

**THE DEFENSE OF PROVOCATION: A CRITICAL ANALYSIS  
OF THE EXTENT OF ITS APPLICATION TO WOMEN IN  
ZAMBIA**

**BY  
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**SCHOOL OF LAW**

**THE DEFENCE OF PROVOCATION: A CRITICAL ANALYSIS OF THE  
EXTENT OF ITS APPLICATION TO WOMEN IN ZAMBIA**

**BY**

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**Being a Directed Research Essay submitted to the University of Zambia Faculty of  
Law in Partial Fulfillment of the requirements for the Award of the Bachelor of  
Laws (LLB) Degree**

## **DECLARATION**

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## **ABSTRACT**

The main aim of this research paper is to critically analyze the extent to which the defense applies to the female offender who pleads it. The overall objective as such is to highlight the challenges women face, in particular those who are victims of domestic violence when they rely on the defense.

Research that has been undertaken shows that there is an express provision in the Penal Code governing the defense of provocation. This particular provision is meant to apply equally to both males and females. An inherent malfunction of this provision is however evident in its application to female offenders who have been victims of continuous domestic violence and abuse. Firstly, the defense appears to be a male defense owing to certain requirements that have to be satisfied in terms of the loss of self-control. It has been observed that the statutory provision on provocation does not take into account the realities of women who are victims of continuous domestic violence in the event that they plead the defense. This is because the law assumes that women who kill under such circumstances form a pre-meditated intention to actually kill. This essentially means that in its practical application, the defense appears to be gender-biased. This assumption thus raises the fundamental question of whether the law on provocation in Zambia applies equally to both men and women.

The research paper has also proposed changes in some areas of concern and weakness in as far as the defense of provocation is concerned. These recommendations are that the statutory law on provocation be amended to include aspects of domestic violence where a woman pleads provocation. Furthermore, the law should be amended to expressly include cumulative provocation so that women can have a clear statutory basis for the defense. Efforts should also be made to ensure that all law enforcement officers be enlightened on the aspects of domestic violence and their relation to the defense of cumulative provocation so that they may be aware of the realities of women who find themselves in these situations.

## ACKNOWLEDGEMENTS

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## **DEDICATION**

**“It is not the mountain we conquer, but ourselves”**

**-Sir Edmund Hillary-**

This paper is dedicated to the two people that have mattered most to me and will always matter...Mr. Thomson Mulele and his beautiful wife, Mrs. Clarina Inonge Mubita Mulele. Mummy and Daddy, I will never be able to repay you for all that you have done for me but please let this little effort be the first of many. How could you ever put up with the skinny little kid who never wanted to eat her greens and mould her into the phenomenal woman she is yet to be? Nitumezi ahulu bondate ni bomahe-this is for you.

To my one and only twin sister, the other half of me, this is all for you. The fights, the laughs, the rage and the jealousy, I am in awe of the fact that you have always stood up for me and beside me and even now as I graduate, I know that all I have, all I am to be...you are the reason. Everything I achieve, you do to.

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# CHAPTER ONE

## 1.0 INTRODUCTION

Murder is defined as the killing of a human being with malice aforethought.<sup>1</sup> It is generally governed in many jurisdictions by the Penal Code. There are two elements that are vital to convict a person of the offence; *actus reus* and *mens rea*. *Actus reus* is defined as whatever act or omission or state of affairs as laid down in the definition of the particular crime charged in addition to any surrounding circumstances and any consequences of the act or omission as the definition of that particular crime requires.<sup>2</sup> This element essentially means that for one to be convicted of the crime of murder it must be proved that he actually committed the act that led to the death of the deceased.

With regard to *mens rea*, Williams defines it as the mental element necessary for the particular crime and this mental element may be either intention to do the immediate act or bring about the consequence or recklessness as to such act or consequence.<sup>3</sup> This means that where X is accused of committing murder, it should also be proven that he had the intention to commit the offence and did actually commit it. Section 204 of the Penal Code of Zambia provides that the *mens rea* for murder shall be referred to as malice afore thought.

It should be noted that the penalty for murder is death. However where it is found that there are extenuating circumstances associated with the offence which would diminish morally the degree of the person's guilt, another sentence other than death may be given at the discretion of the court<sup>4</sup>.

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<sup>1</sup> A.B. Garner, editor in chief. Black's Law Dictionary, West Publishing, St Paul, 2007. p. 1043

<sup>2</sup> C.M.V Clarkson and H.M. Keating, Principles of Criminal Law, Sweet and Maxwell, London, 1998 p.1

<sup>3</sup> G. Williams, Criminal Law, the General Part, Sweet and Maxwell, London, 1961

<sup>4</sup> Section 201 of The Penal Code of Zambia, Chapter 87 of The Laws of Zambia

Extenuating circumstances in this case refer to matters or situations which arise, that lead to the accused having been forced or left no option but to act as they did-the result being the commission of an offence. These circumstances operate in such a manner as to justify to some extent the wrongful act of the accused, the effect of which would be a defense which further gives way to a lighter punishment or none at all meted out to the defendant or accused.

There are certain defenses available to a person who has committed the offence of murder. These defenses are diminished responsibility, self-defense and provocation. These defenses may act as extenuating circumstances which are enough to reduce a conviction of murder to manslaughter on the basis that the accused lacked the necessary mental element needed to suffer the full penalty for murder.

Self-defense entails the use of force or violence in order to repel an attack or prevent a crime<sup>5</sup>. An example of this is where A tries to mug B and attacks him with a weapon. B may attack A under the excuse of protecting himself. The attack on A can thus be referred to as self-defense.

Diminished responsibility refers to an impaired mental condition-short of insanity caused by intoxication, trauma or disease and that prevents a person from having the mental state necessary to be held responsible for a crime<sup>6</sup>. An example of this is where the accused may have taken an intoxicating substance such as alcohol and accidentally shot at a passer-by outside his home while still in a drunken state. He may have caused the actual death of the passer-by but may also be said to lack the necessary *mens rea* required on a charge for murder. At that point, the accused was under diminished responsibility as a result of being intoxicated by alcohol.

Of relevance to this research is the defense of provocation. This is defined as a sudden and temporary loss of self-control rendering the accused so subject to passion as to make him or

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<sup>5</sup> S.E. Kulusika Text, Cases and Materials on Criminal Law in Zambia, UNZA Press, Lusaka, 2006 at p. 242

<sup>6</sup> A.B. Garner, Black's Law Dictionary at p. 220

her for the moment, not master of his own mind<sup>7</sup>. For example, where X suddenly begins to hurl insults at Y and proceeds to attempt to physically attack him. If Y loses his temper and hits X in an attempt to silence him but ends up killing him, Y may be accorded the defense as he was provoked and had no time to consider his actions or cool down before attacking X.

### A Brief Background to the Defense of Provocation

Provocation as a defense has been in existence in many systems of law world wide for many years. However, it is largely a creation of the English Common Law. A classic definition of the defense was thus given by Lord Devlin in the case of **R v Duffy**<sup>8</sup> as:

‘A sudden and temporary loss of self-control rendering the accused so subject to passion as to make him or her for the moment not master of his mind’

Even the Roman-Dutch law provided for the defense of provocation in that it did not regard anger as an excuse for criminal liability but only as a factor which might mitigate a sentence if the anger was justified by provocation<sup>9</sup>

It has been noted that the defense existed for many years, at least for men. The judges developed it in cases where the defendant had been provoked after being subjected to a violent physical attack<sup>10</sup>. It was even suggested in Blackstone’s Commentaries that such a crime was of the lowest degree of manslaughter. An example of this is where a man found his wife committing adultery and killed her or her lover.<sup>11</sup>

This seems to show that the defense was at first limited to husbands only but it was later extended to men who killed their partners in similar circumstances as was the case in **Re**

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<sup>7</sup> D. Roe, Criminal Law, Hodder Arnold Publishers, London, 2007 at p. 80

<sup>8</sup> [1967] 1 QB 63

<sup>9</sup> E.M. Burchell and P.M.A Hunt, South African Criminal Law and Procedure (Formerly Gardner and Landsdown), Volume I General Principles of Criminal Law, Juta and Company Ltd, Cape Town, 1970 at p. 240

<sup>10</sup> D. Roe, Criminal Law, Hodder Arnold Publishers, London, 2007 at p. 77

<sup>11</sup> For further reading see R v Maddy (1671) 2 Keb 829 77

**Gauthier.**<sup>12</sup> In this case, the accused attacked and killed his lover who was not his wife after finding out about her infidelities.

