

THE STATE
versus
FARESI MANYOWA

HIGH COURT OF ZIMBABWE
HUNGWE J & ASSESSORS
HARARE, 11 & 20 November 2008

Criminal Trial

D Chesa, for the State
J Majome, for the accused

HUNGWE J: The accused was charged with the crime of contravening s 47(1)(B) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] in that on 25 April 2007 at 19h00 she unlawfully picked up a knife and stabbed Stewart Pilate Mhlanga twice with the knife once on the left side of the chest and once on the neck resulting in the death of the deceased. She pleaded not guilty. The summary of the State's case indicated that the State would rely on evidence of at least ten witnesses. However at the commencement of proceedings counsel of the State the defence agreed that certain witnesses' evidence be admitted on to the record in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. Thus the evidence of the following witnesses was placed on record as undisputed fact:

- (1) Anymore Nosenga
- (2) Mercury Takaidzwa Mhlanga
- (3) Zephania Takaidza
- (4) Margaret Nyanhoo
- (5) Mudonhi Gogoda
- (6) Edward Museve and
- (7) Dr George Mapiye

Thereafter the Post-Mortem report by Dr Mapiye was admitted as exh. 3 and the accompanying affidavit to the post-mortem was exh 4. The State then called the evidence of accused's sister-in-law Mary Mudyanebanga. She shared the same house with accused and her late husband. Their respective husbands were brothers.

Her evidence was to the following effect. The accused had come and knocked

at her door indicating that somebody had come in search of containers from her husband. Soon after accused returned to her room in the same house, she had her calling for help. She rushed into the accused's room and found her and the deceased, her husband fighting. She restrained the deceased asked them why they fighting. Upon being assured that they will not fight she went back to her room. A while later, she heard someone cry from their room and the sound of footsteps running down the passage. When she got out of her room she saw the deceased who was bleeding going down the passage. He was in pain. She ran out to call for help. When she came back she found the deceased lying dead outside the house.

She did not witness the struggle. She did not see from where the deceased was bleeding. Under cross-examination she confirmed that the deceased and the accused had fought frequently. On each occasion of such fights the accused would retreat to the safety of her maiden home. According to her the deceased was a man of violent disposition although he was smaller in stature to the accused. She also stated that their room was lit by an electric bulb.

Harusekwi Hedegwe is the neighbour to whom the accused took refuge upon running out of the house. She told the court that it was around 19h00 when accused came running to her house. She wielded a kitchen knife exh 5. She appeared frightened. She kept looking back to the house as if afraid of someone pursuing her. She, under heavy breath of the flight, told her that she had stabbed him. She went to accused's residence and found the deceased lying dead in a pool of blood and bleeding from the neck. The couple had had a misunderstanding the previous day. Each time they fought accused would retreat to her parents' home.

The Investigating Officer also gave evidence. He went to the scene upon receiving a report from a member of the special constabulary who had arrested the accused and brought her together with the knife to station. He observed that eh furniture inside their room was in disorder, a sign that there had been a struggle. He noted that there was a broken cooking stick and some artificial braided hair strewn around the room. Accused claimed the deceased had pulled these from her head. He found the deceased covered with a blanket. Upon further examination he observed that the deceased bore one deep stab wound to the neck from where he was bleeding and another superficial would below it.

The accused gave evidence for herself. She described how she had endured physical abuse at the hands of her husband. She had had to go back to her parents on on less than five occasions in order to escape this abuse. Relatives had tried to intervene, including her sister-in-law, and others but to no avail. This day was just another example of what she had to endure.

What triggered this tragedy was a knock to the door which her debt-ridden husband refused to answer preferring to send her so as to off his creditors. But this was an innocent person seeking to secure his empty containers from deceased's elder brother. He had asked her to get this message to her sister-in-law. When she did so and went back to her quarters all hell broke loose. Deceased assaulted her. She cried out for help. The first State witness came and restrained him. No sooner had she left did the assault resume. In the attack which followed, he struck her using his hands and fell her. He then got her head between his legs and began to puff off her braided artificial hair. She felt excruciating pain all over. She reached for a cooking stick from the push-tray nearby and hit him with it without effect. He continued with his murderous attack. She then reached for what she thought was another smaller cooking stick which remained on the push-try. She struck him as he partially covered in a bending position as she lay in agony.

He released her indicating that she had injured him and if he caught her he would kill her. She ran for dear life clutching the knife as she ran. She only realized she still had the knife after she had spoken to her neighbour Harusekwi. She regretted the death of her husband but insisted that she acted in self-defence and defence of her child over who she had fallen during the attack. She used only the force necessary to repel the attack.

Under Cross-examination she introduced new evidence to the effect that the door to their room had been locked during the struggle. She had picked up the keys to the door after deceased dropped them upon releasing her. She had then unlocked the door and fled.

It seems to us that the witnesses were all generally truthful in their evidence. It is the evidence put forward by the accused which on some aspects was clearly meant to mislead the court.

Only the accused testified that the house was light by an oil lamp. Her sister-in-law, the neighbour and the Investigating officer all say there was electricity lighting inside the house. Clearly she did not tell the truth in this respect.

As for the mistake of fact relating to the nature of the object which she picked from her push-tray, she gave us the impression that she believed it was her smaller cooking stick which she had picked and struck him with it. This is however inconsistent with her first reaction to the whole incident when she ran up to Harusekwi and exclaimed that she had stabbed him. Had she not realized what she had one it is unlikely that she would have said this to the witness. In any event the wound from which the deceased died is consistent with a stabbing

rather than a strike blow which she would have delivered using that type of weapon. Stabbing in common parlance is associated with sharp instruments rather than blunt ones.

In that regard it is our finding that the accused was less than truthful in her claim of mistake of fact of the weapon she picked from her push tray.

Our view of the evidence is that the following is established by the evidence. The deceased was in the habit of physically abusing his wife. Over time they had physically exchanged fist cuffs. Accused would leave the matrimonial home as a result. On this occasion she did not manage to escape his clutches. She fought back. In this fight she resorted to whatever means available to her. She picked a kitchen knife which she used to stab him with. She directed the blow to the neck. It may well be that in effort to ward off a murderous attack on her person she did not have the luxury of choice. But she sealed her fate by her decision to use a knife in circumstances where a reasonable woman in her position would have realized that to do so may result in fatal injuries to the deceased. This decision to pick a knife constitutes a negligent step in that she then used more force than was necessary to repel the attack on her person. She did not warn him that she had a knife and that he should stop his attack upon her person. She decided to stab her as an act of self-defence.

We are satisfied that she did not realize the risk inherent in the use of the knife but we also hold that that failure was negligent on her part. As such she is found not guilty of contravening s 47(1)(b) of the Code but is guilty of contravening s 49(a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

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