IN THE COURT OF APPEAL OF ZAMBIA **Appeal No.182/2017**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

ZAMBIA
2018
REGISTRY
P.O. BOX 50067, LUSAKA

B E T W E E N:

PRECIOUS LONGWE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Mulongoti and Sichinga, JJA

On 20th February 2018, 21st February 2018 and 22nd August 2018

For the Appellant: O. Ngoma, Lungu, Simwanza and Company
For the Respondent: R. L. Masempela, Deputy Chief State Advocate, National Prosecution Authority

J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. **Bwanausi v The People [1976] Z.R. 103**
2. **The People v Austin Chisangu Liato, SCZ Appeal No. 291 of 2014**
3. **The People v Robert Phiri and Tenson Siagutu [1980] Z.R. 246.**
4. **Mwewa Murono v The People [2004] Z.R. 2006**
5. **Kalaluka Musole v The People [1963-1964] Z. and N.R.L.R. (Reprint) 206**

6. Tembo v The People [1972] Z.R. (Reprint) 220
7. Sheldrake v DPP [2004] UKHL 43
8. John Lubhozha v The People, SCZ Appeal No 485/2013
9. Katundu v The People [1967] Z.R. (Reprint) 233
10. Simutenda v The People [1975] Z.R. 294
11. The People v Pelete Banda [1977] Z.R. 304
12. Rosemary Chibwe v Austin Chibwe [2001] Z.R. 1
13. Mudewa v The People [1973] Z.R. 147
14. Mulenga v The People [1966] Z.R. 118
15. R v Bird [1985] 1 WLR 816
16. Rosalyn Thandiwe Zulu v The People [1981] Z.R. 341
17. R v Ahluwalia 96. Cr App. R. 64
18. Jack Chanda and Kennedy Chanda v The People [2001] Z.R. 124
19. **Jose Antonio Golliadi v The People, SCZ Appeal No. 26 of 2017**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**

The appellant, appeared before the High Court on an information containing one count of the offence of murder contrary to **section 200 of the Penal Code**. The particulars of the offence alleged that on 26th May 2016, she murdered

Akakanda Lubinda Litebele, who was her husband. She denied the charge and the matter proceeded to trial.

According to the prosecution evidence, on 24th May 2016, around 23:00 hours, the appellant's husband and his brother, Lipimile Litebele, left Times Café at Lusaka's Arcades Mall, heading home. On their way, they passed through Chez Ntemba Night Club in Kabulonga, where they met the appellant, as they had earlier agreed. After a short interaction with her, the two brothers drove off to Woodlands, where they lived.

When they got home, they sat in the sitting room for a while. After midnight, around 01:30 hours (on 25th May 2016), Lipimile Litebele retired to bed. He left his brother in the sitting room, but not long thereafter, he heard him scream, he also heard three or four gunshots. He got up and as he rushed out of the bedroom, he met the appellant who was carrying a gun. She told him that she had shot his brother and would shoot him as well. They wrestled over the gun and ended up in the kitchen, where he disarmed her. Upon noticing

that his brother was dead, he rushed to Woodlands Police Station where he reported the matter.

A postmortem was subsequently conducted on the body of Akakanda Lubinda Litebele by Dr. Maswahu, a forensic pathologist. He found the cause of death to be hemorrhagic shock as a result of gunshot injuries. He found that he was shot 3 times at point blank range. Two of the shots hit him in the chest (from the front), while the third hit him in the back.

In her defence, the appellant told the court that on 24th May 2016, after knocking off from work, she informed her husband that she was going to join friends for a drink at O'hagan's Pub in Woodlands; he did not disapprove of it. That evening, she took alcoholic drinks from various places and through SMSs, she continually updated him of her whereabouts. At some point, she informed him that they had moved to Chez Ntemba Night Club and in turn, he informed her that he would join her there.