Provocation is provided for in Section 205 and 206 of the Penal Code under which four main requirements may be deciphered in order to prove that provocation actually occurred. These requirements are

- (i) Sudden provocative conduct,
- (ii) Actual loss of self-control by the accused person,
- (iii) Where an ordinary person would induce him to assault that person and
- (iv) That the act which caused death bore a reasonable relationship to the provocative act which was offered to the defendant.

There are three main types of provocation namely ordinary (reasonable), cumulative and self-induced provocation.

(i) Ordinary provocation refers to that provocation which causes a man to lose his self-control; and although a reasonable man who has lost control over himself would not kill, yet his homicidal reaction to the provocation is at least understandable<sup>13</sup>. This form of provocation is based on the standard of the reasonable or ordinary man.

(ii) Cumulative provocation is a series of acts or words over a period of time which culminates in the sudden and temporary loss of self control. This provocation is not confined to the last acts before killing the accused, there may have been previous acts or words which when added, caused the accused to lose his self control although the last act may not be sufficient to cause provocation<sup>14</sup>.

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<sup>12</sup> (1943) 29 Cr.App R 113

<sup>13</sup> W. R. LaFare and A. W. Scott Jr. Criminal Law (2<sup>nd</sup> ed) West Publishing, Minnesota, 1995 at p. 654

<sup>14</sup> M. J. Allen Criminal Law Blackstone Press, London, 1999 at p. 279

(iii) Self-induced provocation is a form of provocation in which the accused himself started the trouble. This was illustrated in the case of **R v Johnson**<sup>15</sup> in which the accused started an argument in a night club, made threats to the deceased and later killed him. The court rejected his claim of provocation on the basis that it was self-induced. This type of provocation is rarely successful owing to the fact that the accused actually ‘provoked’ himself and may be rendered responsible for his own anger because he started the trouble himself.

It should be mentioned that there is arguably a link between the defense of provocation and domestic violence. This is owing to the fact that it is in many cases of domestic violence (of which women are usually victims) that women who cannot take the abuse anymore usually end up killing their husbands or partners. Only when murder is committed can the defense be pleaded. This paper is an analysis of the defense based on the context under which it is pleaded as a result of a murder committed by a woman who has suffered abuse (domestic violence) from her partner over a long period of time.

It is appreciated that the law on provocation is meant to, and does apply equally to both men and women. This conclusion is based on the wording of the Penal Code which gives no indication as to preferential application of the defense. Given all the forms of provocation provided by the law and the instances under which it may be pleaded, this study undertakes to critically analyse the law on provocation in Zambia with the aim of showing the extent to which it applies to women.

### **1.1 THE LINK BETWEEN PROVOCATION AND DOMESTIC VIOLENCE**

As stated above, there exists a correlation between domestic violence and the defense of provocation because in the many instances where women have relied on the defense, they have previously been victims of domestic violence.

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<sup>15</sup> (1989) 1 W.L.R 740

Domestic violence is generally defined as a gender crime usually perpetuated by men against women. It involves the infliction of bodily injury, emotional abuse, intimidation or verbal sexual harassment as a means of coercion, control, revenge or punishment.<sup>16</sup>

Brinegar outlines and defines the different forms under which domestic violence may occur. These are namely in the form of physical, psychological (emotional) and sexual abuse.<sup>17</sup> He defines physical abuse as any action toward another person – pushing, hitting, whipping, biting, throwing things, beating, slapping, choking, shoving, locking out or restraining and other acts designed to injure, hurt or cause physical pain. In terms of psychological abuse, Brinegar contends that it refers to constantly doing or saying things to shame, insult, ridicule, embarrass, demean, belittle or mentally hurt another person. Sexual abuse is defined as forcing someone to have sex when she does not want to (in the English courts this is referred to as marital rape where the parties are married), forcing someone to engage in sexual acts she does not like or finds unpleasant, frightening or violent, criticism of sexual performance, sadism or anything that makes her feel demeaned or violated.

The different forms under which domestic violence may occur as espoused above have been stated for the important reason that they go a long way in explaining in detail the different forms of violence which may in effect lead to or result in some form of provocation. This particular point is seen in the analysis of the different cases that are brought before the court I which it is observed that some of the forms of domestic violence outlined above are implicit in the defendant or accused person's claim of provocation.

Physical violence or abuse is catered for in Section 247 and Section 248 of the Penal Code of Zambia, in terms of Common Assault and Assault Occasioning Actual Bodily Harm respectively. In the event that such abuse results in murder, Section 199 and 200 provide for criminalization of these offences in the form of murder and manslaughter respectively. Spousal homicide falls under this category. Spousal homicide is linked to Section 205 and

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<sup>16</sup> M. Natalia, Domestic Violence Against Women in Zambia: A Research Paper Presented To The University of Zambia in Partial Fulfillment of an Award of the Bachelor of Laws Degree (2002)

<sup>17</sup> J. Brinegar, *Breaking Free From Domestic Violence*, Compcare Publishers, Minnesota, 1993 at p. 3

206 which provide for the defense of provocation as a mitigating factor. This means that a killing which would otherwise constitute murder is reduced to manslaughter if the act was done in the heat of passion caused by sudden provocation.

The defense as it currently stands in the statute books is not clear on aspects of continuous or cumulative provocation. It is not clear for example, what the position of the law is on women who kill their partners as a result of domestic violence and abuse they suffer at the hands of their partners over a long period of time. The only form of provocation clearly provided for is ordinary provocation, and not cumulative provocation which would normally be the defense a continuously abused woman would rely on. There is also no strict law per se on domestic violence.

It is a reasonable assumption that the average man may easily rely on the defense owing to his ability to react in the heat of the moment. The question arises as to what happens to a woman who has been a constant victim of any form of abuse by her husband or partner. What happens in the event that on a given day after many years of abuse she feels she has suffered the last straw and kills her husband when he begins to taunt her and threaten to kill her? It would follow from logic that she will rely on the defense of cumulative provocation but she may face difficulties in proving it because she stayed in the relationship for too long and could have found ways of leaving.

Courts have actually been condemned in the way they pass judgments over cases involving women without giving due consideration to the facts. To this effect, Macmillan once commented: “the way in which the courts are passing judgments is very sad because their judgments encourage men to continue abusing women.”<sup>18</sup> An illustration in support of this assertion is the case of **Esther Mwimbe v The People**<sup>19</sup> in which the court rejected the defendant’s plea of provocation despite the many years of physical abuse she had suffered at the hands of the deceased, her husband.

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<sup>18</sup> J. Macmillan, “WILSA Fights for Fair Women Judgments” in The Legal Resource Foundation News, No. 23, Lusaka (November, 2009) at p. 9

<sup>19</sup> (1986) ZR 15 Supreme Court Judgment

Similarly in **Chrystal Alyson Denn V the People**,<sup>20</sup> the accused had been married to her husband (the deceased) during which she was battered and assaulted by him and had been treated for injuries ranging from bruises to cuts. On the fateful day, she killed her husband after a struggle by stabbing him with a knife as he tried to insert his fingers into her vagina. Evidence was adduced to the effect that on eight occasions the accused reported her husband to the police about assault occasioning actual bodily harm. The courts rejected her claim of provocation and she was sentenced to life imprisonment. Only upon appeal was the sentence reduced to fifteen years imprisonment.

## **1.2 STATEMENT OF THE PROBLEM**

Sections 205 and 206 of the Penal Code present a problem in the application of the defense of provocation. This is largely due to the fact that while the requirements laid down by the statute clearly cover ordinary or reasonable provocation, there is no clear provision for cumulative provocation. The law is not clear on how it deals with women who are victims of continuous abuse, particularly as a result of domestic violence. The problem that is encountered with this aspect is that women who are subjected to continuous physical, sexual or mental abuse by their spouses may not be able to successfully rely on the defense owing to the fact that it is usually questioned why they did not leave the abusive relationship in the first place.

A fundamental problem thus encountered with the laws governing provocation is that they raise the question of whether the laws apply equally to men and women. Can a woman or female accused in Zambia successfully rely on the defense of provocation?

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<sup>20</sup> Appeal No. 5/2000 Supreme Court Judgment

### **1.3 OBJECTIVES OF THE STUDY**

#### **1.3.1 GENERAL OBJECTIVES**

This paper highlights what the current position of the law on the defense of provocation is in Zambia, with the main objective of analyzing the extent to which the defense applies to accused women or female offenders in Zambia.

#### **1.3.2 SPECIFIC OBJECTIVES**

- (i) To highlight the law on provocation in Zambia and other jurisdictions.
- (ii) To analyse the extent to which the defense applies to women in Zambia
- (iii) To highlight the difficulties or challenges women face when they rely on the defense.

