

J/COPT

**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT NDOLA**
(Criminal Jurisdiction)

HN/69/2016

THE PEOPLE

V

THOMAS VAN ROOYEN

Before the Honourable Mr. Justice Davies C. Mumba in Open Court on the
21st day of February, 2017.

**For the People : Mrs F.N. Tembo, Senior State Advocate
Mr. M. Lupiya, State Advocate
Mr. S. Zulu, State Advocate**

**For the Accused : Ms. K. Chitupila, Senior Legal Aid Counsel
Mr. I. Nyambe, Legal Aid Counsel**

JUDGMENT

Cases referred to:

1. Nyambe Mubukwanu Liyumbi v The People (1978) Z.R. 25
2. James Chibangu v The People (1978) Z.R. 37
3. The People v Kambilumbilu (1966) Z.R. 88
4. Gilbert Chileya v The People (1981) Z.R. 33
5. George Musupi v The People (1978) Z.R. 271
6. The People v Njobvu (1968) Z.R. 132
7. Dickson Sembauke Changwe and Another v The People (1988/1989) Z.R. 144
8. The People v Abel Zimba (2011) Z.R. 288
9. Mwewa Muroso v The People (2004) Z.R. 207
10. Kambarage Mpundu Kaunda v The People (1990/1992) Z.R. 533
11. Machobane v The People (1972) Z.R. 136 (Reprint)
12. The People v Daudi Phiri and Another (2012) 2 Z.R. 471 at 491
13. Holmes v The Director of Public Prosecutions (1942) A.C.1
14. Chibeka v R (1959) R and N 476
15. Makomela v The People (1974) Z.R. 254

16. *Manchini v The Director of Public Prosecutions* (1942) A.C.1
17. *Esther Mwiimbe v The People* (1986) Z.R. 15
18. *Jack Chanda v The People* (2002) Z.R. 124

Legislation Referred to:

- (1) The Penal Code, Cap. 87 - ss. 183, 200, 204 and 205
- (2) The Criminal Procedure Code, Cap.88 – s.207.

Thomas Van Rooyen, the accused herein, stands charged with the murder of his wife contrary to section 200 of the Penal Code, chapter 87 of the Laws of Zambia. The particulars of the offence alleged that on 5th May, 2016 at Mufulira in the Mufulira District of the Copperbelt Province of the Republic of Zambia, the accused did murder Sheba Nanyinza, the deceased herein. The accused denied the charge and the matter proceeded to trial.

In support of the charge the prosecution called six witnesses.

PW1, Wiseman Kunda testified that after the deceased and her four children; and himself had been to their parents' house (PW3's house), at A56 they returned to the deceased's house at A100 around 23.00 hours. The two houses were approximately 200 metres apart. Upon return to their house, the deceased said she did not feel like sleeping and she warmed some water to bath. PW1 went into his bedroom leaving the deceased in the sitting room. He fell asleep and was not around when her elder sister, the deceased had finished having a bath. During his sleep, he heard a knock on the door to his bedroom and the deceased's voice calling his name. When he woke up she asked him to close the kitchen door after she left the house through that door. Before leaving, the deceased gave PW1 a K5.00 note and when PW1 asked her as to where she was going she simply told him that she was not coming back home. She showed him where sugar was and

told him to use K5.00 to buy bread and make tea for her children the following day. Thereafter, she left and PW1 locked the kitchen door. He did not check the time her deceased sister left home but approximated it to have been around 02.00 hours. He wondered why her sister had left home since her husband (the accused) was away in Ndola where he was working from; and wondered who could have gone with her. PW1 peeped through the sitting room window and saw a vehicle with its lights on. He heard the vehicle doors open and close. He did not clearly see the vehicle except its lights. The vehicle was parked along the road. After some ten minutes, he heard the engine sound of a vehicle and people calling his name. PW1 opened the kitchen door and his deceased sister entered the house and proceeded to the sitting room while himself remained in the kitchen. He did not know what the deceased was doing in the sitting room. Approximately two minutes later, the deceased came out of the sitting room and left the house through the kitchen door which PW1 closed again. The deceased went to the roadside; he heard the sound of a vehicle and peeped through the window. Later the vehicle left. After a few minutes, the deceased came back again, she knocked at the door and when she entered the house she went straight into the sitting room. Shortly, thereafter, PW1 saw the accused who was carrying an axe and to it was tied a sharp iron bar. He did not wear shoes. The accused told PW1 not to say anything and he asked for his deceased wife's whereabouts. PW1 showed the accused where his deceased wife was, that is, in the sitting room. The accused while carrying an axe and a sharp iron bar entered the house and hid himself in the bathroom. PW1 explained that when one entered through the kitchen door it was not possible to see what was happening in the sitting room. A few seconds later, his deceased sister came out of the sitting room and went out of the house using the kitchen door. She asked PW1 to close the door after she left. Then the accused appealed to PW1 not to say anything, and asked him whether he knew where Simon was staying.

Because it was late and the accused had an axe with him, PW1 showed the accused a different person's house. He explained that he had feared to show the accused the actual house for Simon because a week ago his deceased sister and the accused had a quarrel over Simon. The accused had accused his deceased wife of having an extra-marital affair with Simon. Approximately two minutes later, the deceased returned. When the accused heard a knock by the deceased, he went back into the bathroom where he was hiding while still having an axe with him. The deceased entered the house and went straight into the sitting room. At the same time, the accused left the house. He came back later and pretended as if he was not inside the house. He went straight into the sitting room where the deceased was, whilst still carrying an axe with him. A quarrel ensued between the deceased and the accused. The accused asked the deceased as to why she had taken long to return home. During their quarrel, the accused threatened to hack the deceased with an axe. In fear, the deceased called PW1 who joined them in the sitting room. The accused told the deceased that there was a person in the sitting room and asked PW1 to confirm. PW1 replied that he had not seen any such person as he was sleeping. He said this person the accused was referring to was Simon. They moved around the chairs in search of Simon but in vain. PW1 was also asked to check the bathroom, but did not find any person. It did not take long before both the deceased and the accused left their house. PW1 was behind the accused who warned him not to reveal anything. After they left, PW1 closed the kitchen door and went into the sitting room where he was able to see them through the window as they left the premises. PW1 heard the sound of the vehicle doors and the car left. PW1 could not describe the type of vehicle because he could not see it clearly except its lights. PW1 testified that he got confused about the questions the accused was posing to him; and the fact that he had an axe with him. He subsequently fell asleep.

While asleep around 03.00 hours he heard his bedroom window open and saw the accused enter through it. The accused was alone at the time and he warned PW1 not to say anything. The accused proceeded to his bedroom and later came back to PW1's bedroom and stood at the door. Upon the accused enquiring, PW1 stated that he was studying at the time; and that he had sat for exams but he had not collected the examinations results. The accused again warned PW1 not to say anything and he promised to give him money to enable him collect examination results and to go to the college. He further told him to keep 'the secret' whereby he was to take the deceased either to Solwezi or Lusaka because the deceased's mother was making it possible for the deceased to engage in extra-marital affairs with Simon. PW1 was later taken into the accused's bedroom where the accused packed the deceased's clothes into a brown bag. PW1 asked the accused about the whereabouts of his deceased sister, and the accused said that she was in Ndola and already preparing to leave either for Lusaka or Solwezi. The accused assured PW1 that the deceased was well and if he kept the secret he would give him K3,500.00. However, PW1 did not get this money as all he needed was to see his deceased sister in good health. He asked the accused whether his grandmother would not trouble him if he kept the secret, and the accused said if that would be the situation he should be informed; he would then take PW1 to a college; and pick all his children. Thereafter, the accused left the house through the kitchen door and PW1 closed it. He heard the sound of the vehicle doors and later the vehicle drove away.

