

THE STATE
versus
WELLINGTON GWASHURE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 5 September 2024

Assessors: Mrs *Chitsiga*
Mr *Chimonyo*

Criminal Trial

A Mupini, for the state
W Nyika, for the accused

MUTEVEDZI J: The deceased person, a woman called Eunice Mutiwekuziva, is yet another victim of domestic violence. It appears there is no end in sight to the scourge. What is frightening is that in the majority of cases, the murders appear completely senseless and the disputes behind the violence are puerile. The case at hand is no exception.

[1] Wellington Gwashure (the accused) is alleged to have murdered the deceased who was his wife on 3 October 2022. Prosecution alleges that on that date and in contravention of section 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] he unlawfully and with intent to kill or realizing that there was a real risk or possibility that his conduct may cause death but continuing to engage in that conduct despite the risk or possibility, assaulted the deceased several times all over the body with wooden sticks, booted feet and clenched fists. The deceased sustained injuries from which she died.

[2] The background to the murder is that the accused and the deceased were husband and wife. They had a disagreement which resulted in the accused assaulting the deceased with wooden sticks, booted feet and clenched fists. The deceased collapsed during the assault. Upon realising that, the accused dragged the deceased's motionless body from the room where the assault had taken place to the courtyard. He left it there, nonchalantly walked away and proceeded to Innocent Gocha's homestead where he

advised him that he had assaulted his wife. He requested Innocent to accompany him back to his homestead. Innocent agreed but on arrival at the homestead, he observed that the deceased was lifeless. He proceeded to report the matter to the village head called Farai Dzapasi. Subsequently, the matter was reported to the police. A police sergeant named Munda attended the scene and recorded statements from the witnesses. The body of the deceased was ferried to Chimhanda hospital for a post mortem examination. The pathologist who conducted the examination concluded that death was due to deep laceration, ruptured eyes and polytrauma. From those observations, the assault was obviously brutal.

- [3] In his defence, if he had any, the accused stated that on the fateful day he was at his homestead in the company of his wife and child. He decided to go and see his nephew called Nhekairo who stayed in a neighbouring village. Upon arrival at the nephew's place, Nhekairo requested the accused to accompany him to go and see another man called Chipikiri. It was not clear at what stage but along the way Nhekairo bought beer which the two of them shared. The accused's wife later came and together with the accused they left for their homestead. On arrival at the homestead, the accused, possibly pulled by the allure of other women as alleged by the deceased or the thirsty for beer immediately indicated that he wanted to return to where he had been drinking with Nhekairo. The deceased protested and bluntly told him that he was in the habit of 'falling in love' with other women. We are not sure whether one can possibly develop a habit of falling in love. What is clear however, is that the habit as shown by this tragedy can be a dangerous one.
- [4] After the deceased had said the accused couldn't go, the two started pulling and pushing each other whilst outside the house. The accused lost his temper, plucked a switch with which he assaulted the deceased. She fought back with bare hands and groped for the accused's his genitals in vain. She was hit and she cried out for accused to hold her. She was on the ground. When the accused tried to pull her up, she started rolling on the ground. The accused said he then went to seek assistance from his neighbour Innocent Gocha. Upon his return with Innocent, they discovered that she was motionless. They called out her name but she did not respond. They decided that it was better to inform the village head. They went to Chipikiri's homestead before reporting to the village head. It was the accused's nephew called Nhekairo who eventually reported the case to the village head who in turn made a police report.

[5] Meanwhile the accused and Chipikiri left for Runwa shops. The accused further stated that on the advice of Chipikiri, he bought rat poison which he intended to consume in a bid to commit suicide. Surely, there couldn't be a worse friend than Chipikiri. The accused couldn't however overcome the fear of death. He did not kill himself. He said he was dissuaded from doing so by his other friend called Tafadzwa Mupazi from whom he had also sought counsel after telling him what had transpired.

State case

[6] The prosecution opened its case by seeking the admission of the testimonies of the village head, Farai Dzapasi and doctor Tinei Tadiwa Chivese into evidence in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA). The defence did not object and the testimonies were duly formally admitted into evidence in terms of that law. The prosecutor also applied to tender the post mortem report as an exhibit. Once again there was no objection. The report became exhibit 1 in the trial. Equally, the state applied to produce the accused person's warned and cautioned statement. The defence once again did not contest it. As such the accused person's warned and cautioned statement which was recorded at Rushinga Police station on 6 November 2022 and later confirmed by a magistrate at Mt Darwin on 5 December 2022 was admitted and marked as exhibit 2.

[7] Thereafter the state led *viva voce* evidence from various witnesses. The material portions of their evidence are summarised below.

Innocent Gocha

[8] In brief, Innocent's evidence was that he resides at Gocha village Chief Rusambo. He was a neighbour to the accused and the deceased. He regarded the accused as his uncle because the accused is of the same totem as his grandmother. He was blunt that the accused had killed his wife. He said on the fateful day the accused had woken him up around 3 am. He requested for tobacco before asking to be accompanied to his homestead. Innocent said he agreed not because he wanted but because he was scared of the accused who was in the habit of bullying him. He carried a torch. When they got to the accused's father's kraal the accused asked him to trail the beam of the torch ahead of them. Innocent was not yet aware that something dreadful had happened. The accused led the way. Before they reached his homestead, the accused confessed that he had assaulted his wife. Innocent said he was taken aback. They arrived and the accused asked Innocent if the deceased was still alive. Innocent said he checked and

confirmed that she was dead. He advised the accused to check the deceased's eyes and mouth. It was clear she was dead. The accused asked him for advice but the witness said he had none. They then left the homestead together with Innocent going back to his home and the accused going his own way. At day break Innocent went to report the murder to the village head Farai Gocha. At the crime scene he observed a child who had been sent to the accused's place just standing looking puzzled as to what had happened. He also noticed a baby covered with a blanket at the side of the deceased. The baby was making movements in the blanket. He left the scene as he had seen it before reporting to the village head as already stated. It was the village head who then came and made the decision that the baby which was besides the deceased person be taken away. Crucially he stated that he observed injuries on the deceased. She had been assaulted on the soles of her feet, on the knees and on the head. She had visible injuries on the head and the face including the eyes. Innocent also stated that the reason why he quickly parted ways with the accused was that he was afraid of him. Their relationship was not good because of the accused's abusive nature. He used to ill treat the witness and threaten to assault him. The accused's relationship with his wife was equally strained. He is their neighbour and constantly witnessed the abuse. He added that on the day in question the accused appeared sober although he had been drinking beer in the afternoon of the previous day.

- [9] Under cross examination by counsel for the accused Innocent conceded that there were struggle marks in the yard. He said he wasn't surprised that there were given the accused's violent behaviour. He testified that considering how accused related with other people in the society it couldn't be true that his wife could assault him. He could assault anybody for no apparent reason. He refuted the allegations that it was him and Chipikiri who had advised the accused to commit suicide.

Nathan Ambulance Gwashure

- [10] He is an uncle to the accused in that he is a younger brother to the accused's father. His evidence was that on 23 October 2022 he was at his homestead. When he heard the accused raise his voice, he immediately left his homestead with his wife and family. He went to his sister in law's place. The witness's homestead is about fifty (50) metres away from the accused's place. He said he could not stand the accused's threats. Before he started abusing his wife, the accused had targeted the threats at the witness. He always threatened that he wanted to kill the witness. On the fateful day, he was

making the same threats and accusing the witness of having killed his parents. As he said those words, he was drawing closer to the witness's homestead. So, when the accused's altercation with his wife started, the witness said he was no longer around. He confessed that after hearing the accused's rants he didn't even ask him a word because his threat was that either him or the witness was going to die that day. Nothing came out of the witness's cross examination by counsel.

Lloyd Munda S/Statement

[11] He is a police officer based at ZRP Rushinga Station. He was the attending detail in this case. Upon arrival at the scene, he met Farai Dzapasi who showed him the body of the deceased. She had been assaulted by the accused who wasn't at the scene. He had gone to an unknown place. The body was partly covered in a blanket on the upper body. It was lying on open ground about five metres away from the house. It was facing upwards. Her breasts were not covered. He inspected the injuries. She had severe head injuries. The front of the head was swollen. She had bruises on the legs, hands and on the back. She was lifeless. The clothes were soiled and blood stained. At that scene the officer also observed struggle marks about fifteen metres away from where the body lay.

[12] The officer added that there were trees around the homestead. Some switches had been plucked from the trees. He had recovered nine such sticks. He was in the company of constable Soko. Three of the switches were big but the rest were broken. It was however apparent that they had been broken during the assault. He couldn't remember their lengths. He was then shown a bundle of wooden sticks which he confirmed were the ones recovered from the crime scene and allegedly used for the commission of the crime. There were blood stains on three of the longer switches indicating that they had been used during the assault. He also confirmed observing struggle marks at the scene. Counsel for the accused chose not to cross examine the witness.

Israel Sande

[13] He is a police officer and was the arresting detail in this case. He said after committing the crime, the accused disappeared from the area. He was only arrested after the police received a tip off that he had returned to the community. He arrested him on 5 November 2022 after the police ambushed him around 2200 hours. They

were liaising with the people who were drinking beer in the accused's company. After the arrest, they took him into custody thereafter.

[14] At the time of his arrest, the accused had poisonous tablets which he had crushed, diluted in water and put in a container. The police took him to his place for indications after the arrest. During the indications he showed them the clothes he had been wearing on the day of the murder. They were in a disused room and comprised a pair of green shoes, red tennis shoes, a sleeveless blue denim shirt. They were all soiled with dried blood and damp. With the consent of counsel for the accused the bunch of the stated clothes was admitted as an exhibit. Once again, nothing meaningful came out of the witness's cross examination.

[15] With the above evidence, the prosecutor closed his case.

Defence case

Wellington Gwashure

[16] He incorporated his defence outline into his evidence in chief. He admitted assaulting the deceased with booted feet and switches. He denied having used fists. He added that although he had taken alcohol, he was moderately drunk. When he got home, the deceased indicated that she wanted to go and fetch water. He decided to accompany her because the place from which the water was drawn was far. On their way the accused said he heard the call of a jackal and knew that they would return when it was late. The accused then suggested to the deceased that they could do it the following day. He then advised the deceased that instead he wanted to go and visit his friend Nhekairo. The deceased thought he wanted to go and visit his girlfriend called Mona who was not in the village but was in Harare. The accused insisted on going but the deceased followed, grabbed him and dragged him back into the house. As she did so, she hurled insults at him. He said she insulted his mother. A fight broke out between the two of them. During the fight the deceased attempted to grab the accused's genitals. He said he then pushed her away and kicked her once. She fell but he didn't realise what had happened. He ran to innocent's place. He requested Innocent to accompany him back to his place and assist him. He added that during the fight he had used a switch plucked from a tree at the backyard to assault the deceased. His further argument was that initially he hadn't intended to assault her with the switch but just wanted to scare her because of the insult she had hurled at him.

[17] Thereafter, the accused's evidence was similar to that of Innocent Gocha as to what transpired when they went back to the crime scene. The only differences were that when they arrived, Innocent had advised him to take the baby, place it besides the dead body and cover it in the same blanket which was covering the deceased. He further advised the accused to either run away or commit suicide because the offence he had committed was grave. The accused said it was then that he left the house together with Innocent and went to Chipikiri's place. Innocent told Chipikiri what had transpired. Both of them once again advised the accused that the only way was for him to kill himself. They all went to the shops with the accused intending to buy poison with which to kill himself. He however didn't have the money to buy the poison. He suggested selling his phone to Innocent who gave him two dollars and took the phone. With the jackpot, Innocent went back to his homestead. The accused and Chipikiri proceeded into the shop. Chipikiri bought the tablets which cost fifty cents. He implored the accused to immediately take the poison. The accused hesitated and said he first wanted to see his friend Tafadzwa who was to become the accused's saviour because when they met, he dissuaded the accused from killing himself.

[18] The accused maintained that although he had taken alcohol, he wasn't drunk. He said at Chipikiri's homestead and at his advice, he had taken off all the clothes which he had been wearing at the time of the murder. Chipikiri had assured him that no one would notice and that he (Chipikiri) would later take them back to the accused's place and stash them in a spare room. The accused insisted that he had used only two switches to assault the deceased. Under cross examination, he did not however deny that the police had recovered all the switches produced in court at his homestead. His explanation was that he used the switches to drive off cattle and goats from his yard because he has no doors on his structures. He further stated that he did not deny that he assaulted the deceased. His defence was simply that the deceased had angered her by grabbing his genitals as they fought. He admitted that he must have kicked the deceased on the head during the fight. His view was that he was disciplining her for insulting his parents.

[19] With the above evidence, the accused closed his case.

Common cause issues

[20] From the evidence adduced by the prosecutor and the accused's defence a number of issues become common cause. They are that:

- a. The accused and the deceased had a misunderstanding largely caused by the accused
- b. An argument ensued during which the deceased may or may not have insulted the accused's parents
- c. The accused thought he had the right to discipline the deceased for insulting his parents. In the process he used booted feet and switches to assault the deceased. He admitted assaulting the deceased on the head and other parts of the body.
- d. The deceased sustained injuries as earlier described. She died from those injuries. As such the cause of her death is not in dispute.

The issues for determination

[21] The only issue for debate in this case is therefore whether or not the accused's defence of provocation can be sustained.

The law on provocation

[22] Provocation is only a partial defence to a charge of murder. It does not completely exonerate an accused who pleads it from liability. The defence is provided for in s 239 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The provision states as follows:

- “(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 47, 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 s 47; or
 - (b) he or she has the intention or realisation referred to in s 47 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 realization 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 for in section two hundred and thirty-eight.”

[23] It is apparent therefore that provocation is not a defence for all other crimes. I have remarked previously that it is inaccurate to regard provocation as a defence to any other crime other than murder. See the case of *S v Cleopas Kumire* HH .../23. It can

only assist an accused defending himself against a charge of murder. Where the requirements are satisfied, the charge may be reduced to culpable homicide. There are however stringent requirements which must be fulfilled before that can happen. To begin with it must be understood what provocation entails. In that regard, I can do no better than restate what MUNGWARI J remarked in the case of *S v Denford Nyamande* HH 871/22 at p. 9 of the cyclostyled judgment. She said:

“Provocation is essentially speech or action by one person which makes another angry. Such speech or action is usually deliberate. By its nature as a defence provocation must occur suddenly as a result of an impulse. It happens without premeditation. In other words, it refers to an instantaneous and spontaneous response to an event in which the accused has not time to cool off and weigh his options. The accused must have lost self-restraint on the spur of the moment. The defence is not available cumulatively. Provocation cannot build gradually. In instances where an accused is provoked no matter how intensely but has had the opportunity to cool off and does not suddenly react but lets the provocation fester waiting for an opportunity to strike back at the provocateur, he waives his right to rely on this defence.”

[24] The above remarks bring to the fore some of the requirements that an accused has to meet in order to successfully plead provocation. For the defence to stick, the accused must first show that he was provoked. If he was, the second rung of the test is to gauge whether the speech or the action which allegedly constitutes the provocation made the accused lose self-control and if he did whether the provocation was so potent that a reasonable person in the position and circumstances of the accused would have equally lost self-control and acted in the manner that the accused did. See the cases of *S v Kashiri* HMT 13/18, *S v Thsuma* HB 171/22 and *S v Machokoto* HH 461/23.

