

THE STATE
versus
CHAKANETSA NYAKABAU

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE 21, 23, 24, 31 January, 2019, 29 April 2019, & 7 May 2019

Assessors: **Mr Jemwa**
 Mr Mpofu

Criminal Trial

L Masango, for the state
R Kwenda, for the accused

TSANGA J: Waking up to an intruder in your home is conceivably among every person's nightmare, worse still when it unfolds as reality and not just a dream. Eviler still for a woman or a girl child who wakes up to the act of that very intruder sexually violating her. Add to that depraved unfolding situation, the whole gamut of emotions that can be expected from a parent who is equally awoken up by a child's piercing screams, in the middle of the night, only to meet an intruder emerging from the children's bedroom. This is what happened in this case.

The accused herein, whom we shall refer to only as CN for the sake of protection of his minor child, was charged with murdering the deceased, Rutendo Nyamukacha. He was said to have succumbed to assault injuries inflicted all over his body by the accused who fell into a violent rage when he encountered the deceased soon after his act of raping his daughter. She had let out blood curdling screams during the sexual assault.

The accused denied the charge of murder and proffered self-defence in that his own attack on the deceased in the melee that ensued, was only in response to the deceased producing a knife and trying to attack him. Moreover, his defence was that the nature of his mild assault could not, in any way, have resulted in the accused's death. He also argued that

the accused had been attacked elsewhere before intruding at his homestead. The deceased was not a stranger. He was known to him and his family he worked as a herd boy for the accused's brother.

The victim's evidence

The victim who was fifteen years old at the time the incident happened, was the state's first witness. She had woken up on the night in question to the deceased removing her pants and inserting his penis inside her. Her screams had woken her father who had immediately come to room in which she was asleep with her two younger siblings, aged 8 and 4. The deceased tried make good his escape but her father met him at the door and dragged him outside. Whilst she had not witnessed a physical fight as she remained inside her bedroom, she could hear there was a fight and a scuffle. She could also hear them talking although she could not discern what was being said.

Her stepmother's evidence

The second witness was her step mother. She confirmed the screams of her daughter. Their house is a three roomed house with the door to the children's bedroom leading from the veranda outside. Needless to comment, an ill-advised set up, where children sleep in an outer room whilst parents are indoors. Her husband too had awoken to the screams and had gone outside to the bedroom. She had momentarily remained in their bedroom and could hear that the two were fighting from the assault noises which she described as fists and blows and hitting against the wall. She had left the bedroom to call her step son Desire. This had taken all but two minutes as he lived close by.

On her return with Desire, the accused was now in the dining room with the now deceased. She told the court that the deceased still wanted to fight and produced a knife which he wanted to use to stab the accused. At that point, the accused had taken a strop (essentially a piece of leather), which was in the dining room and assaulted him. The deceased was instructed to put the knife away which he proceeded to do by placing it in his pocket.

The deceased also wanted to escape and had been tied to prevent his escape. Desire had then gone to call the deceased's employer. When the police finally arrived, the deceased had been untied. When asked to confirm on how many occasions in total he had been assaulted, she mentioned three. Her testimony was that the deceased and the accused had fought at the time that the deceased was dragged from the spare bedroom, and, also when

they were in the dining room. She also said in her evidence in-chief that there had been a further assault when the deceased was refusing to be tied.

In cross examination, she confirmed that she had not been outside herself when the deceased and the accused initially fought. She did not know the number of times the strop had been used on the deceased but later tried to tally the number with that put to her in cross examination by the accused's lawyer as being once on the hand and once on the back. Her purported statement also introduced in cross examination that she had heard the deceased had been assaulted earlier at the bar was of no value since it was merely hearsay evidence which she had not even been told by the persons who were said to have purportedly assaulted the deceased themselves. She did not even know the names of the persons he was said to have fought with and only agreed to suggested names as put to her in cross examination. It was evident that her intention was to minimise the assault on the deceased. Her evidence also differed somewhat from that Desire whom she had gone to fetch.

The accused son's evidence

Desire who was the accused's son, was the third witness. He knew the deceased as they had gone to school together and moreover he was employed as his uncle's herd boy. When called by his step-mother, he found the deceased in the dining room with his father whom he said was assaulting the deceased with a strop at the time. He specifically said he had seen the accused assaulting the deceased on his back although he could not say how many times since he was not counting. He was definite though that it had not been once.