In the morning, PW1 briefed his parents (PW3 and his wife) about the incident. PW3, the father to the deceased, suspected that the accused could have killed his deceased daughter. He then asked PW2 and his mother to go to Ndola and meet the accused to discover the truth about the whereabouts of the deceased. The same

day, his mother (the wife to PW3) phoned from Ndola to inform them that they had found the accused at his work place. PW1 testified that the people who had gone to Ndola reported that the deceased had been killed by the accused and her body was put in a fridge. He said he lived with the deceased and the accused for 1 year and 2 months.

Under cross-examination, PW1 stated that the deceased never used to sleep out of the house, and that he never experienced that before; that she used to tell him the person she was with whenever she left home; and that on that day she did not tell him that she was going with Simon. PW1 admitted having known Simon but he denied that he was the deceased's boyfriend. He confirmed that on some day, the accused and the deceased had differed over the allegation that the deceased used to go out with Simon. He further confirmed that his deceased sister left home and returned but he did not know the person she was with. He stated that he saw, for the first time, an axe that the accused was carrying with him. He saw him come into the house while the deceased was in the sitting room. Upon the accused's entry into the house, he signaled to PW1 and advised him not to alert the deceased about his presence in the house. PW1 did not inform the deceased about the accused's presence in the house having known that they were husband and wife. In effect he did not see any danger about it.

Still under cross-examination, PW1 stated that after the accused came out of his hiding in the bathroom, he asked him about the place where Simon was staying. He denied that the accused asked him about whether Simon was in the house. He denied having told the accused that Simon was in the house. He confirmed that when the accused was moving around chairs in the sitting room in search of Simon, he was with the deceased. PW1 confirmed that the two were quarrelling

whilst in the sitting room; the accused was telling the deceased that he had found Simon in the house. He said that he gave a wrong residential address to the accused who asked for it after he alleged that Simon had managed to escape from the house. He said he was afraid after he saw what was happening. He confirmed that the deceased went with the accused, and that it was not the deceased who insisted on going with the accused. He denied that the accused had indicated that he was going to hospital, upon his return home. Further, he denied that the accused asked him not to inform the deceased's parents as he monitored her condition in hospital. PW1 admitted that he told the accused that children had no food and the accused advised him to get K3,500.00 which the accused had given to the deceased. He denied that the accused had asked him to check on the condition of the deceased, who remained in the car, upon his return home. PW1 testified that when the accused left with the deceased, he carried with him an axe and not the back bag and tools.

In re-examination, PW1 confirmed that at one time, the accused hid himself in the bathroom. As soon as the deceased entered the sitting room, the accused also came out of the bathroom; he went outside the house and pretended as though he had just arrived; and went straight to the sitting room where the deceased was. There, he started looking for Simon but he did not find him. The accused asked PW1 who answered that Simon was not in the house and together they searched for Simon but in vain. PW1 stated that the accused did not ask for Simon's residential address because he had seen Simon. He confirmed that he feared to show the accused where Simon was staying because he had an axe, and secondly, because the accused had a week ago differed with the deceased over the issue of Simon.

PW2, Brian Sinyinza testified that on 5th May, 2016, PW1 reported the incident to their parents in his presence. He also confirmed that PW3 had sent him and his mother to Ndola on the same day to meet the accused; and that they came back with the accused to Mufulira where the matter was reported at Kansunswa Police Station. The accused was, thereafter, detained in police custody pending further investigations into the whereabouts of the deceased.

Under cross-examination, PW2 stated that it was PW1 who told them about the accused's instructions to keep 'the secret'. He stated that the accused did not complain to their mother about her intention to marry off the deceased to another man. He confirmed that PW1 said that the accused had alleged that the deceased was having an affair with another man. PW2 denied knowing Simon Siakalangu but he knew another Simon who was a family friend with whom they related well. He denied that Simon was in any love affair with his deceased sister. He said since he was not staying with the deceased, he could not know whether Simon used to visit her neither would he have been aware whether the said Simon visited the deceased during the night of 4th May, 2016. He was not aware of their mother's intention to marry off the deceased to another man; and he was also not aware of the fact that the accused complained to PW3 about the deceased's behavior of flirting with other men.

In re-examination, PW2 confirmed that he was present at the police station when the accused was asked about the whereabouts of the deceased. In response, the accused informed the police that when they reached the station he had a quarrel with the deceased. He also confirmed that he used to meet Simon at his parent's home, on the way from the market and when going home.

PW3, Jonas Ephroa Sinyinza testified that on 5th May, 2016, PW1 informed PW2, himself and his wife that the accused took the deceased from their house no. A100, New Kansuswa in a manner that did not please PW1. They tried to call the deceased on her phone but it was not going through. Thereafter, PW3 decided to send his wife and his son, PW2 to Ndola to meet the accused. They found the accused and brought him to Kansuswa Police Station. PW3 informed the Court that when the accused was asked about the whereabouts of the deceased, he answered that she had jumped off the car at the humps near Kansuswa grave yard. He testified that the accused was left at the police station for the police to make further investigations into the matter.

PW3 further testified that, the following day, they went to inquire at the police and they were informed that the body of the deceased had been discovered in a refridgerator in Pamodzi in Ndola. The body of the deceased was later taken to Ndola Central Hospital where it remained until the postmortem was conducted.

Under cross-examination, PW3 denied that the accused ever complained about the behaviour of the deceased, and that he ever knew Simon Siakalonga. However, PW3 admitted having known Simon Kaonga, a medical student at the Copperbelt University who was a family friend as well as a friend to the deceased. This was the same Simon who was working for the mines. To his knowledge, PW3 was not aware whether Simon would visit the deceased as the accused never complained to him about that Simon. He confirmed that, at police, the accused was asked about the whereabouts of the deceased and the accused indicated that she had jumped out of the car at the grave site in Kansuswa. PW3 said he was not aware whether the deceased fought with the accused on 4th May, 2016 and whether Simon visited the deceased on the same date. He confirmed that the accused only complained to him

about Bruce and not Simon. He said Bruce was his cousin's son whom he described to be a small boy.

PW4 was Delphister Chileshe. She testified that on 9th May, 2016 she witnessed the post-mortem examination that was conducted on the body of the deceased who was her granddaughter. She was the person who had identified the body of the deceased to the Doctor. She had a close look at the deceased's body and saw that the left side of her head was depressed; and the face and chest were swollen.

PW5, Detective Woman Sergeant Gladice Mufundisi testified that on 5th May, 2016, in company of some other police officers, they went to Pamodzi in Ndola where she photographed the deceased's body that was placed in a refrigerator, exhibit P2 and wrapped in a green material. After the body was unwrapped, she also photographed the injuries on the deceased's body. She later compiled the photographic album, exhibit 'P1'.

PW6 was Detective Inspector Machona Phiri. He testified that on 6th May, 2016 while on duty he came across the report that was made to the Police by PW3, regarding the deceased who at the time was aged 32 years. PW6 investigated the report and concluded that the deceased was killed by the accused who led the police to Pamodzi in Ndola where he had put the deceased's body in the fridge, exhibit 'P2'.

PW6 made up his mind, charged and arrested the accused for the offence of murder. Under a warn and caution statement administered to the accused in English, the accused gave a free and voluntary reply denying the charge.

Further, PW6 testified that when he interviewed the accused, the accused indicated to him that he had found Simon in his house. PW6 summoned Simon to the police and Simon indicated that he was not in any intimate relationship with the deceased. He only had a social relationship with her. According to Simon, on the material date, he was at house No A56 and later left for his home in Masamba around 21.00 hours.

PW6 successfully tendered into evidence the photographic album, exhibit 'P1', the deep freezer, exhibit 'P2'; and the postmortem examination report, exhibit 'P3'.

Under cross-examination, PW6 confirmed that the accused was placed in police custody on 5th May, 2016; that it was PW2 and the mother to the deceased who apprehended him with the assistance of a Mr. Mulenga. He stated that the accused told him that he quarrelled with the deceased over a certain boyfriend. However, PW6 could not confirm whether there was a fight that ensued between the accused and the deceased. He said PW1 confirmed about the quarrel but that, that fact did not corroborate that there was a fight between the two. PW6 admitted that the accused told him that the fight ensued because he found a man with the deceased. That that fight led to the death of the deceased.

