IN THE SUPREME COURT OF ZAMBIA Appeal No. 621/2013
HOLDEN AT KABWE
(Criminal Jurisdiction)

B E T W E E N:

PATRICK KABWE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Phiri, Muyovwe and Lengalenga, JJS**
on 12th August, 2014 and 17th June, 2020.

For the Appellant: Mr. H. M. Mweemba, Senior Legal Aid Counsel

For the Respondent: Mr. C. Bako, Acting Deputy Chief State Advocate

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Whiteson Simusokwe vs. The People (2002) Z.R. 63**
2. **Jack Chanda and Kennedy Chanda vs. The People (2002) Z.R. 124**
3. **Kalinda vs. The People (1966) Z.R. 29**
4. **Bingwell Changwe vs. The People Appeal No. 32/2015**
5. **Oswald Chanda vs. The People Appeal No. 14/2017**

When we heard this appeal, we sat with Hon. Madam Justice Lengalenga who reverted back to her substantive position and is now in the Court of Appeal.

This appeal is against sentence only. The appellant was tried and convicted of the offence of murder by the Hon. Mrs. Justice Mulenga (as she then was). It was alleged that on the 30th March, 2012 at Lusaka he murdered his wife Nilu Njobvu, (hereinafter referred to as "the deceased"). The trial judge found no extenuating circumstances and sentenced the appellant to death.

We find it necessary to recount the evidence adduced in order to determine whether the learned trial judge was on firm ground when she found no extenuating circumstances in this case. The prosecution called 8 witnesses. The key witnesses, however, were PW1 a friend of the deceased and neighbour; PW2 the aunt to the deceased; PW4 a friend of the appellant and PW5 the son of the deceased and the appellant. According to PW1, around 21:00 hours, PW5 informed her that the deceased had sent him to call her. She proceeded to the deceased's house where she found a lot of people gathered outside and she was told that the appellant was beating the deceased. PW1 decided not to interfere in the marital affairs of the couple and turned back to go to her house. The appellant followed her and grabbed her by the hand and led her back to his house. At this time, the deceased fled from the house

but the appellant managed to take her back into the house. The issue was that the deceased had gone to buy some pork and returned late from the market and this angered the appellant who started beating the deceased. The appellant undressed the deceased and continued beating her in the presence of PW1. The appellant kept on telling the deceased that he was going to kill her. The deceased kept on losing and gaining consciousness as the appellant continued beating her. Eventually, he advised PW1 to leave his house and take the deceased with her, but she refused and left.

PW5 witnessed the appellant continue beating the deceased after the departure of PW1. He stated that the appellant put the deceased's head between his thighs and used a shambok, a fan belt and a shot baton in assaulting her all over the body and on the head. PW5 saw blood oozing from his mother's head. He saw his father, the appellant, pick the blood-stained clothes and threw them into the pit latrine.

The evidence of PW2 the mother to PW1 was that she was informed by PW1 that the appellant was beating the deceased. However, around 03:00 hours the appellant went to her home

requesting for PW1 to go with him to his house to stay with his children while he took the deceased to the hospital. At that time, PW1 was not at home as she had gone to attend a funeral. PW2 then went with the appellant to his house where she found the deceased lying naked on the floor in the bedroom. She observed that the deceased's body was swollen from severe beatings. While the appellant went to look for transport to take the deceased to the hospital, PW2 dressed the deceased. When the appellant arrived with transport, he asked her not to tell the doctor that he had beaten the deceased. PW2 carried with her the couple's 8 months old baby. They ended up at University Teaching Hospital (UTH) and when the doctor inquired as to who had beaten the deceased, the appellant stated that it was a neighbour. The deceased passed away and as they were taking the body to the mortuary the appellant disappeared leaving PW2 alone at the UTH. PW2 reported the matter to the police.

A postmortem examination was conducted on the body of the deceased whose body was identified by her uncle PW3. The cause of death was found to be celebral contusion due to blunt head injury and multiple blunt injuries on the body.

PW4, a friend of the appellant, testified that on the morning of 1st April, 2012 he overheard some passersby saying that the appellant had killed his wife. This prompted him to call the appellant who confirmed that he had a fight with his wife and that she had died but that he had fled to Mazabuka in Southern Province. PW4 advised him to surrender to the police. On his advice, the appellant returned to Lusaka and in the company of PW4, he surrendered himself at Matero Police station where he was detained for the murder of his wife.

The evidence from the arresting officer PW8 was that the appellant told him that he had differed with his wife over her promiscuous behaviour but investigations revealed that it was the appellant who had extra marital affairs.

The appellant's story was that on the material day around 14:00 hours he gave his wife money to go and buy a chicken. Later, his children followed him to his shop with the baby as the mother was not yet back home. By 18:00 hours she was not back home and her phone was unreachable. They all went home to wait for the deceased and by 21:00 hours she had not returned home after leaving home with PW1. The long and short of the appellant's story

is that on her return the deceased admitted that she had escorted PW1 to Matero to meet her boyfriend. According to the appellant, the deceased confessed that she had a boyfriend by the name of Chitalu who was known to her mother and who intended to marry her. That this is how the two started struggling and in the process the deceased fell and hit herself against the door frame. She was drunk. He stated that, PW1 arrived at his home and confirmed that they had been together. And when his wife confessed to the adulterous affair, he got annoyed and beat the deceased with his belt. He stated that the deceased was promiscuous in the past and used to drink. That he did not intend to kill but to stop her bad behaviour although on the material night he did not find her with a man friend.

