

THE STATE

versus

CHIMANGAIDZO NDOU

HIGH COURT OF ZIMBABWE

MAWADZE J,

MASVINGO, 9, 19, 11, 20 NOVEMBER, 2017 AND 9 FEBRUARY 2018

Assessors

1. Mr Mutomba
2. Mr Mushuku

Criminal Trial

M. Tembo for the state

C. Maboke for the accused

MAWADZE J: The accused is facing the charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

The charge is that on 25 October 2016 in Chali Village, Headman Gezani, Chief Sengwe, Chiredzi, Masvingo the accused struck the now deceased Lawrence Mutileni twice on the head with an axe handle causing his death.

Both the accused and the now deceased were fellow villagers in Chali village.

On 25 October 2016 the now deceased proceeded to the accused's homestead where he found the accused and his wife present. The purpose of the visit was to deal with the issue of the alleged infidelity between he now deceased and accused's wife one Mavis Maringa.

The state alleges that the now deceased approached the accused to inquire into the rumour allegedly spread by the accused that the now deceased was having a love affair with the accused's wife. It alleged that a misunderstanding arose between the accused and the now deceased. During the ensuing altercation the accused is said to have taken an axe or hoe handle. Accused is said to have first struck the now deceased with the hoe handle on the head causing him to fall down and delivered a second blow as the now deceased was lying down. It is the state case that the accused picked a stone to further attack the now deceased

but was restrained by his wife Mavis Maringa. According to the state the now deceased sustained two deep cuts on the head. The now deceased managed to proceed to Alice Chauke's nearby homestead from where he was taken to Davata clinic and later transferred to Chikombedzi hospital where passed on the following day on 26 October 2016 as a result of a skull fracture.

The accused in denying this charge raises two defences, one of self-defence which is a complete defence and the partial defence of provocation.

The accused alleged that when the now deceased came to the accused's homestead he alleged that the accused was a rumour monger who was propagating the allegation that the now deceased was having an affair with the accused's wife Mavis Maringa. The accused said realising the sensitivity of the matter he suggested that they proceeded to the village head to discuss the matter but the now deceased who had no shirt and armed with hoe handle refused insisting that they should discuss the matter. The accused said he obliged and called his wife Mavis Maringa who was the centre of the discussion. The accused said he then asked his wife if she was in an adulterous relationship with the now deceased. The accused said the response by his wife was to the effect that the now deceased had raped her whilst the two of the were herding cattle in the grazing area. The accused said the now deceased then retorted that the sexual act had hardly lasted five minutes. This sparked an altercation between the accused and the now deceased. The accused said the now deceased then took a hoe handle in a bid to assault the accused. The accused said he disarmed the now deceased and proceeded to hit the now deceased with the hoe handle on the head. Accused said due to the blow the now deceased fell and hit his head against a 3 legged pot which was nearby and sustained head injuries. The accused said the now deceased got up and proceeded to him home. It is the accused's contention that he was provoked by what the now deceased said admitting to having been intimate with the accused's wife Mavis Maringa. The accused said he acted in self-defence when he assaulted the now deceased.

A total of 3 Exhibits were produced by consent being;

Exhibit 1 the post mortem report; Exhibit 2 accused's confirmed warned and cautioned statement and Exhibit 3 an affidavit on the details of the hoe handle.

The post mortem report was compiled by Dr Lavaia Keith who examined the now deceased's remains on 31 October 2016 at Chiredzi General hospital. The doctor noted the following;

- i. that the now deceased has blood clots in both the ears and nostrils
- ii. now deceased had a laceration on occiput
- iii. there were no long bone fractures noted
- iv. the cause of death was base skull fracture

Dr Lavaia Keith gave *viva voce* evidence further explaining the contents of the post mortem report. He explained the cause of death was the fracture of the lower most part of the skull described in medical terms as base skull fracture. In brief he explained that the skull bones protect the brain and that the base skull is where vessels and nerves from which the functions of the human body are passed in and out. According to the doctor the bloods clots in the nostrils and ears were indicative of base skull fracture. The doctor's view was that in order to inflict such an injury a blunt object would be used with a lot of force. The doctor said a hoe handle could inflict such an injury or even where the deceased hit against a hard object like a 3 legged pot.

The testimony of the doctor was not contested. The cause of the now deceased's death is therefore not in issue. It was the base skull fracture. What is in issue is how the now deceased sustained that base skull fracture.

