

STATE
versus
STELLA TEMBO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 4, 5, 7 & 11 February & 3, 9 & 16 April 2019

Assessors: Mr Mhandu
Mr Mutambira

Criminal Trial

Ms Y Gurira, for the State with *N Mazvimbakupa, H Huni & V Mutake*
D Mwonzora, for the accused

TSANGA J: The 35 year old accused Stella Tembo, struck her 81 year old step-father, Mbalama Shumba, twice on the head with a blunt object on the 30th day of January 2018. He died from the injuries on the 2nd of February 2018. The State charged her with murder to which she pleaded not guilty. She accused him of three counts of rape in the space of one week before she confronted him that fateful night for failing to desist from his violations. She said she had acted in self-defence when he had tried to attack her during the confrontation. The state case was that she had been the one to in fact attack with a metal bar.

The circumstances of the purported acts of rape were somewhat unusual. According to her defence outline they were as follows:

On the first night in that week leading to the fateful attack, she was asleep and said she saw a person in her dreams. She felt the person on top of her whilst at the same time experiencing a deep and inexplicable sense of loss of power, which was accompanied by an inability to scream, move or do anything to ward off the attack. It was as if she was put under a sort of spell or a trance like state for the purposes of the sexual act being carried out as she only regained strength and faculties of motion when the person had left the room. On this occasion she had been unable to see who had entered the room.

On the second instance of rape that week, the person had returned. She had woken up to the same sense of loss of strength save that this time after she had been able to regain her strength and full consciousness from whatever was causing the immobilisation and loss of energy, she said she had followed the person outside. She had observed her step-father going back into his hut where he slept alone. Her mother slept in a room next to the accused. The accused had been sure that it was him because of his limp.

When it was daylight she had told her mother that the accused was having sex with her whilst she was asleep in her room. She had not only told her mother but had also gone on to inform various members of the village committee about what was happening. She wanted him admonished. She had not gone to the police for the reason that she did not want him imprisoned.

The village elders attended and indeed admonished him telling him that he should stop the acts as it was an abomination to sleep with his own step-daughter as he was in reality her father. He had been calm whilst being admonished and had denied the allegations. For a few nights after that she had experienced peace without nocturnal sexual violations but this had not been for long. Within a few days, he had returned as she slept and again the distinct repertoire of helplessness and inertia during the sexual violation had once again played itself out. Save that this time she had had enough of the violations. Once he had left her room, she had gotten up and she had followed him to his hut. She had then asked him why he was continuing to do what he was doing. According to her defence, he had started assaulting her and she fell to the ground. She thought she had seen him holding something and that is when she had taken a nearby log and assaulted him with it twice on the head. This was the gist of her defence outline.

The state's evidence

The post mortem report prepared by Dr K Phiri and Dr Hove was submitted as evidence as Exhibit No 1. It described the deceased as an 81 year old male whose cause of death was subarachnoid haemorrhage secondary to a fracture at the base of the skull, and, a fracture of the right rib with lung contusion. All were due to blunt force trauma.

The state also called three witnesses. The first was the accused's brother Dominico Tembo who had been called to the scene around 1: am that night by a neighbour, Gideon Mpofu, who had heard the deceased's cries. Dominico told the court that on his arrival at the scene, the deceased was still alive. He found him injured and bleeding from the head. He

immediately woke his mother up who asked the deceased what had happened. The now deceased's explanation was that the accused had attacked him after accusing him of having sexual intercourse with her. The accused at that time was nowhere to be seen having fled the scene. Transport had been sought to ferry him to hospital. He had died on the 2nd of February.

Dominico also told the court that he had known the deceased from 1989 when he came into their lives as their step-father. The accused at that time was six years old whilst he was about 16 years of age. Their relationship with the deceased had been cordial and the only reason the relationship soured was when the accused alleged that the now deceased was using "unnatural means" to have sex with her.

He also explained that the accused had come back to stay at home after her husband died in 2012. When she surfaced these allegations against their step-father, Dominico told the court that he advised to look for a job and perhaps go and stay elsewhere. He had also told her to seek the elder's assistance as he could not help since he was a child himself. Their mother had been adamant that she should stay as she needed her labour.