When the deceased had tried to reach into his pocket, he himself had reached into the deceased's pocket and discovered that he was carrying a knife. He had taken the knife and put it in his own pocket before he and the accused proceeded to tie the deceased with a rope. He was adamant the knife had been in the deceased's pocket at least when he arrived. This was in response to the question whether it was possible that the deceased may have tried to use the knife earlier. Whilst his step-mother had entered the dining room first, they were barely a minute apart in their arrival at the scene after he was called.

He also told the court that the assault on the accused had stopped after they had tied him up at which point he had been taken outside and instructed to sit down. It was at that point that he had been instructed to go and advise other relatives about what had transpired. Materially, since his step mother said that the deceased had been assaulted when he was tied up, it is reasonable to assume that after he went to call his uncle and others, the assault persisted.

Upon arrival of other relatives including his uncle, a decision had been made to call the police. The neighbourhood watch officer had finally arrived and had taken the deceased, the victim and the accused with him.

As for the accused emotional state when he arrived at the scene, Desire observed that he was indeed angry and he had told him not to beat the deceased severely. He said the deceased was swollen on his back as a result of the use of the strop but that this was the only injury he had seen. Like the previous witness his purported remarks about an earlier assault was merely hearsay and of no value to the court.

Peacewell Mudzviti

The fourth state witness was a neighbourhood watch police officer who was called to the scene. He said he had arrived at the scene at round 1 am and found the now deceased tied. The deceased was lying on his side. He was said to have been assaulted for raping the accused's daughter. The accused himself was not at home when he arrived. He had asked the deceased what he had done and he had said he was aware that he had "wronged the people at that homestead". He observed that the deceased appeared to be having some mental challenges. He had enquired if he could walk as he had said he was feeling cold. He also observed that the deceased had injuries, as his hands as well as the right side of his face were swollen.

When the accused returned, he narrated that the deceased had raped his daughter. The accused, the victim and the now deceased had then left the homestead in a bid to look for transport to Mutoko. The now deceased was at that time able to walk. They had covered approximately seven kilometres. He had also asked for forgiveness from the accused and had wanted to negotiate. They had failed to agree. The now deceased had then knelt down and lain on his stomach and had started to roll up and down. He had tried to enquire what was happening but the now deceased was no longer responding. At that point the accused had sought permission to run to the road to see if he could get transport and he had allowed him to. Realising that the now deceased no longer had power and that the accused was taking long to return, he had followed the accused and had found him still looking for transport. When they returned to place where they had left the now deceased, he was no longer breathing.

Asked about the allegations that the deceased had previously been involved in a fight that night, he said that this had never emerged and he was not aware of it. What he knew was that the deceased had been assaulted at the accused's residence since he had asked questions about what had happened when he arrived. He had been told that a strop had been used to

assault the deceased. The strop was admitted in evidence as exhibit no 3 as was the rope that had been used to tie the deceased which was admitted as exhibit number 4. Importantly, he clarified when cross examined that when they left the accused's residence, the reason they were heading to Mutoko was to seek treatment for the now deceased. This was proof that the deceased was critically injured as to require medical attention.

Washington Shoko was the investigation officer in the matter and was the fifth witness. He was the one who had arrested the accused and had also carried out indications at the scene with him. He had also taken the deceased's body to the hospital. He had further taken a statement from the accused. He had further gone to Parirenyatwa hospital for the post mortem.

He told the court that the rape had been reported and the victim had been examined. However, as the rape had been handled by other police officers and not himself, the results of the examination were not before the court. He had concentrated on the murder charge. Suffice it to note, however, that it was not disputed that the victim had been raped. He confirmed that he had been advised that a knife had been taken from the deceased during a scuffle but said that it had never been mentioned that the deceased had actually tried to stab the accused.

As for the assault, he said at the time of his arrest the accused had told him he had used his hands, fists and strop to repeatedly assault him all over his body. He had unearthed from the accused himself that he had used the strop on the now deceased when they tied him and put him outside. He too, dismissed as false the suggestion that the accused may have been assaulted elsewhere that day and was emphatic that this was never mentioned at all during the investigations. He also said the deceased had visible marks on his face and hands.