PW6 confirmed that he did not find out about where Simon was living. He stated that the accused informed him that he had gone to the deceased's house around 01.00 hours. PW6 admitted that he didn't know where Simon was at that time; and that he could not confirm whether he was at the deceased's house. PW6 disagreed that the accused found Simon in the deceased's house. He stated that the police could not visit the scene of the fight because the accused could not pin point the actual place where the incident occurred.

In re-examination, PW6 made it clear that he could not visit the place where the alleged fight took place because the accused said it happened in the night and therefore, he could not pin point the actual place. Further, PW6 confirmed that he could not go to Masamba area where Simon was staying because he was a person of no fixed abode. That the houses in Masamba had no marked house numbers.

At the close of the prosecution's case, I found that a *prima facie* case had been established against the accused and, therefore, I placed him on his defence in accordance with section 207 of the Criminal Procedure Code, Cap.88.

The accused elected to give sworn evidence and to call no witnesses.

The accused testified that on 5th May, 2016 around 01.30 hours he returned to his home at house no. A100, Kansuswa in Mufulira; and parked the vehicle that he was using in front of the gate to the house. While the vehicle was facing the house, he noticed that the lights in the house were on, both in the bedroom and in the sitting room. He proceeded to his house where he heard strange groaning noises and like the chair was squeaking. He got close to the sitting room window and peeped through it. He saw the back of a person whom he did not recognize immediately. He then decided to knock on the window and eventually he was surprised to see the face of one Simon, a gentleman he had known very well. That Simon was a friend to his deceased wife and a business partner. He said he was able to see the person in the house because all lights were lit. That Simon rose up, looked at the window at a distance of less than half a metre with his hands raised; and as soon as he saw the accused, he went down again. The accused started banging on the window and shouting: 'What are you doing in the house?' He then

saw the deceased who came off the chair and ran to the door that leads to the passage which contained doors for the toilet, the bedroom and the kitchen. Subsequently, he heard the deceased pulling some things in the bedroom. At that time, the accused was still at the window of the sitting room trying to see where Simon had hidden but as soon as he heard the noise he went to bang on the window of the bedroom. As there was no answer, he proceeded to the kitchen door (which provided the only entrance and exit to the house). He banged at the kitchen door and still there was no answer from there as well. He shouted for the deceased to open it or else he would break it. After about five minutes the deceased opened the door and he blocked her from going out of the house. He closed the door from inside the kitchen; and got an axe that was behind the stove because he was afraid that Simon might attack him in the process of apprehending him. The accused testified that he then asked the deceased where Simon was hiding. The deceased answered him that he was dreaming that he had seen Simon in the house. He suggested to her to go to the sitting room to see where Simon was hiding but she denied him the chance. She stated that there was no need to do so as he was just dreaming. When he decided to go on his own, she quickly pulled him back towards the bedroom away from the sitting room; she pushed him into the bedroom and closed the door behind her. At that point, the accused was becoming furious with the deceased. He told her to move away from the door but she refused; and while shouting she insisted that there was nothing in the sitting room and that the accused should not go there. He pulled her away from the door and headed to the sitting room, again she pulled him back into the bedroom and pushed him onto the bed.

Upon noticing that his 3 year old son was not in the bedroom, it aggravated his fury and he shouted at her. They started shouting at each other and the accused

told the deceased that he was going back to Ndola. The deceased grabbed the accused by his hand while with the other hand she grabbed her trousers. She then rushed to the kitchen door and blocked the accused from going out. According to the accused, he was trying to get out of the house and he did not want to go back to the living room at that moment. Eventually, the accused was pushed in the bedroom where PW1 was sleeping, and the deceased started shouting at PW1 for having slept like a pregnant woman in the midst of all that commotion. The deceased later informed PW1 that she was going with the accused to Ndola. The accused denied her following him to Ndola and pointed out that there was no way she would go with him after what he had seen but that the deceased insisted to go with the accused. She later opened the kitchen door and told PW1 to lock the house. He shouted at her to remain, pulled her away from the door and stopped her from leaving. He then put back the same axe behind the stove from where he got it. The deceased pushed him away from the door, opened it and they both went outside arguing. When they reached the second corner of the house from the kitchen door, the deceased grabbed the vehicle keys, and told the accused to go and wait in the vehicle. They started shouting at each other. He asked her why she wanted to go back and she told him that she wanted to leave money for food. The accused testified that he struggled with the deceased and managed to retrieve the car keys. He opened the car door without entering the car and slammed it; and ran through his neighbour's yard where he hid behind a hedge, a fence that was grown of small bushes commonly known as 'ulunsonga'. There he could hear PW1 and the deceased confer with each other although he did not get what they were saying. Few minutes later, he saw the deceased walk towards the vehicle leaving PW1 standing at the kitchen door. The accused ran back home, knocked at the door and PW1 opened for him. He pushed PW1 inside the house and started shouting at him saying: 'how could they live like that letting men come into the house and sleep

with Sheba.' PW1 answered that he did not understand what the accused was talking about. Then the accused explained to PW1 that he had seen Simon in the house with the deceased naked and they were having sex. He said PW1 expressed anxiety like he knew what the accused was talking about. In response, PW1 stated that he had seen Simon and the deceased around 23.00 hours the previous night at A56, Kansuswa and that they had left that house in full view of the deceased's father, PW3. Further, that PW1 informed him that he had noticed that the two were very close; that the deceased's parents were fully aware of the affair; and that Simon had bought a 52" plasma T.V. for the deceased's parents in appreciation for the deceased. The accused testified that the discussion he had with PW1 lasted for about ten minutes and PW1 mentioned to him that the deceased's mother always gave respect to Simon as a son-in-law.

After that short discussion, they were disturbed by a knock on the door, PW1 advised the accused to hide as he feared that he would be in trouble if the deceased found out about what they were discussing. The accused hid himself in the bathroom and closed the door. Then the accused heard PW1 open the door for the deceased who immediately wanted to know whether the accused had come back home, and that PW1 answered in the negative. From his hiding, the accused heard the deceased speaking in a lower voice saying: 'hurry up, hurry up, come, come....' In a short moment, he heard people's footsteps walk in a rush, half running and they went past the bathroom. He opened the bathroom door and looked at the kitchen door and later he heard footsteps running. Afterwards, he saw the deceased come back into the house. The accused was still hiding in the bathroom with a door partially open and soon, thereafter, he followed her to the sitting room where she sat on a sofa on which he had seen her and Simon having sex. The accused observed that the chair was upside down and the deceased

brought it upright. He began shouting at the deceased saying: 'so that is where you hid Simon, your lover?' The Accused stated that the deceased started screaming at him and said that there was nothing wrong for her searching the chair in the process of looking for him (accused). For the second time, the accused informed the deceased that he was going back to Ndola, and that the deceased should remain with her husband, Simon as her parents already knew about him. As he got out of the house, the deceased went running, by-passed him and jumped into the vehicle. She stated that they had to go together no matter what. The accused tried to open the passenger's door but found that the deceased had already locked it. He then went through the driver's door and shouted: 'Get out of the bloody car, I don't want you here with me.' The deceased refused to get out of the car and that agitated his anger. He started the vehicle and moved away heading to Ndola as they continued shouting at each other. At the main road, he joined the Kitwe-Chingola road. When they passed the humps, the deceased said she had every right to talk to anybody at anytime. The accused shouted at her and called her a professional prostitute. The deceased reacted by hitting the accused with her fist on his left cheek. The accused testified that he felt a lot of pain as he had hit the side of his head on the side door window and consequently, the vehicle veered off the main road and careered onto the gravel almost going into the bush. He stopped the vehicle and both the accused and himself jumped out of the car. He shouted at the deceased saying: 'why do you like fighting all the time? That is why I told you to remain home.' He then walked to the side of the vehicle where she had come out. He said the deceased was waving her hands in the air and saying: 'you think you are a man?' She then started throwing fists at him. One of the fists landed on his chest and he fell into the vehicle on the passenger side of the vehicle. At that point, he lost his temper completely. He put his hand down on the foot rest of the passenger's side of the vehicle and grabbed something that he later