### **1.4 RESEARCH QUESTIONS**

- (i) To what extent does the defense apply to women?
- (ii) What challenges do women face when they rely on it?
- (iii) What is the nature of cumulative provocation-under what circumstances does it arise?
- (iv) What is the criteria used to ascertain whether cumulative provocation may be successfully relied on?

### **1.5 SIGNIFICANCE OF THE STUDY**

This topic is important because it highlights the challenges women face, in particular those who are victims of domestic violence when they rely on the defense. This research paper is an analysis of the laws governing the defense of provocation, to show the effects of its application to persons that plead it as a defense. As the country undergoes important constitutional reform, it is also necessary for other laws to be in conformity with the principles of equality and non-bias. This paper will serve as a means of recommendations as to how the law, in particular that relating to the defense of provocation may be improved upon adequately to apply to both men and women.

## **1.6 SCOPE OF THE STUDY**

This research paper is limited to a discussion of the defense of provocation to cases in which it is pleaded after murder has been committed as a result of domestic violence.

## **1.7 METHODOLOGY**

This research is a qualitative one. It relies on both desk and fieldwork. With regard to desk research, it has been carried out through the collection of secondary data in form of statutes, law reports, dissertations, literature written by eminent scholars, journals and credible internet sources. The field work involved interviewing persons and organizations involved in matters pertaining to the topic. These are persons such as police officers and women's rights activists.

## **1.8 OUTLINE OF CHAPTERS**

### **1.8.1 CHAPTER ONE**

This chapter has dealt with the basic aspects of the research conducted. This is in terms of a basic introduction on the topic, the statement of the problem and research questions that have been addressed in the paper as well as the objectives and significance of the study. It has stated the means under which the research was conducted and the scope of study the research has been limited to, namely cases in which women who have been victims of domestic violence have pleaded the defense. Of notable interest in this chapter is a brief discussion on the link between the defense of provocation and cases of domestic violence. In essence, chapter one is a prelude to the entire research paper and also highlights the salient features of the subsequent chapters.

## **1.8.2 CHAPTER TWO**

This chapter is a discussion of the legal framework governing the defense of provocation in Zambia. This is conducted mainly by way of an analysis of the legislation governing the defense in Zambia and further, a discussion based on the case law adjudicated upon pertaining to the defense.

## **1.8.3 CHAPTER THREE**

This chapter is based on a comparative study of the law on provocation with other jurisdiction. This is conducted in form of a discussion of the legal framework governing the defense of provocation in The United States of America and The United Kingdom.

## **1.8.4 CHAPTER FOUR**

This chapter is based on a critique and analysis of the laws governing the defense of provocation in the country. It looks at commentaries on the same and analysis of the statutory provisions of the defense and the case law adjudicated upon.

## **1.8.5 CHAPTER FIVE**

This chapter has dealt with the general and overall conclusion of the research. It has further given recommendations on the possible areas of reform with regard to the defense of provocation.

## **1.9 CONCLUSION**

Up to this point, it is necessary to appreciate that provocation is a defense available to persons who commit murder. This chapter has been a discussion of how the defense arises and the importance of why this research is being carried out. It is being carried out to analyse the extent to which the defense of provocation applies to women in Zambia. This is especially so in the context of those who plead it as a result of murders they commit following continuous abuse they suffer in the domestic setting.

The next chapter is a discussion of the Zambian legislation on provocation. It is basically a highlight of the statutory provisions on provocation contained in the Penal Code as well as the legislative body's rationale for enacting and retaining the defense as it currently stands. Also contained in this chapter is a look at how the courts have approached the defense of provocation in cases which are brought before them.

## CHAPTER TWO

### LEGAL FRAMEWORK WITHIN WHICH THE DEFENCE OF PROVOCATION OPERATES IN ZAMBIA

#### 2.0 INTRODUCTION

This chapter is an analysis of the laws of Zambia governing the defense of provocation. It is a discussion primarily based on statutory and case law, which form the basis under which one may plead the defense. The chapter gives the relevant provisions in the Penal Code relating to the defense. It further critically analyses them using case law, to bring out certain important elements to show the criteria one must prove to successfully rely on the defense

In order to understand how the defense operates, a brief discussion on how it came to be applied in Zambia is necessary. It should be noted from the onset that the defense of provocation as applied in Zambia, has its roots in early English Common Law. Zambia, by virtue of its colonization by Britain, has adopted a substantial amount of British law which is applied in the courts. British law is further applicable under the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia. This is an Act created to declare the extent to which the law of England applies to the Republic of Zambia. Section two of the said statute provides as follows:

Subject to the provisions of the Constitution of Zambia and to any other written law-

- (a) the Common Law
- (b) the doctrines of equity; and
- (c) the statutes which were in force in England on the 17<sup>th</sup> of August 1911 (being the commencement of the Northern Rhodesia Order in Council 1911); and
- (d) any statutes of later date than that mentioned in paragraph (c) in force in England, now applied to the republic, or which hereafter shall be applied thereto by any Act or otherwise, shall be in force in the republic.

It is by virtue of this section that the Zambian courts have applied English cases in aid of interpreting or stating the law on provocation in Zambia.

## **2.1 LEGAL FRAMEWORK GOVERNING THE DEFENSE OF PROVOCATION**

The definition of provocation is provided for in Section 206 (1) of the Penal Code of Zambia and reads as follows:

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 and 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.

Section 205 of the Penal Code provides for the criteria to be satisfied in order for one to plead the defense. The relevant section reads as follows:

Section 205 (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only

(2) The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.

Section 205 (1) provides for the defense to act as a mitigating factor to the full penalty for murder, which is death. It basically suggests that where one kills another on the basis of his or her loss of self-control without time to think about his actions as a result of being provoked, he can plead provocation and be convicted of manslaughter only. This is owing to the fact that the accused, though guilty of murder, does not deserve the full punishment because he was not in control of his own senses at the material time.

This section also implies that the provocation must be an immediate act preceding the committed murder. That is, A must have attacked B immediately he was provoked without having time to cool down and plot the murder for which he has been accused.

Section 205 (2) places a limit on the use of the defense. The defense shall only be applied when the court is satisfied that the act which caused death bore a reasonable relationship to the provocation. This essentially means that the deceased person's act must have been the immediate cause of the accused person's loss of self control which led to the accused attacking the deceased. For example: A continuously teasing, taunting or attacking B, causing the latter to lose his self-control and attack A. This further means that the accused must use force that is proportionate to the provocation.

It is worth noting that close scrutiny of the provisions of the Penal Code governing provocation shows that there are certain key requirements which are identifiable as vital to the use of the defense. This was first established in the case of **R v Amuli**<sup>21</sup> in which Lewey C.J. stated what was then required to establish provocation on a murder charge:

- (i) That there should be circumstances depriving the prisoner temporarily of his power of self-control
- (ii) That the accused should be shown not to be a particular kind of man but an 'ordinary person' (as envisaged in section 182 of the Penal Code of Zambia Chapter 146 as amended)
- (iii) That there was sudden and sufficient provocation which was acted on in the heat of passion without time to cool down (section 182 of the Penal Code of Zambia Chapter 146 as amended)
- (iv) That the act causing death should be one which bore a reasonable relationship to the provocation in accordance with the principles explained in **R v Mancini** and **R v Duffy**.

With reference to the above requirements, Lewey C.J. further expanded on what the law on provocation as it stood then was:

"It is of the greatest importance to remember that, whereas before the law was amended it was sufficient to fulfill the conditions in (i), (ii) and (iii) which I have set out above, they are now useless unless due consideration was given to the fourth condition; namely whether the provocation was of a kind which could extenuate the use of the particular weapon or other means of retaliation resorted to."

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<sup>21</sup> (1953) 4 N.R.L.R. 243

This means that even in the case where the courts accept that there has been loss of control as a result of the sudden provocation of an 'ordinary person', that is not sufficient to reduce a charge of murder to one of manslaughter unless the court is also satisfied as to the reasonable relationship between the weapon or other means of relation employed and the nature of the provocation - it makes all the difference whether the retort has been by a blow with the fist or by a deadly weapon.

In this case the accused was charged with the murder of his wife by means of an axe. The defense submitted that the cumulative effect of the wife's conduct prior to the attack was sufficient to provoke the husband and cause him ultimately to lose his self-control as an ordinary person. The trial judge found the prisoner guilty on the basis that the mode of retaliation bore no reasonable relationship to the provocative act of the deceased. The accused thus had the *mens rea* necessary for conviction for murder.