Gideon Mpofu who had gone to call the deceased's son was the state's second witness. He told the court that they had found the deceased seated outside his hut. An iron bar used to support the door was in between his legs. He was dressed in shorts. He had injuries to his head and was bleeding heavily.

Givemore Muchakati a member of ZRP stationed at Chinhoyi Rural Police Station was the third witness. He had gone to the scene at 8am, the morning of the fatal attack. He had gone inside and seen blood on the floor. The metal bar was at the door. It had pointed edges. It was blood-stained at the tip. He had taken it to the police station because Dominico had told him that that the now deceased had said the accused had used it to assault him. The metal bar was admitted in evidence as Exhibit no 3.

Rhodney Mukorovi was the investigating officer in the case (IO). He told the court that the accused had been brought to the police station after being arrested by villagers. A statement was taken from her and later confirmed by the court. Exhibit No 2. It stated as follows:

"I have understood the caution and I admit to the charge. Mbalama Shumba used to come at night **whilst I was asleep and have sexual intercourse with me.** On this day I was pained, woke up and took firewood then I followed him to his room where he used to put up. I struck him with it once on head his and once on the other side of his face. I did not use an iron bar".

He told the court that it was not true that the accused had been raped on the basis that no rape report had been received by the police whether before or after the commission of the offence. He was adamant that when she recorded her statement what she complained of was sex in the supernatural realm and said that her father was using supernatural means to have sex with her and that she had tried to sit him down with other villagers. He insisted that she had reported that the deceased was having sex with her in her sleep and that what she complained about was a form of magic sex culturally called *mubobobo*. It is a form of magic mostly used by men to engage in spiritual sexual acts without the consent of their victims.¹

The example cited below² is not by way of taking judicial notice of the practice but to simply give some context to its reference by witnesses in this matter and why her experience caused great confusion. Section 98 of the Criminal Code is clear the court shall not take judicial notice of any practice said to be commonly associated with witchcraft but that a person suitably qualified to do so could give expert evidence on a practice. This was not necessary as the accused herself was persistent that her complaint was not founded on *mubobobo* but on real rape.

When she was arrested the I.O said she had stated that she had not used a metal bar to strike the deceased but had used a log. According to the I.O, no log had been found save for some very large ones which could be not have been lifted by the accused to assault the deceased. He also refuted the self defence argument on the basis that it was the accused who had gone to the deceased's room to attack him as borne out by the evidence. He confirmed

¹ Fortune Sibanda *experiencing sex via the blue tooth: Phenomenological Reflections on the Nature, use and Impact of Mubobobo in Zimbabwe*. **Greener Journal of Social Sciences Vol 3 (2) Feb 2013 pp 84-90.**

² Noting the prevalence of the belief in witchcraft and magic in Zimbabwe, Fortune Sibanda (above) from the Department of Philosophy and religious studies at Great Zimbabwe University in Masvingo studied its impact in Zimbabwe. He observes that witchcraft encompasses the use of magic. He describes *mubobobo* as falling into three different varieties.

“Firstly there is the one in which mubobi (that is, the one who uses mubobobo, the perpetrator) performs the sexual act during daylight and there is no physical contact with the victim. These are regarded as daring users of mubobobo who may employ the magic in public even at gatherings such as soccer matches, pamusika, (market places) and on public transport like buses and *mukombi (commuter omnibuses)*. ..Secondly, there is the nocturnal one whereby the man or woman perpetrator operates at night in the fashion of a typical witch or wizard in this sense, the victim usually has visions of having sex with someone during their sleep such that on waking up they feel as though they had sexual intercourse. Third, mubobi may use symbolic objects. This can be done in two different ways. On the one hand , is whereby the perpetrator uses objects belonging to the would be victim such as underwear.....On the other hand , the symbolic objects can manifest as *zvituma* (witch or animal familiars) such as snakes, lizards, or *zvikwambo* (goblins) to perform their *mubobobo* magic.”

that she had told him of her report to the village committee members. He said he had investigated if village committee had sat and found it was true. However, the village committee members who gave evidence said he did not speak to them personally. Even though the village committee members indeed said the investigation officer had not spoken to them directly, crucially the evidence they gave was not all a different from his in its material respects. There is therefore no reason for the IO's evidence to be discarded as unbelievable as suggested by the accused's lawyer.

He had also attended to the weighing of the metal bar which weighed 3.2 kg. The metal bar was admitted in evidence as Exhibit No 4.

