

STATE
versus
ANESU MAFOKOSHO

HIGH COURT OF ZIMBABWE
MWAYERA J

MUTARE, 24 September 2019, 25 September 2019, 16 October 2019, 12 November 2019,
19 November 2019, 2 December 2019, 6 December 2019, 4 March 2020

Criminal Trial

ASSESORS: 1. DR SANA
2. Mr A. T. CHAGONDA

Mrs J Matsikidze, for the State
C. Ndlovu assisted by Ms T Mafusire for the Accused

MWAYERA J: The accused pleaded not guilty to a charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], (The Criminal Law Code). In which it is alleged that on 24 December 2018 at House Number 1892, Chikanga 2, Mutare, the accused unlawfully caused the death of Vitalis Mudhumo by striking him with an axe on the neck several times intending to kill the said Vitalis Mudhumo or realising that there was a real risk or possibility that her conduct might cause death and continued to engage in that conduct despite the realisation.

The brief allegations forming the basis of the charge are as follows. The deceased and accused were husband and wife respectively. They were on separation and had one minor child. On the fateful day the estranged couple took their daughter for shopping in town. Upon their return when the couple entered their bedroom an argument ensued culminating in the accused hacking the deceased several times with an axe at the back of the neck thereby killing him instantly. The deceased died as a result of excessive external haemorrhage. The accused in her defence outline did not dispute the factual allegations leading to the striking of the deceased on the neck with an axe. She however contended that she had no intention, actual or legal to kill the deceased. The accused's defence was that she without giving thought struck the deceased whose utterances inclusive of announcement that the marriage

was over pierced her heart and shattered her dreams. The accused's defence was that she looked up to the deceased, her husband as her life support and pinned all hopes on him given her poor background. The deceased instead after marrying her started dating other women and on the fateful day among other insults he announced that the other city woman he was dating was better than her in all exploits. The insults and thought of losing her marriage enraged her extensively and she was gripped with the irresistible impulse to hurt the deceased whom she then struck with an axe and he died.

The accused in summary attributed the commission of the offense to the effects of the poor childhood background and the traumatic and abusive marriage. She insisted she had no intention actual or legal to murder the deceased. In closing submissions the defence sought to rely much on the defence of extreme provocation sufficient to reduce the specific intent crime of murder to a non-specific intent crime of culpable homicide. The accused was the only witness who testified in the defence case. The state on the other hand adduced evidence from 10 witnesses of which 5 gave oral evidence while the other 5's evidence which was on common cause aspects was admitted formerly in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

George Sithole a member of the Zimbabwe CID Scenes of Crime Department's evidence was basically that he attended the scene and observed the deceased body in a pool of blood. He observed 5 deep cuts on the back of the deceased's head. He recovered the murder weapon a metal axe tendered as exh 2. The witness was also involved in taking photographs at the scene on the fateful day and later when accused made indications. Photographs marked as exh 4A1 – A5 by consent. The witnesses' evidence on his observation of the lifeless body of the deceased on the bed was confirmed by Ivy Mutsago another police detail who also attended the scene. The evidence of the details was similar to that of Joel Rukara a police detail who also attended the scene. The investigating officer Loyce Chokani's evidence detailed how she investigated the matter, made follow ups and arrested the accused who was by then at her rural homestead in Chigodora. The witness recorded a warned and cautioned statement from the accused. She also drew a sketch plan exh 2 as per indications from the accused and witnesses. The witness also caused the metal axe the murder weapon to be weighed by the post office officials. The investigating officer's evidence was not contentious and it was formerly admitted. Also formerly admitted was evidence of Kiven Matengera who weighed the axe and compiled a certificate of weight recorded as exh 3 by consent. The metal axe weigh 4.030kg.

Mollen Mafokosho a sister to the accused gave oral evidence. Her evidence was straight forward and clear. She could hear that the accused and the deceased who were in the confines of their bedroom were arguing but could not discern the nature of the argument. She took the couple's child outside. Whilst outside she overheard the deceased call his nephew Trouble Chivasa to come to his assistance since the accused had locked him in. According to the witness the accused later came out holding a container of water and went out of the campus leaving instruction that the witness should take care of the child as the accused was visiting a friend. After about 10 minutes after leaving the house, the accused called on the mobile phone and instructed the witness to get inside her bedroom and see what the accused had done. Upon entry the witness just like the attending police details observed blood on the floor, bed and wall while deceased's lifeless body was on the bed. She then alerted the landlady and Trouble Chivasa of her observations. The witness gave her evidence well. Although she was shocked by the horrendous attack she gave evidence with clarity considering she was a juvenile.