He joined her at about 23:00 hours, but he did not stay long. He left and sent her an SMS informing her that she had to find her own way home. Thereafter, he sent her a number of SMSs that were in bad taste. One of them informed her that he would call her father. She sent him an SMS advising him not to do so, but not long thereafter, she received a phone call from her mother advising her to go home. She followed her mother's advice and went home.

When she got home, she found her husband lying on a couch in the sitting room. He had also placed a gun on the table. She said she was apprehensive because he had a history of being violent. When she saw him go for the gun, she went for it as well and they ended up struggling for it. As they struggled, she heard a gunshot, the gun had discharged and shot him accidentally. She then saw him put his hand on the chest and start to advance towards her.

He charged at her and they ended up struggling for the gun again. She was in fear and in the confusion, the gun

discharged again. She said she did not intentionally pull the trigger. Her husband fell to the floor and she rushed to inform his brother. She denied planning to kill him or threatening to shoot his brother. The brother attempted to disarm her and they ended up in a struggle because she refused to hand over the gun to him. It was because she feared that he would shoot her and she only handed over the gun to him when she heard her son crying.

The appellant's parents also gave evidence of the call they received from their son-in- law and the call made by the appellant after the shooting.

The trial judge found that it was not in dispute that the appellant shot her husband in the early hours of 25th May 2016 and that he died as a result of gunshot injuries that he suffered. She considered whether the appellant was provoked by any of the SMS's her husband sent her or the phone call he made to her father, she found that there was nothing wrongful with the call and that no reasonable person

would be unsettled by the possibility of being exposed through such a call. Consequently, she found that the defence of provocation was not available to her.

The trial judge also considered whether the defence of intoxication was available to the appellant. Though there was evidence that she had been drinking from 18:00 hours up to 01:00 hours the following morning, she found that there was no evidence of how much alcohol she had taken or that she became incapacitated as a result of the drinking. The trial judge noted that there was evidence that the appellant was able to respond to her husband's SMSs, communicate with her mother, call the maid, check on the baby and so on. As a result, she concluded that the appellant knew what she was doing and the defence of intoxication was not available to her.

The trial judge also ruled out the possibility that the appellant acted in self-defence when she shot her husband. She noted that there was no evidence of any disturbance in

the room where the body was found and this ruled out the possibility that there was a threat of being shot, which was followed by a struggle that resulted in the shooting. She accepted the pathologist's evidence that the appellant's husband was shot when he was in motion.

Having rejected the appellant's version of what happened in the house before the shooting, the trial judge found that she intentionally shot her husband three times and that she had *malice aforethought* when she shot him. She found the appellant guilty of committing the offence of murder, without extenuating circumstances and imposed the death penalty.

The appeal has raised three points of law. The first, is that the trial judge wrongly placed the burden of proving the defences of self-defence, intoxication and provocation, on the appellant. The second, is that the trial judge should have found that the defences of accident, provocation, self-defence and intoxication were available to the appellant.

The third, which is an alternative argument to the first and second, is that following the appellant's conviction, the trial judge should not have imposed the death penalty because there were extenuating circumstances anchored on the failed defences of provocation and intoxication.

Before we deal with these issues, we will address Mr. Ngoma's submissions that the trial judge should not have placed any reliance on the appellant's parents' testimony because it was hearsay and that the trial judge made findings that were speculative.

Mr. Ngoma's submitted that the trial judge erred when she relied on the testimony of the appellant's parents because it was hearsay. Mr. Masempela's response was that it was not hearsay.

We agree with Mr. Masempela's observation that the testimony of the appellant's parents was not hearsay evidence in so far as the duo told the court what their daughter told them.

Scrutiny of the judgment actually confirms that the trial judge considered their testimony in that context. Further, other than finding that she made the calls, the trial judge did not rely on what her parents said the appellant told them in the phone calls.

