

THE STATE

Versus

MACDONALD URAYAYI

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr A.B. Mpofu and Mr E. Shumba
GWERU CIRCUIT COURT 22 & 23 MAY 2023

Criminal trial

S. Pedzisayi, for the State
A. Chinamatira, for the accused

DUBE-BANDA J:

[1] The accused, Mr Macdonald Urayayi, is appearing before this court charged with the crime of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act Chapter 9:23 (Criminal Code). It being alleged that on 25 September 2021 the accused unlawfully caused the death of Sharon Nyoni (deceased) by stabbing her on the chest with a knife intending to kill her or realising that there was a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

[2] The State tendered an outline of the summary of the State case (Annexure A), which was read into the record. The accused, who was legally represented throughout his trial, admitted the charge. However, a plea of not guilty was entered as required by law. He tendered a defence outline (Annexure B) which was read into the record. He admitted that he caused the death of the deceased but pleaded the defence of provocation.

[3] The following admissions by the accused were noted in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The admissions relate to the evidence of certain witnesses as it appears in the summary of the State case. That is the evidence of:

[3.1] Dr S Pesanai a registered medical practitioner practising as a Pathologist. That he examined the remains of the deceased and compiled a post mortem report (Exhibit 2) depicting the injuries sustained by the deceased and concluding that the cause of death was: haemorrhagic shock; stab wound on the heart; and assault.

[3.2] The evidence of Sarudadzai Goba that she resides at number 1336 Tiger Reef Compound, Kwekwe. Her evidence is that on 25 September 2021 the accused arrived and remained on the road about five metres from her house. He appeared to be in a hurry, and she observed that he was unsettled. She asked him whether he was having problems with the deceased, and he responded by saying that everything was fine. The accused then left. Thereafter, she received a report and as a result of that report she saw the body of the deceased and observed that it lying facing downwards in a pool of blood.

[3.3] The evidence of Muchaneta Makombe is that on 25 September 2021 while going to the bush the deceased passed her running. And after a few minutes she saw the accused running pursuing the deceased.

[3.4] The evidence of Beatrice Ushewarambwa is that on 25 September 2021 she saw the accused running towards the maize fields.

[3.5] The evidence of Edward Edmand Kujenga is that he is a Police Constabulary. On 25 September 2021 at around 1400 hours, he received a report, and as a result of the report he proceeded to maize fields and saw a body with stab wounds. It was lying facing downwards in a pool of blood. He preserved the scene and called the police, and whilst under his care the body did not suffer any further injuries.

[3.5] The evidence of police officers who attended the scene, investigated the matter and recorded a statement from the accused. The summary of their evidence is that the body of the deceased did not suffer any further injuries whilst it was in the custody of the police.

[4] The State tendered by consent the following documentary and real exhibits: a confirmed warned and cautioned statement of the accused (Exhibit 1), and the Post Mortem Report (Exhibit 2) compiled by Dr S Pesanai. The State further a tendered a knife with the following measurements: length of blade – 22cm; length of handle – 12cm; total length – 34cm; length of blade widest part 3.5cm. The colour of handle is black, and the blade is stained silver. The knife is Exhibit 3.

[5] The State called one *viva voce* witness and the accused testified in his own defence. We will summarise the evidence very briefly.

[6] The first State witness was Tonar Hwinya. He testified that he resides at number C12 Tiger Reef Compound, Kwekwe (C12). The deceased was his sister, and the accused is his brother-in-law. Sometime in September 2021, on a date he could not remember, the deceased came to his home at C12 Tiger Reef and made a report to him. As a result of the report, he observed injuries on her arms and legs. He testified that the accused also came to C12 Tiger Reef, and he questioned him as to the reasons he was assaulting the deceased, and he did not give a satisfactory answer. The accused did not say that the deceased was engaging in acts of infidelity. He counselled the two, thereafter the accused apologised to the deceased. The accused and the deceased left and proceeded to their place of residence. After a few days later the deceased returned to the witness's home carrying a bag, and said she made a report to him. The accused arrived later on the same day, he was wearing a black jacket and a jean trousers. Sarudzai Goba asked the accused whether he had a problem with the deceased, his answer was that "there was no problem." He testified that the accused was appearing unsettled. The accused proceeded to House C12 where the deceased was, and the witness remained in the company of Sarudzai Goba outside house number 1336. Thereafter he followed accused to house C12. He testified that when he got to C12 he did not find anyone, and the doors were locked.

