

THE STATE  
versus  
CLAYTON MABASA HUNDA

HIGH COURT OF ZIMBABWE  
MUNGWARI J  
HARARE, 26 May 2022, 15 & 28 November 2023

### **Criminal Trial**

Assessors: Mr *Mhandu*  
Mrs *Chitsiga*

*P Gumbo*, for the State  
*O Marwa*, for the accused

**MUNGWARI J:** Clayton Mabasa Hunda, (hereinafter called “the accused”) appeared before us charged with the crime of murder in contravention of s 47(1), of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations against him are that on 8 November 2021 and at 34 Rolf Avenue, Harare he unlawfully and with the intent to kill or realizing that there was a real risk or possibility that such conduct may cause death but continuing to engage in such conduct despite the risk assaulted Janet Pongolani (hereinafter “the deceased”) several times all over the body with open hands and fists. The deceased who was his wife sustained fatal injuries from which she died instantly.

The background to the fatality as alleged by the state is that on the evening of 8 November 2021, the couple had a disagreement which degenerated into a physical attack on the deceased by the accused. He used his hands and fists to repeatedly strike her all over her body. The situation worsened when the accused dragged the deceased onto the bedroom floor and in the process forcefully pulled out her braids. As a result of the assault, the deceased lost consciousness. Realizing the severity of the deceased’s condition the accused panicked and informed his brother Vincent Vusumuzi Gumede. A report was made to the police and an ambulance was called for assistance. Upon arrival, the ambulance paramedics noted that the deceased was lifeless. The accused was subsequently apprehended by law enforcement agents

whilst the body of the deceased was conveyed to Parirenyatwa Hospital for an autopsy. The postmortem report concluded that the cause of death was diffuse brain injury, with evidence of blunt force head injury consistent with positional asphyxia. \_

The accused pleaded not guilty to the charge and in his defense outline stated that on the fateful day he and the deceased were happily drinking whisky at their house from about 6 pm in the evening. By around 9 pm, both of them were intoxicated. Despite being the only people in the house, they had a disagreement which escalated as already described earlier. The accused went on to state that during the fight they both fell to the ground where the deceased accidentally hit her head against the furniture in the house. As a result, she remained motionless on the floor. Initially the accused attributed her immobility to the effects of alcohol. However, upon realizing the severity of the fall, he attempted to administer first aid while calling out her name but she did not respond. He then sought assistance and only became aware that she had died upon the arrival of the paramedics. He denied assaulting the deceased all over her body with fists and open hands with intent to cause her death as alleged or at all. He also stated that he did not realize any real possibility that she could die.

In summary, the accused claims that the deceased's death was the result of an accidental fall during a physical altercation. It was not from a deliberate assault. He prayed that the court finds him not guilty.

### **State case**

Prosecution opened its case by applying that the evidence of Tanda Chisi and Portia Marava be formally admitted into evidence in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. With the consent of the defense their evidence was duly admitted. It became undisputed that at around 2230 hours Tanda Chisi who owns the accused and the deceased's rented accommodation at 34 Rolf valley was awakened by the news that the accused had during a misunderstanding, assaulted the deceased into unconsciousness. He rushed over to the cottage where the couple resided where futile efforts to revive the deceased were made. Vusumuzi Vincent Gumede brought the police and an ambulance to the house. The ambulance paramedics advised that the deceased was already dead. Investigations were carried out by the police leading to the arrest of the accused. As can be seen, the evidence of the two witnesses did not add anything new to the state case. All that they said was already common cause.

The prosecutor led oral evidence from five witnesses in Knowledge Mashereni, Montrina Mapetese, Vusumuzi Gumede, Philomina Gumede, and Doctor Tsungai Victor

Javangwe. Below we summarise the evidence of the witnesses in so far as it relates to the issues which arise for determination.

