

HOLDEN AT KABWE

(Criminal Jurisdiction)

WETESI CHIFITA PHIRI

Appellant

Vs

THE PEOPLE

Respondent

Coram: Sakala, Chirwa and Muzyamba JJJS.

17th May and 9th August, 1994.

**For the Appellant, Captain F.B. Nanguzgambo, Senior Legal Aid Counsel.
For the State, Mr. M. Mukelabai, Acting Senior State Advocate.**

J U D G M E N T

Sakala JS delivered the judgment of the court.

The appellant was convicted of murder contrary to Section 200 of the Penal Code Cap 146 of the laws of Zambia. The particulars of the offence alleged that the appellant, on the 31st October 1992, at Katete in the Katete District of the Eastern Province of the Republic of Zambia, murdered Georgina Phiri. Upon the court finding that there were extenuating circumstances, the appellant was sentenced to twenty years imprisonment with hard labour.

The brief facts of the case were common cause. These were that in the morning of 22nd October 1992, at Njuga village, Chief Kawaza in Katete District, the deceased was found bleeding from very severe injuries. Few meters from her was a blood stained knife which according to the prosecution witnesses belong to the appellant. At the scene the appellant was found crying alleging that the deceased had been killed by one Diva Phiri. The deceased died on 31st October 1992 from the injuries she sustained. It was common cause that the appellant suspected Diva Phiri, his relative, of committing adultery with the deceased and that there was a complaint before PW1, the Headman of the village, about the alleged affair between Diva Phiri and the deceased which complaint had not been discussed. According

to PW1, the couple had some problems. The appellant had chased the deceased several times because of the suspicion of adultery.

In support of their case, the prosecution produced in evidence a Warn and Caution Statement recorded from the appellant admitted after a trial within a trial. Part of this statement read as follows:-

"I do remember that on 21st October 1992 at around 20 hours, my wife Georgina Phiri left home and left me sleeping. I thought that my wife was just going to the toilet. I waited for a long time without my wife coming I therefore thought of looking for her. I looked for her, I knocked at the house of Semeli Mulepele Phiri who was my neighbour and she told me that she did not see my wife. I went back home and found that my wife was still away. I therefore thought of following her at her village. While still thinking, my wife came. I asked her where she had gone but she could not answer at this time we started quarreling. My wife got out of the house and run away, I followed her. She ran towards the path which goes to Kalambana village. At that time I had a knife in my hands and when I got hold of her I knifed her on the neck, she fell down and I stepped on her hands and neck and started cutting her on the neck. She fainted and I thought that she had died, I left her there and went back home. Very early in the morning I woke up and started asking for my wife deliberately to make people think that I knew nothing about my wife. I took the path which goes to Kalambana village. When I reached the place where I had left my wife, I found her still there. I felt sorry and pity about her and started crying."

In his evidence on oath the appellant denied killing his wife. The learned trial judge found that the suspicion of adultery and

disappearance of the deceased amounted to provocation but that the defence of provocation could not assist the appellant because the appellant's reaction was out of proportion to the events and so found him guilty as charged but when sentencing the appellant the court accepted the Warn and Caution Statement and made allowance for a provocative situation.

In supporting the conviction the learned State Advocate indicated that there was no evidence that proved provocation and provocation having failed the circumstances described by the learned trial judge only amounted to extenuating circumstances justifying the imposition of a sentence of 20 years.

On behalf of the appellant, Captain Nanguzgambo has submitted that the degree of reaction in this particular case could not have watered down the provocation so found by the learned trial judge. He asked us to interfere with the conviction and be at large as concerns the sentence.

We have very carefully considered the evidence on record and the judgment of the learned trial judge. We are satisfied that there was ample evidence establishing a defence of provocation and that the knife which was the weapon used by the appellant was with the appellant at the very time the wife had also returned. In these circumstances it was a misdirection on the part of the learned trial judge to take a different view of the facts as regards conviction and a different view of the facts as regards sentence. The evidence amply establish the defence of provocation. We therefore allow the appeal, we set aside the conviction of murder, we also set aside the sentence of twenty years imprisonment with hard labour.

We find, on the evidence, that the appellant committed an offence of manslaughter, we convict him of manslaughter and sentence him to ten years imprisonment with effect from the date of arrest.

.....
E.L. Sakala,
SUPREME COURT JUDGE.

.....
D.K. Chirwa,
SUPREME COURT JUDGE.

.....
W.M. Muzyamba,
SUPREME COURT JUDGE.