**WHITESON SIMUSOKWE *v* THE PEOPLE**

Supreme Court
Ngulube, C.J., Sakala and Chitengi J.J.S.
4th June, 2002
(SCZ Judgment No. 15 of 2002).

## Flynote

*Criminal Law – Murder – Provocation – Man and Woman in a stable relationship of intimacy – Whether defence of provocation available where parties not formally married.*

## Haednote

The appellant was tried and convicted on a charge of murder. The particulars alleged that between December, 1998 and March, 1999, at Kalulushi, in the Kalulushi District of the Copperbelt Province he murdered Nondo Sanfolosa. The appellant informed the trial court that he had killed the deceased and claimed that the deceased had become his mistress. On the fateful day he found her with another man in the act of intimacy. He fought the other man who ran away and then he turned on the deceased whom he beat with a stick. When she died, he secretly buried her. The learned trial Judge considered that this was a straight forward murder case and imposed the ultimate penalty on the appellant. In the appeal it was argued forcibly that the case should be considered to have been manslaughter and not a capital murder case.

**Held:**

(i) If a man and woman who are not married are nonetheless in a stable relationship of intimacy, they will be treated on the same footing as married persons.

(ii) In a claim of provocation the reaction of the accused person must be proportionate with the result that any evidence of excessive force defeats the defence.

(iii) A failed defence of provocation affords extenuation for a charge of murder.

**Cases referred to:**

(1) *The People v Njovu* (1968) Z.R. 132
(2) *Banda v The People* (1973) Z.R. 11

*B.M. Singini of Phonex and Partners* for the appellant
*L.E. Eyaa Senior State Advocate* for the State.

## Judgment

**NGULUBE, C.J.,** delivered the Judgment of the court:

The appellant was tried and convicted on a charge of murder. The particulars alleged that somewhere between December, 1998, and March, 1999, at Kalulushi District of the Copperbelt Province, he murdered Nodo Sanfolosa.

The prosecution evidence established that the deceased was residing at a farmstead in the Kalulushi area. She went and employed the appellant as a servant. The evidence from the prosecution was further that during the period in question whenever any son or daughter or relative wished to visit the deceased, they did not find her while the appellant advanced several explanations as to her whereabouts. Eventually, when PW1 visited the farm (this was the son of the deceased), he found that the appellant was freely using his mother's blankets. This caused suspicion. Investigations led to the arrest of the appellant and subsequently the trial at which a strong circumstantial case was made out.

The appellant had kept on pretending that she was still alive and kept giving different stories as to her whereabouts; but finally admitted that she was dead and showed the police and the son the grave of the deceased in the bush. He explained to them at that stage that the deceased was murdered by a person he did not know very well who was known as John and that the appellant had been scared to make a report. All the foregoing is quite irrelevant because during the trial the appellant decided to come clean. He told the Court that he killed the deceased and it was during his defence in Court that he claimed the deceased had become his mistress. On the fateful day, he had found her with another man in the act of intimacy. He fought the other man who ran away and then he turned on the deceased whom he beat with a stick. When she died, he secretly buried her. The learned trial judge considered this was a straight forward murder case and imposed the ultimate penalty on the appellant.

In the appeal before us today, Mr. Singini has argued forcefully that we should consider this to have been a manslaughter case and not a capital murder case. This was on the basis that if the appellant's testimony was accepted that an intimate relationahip had developed between him and the deceased, then the finding of the deceased with another person amounted to provocation. Indeed, Mr. Singini has referred us to an old decision of ours in *The People v Njovu* (1) in which the principles and factors of provocation were considered. We are prepared to accept that if a man and a woman who are not married are nonetheless in a stable relationship of intimacy, they will be treated on the same footing as married persons. Our authority for this is *Banda B –v- The People (2)* which was a Court of Appeal decision. However, in reverting back to the defence of provocation, one of the elements is that the reaction of the accused person must be proportionate, with the result that any evidence of excessive force defeats the defence. It has been pointed out in this particular case that according to the postmortem report far from using a stick, the appellant had inflicted serious injuries with an iron bar. That use of excessive force immediately defeated any defence of provocation so that it is not possible to reduce this case to manslaughter. We uphold the conviction for murder.

However, we accept that a failed defence 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. In the circumstances, we quash the death sentence. We must point out that as a general rule an extenuated murder will still be treated a little bit more severely than manslaughter case although both might carry the life sentence. From the facts of this case, a very suitable sentence to impose is one of twenty (20) years imprisonment with hard labour. This is the sentence the appellant will go and serve with effect from the date he was arrested. The appeal against sentence succeeds to that extent.

*Appeal against sentence succeeded.*