

STATE
versus
TAURAI NYANGA

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 25 and 27 July 2023

CRIMINAL TRIAL

ASSESORS: 1. Mr Magorokosho
2. Mr Chagonda

M Musarurwa, for the state
F Matinhure, for the accused

MUZENDA J: On 14 August 2022 at Corner Silverton Road and Mbuyanehandanda Street, Jacaranda Market Place, Rusape, accused stabbed Tariro Flageolet Mutumbami with an okapi knife, several times on the upper part of the body killing her instantly. He is now facing a charge of Murder as defined in s 47(1)(a) or (b) of the Criminal law (Codification and Reform) Act, [*Chapter 9:23*].

He pleaded not guilty to the charges and in his defence outline he denies unlawfully and intentionally causing the death of now deceased who was his customarily union wife. He stated further that on that day he travelled from Nyazura to Rusape town with the intention of seeing his daughter who was not feeling well. He did so upon invitation by the deceased. Upon arrival at Jacaranda Market Place, he saw now deceased hugging a man. He felt provoked but remained cool. He then approached the pair and requested to speak to the now deceased, they moved to a place 80m away and at that position the now deceased apologised to accused. The two returned to the market stall and when accused peeped into the now deceased's handbag he saw illicit beers. He took them out of the bag and threw them away. He also saw deceased's boyfriend partaking the identical beer to the ones he had thrown away. He was very angry and concluded that now deceased was cheating on him. In a fit of rage and madness he stabbed the now deceased with an okapi knife. He alleges great provocation which clouded his judgment. When he gave evidence in support of his defence outline, he added that the can hardly recall what he was doing. However he also told the court that after stabbing his wife, he chased after

the alleged boyfriend, he could not catch up with him because a Honda Fit blocked him and took him back to the scene where now deceased was lying dead.

Background Facts

The now deceased was residing at Chitova Farm, Rusape. Accused was staying with his parents at Clare Farm compound, Nyazura. The two had separated but had a four year old daughter who was staying with now deceased in Rusape. Accused travelled to Rusape early in the morning intending to meet now deceased. Upon arrival at Jacaranda Market Place he was welcomed by the daughter as well as by the now deceased who both rose from where they were seated. After a chat between accused and now deceased, the two walked to a place where now deceased had left a bag so as to pick it and proceed to town. Accused then noticed beer containers in now deceased's handbag, threw them away. He then tripped the now deceased who fell on her stomach, pinned her down and stabbed her twice on the neck, once on the left jaw below the ear, once on the right ear, once on the left armpit, once on the forearm, several times on the head, it appears accused delivered countless blows on the now deceased. Now deceased sustained serious injuries, lost a lot of blood, she tried to rise but staggered and collapsed, dying instantly. The post-mortem examination reveals that the cause of death was due to acute anaemia, section of the carotid vessel and severe neck trauma due to stab wounds.

Evidence led by the state

The state applied to court that evidence of witness 1, 3 -12 as it appears in the summary of the state case be admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The defence did not oppose the application and that evidence was accepted as not being controverted by the accused. Batsirayi Musawaya's evidence as per Annexure A, state summary, is to the effect that on the day in question he was at the market place. He witnessed accused opening now deceased's handbag and took 3x200ml bottles of ranger whisky and threw them over the hospital fence. He picked the 3 bottles. He saw accused grabbing the now deceased's neck and tripped her to the ground. She fell on the ground on her stomach. Accused stabbed the now deceased on the throat, right side of the neck, armpit and on the left shoulder. Accused used an okapi knife. The witness threatened accused with a log and he ran away towards the eastern direction. The witness saw that now deceased was lying on the ground, blood oozing from the wounds.

Linda Mutandwa gave oral evidence. Her testimony is identical to Batsitayi Musavaya's evidence. Under cross examination by defence counsel, she denied seeing now deceased hugging a man, she also disputed a suggestion put to her by counsel for accused that the man hugged by now deceased was partaking the same type of whisky as that found in now deceased's handbag. According to this witness, now deceased arrived at the market in the company of a man and now deceased's daughter. She served them and after about 30 minutes accused arrived, now deceased and daughter rose from where they were seated to welcome accused. The witness denied seeing accused giving his daughter and wife pieces of a bun. Takemore Chiringa weighed and measured the knife, its weight is 0,52 kgs, it is 23cm long and the blade is 10cm and handle 13cm long. Most of this evidence was not contested by accused except a few questions put to Linda Mutandwa. An album of photographs was produced by the state, exh 4, showing various stab wounds, all of them are heart-wrenching. Accused's confirmed warned and cautioned statement was produced by the state, exh2, where accused admits stabbing now deceased "after he had seen her grabbing her boyfriend." The post-mortem report, exh 1, on para 16, the pathologist noted a total of 10 stab wounds on now deceased's body stretching from 2cm to 5cm in depth, there was occipital scalp haemorrhagic infiltration around the wounds and the thorax, trachea walls, left lung were wounded. The pictures, exh 4, confirm the external injuries observed by the pathologist.