In sum, the learned trial judge after considering the evidence, rejected the appellants defence and convicted him as charged.

With regard to sentence, which we are concerned with in this appeal, the learned trial judge addressed her mind to Section 201 of the Penal Code and the cases of **Whiteson Simusokwe vs. The People**[1] and **Jack Chanda and Kennedy Chanda vs. The People**[2] where we held that a failed defence of provocation affords

extenuation for the murder charge. The learned trial judge found that the two cases were not applicable to this case and found no extenuating circumstances and sentenced him to the mandatory death penalty.

In his sole ground of appeal, the appellant argues that the learned trial judge erred by not finding extenuating circumstances. First of all, Counsel for the appellant Mr. Mweemba pointed out that PW1, PW2 and PW3 were witnesses with a bias as they were related to the deceased and that their evidence ought to have been treated with caution. Further, that PW5's evidence confirmed the appellant's version that an unnamed uncle of the deceased used to visit her each time he was away from home. Counsel submitted that the appellant's story that the deceased had confessed to having an illicit affair with a man named Chitalu which affair was well known to her mother should be believed by this Court. That any reasonable husband would be infuriated by such behaviour. The gist of Mr. Mweemba's argument is that the appellant was provoked by the deceased's actions on the material day. Counsel buttressed his argument by relying on the case of **Kalinda vs. The People**[3] where it was held that:

(1) To be found in adultery has always been considered one of the gravest forms of provocation.

(2) A confession of adultery has been held to be equivalent at being found in adultery and to grave and sudden provocation."

Counsel also cited the case of **Whiteson Simusokwe vs. The People**[1] where this court held that:

> **"The use of excessive force immediately defeated any defence of provocation so that it is not possible to reduce this case of manslaughter. We uphold the conviction for murder. However, we accept that a failed defense of provocation nonetheless affords the extenuation for the murder charge. The intimate relationship and the alleged infidelity which led to the assault were therefore an extenuating circumstance. This justifies the non-imposition of a mandatory capital sentence."**

We were urged to allow the appeal, set aside the death sentence and impose an appropriate sentence.

Mr. Bako on behalf of the respondent supported the trial court for not finding extenuating circumstances. Counsel argued that the learned trial judge rightly found that the defence of provocation was not available to the appellant in that the delay by the deceased to prepare food for the appellant could not amount to provocation. It was submitted that the weapons used to assault the deceased showed that he intended to kill her. Counsel emphasized that the deceased at the time of the attack was defenceless, sober and was

not found in any compromising position to warrant such a brutal attack from the appellant. We were urged to dismiss the appeal.

We have considered the record of appeal and the submissions by Counsel. The issue for our determination is whether the learned trial judge was on terra firma when she held that there were no extenuating circumstances in this case.

Mr. Mweemba cited the case of **Kalinda vs. The People**[3] which in our view can be distinguished from the case in *casu*. In the **Kalinda** case the deceased was definitely in a relationship with another man whom she declared she intended to marry. In fact, there was evidence that the deceased confessed to the adulterous affair but continued living with her husband, the appellant. There was evidence that the appellant practically imprisoned the deceased in her own home in his bid to prevent her from leaving him and the children. He was also afraid of losing his children once his wife left him for another man. Clearly, the **Kalinda** case is not applicable to this case.

In the case in *casu* the learned trial judge, after considering the cases of **Whiteson Simusokwe**[1] and **Jack Chanda and Another**[2] had this to say:

> **"These two authorities are to the effect that a failed defence of provocation generally affords extenuation in the case of murder. When these authorities are considered in the light of Section 201(2)(b), it is clear that this extenuation is not automatic but has to be objectively considered and must necessarily meet a certain threshold as the court would consider reasonable. It would be absurd to stretch it to mean that any flimsy defence of provocation which is raised but fails would still automatically amount to an extenuating circumstance.**
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> **On the facts of this instant case, my findings are that this defence of provocation totally lacked merit as there was no provocation of the nature as alleged by the accused. The prosecution evidence totally negated the allegation that the deceased had a boyfriend or admitted to one or that she had been drinking with PW1. This defence was thus a mere afterthought and figment of the imagination of the accused. It did not even meet the required threshold for one to consider whether the reaction or retaliation was reasonable or not.**
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> **I thus find that the failed defence of provocation in this case does not meet the threshold to be considered as an extenuating circumstance."**

We cannot fault the learned trial judge who had the opportunity to hear the witnesses and observe their demeanour. She weighed the prosecution evidence against that of the appellant and came to the inevitable conclusion that on the peculiar facts of this case, the appellant could not hide behind the defence of

provocation. We agree with her reasoning that there were no extenuating circumstances in this case. As courts, we cannot allow a situation where mere suspicion of infidelity will afford an accused person the benefit of extenuation. We have pronounced ourselves on this matter in a plethora of cases including our recent cases of **Bingwell Changwe vs. The People**[4] and **Oswald Chanda vs. The People**[5] and we totally agree with the reasoning of the learned trial judge that there were no extenuating circumstances in this case as there was no provocation worthy of note.

We find no merit in the sole ground of appeal and we dismiss it accordingly.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE