

THE STATE

Versus

KUDAKWASHE MUJAJATI

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr A.B. Mpofu and Mr E. Shumba
GWERU CIRCUIT COURT 23, 24 MAY 2023 & 10 November 2023

Criminal trial

Ms. L. C. Mamombe, for the State

Ms. S. Ncube, for the accused

DUBE-BANDA J:

[1] The accused, Mr Kudakwashe Mujajati, 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] (hereinafter referred to as the “Criminal Law Code”). It being alleged that on 8 July 2021 he unlawfully caused the death of Audrey Chikoka (herein after referred to as the “deceased”) by striking her once on the back of the head and once on the forehead with a wooden board intending to kill her or realising that there is 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 accused, who was legally represented throughout the trial pleaded not guilty to the charge of murder, and offered a guilty plea to the lesser crime of culpable homicide. The State rejected a plea of guilty to culpable homicide and the matter proceeded to trial on the charge of murder. The State tendered an outline of the summary of the State case (Annexure A), which was read and is part of the record, and the accused tendered a defence outline (Annexure B) which was also read and is part of the record. In his defence outline the accused admitted that he caused the death of the deceased but raised the defence of provocation.

[3] The accused made admissions in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP & E Act). The admissions relate to the evidence of certain witnesses as it appears in the summary of the State case.

[3.1] The Evidence of Pedzisai Prince Tanyaradzwa is that he is a medical doctor stationed at Shurugwi District Hospital. On 8 July 2021 the body of the deceased was brought to hospital and he certified it dead. He observed injuries on the head. The evidence of Buhlenkosi Ncube is that she is a member of the ZRP. She identified the body of the deceased to Dr Juana Rodriguez Gregori who conducted a post mortem examination. While the body was in her care it did not suffer any further injuries. The evidence of Doctor Juana Rodriguez Gregori is that she is a registered medical practitioner stationed at United Bulawayo Hospitals. Her evidence is that she examined the remains of the deceased and compiled a post mortem report (exhibit 2) depicting the injuries inflicted on the deceased and concluding that the cause of death was cranial trauma; assault and Covid-19.

[3.2] The evidence of Timias Mawadzuri (Mawadzuri) is that he resides at house number 1111 Makusha Shurugwi (the “house”). The accused and deceased were husband and wife and tenants renting a room at this house. On 8 July 2021 at around 0700 hours, he heard the accused demanding cash from the deceased and the latter asking him to stop assaulting her. Thereafter the accused emerged from the room and locked the door and went away. He peeped through the window and saw the deceased lying on the floor. Police officers broke the door, he then entered the room and saw the deceased lying lifelessly on the floor bleeding from the nose and mouth.

[3.3] The evidence of David Ncube is that he entered the room through the window to rescue the two minor children who were trapped and crying inside the room. He saw the deceased lying on the floor unconscious and bleeding from the nose and the mouth. The evidence of Marko Mambwanda is that he saw the deceased lying unconscious on the floor and bleeding from the nose and mouth. He used his motor vehicle to ferry the body of the deceased to Shurugwi Hospital. While the body was in his care, it did not suffer any further injuries.

[3.4] The evidence of Noris Chiripo is that he is a member of the Zimbabwe Republic Police (ZRP). His evidence is that he broke down the door and entered the room. He saw the deceased lying on the floor in a pool of blood and unconscious. He inspected

the body of the deceased and observed a laceration above the right eye, laceration on the right cheek and blood oozing from the ears, nose and mouth. During the time the body of the deceased was in his care, it did not suffer any further injuries.

[3.5] The evidence of Joseph Shava is that he is a member of the ZRP stationed at CID Shurugwi. He examined the body of the deceased and took photographs. He noticed that the body had a laceration on the right eye, a laceration on the right cheek, swollen head and blood was oozing from the nose and mouth. He went to the scene of crime and took the wooden board used in the commission of this offence. The evidence of Chipo Vandirai is that she is the investigating officer in this matter. She recorded a warned and cautioned statement from the accused. The accused gave his statement freely and voluntarily.

[4] The State tendered with the consent of the accused the following documentary and real exhibits: a confirmed warned and cautioned statement of the accused (exhibit 1), and the Post Mortem Report No. 687-531-21 (exhibit 2) compiled Dr Juana Rodriguez Gregori. A wooden board (exhibit 3) with the following measurements: length 38cm; width 38cm; weight 1, 8845kg.

[5] The State called two *viva voce* witnesses and the accused testified in his own defence. The evidence of the witnesses will be summarised very briefly.

[6] The first State witness was Taizivei Chisake (Chisake). She testified that she was renting a room at house number 1111 Makusha, Shurugwi. The accused and the deceased were also renting a room at the same house. In the morning of 8 July, as she was sleeping the yard, she heard some noise emanating from the room rented by the accused and the deceased, the noise was indicating that there was a quarrel. But she did not hear the exact words used by the accused and the deceased. She heard a sound indicating that a person was falling down, and thereafter she heard children crying. She testified that she received a report from the deceased's four-year-old child, and as a result of the report she asked the child to open the window of the room, where she saw the deceased lying down. David Ncube was asked to open the window and remove the two children from the room, a two year and four-year-old. The window was opened and the children were removed from the room through that window. The police arrived and directed that the door be opened by force, the door was opened and the deceased was found

lying on the floor. The deceased had blood coming out of the mouth and nose. The deceased was then carried to hospital. Chisake, came across as a witness who had a clear recall of events. She was a good and credible witness. Not stating more than she knew. She was honest that she did not see the accused assaulting the deceased, she merely heard a quarrel but did not hear the exact words exchanged in that quarrel. Her evidence was not challenged in any material respects and there is no reason not to accept it.

[8] The next State witness was Sithembekile Mpofu (Mpofu). She testified that she is the owner of house number 1111 Makusha, Shurugwi. The accused and deceased were husband and wife and her tenants, renting a room at her house. She received a report that the accused and the deceased were having a quarrel. She knocked at their door and heard a sound indicating that someone was been beaten inside the room. She testified that she spoke to the accused, while outside their room, asking him the reason he was beating up the deceased. The accused apologized, unlocked the room from inside, walked out of the room, and told the witness that the deceased took a lot of his money. He then locked the door from outside and walked away saying he was going to make a police report. She looked inside the room through the window and saw the deceased lying on the floor, she was appearing lifeless. She testified that when the police arrived, the door was forcibly opened. The deceased was found dead. She had a number of wounds. The body was then transported to hospital. The accused used to dial her cell phone requesting to talk to the deceased.

[9] Under cross examination she testified that the accused assaulted the deceased while she (witness) was standing outside the door of their room. She asked the accused the reason she was beating up the deceased, he said “sorry.” When she finally got inside the room, she saw that the deceased was lying down in a pool of blood. After the accused left, he dialed her cell phone and she told him that his wife i.e., the deceased was refusing to talk to him, because he assaulted her. The whole idea was to make the accused return to the house so that he would be arrested, the accused remained in hiding until he was arrested. Mpofu came across as a witness who had a clear recall of events. Her evidence was not challenged in any material respects and there is no reason not to accept it. It is accepted without any reservation.

[10] The accused testified in his defence. He testified that he had gave the deceased some money for safe-keeping. This money was to be used for the construction of a house at their

communal home. In the evening of 7 July 2021, he requested the deceased to produce the money so that he would count to ascertain whether more was still needed to complete the construction of the house. At that stage a misunderstanding ensued and the two started to quarrel. He testified that he then decided to keep quiet and to lie down on the bed. The deceased slept on the floor, something that she had not done before. In the morning of 8 July 2021, he asked the deceased the reason she slept on the floor, a quarrel started and the deceased struck him with a bottle on the forehead. He fell off the bed, got dizzy and after regaining strength he slapped the deceased with an open hand. He testified that he got so enraged such that he could not control himself. He then took a board of plank and struck her twice on the head.

