

THE STATE
versus
TINOTENDA GUDO

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 5 June 2024 & 11 November 2024

Assessors: Mr *Jemwa*
Mr *Gwatiringa*

Criminal Trial

Ms A Mupini, for the state
Mr W. Sengweni, for the accused

MUTEVEDZI J: There is nothing victim friendly about a murder. In the normal course of things, the courts usually do not concern themselves with which unit of the Zimbabwe Republic Police conducts investigations into a particular crime. In this case, we were however taken aback and found it odd that a homicide was assigned to the police's Victim Friendly Unit. The officer who conducted the investigations confessed that she had no clue in murder investigations. Such conduct can easily cause injustice to the victims of crime where an accused then walks free not because they did not commit the crime but because the police would have bungled investigations.

[1] The accused person appeared before us facing a charge of murder as defined in s 47 (1) of The Criminal Law Codification and Reform Act [*Chapter 9:23*] (the Code). The allegations were that on the fateful day, he unlawfully and with intent to kill or realising that there was a real risk or possibility that his conduct could lead to death, but persisting with the conduct despite the realisation of the real risk or possibility, assaulted the deceased person Susan Trisha Munemo with open hands, a cooking stick, bamboo sticks and plank several times all over the body at various intervals. The deceased died from the wounds she sustained in the assault. The pathologist who examined her body concluded that the deceased had died due to severe brain oedema, severe craniocerebral trauma and universal subarachnoid haemorrhage.

[2] In his defence the accused said he had neither the intention to kill the deceased nor did he foresee that death could occur.

The state case

[3] The State led oral evidence from five witnesses in addition to the testimonies of Anna Chiunye and Doctor Q. P. Gonquet which were formally admitted into evidence in terms of section 314 of Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA). The prosecutor also tendered the weapons allegedly used for the commission of the offence as exhibits. Exhibits of weapons that were used during the commission of the offence were tendered. Further, the post mortem report compiled after the examination of the deceased's body was also produced although the cause of death was not contentious. Below we summarise the evidence of the witnesses who gave oral testimonies.

Samuel Tariro Makuto

[4] His evidence was key to the resolution of this murder. We therefore recite it in full given the accused's defence that he did not intend to kill the deceased. The witness said on the day in question, the accused and the deceased had a misunderstanding. The accused alleged that the deceased had extra-marital relationships. The argument went on for about an hour. The accused then started beating the deceased. The argument initially took place in the couple's living cum dining room. The witness was with them in the room. He had spent the previous night at the house. At the time the accused was assaulting the deceased another man called Chitungwiza was also present. Both the witness and Chitungwiza tried in vain to restrain the couple and urged them to resolve their dispute amicably. At first the accused used open hands to assault the deceased but as it escalated he took bamboo sticks which were in the room and used them in the assault. He threatened both the other men not to intervene because the dispute was between him and his wife. At first the deceased had tried to fight back but she was overpowered. The accused later asked the deceased to get into the bedroom. She complied. He closed and locked the door. Thereafter the witness said they could hear the deceased screaming and that someone was being banged against the wall. At one time the witness said he got out of the house intending to seek assistance from the neighbours. He and Chitungwiza had failed to help on their own because the accused was very threatening and they were both scared of him because he had earlier overpowered both of them. A glass table which was in the house had been broken as

the tried to restrain him. The neighbours from whom the witness sought assistance refused to help alleging that the accused was violent and whenever he beat his wife he would turn on anybody who attempted to intervene to stop the beating. When he failed to get assistance, the witness said he went back to the house of horror. Both him and Chitungwiza tired once more to persuade the accused to stop the assault. It was only a while later that the accused finally opened the bedroom door. He was holding a cooking stick and was still fuming about the deceased's infidelity. The deceased followed him out. They sat down. During all the time she was assaulted, the deceased was being forced to admit that she had been promiscuous. When they came out of the bedroom, she said she was ready to confess her indiscretions and name her paramours whom she indicated were called Chairman, Robbie, Simbarashe and Partson. Those men were either tenants or friends of the accused. Chairman was said to be the accused's brother. That Chairman and Robbie stayed at the same house as the couple. After she divulged that, the accused continued shouting. The witness and Chitungwiza asked him for a way forward since the deceased had confessed. The accused refused to accept the confession and said it was painful to be betrayed by people he was looking after. He then said he was willing to let the deceased go but he wanted to assault her first to vent his anger and avenge the pain that he had suffered.