**Knowledge Mashereni (Knowledge)**

He is a gardener and resides at 34 Rolf valley. He confirmed that he knew the accused, who was a tenant at his place of employment. His evidence was that the couple had been residing at the house for nearly a year. His relationship with both husband and wife was cordial. The staff quarters where he resided was located a mere five metres from their cottage. His further testimony was that on the fateful day he was engaged in some construction work when he saw the accused and the deceased approach him. They appeared to be in a jovial mood. Eventually they retired to their own house. At around 9 pm the witness was awakened by a knock on his door. When he stepped out, he saw the accused who informed him that he had a disagreement with his wife, resulting in him assaulting her and causing her to faint. The witness probed further and the accused revealed that he had poured water on the deceased in an attempt to revive her and had called his brother Vusumuzi Vincent Gumede for assistance. The witness recounted that the accused informed him that he had reassured the landlady that everything was alright, when she came to his door to enquire. Alarmed by the obvious misrepresentation to the landlady, Knowledge refused to accompany the accused to his quarters to assist him and returned into his quarters. The accused returned shortly thereafter to ask him once more to assist but the witness declined reiterating the need to involve the landlady as well as the police. The witness remained in his room until the following day at approximately 5.30 am when he noticed the arrival of police officers, who informed him of the deceased's passing.

During cross-examination the witness revealed that the accused approached him in a state of panic. His fear was palpable. He also noted from the accused's speech that he was moderately drunk. Despite the close proximity of their dwellings, the witness stated that he did not hear any sounds of a struggle or screams emanating from the accused's residence. He also did not hear the landlady attending to the accused's cottage. The witness clarified his inability to hear any sounds by stating that it was dependant on the location of the room where the noise would originate from.

In addition to the misrepresentation to the landlady regarding the situation at the accused's residence the witness was clear to the court that he was hesitant to get involved in the accused's issues particularly after learning that the deceased was unconscious.

The witness remained steadfast in his testimony. The court was impressed by his composure on the witness stand. He remained unshaken during cross examination and consistently stated that he did not hear any sounds of a scuffle from within the accused's house but that the accused had informed him that he had assaulted the deceased resulting in her fainting. The witness had a good relationship with the couple and demonstrated that he had no reason to falsify his testimony. He struck us as a truthful witness worthy of belief.

**Montrina Mapetese (Montrina)**

She is married to Tanda Chisi, the accused's landlord. By extension she is the accused's landlady. She resided with the couple at 34 Rolf valley. Montrina lived in the main residence, while the accused occupied a cottage located less than ten meters from her bedroom window. She equally enjoyed a cordial relationship with the accused. Her evidence corroborated the undisputed evidence of Tanda Chisi with the following additions:

On 8 November 2021 at around 2125 hours she was in her house when she heard noises indicating an altercation coming from the accused's cottage. Shortly after, she heard the deceased screaming. Concerned, she went to the cottage to check on the situation. She found the doors to the cottage secured and she stood by the window from where she enquired what was going on. The accused responded by informing her that he had a disagreement with the deceased. Through the window she heard the deceased crying and groaning and suggested that they resolve their issues peacefully. At some point she asked both of them to come out so they could discuss the issue together as she felt that they would not be able not resolve their differences on their own. The accused did not come out and the deceased also remained unresponsive to her request. Montrina then informed the accused that if he did not want her assistance she would call the police. The accused asked her not to call the police and indicated that they would resolve their issues. Dissatisfied with that promise the witness persisted in her attempts to reach out to the police from her cellphone. After her unsuccessful attempt to contact the authorities she returned to her house and prepared to retire to bed. While in the process she heard the main gate open and a car drive towards the cottage. After some time she overheard her husband answering a phone call from Vusumuzi Vincent Gumede who informed him about an issue at the cottage. Her husband left the house and then returned urging her to accompany him to the cottage. She went with him and entered the cottage. Standing by the bedroom door she observed the lifeless body of the deceased lying on the floor. She was dressed in a blouse and covered with a cloth. She also observed water which had spilled on the floor which she interpreted as a sign that something chaotic had just

occurred. She further noticed some detached braids scattered around and assumed that they had fallen from the deceased's head because there were still some of them hanging on her head. Regarding whether or not the two had fought the witness said she didn't know. All she heard was a woman's screams.