The accused's evidence

In her evidence she said she had reached out for the log at the scene after she fell down. At the time she thought she had seen him holding something. She blamed the police who recorded her warned and cautioned statement for projecting her complaint as sex using unnatural means and distanced herself from the wording of the warned and cautioned statement. She said that what she had told them was that he was in the habit of coming to her room physically and having sex with her and that she would feel weak. She referred to him leaving "dirt" her after each act which she clarified as referring to the deceased's sperm.

She stated that the deceased never at any time admitted to her allegations as being true. She also said she went to his hut that night to chastise him and to remind him of what the village committee members had said to him. However, she conceded when asked by her own lawyer during arisings from the court's clarifications that this was not the first time to have this nature of dream in her lifetime in which she felt she was having sex with someone. She said this had happened before she got married.

The evidence of the village committee members

For an informed decision the court subpoenaed the village elders.

Moses Mpofo a committee member confirmed that indeed the accused had made a report to them about her father. The report she made was that her father would come to her physically whilst she was sleeping and would do what he wanted with her. Materially, his evidence was that the Committee did not encourage her to report because she did not have tangible evidence that she was being raped. He said they were not sure whether this was unnatural intercourse in the form of *mubobobo* or something else and hence the reason why they had told her to apprehend him in the act the next time it happened.

Anna Mutiziri also a committee member equally confirmed the report. She too stated that they were of the view that there was no direct evidence and hence their action of merely cautioning the now deceased and warning him that if he did it again, he would be taken to the chief.

Mr Kiri Mutanga the village head also reiterated that the accused's report was that when she went to bed that is when she would see her father. He described her report as confusing and pointed out that it was difficult to tell whether she was imagining or if this was something that was actually happening at the time. He too confirmed that because of the difficulty they had with the complaint, they advised her that it would be easier if she apprehended him physically. According to this witness, they concluded she was lying because there was no evidence. He also told the court that the accused never reported that the deceased was leaving semen on her. He had also observed that the deceased had remained calm and levelled headed in the face of these accusations. He alluded to the difficulty of this case as arising from its cross fertilisation with traditional beliefs.

The legal position and analysis of evidence

Rape is defined in s 65 of the Code as arising from a male person knowingly having sexual intercourse or anal intercourse with female knowing that she has not consented to it or realising that there is a real risk of possibility that she has not consented to it. In other words, lack of consent is central to the definition of rape.

Section 253 of the Criminal Code permits self-defence in order to preserve one's life and physical integrity. It is a full defence which permits a person to escape punishment provided its requisites are met. These are as follows; i) The accused must be under an imminent attack; ii) the attack must have commenced or be imminent; iii) the action must be necessary to avert the attack; iv) the means used by the reasonable or proportionate.

As regards provocation which can be partial defence to murder much depends in the first place on whether there was an intention to kill when a person says they reacted to provocation. See s 239 of the Criminal Code. Where there is no such intention to kill then the accused is charged with culpable homicide. Where there is an intention to kill the court then has to look at whether a reasonable person faced with such provocation would have reacted similarly. For a discussion of the impact of anger on one's deadly action see *S v Muleya & Ors* 1988 (1) ZLR 359 (S). Restraint of course is encouraged in the face of provocation. See *S*

v *Mapaiki* HH 634 / 14. Herein the accused says that the intention at all times was to inflict pain on the accused. In other words, she says it was never her intention to kill.

The core issue is whether the accused was raped in the physical sense given that where rape has indeed taken place and the victim has killed her rapist in the moment, she could very well craft a defence on self-defence. This is so given the nature of personal interests that are at stake for women in particular when it comes to rape. These include autonomy³, physical integrity⁴ and psychological well-being of a woman. As captured in feminist jurisprudential analyses of rape⁵, their violation can justify the use of deadly force in preserving those interests. On personal autonomy the critical observation is that rape deprives its victim of the right to choose whom, where, or when to have sexual intercourse. As regards physical integrity, the observation is of rape as a violation of one's most private inner being. As explained:

“The social value of personal space is evident in the recognition of individual rights of privacy in both law and culture. The importance of personal space appears also in the elaborate system of etiquette that controls bodily proximity in everyday interactions. The body, as the "envelope of the self," includes the most personal of private spaces. Some forms of bodily invasion are, of course, trivial aspects of life in society- e.g., a hand on the shoulder or bodily contact in a crowd. Medical examinations and treatment are a more significant form of bodily invasion which occur under controlled circumstances for important reasons. The bodily contact that occurs in sexual intercourse goes beyond any of these events to involve the most invasive form of contact with the most private of personal spaces.”⁶

Finally, as regards its psychological effects, the observation is that rape causes trauma not just at the time of the event but often for long afterwards. The trauma can affect how victims view sexual intercourse. The important point is that the violation of these personal interests or the threat of violation can cause irreparable harm. As such, it is argued that a victim who acts with deadly force to defend herself would in essence be acting within the reasonable parameters of self-defence. For a discussion in our case law of the constitutional and human rights violated in instances of rape see *S v Chirembwe* 2015 (1) ZLR 211 (H).

³ Section 51 of our Constitution protects the right to human dignity in private and public life whilst s 56 (2) in particular accords women and men the right to equal treatment including equality in cultural and social spheres among others.

⁴ Section 52 deals with the right to personal security and to freedom from all forms of violence from public or private sources.

⁵ Judith Fabricant, *Homicide in Response to a Threat of Rape: A Theoretical Examination of the Rule of Justification*, 11 Golden Gate U. L. Rev. (1981).
<http://digitalcommons.law.ggu.edu/ggulrev/vol11/iss3/7>

⁶ Fabricant above at page 972

From the totality of the state's evidence as against that of the accused, we arrived at the conclusion that the rape that the accused complained of was not in the physical sense for the following reasons. Her own evidence of all three instances when the rapes were supposed to have taken place were punctuated by reports of the sex being in the context of a trance like state when it was occurring from which she would then awaken. There is no doubt that it was her belief that it was the deceased who was placing her in that dazed state from which she would only recover once he had left the room but this in itself does not make it real. Her description of her first encounter in particular is crystalline in its description that this happened in her sleep.

Her complaint to her brother was that the deceased was using unnatural means to have sex with her. Whilst the accused claimed in her evidence that the deceased would leave sperm on her, this was her mere say so. The village committee members said she never mentioned this to them. Even at the crucial point after she killed the deceased she did not surrender herself to the police or go for a medical check up to confirm that indeed her actions were motivated by actual rape. The state did not need to disprove the assertion that she had sperm because she was never examined and it was her mere say so.

As for the nature of her report to her brother, she was not being credible when she now told the court when it sought clarifications that she had never told her brother of the rape being by unnatural means because sex was a taboo topic to discuss with him. When he was in the witness stand, not once did she deny through her lawyer, that she had ever spoken to him about it.

Notably, even the village committee members to whom she complained of the rape asked her to bring evidence that it was him in the physical sense. This she could not do. Instead after she had the same dreamlike encounter she decided to attack him. Therefore in reality we have her brother's evidence confirming that her complaint was that of unnatural sex then we have the village elders who were also equally baffled by her description of the sexual encounters; then there is her own warned and cautioned statement which again suggests that all this took place in a sleep state. To the extent that there was any sexual intercourse our conclusion from the evidence is that it occurred in a dreamlike state. Crucially, as noted earlier, she too acknowledged that the incident of sex in this dreamlike state was not a new experience to her. The court did try to put in motion the process of having her examined by a psychiatrist to ascertain whether she suffers from sleep epilepsy. She was

out of custody and her lawyer was of the view that ultimately it was not necessary to put her through unnecessary expenses as she was not mentally challenged.

It is not in doubt that she attacked him. There was the unequivocal evidence which was not shaken from her brother that the deceased had told him before his death that he had been struck by the accused when she came to him accusing him of continuing to sleep with her. There was no mention by the deceased of a fight with the accused. What he mentioned was an attack by the accused preceded by her verbal confrontation. As for her assertion that she acted in self-defence, again her own evidence was very clear that she is the one who went to confront him in his hut because she wanted to inflict pain on him. Her warned and cautioned statement said she left with a log for the purpose of the attack. In her evidence her version was different. The difficulty with the accused is that her statements were never consistent and were more often than not lacking in truthfulness. They tended to speak to whatever version she thought would make her get away with the murder.