came to identify as a tool which he had made. It was measuring 30 to 40 centimetres long and 10 millimetres radius. He used it when he had a breakdown especially on the truck that he had followed the previous night. The deceased had already grabbed his left hand and was pulling him out of the car, while she had her right fist ready to hit him again. He swung the tool which looked like a chisel and hit the deceased on the left side of her head twice and she went down on her knees. He said he hit the deceased because he was furious as a result of the pain that he had gone through after she had beaten him. He said he threw away the said tool into the bush because he was still upset; he realized that he had hurt her; and threw away the tool out of fury. He helped her to stand up and she was able to talk. He put her in front of the car on the passenger seat. He noticed that blood was coming out of her nose and from her head. They drove back home, the accused used PW1's window to gain entry into the house as PW1 was not responding to knocks on the kitchen door. He testified that he had left the deceased in the car and explained to PW1 about the fight he had with the deceased. He searched for the money in vain, and therefore, instructed PW1 to continue looking for the money as he packed clothes for the deceased to change. PW1 refused to go with him to the vehicle to check on the condition of the deceased. The accused denied telling PW1 to keep 'the secret' that he was taking the deceased to Lusaka or any other place where the deceased's mother would not know; instead he said that he mentioned to PW1 that he was taking the deceased to hospital.

Around Ganerton area between Mufulira and Kitwe, the deceased started breathing heavily and abnormally and he could not feel her pulse. The accused informed the Court that he thought that was the time she had died.

After the deceased's death, the accused became confused and drove at a high speed only to realize that he was in Ndola and he went to his house in Pamodzi. He took the deceased in the house; lay her on a blanket and bedsheet. He tried to resuscitate her but in vain. He then realized that she had passed on. The accused averred that he wrapped her body in the green bedsheet and decided to put her in a fridge. He thought, the cold temperature would bring her back to life but she did not respond. He closed the fridge and went outside.

The accused went to his work place at Foodgate Enterprises in the morning. He phoned a Mr. Mulenga, his friend and informed him that he had a problem, without disclosing the nature and type of the problem. In the afternoon, the accused found PW2 and his mother at his work place. Later, they were joined by a Mr. Mulenga and all of them, including the accused travelled to Mufulira after the accused bought fuel for the trip. Upon arrival in Mufulira, they all went straight to Kansuswa Police Station where they found PW3, among other people. In answering the question from the police, the accused told them that he had a fight with the deceased and she ran into the bush. After weighing the situation, he requested the police to detain him so that he could meet the C.I.O. in the morning, which he did. He explained to the C.I.O. and six other police officers about what had happened; and that the deceased was in a fridge in Ndola. The accused travelled with police officers to Ndola; collected the body and took it to Ndola Central hospital and later returned to Mufulira where he was detained in police cells.

The accused informed the Court that when he travelled to Mufulira on 5th May, 2016, there was a breakdown of a truck in Chimwemwe, Kitwe. When he arrived

in Kitwe he did not find the truck that had broken down hence his decision to go home in Mufulira.

He testified that he was married to the deceased for 11 years; that prior to 5th May, 2016 they never had a similar problem that he had witnessed on the material date; and it was on the same night that he had learnt that Simon was having an affair with his deceased wife. He said he loved his wife so much.

Under cross-examination, the accused stated that when he was about 1 to 1½ metres away from his house he heard groaning sounds. He confirmed that he caught the deceased red-handed in a sexual act but that when he entered the house she denied being engaged in such an act. He said it was possible for one to deny the commission of an act even when one is caught red-handed. He confirmed that when the deceased opened the door for him, after threats to damage it, he locked the door. He said the first thing he did was to go and check where he had seen the man but he was stopped from entering the sitting room by the deceased and therefore, he did not manage to check. The accused confirmed that he had an axe with him at the time. He averred that the deceased was stronger than him and she managed to grab PW1 and held him at the same time. He said Simon was a business partner to the deceased.

Further, that after the incident of being held, he wanted to go out of the house because he had given up on checking for Simon following the quarrels and fighting. That he went out and came back again. He stated that he had carried an axe for fear of being attacked by Simon. He confirmed that when he got out of the house, he informed the deceased that he was going to Ndola and that he did not want her to go with him. That when she grabbed the car keys from him and made

a U-turn, he shouted at her. He shouted at her not because she was going back but because she had grabbed the car keys. He admitted that he recalled that PW1 did not mention about the accused having seen the deceased having sex, and this fact was not challenged in cross-examination.

The accused confirmed that he did not see Simon throughout the time he was hiding in the bathroom but when he came out of the bathroom he saw Simon with the deceased who was pushing him. He confirmed that at the time he went to the sitting room he did not bother to look for Simon because he had seen him go out of the house. When he was pressed, the accused said seeing Simon was enough. Therefore, he did not attempt to approach him because he did not want to get into a fight with anybody. He averred that on the way to Ndola, the deceased punched him and the car careered off the road. At that point, both of them jumped out of the car; the deceased punched him again and he fell right into the car passenger seat; from the foot base, he picked a tool which he only came to know the type after he had used it to hit the deceased.

Still under cross-examination, the accused said that he had followed the deceased to the side of the car where she was in order to chase her; she was ready to fight him and that he was not the aggressor. He did not think of driving away at the time even though she was already out of the car. He confirmed that he did not sustain any physical injuries but that he felt pain inside his body. However, he had no proof because he could not manage to report the injuries he had sustained as the deceased was his priority. He denied that it was a made up story that the deceased hit him. Further, he stated that he had decided to leave his home for Ndola after he found the deceased with Simon because he got frustrated. The accused said he did not want to deal with the deceased immediately because he (the accused) was not a

violent person. The accused stated that he could not remember anything that happened after the death of the deceased, that is, from Ganerton to Ndola. According to him he had a black-out and strangely found himself at his home in Pamodzi, Ndola. He averred that while in Ndola, he did not take the deceased's body to hospital because he did not want her to leave and go anywhere.

In re-examination, the accused averred that PW1 confirmed to him that the deceased was with Simon in the house. That he gave money for their partnership business to Simon through his deceased wife. He said he could not follow Simon and his deceased wife after he had seen them go out of the kitchen door because he was afraid that they would attack him. That Simon left running. That he did not know what he had used to hit his deceased wife because there were several tools. That apart from feeling pain, he hit his deceased wife because she had already angered him and agitated him. That she made him look like a fool by denying that there was someone in the house. That the fight was started by his deceased wife. That the fight ensued after he caught her red-handed having sex with Simon. That he did not have proof of the injuries his deceased wife inflicted on him because he didn't go to any hospital, and that he considered her death as being first priority. That he felt a lot of pain and anger in his heart when he saw the deceased having sex with another man.

Counsel on both sides filed in written submissions.

Submitting on behalf of the accused person, Defence Counsel referred me to section 204 of the Penal Code and contended that the State had not established beyond reasonable doubt that the accused caused the death of the deceased with malice aforethought. That none of the prosecution witnesses had testified to any

fact that would lead to an inference of the intention of the accused to kill the deceased. He argued that the accused would not have intended to cause grievous bodily harm or injury to the deceased as he hit her with an object he did not know, which he only later discovered to be a metal tool.