As regards Mr. Ngoma's submission that the trial judge's finding that there was no struggle between the appellant and her husband because the items on the table did not fall; the couch did not move; and the tiles bore no scratch marks, being speculative, in the case of **Bwanausi v The People**[1], it was held, *inter alia*, that:

> **"Where a conclusion is based purely on inference that inference may be drawn only if it is the only reasonable inference on the evidence; an examination of alternatives and a consideration of whether they or any of them may be said to be reasonably possible cannot be condemned as speculation."**

It is common cause that the case against the appellant was anchored on circumstantial evidence because there was no eye witness to the shooting. Examination of the judgment in the court below, indicates that there was a conflict between the

prosecution and defence witnesses, on the circumstances surrounding the shooting. To arrive at what could have happened, the trial judge was entitled to consider the veracity of the testimony of each of the witnesses on the basis of the other evidence before her. We find that such consideration and the conclusions she arrived at, thereafter, cannot be labelled and condemned as being speculative.

Reverting to the legal issues raised by the appeal, Mr. Ngoma submitted that the trial judge wrongly placed the burden of proving the possible defences on the appellant. He referred to the cases of **The People v Austin Chisangu Liato**[2] and **The People v Robert Phiri and Tenson Siagutu**[3], and submitted that in criminal cases, the burden of proof, on all issues, rests on the prosecution. They must be proved beyond all reasonable doubt. He also submitted that even in the case of defences available to an accused person, the burden still rests on the prosecution to negative them, it is never the duty of an accused person to prove them.

In response, Mr. Masempela referred to the case of **Mwewa Murono v The People**[4] and submitted that while the burden of proof lies on the prosecution, the burden of adducing evidence in support of any defence, rests on the accused person.

In the case of **Kalaluka Musole v The People**[5], commenting on the onus once a defence has been raised, Blagden JA, at page 214, observed as follows:

> **"there is no onus on an accused person to prove or establish any of these defences. The onus remains on the prosecution throughout to prove the accused's guilt as charged beyond reasonable doubt; and it is for the prosecution to negative these defences when they arise.**
>
> **But naturally there is no onus on the prosecution to negative something that is not there. The defence must be raised. ..... " What is essential is that there should be produced, either from as much of the accused's evidence as is acceptable, or from the evidence of other witnesses, or from a reasonable combination of both, a credible narrative of events disclosing material that suggested provocation in law. If no such narrative is obtainable from the evidence, the jury cannot be invited to construct one."**
>
> **Ordinarily, these special defences are specifically raised by or on behalf of the accused. But a defence may arise by**

itself as a result of the evidence adduced before the court. In either event it becomes an issue which the court must decide and the burden of proof in regard to it is upon the prosecution to satisfy the court beyond reasonable doubt that the defence so raised cannot be maintained."

Further, in the case of **Tembo v The People**[6], commenting on when a court can consider the availability of a defence, Baron JP, at page 290, observed as follows:

> **"To constitute 'evidence fit to be left to a jury' for the purposes of section 13 (4) there must be evidence that the accused person's capacities may have been affected to the extent that he may not have been able to form the necessary intent, only if the evidence goes as far as this goes the question whether the accused did in fact have the intent fall to be considered, and it is then for the prosecution to negative the possibility that he may not have had such intent."**

In the case of **Sheldrake v DPP**[7], Lord Bingham had the following to say on the evidential burden in relation to defences in criminal cases:

> **"an evidential burden is not a burden of proof. It is the burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If the issue is properly raised, it is for the prosecutor to prove beyond all reasonable doubt,**

> **that ground for exoneration does not avail to the defendant"**

It follows, that the prosecution's duty to negative a defence only arises, in cases where evidence suggesting that the defence may be available to an accused person, has been led. Such evidence does not need to prove the defence. All it needs to do, is to simply raise the possibility of the defence being available. We will now consider whether the evidence before the trial judge could have established any of the defences.

The first defence that Mr. Ngoma submitted on was the defence of intoxication. He argued that there was misdirection when the trial judge found that the defence of intoxication was not available to the appellant because she did not lead evidence of the extent to which she was drunk.

In response, Mr. Masempela referred to the case of **John Lubhozha v The People**[8] and submitted that in that case, composure and alertness, led the court to conclude that the defence of intoxication was not available. Having considered

the conduct of the appellant that evening, the trial judge rightly rejected the defence of intoxication.

