IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 172/2020**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

MARTIN LUKUWA **APPELLANT**

V

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS.
On 3rd November, 2020 and 10th November 2020

For the Appellant: *Mr. K. Muzenga, Director of Legal Aid*

For the Respondent: *Ms. G. Nyalugwe, Deputy Chief State Advocate, National Prosecutions Authority.*

J U D G M E N T

Hamaundu, **JS**, delivered the Judgment of the Court.

Cases referred to:

1. **Tembo v The People (1972) ZR 220**
2. **Lubendae v The People (1983) ZR 54**
3. **Tembo v The People (1976) ZR 332**
4. **Attorney-General and The Movement for Multi-party Democracy v Lewanika & 4 Others (1993-1994) ZR 164**
5. **Chanda and Anor v The People (2002) ZR 124**
6. **Mumbi v the People (2004) ZR 106**
7. **Kezzy Ngulube v The People (2009) ZR 91**
8. **Bwalya v the People (1995-1997)**
9. **Davy Sikaumbwe v The People, appeal No. 61 of 2019**

10. Whiteson Simusokwe v The People (2002) ZR 63
11. Levyson Zimba v The People, Appeal No. 343 of 2011

The appellant was in 2011 charged with two counts of the murder of his "*parents in law*". He was convicted on both counts and sentenced to death. He now appeals against the conviction and sentence.

Briefly, the facts presented to the trial court by both sides were these:

On 4th July, 2010 in Chifubu township in the city of Ndola, the appellant quarrelled and fought with a woman (PW2) with whom he had a child, and was living with, at her parents' home (the two deceased). Incensed by this fight, the appellant turned on the said parents and smote them with the handle of an axe. The mother in law, Juliana Mulanga, died on the spot. The father in law, Frank Musonda, however, was taken to the hospital where he died a few hours later. The appellant vanished from the neighbourhood. He was only seen, and apprehended, some eleven months later.

The appellant told the court that, on the material day, he had been drinking *kachasu* and some other beer for a good part of the day; that he came back home in the evening where a fight with his wife ensued. The appellant said that, during that fight, his father in law joined on the side of the daughter and sought to strike the appellant with the handle; that, in self-defence, the appellant wrested the handle from his father in law but that, in the process, it swerved and hit the father in law, who immediately fell to the ground. The appellant denied striking a blow at his mother in law and said that he did not know how she met her death.

Relying on prosecution eye-witness accounts, the learned trial judge found that the appellant assaulted both his parents in law. She rejected the defence of drunkenness and self-defence which were suggested by the appellant's testimony. Hence, she convicted him of murder. She then said that, on the facts of the case, she did not find any extenuating circumstances. She, therefore, handed down the mandatory death sentence.

The appeal is argued on two grounds couched as follows:

> **"Ground one**
>
> **The learned trial judge erred in law and in fact when she convicted the appellant of the offence of murder in the light of**

the evidence of a fight and the defence of provocation on the record.

Ground two

In the alternative to ground one, the learned trial judge misdirected herself in law and in fact when she failed to find the existence of extenuating circumstances so as to impose any other sentence than the mandatory death penalty on the facts of the case"

In the first ground of appeal, we were called upon to re-define what amounts to provocation under the law. On behalf of the appellant, Mr. Muzenga, the learned Director of Legal Aid, submitted that there was irrefutable evidence that the appellant and his wife fought. Relying on the case of **Tembo v The People**[1], Counsel submitted that a fight can amount to provocation and that, in the circumstances, the learned trial judge should have addressed her mind to the possible defence of provocation. Mr. Muzenga further argued that had it been the appellant's wife who was killed, the matter would have been a straightforward case of manslaughter.

Mr. Muzenga, however, pointed out that this case is novel because the people who were killed were not part of the fight. He nevertheless beseeched us to recognize what he termed as "*the*

concept of transferred provocation" in the same way that the law recognises the principle of *"transferred malice"*. The reason for this submission, according Mr. Muzenga, was that the appellant killed his in laws whilst labouring under extreme provocation caused by the fight with his wife, and that, during that moment, he had lost self-control and ceased to be master of his own mind.

In response Ms. Nyalugwe, the learned Deputy Chief State Advocate, referred us to the case of **Lubendae v The People**[2] where we held:

> "**(iii) The defence of provocation is available only when the deceased was the provoker.**"

Mr. Muzenga, however, urged us to re-visit that decision.

What amounts to provocation is defined by statute. **Section 206** of the **Penal Code, Chapter 87** of the **Laws of Zambia** provides as follows:

> "**(1) The term** *"Provocation"* **means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, and filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or**

insult is done or offered. For the purposes of this section, *"ordinary person"* **shall mean an ordinary person of the community to which the accused belongs.**

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

Our holding in **Lubendae v The People**[2] was based on our decision in another case of **Tembo v the People**[3]. In that case, in 1976 we interpreted the two subsections that we have set out above.