Under cross examination the witness provided an explanation of the sounds she initially heard which were screams followed by a pause in the screams and continued cries for a period of ten to fifteen minutes. According to the witness that indicated that the deceased was being harassed. When it was suggested to her that the deceased screamed because they were fighting she replied that she did not hear any sounds from the accused and so it might not be true that they fought. She further emphasized that the deceased screamed multiple times and demonstrated the nature of the screams to the court. Montrina clarified that accused did not tell her that they fought. Rather he had said they that they had a misunderstanding. She insisted that what she heard was one-sided with screams, cries and groans from the deceased and nothing from the accused. Based on that she assumed that the accused was the aggressor. She could not therefore conclusively state that a fight had occurred in the house.

The witness's testimony revealed that there was an altercation between the couple which resulted in the deceased screaming, crying and groaning in distress. The witness took the disagreement so seriously that she had attempted to contact the police. She emphasized that despite her inquiries only one person responded while the other continued to cry. Even when she finally entered the house, the scene she encountered confirmed her worst fears.

**Vusumuzu Vincent Gumede (Vincent)**

He resides in Zimre Park, Ruwa and is the accused's elder brother. On the night of 8 November 2021, while he was taking a bath at home, the accused rang his mobile phone. He spoke to his wife to whom he explained that their presence was urgently required at the accused's house. Together with his wife they proceeded to the accused's home. His evidence corroborated that of Tanda Chisi and Montrina Mapetese to the extent of what the scene looked like with the addition that upon arrival at the accused's cottage he was confronted with the distressing scene of the deceased lying naked on the floor face down and unconscious. Vincent said he checked for a pulse but found none. He requested that the deceased be covered. He went to Highlands Police station and made a report. During cross examination the witness testified that the accused attributed the misunderstanding between

him and the deceased to their mutual refusal to cook when electricity was restored that night. He claimed that due to his panicked state he did not notice any injuries on the deceased that night but that he saw detached braids strewn all over the house the following morning.

The only highlight in the witness's testimony was the detail regarding the reason for the disagreement between the couple as told to him by the accused shortly after the incident occurred. Besides this, there was little or no probative value to his evidence as he was not an eye witness and only arrived after the fact.

**Philomina Gumede (Philomina)**

The evidence of Philomina fully corroborated that provided by Vincent. She added detail regarding the tele-conversation she had with the accused prior to arriving at the scene. According to Philomina, the accused informed her that he had had a disagreement with the deceased, which escalated into a physical altercation that rendered the deceased unconscious. Philomina advised the accused to administer first aid to the deceased while they made their way to the scene. Upon arrival, the witness observed that the scene appeared consistent with a fight as the deceased's braids were scattered and she had scratches on her face. The witness stated that the accused confessed to her that he had caused the injuries on the deceased through their fight using his fists to inflict the injuries on her face. It was the first time in the trial that the suggestion of a fight had been made by a witness.

**Dr Tsungai Victor Javangwe (Dr Javangwe)**

The witness is a registered medical practitioner employed by the Ministry of Health as a pathologist and stationed at Parirenyatwa Hospital. He holds a medical degree from the University of Zimbabwe as well postgraduate diplomas in pathology. With over a decade of experience in this field he regularly performs autopsies as part of his professional responsibilities. During the court proceedings, he testified that on 18 November 2021, he was requested by the police to examine the body of Janet Pongolani at Parirenyatwa Hospital. He duly obliged. Subsequently he authored the post-mortem report which was tendered as exhibit 1 with the consent of the defence. The doctor said that the police report indicated that the deceased had her head bashed against the floor and was subsequently sat on. Upon examination he observed peripheral cyanosis which is a condition where insufficient oxygen may result in dusky lips. He explained that dusky lips serve as an indication of oxygen deprivation. He also noted the presence of darkened and abraded cheeks which suggested the use of blunt force as well as bilateral conjunctiva haemorrhages which typically point to

trauma. He noted that the skin on her back displayed patches of intramuscular haemorrhages which illustrated the application of blunt force to that area.

Upon examining the scalp, haemorrhaging was also observed on an area at the back. Additionally a right frontal injury was noted although no skull fracture or bleeding was present. He explained that a head injury can potentially obstruct oxygen supply thus exacerbating the issue. He found no evidence of strangulation during the examination. He specifically observed blunt force trauma on the left occipital and right frontal parietal regions which he said corresponds to the forehead and back part of the left side of the head. The head injuries were caused by moderate to severe blunt force.