The defence of intoxication, is set out in **section 13 of the Penal Code.** It provides that:

"(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if, by reason thereof, the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged, and in a case falling under paragraph (b) the provisions of section one hundred and sixty-seven of the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purposes of this section, "intoxication" shall be deemed to include a state produced by narcotics or drugs."

In the case of **Katundu v The People**[9], delivering the judgment of the Court of Appeal, Blagden CJ, at page 235, stated that for the defence of intoxication to succeed, the court must be satisfied of two negatives:

> **(1) that the accused was not so affected by intoxication that he did not know what he was doing or that he did not know it was wrong to do it ....., (2) that the accused was not so affected by intoxication that he was incapable of forming any intention necessary to commit the offence .....**

He went on to say that if the court is not satisfied of both these negatives, then the defence of intoxication fails.

Further, in the case of **Simutenda v The People**[10], it was held, *inter alia*, that:

> **"Evidence of drinking, even heavy drinking is not sufficient for intoxication to provide a defence under section 13 (4) of the Penal Code; the evidence as a whole, including that of intoxication, must be such as to leave the court in doubt as to whether the accused actually had the necessary intent, namely in this case the intent to kill or to do grievous harm."**

In this case, the trial judge concluded that the defence of intoxication was not available to the appellant, though there was evidence that she had been drinking from 18:00 hours up to 01:00 hours the following morning. This is because there was no evidence that she became incapacitated as a result of the drinking, so as not to know what she was doing. There was evidence before her that the appellant was able to respond to her husband's SMSs, communicate with her mother, call the maid, check on the baby and so on.

Having considered the conduct of the appellant that night, we find that the trial judge rightly found that the defence of intoxication was not available to the appellant. As was held in the cases of **Simutenda v The People**[10] and **John Lubhozha v The People**[8], the defence of intoxication cannot merely be anchored on evidence that the appellant had been drinking the whole day. The evidence should have shown that she was too drunk that she did not know what she was doing or that what she was doing was wrong and could not have formed the intention to kill her husband.

Coming to the defence of self-defence, Mr. Ngoma referred to **section 17 of the Penal Code** and the case of **The People v Pelete Banda**[11] and submitted that the appellant's conduct should have been judged on the basis of the conduct of a drunk person of her class. The trial judge did not do so. He then referred to the case of **Rosemary Chibwe v Austin Chibwe**[12] and submitted that the finding that there was no struggle in the seating room should be set aside because it was speculative and not supported by the evidence.

Mr. Masempela referred to the case of **Mudewa v The People**[13] and submitted that the appellant failed to lay evidence to successfully raise the defence of self-defence. The appellant did not meet the objective test of how a reasonable person would have reacted to the situation she found herself in. She used excessive force and the threat to her husband's brother shows that she actually had *malice aforethought*. On the duty on the prosecution to negative the defence of self-

defence, he submitted that it was negatived and the trial judge did not come to conclusions that were speculative.

The defence of self-defence, is set out in **section 17 of the Penal Code**. It reads as follows:

> **"Subject to any other provisions of this Code or any other law for the time being in force, a person shall not be criminally responsible for the use of force in repelling an unlawful attack upon his person or property, or the person or property of any other person, if the means he uses and the degree of force he employs in doing so are no more than is necessary in the circumstances to repel the unlawful attack."**

In the case of **The People v Pelete Banda**[11], it was held that an act of self-defence consists of an attack by the accused person, who, on reasonable grounds, believes, that she was in imminent danger of death or serious bodily harm. In addition, the force used in that attack should be no more than is necessary to repel the threat she faces; see the case of **Mulenga v The People**[14]. In the case of **R v Bird**[15], it was held that in determining whether it was necessary to use force or whether the force that was used was reasonable, the

court will consider whether the accused person had the opportunity to retreat.