[7] He testified that he later received a report, and as a result of the report he proceeded to the scene and saw the body of the deceased lying on the ground. The body was about 200m from house C12. It was badly stabbed. It had a very deep wound on the chest. There were other two wounds on the side of the body. He testified that he was seeing the knife (Exhibit 4) for the first time in court. There was no such knife at his home i.e., C12 Tiger Reef.

[8] Under cross examination he confirmed that he heard that the accused destroyed the deceased's cell phone lines. He disputed that the deceased was having extra marital relationships. On the first occasion he asked the two about the source of their problems, but they did not say anything of substance. He testified that he did not see the accused stabbing the deceased. House 1336 and C12 are not far from each other, and when at house 1336 one could see and hear what could be happening at C12. He did not see the accused talking to the deceased. He disputed that when accused arrived at C12 the deceased insulted him, and that a scuffle ensued. He disputed that the accused picked the knife (Exhibit 3) outside C12, he testified that there was no such knife at C12.

[9] In re-examination he testified that when accused left house 1336, he remained behind for only between 2 and 3 minutes and followed and proceeded to C12. He testified that if ever they was scuffle between the accused and deceased at C12, he could have witnessed it. His evidence was that there was no scuffle between the accused and deceased at C12.

[10] After this evidence the State closed its case.

[11] Tonar Hwinya was a credible witness. For example, he was honest and testified that he did not see the accused stabbing the deceased. His evidence is accepted without qualification.

[12] The accused testified that he resides at Plot 28 Chesterfield Tiger Reef, kwekwe (Plot 28). As at 25 September 2021 he had been married to the deceased for period of one year and six months. The two dated for three months prior to marriage. The altercation with the deceased started on 21 September 2021. The deceased returned home late in the evening. He demanded that the deceased hand over to him her cell phone, and she refused, he slapped her with an open hand and confiscated the phone. He opened the phone and saw two messages, the first read as follows: "Hie sweetie have you arrived. Is your husband present, if so inform me." The second one was: "Hie sweetie have you arrived, why not responding. Why did you not respond. Is your husband present, inform me so that I should know." He testified that that the deceased refused to disclose the author of the messages, and he then assaulted her with a switch.

[13] He testified that the same day 21 September the deceased left and proceeded to C12 her brother's house. He followed her on 23 September 2021. He showed her brother (Tonar Hwinya) all the messages he saw in the cell phone of the deceased, thereafter he reconciled with the deceased and the two returned to Plot 28. On 25 September 2021 when he got home from work, he found deceased gone to her brother's house i.e., C12. He testified that he proceeded to C12, and he saw Tonar Hwinya and Sarudzai Goba outside house 1336. Sarudzai Goba asked him whether there was a problem, he said "there was no problem." He asked where the deceased was, and he was told that she was at house C12. He testified that he found deceased at C12 and she insulted him saying "*Voetsak*, leave me alone. I have found someone better that you. I do not want you." He testified further that at that point the deceased started to flee. He saw a knife at C12 and picked up and he pursued her. He caught up with her at the fields, he did not say much to her, he just got hold of her and started to stab her. He testified

that what caused him to stab the deceased was rage, anger and immaturity, provoked by the insult.

[14] Under cross examination he testified that he told Sarudzai Goba that he had no problem with the deceased. The deceased insulted him and fled; he then saw a knife on the wall on C12. It was in a sheath. He picked it up and gave chase and caught up with her. He conceded that he pursued her for about 200m. He got hold of her, used his foot to remove the knife from the sheath. She turned to face him and he started to stab her. He directed the knife on the chest of the deceased. He conceded that he used excessive force in stabbing the now deceased. He conceded that he stabbed her eight times. He testified that it was not his intention to cause the death of the deceased.