Defence Counsel contended that the accused had killed the deceased due to cumulative provocation and later provocation from the deceased. The provocative acts were that he had found her with another man in their matrimonial home; that she said taunting remarks to him on the way to Ndola, despite what he had seen; and that she subsequently punched him several times on his jaw. That after this provocation, the accused retaliated. Counsel relied on the defence of provocation as provided for under section 205(1) of the Penal Code, Cap. 87. Counsel submitted that the accused killed the deceased in the heat of passion and had no time to cool off and therefore, should not be found guilty of murder but manslaughter. Further, that after finding his wife *flagrante delicto*, he was filled with so much anger and pain that he decided to leave the house after the deceased helped her lover to escape.

In emphasizing the defence of provocation that ought to be available to the accused, Defence Counsel cited the case of **Nyambe Mubukwanu Liyumbi v The People**¹ in which the three essential elements of provocation were outlined viz the act of provocation; loss of self-control, both actual and reasonable; and retaliation proportionate to the provocation. That all the three elements were present in the case in casu and, therefore, that the defence was available to the accused.

Counsel submitted that the act which caused the death of the deceased bore a reasonable relationship with the provocation elucidated above. He prayed

this Court to consider reducing the charge of murder to manslaughter on the authority of the case of **James Chibangu v The People**² where the Supreme Court held that:

“It is a condition precedent to the reduction of a charge of murder to manslaughter that the Court must be satisfied that the act which caused the death bore a reasonable relationship to the provocation.

Further, defence Counsel submitted that the State had not negated the defence of provocation, which burden it bore. The case of **The People v Kambilumbilu**³ was cited in buttressing this point. He also referred me to section 183 of the Penal Code, which provision I find to be irrelevant to the issue of provocation.

Defence Counsel submitted that the State has not disproved the evidence that the accused and the deceased had a continuous fight from home till the time the deceased died; neither have they shown that there was no male person called Simon in the house apart from the evidence of PW1, whom Defence Counsel regards as a witness with an interest to serve. Counsel emphasized that the prosecution witnesses were all related to the deceased, and they created false testimony in order to save the reputation of the deceased especially as to the existence of Simon and that he was the deceased's lover. My attention was drawn to the case of *Kambilumbilu*³. Defence Counsel urged me to consider the evidence of PW1, PW2 and PW3 as biased and unreliable as material facts were suppressed.

Defence Counsel added that PW4's failure to confirm the whereabouts of Simon after he left the deceased parent's home with the deceased, PW1 and children amounted to dereliction of duty which ought to operate in favour of the accused to

the assertion that Simon was indeed in the house of the accused with the deceased. The case of **Gilbert Chileya v The People**⁴ was called in aid. In that case it was adumbrated *inter alia*, that:

“Dereliction of duty in failing to make a test which could conclusively prove one way or another the claims of contending parties would result in a presumption, albeit a rebuttable one in favour of the applicant.”

On behalf of the Prosecution, Counsel submitted that the Prosecution has adduced enough evidence to prove all the elements of the charge of murder as provided for under section 200 of the Penal Code. That it was not in dispute that the deceased was killed on the material date by the accused.

Counsel submitted that although PW1, PW2, PW3 and PW4 were related to each other, their evidence could be relied upon as there were compelling reasons to do so and that there was nothing on record to suggest that they had a motive to falsely implicate the accused. To buttress this point, Counsel referred me to the case of **George Musupi v The People**⁵.

Counsel submitted that since there was no dispute that the accused killed the deceased, the main question for determination was whether the accused had malice aforethought when he killed the deceased. Counsel referred me to section 204 of the Penal Code which stipulates the various circumstances under which malice aforethought is deemed to be established; and the case of **The people v Njobvu**⁶ which is instructive on what the Prosecution needs to prove in order to establish malice aforethought. Further, the case of **Dickson Sembauke Changwe and Another v The People**⁷ was cited wherein it was decided that:

“It is a question of fact whether a reasonable person must know or foresee that serious harm is a natural and probable consequence of throwing someone out of a moving train. If, armed with this realization and foresight, and knowing that serious harm could result, an intent founded on knowledge of the probable consequences will be evident and will be sufficient to satisfy section 204 of the Penal Code.

It was submitted that the accused person knew or ought to have known that hitting the deceased with a tool would cause death or grievous harm. Counsel contended that malice aforethought could be inferred from the serious injuries that the deceased sustained as per postmortem report, exhibit ‘P3’. That in fact in cross-examination, the accused admitted that he knew that the tool that he used would cause grievous harm to the deceased. Counsel submitted that from the evidence on record, the accused killed the deceased with malice aforethought.

Counsel indicated that the apparent defences, on record, which the accused seeks to rely on are provocation and self-defence. I totally agree with this position.

With regard to the defence of provocation, Counsel submitted that provocation was a partial defence, which if proved by the defence, it might result into someone charged with murder being convicted of manslaughter. That should the defence fail, it would amount to an extenuating circumstance. Counsel contended that the defence of provocation should not succeed considering the evidence on record and the circumstances of the case. Counsel relied on the cases of *Liyumbi*¹ and *Chibangu*² already cited by Defence Counsel. He submitted that all the three elements of the defence of provocation were not present; and that the retaliation by the accused was not proportionate to the alleged provocation. Counsel submitted that the accused in his own evidence-in-Chief indicated that the reason why he hit

the deceased was because he was furious as a result of the pain that he was going through after the deceased punched him; and that she was about to punch him again. Counsel contended that a reasonable man in those circumstances would not have gruesomely murdered his wife in the manner in which the accused did.

With respect to the defence of self-defence, Counsel submitted that it is trite law that the said defence when successfully pleaded would result in the acquittal of the accused; and that if it failed would amount to extenuating circumstances. Counsel contended that this defence could not succeed in the circumstances of this case. That although the accused claimed that he was punched by the deceased and that she was about to punch him again, the accused was not in imminent danger. That in fact, from the accused's own testimony he alleged that when the deceased punched him he fell into the car on the passenger's seat then picked up a tool which he claimed not to have known the type, and then followed the deceased. It was submitted that, therefore, the accused did not retreat or make any attempts to avoid violence. Counsel argued that from those circumstances, it was the accused who in fact was the aggressor as he followed the deceased after she jumped out of the vehicle to her side even before the alleged punching happened, which might suggest that she could have been protecting herself from the accused.

Counsel submitted that in any event the retaliation by the accused was very excessive and he used a metal tool which was not in any way proportionate to the deceased's actions, a fact which the accused himself acknowledged in cross-examination. Counsel averred that it was trite law that self-defence cannot be available to an accused who had an intention of killing, purportedly in self-defence. Counsel contended that although the accused said he hit the deceased twice with the tool, it was highly probable that he hit the deceased several times

considering the nature of the injuries she sustained; and that that was indicative of the accused's intention to kill the deceased. Counsel placed reliance on the case of **The People v Abel Zimba**⁸ which discussed the two aspects of self-defence which ought to be established by the accused. These are the question of retreat, and the degree of retaliation.

Finally, Counsel submitted that the defences of provocation and self-defence cannot succeed. Counsel averred that the Prosecution has established beyond all reasonable doubt that the accused with malice aforethought killed the deceased. He prayed that the accused be convicted accordingly with extenuating circumstances.

I have considered the evidence on record and the written submissions filed by Counsel on both sides. I am greatly indebted to the Counsels for their submissions and I have taken them into consideration in arriving at my decision.

The offence of murder with which the accused stands charged is set out in section 200 of the Penal Code, chapter 87 of the Laws of Zambia. The said section provides that:

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

For the prosecution to succeed, it must prove the following elements of murder:

- (i) That the accused person caused the death of the deceased;
- (ii) By unlawful act or omission; and
- (iii) With malice aforethought.

In the case of **Mwewa Murono v The People**⁹, it was held that the burden is on the Prosecution to prove each and every ingredient of the offence beyond all reasonable doubt. It is trite law that the accused bears no burden to prove his innocence.