As per Exhibit 3 the hoe handle in issue 80 cm long, the weight is 837g and the diameter is 7 cm. We accept the doctor's evidence that such a hoe handle which a blunt object could cause base skull fracture. The accused admits using the hoe handle but seems to allege that it was not the source or cause of the now deceased's fatal injuries. Instead the accused said it was the 3 legged pot.

The accused's confirmed warned and cautioned statement Exhibit 2 is somewhat different from the accused's defence outline and evidence. In that statement the accused said;

"I admit the charge of murder of the deceased. I assaulted him which resulted in his death. The reason being that the deceased was in a love affair with my wife. I did not intend to ask him about the issue concerning my wife, but instead it is him who came to my homestead to ask me about his love relationship with my wife."

What is pertinent to note is that in that statement the accused seems to admit to have inflicted the fatal injuries on the now deceased and that those injuries were the proximate cause of the now deceased's death. The other notable aspect in that statement is that the accused did not state that he acted in self-defence at all. A proper reading of that statement would suggest that what provoked the accused was the alleged love affair between the now deceased and accused's wife as the accused did not, in that statement, refer to any provocative utterances by the now deceased like that the sexual act hardly lasted 5 minutes or even mere admission of the alleged intimacy. In fact, nowhere in that statement does the accused refer to the alleged rape of his wife by the now deceased. The impression as per that statement suggests that the accused's wife and the now deceased were in love. Lastly, in that statement the accused did not mention at all that the now deceased was fatally injured when he hit his head against a 3 legged pot. No such pot is mentioned. These disparities between the accused's evidence and confirmed warned and cautioned statement indeed create problems for the accused's case. It puts into issue the truthfulness of the accused's version.

The evidence of Brenda Ndavani, Foster Mutileni, Elizabeth Matsimbi and Cst Ralph Chivenge was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. For the completeness of the record their evidence as follows;

Brenda Ndavani, Foster Mutileni and Elizabeth Matsimbi all resided in the same village with the accused and the now deceased. Cst Ralph Chivenge based at Chikombedzi just witnessed the recording of accused's warned and cautioned statement Exhibit 2. Brenda Ndavani regarded the now deceased's as a brother in law. Her evidence is to the effect that the now deceased came to her homestead on 25 October 2016 already injured. She helped to clean the now deceased injuries which were deep cuts on the head. She advised fellow villages of the now deceased's serious injuries and that Polite Matsimba and Foster Mutileni took the now deceased away.

Foster Mutileni regarded the now deceased as her uncle. She too met the now deceased who already had been injured. Her role was to assist together with Polite Matsimbi to take the now deceased to the now deceased's mother one Esnath Chauke.

Elizabeth Matsimbi a cousin to the now deceased visited the now deceased at Davata clinic. She noted the two deep cuts on the now deceased's head and made a police report at

Davata police base. She confirmed that the now deceased was on the same day transferred to Chikombedzi hospital where he passed on the next day 26 October 2016 in the afternoon.

The now deceased's wife Portia Chauke and the investigating Officer Cst. Russel Chigudu gave *viva voce* evidence. This is an addition to the *viva voce* evidence of Dr. Keith Lavaia which we have already alluded to. We now deal with the evidence of Portia Chauke and Cst. Russel Chigudu.

Portia Chauke (Portia)

Portia is the now deceased's wife. She was employed at 18 Cornershop as a shop attendant and had been married to the now deceased for 5 years. They had one child. She did not witness how the now deceased was fatally injured but was well known to the accused.

Portia testified that a week before the death of the now deceased the accused visited her consecutively at her workplace on two days whose date she could not specifically recall.

She said on the first occasion the accused told her that her husband the now deceased was in love with his wife. As she was not aware of this she simply told the accused to discuss that issue with the now deceased instead of her. She nonetheless was hurt but did not disclose it to her husband the now deceased.

Portia said the following day the accused again approached her and made similar allegations. She realised the accused was angry as he made threats to kill her husband the now deceased saying he would thereafter dispose of his body. Realising the seriousness of the matter she decided to confront her husband the now deceased about accused's allegations. According to her the now deceased was taken aback as he denied being in love with the accused's wife. Instead her husband the now deceased indicated that he was proceeding to confront the accused and inquire about the allegations.

Portia testified that moments later after the departure of her husband she received word that her husband the now deceased had been injured and was admitted at Davata clinic. Since she was still angry about the alleged love affair between her husband and the now deceased she could not bother to visit her husband at Davata clinic. She was advised of her husband the now deceased's death the next day. Portia has since gone back to her maiden home.