[5] In relation to the injuries suffered by the deceased, the witness said the deceased had been wearing a pair of trousers but observed that both her arms were swollen. Her forehead was also swollen suggesting having been hit against something. True to his threats, the accused started assaulting the deceased once more in his bid to avenge his so-called pain. He ordered her back into the bedroom. He used both the cooking stick and the bamboo sticks. His blows were indiscriminate. When Chitungwiza tried to block them from getting back into the bedroom the accused once more said it was his house and that he wouldn't brook the other men's interference. He dragged the deceased inside the bedroom and once again locked the door. The beatings resumed and the deceased could be heard screaming. A while later the accused again opened the door and directed the deceased to leave his residence. The second bedroom assaults took about fifteen to twenty minutes. The first episode had taken about twenty-five to thirty minutes. When the door was opened, the deceased was standing but could not walk on her own. She then collapsed to the floor but the accused continued ordering her to leave the residence. She was helpless and panting. She was breathing heavily.

Her legs were still in the bedroom whilst the other part of the body was in the dining room. Her body had become swollen. It had cuts all over. The face was now also bloated. Regardless of the severe injuries, the accused held her by the legs and dragged her fully into the dining room. He was still yelling that she gets out of the house. The witness said he was struck with fear and trepidation. The deceased was no longer crying. She was only weeping but couldn't do or say anything. She continued gasping for breath. The accused then opened the door to the dining room. He held the deceased by the legs again and dragged her out. He closed the door whilst the witness and Chitungwiza were still inside. After close to a minute, the accused returned into the dining room. He continued yelling at everyone and said he had been betrayed by ungrateful people. He ordered both of them out of the house. The witness and Chitungwiza went out but stood by the doorway to the kitchen. The accused went into the toilet. When he came to the kitchen he told both men that it appeared the deceased had passed on. He called them to check. The witness said he told the accused that he didn't know the difference between a dead and a living person. His advice was that they were supposed to look for an elderly person who could tell if indeed the deceased had died because he thought the accused was just afraid after having heavily assaulted his wife.

[6] After the deliberations, the accused suggested that there was an elderly man who lived nearby who could be called. All of them went to that granny's place and told him the story. He said he couldn't do anything but advised that they go to the police. On their way to the police station, the trio passed through a woman called Cecilia's house and asked for water and bought bananas. At that moment, the accused and Chitungwiza said they were no longer proceeding to the police. The accused said the police would find him at his residence. Chitungwiza said he couldn't go to the police probably because he had pending issues with the police. The witness said he was apprehensive that the accused could flee. Chitungwiza however said he would make sure the accused didn't abscond. The witness proceeded to the police station alone. When he got there, he suspected someone had already called the police informing them because the details were already preparing to attend the scene. He got into the police car and proceeded to accused's residence. As they approached, they saw that a crowd had already gathered. The accused was on the road to his residence. The witness pointed him out to the police

details. He was wearing a white vest. He was already raising his hands advancing towards where the police were. He was arrested.

Tatenda Chigodora

[7] He is the man who was referred to as Chitungwiza in the first state witness's testimony. He was very close friends with the accused and said he literally stayed at the couple's place. He referred to the deceased as his aunt. Needless to state, he was present when the assault took place. He narrated the genesis of the misunderstanding in exactly the same way that the first witness did. The deceased was being coerced to reveal her paramours after the accused had allegedly discovered messages in her phone. He confirmed the assaults both in the bedroom and in the living room. He also confirmed that they could not stop the accused from assaulting the deceased much as they tried because he appeared extremely angry and was fearsome. Nonetheless he said he begged the accused to stop because 'something serious could happen.' He equally disclosed that the deceased ultimately made some confession. The accused assaulted her more and finally left her sprawled in the living room. He later dragged her into the toilet. He said the accused had to drag her because she couldn't walk. Her legs seemed injured. He also narrated the time the accused approached him and the first witness expressing his fears that the deceased had died. Crucially he added that he had been staying on and off at the couple's house for many months. As far as he knew, the two's relationship was acrimonious and characterised by violence.