The proposition given by Lewey C.J. is still the current position of the law on provocation and is also supported by Kulusika who argues that a critical analysis of section 205 and section 206 leads to the identification of four basic requirements that must be satisfied in order to entitle an accused person to invoke the defense of provocation<sup>22</sup>. These requirements are discussed in detail below:

### **2.1.1 Sudden provocative conduct**

In the case of **Nyambe Mubukwanu Liyumbi v The People**<sup>23</sup> the court stated that sudden provocative conduct will only be considered as such where it deprives an ordinary person (of the community to which the man who kills belongs) of the power of self-control and induces him to assault the person who does the wrongful act or utters the insult. Herein, the appellant stabbed the deceased in circumstances where the force applied was unreasonable.

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<sup>22</sup> S. E. Kulusika, Text, Cases and Materials on Criminal Law in Zambia, UNZA Press, Lusaka, 2006 at p.

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<sup>23</sup> (1978) Z.R. 25 (SC)

In **R v Che Mkola Mudala Amuli**<sup>24</sup>, Lewey C.J. stated that as one of the necessary requirements to establish sufficient provocation, the provocation must have been sudden and acted upon in the heat of passion and without time to cool, as then provided by section 182 of the Penal Code of Zambia Chapter 146 of the Laws of Zambia.

Kulusika contends that:

“The phrase ‘sudden provocation’ in section 205 is broad and needs to be defined. If strictly construed, it imposed restriction on the definition of provocative conduct. This means that it will require that the provocative act or insult happens in the presence of the accused person, giving him no time to deliberate and causes the accused person to lose his self-control. By implication, under Common Law this loss of self-control of the accused person could be described as sudden.”<sup>25</sup>

He goes on further to state that in either case, construing the word ‘sudden’ the court may take into account the effect of previous provocative acts or insults and the last act or insult that led the accused person to kill the victim. This was seen in the case of **Rosemary Thandiwe Zulu v The People** which has been briefly discussed in chapter one and is further discussed in detail in chapter four.

In ascertaining what amounts to sudden and provocative conduct, it is necessary to determine what acts actually amount to provocation. There must be evidence of the wrongful act or insult of the accused which provoked the accused to the point that he lost his self-control. Kulusika notes that:

“It is clear from the provisions of section 205 and 206 of the Penal Code and the decision in **Liyumbi** that the act or insult must be wrongful and must rise from a human agency having legal capacity. There must also be evidence of the wrongful act or insult-which must come from the victim”

It is thus a sufficient provocative act to find one’s wife, husband, or partner with another man or woman in *flagrante delicto* as was the position in **R v Alayina**<sup>26</sup> in which the accused killed the deceased when she found her husband in bed with the latter’s girlfriend. A similar holding was adopted by the Court of Appeal in **Banda v the People**.<sup>27</sup> Herein, the appellant claimed in a confession that he found his girlfriend committing adultery with

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<sup>24</sup> (1953) 5 N.R.L.R. High Court of Northern Rhodesia

<sup>25</sup> S.E. Kulusika, Text, Cases and Material on Criminal Law in Zambia at p. 347

<sup>26</sup> (1957) High Court of Nyasaland

<sup>27</sup> Court of Appeal of Zambia (1973)

another man and he killed them both with an axe. The court held that despite not being formally married, they were living together as man and woman in a stable relationship. As such, it would be unrealistic to ignore this state of facts determining how an ordinary man would react in to finding his partner with someone else in circumstances of intimacy.

With regard to acts or insults that operate to diminish the integrity of a person, they may or may not suffice as acts of provocation. Examples of this insults targeted at a man's virility or impotence. The courts have taken the view that such insults may be grossly provocative, but the deciding factor on whether the accused should be afforded the defense of provocation is based on whether the mode of retaliation by the accused is out of proportion to the given insult.

In **R v Chintunkwe**,<sup>28</sup> the accused was charged with the murder of his wife. It was common ground that the accused had killed his wife with an axe and a knife after a quarrel during which she had taunted him with impotence and had also said:

“You are not like other men such as Skini Njani”

In delivering the judgment of the court Lewey, C.J stated as follows:

“In dismissing the application, we wish to say that, in our opinion, the insult that was offered to the applicant, was of a very gross nature. It was not simply a suggestion of impotence, but such a suggestion of impotence coupled with an allegation that the deceased had received a greater satisfaction from other men, one of who was named. An insult of this nature would operate on the mind of an African of the type of the applicant in a severe manner. Nevertheless, we feel that there is no question that the form of retaliation was out of all proportion to the insult”

It should be stated however that section 206 of the Penal Code restricts provocative conduct to acts of human beings. Circumstances such as traffic chaos and sudden failure of a car's engine leading to the delay of the cars behind, cannot constitute provocation. Anyone

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<sup>28</sup> (1954) High Court of Northern Rhodesia

involved in a traffic chaos cannot as a result murder someone and successfully plead the defense of provocation.<sup>29</sup>

### **2.1.2 Actual Loss of Self-Control By The Accused**

This is the requirement that the provocative act or insult caused the accused person to lose self-control. It is a subjective test and a question of fact. What is meant by loss of self-control is that the accused is unable to control his temper and attacks the victim without taking time to think of his actions.

An example of where the accused actually lost self-control is seen in the case of **Mupota v The People**<sup>30</sup>. The accused stabbed the deceased owing to the latter insulting and taunting him over his sexual impotence continuously for a period of three years and in particular on the day of the homicide. The learned judge considered the nature of the insult alleged and stated:

“It has not escaped my sight that in our society an imputation that a person is affected with sexual impotence may deprive an ordinary person of the power of self-control”

It should be noted that in cases of prolonged domestic violence, the court should and does take into account previous provocative acts or insults and treats them as cumulative (enough to cause one to lose their self-control), provided that the killing is a response to a final act of provocation, such as “I will beat you in the morning” or “I will kill you”. This approach to the defense is evidenced in the case of **Rosalyn Thandiwe Zulu v The People**<sup>31</sup>. Herein the appellant was convicted for the murder of her husband. It was an undisputed fact that she had suffered extreme violence at the hands of her deceased husband. On the fateful day of the homicide he had said to her: “I am a hard-hearted man, I will kill you” and further “You think I cannot kill you” as he reached for a gun. In the final court of appeal, the judges reversed the decision of the lower court and took into account

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<sup>29</sup> S.E. Kulusika, Text, Cases and Material on Criminal Law in Zambia, at p. 351

<sup>30</sup> (1976) ZR 212

<sup>31</sup> (1981) ZR 342 Supreme Court

the statements made by the deceased to amount to provocation justifying the attack made by the accused.

However in **Esther Mwimbe v The People**<sup>32</sup> the court extended this approach and rejected the accused's defense for the murder of her husband after extreme violence he subjected her to over a continuous number of years. The learned justices in the Supreme Court stated the facts of a particular case will show whether or not a situation in which the accused found himself including the nature of the attack upon himself of the gravity of the imminent peril was such that it was reasonable and necessary to take the particular action which has caused death in order to preserve his own life or to preserve his own life or to prevent grave danger to himself or another.

In Re Mwimbe, the court rejected her defense of cumulative provocation on the basis that the force she used by spilling hot oil on her husband was unreasonable because she was not in imminent danger by the deceased's act. Furthermore, that she had not lost her self-control and was able to think about her actions before killing him.

### **2.1.3 Ordinary person assaults the other**

This is an objective requirement for the defense of provocation. **Section 206 (1)** requires that the provocative act or insult must be such as might cause an ordinary person to lose his or her self-control and do as the accused person did. This test basically provides a standard for the courts to determine whether the accused person's response to the act or insult amounting to provocation was justified.

This standard is what is referred to as the 'objective or reasonable man test.' It essentially means that the courts will take into account how a reasonable person in the society would react to certain provocative acts to determine whether the accused acted as an ordinary person would. With regard to what would be considered as reasonable, the learned justices

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<sup>32</sup> (1986) ZR 15 Supreme Court

in **Chibangu v the People**<sup>33</sup> were of the view that this aspect was best expressed by the Federal Supreme Court in **Chibeka v R**<sup>34</sup>, namely that reasonableness must be tested with regard to ordinary persons of the community of the accused.

In **Chibangu v the People**<sup>35</sup> it was stated that in Zambia, the test for provocation is objective but only in a limited sense in that it is of a parochial nature, namely, faced with similar circumstances can it be said that an ordinary person of the accused's community might have reacted to the provocation as the accused did?

#### **2.1.4 Act causing death bore a reasonable relationship to the provocative act**

**Section 205 (2)** requires that the response of the accused must bear a reasonable relationship to the provocation. The gist of this is that grave provocation may be met with just as grave a response or extreme retaliation. An example may be where A constantly threatens B and on the material day actually lifts and points a rifle at B. B may be justified in grabbing the rifle and shooting or hitting A, in order protect his or her life. Where the provocation is trivial, a response which is disproportionate should not be allowed as a mitigating factor to murder. An example is where X spits at Y's girlfriend-Y would not be responding proportionately by decapitating X as a result of his provocative conduct.