In cross examination he said that the accused only started denying the use of the strop at the time that were recording a statement from him.

Doctor Tsungai Victor Javangwe the pathologist who carried out the post mortem examination was the last witness. He holds a medical degree and a Masters and diploma in forensics from South Africa. He qualified in 1998 as a medical practitioner and has worked as a pathologist since 2010.

The history of the deceased given to him when brought for the examination was that he had been assaulted for raping someone. He had multiple blunt force injuries. He had abrasions to his right upper arm and to his right temple. He also had injuries below his cheeks and had a swollen forearm. The examination had also revealed injuries beneath the skin. As for his head, it was swollen although there were no skull fractures. There was evidence of

blunt force head injury. The deceased had basically been assaulted on his head, upper arms chest wall, lower back and his thighs as well. When shown the strop and asked if the injuries were consistent with its use, he stated that it was indeed possible that it was the weapon used. Moderate to severe force would also have been used.

Of significance, was his emphasis that deadly injuries may not necessarily be visible to the eye and yet when the skin is pulled back, it may become apparent that there was bleeding into the tissues. In other words, the gist of his explanation was that people can and do succumb to death due to hidden injuries.

His evidence was not shaken during cross examination. In fact, he further explained that the injuries appeared to have been inflicted during the same time frame and were relatively fresh. Materially the strop used fitted the descriptive category of a blunt object. Additionally, he confirmed that hands and fists too, can cause blunt force injuries. As he had also recorded injuries that were hidden, the issue of a single blow was discounted. In particular the use of a linear object had been observed as a constant in the injuries. This was in line with the strop.

The accused's evidence

His version was that when he saw the now deceased leaving his daughter's room, he knew instantly that he had raped her because he was always threatening to do so. The deceased had tried to run away and had thrown fists at the accused which he had blocked and had dragged the now deceased into the dining room. At the point that his wife returned from calling Desire, the deceased had tried to produce a knife which the accused said he knew he always carried. He had taken the strop and assaulted him with it. The deceased had put the knife back in his pocket and it was at that point that his son Desire arrived. He ordered the deceased to sit and assaulted him again with the strop whilst telling Desire to take the knife away from him. They had thereafter tied the deceased because he was refusing to sit.

When his brother who was the deceased's employer came to the scene, he had obtained numbers from him and had tried to call the police who had not answered his call. It was then that Peacowell Mudzviti the neighbourhood officer had been called instead. Materially, he told the court that when Peacowell arrived, the deceased had complained of feeling cold. On their way to Mutoko the deceased had indeed admitted to raping his daughter and said he wanted to marry her. He had said he had been drunk when he committed the offence. He had also complained of feeling hot. He equally complained of feeling thirsty and

had drunk copious amounts of water. What can be gleaned therefore is that the now deceased was unwell from the time they departed the residence.

He had refused to forgive the now deceased. As he explained:

“I was not able to forgive. I considered that my daughter could have contracted a disease and also that the rape would now compromise her marriage.”

The accused’s warned and cautioned statement was admitted as Exhibit D1. He essentially admitted to fighting with the deceased after the rape encounter. He also admitted to tying him up and disarming him of a knife which he said was in the deceased’s pockets.

He also told the court that he had learnt that the deceased was coming from the shops before coming to his place and that he had been told by the Kasimbe family that the deceased had an altercation with people at the shops. He did not say which people or which member of the Kasimbe family had told him this neither did he bring them or state them as his witnesses at the start of his case. His statements were again in the form of hearsay about who had said what to whom. All this was meant to bolster his suspicion that the accused had sustained injuries at the shops.

He admitted in cross examination to being hurt and provoked by the attack on his daughter. He claimed that the sound of fists which his wife had heard were sounds of the now deceased attacking him at the time and him blocking the fists but later admitted to fighting. He admitted to signing the indications freely in which it was indicated that he had fought the deceased whilst at the bedroom. The unlikelihood of him assaulting the deceased only twice for raping his daughter was also canvassed and it was put to him that he had assaulted the deceased out of anger even if he did not intend to kill him. He denied multiple assaults.

Analysis

Desire’s evidence was the most lucid about what had happened to the deceased from the point that he had been called to the homestead that night. It in fact, it tied in largely with what the accused himself had stated in his warned and cautioned statement that a knife in the deceased’s pocket had been taken from him. Embedded in self-defence is essentially the acceptance that it is only a threat to one’s life that can justify the taking of another life. From all accounts, the accused was not threatened in this way since the knife was unearthed because the accused said he knew that the deceased always carried a knife. We do not believe the accused’s wife when she said that the now deceased had tried to stab the accused or that this incident occurred before Desire came into the room. They were only a minute apart and Desire would have seen this incident. There was indeed a motion to reach into his pocket on

the part of the deceased when all three were in the room but it was also manifest that the motion had been stopped in its tracks by Desire who removed a knife from the now deceased's pocket. He confirmed that the deceased was searched and disarmed. The accused's own warned and cautioned statement also spoke to disarming the deceased as opposed to a life threatening situation posed by the deceased. He did not speak of two incidents of knife production. There was only one such incident.

However, as far as both the accused's wife and Desire tried to project in their evidence that the deceased had been assaulted minimally, it is material that from the evidence as a whole this was not the case. The neighbourhood watch officer observed that he was swollen on his hands and right side of his face, whilst the investigation officer had also observed marks on his face on hands. The post mortem report also spoke volumes on the assault. He had certainly not been assaulted on his back only as alleged by Desire. It could be that this is what he witnessed when he got there but it was certainly not the sum total of the assault on the deceased.

We also lean fully in favour of believing the police when they stated that no report of the accused having been assaulted elsewhere ever arose during the investigations. The accused, aided by his wife, was evidently consumed with finding a way out of the fatal assault. We find it unlikely that the deceased would have been assaulted elsewhere without anyone reporting that to the police when they were investigating the matter. The villagers were aware by morning that the deceased had died. There is absolutely no reason why it would not have emerged at the material time. There was also no reason why the accused, having been out of custody, would have failed to put his material witnesses together for this trial. Observably, the statements regarding these purported assaults were largely hearsay and of no value to the court. The court essentially heard evidence that the deceased was in fact assaulted very brutally at the accused's residence which evidence was equally corroborated by the medical report.

Attributing the deceased's injuries to rolling on the ground was also not supported by the evidence. It was clear that when Peacewell the neighbourhood watch officer arrived the deceased was already showing signs of being unwell. The objective of passing through Mutoko was also to seek medical assistance. On the way there the deceased also showed signs of being unwell from the injuries sustained. The post-mortem report was also very compelling and detailed in the injuries that the deceased was said to have suffered within the same time frame. They were also consistent with the stop.

What we find is that the accused was definitely provoked by the attack on his daughter. Provocation is a partial defence to murder in terms of s 239 of the Code. Unpacking s 239 of the Criminal Code in the *Commentary on the Criminal Law (Codification and Reform) Act [Chapter 9:23]* compiled by Professor G. Feltoe¹ explains as follows:

“In murder cases there is a two-stage approach.

The first stage is to decide whether X had intention to kill when he or she reacted to the provocation. If X did not have intention to kill, X will not be convicted of murder but only of culpable homicide.

If X had intention to kill, then the court will proceed to the second stage, which is to decide whether X lost his or her self-control and killed intentionally in circumstances where even the reasonable person, faced with this extent of provocation, would also have lost self-control. If X did lose his or her self-control and the reasonable person would have done likewise, X will have a partial defence and will be found guilty of culpable homicide and not murder.”

As regards the second rung in particular he uses the following example:

“Clearly the second rung of the defence will only succeed in a limited range of situations where the provocation has been very severe and has provoked the person beyond endurance. For example, it might apply–

- where X kills a man whom he discovers raping his daughter or sodomising his son”;

It is not in doubt that the deceased created the explosive situation that led to his assault. The provocation was extreme and the risk of fatal consequences in assaulting him in the manner that the accused did was foreseen. Desire said he warned him as much about assaulting the deceased too much. As to whether a reasonable person would have reacted in a similar fashion to the accused by assaulting him, in reality this is always a contextual rather than an armchair analysis.

