

THE STATE  
versus  
ISHMAEL NGWANDA

HIGH COURT OF ZIMBABWE  
BHUNU J  
MASVINGO, 14, 15,16 February  
and 15 March 2006

MR MUZVIDZIVA & MR MUSHUKU: ASSESSORS

### **Criminal Trial**

*Mr Mudamburi*, for the State  
*Mr Makausi*, for the defence

BHUNU J: The accused is charged with murder. It being alleged that on the 11<sup>th</sup> February 2004 at or near section 9 Hippo Valley Estates, Chiredzi the accused unlawfully and intentionally killed and murdered Simbarashe Parwazenga, a male adult who was alive at the time.

The facts giving rise to this charge are to a large extent common cause.

The undisputed facts are that the accused married his wife Cathrine Musendeke sometime in 1997 in terms of customary law. The accused was employed by Hippo Valley Estates as a tractor driver whereas the now deceased Simbarashe Parwazenga was employed as a sugar cane cutter by the same employer. They resided in the same compound in section 9.

It so happened that the accused's wife had an adulterous affair with the deceased. Sometime in June 2003 the accused unexpectedly returned home from night duty to find his wife and the deceased in a compromising position in his own bedroom. He managed to confine the deceased with a rope and took the matter to the elders. He took the matter to the village court which ordered the deceased to pay the accused \$190 000.00 adultery damages.

Although the deceased admitted his guilt and asked for time to pay he never paid the adultery damages. To add insult to injury he went about boasting about his illicit sexual affair with the accused's wife. He openly

challenged and taunted the accused about the paternity of the accused's last child. He claimed to have fathered the child.

Meanwhile the accused had forgiven his wife and had given up on getting any payment from the deceased by way of adultery damages.

The accused's wife apparently having reconciled with her husband severed her adulterous relationship with the deceased. This did not go down well with the deceased who continued to pester the accused's wife to rekindle the adulterous relationship.

The accused's wife was apparently not persuaded and was not keen to renew the adulterous affair. This must have infuriated the deceased who then adopted a very hostile and belligerent attitude against the accused whenever he met him. He would taunt and threaten to kill the accused claiming that he had fathered the accused's last born child. He protested that it was wrong for the accused to look after the child as if it was his when he had not fathered the child. There were therefore strained relations between the two yet the deceased did not relent. He continued to pay clandestine visits to the accused's home in search of sexual favours from accused's wife with brazen impunity.

The deceased was known to be a village bully. He made no secret of his adulterous affair with the accused's wife such that the affair became common knowledge within the locality. The accused himself was scared and terrified of the deceased who was of a massive built. The accused is of a slight built and slim in stature. He appears to be a weakling.

On the 11<sup>th</sup> of February 2004 the accused was at the local beer hall for the purpose of watching soccer on television. Nigeria was playing Tunisia. The accused arrived at the beerhall around 3 p.m. He was not drinking any beer. He however mingled with fellow patrons waiting for the kick off time around 5 p.m.

The deceased arrived at the beerhall around 5 p.m. He was in a drunken and disorderly mood. He was not wearing a shirt. He proceeded to buy opaque beer commonly know as scud. That done he immediately

proceeded to where the accused was and straddled over his legs, shook the scud of beer in his face and blew cigarette smoke into his face.

He then picked up a quarrel with certain women patrons whom he threatened to assault. The barman one Pearson Shumba attempted to intervene but was also threatened with assault.

Upon exhausting his quarrel with the ladies he proceeded to stand in such a way as to block the view of patrons who were watching soccer on the television set. When the patrons complained he challenged them and threatened to assault all of them.

The deceased however eventually relented and he joined the patrons in watching the soccer match which spilled into extra time. That match was to be followed by another one between Mali and Morocco at 9 p.m.

The beerhall is situated about 100 metres from the accused's house. The deceased having realised that the accused was engrossed in watching soccer and was unlikely to go back home soon sneaked out and proceeded to the accused's house in pursuit of his wife.