Section 204 of the Penal Code provides that:

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

- (a) An intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;**
- (b) Knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
- (c) An intent to commit a felony;**
- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."**

In the case of *Njobvu*⁶ cited by Counsel for the State, it was held that:

"To establish 'malice aforethought' the prosecution must prove either that the accused had an actual intention to kill or to cause grievous harm to the deceased or that the accused knew that his actions would be likely to cause death or grievous harm to someone."

In addition to the above case, I fully take cognizance of the interpretation of 'malice aforethought' as espoused in the decision of the case of *Changwe and Another*⁷ cited herein before by Counsel for State.

It is common cause that early morning on 5th May, 2016, the accused unexpectedly returned to Mufulira from Ndola where he was working from. While armed with an axe he entered his house no. A100 in Kansuswa, Mufulira where his deceased wife was staying with their children and PW1. The accused and the deceased eventually picked up a quarrel over the suspicion that one a Mr. Simon was seen by the accused in the sitting room having sexual intercourse with the deceased. The said Simon was not found in the house even after a thorough search for him was done. Later on, both the accused and the deceased while still engaged in a quarrel and shouting at each other left for Ndola in a car that was being driven by the accused. After sometime, PW1 was awakened by the accused who entered the house through the bedroom window where PW1 was sleeping. The accused later left after he packed some of the clothes for the deceased.

Acting on the report by PW1 and the subsequent instructions issued by PW3, the wife to PW3 and PW2 travelled to Ndola in search of the deceased and found the accused in Ndola at his work place. They came back with him and went straight to Kansuswa Police Station where the missing of the deceased was reported. While in police custody, the accused disclosed that he had killed the deceased and had put her in a deep freezer at his home in Pamodzi in Ndola. According to the accused, this was after a fight that ensued between the accused and the deceased on their way to Ndola.

PW5 in company of other Police Officers went to Ndola and retrieved the body of the deceased from Pamodzi Township; and took it to the mortuary at Ndola Central Hospital. The accused remained in the custody of the police.

On 9th May, 2016, PW4 identified the body of the deceased to the Pathologist who conducted the postmortem examination on the body of the deceased, and a postmortem examination report, exhibit 'P3' was issued. Prior to the postmortem, PW4 noted some head injuries on the deceased: the head was depressed on the left side; and both the face and the chest were swollen.

In summary, the accused does not dispute having caused the death of the deceased on 5th May, 2016. However, he has raised the defences of provocation and self-defence. Therefore, the only question for determination is whether the two defences can be available to the accused so that the killing of the deceased would have been without malice aforethought. It is trite law that where the accused has raised the two types of defences, the Prosecution bears the burden to disprove the defences.

From the onset, it is worthy to point out that none of the prosecution witnesses saw the accused inflict the injuries on the deceased that led to her death. The accused was the only person who was with the deceased at the time she died of the injuries inflicted on her. How that happened and the circumstances under which that happened depends solely on the testimony of the accused himself.

First and foremost, I find that PW1, PW2, PW3 and PW4 were all related to the deceased, and as such they might have had their own interest to serve. In the case of **Kambarage Mpundu Kaunda v The People**¹⁰, the Supreme Court held, *inter alia*, that:

“Prosecution witnesses who are friends or relatives of the prosecutrix may have a possible interest of their own to serve and should be treated as suspect witnesses. The Court should,

therefore, warn itself against the danger of false implication of the accused and go further to ensure that danger has been excluded.”

Further, in the case of *Musupi*⁵, the Supreme Court in its holding emphasized that:

“The tendency to use the expression ‘witness with an interest (or purpose) of his own to serve’ carries with it the danger of losing sight of the real issue. The critical consideration is not whether the witness does in fact have an interest or a purpose of his own to serve, but whether he is a witness who, because of the category into which he falls or because of the particular circumstances of the case, may have a motive to give false evidence.”

In the case of *Machobane v The People*¹¹, it was held that an accused should not be convicted on uncorroborated testimony of a witness with a possible interest, unless there are some special and compelling grounds.

In the present case, I have found PW1, PW2, PW3 and PW4 to be reliable and truthful witnesses. I have observed that there is no contradiction between their evidence and the accused’s own testimony on material facts. In short, their evidence has been corroborated. Therefore, I have accepted their evidence on all material facts relevant to this case. On the evidence in this case, I am satisfied that there is no motive on the part of PW1, PW2, PW3 and PW4 to give false evidence against the accused. I have accordingly excluded the danger of false implication of the accused in the commission of the offence charged.

Further, I find the submission by Defence Counsel that the State has not disproved the evidence that the accused and the deceased had a continuous fight from their home till the time the deceased died to be anchored on no evidence. I say so because in his evidence in chief all that the accused mentioned were quarrels he had with the deceased until at a point when he called the deceased a professional

prostitute, at which point she is alleged to have punched him; and another incident after the car veered and careered off the road. Other than those two instances, there is no evidence that the deceased and the accused were engaged in a continuous fight.

The issue of dereliction of duty has also to be mentioned at this juncture. Defence Counsel submitted that the failure by PW4 (I presume referring to PW6) to confirm the whereabouts of Simon after he left PW3's house (deceased's parent's home) amounted to dereliction of duty. Defence Counsel relied on the case of *Chileya*⁴ which I found to be inapplicable to the facts of this case. I have not accepted Defence Counsel's submission that there was any failure by PW6 to investigate the whereabouts of Simon after he left PW3's house. It is in evidence that PW6 interrogated Simon with regard to both the relationship he had with the deceased, and where he went after leaving the home of the deceased's parents. Simon denied the allegation that he was a paramour to the deceased; and indicated that after he left PW3's house he went to his house in Masamba where he was staying. Even if Simon for one reason or another was not seen at his home by any person at the material time, that could not in itself be conclusive that he was with the deceased at the accused's house. I have found no evidence either from the prosecution or the defence that Simon was at the accused's house; and from the facts I cannot draw any such inference. In my considered view, that is how far the investigations officer would have gone in establishing the whereabouts of Simon after he left the home of PW3. In any event the discovery of the whereabouts of Simon would not have helped the accused in his defence of provocation or self-defence in the circumstances of this case. Accordingly, I reject defence Counsel's submission that there was any dereliction of duty by PW6 which would be resolved in favour

of the accused or lead to his acquittal in the face of the overwhelming evidence in this case relating to the death of the deceased.

I will now consider the possible defences of provocation and self-defence raised by the accused.

Firstly, I will consider the defence of provocation. The said defence is set out in section 205 of the Penal Code, Cap. 87 which provides that:

“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 death in the heat of passion, caused by sudden provocation as herein defined, and before there is time for his person to cool, he is guilty of manslaughter only.

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

Counsel on both sides correctly cited one of the celebrated cases of **Liyumbi**¹ where the Court held that:

“There are three inseparable elements to the defence of provocation: the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. All three elements must be present before the defence is available.”

In the case of the **People v Daudi Phiri and another**¹², Judge Dr. Matibini, S.C. quoted with approval the decision in the case of **Holmes v The Director of Public Prosecutions**¹³ where Viscount Simon elucidated the doctrine of provocation in the following terms:

“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 negated. Consequently, where the provocation inspired 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 recognized, viz, the actual finding of a spouse in an act of adultery. This has always been treated as an exception to the general rule."

Further, in the same case of *Phiri*¹² cited above, Judge Dr. Matibini, SC quoted the case of *Chibeka v R*¹⁴ wherein 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."

From the provisions of section 205 of the Penal Code, and the authorities cited above, it is correct to say that if a man kills another in consequence of reacting to sudden provocation, and he so kills in the heat of passion and before there is time for his passion to cool, he is guilty of manslaughter only. Further, that the act which causes death must bear a reasonable relationship to the provocation. But it is also settled that if the mode of reaction (resentment) is out of proportion, then the defence of provocation is unavailable to the accused. In the case of *Phiri*¹², it was emphasized that:

"It is important to note that the question is not merely whether an accused was provoked into losing his self-control, but also whether a reasonable man would have lost self-control, and having done so, would have acted as the accused did."