Under cross examination the witness acknowledged that he had classified the cause of death as a combination of positional asphyxia and head injury. Furthermore he confirmed the possibility that even in the absence of positional asphyxia, the deceased could still have died from the head injuries. He established however that the risk of death was heightened by the substantial and forceful impact inflicted upon the deceased's head. The witness also confirmed the possibility of the deceased falling and striking her head on a piece of furniture which could explain her remaining motionless. However he emphasized that this explanation must be considered alongside the extensive injuries observed on the left occipital area and right frontal parietal injury. He confirmed that the deceased's obese body may also have worsened these injuries.

In our view, Dr Javangwe's evidence conclusively ruled out the possibility of the deceased's death resulting from an accidental fall and sustaining two significant head injuries in two different places that is on the left occipital and right frontal parietal of the head. Instead his testimony confirmed that the deceased's head was forcefully struck against the floor resulting in the significant injuries and that the act of sitting on the deceased was consistent with the positional asphyxia which he noted. His evidence was also crucial in highlighting the visible signs of violence on the body of the deceased. The location, form and color of the injuries all pointed to acts of violence being the cause of her death.

#### **Defence case –Clayton Mabasa Hunda**

The accused adopted his defence outline and provided additional detail. He stated that he had had a seven years long happy marriage with the deceased. Together, they had a five-year-old daughter. On the fateful day they arrived home to find that there had been a power outage. They decided to wait for the electricity to be restored while enjoying some Gordon's Gin outside their cottage. Both of them were regular drinkers and had last

consumed alcohol together two days previously. The fact that it was a workday did not concern them on this particular Monday. Later they moved to the veranda of their house and engaged in a friendly conversation with Knowledge the gardener who was busy with his tasks. The deceased was in good spirits following a telephone conversation with a friend based in South Africa. They finished a 750 ml bottle of alcohol with 43% alcohol content. Eventually they went to bed drunk before the electricity was restored.

The accused claims that he asked the deceased three times, to prepare supper once power had been restored but she was preoccupied with her mobile phone and did not comply. On the fourth occasion the accused pleaded with the deceased to prepare supper and questioned why she was being uncooperative. It was at that point that the deceased retorted suggesting that she could have been talking to her boyfriends. Enraged, the accused immediately slapped her on the cheek. She fought back resulting in a scuffle. She retaliated by slapping him on the face and biting his right hand finger. She only released her grip after he punched her on the left hand. The scuffle lasted approximately forty minutes during which the two became entangled and rolled off the bed. The deceased fell first hitting a small stool before landing on the floor with the accused on top of her. The deceased's head and shoulder made contact with the stool. She hit the floor with the side of her body thus sustaining the head injuries that were observed by Dr Javangwe. The accused then stood up and left her groaning on the bedroom floor with her head tilted to the side. He intended to get some fresh air. Approximately ten to fifteen minutes later he returned to the bedroom to check if she was up only to find her still lying on the floor. He called her name and shook her but she did not respond.

The accused acknowledged that the deceased had screamed during the scuffle. He admitted to causing the injuries on the deceased's cheeks with his fists and open hands. He also confirmed that the injuries observed by the doctor on the deceased's back were caused by him when he fell on top of her due to her sturdy build. He also admitted that when the landlady arrived at the cottage the deceased was still groaning. Additionally he acknowledged that the braids were scattered throughout the house but attempted to explain their presence by saying that the deceased had been undoing her hair in the past two days when the maid was off duty and that she had not bothered to clean up during that time. Under cross examination his explanation crumbled as he struggled to support the implications of his statement. According to him the deceased was so untidy that she couldn't even clean her



own house including her bedroom and would only wait for the maid's return. We found his explanation unconvincing.

He conceded that his actions led to the deceased sustaining head injuries making his conduct the ultimate cause of her death. He claimed to have sustained an injury on his finger but said that since no one paid attention to him he was unable to show the police the injury. He acknowledged that he was infuriated by the deceased's behaviour but denied having a motive to kill. He reiterated two reasons for his conduct and these were that he was angered by the deceased's delay in preparing him a meal and also by her response when he asked who she was conversing with.