Trouble Chivasa is an uncle to the deceased by virtue of marriage to deceased's aunt Mavis Chivasa also gave oral evidence. He confirmed receiving a call from the deceased on the fateful day and further being alerted by Mollen Mafokosho of what had happened. The accused also phoned the witness disclosing that she had killed the deceased. The witness confirmed that the accused and deceased relationship was no longer cordial as the accused tended to be of violent disposition and that on occasions the relatives had stepped in to assist but the relationship appeared to be on a sliding slope, culminating in the deceased moving out of the rented matrimonial home. The witness did not witness the actual killing of the deceased. His evidence was clear that the couple's relationship was no longer good hence the separation. The witness was sincere with the court in the manner he testified even under cross examination by the defence counsel.

Lucia Vhurandi: - the landlady also testified. She knew both the accused and deceased. She was alerted of the fatal attack of the deceased by Mollen Mafokosho, whereupon she proceeded to the bedroom and observed the deceased's body. The witness told the court that the deceased was generally quiet and she could only see him on rare occasions. From her observation going by the mode of dressing and lifestyle the accused was well catered for by her husband. She had never in the past witnessed the couple engage in volatile exchanges verbal or physical. The accused had also never shared with her that she was tormented physically, emotionally and financially. All appeared well. She denied having

witnessed the accused engage in firewood selling business when it was suggested by defence counsel. She actually stressed that at the relevant period there was no power outage such that firewood was not necessary. The witness was viewed as a candid witness by the court. She was shocked by the gruesome attack as evidenced by her narration of observations of the cuts on the head but clearly had no motive to mislead the court. We accepted her evidence wholesome.

Mavis Chivasa: - an aunt to the accused and wife to the second state witness Trouble Chivasa also gave oral evidence. Her evidence was basically that she received a call from the deceased alerting her that he had been locked indoors by the accused. She advised the deceased to contact Trouble Chivasa. She later got a call from the accused informing her that she had killed the deceased. The witness confirmed that the couple's relationship was acrimonious and that the relatives had intervened to restore normalcy but to no avail. The couple was at the relevant time on separation. The witness was visibly angry and emotional about the death of the deceased to the extent of at times failing to answer questions and insisting on getting an explanation why the accused killed the deceased. This emotional stance however did not cloud the common cause factual aspects that the accused and deceased were no longer enjoying good relations as husband and wife and thus were on separation.

The accused person as a witness did not deny striking the deceased severally and severely in the heard as observed by all witnesses inclusive of the Doctor Stephen Murahwa who also compiled the Post Mortem Report exh 1. She however sought to portray that she was tormented and physically, emotionally and economically abused over a stretched period with the result of the losing it and striking the deceased with an axe culminating in his death. The accused as a witness did not fare well as she came up with diverse explanations of possible pressure mounting on her leading to psychological breakdown. She painted a picture that she was raised from a very poor background and that the poverty had a bearing on her such that when she found deceased who had a good and stable income she believed salvation had come. Contrary to her assertion that she was from a very poor background is the obvious evidence from her that her father was employed and in town while we mother and children where in the communal area working in the fields. The evidence of the sister Mollen Mafokosho is clear on the social standing of the family. In fact even the accused did not believe in her suggestion of the poverty as she dreaded and was very apologetic to appear like insulting the father for alleged poverty. In short we observed that the accused was