We find that the trial judge was correct when she found that the defence of self defence was not available to the appellant. She found that contrary to the appellant's claim, there was no evidence of any struggle in the living room. That discredited the claim that the appellant and her husband struggled for the gun.

As earlier indicated, the appellant was the only eye witness to the shooting and her evidence was that she found that her husband had placed a gun on the table. When she saw him attempt to pick it, she decided to pick it as well. They ended up struggling for it and it discharged accidentally, fatally wounding him. The trial judge did not find this explanation to be credible.

In the light of the pathologist's finding that of the 3 gunshot wounds Akakanda Lubinda Litebele suffered, one was

in the back, we find that the trial judge cannot be faulted for not accepting the appellant's explanation. It is inconceivable that he would have been shot in the back if her husband was attacking her. The forensic evidence points at the fact that he had his back to her when one of the shots was fired.

As regards the defence of provocation, Mr. Ngoma referred to the case of **Rosalyn Thandiwe Zulu v The People**[16] and submitted that in the face of evidence that her husband had previously acted violently towards her, the court should have considered how a reasonable person, in her situation, would have reacted. Had she done so, the trial judge would have found that the appellant was justified in believing that he was going to attack her and draw the gun. Instead of taking that approach, the trial judge speculated and ruled out the defence. He outlined observations by the trial judge that he considered speculative. There was also misdirection when the trial judge relied on the evidence given by the

appellant's parents in assessing the appellant's conduct because it was hearsay evidence.

On the defence of provocation, Mr. Masempela submitted that the appellant failed to meet the test to successfully set up that defence as set out in the case of **The People v Pelete Banda**[11]; the act of provocation and loss of self-control. She did not attack her husband immediately after the offensive SMS was sent and she had time to cool off. Finally, he submitted that the defence of accident is not available in the face of evidence that the appellant deliberately pulled the trigger.

Section 206 of the Penal Code, defines provocation, as follows:

> **(1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him**

to assault the person by whom the act or insult is done or offered. For the purposes of this section, "an ordinary person" shall mean an ordinary person of the community to which the accused belongs.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

In the case of **Simutenda v The People**[10], it was held that the defence of provocation consists of three main elements; the act of provocation, the loss of self-control both actual and reasonable, and retaliation that is proportionate to the provocation. These three elements must all be present for one to successfully raise the defence. The defence will not be ruled out merely because the provocative conduct has

extended over a period of time or there was a delayed reaction to it; see **R v Ahluwalia**[17].

The appellant's evidence was that when she got home, she found that her husband had placed a gun on the table. They ended up struggling for it and it discharged accidentally. From this evidence, it is clear that the shooting was not triggered by the SMSs sent by her husband or the phone call he made to her parents. We agree with the trial judge's finding that the defence of provocation was not available to the appellant because her evidence was that the firearm accidentally discharged as they struggled for it.

Coming to the defence of accident, Mr. Ngoma submitted that the state failed to negate the defence of accident by leading evidence establishing that it was intentional. It was wrong for the trial judge to find that the appellant intentionally pulled the trigger and he referred to **Section 9 of the Penal Code**, urging us to find that the killing was accidental.

The defence of accident, is set out in **section 9 of the Penal Code**. It provides as follows:

> **"(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.**
> **(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.**
> **(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."**

As earlier indicated, the appellant was the only eye witness to the shooting and her evidence was that she found that her husband had placed a gun on the table. When she saw him attempt to pick it, she decided to pick it as well. They ended up struggling for it and it discharged accidentally, fatally wounding him. The trial judge did not find this explanation to be credible.

In the light of the pathologist's finding that of the 3 gunshot wounds Akakanda Lubinda Litebele suffered, one was in the back, we find that the trial judge cannot be faulted for not accepting the appellant's explanation. It is inconceivable that he would have been shot in the back if they were struggling for the gun in the manner described by the appellant. The forensic evidence points at the fact that he had his back to her when one of the shots was fired. Consequently, we find that the defence of accident is not available to the appellant because they could not have been struggling for the gun at the time she shot him. The trial judge, cannot, in the circumstances, be faulted for drawing the inference that she intentionally shot him.

