

Should provocation be a partial defence to intentional killing of an adulterous spouse?

Case note on the case of *S v Ranchi* HH 515-17

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This case raises the important issue of whether the defence of provocation should operate as a partial defence when a man intentionally kills his spouse whom he discovers committing adultery.

The current law generally

During interaction in society, people often provoke others by their conduct or their words. There would be chaos and disorder in the society if people responded with violence when subjected to every minor provocation they may encounter. The underlying policy in relation to this defence is therefore that, generally, the law expects people to exercise restraint and self-control when provoked and to refrain from engaging in violence against the provokers. The defence of provocation is thus a limited defence in Zimbabwe. For crimes other than murder, provocation does not operate as a defence but can only be a mitigatory factor. For murder, provocation will at most be a partial defence. Section 239 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] codified the common law two stage approach to provocation as a defence to a charge of murder. The first stage is to decide whether the accused had intention to kill. If the provocation received caused him to act in a "blind rage" without intention to kill, he or she would be found not guilty of murder but would instead be found guilty of culpable homicide. Under the second stage if the accused was found to have had intention to kill, he or she would still be entitled to a partial defence reducing murder to culpable homicide if the provocation caused him or her to completely lose his or her self-control and the provocation was sufficient to make a reasonable person in this position and circumstances to lose their self-control and intentionally kill.¹ The automatic conviction for culpable homicide under the second stage of the test appear to be contradictory as the court will have found, in effect, that the accused responded to the provocation in a manner that even a reasonable person would have responded. In a number of cases it has been observed that the second rung rarely applies and this partial defence would only succeed where there was extreme provocation.² Clearly the reasonable person would not engage in fatal violence when subjected to slight provocation.

South African law does not follow the second stage of the approach in Zimbabwe. In South Africa if the accused was found to have had the intention to kill, he or she would be convicted of murder and the provocation to which he or she was subjected would simply be taken into

¹ In the case of *S v Nangani* 1982 (1) ZLR 150 (S) the Supreme Court suggested an alternative formulation of this test, namely: Was the provocation such as could reasonably be regarded as sufficient ground for loss of self-control that led the accused to act against the victim as he or she did. This formulation avoids the need to find that even a reasonable person would have gone ahead and intentionally killed when faced with that extent of provocation.

² See for instance *S v Howard* 1972 RLR 247 (G) at 254.

account in mitigation of sentence. However, serious provocation might form a basis for the defence of non-pathological criminal incapacity.

The second stage approach to provocation was subjected to trenchant criticism even before it was incorporated into the Criminal Law Code. In the case of *S v Dzaro* 1996 (2) ZLR 541 (H) Mubako J accepts that this approach has the support of a respectable pedigree of case law, but maintains that it is theoretically unsound and adds little to the basic approach followed in South Africa. He states that it is artificial to use of an objective test to measure a person's mental state as a person is provoked subjectively not objectively and this involves no objective standard. The second stage attempts to give the accused a second chance to save his defence. It is a contradiction in terms to talk of an objective justification for an unlawful killing. He contends that "the proverbial reasonable man is a paragon of virtue" and "the least one would expect of the reasonable man is that he would in all circumstances exercise a sufficient degree of self-control to avoid committing any unlawful killing intentionally." Once it is conceded that the killing was unlawful and intentional, a reasonable man cannot be heard to say that he killed because he was overcome by anger.³

However, it could be argued that Mubako J was setting an unrealistic standard for what is to be expected of the reasonable person. The reasonable person is not devoid of human emotions and cannot be expected never to lose his or her temper and always to maintain his or her self-control even when faced with extreme or overwhelming provocation. Take for instance a situation where a father comes home and discovers his young daughter being raped or his young son being sodomised by a man. Surely a reasonable person placed in this situation might well not be able to maintain self-control and might not be able to stop himself from intentionally attacking and killing the perpetrator. Although made in the context of whether compulsion should ever be a defence to killing of a person under compulsion, the South African Appellate Division in the case of *S v Goliath* 1972 (3) SA 1 (A) points out that the criminal law "should not be applied as if it were a blueprint for saintliness, but rather in manner in which it can be obeyed by a reasonable person."

An example of extreme provocation is to be found in the case of *S v Ngwanda* HH-30-2006. Here the accused stabbed to death the deceased. The deceased had previously committed adultery with the accused's wife on numerous occasions. He openly bragged about having seduced the wife. The accused took the legal route and obtained a judgment against the deceased for adultery damages. The deceased contemptuously refused to pay these damages and continued to brag and taunt the accused to the extent of boasting in public that he had fathered the accused's last child. Despite having been caught red handed committing adultery with the accused's wife he did not repent nor relent despite being sanctioned by the village court and elders. On the day in question he was caught red handed again soliciting for sexual favours

³ At p 459 D to H. It should be pointed out that in the *Dzaro* case a woman had intentionally stabbed to death her boyfriend because he had taunted her by telling her that she had failed to sexually satisfy him. The court found that a reasonable person in the accused's position, however much she was offended by the taunts received, would not have formed the intention to kill and acted in the manner in which the accused acted.

from the accused's wife. Shortly before his death the deceased had harassed and tormented the accused at the beerhall. The accused then lost his self-control and stabbed to death the deceased. The court found that any reasonable man could have lost his temper to the extent of exercising self-help by taking the law into his own hands as the accused did. The extreme provocation was sufficient to reduce murder to culpable homicide. The court pointed out, however, that the courts do not condone the unlawful shedding of precious human blood. Undoubtedly the deceased was a nasty wicked character. The evil and wicked members of society, however, also have the right to life and due protection of the law. That being the case no one is allowed to exact punishment or deprive them of their life without the due process of law.