exaggerating the poor background which when all evidence is considered was fictitious. She grew up in an average rural family like most citizens in the communal area. There is nothing weird about doing piece work and working in the fields. She further suggested trauma because of earlier breakups. Having had affairs in the past and termination thereof again is a normal phenomenon of growing up into manhood or womanhood. These exaggerations of adverse childhood experiences and imagined poverty were not taken as having caused the accused to hack the deceased. To that extent we viewed accused's explanations as not only being false but as lacking sincerity. The building up of psychological trauma having triggered the commission of the offense again faces a challenge when one considers events immediately before the hacking. The deceased went for Christmas shopping for the couple's child. It is common cause the accused, her sister, the child and the deceased went together. The accused was not ready to accept anything for herself and offered that her sister gets items bought instead. The couple was not on talking terms as accused was not willing to accept gifts. When they got back home and the accused invited deceased indoors. Whilst inside accused locked the bedroom door. The axe was pulled from under the bed by the accused and the deceased who was fiddling with his phone was struck giving a picture of him least expecting the attack. The axe was already in the bedroom as if placed there in anticipation of the eventual use. We discarded the accused's story that the axe was for chopping firewood a business enterprise not only because the land lady did not witness the sale but also because there was no basis for keeping the axe under the bed. These events immediately before the fatal blows disrupt the alleged sudden trigger of loss of self-control and depicts a clearly thought out process.

It emerged as trial progressed accused seemed to have abandoned psychological disintegration at the time of commission of the offence for lack of scientific evidence. See *S v Stephen* 1992 (1) ZLR 115 HC and also *S v Chikondiwa* HH 281/17 wherein HUNGWE J (as he then was) discussed the issue of onus on the accused to prove mental incapacitation remarked that:

"In discharging the onus upon it the state is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to a reasonable doubt as to the voluntary nature of the alleged *actus reus*."

See also *S v Stephen* 1992 (1) ZLR 115 and *S v Pamela Mashungu* HH 357/13. The common thread that runs through the cited cases is that where a plea of diminished criminal

liability is raised on the basis of overwhelming severe psychological and emotional stress the medical and or scientific evidence to support such assertion must be availed failing which the inference of sanity must prevail. *S v Ticket* 1973 (3) SA 526, *R v Romeo* 1991 (1) SCR 86 and *R v Chalk* 1990 3 SCR 1303 the accused is presumed sane until the contrary is proved. *In casu* the accused as trial progressed and in closing submissions on realisation of lack of scientific evidence shifted more to excess provocation as having triggered the hacking of the deceased. The defence of the provocation which the accused sought to rely on is not a complete defence but rather a partial defence which would reduce the conviction to culpable homicide in the event of the court holding that the provocation was sufficient to occasion momentary loss of self-control thus rendering the individual incapable of having the requisite intention, actual or legal. Section 239 of the Criminal Code provides as follows:

“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 cause maybe, with the intention or realisation 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 realisation 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.”

The partial defence is clearly available in circumstances where the provocation is sufficient to negate intention were an individual has been subjected to provocation to the extent of temporarily losing self-control and thus not capable of formulating intention or realising the possibility of real risk then the partial defence ought to be sustained. However in the absence of extreme provocation vitiating intention the defence cannot be sustained. See *The S v Best Sibanda* HB 139/18, *George Isiga v The State* AD 77/76 and *S v Stephen* 1992(1) ZLR 115H.

Ordinarily therefore for this defence to hold, one ought to have been provoked and react spontaneously to the provocation. The reaction has to be on the spur of moment such as to exclude room for reconstruction and consideration of events and then rising to react with clear thought and or realisation. Where there is room for formulation of intention as in this case where there was no instant spontaneous reaction to provocation the defence cannot be sustained. A close look at the evidence reveals that on the fateful day it was not the first time the couple had fallen out. Even the news of breaking up was not new as the parties had previously on numerous occasions sought counsel with relatives but failed to reconcile. The accused was angry over the impending breakup but that does not amount to excessive provocation leading to loss of self-control. In breaking up just like falling in love the

deceased was exercising his right and freedom of association, and such cannot warrant loss of self-control.

Upon considering the totality of the evidence and the events of the day in question. The couple's relationship was no longer cordial. They were on separation. The metal axe a lethal weapon was put in the bedroom beforehand. The gestures to buy clothes for her by deceased were turned down as accused was clearly angry. Once back at home the accused invited the deceased indoors in the bedroom in which the axe was. Whilst inside an argument ensued and accused locked deceased inside. It is not in contention that the deceased called his relatives to come to his rescue as he had been locked in. Assuming the deceased had shown the accused photos of his new lover it was not any news to the accused as she already knew this woman by name. In fact the accused told the court that she was shown ordinary photographs of his other woman and not that she was shown obscene pictures or pictures of the woman and deceased in a compromised position.