All in all, we find that the appeal against conviction fails. We find that the trial judge rightly found that the defences of intoxication, provocation or self-defence were not available to the appellant. We similarly find that even if the defence of accident had been raised, is was not available to her.

We will now deal with Mr. Ngoma's alternative argument which relates to the sentence. He argued that the trial judge erred when she failed to find that the failed defences of provocation and intoxication amounted to extenuating circumstances warranting the imposition of a sentence other than the death penalty. He referred to **Section 201 (1) (b) of the Penal Code** and the case of **Jack Chanda and Kennedy Chanda v The People**[19].

In response, Mr. Masempela submitted that the case of **Jack Chanda and Kennedy Chanda v The People**[18], only held that in some cases, evidence of drinking can amount to an extenuating circumstance. In this case, the trial judge rightly found that it was not. He referred to the case of **Jose Antonio Golliadi v The People**[19] and pointed out that in that case, it was held that the mere fact that one has been drinking does not automatically lead to a finding that there were extenuating circumstances; there must be evidence to support the finding.

In the case of **Jack Chanda and Kennedy Chanda v The People**[18], it was held, *inter alia*, that a "**failed defence of provocation; evidence of witchcraft accusation; and evidence of drinking can amount to extenuating circumstances.**" It is our view, that a failed defence of self-defence, can equally amount to an extenuating circumstance. The question that then follows, is, when can it be said that there is an extenuating circumstance because of the failed defence of provocation, self-defence or where there was evidence of drinking?

As indicated earlier on, the defence of provocation consists of three main elements; the act of provocation, the loss of self-control both actual and reasonable, and retaliation that is proportionate to the provocation; see **Simutenda v The People**[10]. These three elements must all be present for one to successfully raise the defence. In our view, a failed defence of provocation becomes an extenuating circumstance in cases where there is a provocative act and loss of self-

control but the retaliation is not proportionate to the provocation.

In this case, the trial judge did not find any provocative act that could have triggered the loss of self-control by the appellant and rightly so in our view. This being the case, there was no failed defence of provocation that could have been an extenuating circumstance.

Coming to the failed defence of self-defence, in the cases of **The People v Pelete Banda**[1] and **Mulenga v The People**[14] it was held that an act of self-defence consists of two elements, the belief by the accused person she was in imminent danger of death or serious bodily harm and the use of reasonable force to repel such an attack. The defence fails where there is reasonable cause to believe that there is eminent danger of death or serious injury from an attack but the force used to repel the attack is more than reasonably necessary to do so.

In this case, the trial judge rejected the appellant's evidence that she was under attack. Not being under attack, the question of the defence of self-defence and indeed a failed defence of self-defence, does not arise. We find that there could not have been extenuating circumstances on the basis of a failed defence of self-defence.

In the case of **Jose Antonio Golliadi v The People**[19], Muyovwe, JS, delivering the judgment of the court, at page J13, observed as follows;

> **"we must emphasise that trial courts must be wary of finding drunkenness as an extenuating circumstance in every case where the offence is committed at a drinking place or where the accused claims he was drinking or drunk. it is important to consider the peculiar facts instead of applying drunkenness as an extenuating circumstance in every single case which would lead to injustice"**

The starting point when considering intoxication as an extenuating circumstance, is that an accused person must have been drunk. It is not enough that she was seen drinking or spent a long time in a drinking place. In this case, other than evidence that she was drinking, there was no evidence

that she was drunk at the time she shot her husband. We find that the trial judge rightly found that there were no extenuating circumstances on account of the consumption of intoxicating liquor.

The appeal against conviction and the alternative appeal against sentence, having failed, the appellant's conviction and the sentence imposed by the trial court, are upheld.

.....
C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

.....
J.Z. Mulongoti
COURT OF APPEAL JUDGE

.....
D.L.Y. Sichinga
COURT OF APPEAL JUDGE