Another possible objection to the second rung test is to be found in the *Ranchi* case. In that case the Judge cites an article referring to psychological research that casts doubt on whether an anger impulse can ever completely overwhelm a person even when reacting to the most provocative conduct. Even in an extreme situation the person has "a high level of choice" and if the person kills, he does so because he elects to do this. The conclusion in this article is that such a person has not lost the ability to control his actions and that person should enjoy no special privilege in law if he kills in these circumstances.⁴

But even if the reasonable person test does take account of human emotions when faced with extreme provocation, the issue still remains as to whether the second rung is necessary and appropriate or whether the accused should simply be convicted of murder in mitigating circumstances.

Provocation arising out of adultery

The second rung has most frequently been relied upon in respect of situations where male accused have intentionally killed their spouses after discovering them in the act of adultery. It is clear that a mere suspicion of adultery cannot be the basis for a successful defence under the second rung. Thus in the *Ranchi* case the court decided:

"This court can only surmise that the jealous demon in him got the better of him that day. At most it would appear that the accused may have had his own suspicions in his head about his wife's fidelity since by his own admission he frequently travelled to Malawi. But suspicion alone can never be the basis of using provocation as a defence for fatally killing one's spouse."

In more general terms in the *Ranchi* case the Judge points out that "throughout the world most married couples encounter insults, suspicions, and confessions of infidelity by their spouse and yet only a small number resort to killing."

There are no reported cases in Zimbabwe where a woman killed her spouse in these circumstances, although there is one case where a female spouse killed the woman who was

⁴ Graeme Coss *The Defence of Provocation: An Acrimonious Divorce from Reality* 18 *Current Issues Crim. Just.* 51 2006-2007 pp 51-78 at pp 52-53

having an affair with her husband.⁵ It is clear that men are far more likely than women to resort to spousal killing. The extreme male reaction to the discovery of infidelity is explicable on the basis of how men perceive the marital relationship in the context of a male dominated society where many men treat spousal infidelity as a violation of their proprietary and possessory rights over their wives. Cultural factors also play into this social construct. On the other hand, wives may only try to assault but not kill their cheating spouses and if they are able to do so, they may file for divorce.

Tsanga J in the *Ranchi* case raises serious doubts about the constitutionality of allowing the provocation defence to operate as a partial defence in a situation where a spouse is killed because of adultery. She points out that section 52 of the Constitution provides for the right to personal security and prohibits all forms of violence by private actors, and this encompasses protection from violence within family and domestic spheres. The Judge observes that the domestic sphere is “where women in particular encounter the most violence.”⁶ It could also be added that there are various other constitutional provisions that are relevant such as the right to life⁷ [section 48(1)]; the rights of women and protection of their dignity and worth as equal human beings in the society [section 80(1)]; and the provision outlawing laws, customs, traditions and cultural practices that infringe upon the rights and personal safety of women [section 80(3)].

The Judge therefore observes that it is “ludicrous to allow a man, who kills his wife in an infidelity-inspired rage, to get away with murder by harnessing the defence of provocation in order to be treated with compassion by reducing that murder to culpable homicide.” She goes on to say:

“Whatever it’s historical, biblical or evolutionary aspects, the use of the defence of provocation in instances of spousal killing is increasingly seen as flawed. It is regarded as gender biased and archaic not just because of its proprietary and possessory underpinnings but because it does not stand up to logical scrutiny that the reaction of killing is necessarily that of reasonable person.”

The Judge points out that Zimbabwe is a signatory to UN Convention on the Elimination of All Forms of Discrimination Against Women and Article 2 obliges States to repeal penal provisions

⁵ See *S v Ncube* S-14-87. In this case the deceased had blatantly taunted the accused about her adultery with the husband. See also *S v Nangani* 1982 (1) ZLR 150 (S) where a man killed his common law wife in circumstances which.

⁶ The victims of domestic violence are overwhelmingly women. Speaking during commemorations of the international day of gender based violence in Harare in 2016 the UN resident coordinator Bishow Parajuli said there was a spike in cases of abuse, especially against women and girls. He pointed out that police records showed that some 40,500 cases were reported between January and September 2016. He observed that gender based violence is a grave violation of human rights with the problem deeply rooted in gender inequality and discrimination. New Zimbabwe report 26 November 2016. The Domestic Violence Act [*Chapter 5:16*] seeks to provide protection and relief for victims of domestic violence.

⁷ The right to life is absolute except that a person may who commits a murder in aggravating circumstances may be sentenced to death.

which constitute discrimination against women. The Judge therefore recommends that the partial defence of provocation when applied to killing of an adulterous spouse should be removed from the ambit of provocation because it increases women's vulnerability to violence given that women and not men are predominantly though not exclusively at the receiving end of crimes of passion. In fact the recommendation of the UN Division on the Advancement of Women is that both 'honour' and adultery be removed as defences for premeditated killings or 'crimes of passion.' "

It is respectfully submitted that for the compelling reasons given by Tsanga J, intentional killing by a man of his adulterous spouse should be treated as murder and provocation should not be a partial defence but only a mitigatory factor. To avoid gender discrimination the same approach should apply where a male accused kills a man who is found committing adultery with the accused's wife and the rare situation where a woman kills her adulterous spouse or another woman who is engaged in an adulterous relationship with her spouse.

Conclusion

The Law Development Commission and the legislature should critically re-examine the second rung approach to provocation in Zimbabwe to decide whether a person who intentionally kills another under provocation should be convicted of murder and whether the provocation can be taken into account in mitigation of sentence. But even if the second rung approach is to be retained where there has been grave provocation, the recommendation of Tsanga J must be followed and we must include an explicit proviso to the provision in the Criminal Code to the effect that a person who kills an adulterous spouse will not be entitled to a reduction of murder to culpable homicide on the basis of the second rung.