In this instance, the attack on his daughter had been sudden and in the dead of the night. Reasonably, he did not have the opportunity to appeal to the law to take its course in that moment. Unlike parts of the developed world where the police are genuinely a phone call away at the mere dialling of an emergency number such as 911, that is not our reality where the bulk of the population remains rural based. In reality, in our rural communities police stations are very faraway and transport is a challenge. In this instance, the evidence was that the nearest police station was 40 kilometres away. Even though it cannot be said that the accused totally lacked the opportunity to appeal to the official law in dealing with the intruder, the difficulties that people living in rural communities encounter in accessing the

¹ November 2017 version

state's justice delivery institutions should certainly not be overlooked. These challenges do have an impact in making an informed decision as to the realities that may have faced an accused in a given situation. Much will depend on the facts in terms of what was reasonable conduct under the circumstances.

A fight would naturally have ensued when he bumped into the deceased as he tried to flee from his daughter's bedroom. That is a natural reaction of any father to protect his child. A reasonable person would have reacted in the same way as the accused by engaging the intruder in a fight. He did later try to call the police after he had meted out punishment but got no response. The neighbourhood watch officer came after about an hour.

The accused was upfront about other the considerations in a social context that added fuel to his anger over the rape of his daughter. The rape was seen by the accused as a threat to his own interests, much the same way as it would be seen by most such males in his setting who view their daughters as a form of property in specific settings. Even though considerations of women's own rights as victims of violence have gained traction, still notions of women and girls as men's possessions have proved to be less easy to overcome. (See the discussion in *S v Tembo* CRB118 on the nature of the rights that are violated for rape victims). In a social system where bride price is paid to the father to secure a daughter's hand in marriage, he was categorical about his fears that as a rape victim, her chances of marriage had been compromised. His daughter was damaged goods as far as he saw it as a result of the rape actions of the now deceased. His status and honour in the eyes of the wider community had been interfered with.

However ignoble his reasoning in this context may have been, his reaction has to be also understood from this perspective. In other words, his anger may ultimately have had less to do with deprivation of his daughter's physical integrity and autonomy as a person in her own right and more to do with the perceived harm to his possession. Observably, he was no longer acting just to protect his daughter and to apprehend the intruder but also to inflict punishment. He was negligent in so doing as the law would have taken its course for the crime of rape that the deceased had committed.

We therefore return a verdict of guilty to culpable homicide in terms of s 49 of the Criminal Law Reform and Codification Act [*Chapter 9:23*].

Having heard the usual personal mitigation circumstances including his compensatory gestures of paying cattle to the deceased's family, what is of prime relevance in arriving at an appropriate sentence are the provocative circumstances that led to the assault. Provocation

acts as a mitigatory consideration. Whilst the state took issue with accused minimising the nature of his assault, ultimately issues of remorse or lack of it are not the primary consideration. See the discussion on remorse in *S v Thomas Kanongo* HH 158/19. It is the crime that the accused committed that must remain the primary focus.

The state also drew attention to the case of *S v Ncube* HM 21/18 in which a father killed the deceased who was his daughter's boyfriend whom he found in his house. A six year term of imprisonment with two years suspended was imposed in that case. The state agreed that the facts and the nature of provocation herein are very different compared to that case. Herein the father caught the deceased who had just raped his daughter. We are cognisant that the family of the deceased also expects justice for the taking of a life, which is indeed a very serious offence. This court is equally cognisant that the law should be seen not to be encouraging people to take the law into their own hands. At the same time, in arriving at an appropriate sentence, we take into account the realities that the accused encountered including those challenges posed by the absence of readily and easily accessible police stations for rural communities. In instances of dire emergencies, self-help as a protective measure may prove to be deadly through no fault of their own.

It is also necessary to take into consideration the trauma that the victim is already having to deal with not just from being raped but from her father having killed an intruder. Balancing all that there was and all that there is to this matter, a suspended sentence under the circumstances of extreme provocation will meet the justice of the case. Accordingly the accused having been convicted of culpable homicide is sentenced as follows:

Three years imprisonment wholly suspended for five years on condition that the accused does not during that time commit crime involving violence on the person of another for which he is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Machiridza Law Chambers, accused's legal practitioners