Mr Maboke for the accused did not meaningfully challenge Portia's evidence in cross examination. It was only in his written closing submissions that he urged us to disregard Portia's evidence who he labelled as a liar. We are however at pains to find any plausible reason as to why Portia would lie in her evidence. Her testimony clearly explains why the now deceased confronted the accused about the allegation that the now deceased was in love with accused's wife, a confrontation confirmed by the accused himself. How else would the now deceased have known that the accused was making such an allegation or harboured such a suspicion. It is clear from Portia's evidence why the now deceased ended up at the accused's residence. We are therefore inclined to accept Portia's testimony moreso as we find no motive for her to fabricate the visits by the accused. The accused himself does not dispute that he harboured the suspicion that something untoward was going on between the deceased and his wife.

Cst Russel Chigudu (Cst Chigudu)

Cst Chigudu was based at ZRP Chikombedzi and is the investigating officer.

Cst Chigudu said a case of assault was first reported against the accused at Davata police base. As a result, he proceeded to Davata clinic where the now deceased was admitted but was unable to get the now deceased's version of events as the now deceased was seriously injured and could no longer talk. All he observed was the two injuries on the now deceased head, one on left side of the head which was more of a laceration and the other a deep cut at the back of the head. Due to the serious nature of the injuries the now deceased was transferred from Davata clinic to Chikombedzi hospital the same day on 25 October 2016. By then other police details had arrested the accused on assault allegations that same day.

Cst Chigudu said thereafter he proceeded to accused's homestead where he inquired from the accused's wife what had happened. The accused's wife indicated to him where the accused and the now deceased were seated discussing the issue, the place the accused took the hoe handle, the places the now deceased fell after being struck with the hoe handle on both occasions and the 3 broken pieces of the hoe handle. He later learnt of the now deceased's death the following day. The accused by then was in remand in prison.

Cst Chigudu said he then collected the accused from prison for purposes of further investigations and indications as the accused was now facing a more serious charge of murder. He said the accused explained to him that he had suspected that his wife was in love with the now deceased after he had seen the now deceased and his wife herding cattle together in a bushy area. Cst Chigudu asked accused's wife about the accused's allegations and she denied being in love with the now deceased.

As per his investigations Cst Chigudu said the accused did not allege that he, the accused, had fought the now deceased but had simply struck the now deceased with a hoe handle. The same version was confirmed by the accused's wife. He said neither the accused nor his wife mentioned that the now deceased had hit his head on a 3 legged pot and that no one mentioned or showed him that 3 legged pot. In fact, he said both accused and his wife agreed that the accused had delivered two blows with the hoe handle which got broken. The accused's wife added that the accused had thereafter picked a stone to further attack the now deceased but she restrained the accused. The accused also made indications at the scene.

The only issue *Mr Maboke* for the accused took issue with when he cross examined Cst Chigudu relates to the language accused used during the investigations and indications. Cst Chigudu said although the accused was conversant with Venda language he also fully understands and speaks Shona. No other questions were put to Cst Chigudu.

We were urged by *Mr Maboke* for the accused in his closing written submissions to disregard Cst Chigudu's evidence as irrelevant to what is in issue. We do not share that view. Cst Chigudu's testimony corroborates what the accused said in his confirmed warned and cautioned statement on the material aspect of how the now deceased was injured. His testimony contradicts the accused's version. Further, it is incorrect that all what Cst Chigudu said is hearsay evidence. His evidence explains how the broken pieces of the hoe handle were recovered and the nature of the injuries sustained by the now deceased. This is not disputed by the accused. His testimony further discounts the accused's version that the now deceased hit his head against a 3 legged pot. Again we are inclined to accept Cst Chigudu's evidence.

The accused's evidence

We have already alluded the accused's defence outline which version he adopted in his evidence. The accused's version is simply that it is the now deceased who came to the accused's homestead on 25 October 2016 asking the accused about the gossip that the now deceased was in love with accused's wife. He said the now deceased seemed poised for fight as he had a hoe handle and was without a shirt. What is missing from the accused's version is how this gossip had started in the first place. The state case is clear that it is accused who first made such allegations to Portia the now deceased's wife which prompted the now deceased to proceed to accused's residence to ask him about such allegations.

The accused's evidence is that he felt disrespected by the now deceased to be approached at his residence and asked about such an issue. We are pains to appreciate why the accused would feel disrespected if all what the now deceased wanted to know was the basis of the accused's suspicions.

