ESTHER MWIIMBE v THE PEOPLE (1986) Z.R. 15 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, JJ.S.
14TH JANUARY AND 25TH FEBRUARY, 1986
(S.C.Z. JUDGMENT NO. 5 OF 1986)

Flynote

Criminal law and procedure - Murder - Provocation - Evidence of - Necessity for.
Evidence - Similar fact evidence - Admission of old Police docket - Validity of.
Evidence - Witnesses - Unlisted prosecution witnesses - Whether admissible.

Headnote

The appellant was convicted of the murder of her husband and sentenced to death. She appealed claiming cumulative and immediate provocation on the basis of the couple's unhappy marital history.

Held:

(i) Evidence of cumulative provocation in the absence of immediate provocation cannot suffice to establish the three vital elements for the defence to stand i.e. the act of provocation, the loss of self control and the appropriate retaliation.

(ii) Evidence of an alleged previous attempt by an accused on the life of a victim is admissible at the courts discretion as similar fact evidence provided that the court has clealy

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established that its evidential value outweighs its prejudicial effect.

(iii) It is irregular for the state to call a witness who was not on the list and in respect of whom the procedures under s. 258 of the CPC are not complied with; the defence should raise an objection to this at the earliest opportunity.

Cases referred to:

(1) Rosalyn Zulu v The People (1980) Z.R. 341
(2) R. v McInnes [1971] 3 All E.R. 295
(3) R. v Julian [1969] 2 All E.R. 856
(4) Palmer v R. [1971] 1 All E.R. 1077
(5) The People v Lewis (1975) Z.R. 43
(6) Elisha Tembo v The People (1980) Z.R. 209
(7) Munkala v The People (1966) Z.R. 12
(8) Liyambi v The People (1978) ZR 25

Legislation referred to:
Criminal Procedure Code, Cap. 160, s. 258
Supreme Court of Zambia Act, Cap. 52, s. 15

For the appellant: S. S. Zulu, Zulu and Co.,
For the respondent: N. Sivakumaran, Assistant Senior State Advocate

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Judgment

NGULUBE, D.C.J.: delivered the judgment of the Court.

The appellant was sentenced to undergo the extreme penalty for the murder of her husband. It was not in dispute that the appellant killed her husband when, on the night of 2nd January, 1984, she burnt him with hot cooking oil in the matrimonial home. He was hospitalised but died on 11th January, 1984, of extensive burns on the face, the front of the head, the front of the chest to a point just above the abdomen, then burns on the back of the chest to a point half way down. He was also burnt on the arms and hands and on the lower extremities. His private parts were also burnt. The doctor's internal examination revealed that the skin in front of the skull was burnt and there was haemorrhage under the bone and brain layer. 45 percent of the body was burnt. The issue at hand in the trial court and here was whether on the facts and in the circumstances to which we shall shortly turn, the appellant's action was justifiable at law so as to absolve her of any criminal liability or if grounds existed which the law accepts as reducing the charge to one of manslaughter only. The defences put forward were self-defence and, in the alternative provocation. The learned trial judge rejected both.

On the evidence there was no dispute that the couple's marriage was

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an unhappy one.The husband was given to extreme violence and frequently assaulted and injured his wife. The prosecution case was that on the night in question, the appellant deliberately boiled some cooking oil in a big black cooking pot which was exhibited in the case and that she deliberately poured this boiling oil on her husband as he lay asleep on the bed. She then ran out of the house through a window in the bathroom. The deceased, who was naked, was given a chitenge material by his daughter, PW. 5 and a jacket by his son, PW1. The assistance of pw.8, the neighbour, was sought and the deceased was taken to the hospital. There was evidence that the deceased kept a number of brief cases one of which he warned his family not to touch as it was dangerous. There was also evidence that after the incident a pounding stick and a hammer belonging to the family was found under his bed. The prosecution case was that the bedding was soaked with cooking oil and the big black pot was seen by the witnesses to contain a film of oil. The daughter, pw.5, removed the pot from the bedroom and put it in the kitchen.

The appellant's evidence was to the effect that, on the night in question, the deceased arrived home late at night. She was sleeping in a chair in the sitting-room waiting to open for him since he did not have the keys to the house. She was to realise later that he must have entered the house through the bathroom window since the next moment he shook her to wake her up. Her inquiry as to how he had come in, since she had the keys received a rude retort. He threatened her that she would not see the sunrise the next day. He ordered her to cook for him for what he said would be the last time.