[11] The accused testified further that as he left the room, he closed the door. He just decided to go but had no destination in mind and did not know where he was going. As he was walking his cell phone rang, he answered the call and he requested the caller to give the phone to the deceased so that he could talk to her. He was told that the deceased was refusing to talk to him because he assaulted her. He testified that at that point he did not know what was happening to him, he was feeling dizzy. He continued walking around Shurugwi. He was only told by people that he killed his wife and left the door locked. He was arrested by members of the public and handed over to the police.

[12] Under cross examination the accused testified that he was not intoxicated. He had previously given the deceased USD\$4 800.00 for safe-keeping. Asked about where he got the money, he said he got the money from his business of selling clothes and plaiting hair styles called dreadlocks. Asked whether he was angry that the deceased did not give him the money, he said he was confused. He said the sound heard by the witnesses indicating that someone was falling down, it was him and not the deceased who fell down. He fell down after he had been struck with a bottle. Asked whether he sought medication treatment for the injuries he sustained, his answer was that he was confused. He identified the wooden board (exhibit 3) as the weapon he used to attack the deceased. He conceded that he struck the deceased twice. He testified that when he left the room, the deceased was still conscious. He was arrested on 13 July 2021.

[13] The general quality of the evidence of the accused was poor. He was not consistent both within the content and structure of his own evidence and with the objective and established

facts. Under cross examination he was merely seeking refuge under the contention that “I was confused.” Were he had no answer or was cornered he would say “I was confused.” The accused lied that the deceased struck him with a bottle. This evidence is false because it is at variance with the evidence of Mawadzuri admitted in terms of s 314 of the CP & E Act. The effect of a formal admission in terms of s 314 is that it relieves the State of the necessity of proving the admitted facts. The admissions made in terms of s 314 are binding on the accused. He cannot riddle out of it. Mawadzuri’s evidence was that the accused was demanding cash from the deceased and she was asking him to stop assaulting her. Thereafter he emerged from the room and locked the door and went away. Again, during the extra curial statement confirmation proceedings, in answering a question whether he had any injuries, he said he was injured on the left eye by the relatives of the deceased. In this court this is the injury he now attributes to the alleged assault by the deceased. Again, no such beer bottle was seen in the room by the landlady Mpofu. Asked in cross-examination the reason he did not seek medication of the injury, he said he was “confused.” The reason he did not seek medication is because he had no injury when he left house 1111 Makusha.

[14] The accused lied that the sound indicating that someone was falling that was heard by the witnesses was for him falling from the bed after being struck by a bottle by the deceased. The sound was for the deceased falling after he struck her twice with the wooden board. He lied to Mpofu that he was going to report the issue of his money at the police station. He did not go to the police; he was just fleeing from the scene and absconding. He lied that he was spending the nights at the bus terminus and going around picking and carrying plastic bottles. In cross examination when asked those questions which could show that he was peddling falsehoods, he would dodge them under the ruse that on the fateful day he was confused. When in fact it was clear that he remembered all that happened and where it happened. It is clear that he assaulted the deceased because he believed that he had stolen his money. This is what Mawadzuri heard him saying to the deceased, while the deceased was pleading with him to stop assaulting her. To Mpofu he said the deceased had taken a lot of his money.

[15] The following facts are found established. In the evening on 7 July 2021, the accused demanded his money from the deceased and he was not satisfied with the answer he got from the deceased. The conversation about the money continued in the morning on 8 July 2021. An altercation ensued and the accused assaulted the deceased. The deceased was pleading with

him to stop assaulting her, notwithstanding her pleas, he continued assaulting her. He then struck the deceased twice with a wooden board (exhibit 3) and the deceased fell down. The falling was heavy and the thud was heard by the witnesses who were outside the house. After noticing that he had inflicted fatal blows on the deceased, he fled. Before he fled, he locked the room leaving the deceased and a four year and two-year-old step children inside the locked room. The door had to be forcibly opened. From his hiding he would phone Mpofu enquiring about the condition of the deceased. He disappeared and remained in hiding until he was arrested five days after the incident.