We are firmly convinced that the couple did not fight on the night in question. The evidence presented supports this conclusion. Knowledge, who was in close proximity to the couple claims not to have heard any sounds of a scuffle or screams and insisted that his ability to hear would have depended on the location in which the altercation occurred. Further, Knowledge stated that the accused himself informed him of a disagreement with the deceased which he said had resulted in him assaulting her until she collapsed. This testimony was corroborated by Montrina who heard the deceased's screams, cries and groans through her bedroom window which prompted her to go and investigate. Even when she arrived at the accused's cottage she continued to hear the deceased's distressing sounds which were one sided. She did not hear any sounds coming from the accused which would have been expected if the two had engaged in a fight of the kind described by the accused himself. According to his own account they supposedly tussled and threw things at each other as well as bit and slapped each other for a duration of forty minutes. She inevitably declined to testify that a fight had taken place between them. Philomina too claimed that while the room was in disarray she however did not see any evidence on the accused suggesting that he had been assaulted. Even more incriminating is the accused's behaviour that night. He said soon after the deceased had fallen to the ground, he went outside and returned about fifteen minutes later. The deceased was apparently unconscious when he returned indoors. The deceased's state must have alarmed him. That Montrina came and on several times for a considerable period begged him to come out and discuss the issues. The accused refused to do so. It was utterly unreasonable for him to do that if indeed the deceased had been injured as a result of an accident. She needed help and Montrina and her husband were present at the main house and could immediately assist. The accused chose to wait for his relatives who

were coming from kilometres away. He chose to also seek help from the gardener who did not want to do so. Our conclusion is that he went to the gardener well after noticing that the deceased's condition had deteriorated. Montrina went to the couple's quarters first because the accused himself told the gardener so. He was clearly hiding a lot from the landlady. His behavior was not commensurate with a husband who had accidentally injured his wife. The expectation in such circumstances is for one not to be selective as from whom one seeks help. One would take it from whoever offers it.

In addition, the accused failed to provide a plausible explanation for the presence of the scattered braids. It supports the state's assertion that he in anger, had pulled them out of the deceased's head. The bruises on the deceased's cheeks, neck and back further support the inference that the accused was aggressive towards the deceased. He continuously assaulted her while she screamed and cried in pain for a prolonged period of time. His narrative that the deceased accidentally knocked herself over a stool was excluded by Dr Javangwe's medical evidence. In any case, common sense tells us that if she landed on her side with her head tilted then she would not have sustained the head injuries that she had. We therefore reject the accused's version as palpably false.

### **Common Cause factors**

From the state's evidence and the defense's arguments the following facts became common cause:

1. On the 8 November 2021, the deceased and the accused had a disagreement in their bedroom after electricity had been restored.
2. The accused physically assaulted the deceased. The screams, cries and groans of the deceased attracted the attention of the landlady Montrina Mapetese who came to check up on the two. The accused assured her that all was well and refused her access to himself or to the deceased. The accused literally rejected help from Montrina.
3. The accused sought help from Knowledge Masherani who refused to assist as he did not want to be involved.
4. Accused called his brother Vincent Gumede for assistance and was advised to render first aid to the deceased whilst Vincent and his wife Philomina made their way to the accused house.
5. All attempts to render any help were fruitless until the ambulance crew called in by the police pronounced the deceased dead at the scene.

6. There is no eye- witness to the incident that took place between the accused and the deceased in their bedroom.
7. The deceased died at the scene. The cause of her death was diffuse brain injury with evidence of blunt force to the head injury and consistent with positional asphyxia.

### **The issue for determination**

Given the above common cause facts, the only issue which falls for determination in this trial is whether accused had the requisite *mens rea* to commit the crime. The prosecutor was adamant that the chain of events as narrated shows that he did whilst the defence maintained that he did not. In view of this we proceed to analyse the witnesses' evidence in so far as it deals with the intention of the accused while also assessing if there was provocation. Although the accused did not explicitly state in his defense outline that he was provoked we observed that in his evidence he attributed his assaults on the deceased to provocation. In his closing submissions he placed significant emphasis on this point prompting the need to carefully analyze the issues in order to determine whether it amounted to provocation.