While he held on to her night-dress, and at his request, she cooked some chips and some sausages. It was not the big black pot which was used but the electric pot which was also exhibited in court. She carried the plateful of chips and the sausages together with a knife and fork. They retired to the bedroom where he ate the sausages and some of the chips. She noticed that under the bed, he had a hammer, a pounding stick and a knife. He talked at length about the problems he was facing at work; about his suspension from duty and an impending prosecution against him, inter alia, for the alleged murder of a white man whom he had collected from prison in Kabwe who was said not to have been duly delivered to Lusaka. He complained that the appellant must have revealed to the police, who searched his house on 29th December, 1983, that he had a lot of property and unlawful firearms which were all taken during the search. She became very frightened when he said he would kill all the children, the appellant and himself. She tried to dissuade him. At length he declared that he had stopped his quarrelling and his other ideas. Because of his previous violence which had left her scarred all over, she did not believe him and thought she would be killed that night. He requested her to go and switch off the lights in the sitting room and the kitchen. She left him in the bedroom but thought he might be following her. he was thinking of her life and that of her children. She heard explosions and saw smoke coming from the bedroom and thought that he must have exploded the dangerous briefcase and must have intended to harm her as she walked back into

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the bedroom but that, fortunately, she had taken long to complete switching off the lights. She thought that the quarrelling had not ended and that he meant to kill her and the children. She asked him if he intended to kill her and he shouted back that he had stopped, that it was all over and she should go to bed. She did not believe him. She went into the kitchen and fetched the hot cooking oil in which she had fried the chips thinking to herself that if she should meet him in the corridor, as she returned to the bedroom, and if he should attempt to attack her, she would use the oil in her defence. He was not in the corridor. She found him lying in bed but not asleep. She questioned him about the explosions. He said it was all over and that she should come to bed. She asked him if he had seen what she had in her hands namely, the electric pot full of boiling oil. He replied in the affirmative. She told him that if he had really stopped his quarrelling and his ill intentions against her and the children, he should hand over to her the pounding stick, the hammer and the knife which were under the bed. He bent over, picked up the knife and, instead of giving it to her in a gentle and proper manner, he threw it at her with considerable force, injuring her on the arm. At the same time, he had got up and was advancing towards her. She then threw the pot containing the hot cooking oil at him. He called to her to fetch the house keys from his trouser pocket and arrange to take him to the hospital. She did not trust him and thought that was a ploy to grab her and finish her off. She ran out through the bathroom window.

It was argued at the trial that her evidence should be accepted and that such evidence, on the authority of *Rosalyn Zulu v The People* (1) disclosed self-defence. In the alternative, it disclosed provocation which should reduce the charge. The learned trial judge distinguished the facts in *Zulu* and he disbelieved her. Going by her own account in court and on the basis of a warn and caution statement which she made to the police, the learned trial judge held that her actions were not within the principles of self-defence. The learned trial judge found, among other things, that her actions did not demonstrate that she did not want to fight; that the deceased made no immediate attempt to

harm her but that she challenged a sleeping person after travelling all the way from the kitchen with hot cooking oil. He found that she had every opportunity to run away and that her action was not instinctive but deliberate and unreasonable. He disbelieved her and found that she poured cooking oil on the deceased as he lay in bed. The learned trial judge, therefore rejected the plea of self-defence. He also rejected the defence of provocation holding that it was not available on the facts of this case.

On behalf of the appellant, Mr Zulu has advanced a number of grounds. One major ground is to the effect that the learned trial judge misdirected himself in disbelieving her story and in finding that self-defence failed on the facts of the case. The arguments under this ground boiled down to the submission that, since only the appellant and the deceased were party to the events that night, it was wrong for the learned trial judge to rely on the evidence of the children and other

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witnesses in order to disbelieve her story that she had fried chips in the electric pot, that he had exploded a danger box, he had threatened her and finally thrown a knife at her. We have been asked to find that there was no prosecution evidence to disprove her detailed account and that, accordingly, the fatal finding that she had poured oil on the deceased as he lay in bed was not justified. According to the submissions the salient facts should have been and should now be accepted, can be summarised thus:

After the deceased had threatened to kill them all, she had genuine fear for her safety and that of her children; after all he was a man capable of extreme violence and the mood he was in was frightening to her. The house was locked since he had at some stage during the evening obtained the possession of the keys; escape was not easy and she was thinking of her children. She had seen the weapons under the bed and genuinely feared be might use them against her. She did not believe his assurances that he had desisted and her fears were fanned when he exploded the dangerous briefcase. She carried the cooking oil solely as a defensive weapon in case he should attempt to attack her in the corridor and also to use it for purpose of divesting him of the weapons under the bed. When he threw the knife and advanced menacingly towards her, she was justified in throwing the pot containing the hot cooking oil at him in self-defence.