Kulusika contends that the essence of the rule in section 205 (2) is to give the courts guidance that they should pay greater attention to the mode of retaliation used by the accused.<sup>36</sup> Similarly, in **Chibangu v The People**<sup>37</sup> the court stated that the reasonable relationship rule is important in that it provides a measurement as to the mode of resentment or retaliation on the one hand and the nature and degree of provocation on the other. Herein the court held that the shooting of the deceased by the appellant bore no

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<sup>33</sup> (1978) Supreme Court of Zambia

<sup>34</sup> (1959) 1 R. & N. 476

<sup>35</sup> (1978) Supreme Court of Zambia

<sup>36</sup> S. E. Kulusika, Text, Cases and Material on Criminal Law in Zambia, UNZA Press, Lusaka, 2006 at p. 352

<sup>37</sup> (1978) Supreme Court of Zambia

reasonable relationship to the provocation offered (hitting the appellant with bare hands); consequently the defense of provocation was not available to the accused.

The Supreme Court also stated in **R v Chibeka**<sup>38</sup> that one must consider the whole of the provocation given and the whole of the accused person's reaction to it, including the weapon, if any, used, the way it came to hand, the way it was used, and every other relevant factor and must finally decide whether an ordinary man of the accused person's community-with his ordinary allowances of human wickedness-might have done what the accused did.

Similarly in **R v Chintukwe**,<sup>39</sup> the learned justices cited **R v Che Mkola Mudala Amuli**<sup>40</sup> as authority for the proposition that the force and effect of such acts or insults must always be viewed in the light of the means of retaliation employed in accordance with the cases in English Law such as **Mancini** and in accordance with section 182 (2) of the Penal Code of Zambia (as it was then).

The cases cited in this particular section basically suggest that whereas an accused person may be entitled to the defense of provocation upon satisfaction of the named requirements, the important aspect of the means of retaliation to the provocation must always be considered.

### **3.0 CONCLUSION**

This chapter has been a discussion of the law on the defense of provocation in Zambia. It has been an analysis of the statutory provisions governing the defense contained in the Penal Code. It has also encompassed how the courts have applied these provisions in the form of cases before it. It is worth noting that the law in Zambia is mostly as a result of incorporation of English Common Law principles on the defense. The next chapter is a study of the law governing the defense in English and American jurisdictions.

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<sup>38</sup> (1959) 1 R. and N. 476

<sup>39</sup> (1954) High Court of Northern Rhodesia

<sup>40</sup> 5 N.R.L.R. 243

## **CHAPTER THREE**

### **LEGAL FRAMEWORK WITHIN WHICH THE DEFENSE OF PROVOCATION OPERATES IN THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM**

#### **3.0 INTRODUCTION**

The law on provocation is practiced in countries the world over. The United States of America (USA) and the United Kingdom are generally viewed as considerably advanced with equally advanced systems of law. Although both countries apply Common Law, they also have distinct statutes that govern the defense of provocation. Thus chapter is thus a discussion on the law on provocation in the USA and England. The relevance of this chapter is to discuss the laws in England and the USA, so as to form a basis upon which our laws can be improved upon in order to move with changing times and apply equally and fairly.

#### **3.1 LEGAL FRAMEWORK GOVERNING THE DEFENSE**

##### **3.1.1 LEGAL FRAMEWORK IN THE UNITED STATES OF AMERICA**

Separate provocation rules exist in each of the fifty American states. As a result, in the USA there is an opportunity for concurrently developing different legal rules concerning domestic homicide. To this end, Forrell contends that there are two sets of “heat of passion” rules: traditional provocation rules and the Model Penal Code’s (MPC) Extreme Emotional Disturbance (EED) provision.<sup>41</sup> This Particular practice implies that each state has its own set of rules on how the defense of provocation shall be governed, while there is also another set of general rules that govern the defense.

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<sup>41</sup> C. Forrell, “Gender, Social Values and Provocation Law in Australia, Canada and the United States of America” *Journal of Gender, Social Policy and the Law*-Volume 14:1, 2009 at p. 43-44

On the rationale as to why there are traditional rules on provocation in all different states, Forrell comments as follows:

“The United States Supreme Court lacks jurisdiction to review homicide cases concerning provocation because provocation typically does not involve a constitutional or federal issue. Because criminal law is an area traditionally left to states, in the United States there is little judicial guidance concerning provocation doctrine from federal courts.”<sup>42</sup>

The general rules on provocation in the USA are contained in Section 210 (3) (1) (b) of the Model Penal Code of 1962, first adopted by the American Law Institute. The relevant section provides:

“A homicide which would otherwise be murder [is manslaughter when it] is committed under the influence of extreme emotional disturbance for which there is no reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be”

The MPC rule merges diminished responsibility and provocation and accommodates other defendants who kill in circumstances of extreme emotional pressure. This is noted by Forrell who further contends that under the MPC is the requirement that the jury find that the killer acted:

“under the influence of extreme mental or emotional pressure for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances a he believes them to be”

The question of how the courts have dealt with the aspect of EED was discussed in the case of **Patterson v New York**.<sup>43</sup> The defendant herein had claimed that he had committed the murder under the influence of “extreme emotional disturbance” and was therefore entitled to a verdict of manslaughter. The jury found him guilty of murder. New York law provided that the state had to prove only “[t]he death, the intent to kill and causation” in order to convict a defendant of murder. If the state met its burden, the defendant could reduce the conviction to manslaughter by proving by a preponderance of the evidence that he had acted under the influence of extreme emotional disturbance for which there was a reasonable explanation. It was held that-shifting the burden to the defendant on the issue of extreme emotional disturbance did not violate the Due Process Clause.

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<sup>42</sup> C. Forrell (2009) Journal of Gender, Social Policy and the Law at p. 44

<sup>43</sup> 432 U.S 197 (1977)

The elements on provocation implicit in the MPC and Federal Penal Codes have been outlined in the case of the **State v Viera**<sup>44</sup> as:

- (1) The provocation must be adequate
- (2) The defendant must not have had time to cool off between the provocation and the slaying
- (3) The provocation must have actually impassioned the defendant and
- (4) The defendant must not be seen to have actually cooled off before the slaying.

Being a country that provides for a jury system, matters pertaining to the defense are determined by the jury. Forrell makes a note of this and states:

“Provocation is a classic jury question, one where the jury is asked to determine what the ordinary person would do under the circumstances.”

It may be concluded that the reason for this particular practice is that a jury finding of manslaughter enables the public to understand why a seemingly lenient sentence has been proposed. It may further aid the community within which it operates a better if not precise, understanding of the law.

The courts have had occasion to interpret the statutory provisions on the defense of provocation. In the case of **Mullaney v Wilbur**<sup>45</sup>, the defendant had been convicted in a Maine state court of murder despite his defense of provocation. Under Maine law, the learned justices explained when the defense of provocation may arise:

“[A]bsent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder-i.e., by life imprisonment-unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it is punishable as manslaughter-i.e., by a fine not to exceed \$1,000 or by imprisonment not to exceed 20 years”

They went on to state that”:

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<sup>44</sup> 787 A. 2d256 264 N.J Super.Ct.App.Div.2001

<sup>45</sup> 421 U.S. 684 (1975)

“If the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation

On the rules of procedure taken once the defense of provocation was raised by the defendant, it was held by the learned justices as to what practice is to be followed in **Re Winship**<sup>46</sup>:

“Once evidence tending to show provocation was introduced, the state-not the defendant had to bear the burden of proving beyond a reasonable doubt the absence of provocation.”

### **3.1.2 LEGAL FRAMEWORK IN ENGLAND**

The Common Law rule governing the defense was stated by Devlin J. as follows:

“Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable man, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his own mind.”<sup>47</sup>

The Common Law rule has been modified by the Homicide Act of 1957, in particular **section 3** which reads as follows:

“Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury, and in determining the question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.”

It should be stated that this Act does not create or codify, but assumes the existence of, and amends the Common Law defense. It does not state the effect of a successful defense-it is by virtue of the Common Law defense that the offence is reduced to manslaughter.

Ormerod notes that the section assumes the existence of the dual test:<sup>48</sup>

(1) Was the defendant provoked to lose his self-control? (A subjective test) and

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<sup>46</sup> 397 U.S. 358, 25 L. Ed. 2d 368 (1970)

<sup>47</sup> R v Duffy [1949] 1 All ER 932n

<sup>48</sup> D. Ormerod, Smith and Hogan Criminal Law, Oxford University Press, New York, 2005 at p. 442

(2) Was the provocation enough to make a reasonable man do as he did? (an objective question)

The courts have created a number of rules based on the section to determine when and how the defense may be used. For example in the case of **R v Marks**<sup>49</sup> the courts held that the defense is applicable only to a charge of murder, whether the defendant acted as a principal or accessory. In **R v Cunningham**<sup>50</sup> it was decided that provocation is not a defense to a charge of wounding or any charge other than murder.