For expediency we will start with the issue of whether the accused was provoked

### **The defence of provocation**

The Criminal Law Code provides that the defence of provocation can only serve as a partial defence to the crime of murder. The accused's defence in this case will therefore be assessed against the statutory requirements of the defence of provocation.

S 239 of the Criminal Law Code provides that:

- (1) If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realization referred to in section forty-seven, the person shall be guilty of culpable homicide if, as a result of the provocation—
  - (a) he or she does not have the intention or realisation referred to in section forty-seven; or
  - (b) he or she has the intention or realization referred to in section forty-seven but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control.
- (2) For the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that—
  - (a) he or she did have the intention or realization referred to in section forty-seven; or

- (b) the provocation was not sufficient to make a reasonable person in the accused's position and circumstances lose his or her self-control; the accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided for in section two hundred and thirty-eight."

As can be seen, the provision states that provocation can be a partial defence to murder. In other words, it cannot completely exonerate an accused from liability. There is a two-stage approach in applying the defence. The first stage is to decide whether:

1. The accused had the intention to kill or the realization that death could occur when he or she reacted to the provocation. If the accused did not have the intention or realization, he or she will not be convicted of murder but of culpable homicide. If the accused had the intention to kill or the realization that death could occur, the court will proceed to the second stage, which is to decide:
2. Whether the accused lost his or her self-control and killed the deceased in circumstances where even a reasonable person faced with that extent of provocation would also have lost self-control. If the accused lost self-control in circumstances where a reasonable person would also have lost self-restraint, the accused will be entitled to the partial defence and will be found guilty of culpable homicide: see Prof G Feltoe *Commentary on the Criminal Law (Codification and Reform) Act* [Chapter 9:23] Legal Resources Foundation, 2<sup>nd</sup> Edition 2012 @ p 216.

*In casu*, the alleged provocation related to the deceased's delay in preparing supper and her subsequent retort that she might as well have been talking to her boyfriends. Besides this we have no other details. It was just this statement and her unwillingness to prepare the meal that supposedly triggered the rage in the accused and caused him to attack her. In the court's view even if it were to be admitted that the allegation is what happened, it is brazen unreasonableness for the accused to have reacted in the manner he did. A single boyfriend with a name would be more provocative than the mention of just boyfriends. Coming from a background of having had a pleasant day together one could assume that it was more the alcohol that gave way to proper reasoning than provocation. If anything we were told by the accused himself that he had a happy marriage. It therefore defies logic that the accused could have been provoked by the mere mention of the word boyfriends when in reality his marriage was joyous. Instead a reasonable person would have asked the deceased to repeat and explain what she meant by that statement before he reacted. We conclude that this kind of

provocation, if it was provocation at all, was insufficient to trigger rage in any reasonable person. We hold instead that the raising of such a defence at the eleventh hour might have been an afterthought meant to try and defend the indefensible. He clearly did not take it seriously, hence his silence about it at the initial stages of his arrest and defence. That also possibly explains why the accused only told Philomina about the issue of infidelity. To the others he only mentioned the delays in cooking supper.

The medical evidence on the other hand leaves us in no doubt that the accused intended to kill the deceased or at the very least realized the real risk or possibility that death might ensue but nevertheless continued. The accused in his evidence voluntarily disclosed that the deceased was diabetic as well as morbidly obese. She weighed approximately a hundred kilograms. For him to have then assaulted her and pushed her around in a room full of furniture items left us in no doubt of that he subjectively realized the risk or possibility of causing death. The evidence points to that he was the aggressor. After assaulting her and bashing her head on to the floor he pulled out braids from her head and sat on her causing her to be deprived of oxygen over a period of close to forty minutes. That prolonged period and the indiscretions described in earlier paragraphs illustrate his intention to assault and injure the deceased. He clearly had the requisite intention to commit murder.

From the foregoing we are convinced that prosecution managed to prove beyond reasonable doubt the accused's guilt on the charge of as required by law. **He is accordingly found guilty of murder as charged.**

*Tabawa & Marwa, accused's legal practitioners*  
*National Prosecuting Authority, State's legal practitioners*