

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BRUCE MWAULUKA LUBASI

APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: Ngulube, D.C.J., Gardner and Sakala, JJ.S.

For the Appellant, Mrs E. N. C. Muyovwe, Legal Aid Counsel

For the Respondent, Mr. F. C. Mwiinga, Director of Public Prosecutions

J U D G M E N T

Ngulube, D.C.J., delivered the judgment of the court.

Case referred to:

(1) Liyumbi -v- The People (1978) ZR 25

The appellant was sentenced to death following upon his conviction on a charge of murder. The allegation was that on 18th October, 1984, he murdered his father. There was evidence that on 22nd September, 1984 at the deceased's village there was a quarrel between the appellant and his father over some beer. There was evidence on record that the relationship between the appellant and his father had for a number of years been strained. The deceased would insult the appellant and chase him away from the village and he would occasionally assault the appellant.. On the fateful day, after a quarrel, the deceased advanced towards the appellant and ordered him to leave the village and to go to his maternal relations. The deceased also punched the appellant; then he went to where his wife was seated and sat down. Immediately after this the appellant fetched a hoe which was close at hand and struck the father on the head once. The deceased died as a result of the injuries received.

On behalf of the appellant, Mrs. Muyovwe has advanced two grounds of appeal. The first alleges a misdirection on the part of the learned trial commissioner in rejecting the defence of provocation. She has argued that as a result of the cumulative provocation to which we have referred and as a result of the insults and the assault immediately preceding the incident, the appellant was provoked and had lost self control and that, once this was so, the use of the hoe which was close at hand was not disproportionate. On behalf of the State, the learned Director of Public Prosecutions supports the findings of the learned trial commissioner. His major point was that, even accepting that the appellant had acted under provocation in the heat of passion, the retaliation should be regarded as having been out of all proportion to such provocation. We have considered the submissions on both sides and we reaffirm the principle applicable to this defence as discussed in the decision of this court in the case of Liyumbi -v- The People (1) which was a case which the learned trial commissioner referred to. The case reaffirmed that there must be three elements all of which must subsist at one and the same time for the defence to be available. These are: The act of provocation; the loss of self-control, both actual and reasonable, and retaliation proportionate to the provocation. We have no difficulty in holding that, on the evidence on record, there was provocation and loss of self-control. With regard to the question of the retaliation being proportionate, we observe that the learned trial commissioner appears to have based her decision on the fact of the insults rather than on the assault by the deceased upon the appellant. We also entertain considerable doubt whether the use of the hoe, which was close at hand, within those few seconds immediately after the assault upon him was so unreasonable and disproportionate. Following the usual practice in criminal matters, we resolve such doubts in favour of the appellant. That being the case we uphold the grounds of appeal and

allow this appeal. The conviction on the capital charge is quashed and the sentence set aside. With regard to the sentence, we take into account the history and facts of this case and in particular we bear in mind that this unfortunate incident occurred in a domestic setting. In all the circumstances we feel that a sentence of six years imprisonment with hard labour will meet the ends of justice. The six years will take effect from the 18th of October, 1984.

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M. S. Ngulube
DEPUTY CHIEF JUSTICE

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B. T. Gardner
SUPREME COURT JUDGE

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E. L. Sakala
SUPREME COURT JUDGE