**IN THE COURT OF APPEAL OF ZAMBIA** **APPEAL NO 070/2020**
**HOLDEN AT NDOLA**
*(Criminal Jurisdiction)*

**BETWEEN**

**DAVID CHIMWANGA** **APPELLANT**

**AND**

**THE PEOPLE** **RESPONDENT**



**CORAM: CHISANGA JP, MULONGOTI AND SIAVWAPA, JJA**

On 10th and 18th November, 2020

FOR THE APPELLANT: MRS. E. I. BANDA, SENIOR LEGAL AID COUNSEL

FOR THE RESPONDENT: MISS M. P. LUNGU, DEPUTY CHIEF STATE ADVOCATE

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# J U D G M E N T

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**SIAVWAPA, JA, delivered the Judgment of the Court.**

**Cases referred to:**

1. *Liyambi v the People (1978) ZR 25*
2. *Kalinda v the People (1966) ZR 29*
3. *Banda v the People (1973) ZR III*
4. *The People v Sitali (1972) 139*
5. *Palmer v R (1971) 1 ALL E. R. 1088*
6. *Jack Chanda and Kennedy Chanda v the People SCZ Judgment No. 29 of 2002*
7. *Mwiimbe v the People (1989) ZR 15*

8. *R v Julien (1969) 2 ALL E R: 856.*
9. *Dorcas v the People CAZ Appeal No. 124 of 2018*
10. *Binwell Changwe v The People SCZ Appeal No. 32 of 2015*

## 1. INTRODUCTION

This appeal seeks to impugn the Judgment of the High Court delivered by the Honourable Mrs. Justice M. K. Makubalo on 20th November, 2018.

In her Judgment, the learned Judge convicted the Appellant of one count of murder and sentenced him to death.

## 2. BACKGROUND FACTS

The Appellant is a young man who, six years prior to the commission of the offence, had a sexual relationship with PW1 which resulted in the birth of a child. The parents to PW1 refused to allow the two to get married in order for PW1 to return to school after delivery.

In July 2018, the Appellant went to PW1's village and entered the house where she was sleeping and murdered the deceased whom he found with PW1.

## 3. THE EVIDENCE

During trial, the prosecution evidence was that the Appellant did go to PW1's house in the night of 1st July 2018 upon which

he forcibly entered the house armed with a knife in one hand and a torch in the other.

At the time, PW1 was in company of the deceased, whom she said was her boyfriend. She said that the deceased had arrived at her home earlier around 21:00 hours in a drunken state while the Appellant arrived around 23:00 hours while they were asleep.

According to PW1, the door was secured using a chain and a lock but that she was awakened when the Appellant entered the house after breaking the locking system.

The Appellant, who had a knife in his right hand and a torch in his left had proceeded to stab the deceased who was sleeping beside her on the bed.

As PW1 got up while screaming and trying to come out of the house, the Appellant stood by the entrance and threatened to kill her. She however, escaped when the Appellant went to pull the deceased from the bed to the floor.

PW1 went to alert her grandmother and ran into the bush where she spent the rest of the night allegedly because she feared a reprisal from the villagers.

As PW2, PW1's grandmother was approaching PW1's house, she saw the Appellant coming out of the house running and when she asked him to stop, he simply insulted her and disappeared.

PW2 then entered the house and found the deceased lying on the floor face-up but still breathing until he stopped breathing. The man lay in a pool of blood with the area around his waist soaked in blood.

She went outside and called for help thereby attracting the attention of PW3 and two others who came to the scene. Later PW3 went to call Community Crime Prevention members who in turn called the police.

PW5, a police officer, inspected the body and discovered three wounds one in the neck and two near the chest. He also discovered that the deceased's manhood had been severed and placed on the right side of the body. The body of the deceased was collected and deposited at Solwezi General Hospital Mortuary.

The following day, the 2nd July 2018, PW2 and PW3 went searching for PW1 and found her hiding in the bush. They took her to the police station and handed her over to the police.

PW4, the Appellant's uncle, told the Court that the Appellant lived with him and he was married. Upon receiving information that the Appellant had allegedly murdered someone, he went to the Appellant's house where he only found the wife. The wife expressed ignorance of the Appellant's whereabouts.

He later was informed that the Appellant had been seen and when he went to the Appellant's house around 12:00 hours, he found him and questioned him on the alleged murder but got no satisfactory answer. He conveyed him to the police station and handed him over to the police around 19:00hrs.