[25] The defence connotes abruptness of events. The accused’s reaction to the provocation must have been spontaneous. There mustn’t have been any room for the accused to ponder his next move. The accused must also demonstrate that between the time he/she was provoked and the time he/she reacted to the provocation there wasn’t any intervening cooling period. The accused must have lost self-control in the midst of his anger.

[26] As what has been said before, the first rung of the provocation test is subjective. The accused must show that because of the deceased’s conduct, he/she was driven into a state of temporary loss of self-control which was sudden. The loss of self-restraint must render the accused so subject to passion as to make him or her for the moment not master of his/her mind.

[27] It may be needless to point that in instances where the accused wasn't provoked by the deceased's conduct even in circumstances where a reasonable person would have been provoked by the conduct complained of, the investigation must end there. The second part of the test can only kick in if it is established that indeed the accused was provoked.

Application of the law to the facts

[28] In the instant case, the accused said he was provoked when the deceased insulted his parents. What is glaring is the accused's omission to mention the actual words which the deceased uttered resulting in the provocation. We have said above that the first part of the test requires that the accused must have been provoked. Apart from his mere statement that he was angered by the deceased's utterances there is absolutely no proof that he was provoked. We are prepared to give him the benefit of doubt and accept his allegation that he was provoked. He unfortunately will still not surmount the second rung of the test.

[29] For the accused to succeed in his defence, he must show that a reasonable man placed in his circumstances would have also been provoked by the words or conduct of the deceased. As already stated, we cannot hold that a reasonable man would have been provoked by words which we are not aware of. The accused ought to have taken the court into his confidence and disclosed the actual words uttered instead of simply saying that the deceased insulted his parents. Even if he had, it is difficult to imagine an accused flying into a rage, assault his spouse brutally resulting in her death merely because she had somehow insulted his parents. We unable to buy that story.

[30] What is clear is that the accused was a bully in his community. He terrorised his own uncle to the extent that when he heard him raise his voice, the uncle abandoned his home and fled. Innocent Gocha also testified that the accused frequently and repeatedly abused his wife. The allegation that he had been provoked is possibly a make- believe story. After the assault he immediately went to Innocent's homestead. He never mentioned that the deceased had provoked her. He later met his nephew and friends. Once again, he did not mention the story of the provocation to any of them. All this simply serves to trash his defence.

[31] The accused also mentioned that the deceased wanted to grab his genitals. If we go by his version, she did not do so but only attempted. Even if she had held him by the genitals, the irrefutable evidence is that she only did so after he had started

assaulting her. As such that could only have been done in a bid to protect herself from further assaults. The beating itself was savage. The deceased's eyes were raptured, she suffered head and other bodily injuries. Innocent who was first at the scene said he observed injuries under her soles, on the head and various other parts of the body. That illustrates the untruthfulness of the accused's testimony that he had only moderately assaulted the deceased with a switch and no more.

[32] The accused apparently knew what he was doing throughout the assaults. It was the reason why when he noticed that the deceased had collapsed, he stopped and sought to rope in Innocent. He fled from the area after committing the crime. That behaviour is not consistent with someone who simply made a mistake after having been provoked. He was only arrested days after the commission of the crime through a trap set by the police otherwise, he was determined not to face justice in this case.

[33] It is for the above reasons that we are convinced that the accused did not even begin to fulfil any of the requirements to establish the defence of provocation. The evidence led by the prosecution completely controverts the defence of provocation. The prosecutor successfully disproved the accused's argument. For those reasons, we have no apprehension to hold that the accused's defence is not only false but palpably so. The evidence against him is simply overwhelming and points to that he attacked his wife after she asked him why he wanted to leave home. He was not provoked by anything. A reasonable man in his circumstances would never have been provoked by being asked why he wanted to leave home and possibly that he wanted to go and flirt with other women. Against that background we are convinced that the state managed to prove its case beyond reasonable doubt. **Accordingly, the accused is found guilty of murder as charged.**

MUTEVEDZI J:

National Prosecuting Authority, the State's legal practitioners
Nyika and Associates, the accused's legal practitioners