

THE STATE

Versus

FREDDY NYAMHANGA SHAVI

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mr Matemba and Mrs Baye
GWERU CIRCUIT COURT 22 MAY 2017

Criminal Trial

Shumba for the state

Mandipa for the accused

MAKONESE J: The deceased Nestai Ncube was employed as a lecturer at the Midlands State University at the time she met her death. She was 48 years old. She had been married to the accused since 2001 and resided at their matrimonial home at 33 Wentworth Road, Southdowns, Gweru. The accused who is aged 63 is facing a charge of murder, it being alleged that during the early hours of the 27th February 2016, accused armed himself with home-made mattock and struck the deceased with it on the head three times. As a result, the deceased sustained three deep wounds in the head, leading to her death. The accused pleads not guilty to the charge and in his defence avers that he acted in self defence as he was under imminent attack from the deceased.

The bulk of the evidence in this matter is common cause or at least not in dispute. It shall not be necessary to repeat the contents of the state outline which has been tendered into the record of proceedings and now forms part of the record as exhibit 1. The defence outline was tendered as exhibit 2. In brief the accused's defence was that prior to this fateful day the accused had established that the deceased was engaged in an extra-marital affair with one Prosper Maburo. The accused had confronted deceased's lover who admitted the illicit relationship and promised to terminate the affair. This did not happen. In a desperate attempt to save his marriage the accused had roped in the assistance of two pastors from the Seventh Day Adventist Church, one Xmas Mutero and Artwell Tapera to counsel the deceased and persuade her to end

the relationship. On the night of the 26th February 2016, the two pastors visited the deceased at her matrimonial home and held lengthy discussions with the deceased. At the end of these discussions the deceased said she needed more time to consider the issue. The accused avers that following this discussion he retired to bed around 9pm. The deceased said she was going to the kitchen to wash dishes. The accused states that he did not notice the time the deceased came to the bedroom. He states that around 2am the following morning the deceased woke up and left the bedroom going to the toilet. When she returned she was in possession of a home-made mattock (exhibit 5) which she swung at him while he lay in bed. Accused managed to wrestle the deceased and dispossessed her of the weapon. Accused then struck the deceased three times in the head as she tried to get up from the bed where she had fallen. The deceased fell down and never got up again thereafter. She had been fatally injured. Accused locked the house and the outer gate to the premises and drove off to Sanyathi where he later handed himself to the police. Accused avers that he had no intention to kill the deceased but acted in self defence at the spur of the moment and did not have time to rationalize things but had taken immediate defensive measures.

The state tendered the accused's confirmed warned and cautioned statement (exhibit 3) recorded at Gweru on the 1st day of March 2016. In this statement, the accused gave his response to the allegations as follows:

“On the night of Friday 26th February 2016, Pastors Tapera and Mutero had held discussions with Nestai Ncube on the marital problems between myself and Nestai Ncube as I was emotionally stressed. These related to her affair with Prosper Maburo which had been going on for quite some time resulting in her not coming home sometimes and to my former wife Grace Muchadenyika whom she thought I was having an affair with and she indicated that she was bitter. Nestai Ncube needed time to consider the request that she lets go off the bitterness (sic) and vengefulness. Early Saturday, around 0200 or 0300 hours, Nestai Ncube woke up to visit the toilet and after quite a long time, she came back and as I looked through the bedroom door I noticed that she was holding an object. On entering the bedroom she proceeded to where I slept and swung the object intending to strike me. We wrestled and I managed to get the weapon and struck her and she groaned. I left home thereafter fearing for my life as my brothers-in-law were known to be violent. Later, I phoned Xmas Mutero to go and check Nestai Ncube’s condition and possibly take her to hospital. I proceeded to Sanyathi to brief my mother and relatives on the matter and I voluntarily handed myself over to the police at Sanyathi Police Station. It was never my intention to cause the death of Nestai Ncube.”

After recording the accused’s response to the charge, the accused was asked further questions relating to his defence and two of those questions were as follows:

“Q When you struck Nestai Ncube where was she?”

A She was on the bed after she had fallen on the bed when I was trying to take the object from her. (emphasis added)

Q How many times did you strike her and on which part of the body?”

A Three times around the neck area”

It is important to note that the accused stuck to his defence throughout the trial and did not depart from his defence outline in material respects when he gave viva voce evidence.

The state tendered the post mortem report as (exhibit 4). The post mortem report was prepared by Dr Ivian Betancourt following an examination on the remains of the deceased at United Bulawayo Hospitals on the 29th February 2016. The pathologist concluded that the cause of death was:

- (a) Severe cerebral damage
- (b) Subdural haematoma, skull bones fractures
- (c) Severe head trauma due to unknown object

On marks of violence, the report indicates that following injuries:

- (1) Sutured wound 10cm on the middle frontal region
- (2) Sutured wound 12cm on the right temporal and parietal region
- (3) Sutured wound 3cm on the back of right ear
- (4) Abrasion (one circular abrasions) on the left scapular region
- (5) Swollen both eyelids, marked on the right eyelid

The post mortem further reveals the following injuries on the skull:

- (1) Subgaleal haematoma on the frontal and both parietal areas and occipital region
- (2) Skull bones fractures (multiple) localized in frontal region (complete frontal region) and another big stellate fracture with bone fragments localized in right temporal and parietal region
- (3) Sortie of encephalic mass and severe brain damage
- (4) Big right subdural haematoma through the right skull fracture seen.

The state produced the murder weapon, a home-made mattock as exhibit 5 and a visual observation of the weapon reflects that it is a garden tool shaped like a pick axe, with blunt edges on both sides. The mattock has a handle 89cm long. Its blade is 23cm long and it weighs 2.6kg.

The state with the consent of the defence counsel introduced the summary of the evidence of the following state witnesses as it appears in the state outline by way of formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07), namely;

- (a) Xmas Mutero
- (b) Nixion Mupasiri

- (c) Osbert Jere
- (d) Prisca Mbwende
- (e) Conrad Ngungu
- (f) Detective Sergeant Mushura
- (g) Detective Sergeant Sakala
- (h) Dr I. Betancourt

The state opened its case by leading oral testimony from its sole witness Constance Chirigo. This witness testified that she is employed at Gweru Provincial Hospital as a nurse. She has nine years nursing experience and she was on duty on the 27th February 2016 in the casualty ward when the deceased was brought to the hospital in an ambulance. The witness pushed the patient on the stretcher into the resuscitation room. The deceased was badly injured and was not able to talk. She observed two deep wounds, one near the forehead and the other at the back of the head. The deceased was bleeding profusely from these injuries. The doctor on duty was called to attend to the patient. The wounds were sutured and she was transferred to the female surgical ward for further treatment and care. The witness's evidence was not challenged by defence counsel as it was essentially common cause.

The state closed its case at that stage.

The accused opened the defence case by giving *viva voce* evidence under oath. To a large extent the accused adhered to his defence outline and maintained that he acted in self defence. The accused narrated in detail how he had tried to restrain the deceased from engaging in an adulterous relationship with one Prosper Maburo. He testified that he had confronted his wife's lover at his workplace and warned him not to continue his relationship with the deceased. The deceased's lover promised to discuss the matter with the deceased and thereafter give him feedback. The accused stated that he got the impression that the affair had persisted as his wife continued to come home late and in certain cases did not come back home at all. This prompted the accused to solicit the assistance of Xmas Mutero and Artwell Tapera, two pastors from the SDA Church. The two arrived at accused's matrimonial home on the 26th February 2016 and

held a lengthy discussion with the deceased. Accused testified that at the end of the meeting with the pastors, the deceased intimated that she still required more time to consider the issue. It would seem that the failure by the deceased to undertake put an end to the illicit affair was not taken well by the accused. It would also appear he was frustrated as he went to bed early. The deceased meanwhile went to the kitchen to wash the dishes. What transpired in the bedroom in the early hours of the morning of the 27th February 2016 is only known to the accused and the deceased, who is no longer alive to testify. There is no independent evidence to corroborate or rebut the accused's version of events. The court shall to a large degree assess the evidence placed before it and weigh the probabilities before accepting or rejecting such evidence. The court is mindful that the accused's version can only be rejected if it is found to be false and if it is not reasonably possibly true. The accused's version is that he went to bed alone leaving the deceased to do the dishes. The accused stated that he believed that the deceased was only trying to find an excuse to update her lover on the outcome of her discussion with the pastors. The accused says he proceeded to sleep and did not notice at what stage the deceased came to bed. He said that in the early hours of the fateful day the deceased had woken up ostensibly to visit the toilet. He said she took an unusually long time before returning to the bedroom. When she came back and while he was lying in his bed he observed that the deceased was holding an object in her hand. Accused remained still and when the deceased was about a metre and half away he realised that she was in fact in possession of a home-made mattock (exhibit 5). The accused said deceased swung the mattock towards him and aimed at his chest. The accused blocked the blow and there was a tussle for the weapon. Accused dispossessed the deceased of the weapon, resulting in deceased falling on the bed on her stomach. The accused said he was seized with fear and could not accurately remember what happened thereafter. On how he struck the deceased, the accused had this to say:

“As the two of us wrestled I got hold of exhibit 5. I do not know what happened thereafter. What I still remember is that deceased was still trying to get up that is when I struck her with exhibit 5.” (emphasis added)

The accused then narrated that he struck the deceased at least three times and when he realized that the deceased was on the floor and injured he exited the bedroom in a hurry, locked the house and the outside gate and drove off. Accused said he knew the deceased's brothers to be persons of violent disposition so he felt unsafe and took a decision to drive to his home in Sanyathi. He did not think it wise to report the matter at a police station in Gweru.

From the accused's own version he struck the deceased on the head on more than one occasion as she was trying to get up from the bed. She was no longer in possession of the mattock. He had managed to overpower the deceased and he was in a stronger position. On the accused's own version as she lay on the bed after he had taken the murder weapon from her she posed no real danger to him. The accused had evidently averted the danger by taking the mattock. At that stage the person who was in imminent danger was the deceased. The accused did not choose to leave the bedroom when he had secured the weapon. He only thought of striking the deceased. The accused accepts that he delivered at least three blows to the head in quick succession. He testified that he had no time to think or rationalize things and merely took defensive measures. The accused refused to disclose the amount of force he used to inflict the injuries but readily conceded that the extent of the injuries reflected in the post mortem report is indicative of the fact that excessive force was used.

Factual findings by the court

This court makes a specific finding that from the accused's own admission he was under no imminent attack when he struck the deceased. Accused was content to state that he was full of fear. The accused failed to explain why he struck the deceased repeatedly when he was aware that he had already averted the danger. Mr *Shumba* appearing for the state fairly put the position when he indicated that had it been shown that the accused introduced the mattock into the bedroom, the matter would have taken an entirely different complexion. The court makes a finding that on the facts, the accused used excessive force and attacked a defenceless person indiscriminately. The court rejects the accused's explanation that when he saw the deceased approaching him with a weapon he remained still in bed and did nothing. The accused's version

on this aspect is not within ordinary human experience. In the face of danger any normal human being will seek to confront the source of danger or run away from it. It is clear that on this aspect the accused was not telling the truth and one would wonder what he was hiding. Before concluding the assessment of the accused's evidence the court observes that the demeanor of the accused in the witness stand was poor. The accused did not answer questions put to him directly and sought to give lengthy explanations. Accused's defence counsel was so exasperated by accused's manner of answering questions and had to caution the accused to answer the questions put to him. One crucial observation is that accused was free to give a detailed account of each and every event up to the moment he went to bed on the 26th February 2016. The accused seems to have suffered loss of memory from the point he says he dispossessed the deceased of the murder weapon. The accused was evidently uncomfortable to confront the gory details of his attack upon the deceased. On the most critical aspects of this matter the accused pretended not to remember much. It is the court's view that the accused was very mean with the truth on his account of what happened in the bedroom. The accused, it would seem, only told the court what he wanted to disclose.

Analysis of the law

In his book, *The Guide to Zimbabwean Criminal Law*, Professor G. Feltoe discusses the distinction between positive or actual intent and constructive intent or legal intent. The author characterises the distinction as follows:

Actual intention

- (a) Desires death. Death is the aim and object; or
- (b) Death is not the aim and object but in the process of engaging in some activity foresees death as a substantially certain result and proceeds regardless as to whether this consequence ensues.