Sonia Zuze

[8] At the material time, she was a tenant at accused's residence. She was also present when the assault took place. She was doing her laundry outside whilst the deceased was also outside the house. The deceased asked about some man who she said had been standing by the perimeter wall. Sonia indicated that she didn't know the man. The accused was inside the house. The deceased then went indoors and called the accused. The accused looked for the person but didn't find him. He went back into the house. The deceased later approached Sonia and confided that the accused was accusing her of having an affair with that man. She had been ordered to go inside. The witness further said when she went into the house later she heard the deceased crying. She then left the house going to High Glen shopping centre. She returned and went into her room but shortly thereafter she heard a knock on her door. It was the accused. He requested for Sonia's keys. He called someone whom he told that the person had died. He was standing by

the toilet. A man called Samuel came and checked and advised the accused that he had killed her. Sonia also confirmed that throughout the time she stayed with the couple, they were in constant fights.

Tendai Nzvenga

[9] He was the detail who attended the scene shortly after the murder. He said he observed the deceased lying down facing upwards. Both her hands were spread out. Her head was just some few centimetres from the toilet seat. He interviewed two tenants who were present. On the body of the deceased, he observed some bruises particularly on the left arm. The accused had been secured by other details outside. He asked the accused to show them what he had used to assault the deceased. He recovered two bamboo sticks in the dining room. Both of them were about one and half metres long. One of them was fragmented at the tip. He identified them as the exhibits which were in court. They were, with the consent of the defence admitted into evidence together with their certificate of measurements

Patricia Mangava

[10] She was the investigating officer in the case. She visited the crime scene with the accused and other police officers a day after the murder. She was accompanied by other police officers and the accused. At the scene, she recovered a cooking stick and a plank. She recovered them from the room which was used by the accused and the deceased as their bedroom. She said it was the accused who pointed out the weapons. She identified the same cooking stick in court after which the prosecutor applied for its admission as an exhibit. Together with its certificate of measurements, they became exhibits 4(a) and (b) respectively. By consent it was duly admitted. It was brown in colour and about half a metre long. She added that nobody had pointed out the plank. She had just found it outside at the premises and thought it could have been one of the items used in the commission of the crime. When asked that the accused was denying ever assaulting the deceased, her answer was simply that it is what he had also told the police. Under cross examination, she conceded that she was ill-equipped to investigate the murder. Like we pointed out earlier she was from the police victim friendly unit.

Defence Case

[11] In his defence, the accused accepted that he assaulted the deceased. He said he used bamboo sticks and a cooking stick all of which were produced in court as exhibits. He said he used the cooking stick to assault her in her palms and the bamboo sticks

from the waist to the feet. He said he remembered assaulting her three times with the cooking stick and about five times with the bamboo sticks. For reasons which we couldn't understand, he added that the deceased was wearing tights and a shirt on top. He further insisted that the assault took place in the dining room only. He confirmed that Samuel and Tatenda were present during the assault but couldn't do anything to stop him probably because they were afraid. When asked to comment on the allegation that the deceased had injuries on the forehead, the accused said it was true but that she had probably suffered them when he pushed her and she hit her head against a wall in the bathroom. He also said that he didn't check the time to gauge the duration of the assault but that it was probably fifteen to twenty minutes. On the murder weapons, the accused said he had an interest in bamboo weaving so he kept the bamboo sticks in the house. They just happened to be there. In the end he said gravely regretted his actions; that he was sorry. He didn't think that the matter would end up like this. He added that his relatives had assisted at the burial of the deceased. They provided a coffin and food which was consumed at the funeral. After he was granted bail his uncle and his paternal grandfather went and met the parents of the deceased. Issues of compensation were discussed. They said they wanted the accused's family to first perform the *roora* rituals and only after that would they advise of the way forward.

Common Cause Issues

[12] A number of issues are not in argument in this case. First the accused and the deceased were husband and wife. Their marriage was tumultuous and characterised by violence. On the fateful day they had a misunderstanding over allegations of infidelity. The accused then assaulted the deceased. Three of the witnesses who testified in court were present when the assault took place. Two of them Samuel and Tatenda witnessed it from start to end. The accused also doesn't deny using the weapons produced in court in the assault.

The issue for determination

[13] This is a matter that turns on the facts. The accused feebly alleged that he didn't intend to kill the deceased. So, the only question that the court must determine is whether or not the accused had the requisite mental element.