Section 8 of the Criminal Justice Act of 1967 gives the procedure to be followed in the event that the defense is pleaded. It provides that on a murder charge, in deciding whether the defendant intended to cause death or grievous bodily harm, the jury must consider the evidence of provocation with all other relevant evidence. If they are not satisfied that he had the necessary *mens rea* they must acquit. But even if they decide he did have the *mens rea*, provocation may still be defense to a charge of murder at Common Law entitling the defendant to be convicted of manslaughter.

**DPP v Mancini**<sup>51</sup> further stated that once a judge decides there is sufficient evidence that the defendant was provoked, whether or not the defense has been raised expressly by the defendant or his counsel, he must leave it to the jury to answer the two questions;

- (i) Was the defendant provoked enough to lose his self-control?
- (ii) Was the provocation enough to make a reasonable man do as he did?

In their interpretation of section 3 of the Homicide Act, the English courts have taken to give words their ordinary and natural meaning free of the technical limitations of the Common Law. An example is given in the case of **R v Doughty**.<sup>52</sup> Herein it was held that the judge was bound by the plain words of the section to leave provocation to the jury

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<sup>49</sup> (1998) Crim. LR 676

<sup>50</sup> (1959) 1 Q.B. 288; (1958) 3 All ER 711

<sup>51</sup> (1942) AC 1

<sup>52</sup> (1986) 83 Criminal Appeal R319

## The subjective Condition

It is important to note that this requirement was created as an attempt to distinguish revenge killings of a pre-meditated or calculated nature from killings committed in the heat of the moment. In **R v Brown**<sup>55</sup> it was held that in their evaluation of the defense as a whole, the jury should be directed to consider the subjective condition first. In deciding this question of fact they are, naturally entitled to take into account all the relevant circumstances; the nature of the provocative act and all the other relevant conditions in which it took place, the sensitivity or otherwise of the defendant at the time, if any, which elapsed between the provocation and the act in question which caused death.

The loss of self-control must be seen to be sudden and temporary. The words ‘sudden’ and ‘temporary’ imply only that the act must not be pre-meditated and calculated. It is the loss of self-control which should be ‘sudden’, which does not mean immediate.<sup>56</sup> In the landmark case of **Ahluwalia**,<sup>57</sup> the Lord Chief Justice Taylor stated that

“The longer the delay and the stronger the deliberation on the part of the defendants, the more likely it will be that the prosecution will negative provocation.”

In the more recent decisions of **Ibrams**<sup>58</sup> and **Thornton**,<sup>59</sup> the court of appeal has reaffirmed that there must be a ‘sudden and temporary loss of self-control’ as a necessary requirement to proving the defense.

Since the sudden and temporariness requirement was designed to exclude from the ambit of the defense cases of pre-meditated killing, evidence that D had an opportunity to regain control and kill in a calculated fashion is important. In **Re Ibrams** D had received gross provocation but the last act occurred on 7<sup>th</sup> of October. The attack was carefully planned on the 10<sup>th</sup> of October and carried out on the 12<sup>th</sup> of the same month. It was held that the judge was right to rule that there was no evidence of loss of self-control. The case should be

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<sup>55</sup> [1972] 2 All ER 1328 at p. 1333

<sup>56</sup> D. Ormerod (2005) Smith and Hogan at p.448

<sup>57</sup> [1992] 4 All ER 889; [1993] Crim. L.R. 63

<sup>58</sup> (1981) 74 Cr. App R154

<sup>59</sup> [1992] 1 All ER 306; [1992] Crim. LR 54; [1992] Cr.App. R108; [1996] Crim.LR 597

approached with care. The question of delay and potential cooling period is evidence relating to the substantive law question whether D had lost his self-control at the time.

### Objective Condition-Did the Accused Act as a Reasonable Man Would Have?

In older cases, courts laid down as a matter of law what was, and what was not capable of amounting to provocation-judges took it upon themselves to instruct the jury as to the characteristics of a reasonable man. Section 3 of the Homicide Act has made three important changes to this practice:

- (i) It made it clear that 'things said' alone may be sufficient provocation, if the jury should be of the opinion that they would have provoked a reasonable man
- (ii) It took away the power of a judge to withdraw the defense from the jury on the ground that there was no evidence on which the jury could find that a reasonable man would have been provoked to do as D did.
- (iii) It took away the power of the judge to dictate to the jury what were to be the characteristics of the reasonable man

Lord Diplock in the case of **Camplin v DPP**<sup>60</sup> stated how the jury should be directed:

"The judge should state what the question is using the very terms of the section he should then explain to them that the reasonable man referred to in question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused person's characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also would react to the provocation as the accused did."

The learned jurist Ashworth noted in a seminal article that the proper distinction is that the individual peculiarities which lean on the gravity of the provocation should be taken into account, whereas individual peculiarities bearing on the accused person's level of self-control should not.<sup>61</sup>

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<sup>60</sup> (1978) AC 705 HL

<sup>61</sup> D. Ashworth 'The Doctrine of Provocation' [1976] CLJ 292

The rules to be followed in determining the objective test or the relationship between provocation and the mode of resentment were the laid down in **Phillips v R** in which the learned justices stated:<sup>62</sup>

“.....the question is.....not merely whether in their opinion the provocation would have made a reasonable man lose his self-control but also whether, having lost their self-control, he would have retaliated in the same way as the person charged in fact did.”

The English law on provocation has of course been the subject of much criticism for its apparent discriminatory fashion because it disadvantages women who plead it. This is largely due to the fact that owing to relative limited strength, it is not uncommon for women to respond lethally when facing an immediate attack by an abusive male partner. This has led to the Law Commission of Wales advocating for what is termed ‘Battered Women Syndrome’ as a defense for women who kill in such circumstances.

## **CONCLUSION**

This chapter has been a discussion of the laws of provocation in the USA and England. It is thus concluded that the defense generally has the same elements and character in both countries and in further comparison, to Zambia as well. The next chapter is a critical analysis and critique of the Zambian law on provocation based on the American and English statutes.

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<sup>62</sup> [1969] 2 AC 130 at p. 137 PC

## **CHAPTER FOUR**

### **A CRITICAL ANALYSIS OF THE EXTENT TO WHICH THE DEFENCE OF PROVOCATION APPLIES TO WOMEN IN ZAMBIA**

#### **4.0 INTRODUCTION**

This chapter is an analysis of the extent to which the defense of provocation applies to women in Zambia. It takes the form of a critique of the laws on provocation in Zambia with reference to how far women can successfully rely on them. As a result, this chapter uses the objectives and research questions outlined in chapter one as a basis for this discussion. This is done in order to assess the extent to which the defense actually applies to women in Zambia. In its analysis, the chapter looks at the penal provisions on provocation and cases that have been brought before the court. This is validated by views, cases and commentaries from other jurisdictions and learned authors.

#### **4.1 EVALUATION OF THE OBJECTIVES OF THE STUDY**

##### **4.1.1 What challenges do women face when they rely on the defense?**

Upon conducting research through the analysis of major precedents governing the defense of provocation, it has been observed that the major challenge women face when they rely on the defense of provocation is that the defense tends to operate more in favor of men than women. This argument is supported by Professor Munalula who contends that provocation

appears to be a male defense because the requirement for the reaction to be immediate eludes most women.<sup>63</sup> She adds that:

“It is virtually impossible for women to raise this partial defense because of their physical inability to respond in the heat of the moment and with deadly force during a domestic altercation. Their type of response or homicide is therefore more measured and delayed and precisely fitted to the offence of murder that carries the ultimate penalty of death.”

The requirement that the reaction must be an immediate response to the provocation given is found in Section 205 of the Penal Code. It is the general assumption that unlike men, the average woman may not be able to lose her temper and react violently to provocation. This is more so in the case of women who are victims of domestic violence. Women who are continuously abused or victims of domestic violence thus usually react much later to the provocative acts of their partners, by attacking them when they feel they have been provoked to the ‘last straw’.

The practical effect of an abused woman’s reliance on section 205 of the Penal Code is that owing to her delayed reaction, she will be considered as having had time to calculate the attack (during the duration of the abuse she was subjected to) as opposed to reacting immediately to the provocation. This is primarily the conclusion drawn because women who kill in such circumstances are viewed as perpetrators of such violence because they choose to place themselves in relationships that end in such violence.<sup>64</sup>

Professor Munalula further notes that:

“The only question the law asks is why a woman who suffered abuse did not leave the marriage as opposed to killing her spouse? In other words, fighting back becomes a choice to commit murder in the same way a woman may choose to marry under customary law and was therefore fully responsible for the consequences of her actions such as death of either spouse”<sup>65</sup>.