It was PW5, the arresting officer's testimony that when he and other police officers went to the scene to look for the knife used in the commission of the crime, they found an angry mob of villagers who attacked and injured some police officers and the Appellant.

The scar on the Appellant's forehead was attributed to the mob attack and not the blow by the deceased as stated by the Appellant.

4. **THE DEFENCE**

The Appellant's claim was that PW1 was his wife and that he had left home a week earlier for the farm.

On the material day, he left the farm on his bicycle around 17:00 hours and headed back to the village. He arrived at PW1's house between 21 and 22 hours and after knocking for a long time, PW1 came to the door and asked who was knocking. He identified himself after which PW1 opened the door and upon entering the house, someone struck him on the head twice. On the third attack, the Appellant intercepted the blow and held the assailant. He disarmed the assailant and struck him with the same weapon used against him.

According to the Appellant he heard the assailant shout that he had been injured after which he did not know what happened until he found out that he was in hospital.

He disputed PW4's evidence that he had a wife at his village. He however admitted in cross-examination that he lived at his uncle (PW4)'s home but that he used to spend nights at PW1's home.

5. **THE DECISION OF THE HIGH COURT**

After analysing the evidence, the learned Judge came to the conclusion that the prosecution witnesses were truthful and

accepted PW1's evidence that the Appellant stabbed the deceased with a knife and that the deceased died due to the stab wounds. The learned Judge then went on to consider the two defences raised by the Appellant namely self-defence and provocation.

(a) **Provocation:**

The learned Judge considered the elements that constitute provocation namely;

(i) The provocative act
(ii) resulting loss of self-control and
(iii) proportionate retaliation

After considering the case of *Liyambi v the People*[1] which sets out the three elements; and applying the same to the facts; the learned Judge found that the principles did not apply to the Appellant because there was no marriage between him and PW1. This was in the context of the case of *Kalinda v the People*[2] in which it was observed as follows;

***"To be found in adultery has, in the English Common Law, always been considered one of the gravest forms of provocation. In Zambia and other African territories, a confession of adultery has been held to be the equivalent of being found in adultery and to be grave and sudden provocation."***

In that regard it was the learned Judge's accepted position that the Appellant was not married to PW1 and therefore finding her with another man in bed did not constitute adultery by reason of which the Appellant could not be provoked at law.

The learned Judge went further to find that the law on provocation is extended to couples who may not be married but enjoying a long intimate relationship. Reference was made to the cases of *Banda v the People*[3] *and the People v Sitali*[4] which is a High Court decision.

On this second limb, the learned Judge rejected the idea that there existed an intimate relationship between the Appellant and PW1.

(b) **SELF-DEFENCE**

The claim emanates from the Appellant's evidence that upon entering the house, he was struck twice by a person he could not see because it was dark but that he saw the assailant on the third attempt to strike and dispossessed him of the weapon and struck him back with the same.

The learned Judge rejected this evidence on account that the Appellant did not state how he was able to see the assailant on the third attempt to strike. The learned Judge also found the story incredible on account of the post-mortem report that revealed three deep lacerations on the deceased as opposed to a single strike which the Appellant says he made on the deceased. In addition, the learned Judge found the severing of the deceased's manhood to be contrary to the Appellant's version.

The learned Judge also considered the fact whether the Appellant was in imminent danger and the opportunity to avert it by retreating. She came to the conclusion that the Appellant had an opportunity to retreat when he was struck the first time and after disarming the deceased.

The learned Judge further held the view that the injuries inflicted on the deceased did not suggest self-defence but pure aggression.

6. **THE APPEAL**

We were moved on two grounds of appeal namely;

1. That the learned Judge misdirected herself in law and in fact when she did not accept the pleas of self-defence and provocation on the facts of the case.

2. That in the alternative the learned trial Judge misdirected herself in law and in fact when she failed to analyse that there existed extenuating circumstances on the record to warrant a sentence other than death.

7. **ARGUMENTS BY THE APPELLANT**

(a) SELF-DEFENCE

Counsel for the Appellant sought the aid of Section 17 of the Penal Code to buttress the position that the Appellant acted in self-defence and ought to have been acquitted.