[15] After this evidence the defence closed its case.

[16] On matters of detail the accused was not a good witness. He lied that the deceased insulted him. If the deceased had insulted him, he would have said so in his confirmed extra curial statement. He lied that he picked the knife at house C12, if it was so he again would have said so in his statement. Again, Tonar Hwinya the owner of C12 disowned the knife. He testified that he did not have such a knife at his house, it was his first time to see it in court.

[17] The established facts are these: on 21 September 2021 the accused and the deceased had an altercation. The accused suspected that the deceased was having extra marital relationships with other men. The accused assaulted the deceased, and she absconded and went to her brother's house i.e., at C12. She made a report to her brother, i.e., Tonar Hwinya. She had injuries on the arms and legs. On 23 September 2021 the accused proceeded to house C12. Tonar Hwinya counselled the two, and they returned to Plot 28.

[18] On 25 September 2021 the deceased again absconded and returned to her brother's house at C12. She arrived at her brother's house carrying a bag, and made a report to him. The accused arrived later on the same day, he was wearing a black jacket and a jean trousers. The deceased did not insult the accused. The accused was in possession of a knife (Exhibit 3). He was appearing to be in a hurry and unsettled. When the accused got to C12 the deceased fled, and the accused pursued her for about 200m, and caught up with her. He produced a knife and

stabbed her eight times causing her death on the spot. The deceased died of haemorrhagic shock; stab wound on the heart; and assault.

[19] It is trite law that the *onus* rests on the State to prove the guilty of the accused beyond a reasonable doubt in order to secure a conviction. There is no *onus* on the accused to prove his innocence. The accused pleads provocation. Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation, if the accused acts upon it on the sudden and before there has been time for his passion to cool. When a person is provoked by the words or actions of another, he may lose his temper and cause harm to the person who provoked him. Even at its best provocation is not a complete defence. The comfort it may give to an accused is to reduce murder to culpable homicide. In that where the accused kills intentionally because he lost self-control after being subjected to extreme provocation, the court may reduce the crime of murder to the crime of culpable homicide.

[20] The first question to be answered is whether the accused had an intention to cause the death of the deceased? He armed himself with lethal knife with a blade of 22cm. The deceased attempted to escape, but he pursued her and caught up with her after a 200m chase. When he caught up with her, he did not talk to her but just stabbed her eight times. He stabbed on the chest. The post mortem report under “marks of violence” states the following: laceration on the right distal thumb, defence wound; stab wound right axillar (3x1cm); stab wound right lateral chest 3 x 1 cm; stab wound right lower chest 3 x 1cm; stab wound right lower chest 5 x 2cm; epigastrium laceration (4x2cm) located on the midline 11cm from nipple 1cm from sternum; stab wound left breast (8 x 2cm) located 1cm from nipple, 7cm from midline, 8cm from clavicle; and stab wound right back 3 x 1cm located from midline and 5cm from scapula bone. The knife perforated and stabbed the heart. He directed the knife on the chest a delicate and vulnerable part of the human body. These injuries are a manifestation of the excessive force used in stabbing the deceased. His intention was to kill the deceased.

[21] The above facts considered cumulatively demonstrate that the accused intended to cause the death of the deceased.

[22] The second question to be answered is whether the accused caused the death of the deceased after he lost self-control as a result of provocation? On 25 September 2021 at house C12 the deceased did not insult the accused. If the accused was provoked by the events of 21 September, by 25 September such provocation must have to some extent subsided, and must have cooled down. This is so because he accepts that on 23 September the deceased's brother counselled them and he (accused) apologised to the deceased and the two returned to Plot 28. It was on 25 September that the deceased returned to her brother's home, that the accused followed her and committed this crime. It is clear that on 25 September the accused left Plot 28 and proceeded to C12 itching for a fight with fatal consequences, to achieve this purpose he armed himself with a lethal knife. When he got to C12 he pursued the deceased for 200m, and when he caught up with her stabbed her eight times. A person subjected to extreme provocation and who had lost self-control could run for 200m without stopping to reflect on his actions.