Unbeknown to the deceased the accused shortly thereafter decided to go back home for a bath and dinner before coming back to watch the remaining game between Mali and Morocco.

When the accused got home he was surprised to find the deceased knocking at his door accosting his wife for sexual favours. He confronted the deceased who told him to get away before fleeing in the direction of the beerhall with the accused in hot pursuit.

The accused caught up with the deceased within the beerhall's environs. A brief scuffle then ensued between the two belligerents. During that brief scuffle the deceased was struck a mortal blow in the chest with a knife.

Upon being stabbed the deceased turned away and fled behind the beerhall with the accused still in hot pursuit.

The scuffle took place in full view of the barman Pearson Shumba and beerhall patrons including Rodgers Jawa who both testified before this court.

There is a dispute as to the ownership of the murder weapon and whether or not the accused struck the fatal blow in self defence.

Pearson Shumba who was on duty and not drinking at around 7 p.m. noticed that the accused who had been making a nuisance of himself picking up quarrels with beer patrons and generally spoiling for a fight was no longer in the bar.

Regarding the circumstances under which the fatal blow was delivered this is what he had to say:-

“This was around 7 p.m. I then went back to where I was working. I then saw people running. When I turned I saw there was only the accused and the deceased who had remained to the east. I only saw the movement of the accused person’s arm. It appeared as if they were fighting. They were between 15 to 20 metres from me. It was not quite visible. It was sort of dark.

I only saw the movement of accused’s hand and the deceased turned and ran away with the accused chasing him. They left the beerhall and went along a foot path with the accused chasing the deceased.”

Rodgers Jawa who watched the scuffle from a distance of about 16 paces confirmed Pearson’s evidence in every material respect. He confirmed that the deceased arrived at the beerhall in a drunken and belligerent mood. He confirmed that during the scuffle he only saw the movement of the accused’s hand. He denied seeing the accused wresting the knife from the deceased.

The accused himself in his own confirmed warned and cautioned statement which he did not dispute amply corroborated the evidence of Pearson and Rodgers. This is what he had to say:-

“I found the deceased at my house and I asked him what he wanted and he ran away. I once found the deceased in my house having sexual intercourse with my wife Cathrine Masendeke. The case was heard and (he) was ordered by the court to pay one hundred and ninety thousand dollars but he did not pay the damages.

I followed the deceased and found him outside the beerhall. I stabbed him twice with a knife on the chest and he ran away. I went to old mill guardroom and reported to the security guards that I had stabbed the

now deceased. I was later told that the person I had stabbed with a knife had died. (my emphasis)

It is clear that in his undisputed confirmed warned and cautioned statement the accused makes no mention of wresting the knife from the deceased. He simply says that he pursued the deceased, caught up with him at the beerhall and stabbed him with a knife. That statement accords with the evidence of Pearson and Rodgers who were both honest and credible witnesses. In any case it is highly unlikely and not in the least probable that the accused could have vigorously pursued the deceased in circumstances where he was so much afraid of the deceased to the extent of being publicly abused without response. The only reasonable inference to be drawn from the facts is that the deceased only fled from the accused and the accused had the guts to pursue him because he was armed with a knife.

In the circumstances we unanimously found as a fact proved that the accused pursued and stabbed the deceased in the manner stated in his warned and cautioned statement. His present stance that he wrestled the knife from the deceased and proceeded to stab him in self defence is false in fact, misleading and a product of recent fabrication. The accused could not have been acting in self defence in circumstances where he was the aggressor and was actively and relentlessly pursuing his victim. In our law it is trite that a man is deemed to intent all the natural consequences of his act. By stabbing the deceased in the chest, a vulnerable part of the body the accused must have intended to bring about the deceased's death. At the very least he must have foreseen and therefore did foresee the possibility of death ensuring from his conduct.

Having said that it is however our unanimous view that the accused stabbed the deceased in circumstances of extreme provocation sufficient to reduce the specific intent crime of murder to the none specific intent crime of culpable homicide.