The gist of Section 17 of the Penal Code Chapter 87 of the Laws of Zambia is that it absolves a person who uses force to repel an unlawful attack upon his person, property or the property of any person of criminal liability if the means and force employed is not more than what is necessary in the circumstances to repel the attack.

The case of *Palmer v R*[5] which the learned trial Judge extensively quoted has also been adopted by the Appellant to the extent that it proposes an objective test as to the degree of force that is used to repel the attack to determine whether the accused's action was reasonable in the circumstances.

(b) PROVOCATION

After quoting Sections 105 and 106 of the Penal Code which set out the elements which reduce the charge of murder to manslaughter as a result of sudden provocation causing the accused to act in the heat of passion without time to cool down and the definition of provocation as an act likely to deprive a person of self-control, respectively; the Appellant has urged us to find provocation on the part of the deceased and substitute the conviction of murder with that of manslaughter.

The Appellant also relied on the case of *Liyambi v the People* which brings out the element of a reasonable relationship between the mode of resentment and the provocation. It goes on to say that if the mode of resentment is out of proportion to the provocation then the relief is not available.

In the alternative ground, the submission is that the failed defences of self-defence and provocation should avail extenuation to the death penalty.

The case of *Jack Chanda and Kennedy Chanda v the People*[6] was called into aid in so far as it holds that;

***"Failed defence of provocation, evidence of witchcraft accusation and evidence of drinking can amount to extenuating circumstances".***

8. **ARGUMENTS BY THE RESPONDENT**

(a) SELF-DEFENCE

The Respondent out rightly rejects the argument for self-defence stating that the Appellant found the deceased lying on the bed and stabbed him.

Alternatively, it is submitted that having disarmed the deceased, the Appellant was no longer in imminent danger and at that point, the Appellant simply used aggression to punish the deceased.

Further that the nature of the injuries reveal a disproportionate level of retaliation to the attack offered by the deceased.

He cited the cases of *Mwiimbe v the People*[7] *and R v Julien*[8]. Both cases speak to the proportionality of the retaliation to the attack and the need for the accused to show desire to disengage and physically withdraw if circumstances allow.

(b) PROVOCATION

The Respondent dismissed this defence for the reason that it has not been established that there was an intimate relationship between the Appellant and PW1 as evidence by PW4 showed that the Appellant was married and living with his wife at PW4's village.

On the ground in the alternative, it is argued that there was no provocative act done by the deceased to give rise to extenuation on account of a failed defence of provocation. We were referred to our decision in the case of *Dorcas v the People*[9] in which we said'

> ***"A failed defence of provocation can afford extenuation to an accused person. Our considered view is that for this to occur, some elements of provocation should have been met. However, it should have failed due to disproportionate relation by the accused person.***
>
> ***Here, the elements of provocation have not been met. It cannot be said extenuation arises."***

Further we were referred to the case of *Binwell Changwe v The People*[10] where the Supreme Court said;

***"The question of failed defence of provocation cannot arise as there was no provocation at all..."***

9. **OUR DECISION**

Although there are two grounds of appeal advanced, our decision on the second ground of appeal, which is in the alternative, will depend on how we resolve the first ground.

In the first ground, the Appellant canvasses two possible defences namely self-defence and provocation. From the evidence on the record, it is clear that provocation and self-defence provided the only possible escape route to the Appellant. What is firmly established is that the Appellant and PW1 did have a sexual relationship in the years past that brought forth a child in 2013.

According to PW1 and PW2, the pair was prevented by PW1's parents from marrying as PW1 wanted to go back to school. It would however, appear that the Appellant did not fully accept to disengage from PW1 and continued to follow her even at school to threaten her.

## (i) PROVOCATION

The first question for our determination is therefore; that: was the Appellant provoked into causing the deceased's death?

In light of the elucidation of the law on provocation by the learned Judge in her judgment, we do not wish to repeat what she said all over again. We however, note that for provocation to be established there should be compelling evidence that the deceased did or said something to the accused, which would cause an ordinary person of the accused's standing to lose self-control and act in the heat of passion and cause the death of the provocative person.

The Appellant's contention is that PW1 was his wife. He however does not argue that he was provoked by the presence of the deceased in the house with his wife. He instead claims to have acted in self-defence upon being attacked and struck twice by the deceased. According to the Appellant, he hit the deceased in retaliation to the earlier assault he had inflicted upon him.