Legal intention

Does not mean to bring about death but foresees it as a possibility whilst engaged in some activity regardless as to whether death ensues. The requirements are thus:

- (a) Subjective foresight
- (b) As to possibility not probability
- (c) Recklessness

These requirements are now fairly established in our law. For the court to return a verdict of murder with actual intent the court must be satisfied beyond reasonable doubt that:

- (a) The accused's fixed and settled intention was to bring about the death of his victim
- (b) While pursuing another objective he foresees the death of his victim as a substantially certain result and proceeds with his conduct recklessly.

See the case of *Robert Mugwanda v The State* SC-19-02; *The State v Herold Moyo* HB-19-17.

Self defence

In our law the law of private defence that is self defence and defence of third persons and defence of property provides that a person is entitled to take reasonable steps to defend himself against an unlawful attack. Under our law the defence has been codified and section 253 of the Criminal Law (Codification and Reform) Act (Chapter 9:23) sets out the requirements for this defence:

- (a) there must be an unlawful attack
- (b) the attack must be on the accused
- (c) the attack must have commenced or imminent
- (d) the action taken must be necessary to avert the attack

(e) the means used to avert the attack must be reasonable.

The court's approach to this defence should be as objective as possible. The court must take into account the circumstances of the victim and all the emotional pressures which the accused was subjected to. The court must assess the threat that was directed at the accused and the possibility of a fatality arising therefrom.

See the cases of *The State v Nkululeko Nleya* HB-138-02 and *Ntsoni v Minister of Law and Order* 1990 (1) SA 572.

On the facts of the instant case the following facts have been established:

- (a) The accused perceived the imminent threat to be the mattock that was being wielded by the deceased
- (b) The accused succeeded in averting the danger by dispossessing the deceased of the weapon
- (c) When the accused struck the deceased he had eliminated the danger and the deceased was lying on the bed trying to get up
- (d) When the accused struck the deceased he had various options and could have simply exited the bedroom. He did not have to assault the deceased.
- (e) The force use in striking the deceased was disproportionate in all the circumstances of the case.

Mr *Mandipa*, appearing for the accused fairly conceded in my view, that had difficulty in finding the rationality of the means used by the accused in averting the perceived danger. He conceded that a perusal of the findings in the post mortem report reveals that the degree and extent of the injuries leads to only one conclusion, that the force used to avert the danger was exceedingly disproportionate. The accused acted recklessly and proceeded with his conduct regardless of the consequences. The accused's explanation for striking the deceased is that he

felt afraid and believed that she might get up and wrestle for the weapon again. This explanation is not reasonable and does not accord with common sense.

In my view, the state has managed to prove that the accused is guilty of murder with constructive intent. He did not intend, on the evidence before us, to bring about the death of the deceased. There is however proof beyond reasonable doubt that the accused subjectively foresaw death as a substantial possibility when he repeatedly struck the accused on the head with a dangerous weapon. At the material time, the accused had averted the danger. He failed to explain why it was necessary to inflict the injuries on a person who was lying on a bed. He had neutralized the danger.

We, accordingly find the accused guilty of murder with constructive intent.

Sentence

This court takes into account the mitigating features of this case as against the aggravating factors. The accused is a mature man aged 64 years. He spent one month in prison before he was granted bail pending trial. He is a first offender and has lived a blameless life for the greater part of his life. He has however been convicted of a very serious offence. His moral blameworthiness is exceedingly high having regard to the following factors; he savagely attacked the deceased who was lying on the bed and trying to get up; he struck the deceased on the head using a dangerous weapon; he struck the deceased repeatedly and aimed at the head; he used excessive force as shown by the injuries reflected in the post mortem report. After the assault the deceased fled the scene and failed to render any form of assistance to the injured victim. The force used by the accused was grossly disproportionate to the perceived danger. What further aggravates the matter is that accused has shown no signs of remorse and has not shown any regret for his conduct. The court does take into account the fact that prior to this offence deceased had failed to terminate her extra marital affair with her lover. This fact however must be taken together with the fact that accused himself was accused of having an affair with his ex-wife. The moral turpitude of both parties was therefore on level terms.

These courts will not condone the use of violence as a means of resolving matrimonial disputes. This was a barbaric and despicable attack on a defenceless woman. The accused struck 3 fatal blows and the deceased died a painful death. This court must impose a sentence that is just and fair. The sentence must reflect the seriousness of the offence.

Accused is sentenced to 20 years imprisonment.

*The National Prosecuting Authority, state's legal practitioners
Gundu & Dube, accused's legal practitioners*