considered the events leading to the scuffle or fight between the 1st accused and the deceased. And I am not satisfied on the facts of this case that there was an immediate and imminent risk of the deceased causing death or grievous bodily harm, if he was left at liberty. The evil that confronted the 1st accused was not in my opinion so great as to warrant, or justify the nature and degree of force used in this case. Further, whilst the accused was not expected to take to his heels and run away in a dramatic fashion, he should have nonetheless demonstrated, in my opinion, that he was prepared to temporise and disengage. Or to make some physical withdrawal of some sort. Simply stated, when struck with the blow, the 1st accused should have considered taking some simple avoiding action.

The retaliation in this case was also in my opinion, wholly out of proportion to exigency of the moment. The employment of excessive force in this case, appears to have been a means of paying of an old score; revenging the acts of adultery committed by the deceased with his wife. The use of excessive force also suggests that there was no longer any nexus or link with a necessity of defence. In a word, the 1st accused life was not in my opinion in immediate and imminent danger, or object of a murderous assault. And the 1st accused had no reasonable grounds so to believe. The net result is that the defence of self-defence also fails.

I will now proceed to consider the defence of duress. The law has long recognised the defence of duress by threats. And duress is a complete defence in certain circumstances. An offender is to be taken as having acted under duress if he was induced to take the action, if he believed whether or

not on reasonable grounds that first, the harm threatened was death or serious persons injury. Second, the threat would be carried out if he did not take any action. And third, there was no other way of preventing the harm threatened.

While duress is a defence to all crimes, it would hardly be available to a person's charged with murder. The defence is also not available to person charged with murder as an aider, abbeiter, counsellor, or procurer. The rationale for the rule is that a person under duress ought rather to die himself, than escape by the murder of an innocent. In a word, I agree with Ms Soko's submission that duress is not available in a charge of murder.

In order to assess whether the 2nd accused is criminally liable for the offence of murder, it is necessary to consider the doctrine of common purpose or design. When two or more persons form a common intention to commit an unlawful purpose or act, and in the process commit an offence; if the commission of such offence is a probable consequence of the prosecution of the unlawful purpose or act, then each of them is deemed to have committed the offence. Thus in law a participation which is the result of a concerted design to commit a specific offence is sufficient to render the participant a principal. Thus, section 22 of the Penal Code contemplates that liability will attach to a person for the criminal acts of his confederates which will be considered his act also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common purpose or design. Where the act was not originally contemplated, an adventurer will only be relieved of liability if the criminal act of this confederate falls wholly outside the common purpose.

What then is a probable consequence of commission of an unlawful purpose. It is said that a probable consequence is that which a person of average competence and knowledge might be expected to foresee as likely to follow upon the prosecution of that particular purpose. It must be emphasized that first, the formation of the common purpose does not have to be by express agreement or premidated. Second, it is the offence which was actually committed in the course of prosecuting the common purpose which must be a probable consequence of the prosecution of the common purpose. But authorities are also clear that where death results from an act of one of a gang which went beyond the common purpose, or design to which the others where parties, those others cannot be convicted of the offence of which one is guilty.

On the facts of this case, there is no evidence whatsoever to suggest that the accused persons formed a common intention to kill the deceased. Put at the highest, the accused persons at the behest of and by dint of threats by the 1st accused, schemed the adventurous visit of the deceased to the accused's home in order to prove the adulterous relationship between the 2nd accused, and the deceased. I am therefore not prepared to hold that the death of the deceased was a result of the 1st and 2nd accused persons pursuing and jointly executing an unlawful purpose to kill the deceased.

The net result is that the defences of provocation and self-defence raised by the 1st accused have failed. And consequently, I find that the 1st accused killed the deceased with malice aforethought. Accordingly, I convict him of the offence of murder.

As regards the 2nd accused, there is no evidence to suggest that she jointly with the 1st accused formed the intention to kill the deceased, or indeed participated in the actual killing of the deceased. Accordingly, I acquit her of the offence of murder, and set her at liberty.

Dr. P. Matibini, SC.
HIGH COURT JUDGE