The deceased had previously committed adultery with the accused's wife on numerous occasions. He openly bragged about having seduced the

accused's wife. The accused took the legal route and obtained a judgment against the deceased for adultery damages.

The deceased contemptuously refused to pay 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 in his evil deeds inspite of being sanctioned by the village court and elders.

On the day in question he was caught red handed again soliciting for sexual favours from the accused's wife. Upon failure of the legal route any reasonable man could have lost his temper to the extent of exercising self help by taking the law into his own hands as did the accused.

Shortly before his death the deceased had harassed and tormented the accused at the beerhall with brazen impunity.

This kind of provocation was in our view sufficient to reduce murder to the lesser crime of culpable homicide as happened in the case of *Chamunorwa Munyaradzi Mandizha v The State SC 200/91*.

The courts do not however 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.

That being the case and in the circumstances of this case the accused is accordingly found guilty of culpable homicide.

### **Sentence**

The accused was charged with murder but was convicted of the lesser charge of culpable homicide. The accused killed his victim in circumstances of extreme provocation.

The deceased had persistently committed adultery with his wife. He was ordered to pay adultery damages by the village court but he contemptuously refused to pay.

The deceased continued with his endeavors to seduce the accused's wife and openly bragged and boasted about it in public. He claimed paternity of the accused's last born child. He subjected the accused to both mental and physical torture before meeting his death at the hands of his victim, the accused.

The accused had attempted to get legal redress without any success. Despite having an order of adultery damages hanging over his head the deceased did not relent in his endeavors to seduce the accused's wife. He continued to thump his nose at the village court and elders with brazen impunity.

The deceased was a known village bully who met his death in circumstances which did not arouse any sympathy from the local community judging from the evidence given in this court.

He was a nasty wicked character which it appears the local community was not sorry to lose.

On the other hand the evidence before us establishes that the accused was an innocent law abiding citizen who was a victim of circumstances. He is in this trouble mainly because of the adulterous escapes of his wife. He showed great restraint and magnanimity when he forgave his wife, reconciled with her and did not press for payment of the adultery damages yet the deceased did not relent in his bid to continue committing adultery with his wife.

On the fateful day when the deceased met his death he had physically and verbally abused the accused before proceeding to his house in search of sexual favours from the accused's wife.

He was again caught red handed accosting the accused's wife resulting in the fatal stabbing.

Upon being arrested and being released on bail the accused again caught his wife red-handed in a compromising position with another man Calisto. This time the accused did not take the law into his own hands he simply took his wife and surrendered her to her parents.

In assessing sentence the court takes into account that the deceased had provoked the accused to breaking point. The accused seems to have been rehabilitated by his nasty experience in prison following the killing of the deceased. This is amply demonstrated by his behaviour in restraining himself from taking the law into his own hands when he again caught his wife committing adultery.

The accused is a responsible family man with 3 minor children to look after. He is a qualified class 2 driver. He lost his job as a result of this crime. He has already spent about 2 months in prison while awaiting trial.

While the courts will always take a serious view whenever human life is lost, in this case the accused's moral turpitude is of a very low degree indeed. He has already been rehabilitated and it appears he is unlikely to commit a similar offence again. Nothing can therefore be achieved by sending the accused to prison where he will be contaminated by hardened criminals.

The accused does not appear to have any criminal inclinations or tendencies. He is in this predicament because of his wife and the deceased's conduct which subjected him to severe provocation and emotional stress which resulted in the fatal stabbing. That being the case the deceased was the author of his own death.

It is accordingly ordered that the accused be and is hereby sentenced to 3 years imprisonment the whole of which is suspended for a period of 5 years on condition the accused does not again within that period commit any offence involving assault or the unlawful killing of a fellow human being and for which he is sentenced to imprisonment without the option of a fine.

*Chihambakwe, Makonese & Ncube*, the accused's legal practitioners  
*The Attorney-General's Office*, the State's legal practitioners