Issue for determination

The crucial issue for determination is whether accused had the necessary mens rea to cause now deceased's death.

The Law

Provocation

Section 239 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] provides as follows:

"When provocation a partial defence to murder

(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 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.*

(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 realisation 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 in section two hundred and thirty-eight.¹

In the matter of *State v Chigova*² dealing with provocation it was held:

“Appellant went with others in search of his wife to her lover’s home at night, found her naked in bed and beat her savagely with fists and a stick before dragging her before the headman. She died from shock induced by multiple injuries. The provocation was not sudden and unexpected, he had realised she was living with someone else, had travelled a considerable distance and had had time to cool down, he must have expected to find her in that hut at night, probably naked, it was unreasonable to lose his self-control, if he did so objectively there was not sufficient provocation. He must have intended to attack her. The conviction of murder with constructive intent was proper.”

In the matter of *George Tsiga v The State*³ it was said:

“It is of the essence of a defence of provocation that has the effect of reducing the crime from assault with intent to commit grievous bodily harm to common assault or murder to culpable homicide, that the reaction to the provocation must be sudden, in the sense that the person provoked acts on the spur of the moment and in circumstances where he has temporarily lost his power of self-control and does not appreciate what he is doing.”

In *Dezzy Ncube v The State*⁴ it was clearly stated on the question of provocation:

“The human mind does not move logically from one intention to the next. It is capable of entertaining contradictory intents and of disguising them from itself. The emotional response to provocation is difficult to measure, whether subjectively or objectively. I find it difficult therefore to adopt an analytical categorisation of the conduct of the appellant. I would say simply that if she had an intention to kill, it was formulated in circumstances where long-standing and deep provocation was brought to flashpoint by the events immediately preceding the assault. I am satisfied, in the words of FIELDSEND CJ in Nangani’s case, (supra), that

‘...the provocation was such as could reasonably be regarded as sufficient ground for the loss of self-control that led the accused to act against the victim as (she) did.’

and also that

‘...the provocation actually caused the accused to lose (her) self-control.’

In *S v Rusike & Anor*⁵ it was held:

¹ See also the matter of *S v Wilson* 1984(2) ZLR 129 (per Gubbay JA as he then was)

² SC-234-95 per EBRAHIM JA (as he then was)

³ Appellate Division Judgment No. 77/76 per LEWIS JA (as he then was)

⁴ SC 14/87 per McNALLY JA as he then was

⁵ 2019(3) ZLR 446 (S) at 446 D-G per GOWORA J.A. as she then was

“In a murder trial, the intention of the accused is a subjective issue. The evaluation of his intention vis-à-vis the offence must be scrutinised with the accused person in mind. The court cannot embark on an examination of the surrounding circumstances in an objective manner. Any scrutiny of the accused’s conduct must be undertaken within the context of the accused person’s behaviour, thoughts and reactions on the offence. The accused must be taken through every aspect of the critical events for a proper assessment of what his intent was.

Intention in our law takes different forms defined variously as dolus directus, actual intent, dolus indirectus, indirect intention and dolus eventualis, constructive or legal intent. For a trial court to return a verdict of murder with actual intent it must be satisfied beyond a reasonable doubt that:

- (a) either the accused desired to bring the death of his victim and succeeded in completing his purpose; or*
- (b) while pursuing another objective, foresees the death of his victim as a substantially certain result and proceeds regardless.*

The test for both actual and legal intent is subjective and involves a consideration of the personal state of mind of the accused person at the time of commission of the alleged offence. The test is therefore what the accused’s state of mind was at the requisite time, as opposed to what would have been the state of mind of a reasonable man placed in the same situation.”

Applying law to the facts

In addressing the court in his closing submission, accused’s counsel Mr *Matinhure* submitted that from the facts adduced in court the question to be asked is whether the conduct of the deceased at that time sufficient to warrant provocation and whether the accused’s reaction spontaneous to the provocation. He further urged the court not to ignore the hugging by deceased and the alleged boyfriend as well as the specie of liquor found in deceased’s handbag and that which the alleged paramour was partaking. To the defence the conduct of accused falls within the four corners of s 239(1) of the Criminal Law Code (*supra*). He concluded by stating that the State managed to prove a crime of culpable homicide and not murder, he prayed we return a verdict of guilty to Culpable Homicide. The state was happy with its evidence and chose not to address the court nor to respond to accused’s closing submissions.

Most facts are admittedly undisputed. What the court was deprived of by both parties is the status of the marital relationship of the couple as at 14 August 2022. The state mentions in Annexure A that deceased and accused were living in separation. Accused confirms such a situation and added that deceased had acrimonious relationship with accused’s parents. No details were sought nor supplied. This aspect is directly central to the court for us to adjudge appropriately the aspect of provocation defence raised by the accused. If parties had separated and only merged on that date to attend to the ill-daughter, if accused’s version is by any means

accepted by this court, would accused had reacted in the manner he did? Alternatively if deceased was fully aware that accused had heeded her invitation, would deceased be so naïve to be accompanied by a new lover to the rendezvous of the meeting point?