There are two landmark Supreme Court judgments involving two women who killed their husbands after years of domestic violence and unsuccessfully pleaded the defense of provocation. In **Esther Mwimbe v the People**<sup>66</sup> the courts rejected the appellant’s plea of

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<sup>63</sup> M. M. Munalula, *Women, Gender Discrimination and the Law* UNZA Press, Lusaka, 2005, at p. 148-153

<sup>64</sup> M. M. Munalula, *Gender Discrimination and the Law* at p. 153

<sup>65</sup> M. M. Munalula, *Gender Discrimination and the Law* at p. 153

<sup>66</sup> (1986) ZR 15 Supreme Court Judgement

provocation owing to her inability to act in the heat of the moment. They took her act of boiling cooking oil and spilling it on her deceased husband as pre-meditated and calculated because she was not in immediate danger of his attack and his verbal taunts and threats to kill her and the children did not amount to provocation. In its judgment the court stated:

“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 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”

The court however took note of the tragic circumstances in which the case arose and gave remarks in their obiter in favor of the appellant to the executive. Her sentence was later commuted to ten years imprisonment.

In **Chrystal Alyson Denn v the People**<sup>67</sup> the courts drew a similar conclusion to the holding in *Re Mwimbe* despite evidence having been adduced to the fact that she had been subjected to constant abuse which amounted to provocation by her husband. They held that the deceased's act of abuse did not amount to immediate provocation thus her act of killing him was pre-meditated.

It is submitted that the subjective test in terms of the ‘loss of self-control’, is unreasonable when applied to women who kill after being subjected to continuous violence by their partners. This is owing to the fact that the test is too subjective and does not take into account the harsh realities of women who kill their partners after being subjected to a continuous period of violence. This argument is further supported by the case of **Ahluwalia**<sup>68</sup> where the defendant killed her husband following a long period of domestic violence under his hand. Herein it was argued by the appellant that in domestic violence ‘slow-burn’ cases, where the accused only loses self-control after a long period of provocation from the deceased, the ‘**Duffy**’ test was an inappropriate test on the loss of self-control.

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<sup>67</sup> Appeal No. 5/2000 Supreme Court Judgment

<sup>68</sup> [1993] Crim. L.R. 63

The court of appeal stated that only Parliament could change the law on provocation but did specifically state with regard to the alleged ‘slow- burn’ reaction:

“We accept that the subjective element in the defense of provocation would not as a matter of law be negated simply because of the delayed reaction in such cases, provided that there was at the time of killing a ‘sudden and temporary loss of self-control’ caused by the alleged provocation. However, the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negate provocation”

This particular quotation is relevant because it brings to light the aspect of Battered Woman Syndrome (BWS) which the English courts are now taking into consideration when determining whether a female victim of continuous violence can plead provocation.

BWS refers to a post traumatic stress disorder. In **R v Smith (Morgan)**<sup>69</sup> it was held that the jury in a murder trial can consider BWS as a relevant characteristic which makes a woman more prone to lose her self-control. Lord Taylor C.J. in **Re Thornton (No.2)**<sup>70</sup> gave two reasons as to why the aspect of BWS is relevant to a plea of the defense of provocation:

“Firstly, it may form an important background to whatever triggered the actus reus. A jury may more readily find that there was a sudden loss of self-control triggered by even a minor incident if the defendant had endured abuse over a period or on the ‘last straw basis.’ Secondly, depending on the medical evidence, the syndrome may have affected the defendant’s personality so as to constitute a significant characteristic relevant.....to the second question the jury has to consider in regard to the defense of provocation”

The ‘second question’ his Lordship referred to in the above quotation is with regard to whether the accused acted as a reasonable man would have given the provocation they were offered. In response to this question, it has been discovered that much of the case law analyzed shows that where abused women kill their partners, the murder is to a large extent considered as an unreasonable reaction to the provocation given by the deceased.

This is because the defense as it stands in the *Zambian Penal Code* and the case law adjudicated upon does not take into account the aspect of BWS. This is detrimental to battered women who plead provocation as their defense because their reaction to cumulative provocation will be seen as a total failure of the reasonable man test. The test

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<sup>69</sup> (2001) HL Reports

<sup>70</sup> [1996] 1 WLR 1174 at pp. 1181-1182

being that they did not react as a reasonable man would have and either used excessive force or the provocation rendered was not enough to make them lose their self-control.

#### **4.1.2 What is the nature of cumulative provocation in the Zambian Penal Code?**

This particular section may be addressed with the aspect of what criteria may be used to ascertain whether cumulative provocation may be successfully relied on. This paper observes that there is no express provision in the Penal Code of Zambia that provides for cumulative provocation. This serves as an immediate problem because women who kill their abusive partners after years of domestic violence are more likely to rely on cumulative provocation than ordinary provocation.

Just as there is no express statutory provision for domestic violence and women have on many occasions failed to rely on it, the courts may be reluctant to allow a female victim of violence to successfully plead cumulative provocation. It has been difficult for women to prove they have been victims of domestic violence because there is no Act under which they may rely apart from section 247 and section 248 of the Penal Code. This provision caters for general physical violence and does not focus on domestic violence per se.

Domestic violence not only encompasses physical violence but emotional abuse, intimidation or verbal, sexual harassment as a means of coercion, control, revenge or punishment.<sup>71</sup> Natala notes that:

“Addressing this violence is very complex because in most cases women are reluctant to reveal their situation and choose to remain with their abusive husbands because of the stigma attached and the culturally consistent behavior which conceives the violence as being normal.”<sup>72</sup>

Women who continually go through this form of violence are more likely to be provoked and murder their partners as a result. If there is no strict law on domestic violence, there is likely to be difficulty in proving cumulative provocation.

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<sup>71</sup> M. Natala, Domestic Violence Against Women in Zambia: A Research Paper Presented To The University of Zambia in Partial Fulfilment of The Bachelor of Laws Degree (2002) at p. 24

<sup>72</sup> M. Natala, Domestic Violence Against Women in Zambia at p. 27

To this end McColgan argues that one of the criticisms of provocation is that it is problematically biased in favor of men and tends to exclude the experiences of women. Whereas men tend to fall easily within the contours of the defense and achieve at times very lenient sentences, abused women who kill have struggled to have their circumstances recognized by the courts.<sup>73</sup>

Kulusika also makes an observation on the aspect of domestic violence in relation to a plea of cumulative provocation:

“In situations of prolonged domestic violence, the court should take into account previous provocative acts or insults and treat them as cumulative, provided that the killing is an immediate response to a final act of provocation, such as ‘I will beat you in the morning’, or ‘I will kill you, I am tired of you’. Some of these words may appear trivial, but they should suffice as the ‘last straw’.”

It goes without saying that as there is no statutory provision for the defense then there is no statutory law on cumulative provocation at all. This form of provocation has been mainly addressed by referring to previous case law; British or Zambian. The Zambian courts have pretty much followed the approach taken in **R v Duffy**,<sup>74</sup> in which the Lord Justices stated that “it does not mean that there cannot be cumulative provocation, that is, a series of words or acts over a long period of time which culminate in the ‘sudden and temporary loss of self-control’ by the accused.” This means that provocation is not confined to the last act before the killing occurred; there may have been previous acts or words which when added together, cause the accused to lose his self-control, although the last act on its own may not be sufficient to constitute provocation.

The courts have had occasion to address the aspect of cumulative provocation in the case of **Rosalyn Thandiwe Zulu v The People**.<sup>75</sup> Herein the appellant was constantly abused by her husband. On the fateful day, he said to her “I am a cruel man, I will kill you”. She then reached out for a weapon and killed him. The Supreme Court held that these words amounted to provocation and owing to the constant abuse she was previously subjected to it

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<sup>73</sup> A. McColgan ‘In Defense of Battered Women Who Kill’ Oxford Journal of Legal Studies 13(4), 2000 at p. 508-529

<sup>74</sup> (1949) 1 All E.R 932n

<sup>75</sup> (1981) ZR 342 Supreme Court Judgment

resulted in cumulative provocation. Her sentence in the High Court was thus quashed and she was acquitted.

This is a major case that adjudicated upon the aspect of cumulative provocation in Zambia. It showed that the nature of such a defense in the Zambian legal system is dependant upon the accused being subjected to provocation over a continuous period of time. However, this will only apply if there is a sudden act which triggers the killing. Although there is no express statutory provision relating to cumulative provocation, this has been compensated for by precedents which heavily rely on the English Common Law.