She initially stated that the deceased was surprised at the confrontation before telling the court that he was not. We also believe the state version that she used an iron bar as opposed to the log mentioned in her warned and cautioned statement, since that was the weapon found at the scene of the crime. She may indeed have left her hut to go and confront him and attack him but the evidence spoke to her having used a metal bar she found at the scene. Dominico Tembo, Gideon Mpofu and Givemore Muchakati all gave credible evidence that what they had found at the scene was a blood stained iron bar. No wooden log had been found.

Also from the evidence of all the witnesses, her father did not concede to the sexual assault claims at any point. From her own admission, prior to these allegations at no time had the now deceased ever made any untoward advances towards her.

Initially, she said she thought he was holding something then said she thought it was metal bar because he worked with metal. She did not say he tried to attack her but that she thought he would do so because he was short tempered. The accused's brother described the accused's relationship with the deceased as cordial at all times save for her allegations. She too acknowledged a cordial relationship. The village committee said he had remained calm when faced with the accusations. Against this backdrop. She told the court that her intention in attacking him was to inflict pain so that he would stop his visits. However, she said she did not intend to kill him.

Whilst most rapes are not reported it is unusual not to report one especially where you have fatally attacked someone because of it. We do not believe that she was responding to an actual rape when she attacked the deceased but we cannot refute her experiences of sexual intercourses in a dreamlike state. We therefore believe her when she says that because of these dreamlike experiences of a sexual nature which pervaded her own testimony and in which the deceased was the major perpetrator, her intention was to inflict pain when she went to confront him. Because she associated her dream with reality she would have felt provoked. There is no evidence that she was defending herself. She actively went to him and acted very negligently in attacking him on the head with a metal bar. If she was indeed having dreams of her father having sexual intercourse with her as we are inclined to believe, then chances that are that she was under severe emotional stress and may indeed have been acting under some form of diminished responsibility or “non-pathological incapacity” which is mitigatory in sentencing as opposed to being a defence to the murder. See *S v Gambanga* 1998 (1) ZLR 364 (S) which posits that diminished responsibility can result from a “non-pathological incapacity” occasioned by severe emotional stress, and not only from a less than total mental disorder or defect as such.

In the final analysis when we examine all the evidence that was placed before this court our conclusion is that we find her guilty of culpable homicide in terms of s 49 of the Criminal Code.

The court was told that the accused is a 35 year old widow and a mother of three minor children. She survives on subsistence farming and does piece jobs. Prior to this case we were told that like most offenders this is her first encounter with the criminal justice process. It was therefore argued that the court should take this into account in addition to the severe mental stress that she was suffering from when she committed the offence. The dreams were said to be not of her making. A non-custodial sentence was pushed for bearing this in mind. In fact her lawyer argued that a fine would meet the justice of the case as she genuinely believed that she was being raped. In assessing sentence, the court was urged to assume that everything was to her real. The bad dream was in itself said to be punishment enough.

On the other had the state put its emphasis on the seriousness of the offence and the loss of human life. The state stressed that violence leads to lawlessness and anarchy when people take the law into their hands. A sentence reflecting condemnation at the loss of a human life was lost was pushed for. Moreover she had negligently struck him on the head - a

delicate part of the body with an iron bar. This was said to compound the seriousness of her attack. A fine was deemed inappropriate on the basis that it would trivialise the offence. A sentence in the region of 10 years was what the state pressed for.

In arriving at an appropriate sentence, this court takes into account that she had reported what she believed to be a rape to the village authorities. She had also told her family. Having made a complaint, however, it was unfortunate that she took the law into her own hands under circumstances where there was doubt as to whether the experience was real or in her dreams. She had been asked to bring concrete evidence that the deceased was coming in person which she chose not to do opting to attack him instead. Her attack with a metal bar on a delicate part of the body was definitely highly negligent. However, the totality of the circumstances under which the attack took place, and the fact that she is a widow who has three very minor children does call for a measure of leniency. Being that as it may, she cannot escape a custodial sentence.

The accused is sentenced as follows:

Five years imprisonment of which two years is suspended for five years on condition that the accused does not during that time commit an offence involving violence on the person of another for which she is sentenced to a term of imprisonment without the option of a fine. Effective sentence 3 years.

Mwonzora & Associates, Accused Person's legal practitioners
National Prosecuting Authority, State's legal practitioners