Furthermore, it was held in the case of *Phiri*¹² that evidence of cumulative provocation in the absence of immediate provocation cannot suffice to establish the three vital elements of provocation, that is, the act of provocation; loss of self-control; and the retaliation proportionate to the provocation.

Let me now consider the summary of the accused's evidence leading to the killing of the deceased by the accused on that fateful day.

The accused informed the Court that on the material date he returned to his house in Mufulira around 01.30 hours. He stated that as he approached the house he heard some groaning noises from the sitting room and like the chair was squeaking. He peeped through the sitting room window and eventually discovered that Simon was in a sexual act with his deceased wife. He testified that he started banging on the window while shouting: 'what are you doing in the house?' He then saw Simon and later the deceased who was completely naked come off a chair and run towards the door leading to the passage. Later, the accused heard the deceased pulling things in the bedroom but he remained at the sitting room window in trying to see where Simon had hidden. After banging on the bedroom window and the kitchen door, the deceased eventually opened for him and he prevented her from going out of the house; he closed the kitchen door; and got an axe that was behind the stove because of the fear that Simon might attack him in the process of apprehending him. That he made attempts to gain access to the sitting room but the deceased blocked him from doing so. He became furious and subsequently gave up the search for Simon. He testified that upon the deceased hearing that the accused had decided to go back to Ndola, she insisted to go with him. He said he refused to go with her in view of what he had seen. After he put back the axe he had behind the stove, they both left their home for Ndola while quarrelling and

shouting at each other. While on the Kitwe-Chingola road, the deceased scorned him that she had every right to talk to anybody at any time. The accused shouted at the deceased and called her a professional prostitute. At that point, the deceased reacted by hitting the accused with her fist on his left cheek and he felt a lot of pain. Consequently, the vehicle veered off the road and careered onto the gravel road almost going into the bush. When the accused stopped the vehicle; they both jumped out of the vehicle; and accused followed the deceased to her side of the vehicle. The accused indicated that the deceased started throwing fists at him and taunted him by saying: 'you, you think you are a man?' He testified that one of the fists landed on his chest and he fell into the car on the passenger side of the vehicle. At that stage, the accused lost his temper completely. He put his hand down on the foot rest and grabbed something he later came to identify as a tool which he had made and used it on the trucks during breakdowns. He hit the deceased with that tool on the left side of her head twice. According to him this was because of the pain that he had gone through after the deceased had beaten him. The deceased later died as a result of the head injuries she sustained after the accused hit her with the said metal tool.

I have considered the possibility that the deceased may have provoked the accused and it was as a result of such provocation that she was killed. Counsel for the accused submitted that it was the presence of Simon in the matrimonial house of the accused that caused the accused the pain and anger; and the insults and taunting remarks and lastly the blow to the jaw of the accused that resulted in cumulative provocation and instant provocation from the deceased which made the accused hit the deceased on the head thus causing her death. Further, Counsel submitted that the accused killed the deceased after such provocative acts from the deceased, and therefore, this takes the killing from the ambit of section 200 of the Penal Code as

it negatives malice on the accused's part. Defence Counsel relied on section 205(1) of the Penal Code and submitted that the accused killed the deceased in the heat of passion and had no time to cool off and, therefore, should not be found guilty of murder but manslaughter.

The Prosecution, on the other hand, submitted that it was clear that the accused had killed the deceased; and that the main question is whether the accused had malice aforethought when he killed the deceased. The Prosecution relied on the provisions of section 204 of the Penal Code, and the cases of *Njobvu*² and *Changwe*⁷ in defining what constitutes malice aforethought. They contended that the defence of provocation could not be available to the accused as the accused had not acted in the heat of passion or a spur of a moment. Reliance was placed on the cases of *Liyumbi*³ and *Chibangu*⁴ referred to hereinbefore.

I do not accept defence Counsel's submission that the accused killed the deceased in the heat of passion before there was time to cool off after finding the deceased *flagrante delicto* in a sexual act with Simon. There is no proof that the deceased was caught red-handed in an adultery act with Simon as a result of which there was sudden provocation; and before there was time to cool off the accused killed the deceased.

PW1, who helped the accused to search for Simon testified that the accused and himself did not find Simon in the house after the search for him. The accused conceded this fact. I am satisfied that Simon was never found in the house of the accused on the material date; and therefore, could not have been found in *flagrante delicto* in a sexual act with the deceased. In the case of *Phiri*¹² it was held, *inter alia*, that to be found in adultery has always been considered as one of the gravest

forms of provocation. It is settled law that had the accused killed the deceased in those circumstances he would have successfully pleaded the defence of provocation. In the present case, that was not the situation.

It is also not in dispute that the deceased was not killed at her home instantly following her being found in an adulterous act (which was not the case here). The accused killed the deceased at some unknown place on the way to Ndola hours after the duo left their home. Therefore, the defence of provocation based on the allegation of having found the deceased *fragrante delicto* in a sexual act fails, and accordingly the defence cannot be available to the accused.

Further, the accused has not sufficiently disclosed the taunting remarks and insults that would have deprived him of the power of self-control and would have induced him to assault the deceased in the manner he did. On the material date, the quarrel ensued and what may be regarded as taunting remarks or insults were: 'I have a right to talk to anybody.' I do not find that these remarks would have been in any way confirmation of adultery with Simon by the deceased. I find that these remarks could not have been so provocative as to have led to the loss of self-control on the part of the accused. The deceased did not even mention the name of Simon which would have made the situation different. Furthermore, at the point of preparing to throw her fists, as put by the accused, she said 'you, you think you are a man'. Aptly, I find this to have been a statement referring to the notion as to who was more powerful between them or who was a stronger person between them. Could these sentiments have caused a reasonable man in the community to which the accused belonged to have reacted with a metal tool and kill his wife? The obvious answer is in the negative. I note that at the point where the accused managed to control the car and brought it to a stop and both of them came out of

the car, the accused had not shown any signs of disengaging in the fight that might have ensued despite having had the opportunity to move away in his car leaving the deceased alone. He was determined to fight the deceased at all cost. He followed her to the other side of the car where she was and attacked her since he knew that he had well prepared himself with some dangerous weapons which he hid in his car. I find that the accused was the aggressor who certainly provoked the deceased and she may have reacted in self-defence.

It cannot be doubted that the accused cleverly got his deceased wife from their home in Mufulira to an unknown place where he mercilessly killed her for no reason at all except on a strong suspicion which he entertained in his mind alone, over Simon being a paramour to the deceased. I am satisfied that he did so in order to punish her for what he had considered to be adulterous acts with Simon. Therefore, I find no insults or taunting remarks that would have caused the accused, as a reasonable person, to be deprived of self-control and induced him into reacting with a metal tool to kill his wife under the pretext of provocation. I am satisfied that there was no such provocation or at the least the provocation was trivial. In the case of **Makomela v The People**¹⁵, it was held, *inter alia*, that a man who completely loses his temper on some trivial provocation and reacts with gross and savage violence cannot hope for a verdict of manslaughter on grounds of provocation. I find that, if there was any provocation in the present case, it was trivial provocation which would not have led the accused to react with such gross and savage violence as he did.

Lastly, the purported evidence of cumulative provocation cannot help the accused. I am fortified by the decision in the case of *Phiri*¹² where it was held *inter alia* that the evidence of cumulative provocation in the absence of immediate provocation

cannot suffice to establish the three elements of the defence of provocation, as herein before mentioned. It must be stressed that for provocation to reduce murder to manslaughter, it must be sudden.