At no point did the Appellant in his evidence suggest provocation as the basis for attacking the deceased. We however, note that counsel for the Appellant asked PW1

questions suggesting provocation during cross-examination by suggesting that at the time of the crime, there was an existing intimate relationship between him and PW1.

Although it is perplexing to us that a man would go to a woman's house late in the night without appointment when the two have no intimate relationship, we are of the considered view that although PW1 had called off the relationship with the Appellant, the Appellant had stubbornly continued to accost PW1 for sexual purposes and hence his un announced visit that fateful night.

This insistence on a relationship by the Appellant did not amount to an intimate relationship as clearly PW1 and her relatives had rejected the Appellant. For there to be an intimate relationship between an unmarried pair, the feeling must be mutual.

Consequently, the elements upon which provocation can be established at law did not exist namely, a marriage relationship or an intimate relationship between the two.

We take the view that rather than provocation, what inspired the Appellant to attack the deceased was

jealousy against the deceased who had stolen PW1's affection from him.

In the circumstances Section 205(1) of the Penal Code would not offer any comfort to the accused. We accordingly uphold the finding by the honourable Judge below that there was no provocation in this case.

(ii) **SELF DEFENCE**

As indicated in paragraph (i) above self-defence is the Appellant's preferred route of escape. This is anchored on an alleged attack on him by the deceased upon entering PW1's house. The evidence he offers for the attack is the scar on his forehead which is not in dispute. However, the only eye witness, PW1, disputes the attack and places the Appellant in the position of aggressor.

Both PW2 and PW4, the arresting officer, attribute the scar on the Appellant's forehead to the instant mob justice he received at PW1's village when he was taken by the police to look for the knife he allegedly used to attack the deceased.

It therefore seems to us that the plea of self-defence has been sufficiently negatived by the prosecution evidence. But even assuming he was attacked first, the kind of

injuries inflicted on the deceased, including the severing of his penis; do not accord with the principles upon which the defence may be claimed. Clearly the force used far exceeded that necessary to ward off an unlawful attack.

The Appellant's evidence was that he managed to disarm the deceased after a struggle. This suggests that if it is true that the deceased had first struck him twice on the forehead with a heavy object, and yet he still managed to wrestle the same object from him, the impact of the strikes was negligible. After disarming the deceased, he had the opportunity to show his willingness to disengage rather than inflict those deadly injuries on the deceased.

It follows that the Appellant's conduct was not consistent with Section 17 of the Penal Code to absolve him of criminal liability for his conduct. We therefore agree with the learned Judge that the Appellant did not act in self-defence and if he did, he did more than what was necessary to fend off the unlawful attack.

10. **EXTENUATION**

With both defences having failed, only a failed defence of provocation is considered as an extenuating circumstance in accordance with the law.

The first point to consider is whether provocation was established in line with our decision in *Dorcas v The People* (*supra)* before we can accept its failure as extenuation. The point to note from our judgment is that provocation must be found to have occurred as a fact by establishing that the deceased did indeed utter provocative words or did a provocative act against the accused.

Once that is established, then the Court considers whether the force used was commensurate with the provocation or excessive and if it finds it to have been excessive, the defence fails. Such a failed defence is then accepted as an extenuation against the imposition of the death penalty.

In this case the learned Judge below found that no provocation was committed and we agree with her for the reasons earlier stated. It follows therefore, that there is no failed defence of provocation to extenuate the death penalty.

11. **CONCLUSION**

There is no question that the deceased in this case died due to the injuries inflicted upon him by the Appellant. We note that PW1's evidence is to the effect that upon entering the house, the Appellant was armed with a knife in his right hand while he held a torch in his left. This evidence suggests that the

Appellant's visit to PW1's house that night was not an innocent one. It would appear he had been tipped about the presence of the deceased at PW1's house and went there with intent to attack the deceased.

On that account, we do not see how the two defences canvassed could hold in the face of the evidence before the learned trial Judge which, in our view was overwhelming against the Appellant.

Having found that ground one lacks merit we find the second ground in the alternative to be misconceived at law. We accordingly dismiss the appeal wholly and uphold the judgment of the court below.

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F. M. CHISANGA
**JUDGE PRESIDENT**

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J. Z. MULONGOTI
**COURT OF APPEAL JUDGE**

.....
M. J. SIAVWAPA
**COURT OF APPEAL JUDGE**