The mystery was resolved by Linda Mutandwa the second state witness. She did not witness deceased hugging a man at the scene. Yes she acknowledged that deceased was in the company of a man and her daughter. Upon arrival she confirmed that she served deceased who bought some drinks and sat at a place with her daughter away from the man who had accompanied him to the market place. The man stood at a distance smoking and not holding or drinking any liquor. Linda virtually disputed accused's fact which he sought to build his defence. No one supports it in form of a testimony. The assault occurred in the early hours of the day approximately around 0800 hours, Linda was an impartial witness, she did not know either accused nor deceased, she crisply narrated what she observed and she further told the court under cross-examination that it was not a busy day and paid attention to the events that crucially led to the demise of the now deceased. She gave her untainted evidence very well and remained cool and forthright under cross-examination by the defence. We have no hesitation in accepting her evidence.

On the other hand accused under cross-examination by the state dithered and prevaricated on what was the proximate cause of his provocation. Was it the hugging or the discovery of beer bottles in deceased's bag? He became tongue tied. At the time accused closed his defence case the court remained in darkness as to what really provoked the accused. According to accused, he put aside the hug and seemingly remained calm, later he accepted deceased's apology and then decided to go back and collect the handbag in order to proceed to town. All of a sudden after throwing the beer bottles he fell deceased, pinned her neck to the ground and numerously stabbed her all over the body. After carefully looking at the circumstances of the matter before us, we dismiss accused's version as palpably improbable and untrue. He did not see deceased hugging a boyfriend at Jacaranda Market place or anywhere, where Linda Mutandwa was selling her goods, he did not see the alleged boyfriend partaking liquor. It appears accused had some undisclosed grievance against the deceased. Nothing turns up from the adduced facts to trigger elements of provocation. Accused greeted the deceased and welcomed his daughter in a cool manner contrary to one who is remarkably seething with anger. For a defence of provocation to be assailable it must be sudden, to the extent that a provoked person acts on the spur of the moment in circumstances where he has

temporarily lost his power of self-control and apparently from the manner he would act, exhibits that he does not appreciate what he is doing (See *G. Tsiga v State (supra)*).

It is true that a human mind does not move logically from one intention to the next but facts as witnessed by officious bystanders must point to an accused behaving extra ordinarily out of this world and when one looks at the instant case accused had all the chances to cool down and control himself particularly at the time he had perceived the “hug” between deceased and an unidentified companion. We have come to a firm conclusion that accused’s defence of provocation has not been established, we reject it. On 14 August 2022 accused travelled from Nyazura to Rusape. He met now deceased, tripped her and brutally and fatally stabbed her to death. Accused had premeditatedly planned the attack, he chose to carry a lethal weapon, an okapi knife, fell deceased and strategically chose fairly dangerous vulnerable parts of the upper body, the head, the neck, the chest or thorax to stab a record of ten times as observed by the doctor. Deceased instantly succumbed to the stabs and died on the spot. Our evaluation of accused’s intention *vis-à-vis* the accused is very un-mistakenly that accused’s behaviour, thoughts and reaction at the scene is that accused desired to bring the death of his wife and succeeded in completing his purpose. It appears he was piercing an animal and fully aware of his purpose he stabbed obvious fatal points of the victim’s body. We have no doubt in our minds that accused is found guilty of Murder as defined in s 47(1)(a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

Sentence

In arriving at an appropriate sentence I will take into account all the aggravatory and mitigatory aspects submitted by the parties. I will also look at the post mortem report, the pictures of the now deceased taken after the offence. I will also focus on the personal circumstances of the convict, the period he had been in custody.

Section 47(3) of the Criminal Law Code regards as aggravatory the fact that the murder was premeditated. More aggravatory to the matter is that a younger life was prematurely and mercilessly terminated in a public place in front of a 4 year old daughter. The post mortem report shows that the doctor observed soiled clothes and body of deceased, she died like an animal at a death floor moreso at the hands of a person who should have protected her against all threats.

A court of justice should not be seen to be condoning such behaviour. Domestic altercations and gender based violence are not tolerated. The tendency of the male protagonist to settle issues by resorting to physical violence simply because of superior natural strength must be continuously and meaningfully condemned and deterred. It is thus a mundane truism to restate that the courts are there to protect the weak. The facts of this sad case reveal a shameful and brutal callous attack on a young defenceless woman, a woman whom you had a moral duty to love and protect, moreso a protector of your daughter. The daughter is now motherless. If deceased had chosen to leave you, she had that right and you had no right whatsoever to stop her from loving whomsoever she chooses. The legislation in s 47(3) of the Criminal Law Code prescribes a sentence of death for this offence or life. The way you committed this offence calls for stiffest penalty. However given your age, you escaped capital punishment but the only appropriate sentence for this type of a brutal, heart wrenching, merciless offence is for you to stay in prison.

Accordingly you are sentenced as follows:

Life.

National Prosecuting Authority, State's legal practitioners
Gonese and Ndlovu Legal Practitioners, Accused's legal practitioners