[23] Again in his confirmed extra curial statement made on 27 September 2021, when the events were still new in his mind he was clear that he had a misunderstanding with the deceased caused by her alleged infidelity. He then stabbed her. He does not say he stabbed her because she insulted him. The issue of insults is just a recent fabrication. What upset the accused and caused the attack was that on 25 September the deceased returned to seek refuge at his brother's home. Furthermore, the accused's recall of events is so clear that it could not be said that he was so beside himself with anger as not really to know what he was doing.

[24] The totality of the evidence shows that the injuries inflicted on the deceased were caused by the accused. The injuries inflicted by the accused caused the death of the deceased. On the facts and evidence of this case the defence of provocation is not available to the accused as a defence to this crime.

[25] The accused intended to kill the deceased; or realised that there was a real risk or possibility that his conduct may cause death, and continued to engage in that conduct despite the risk or possibility. Having carefully weighed the evidence adduced as a whole in this trial it is clear that the State has proved its case beyond a reasonable doubt against the accused person.

[26] The accused person is charged with murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. It is no longer necessary in our law to specify

whether the accused is guilty of murder in terms of s 47(1) (a) or (b). See: *Mapfoche & Another v The State* SC 84/21.

In the result: Accused is found guilty of murder as defined in section 47 (1) of the Criminal Law (Codification & Reform Act) [Chapter 9:23].

Sentence

[27] Mr. Urayayi, this Court found you guilty of the crime of murder as defined in s 47(1) of the Criminal Code. The murder you have been convicted of was not committed in aggravating circumstances.

[28] It is now the task of this court to impose an appropriate sentence. In sentencing you this court has to take into account all relevant factors, afford each the appropriate weight thereto and strike a balance between the various interests. In determining a sentence which is just and fair, this court will have regard to the *triad* of factors that have to be considered as set out in case law, e.g., in the case of *S v Zinn* 1969 (2) SA 537 (A). This Court must therefore take into account your personal circumstances, the nature of the crime including the gravity and extent thereof and the interests of the community. It is trite that a sentence must be blended with mercy. See: *S v Rabie* 1975 (4) SA 855 (AD) at 862G-H. The right balance must be achieved. As sentence that is too light is as wrong as sentence too heavy. Both can bring the criminal justice system into disrepute. See: *S v Matika* (HB 17 of 2006) [2006] ZWBHC 17 (15 March 2006). It is also trite as stated in case law that true mercy has nothing in common with soft weakness, or maudlin sympathy for the criminal or permissive tolerance. It is an element of justice itself. See: *S v Matika* (*supra*); *Graham v Odendaal* 1972(2) SA 611A at 614. Mercy must not be allowed to lead to condonation or minimisation of serious offences. See: *S v Van der Westhuizen* 1974(4) SA 61(c) and *A guide to Sentencing in Zimbabwe* by G Feltoe at pages 2-3.

[29] This means that a court should consider the objectives of punishment which is that of prevention, deterrence, reformation and retribution and a court must decide what punishment would best serve the interests of justice. A court should also be cautious in weighing the elements under consideration and not unnecessarily elevate one element of above others, rather,

a balance must be struck amongst these factors and between the interests of the accused and that of society.

[30] This court now turn to the facts of this case and the submissions made by your Counsel and Counsel for the State in the light of the above principles.

[31] In mitigation of sentence, your Counsel addressed the court and placed factors which she urged this court to take into account in order to impose a lesser sentence to you in respect of the crime of which you had been convicted. Your personal circumstances are as follows: you were 19 years old when you committed this crime. You are now 22 years old. You were born in a family of five and you are the third born. Prior to your arrest you were staying and fending for your parents, and your father is now late. You are a first offender. Again, you have been in pre-trial incarceration for a period of 1 year 6 months. You are a youthful offender.

