

IN THE SUPREME COURT OF ZAMBIA

SCZ APPEAL No.136/1993

HOLDEN AT NDOLA

(CRIMINAL JURISDICTION)

B E T W E E N :

MALUMBA PHIRI

APPELLANT

and

THE PEOPLE

RESPONDENT

Coram: Sakala, Chirwa and Muzyamba, J.J.J.S.

7th December, 1993

For the Appellant: In person

For the Respondent : P. Agarwal, Senior State Advocate

J U D G M E N T

Muzyamba, J.S. delivered the judgment of the court.

The appellant was convicted of murder Contrary to Section 200 of Penal Code, Cap 146 of the Laws of Zambia and detained at the President's pleasure

The particulars of the offence are that Malumba Phiri on the 20th day of September, 1991 at Lundazi in the Lundazi District of the Eastern Province of the Republic of Zambia did murder one EDWIN MTONGA.

He has appealed against both conviction and sentence.

The facts adduced in the court below were that the deceased was a hunter. On 19th September, 1991 he and PW.1, Muleya Lungu went hunting. On 20th September, 1991 the deceased killed a buffalo. He then went back to his village and got some helpers, one of whom was the appellant, to help them skin and cut the animal and dry the meat. It is alleged that on two separate occasions the appellant hid some meat, one of which was a special cut, the hunter's meat called lukombe in tumbuka. The meat was discovered and taken by the deceased. This

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angered the appellant who refused to take part of his share. There is evidence that later, at home, the appellant's wife went to the deceased's house and got her husband's share. On that same day, the 23rd of September, 1991 at night the appellant shot the deceased in the buttocks and thigh. It is common ground that the deceased died from the gun shot wounds.

In his defence the appellant gave evidence on oath. He said that he shot the deceased because he was provoked. That on the night before he shot the deceased, his wife had confessed to him that she had committed adultery with the deceased and on the night he shot the deceased his wife came home late and when he confronted her she again confessed that she had committed adultery with the deceased. He became annoyed, got the muzzle loader, loaded it and ran a distance of one kilometre to the deceased's house. He found the deceased, hid himself, aimed and shot him.

In arguing the appeal, both the appellant and the learned Senior State Advocate, Mr. Agarwal indicated that they would rely on the evidence on record.

We have considered the evidence on record. The learned trial judge accepted the fact that the appellant was provoked by his wife's confession but rejected the defence on the ground that the appellant did not find the deceased and his wife in the act of committing adultery and that he had time to cool off. This was, in our view, a misdirection because the evidence is quite clear that immediately his wife made the confession, the appellant got his gun and ran without resting to the deceased's house and shot him. It cannot therefore be said that the appellant did not act at the spur of the moment or in the heat of passion. We are satisfied that for provocation of this nature to stand as a defence, one need not find his spouse in the act of committing adultery or in a

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compromising situation. A confession is sufficient. We would therefore, for this reason allow the appeal against conviction. The conviction of murder and sentence imposed by the trial judge are set aside and we substitute a conviction of manslaughter contrary to Section 199 of Cap. 146.

On sentence, there is evidence that the appellant was aged 16 years, though married with a child, when he committed the offence. He was therefore a juvenile and we have considered the question of whether or not it would be proper for us to impose a custodial sentence, in view of his age at the time or to send him to an approved school. Section 73 (1) (1) of the Juveniles Act, Cap. 217 empowers the court to sentence a juvenile to a term of imprisonment where the offender is a young person. In the definition Section, Section 2 of the Act, a young person means a person who has attained the age of 16 years but has not attained the age of 19 years. The appellant was therefore a young person at the time he committed the offence. In that event we feel that being a married person, the appropriate sentence would be a term of imprisonment and not an approved school. We would therefore sentence him to six years imprisonment with hard labour with effect from 25th September, 1989 when he was arrested.

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E.L. SAKALA
SUPREME COURT JUDGE

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D.K. CHIRWA
SUPREME COURT JUDGE

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W.M. MUZYAMBA
SUPREME COURT JUDGE