The situation is certainly distinguishable from a scenario were a spouse catches their spouse *in flagrante* and on the spur of moment lose it and attack with the loss of mind reducing liability to culpable homicide due to lack of intention. In this case the accused built up tension within herself and took the opportune time to strike in revenge when the deceased least expected as he was struck while fiddling with his phone seeking rescue having been locked in.

There is no evidence even from the accused that the deceased defended himself as the event was impromptu and vicious on an unsuspecting individual. The vicious attack was targeted on the neck and head. Going by the weapon used, a metal axe on the body parts to which blows were directed to the neck and head the obvious outcome is death. Intention is clear from the manner of assault, the weapon used and the vulnerable part of the body to which the assault was directed. See *S v Zorodzai Moyo* HMA 16/17 and also *S v Mema* HB 143/13.

What is apparent from the circumstances of this matter is the fact that the accused was angered by rejection by the deceased over a long period. She did not immediately react but allowed the grudge incubate in herself while awaiting for an opportune time to exert revenge. Such actions do not fall under defence of provocation for the obvious preplanning and execution to exert revenge. The murder weapon was stashed in the bedroom well in advance awaiting the opportune time. When the opportunity arose the accused who was so engrossed in scorched earth policy

and with desire to revenge in the firm belief if I cannot have you no one else can fulfilled her desire to eliminate the deceased.

In the circumstances the accused intended the consequences and thus intentionally struck the head and neck with a lethal weapon metal axe viciously and severally, in circumstances where death was substantially certain.

She therefore cannot escape conviction and is found of guilty of murder with actual intention as defined in s 47 (1) (a) of the Criminal Law (Codification Act and Reform) Act [Chapter 9:23]

Sentence

In passing sentence we have considered all mitigatory and aggravatory circumstances submitted by counsel. In mitigation we have taken note of the fact that the accused is a female first offender. The accused throughout the proceedings exhibited remorse and genuine penitence. She regretted her violent conduct which culminated in the death of a man she loved, husband and father of her child. Also in mitigation is the fact that a 4 year old child is in the cold after the death of the father and the subsequent incarceration of the mother. That the accused has been in custody for a period in excess of a year is a factor which cannot escape our attention in assessing sentence. This is for the obvious reason that pre-trial incarceration is traumatic more so with a murder charge hovering over one's head.

The accused committed the offence at the age of 23. She is a youthful offender. The immaturity could have exposed her to acting on impulse and being easily swayed by external factors is not far-fetched. The accused's youthfulness coupled with her rural background must have propagated her obsession and clinging on to the archaic notion if I cannot have you no one else should at the expense of violating the accused's rights and freedom of choice and association. Also in mitigation is the fact that the accused's moral blame worthiness is reduced by the fact that the relatives did not render the chain of support expected for a young lady facing challenges of rejection. The trauma associated with rejection albeit not reducing criminal liability cannot be ignored when considering an appropriate sentence. The accused is prepared to compensate the bereaved family for the death of her husband, that is a noble gesture but no amount of compensation can bring back the precious human life.

The accused stands convicted of a serious and heinous crime of murder. The attack on the deceased a supposed lover was most brutal and vicious. The accused mercilessly hacked

the deceased several times with a metal axe on the head and neck. The ghastly attack caused loss of precious human life. In the circumstances the deceased died for simply exercising his rights to terminate a love affair. No one has a right to take away another's life for whatever reason. Section 48 (1) of the Constitution is instructive it says

“Every person has a right to life”.

The right to life is a God given right which must not be taken away on whims. No amount of compensation or remorse can bring back the lost precious human life. The deceased's child has been deprived of father love by her mother who murdered the father in cold blood. The murder emanated from the unaccepted social ill of domestic violence. The home has been turned into wrestling and boxing rings with fatal consequences instead of being a place of safe abode and protection. Love can never be expressed by physically assaulting the spouse or other family members. Courts ought to register displeasure and revulsion of domestic violence related murders by passing severe sentences. The circumstances of this matter would call for the maximum penalty. However in due recognition of the youthfulness of accused and that her actions could have been perpetuated and precipitated by lack of guidance and support from the large family and society a reasonably long prison term is considered appropriate.

In weighing mitigatory factors *visa vis* aggravatory factors and matching the offence to the offender it is our considered view that accused be sentenced as follows:

18 years imprisonment

*National Prosecuting Authority, state's legal practitioners
Gonese and Ndlovu legal practitioners, for the accused*