What we find intriguing is the accused's version that during this discussion the accused's wife said the now deceased had raped her. The accused said his wife said while she was herding cattle in the bush with the now deceased, the now deceased had dragged her into some bush where he caused her to bend and forcefully had sexual intercourse with her. The accused said the now deceased did not dispute this but simply retorted that the sexual act hardly lasted 5 minutes thus further provoking the accused, resulting in an argument. What we find baffling is that how would the accused had known about this alleged rape if his wife had not hitherto disclosed to him the sexual act? Further if this is what had happened and was a secret between the now deceased and accused's wife why then would the now deceased approach the accused. The accused's version of events is not only illogical but cannot possibly be true. This explains why it is different from the version the accused gave in his confirmed warned and cautioned statement.

In relation to the assault the accused's version is that it is the now deceased who took the hoe handle during the argument intending to strike the accused. The accused said he then disarmed the now deceased. The accused said he then struck the now deceased on the left side of the head with the hoe handle causing the now deceased to fall on his back. The now deceased bled from the head as he hit his head against a 3 legged pot. The accused denied that the hoe handle he used got broken.

We are inclined not to accept accused's version for a number of reasons. Firstly, if this is what had transpired the accused would have told Cst Chigudu such a version and include it in his confirmed warned and cautioned statement on how the now deceased was injured. The accused would not have failed to make such material disclosures which were central to the police investigations. The conclusion we make is that this latter version by the accused is a sanitised one and an afterthought.

Even if we were to accept the accused's version we wonder why the accused alleges he acted in self-defence as defined in s 253(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. If the accused had disarmed the now deceased of the hoe handle it meant, he had he had thwarted the alleged attack? Was it then reasonable in the circumstances to proceed to strike the unarmed now deceased with a hoe handle in the head? What makes the accused's version clearly improbable is that he hit the now deceased on left side of the head how and the now deceased fell on his back? The laws of motion dictate that the now deceased would in all probabilities have fallen on his side. It is also crucial to note that the issue of the 3 legged pot only arises now in accused's evidence in court. The bottom line is that the accused's version factually falls far short of meeting the requirements of self-defence in our law. Such a defence can therefore not succeed in the circumstances.

Our view is that although no eye witness testified on how the now deceased was fatally injured the accused himself concedes that he struck the now deceased on the head with the hoe handle. We have already discounted the possibility that the now deceased fell on to a 3 legged pot. The accused's motive was clear from Portia's evidence. He harboured unfounded suspicion that something improper was going on between his wife and the now deceased. Indeed, the suspicion was baseless hence the accused's various explanations that he suspected a love affair but later on said his wife was raped.

The accused has not discharged the evidential onus thrust upon him in terms of s 256(1) of the Criminal Procedure and Evidence Act [*Cap 9:07*] for him to successfully distance himself from his confirmed warned and cautioned statement.

We wish to comment briefly on the accused's unwillingness to allow his wife to testify as a state witness. Further accused did not even call his wife as a defence witness. Both counsel placed reliance on s 247(2) of the Criminal Procedure and Evidence Act [*Cap*

9:07]. I understand counsel's interpretation to be a wife or husband can only testify against her spouse in a murder case with the consent of the accused spouse. This is a matter which may require further argument and research but my immediate view is that this provision does not at all bar a spouse from testifying against the other even in a murder case even without the consent of the other spouse. I believe what it means is that a spouse in such a scenario should be properly warned by the court and would not be obliged to answer certain questions which are directly material to the marital relationship. As I said this is food for another day.

Our conclusion is that the accused has dismally failed to lay the factual basis that he acted in self-defence. In fact, that assertion is clearly false. The same goes for the accused's allegation that he was provoked as is provided in s 239(1) Criminal Law (Codification and Reform Act [*Cap 9:23*] which is a partial defence to a charge of murder. The accused has dismally failed to show how he was provoked by the now deceased but has sought to mislead the court as regards the basis of the alleged provocation. No wonder why accused blows hot and cold by alleging a love affair between his wife and the now deceased but in the same breath alleges forced sexual act.

We are satisfied that the accused struck the now deceased with the hoe handle twice on the head. The accused delivered two blows one on the side of the head and the other at the back of the head. Severe force was used as the hoe handle broke into 3 pieces. This resulted in basal skull fracture which is the proximate cause of the now deceased's death. Whatever the accused's motivation was he did realise that there was a risk or possibility that such a brutal assault may cause death but nonetheless proceeded to assault the now deceased in that manner oblivious of such a risk or possibility. We are inclined to find the accused guilty of murder with constructive intent.

VERDICT: Guilty of contravening s 47(1)(b) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] :- Murder with constructive intent.

SENTENCE: 14 years imprisonment.

National Prosecuting Authority, counsel for the state

Ruvengo Maboke & Company pro deo counsel for the accused