[32] On the other hand Counsel for the State submitted that a life was needlessly lost, and the prevalence of the crimes of murder require this court to pass a deterrent and exemplary sentence. And that this crime is aggravated by the fact that it is violence against a woman, which amount to gender violence, which is prevalent and must be arrested now. This court was urged to emphasise the sanctity of human life.

[33] In such gruesome murders the personal circumstances of the accused recede to the background. The only weighty mitigatory factor in your favour is your youthfulness. You were just 19 when you committed this crime, and you are 22 years now. Youthfulness connotes immaturity, lack of experience of life, and thoughtlessness. It is the policy of the courts to give consideration to youthfulness because to measure the youth's conduct using the yardstick of adult behaviour would rather be unfair.

[34] In considering an appropriate sentence, this court factors into the sentencing equation in the reading of s 239(2) of the Criminal Code that you believed that your wife the now deceased was engaging in extra-marital relationships.

[35] On the other hand you stand convicted of a serious offence. A life was ended. It is incumbent on this court to emphasize the sanctity of human life. You used a lethal weapon

with excessive force against another human being. The murder of your wife was callous, brutal and shocking. Sheron Nyoni died a painful and gruesome death. She died on the spot. You followed and attacked her where she had gone to seek refuge. You abused her and assaulted her on 21 September, she left at night and proceeded to her brother's place. On 23 September you followed her and you convinced her brother that you were now a changed man. You apologised for the abuse you were inflicting on her; she accepted and trusted you. She agreed and reconciled with you and returned with you to your residence at Plot 28. You were playing a ruse on her. You continued with your abusive tendencies and on the 25 September, she left to seek refuge at her brother's place. You followed her, found her, she fled from you and you pursued her for 200m. You caught up with her and stabbed her to death.

[36] The degree of violence which you meted out at your wife was egregious, excessive and exhibits horrifying aggression. You were her husband, and you were required to protect her, rather than to inflict harm on her. You executed successive fatal knife attacks in the taking of her life and completely disregarded her bodily integrity. You left her to die at the scene and just walked away.

[37] The attack was brutal and savage. The kind of brutality you exhibited on the day in question is alarming indeed. The deceased died a violent death. You displayed a high degree of callousness. The injuries which you inflicted on the deceased were callous and brutal. You used lethal weapon and attacked the most delicate and vulnerable part of the human body, i.e., the chest. The extent of the force which you used was so excessive that you managed to stab the heart.

[38] This court will take judicial notice of the fact that with regard to the interests of society it is undeniable that we are experiencing high levels of violent crime and in particular with reference to this case, violent crime against women. It is thus important and the duty of this court to impose appropriate sentences, particularly where women are murdered in the context of their marriages, their relationships and homes. Violence against women is rife and the community expects the Courts to protect women against the commission of such crimes. Whilst it is so that you, as the accused, cannot be sacrificed at the altar of deterrence for other would-be offenders, nor can this court impose punishment in anger, the interests of the community must be satisfied that offenders of serious crimes such as this be punished

accordingly. If offenders are punished too lightly for serious offences, society would lose confidence in our Courts and so too would law and order be undermined.

[39] Your Counsel submitted that you are remorseful. You did not testify in mitigation of sentence and did not display remorse for the murder of your wife. Had you done so it would have been taken into account as a mitigating factor. That you elected not to do so, will however not be viewed as an aggravating factor. There is neither factual nor evidential basis for a finding that there is true remorse if you do not step out of the dock and take the witness stand and say what is going on in your inner self.

[40] The deceased was 17 years old. The death and loss of such a young person in itself a traumatic and grieving experience to those close to her and the community at large. By blaming her and lying that she insulted you adds insult to injury.

In the circumstances we are of the view that the following sentence will meet the justice of this case:

You are sentenced to 18 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Masawi & Partners, accused's legal practitioners