If such facts are accepted, it is arguable that self-defence would arise. The principles themselves governing self-defence, as provided for under section 17 of the Penal Code, have normally not been the subject of much controversy. It is usually in the application of those principles to the facts of any given case that difficulties are encountered. In the instant case, the learned trial judge recited the principles applicable quoting from *R. v McInnes* (2) which, among other things, refers to the requirement that a person under attack should try to retreat if the circumstances permit as simply one of the factors to be taken into account in judging the reasonableness of any actions taken by an accused in self-defence. That case also quoted with approval the statement of the principles in the judgment of the Court of Appeal, delivered by Widgery, L.J., in *R. v Julien* (3). The learned trial judge also cited a passage from the Privy Council's decision in *Palmer v R.* (4). In our view the authorities make it abundantly clear that the facts of any particular case will show whether or not the situation in which the accused found himself, including the nature of the attack upon himself or the gravity of imminent peril was such that it was both reasonable and necessary to take the

particular action which has caused death in order to preserve his own life or to prevent grave danger to himself or another. That the facts are all important is illustrated by a number of cases decided in our own courts. Examples include the *Rosalyn Zulu* (1) cases the facts of which were properly distinguished. In that case the deceased husband was prone to extreme violence against the accused wife. After a quarrel the deceased went to have a bath. As he was in the bathtub he called her and threatened to kill her. There was a pistol on the cistern and he made an attempt to seize it. She took it and shot

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him. This court found that the immediate attempt by the deceased to seize the gun coupled with the fact that he was so close to her that he could still attack her, despite the fact that she had the gun, made it reasonable for her to believe that she would be assaulted and the gun taken away from her and used against her if she did not first use the weapon. There were also other aspects which left a doubt in the mind of the court which were resolved in her favour. But undoubtedly the finding of self-defence in that case was on its own peculiar facts. A similar verdict was returned in the *People v Lewis* (5), again on its own facts. Again in *Elisha Tembo v The People* (6) in considering whether the accused was reasonable in assuming that he was in danger to such an extent that it was reasonable to shoot at a suspected chicken thief in a chicken run, we said we were bound to take into account the difference between a man who is attacked and has to decide how to defend himself in the anguish of the moment and a man who has heard a disturbance in an out-building and who has had the presence of mind to go into his house, obtain a pistol and fire a warning shot in the air to accompany his challenge to the intruder. On the latter set of facts, the defence of self-defence failed. There are many other cases in which the particular facts have either supported or failed to support self-defence. An extreme failure of the defence is illustrated by *Munkala v The People* (7) in which the accused killed the deceased, who was not attacking anyone, to prevent him from killing the remainder of the accused's children through witchcraft, other children having died in quick succession and the accused being firmly convinced that the deceased was responsible. Our predecessor court said, at page 13:

> "His position was in no way different to that of a person who, fearing that some enemy is going to kill him, anticipates that event by shooting his enemy first himself."

Turning to the present case, and as we have already stated, the facts contended for by the appellant could support self-defence but - and this is the critical question - only if they can stand. On behalf of the state, Mr Sivakumaran has argued that the learned trial judge was perfectly justified in rejecting the appellant's story and in finding that she had poured cooking oil on the deceased as he lay in bed. The main facts relied upon as disproving the appellant's contention, that she threw the pot as he advanced towards her, are to be found in the medical evidence. The learned trial judge found that the extent and nature of the burns, especially those at the back, as established by the medical evidence, supported the finding that somebody poured the oil from the back and the front. He also relied on the fact that the bedding was soaked in oil. We agree with the learned trial judge that, because of the nature and extent of the burns, especially those at the back, as established by the medical evidence, the appellant's story that she threw the pot as the deceased advanced towards her was disproved. Such medical evidence fully supported the finding that she poured the oil on him as he lay in bed. The suggestion put forward by the appellant, that the deceased may have struggled

with the pot, or the suggestion by counsel that the deceased may have been fully dressed

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and that the clothes may have had something to do with the burns at the back cannot be supported. It is quite clear that once her allegation is disproved and once evidence is accepted which supports the finding which the learned trial judge did make, then self-defence is not available. It follows also that it did not matter which pot was used. All that was relevant was that she purposely took boiling oil and poured it on the deceased as he lay in bed. Self-defence is not available on this finding and it would be to no avail if she was anticipating the event of his doing her and the children some harm later on that night. The submissions on self-defence are, therefore, unsuccessful.