We said:

> **"As can be seen, the words** *'to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered'* **in subsection (1) of section 206 are indicative of the fact that strictly speaking the defence of provocation under the first two subsections of section 206 will only succeed if retaliation by the person provoked is upon the body of the provoker. In the present case it is obvious that Monica and her baby were innocent victims and that the provoker was Samuel"**

Our position, therefore, was that the intention of Parliament had been that provocation should not extend to situations such as the one in the present case.

Now, by asking us to re-consider that holding, Mr. Muzenga is calling upon us to interpret **section 206** again. There are several rules that are employed in interpreting a statute. It is a generally accepted approach that the primary rule of construction of a statute is the "*literal rule*"; which simply means that, unless they are ambiguous, words in a statute must be interpreted in accordance with their ordinary and natural sense. The court will only apply other rules of construction if the words are ambiguous; or a strict interpretation of the law results in absurdity or an unjust situation. We have stated this rule in several cases. One such case is the case of **Attorney-General and The Movement for Multi-party Democracy v Lewanika & 4 Others**[4]. The words in **subsections (1)** and **(2)** of **section 206** are as clear now as they were when we interpreted them in 1976. Since then, we do not think that society has changed its view on the matter: it is still unaccepable today, as it was then, for a person to assault innocent people upon being provoked by a third person. Hence, even today, a strict interpretation of that section does not produce an absurdity or

unjust situation. Therefore, we see no reason to re-visit our interpretation of the section. The first ground of appeal must fail.

In the second ground, Mr. Muzenga's argument is essentially that the learned judge should have considered the extenuating effect of the following: the evidence of drunkenness, the failed defence of self-defence, and, the possible failed defence of provocation.

We start with the evidence of drunkenness. Mr. Muzenga relies on the case of **Chanda and Another v The People**[5] where we held that evidence of drinking provided extenuation to a charge of murder. However, since the case of **Mumbi v The People**[6] and **Kezzy Ngulube v The People**[7], we have held, as we had earlier held in **Bwalya v The people**[8], that what provides extenuation is the drunken circumstances generally attending upon the occasion. In **Bwalya v The People**[6], the murder took place at a beer drinking place where, generally, everybody present was drinking beer. We held that this provided extenuation. In **Mumbi v The People**[6], however, although, there was evidence that the appellant had drunk some beer, the murder took place at his uncle's house where no alcohol was being partaken at all. We declined to find extenuation. In **Kezzy Ngulube v The People**[7], the incident

happened at a drinking place. The facts were, however, that the appellant and the deceased had sat by themselves, and the appellant had intentionally put some poison in the deceased's beer. There was no evidence of the usual quarrels indicative of drunkenness. We declined to find extenuation. In very recent decisions, we have declined to find extenuation in cases of people who come drunk from wherever they have been and start assaulting other innocent people. One such case is **Davy Sikaumbwe v The People[9],** whose judgment we delivered on 14th August, 2020.

In this case, the appellant came from where he had been drinking and killed his in-laws during a quarrel with his wife. The victims were not drunk, and they had not been drinking beer with the appellant. It cannot, therefore, be said that drunken circumstances were attendant upon the occasion. There was, consequently, no extenuation.

Did the defences of provocation and self-defence provide extenuation? In **whiteson Simusokwe v The People[10]**, we held that a failed defence of provocation affords extenuation for a charge of murder. This principle must obviously extend to that of self-defence. In a recent case of **Levyson Zimba v The People[11]**, we explained that, for that principle to apply, there must be on record

evidence sufficient for the court to make a finding that there was provocation or that the appellant was entitled to defend himself. We further explained that, where the defence fails on a technicality, such as that the reaction is disproportionate to the provocation or, in the case of self-defence, that the force used goes beyond that which is reasonably necessary to defend oneself, then, it is only in those circumstances that the failed defence provides extenuation.

In this case, there was no provocation because the victims were not the provokers. So the question of a failed defence of provocation did not even arise. The same goes for the defence of self-defence: for, although the learned trial judge kept making reference as to the excessive force used by the appellant in his *"self-defence"*, the testimony of PW1 who was an eye witness to both assaults showed that the appellant was the aggressor. PW1 found the appellant hitting his father-in-law with the handle of an axe, while the old man was crying out in pain. The appellant then run after his mother-in-law whom he struck on the head. The court below should, therefore, have specifically made a finding that the appellant had been the aggressor; and had not been acting in self-defence.

On the evidence on record, our view is that there was no self-defence and, consequently, the submission that a failed defence of self-defence provided extenuation cannot be sustained. Accordingly we find no merit in the second ground, which must certainly fail.

The net result is that the whole appeal has failed. It is dismissed.

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E. N. C. Muyovwe
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

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J. Chinyama
SUPREME COURT JUDGE