I find that the accused on the material date had embarked on a course of action which was dispassionate and deliberate. I have believed the testimony of PW1 that when the accused went to his home in Mufulira he had an axe and a metal iron tied to it. I have not accepted the accused's story that he got the axe from behind a stove in the kitchen of his house. I find that he had been in possession of the axe and the sharp iron bar tied to it prior to his entry into his house. I am satisfied that his actions were premeditated. I also find that there was no vehicle breakdown for which he carried mechanical tools in his vehicle. The metal tool he carried was part of the preparation for the killing of his wife. It is my finding that the retaliation by the accused using a metal iron was disproportionate to the punch of a mere fist by his deceased wife. I am satisfied that he was the author of the provocative situation and reacted to it out of proportion. It is a cardinal principle of law that for the defence of provocation to succeed the retaliation employed must be proportionate, that is, the mode of resentment must bear a reasonable relationship to the provocation. This was not the case here. As was decided by Dr. Matibini, J in the case of *Phiri*¹², in calibrating the proportionality of the retaliation, it is always important to bear in mind the nature of the weapon used in retort. In the present case, a metallic iron (presumably used on repair of trucks) was employed to strike on the head of the deceased twice in resentment to a blow aimed at the accused with a bare fist. Therefore, I do not entertain any doubt in my mind that the accused had known the type of tool that he had carried and where he had selectively put it in his vehicle so that he could easily access it. It is this same

tool that he had used to inflict the fatal injuries on the deceased. Again, this was a clear intention to kill the deceased.

PW4 who attended the postmortem testified that the left side of the deceased's head was depressed; and that the deceased's face and chest were swollen. The medical report, exhibit 'P3' issued after the postmortem examination disclosed that the cause of death was 'severe head injury'. The summary of significant abnormal findings at postmortem examination, among other things, indicated 'a fissured fracture of the base of the skull. The fracture involved the left part of the middle cranial fossa'. In view of that fact, I am unable to see how the accused in ruthlessly striking at the deceased twice on her head with a heavy metal tool in retaliation to an anticipated second strike with a bare fist can be said to have embarked on an act which bears a reasonable relationship to provocation. I am satisfied that there was no reasonable retaliation to that retort.

In the case of *Phiri*¹⁰, the High Court quoted with approval the English case of **Manchini v The Director of Public Prosecution**¹⁶ which points to the importance of considering the nature of the weapon used. In that case 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.

On the whole evidence in this case, I have failed to see how the defence of provocation can be available to the accused. Therefore, the defence totally fails.

Coming to the defence of self-defence, I have considered the possibility that the deceased may have fought with the accused. The accused has contended that he killed the deceased in the process of the fight that ensued between the deceased and himself. He has argued that the deceased was the aggressor.

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 any other 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 employs in doing so are no more than is necessary in the circumstances to repel the unlawful attack.”

In the case of *Esther Mwiimbe v The People*¹⁷, Ngulube, DCJ (as he then was) noted at page 19, that the principles themselves governing self-defence as provided under section 17 of the Penal Code have normally not been the subject of much controversy. It is usually the application of those principles to the facts of any given case that difficulties are encountered. Ngulube, DCJ then 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 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 had caused death in order to preserve his own life or to prevent grave danger to himself or another.”

I note that the facts relied upon by the accused to plead self-defence, are substantially the same as those for the defence of provocation. Briefly, for the sake of repetition, the accused referred to the point at which he called the deceased a professional prostitute; the resultant pain he suffered after he was hit with fists by the deceased; the subsequent stopping of the vehicle after it veered off the road, and both of them having come out of the vehicle; the accused having followed the deceased on the side of the vehicle where she had gone out of the car; and the second punch he received from the deceased after which he fell into the car on the passenger side of the vehicle. According to the accused, in self-defence, he picked an object and hit the deceased twice on her head and she sustained injuries from which she later died.

As I have already pointed out, the accused at first instigated the aggression by the deceased by referring to her as a professional prostitute without any basis. This was despite the accused's own admission that Simon, the alleged paramour to the deceased, was a known business partner to both the deceased; and the accused himself provided capital for the business. Further, that the said Simon was never found or caught red-handed in a sexual act with the deceased.

Considering the events that led to the deceased's death, at the point he managed to stop the vehicle, the accused had all the opportunity to disengage in the fight but instead he followed the deceased to the opposite side of the vehicle, that is, after she had come out of the vehicle. According to the accused, she punched him with a fist and he fell inside the car on that side. That he got a metal tool and hit her twice on the left side of her head. I am satisfied that by following the deceased on the opposite side of the car where she was outside the car, the accused unlawfully attacked the deceased for the second time, the first being when he insulted her to

be a professional prostitute. I find that the accused, and not the deceased, was the aggressor and therefore, he cannot be entitled to rely on the defence of self-defence.

Even stretching the situation a bit further, and going by the accused's own account in Court, I have not found any circumstances that would have placed the accused in imminent danger or indeed were there any reasonable grounds for him to believe that the only option he was left with was to kill the deceased. By his actions, the accused did not demonstrate that he did not want to fight, and that the situation was such that had he not harmed the deceased he would himself have been killed. The accused vehemently confirmed that the deceased used fists to assault him whereas he resorted to a tool in retaliation. I find that the accused had every opportunity to disengage in the fight, to go away and to leave the defenceless woman alone. I am satisfied that the accused purposely and deliberately so used excessive force to repel the self-instigated attack upon him. That the force used was disproportionate to the attack and unreasonable in the circumstances of the case. On the facts of this case, I also totally reject the defence of self-defence pleaded by the accused.

I must also observe that it is inconceivable that a man who purports to love his wife, as the accused put it in this case, could use an iron bar to hit her precisely on the head. The precision and the repeated strike on the head of the deceased is a clear manifestation of the accused's intention to kill or to cause grievous harm to the deceased. In cross-examination, the accused admitted that he knew or ought to have known the damage a metal bar could cause to the head of the deceased. With the type of tool that was used, I am satisfied that the damage could not have only resulted into a mere injury but death, as in this case. The accused's act of inflicting

the fatal injuries on the deceased using a metallic tool was unlawful as this was without any legal justification.

On the evidence in this case, the Prosecution has disproved both defences of provocation and self-defence. Therefore, I find that the prosecution has proved its case beyond all reasonable doubt. I find that the accused killed the deceased with malice aforethought. He is guilty as charged of the offence of murder contrary to section 200 of the Penal Code, Cap. 87 and I convict him accordingly.

As to sentence, section 201 of the Penal Code sets out the penalty for the person convicted of murder. It provides as follows:

“201 (1) Any person convicted of murder shall be sentenced –

(a) to death; or

(b) where there are extenuating circumstances, to any sentence other than death;

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

(2) For the purpose of this section –

(a) an extenuating circumstance is any fact associated with the offence which would diminish morally the degree of the convicted person's guilt;

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

In light of the above, I have considered whether there are any extenuating circumstances to persuade me to consider any other sentence other than the mandatory death penalty as required by section 201(1)(a) of the Penal Code.

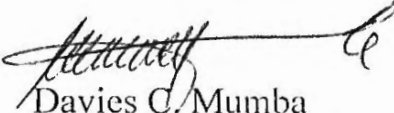
From the evidence of PW1, it is clear that the convict entertained a very strong belief that Simon was in the sitting room of his house and he even inquired about it. He was convinced in his mind that Simon was a paramour to the deceased, although without any tangible proof. This erroneous belief made the convict get agitated and felt provoked by the deceased. In that situation, the convict strongly believed that he was provoked by the deceased and/or acted in self-defence in inflicting the fatal injuries on the deceased. Consequently, he forcefully raised the defences of provocation and self-defence which have all failed since the defences cannot be sustained at law.

In the case of **Jack Chanda v The People**¹⁸, it was held that:

“Failed defence of provocation, evidence of witchcraft accusation; and evidence of drinking can amount to extenuating circumstances.”

Therefore, the failed defences amount to extenuating circumstances associated with the offence; and in my considered view diminishes morally the degree of the convicted person’s guilt. For this reason, I will not impose the death penalty on the convict instead I will sentence him to a term of imprisonment effective from the date he was remanded in custody.

Delivered in Open Court at Ndola this 24th day of February, 2017.


Davies C. Mumba
HIGH COURT JUDGE