The next major ground alleged a misdirection on the part of the learned trial judge in rejecting the defence of provocation. It was argued, among other things, that quite apart from the aspect of cumulative provocation over the years, the appellant was, that night, provoked by a number of circumstances. These included the threats to kill her and the children; the act of hiding the house keys; the act of hiding weapons under the bed; that of exploding the dangerous brief case; and the throwing of the knife. It is evident, having regard to the finding that the deceased lay in his bed, that some of the alleged acts of provocation cannot arise for consideration. However, one of the leading cases on provocation in this country is *Liyambi v The People* (8). We held in that case that there are three inseparable elements to the defence of provocation, namely; the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. All three elements must be present before the defence is available. In the instant case, Mr Sivakumaran has submitted that there was no evidence of provocation and that the learned trial judge properly so found. We agree that there is nothing in the evidence to suggest that the appellant suffered sudden or any provocation by reason of any of the factors put forward. The evidence, far from suggesting any provocation or any loss of self-control, indicated that the appellant embarked on a course of action which was dispassionate and deliberate and certainly not in the heat of passion upon a sudden provocation. This would be so even if her evidence had been accepted which it was not. On the test laid down in *Liyumbi* (8), the submissions in this regard, on the facts of the case, must fail for absence of all three elements.

Mr Zulu raised two other subsidiary grounds, both of which are valid. One was that the learned trial judge erred in admitting the evidence of an old police docket in which an allegation of the attempted murder of the deceased by the appellant had been investigated and dropped. Mr Sivakumaran properly concedes that the docket was wrongly admitted but submits that the irregularity occasioned thereby was not fatal. Evidence of an alleged previous attempt by an accused on the life of a victim may in certain cases, and if relevant, be admissible as similar fact evidence in proof or disproof of a fact in issue. However, the admission of similar fact evidence is in the discretion of the trial court which will no doubt, among other things, consider whether its evidential value outweighs its prejudicial effect. In this case, there is

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nothing on the record to indicate that the learned trial judge had discussed the exercise of his

discretion. That being the case, and following the usual approach to criminal cases, we must assume in favour of the appellant that had' he considered the question, he would have exercised his discretion in favour of exclusion. It follows also that the admission of the evidence complained of must be regarded as wrongful. The learned trial judge, properly in our new, made no reference whatsoever in his judgment to this docket or its purport. But Mr Zulu's argument is that it may have influenced him. The irregularity under discussion can only affect the outcome of this case if we consider that it was a material irregularity and that it had occasioned a failure of justice. In this case we agree with the observations by Mr. Sivakumaran that the learned trial judge had infect fully disclosed his reasoning and the facts and factors upon which he based his decision. It is apparent that the evidence which was wrongly admitted did not feature in any such reasoning and can therefore not be said to have influenced the trial court. It would, of course, be preferable for a trial court which realises an error and which intends to ignore evidence wrongly admitted to say so plainly.

Another irregularity conceded by the State was that a prosecution witness was called whose name was not on the list and in respect of whom the procedure under section 258 of the Criminal Procedure Code was not complied with in the matter of the furnishing of statements and the giving of notice. The witness was pw.11, a bomb disposal expert who came to testify to the characteristics of the dangerous briefcase which allegedly contained only a timed device which produces a dye but not explosives. Once again this evidence had no material bearing on the crucial facts which occurred in the couple's bedroom. We are surprised that objection to this irregularity was not taken at the earliest opportunity. However, we are satisfied that the evidence did not influence the decision which rested on a finding that the appellant poured boiling oil on the deceased as he lay in bed. To the extent that it may be necessary to do so, we find that this is a proper case in which to apply the proviso to section 15 of the
Supreme Court of Zambia Act and to say, notwithstanding the irregularities referred to, we are satisfied that the remainder of the evidence was such that had the learned trial judge not fallen into those errors, he must inevitably still have convicted.

This was a tragic case and we wish respectfully to express our hope that the Executive will take into account the obiter remarks by the learned trial judge at the end of his judgment in favour of the appellant. Our task has been to apply the law as it is and for the reasons given this appeal is dismissed.

Appeal Dismissed.