#### **4.1.3 To what extent does the defense of provocation apply to women in Zambia?**

Research has further shown that the defense does apply to women in Zambia as provided for in Section 205 and section 206 of the Penal Code. These sections basically provide that ‘any person who unlawfully kills another under circumstances in which they were deprived of their self-control may rely on provocation as their defense.’ The term ‘person’ is meant to include both men and women. In terms of substantive justice, the defense applies equally to both men and women but in terms of the practical situation, this is debatable because owing to the reasons given in the above sections, women face challenges when they rely on it.

This opinion is consolidated by the New Wales Law Commission Consultation Paper 173 on Partial Defenses to Murder - a paper submitted towards amendment of the statutory defense of provocation.<sup>76</sup> In its report the Commission stated that:

“Although provocation has provided an available defense to women who kill their abusers and significant cases have established the principle that it can be cumulative, it has not succeeded in practice. Judges may direct juries wrongly because they fail to understand domestic violence. Provocation which depends on the killer’s angry, unplanned ‘sudden loss of self-control’ also does not always reflect the reality of women’s experiences and circumstances. Women experiencing domestic violence do not usually act as a result of danger but of terror and despair. Also, the domestic nature of the provocation and the impact of domestic violence may not be fully represented.”

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<sup>76</sup> <http://www.womensaid.org.uk/domestic-violence-articles>

It can be safely stated that the defense does apply to both men and women by virtue of the neutral language embodied in the term 'person'. There are cases in which women have successfully pleaded the defense. The question however arises relating to the extent to which women have successfully pleaded it especially under circumstances in which the provocation is cumulative. The answer to this question is that based on the numerous reasons stated in this chapter, section 205 and section 206 have operated in a manner that has disadvantaged women going through domestic abuse who plead the defense of provocation

### **4.3 CONCLUSION**

This chapter has been an analysis and critique of the laws on provocation in Zambia. It has been observed that in terms of the substantive law, the defense of provocation does apply equally to both men and women. However, in terms of its practical application, the defense as strictly applied in Section 205 and 206 of the Penal Code has placed women in some serious challenges. This is the case mostly for women who plead cumulative provocation as a result of constant abuse in the form of domestic violence at the hands of their spouses. The next chapter is a conclusion of this research and recommendations as to how the law may be improved upon in order to apply equally and effectively to both men and women who plead the defense of provocation

## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.0 OVERALL CONCLUSION OF THE RESEARCH PAPER**

The main objective of this research was to analyze what the current position of the law is on the defense of provocation in Zambia, with emphasis on highlighting the extent to which the defense applies to female offenders who plead it.

The legal framework governing the defense of provocation in Zambia as per section 205 and section 206 of the Penal Code is such that the defense applies equally to both men and women. This means that in terms of the substantive law on the defense, the defense does not give any indication as to whether it can apply in a manner that is preferential to one sex only. However, research has shown that in relation to the defense of cumulative provocation, there is no express provision in the Penal Code that addresses this issue. This has been left to the judges hearing the cases to determine whether cumulative provocation occurred based on application of the Common Law and their own previous decisions by which they are bound.

Comparison with other jurisdictions however has brought to light the fact that different rules in relation to the defense of provocation apply. Under the Model Penal Code (MPC) of the United States of America (USA), which acts as the standard Penal Code for all the federal state Penal Codes, the provision on provocation merges diminished responsibility and provocation to accommodate other defendants who kill in circumstances of extreme emotional pressure. This pressure is what is referred to as extreme mental or emotional disturbance (EMED).

In England, the law on provocation is basically similar to that of Zambia as the provisions relating to the defense in its Homicide Act are analogous to our Penal Code. The notable

difference however is that the English courts have adopted the approach of considering the Battered Women Syndrome (BWS) as well as the 'last straw' principle when determining whether a female victim of continuous domestic violence can successfully plead the defense of provocation.

The different standards applied in the operation of the defense worldwide has led this research to the conclusion that in terms of the application of the defense in relation to abused women or victims of domestic violence who plead cumulative provocation, the defense has operated in a manner that is disadvantageous to these categories of women. This is firstly owing to the fact that there is no express statutory provision upon which women may base their claim of cumulative provocation. This operates as a disadvantage because just as it has been difficult for women to successfully bring an action on domestic violence in the courts because no statute governs it, it is difficult for a woman to successfully plead cumulative provocation on the basis of continuous domestic violence or abuse.

Further in this matter, the research observed that the defense appears to be a male defense because the requirement for the reaction to be immediate eludes most women. Instead, the conclusion drawn is that women who kill in such circumstances are viewed as perpetrators of such violence because they choose to place themselves in relationships that end in such violence. Case law analyzed in chapter four illustrates a number of cases in which women have unsuccessfully pleaded cumulative provocation on this account.

Research further shows that in terms of the subjective test required to prove whether provocation actually occurred, the requirement for the 'loss of self-control' is unreasonable when applied to women who kill their partners after continuous violence. This is because the realities of these women are not taken into consideration by the courts. It has been observed that provocation goes beyond the ordinary 'loss of self-control in the heat of the moment' to encompass situations in which the accused is subjected to continuous infliction of torture which is mental or physical.

Being subjected to such violence only results in one reaching the last straw or being extremely emotionally disturbed to a point where they react in a manner that may be considered extreme and result in the killing of the person offering the provocation. This also leads to such women falling short of the reasonable man test as their reactions may be considered unreasonable in comparison to how an ordinary member of the society would be expected to react. In relation to continuously abused women, this is a lacuna that is evident in the current statutory provisions governing the defense of provocation in the *Zambian Penal Code*.

## **5.1 RECOMMENDATIONS**

The following recommendations are made in an attempt to improve upon the legal framework governing the defense of provocation in *Zambia*:

### **5.1.1 SHORT TERM RECOMMENDATIONS**

- (1.) That the Domestic Violence Bill be enacted into law as a matter of extreme urgency so that women may have a statutory basis for proof of domestic violence which could be used as evidence of cumulative provocation.
- (2.) That all law enforcement officers such as policemen, lawyers, judges and members of parliament be counseled and enlightened on matters relating to continuously abused women or victims of domestic violence. This is in an attempt to ensure that when an abused woman reports such a matter at the police station her proof of abuse will be taken into account by the attending officers. Further in the event that the unfortunate circumstance arises in which she is provoked to the last straw and murders her husband in the heat of the moment, the judges will be aware of the wide range of instances under which abused women may plead cumulative provocation.
- (3.) Law students at all universities countrywide should be taught and made aware of aspects of domestic violence and their relation to criminal law through the introduction of

literature and courses targeted at the same. An example of this may be evidenced by the course offered in the Law Faculty at the University of Zambia entitled 'Gender Discrimination and the Law' which offers a broad understanding of women and their interaction with the law and its various aspects.

### **5.1.2 LONG-TERM RECOMMENDATIONS**

(1.) That the law be amended to include cumulative provocation in the Penal Code. This is so as to provide for a definite statutory defense on cumulative provocation upon which women can rely on where the murder of an abusive partner occurs. As a result of an express statutory provision of cumulative provocation, it would be easier for women to rely on a defense that is actually provided for by statute.

(2.) That the law be amended to include the aspect of BWS and EED for female victims of continuous gender based or domestic violence. This is in an attempt to address the issue of the realities continuously abused women undergo who reach a point where they cannot take it anymore and murder their partners. The law should take into account the fact that such women become emotionally disturbed and may react violently to such cumulative provocation in a manner deemed extreme or unreasonable by other members of society. This is further to take into account the aspect that women being the weaker sex, do not fall within the contours of the current statutory provisions in the Penal Code and as such tend to react more violently and in a delayed manner to provocation offered by an abusive partner.

(3.) Mechanisms should be put in place to help abused women receive counseling and shelter in the event that they flee from such abusive relationships and have no place else to go. This should be in the form of support groups, safe-houses and centers with qualified staff to help such victims. Such measures serve the ultimate purpose of prevention of future crimes such as spousal homicide before they occur.

### **5.3 CONCLUSION**

It is thus recommended that in as much as these recommendations have been given, they are by no means an end in itself. The defense in the Penal Code is still necessary and should be maintained as it serves as a means of the prevention of an acquittal for murder for crimes not committed in the heat of passion while also ensuring that persons who committed crimes in such a manner do not suffer the maximum penalty of murder. It is only advocated for however, that the defense be modified to include the realities of women who plead cumulative provocation upon killing a partner after being subjected to continuous abuse in the form of domestic violence. Such a modification of the law is in response to the overall aim and objective of this research paper, being to advocate for the defense of provocation applying in a manner that is equal to both men and women.

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