[16] The pathologist who examined the remains of the deceased opined that the cause of death was cranial trauma; assault and Covid-19. The cranial trauma and assault were caused by the accused and Covid-19 is a medical condition which had nothing to do with the accused. The court caused written interrogatories to be submitted to United Bulawayo Hospitals in terms of s 278(12) of the CP & E Act get more information about the cause of the death of the deceased. The hospital could not provide more information apart to what was already provided in the post mortem report. However, the evidence shows that the accused assaulted and then struck the deceased two times on the head with a wooden board. It is clear that the injuries inflicted by the accused actually contributed to the death of the deceased and it does not matter that such injuries were not the sole cause of the death, or that a pre-existing medical condition also contributed to the death. It is therefore not in dispute and it is proved by evidence that the injuries inflicted on the deceased were caused by the accused. And that the injuries inflicted by the accused actually contributed to the death of the deceased.

[17] [26] It is trite law that an accused is not expected to convince the court as to the truthfulness of his version, whatever explanation he gives, no matter how improbable it may be, the court cannot dismiss it unless it has been shown to be not only improbable but beyond doubt false. See *R v Difford* 1937 AD 370; *S v Jochems* 1991 (1) SACR 208 (A), *S v Jaffer* 1988 (2) SA 84 (C), *S v Kubeka* 1982 (1) SA 534 (W) at 537 F-H. However, the accused's version is not looked at in isolation but in light of the evidence led against them, and the probabilities of the whole case. The State must prove the guilt of the accused beyond a reasonable doubt in order to secure a conviction. However, proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it required such proof because it will rarely be achieved. See *Musimike v The State* SC 57/20.

[18] The accused raised the defence of provocation. This common law defence has been codified in ss 238 and 239 of the Criminal Law Code. MATHONSI J (as he then was) said in *S v Ndlovu* HB 293/17 that what is clear is that the jurisprudence formulated as far back as 1982 in the case of *S v Nangana* 1982 (1) ZLR 150 (S) is still applicable because s 239 simply codifies that approach. The first stage is to apply the normal subjective test to decide whether there was an intention to kill. If there was intention the court should proceed to the second stage thus: whether the provocation would reasonably be regarded as sufficient ground for the loss of self-control that made the accused act against the deceased the way he did?

[19] The evidence shows that the accused intended to kill or realised 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. It is so because the accused used a wooden board to struck at the deceased. He aimed his attack on the head. He struck her once on the back of the head and again once on the forehead and she fell down. The post mortem report speaks to the force and the violence meted out on the deceased. The pathologist observed an increased size in left side of the face; contused wound in the right ear, left parietal region. There was ecchymosis in right shoulder, anterior part of therax. There was also haemorrhage infiltrate in left region and left parietal region. The injuries are consistent with what the accused said in his confirmed statement. At the moment the accused left the room, the deceased was unconscious.

[20] There is evidence that the accused was heard demanding his money from the deceased and the deceased asking him to stop assaulting her. Even if there was provocation during the quarrel about the money, it was not such that a reasonable person would lose his self-control, again it was not sufficient to make a reasonable person in the accused's position and circumstances to lose self-control and struck the deceased in a vicious manner he did causing her death on the spot. Therefore, provocation as a defence is not available to the accused person.

[21] The accused did not raise the defence of self-defence. However, a court cannot fail to consider a possible defence because the accused has not taken it. The law provides that a person is entitled to take reasonable steps to defend himself against an unlawful attack. Harm, and even sometimes death, may be inflicted on the assailant in order to ward off the attack. In this

case the deceased did not attack the accused, and it is a lie that she struck him with a bottle. In fact, he was the aggressor, he was assaulting the deceased demanding his money. Therefore, the defence of self-defence as codified in s 253 of the Criminal Law Code is not available to the accused in whatever form as a defence.

[22] Ms. *Mamombe* Counsel for the State sought a verdict of guilty to Murder. For the court to return a conviction of murder in terms of s 47(1) of the Criminal Code, the State must prove beyond a reasonable doubt that when the accused struck the deceased with a wooden board, he intended to kill her or realised 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. The accused struck the deceased with a wooden board twice on the head. He targeted the head a delicate part of the human body. The force used was excessive and violent that it caused injury to the brain. The post mortem report speaks to the injuries inflicted on the deceased. No human being could endure such a violence. No wonder the deceased died on the spot. Ms. *Ncube* Counsel for the accused submitted that the accused must be convicted of culpable homicide. This is not a case of culpable homicide. Culpable homicide has no place in such a case. This is a case of murder. While assaulting the deceased the accused objectively foresaw the death of the deceased as a substantially certain result of that assault and proceeded regardless. See (*S v Mugwanda* 2002 (1) ZLR 547 (S); *S v Tailo & Anor* HB 126/22).

[23] 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. 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, the accused is found guilty of murder as defined in s 47 (1) of the Criminal Law (Codification & Reform Act) [Chapter 9:23].

Sentence

[24] Mr Mujajati, this Court has convicted you of the crime of murder as defined in s 47 (1) of the Criminal Code. The State conceded that the murder you have been convicted of was not

committed in aggravating circumstances as defined in s 47 (2) and (3) of the Criminal Code. The concession was properly made.

[25] This Court must now decide what sentence is appropriate for the offences for which you have been found guilty. To arrive at an appropriate sentence to be imposed, this court will look at your personal circumstances, take into account the nature of the offence you have been convicted of, and factor in the interests of society and the provisions of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023.

[26] Your Counsel has placed your personal circumstances on record. You were 38 years old when you committed this crime, and you are now 41 years old. You are a family man, with three minor children, aged 12; 8 and 3 years. Your first wife and the mother of these children left for South Africa and never to return. These children are in the custody of your mother whom is herself of ill-health. You are the sole provider of your children and your mother. You have no assets of value. Prior to the commission of this crime, you were earning between USD\$350.00 and USD\$400. 00 per month. You have been in pre-trial incarceration for a period of 27 months.

[27] The crime you have been convicted of is grave and serious. The prevalence of the crime of murder is such that cognisance is sometimes lost of the extreme consequences that flow from it. A life is ended. Not only is a life ended, but the lives of family and friends are irreparably altered and damaged. You ended the life a 21-year-old. At the time she met her death she was mother to two young children aged 2 and 4 years old. These children have been deprived of a mother.

[28] 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 a lethal weapon and attacked the most delicate and vulnerable part of the human body, i.e., the head. The extent of the force which you used was so excessive that you managed to cause injury to the brain. Further, what put this offence in the category of the most serious is that you attacked the deceased in the presence of two minor children. At the time you left the room the deceased was unconscious. You still had the audacity to lock the room, leaving the children with what might have been a dead body of their mother inside the room. The deceased was in a pool of blood. The damage you have caused to these children is unimaginable.

[29] This court will take judicial notice that it is undeniable that our society is experiencing high levels of violent crimes 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 society expects the courts to protect women against the commission of such crimes. 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.

[30] You used a weapon against your wife. You chose to direct the attack on her head and injured her brain. The deceased looked upon you for protection. You abused her trust in a horrific manner. What a horrible way to end the life of another human being. This court must say it, and say it strongly that such conduct will not be tolerated. This court has taken a stand, and it will continue taking a stand against this wanton violence and destruction of life. Such conduct must be answered with appropriate and severe punishment.

[31] In general a sentence of 18 years would have been appropriate in this case. However, factoring into the equation the fact that you are a first offender and that you have been in pre-trial incarceration for a period of 27 months calls for a lesser sentence. And blending all with some measure of mercy the following sentences will meet the justice of this case:

You are sentenced to 15 years imprisonment.

National Prosecuting Authority, State's legal practitioners
Midlands State University Legal Aid Clinic, accused's legal practitioners