The law

In the case of *S v Mutero* (178/2023) [2023] ZWHHC 178, this court remarked that:

“The mental element of the crime of murder is split into two distinct categories. The first category is called actual intention. It relates to instances where an accused desire to bring about his/her victim’s death, sets out to do so and achieves that objective. In other words, the accused’s incentive for his actions is to kill his target. The second classification is what is called legal or constructive intention. This class relates to deducing an accused’s *mens rea* from inferential reasoning drawn from the proven facts and or circumstances surrounding the commission of the offence. The accused is not inclined to murder the victim but commences conduct in which it is clear that death or serious injury may result.”

In the case of *S v Mungwanda* 2002 (1) ZLR 574 (S), it was highlighted that:

“For a trial court to return a verdict of *murder with actual intent* it must be satisfied beyond reasonable doubt that:

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

On the other hand, a verdict of murder with constructive intent requires the foreseeability to be possible (as opposed to being substantially certain, making this a question of degree more than anything else). In the case of culpable homicide, he ought to, as a reasonable man, have foreseen the death of the deceased.”

[14] It may not need repeating that the above considerations were applicable under the common law. The codification of our criminal law saw the legislation of the issue of intention in murder cases and in all other offences where intention is a prerequisite. *Mens rea* as it is affectionately called by lawyers is divided into three namely intention, knowledge and realisation of real risk or possibility. The concept of ‘*realisation of real risk or possibility*’ supplanted legal intention. What it means is that an accused would have legal intention where he/she undertakes conduct in full awareness that there was *a real risk or possibility* that the consequence may ensue and despite that awareness proceeds with the conduct heedless as to whether or not the result occurred. I can do no better in explaining this principle than restate what I said in *S v Mutero* (*supra*) that:-

“The major difference is therefore that under the common-law, an accused could be held to have had legal intention simply because he foresaw the possibility, no matter how remote it could have been that a consequence may ensue. There was no categorisation of the likelihood. It sufficed whether it was at the foot or at the summit of the ladder. Under the new regime, an accused must not be convicted on such basis. The view that the legislature intended to alter the common-law position is supported by s 15(4) which unequivocally states that:

- “(4) For the avoidance of doubt it is declared that the test for realisation of a real risk or possibility supersedes the common-law test for constructive or legal intention and its components of foresight of a possibility and recklessness wherever that test was formerly applicable.”

[15] As such, a finding that an accused had the realisation of real risk or possibility can only be drawn from the ‘facts and circumstances of a case.’ Such facts and circumstances include the nature of the weapon that an accused used; the manner in which it is used; and the part of the body at which it is directed; the force with which the weapon is thrust; and the victim’s vulnerability where that is known to the accused must also be considered. See the cases of *S v Munodawafa* SC 220/ and *S v Mhute* HH 784/15 for those propositions.

Application of the law to the facts

[16] In this case, the accused assaulted the deceased with bamboo sticks, a cooking stick and open hands. He also banged her head against a wall. The two bamboo sticks measured about one and a half metres long each. The cooking stick was about half a metre long. More significantly, the assault was indiscriminate and relentless. The accused did not care which part of the deceased’s body that he directed his blows at. The witnesses said all in all the deceased was assaulted for over an hour. We described in detail how that took place. It was barbaric. It was gruesome and sadistic. One would not imagine that the deceased was a person who thought she had found love in the accused. In reality she signed her death warrant the day she fell in love with him. We say so because even when she had collapsed from the assault, the accused deemed it fit to continue assaulting her. The witnesses said at that time the deceased was completely helpless. She wasn’t able to cry aloud anymore. She couldn’t walk. All she was able to do was to weep silently. Yet the accused still dragged her by the legs from the living room to the toilet. We are not sure about the symbolism of dragging her to the toilet but it was akin to saying she was as good as waste. He boasted that he wanted to avenge the pain that the deceased had inflicted on him by her infidelity. His protestations that he only assaulted the deceased three times with the cooking stick and five times with the bamboo sticks is a red herring. The witnesses testified to prolonged beatings in the bedroom with the bedroom door locked from inside. He wanted to ensure that no one could restrain him from assaulting the deceased. All the three witnesses testified to hearing screams and cries for help from the bedroom as well as thudding sounds of someone who was being banged against the wall. In the end the savagery of the assault tallies with the findings of the pathologist that the deceased had died due to severe brain oedema, severe craniocerebral trauma and universal subarachnoid haemorrhage.

[17] Given the above, we are sure that the accused's *mens rea* was actual intention as that described by CHIDYAUSIKU CJ in the case of *S v Mungwanda* 2002 (1) ZLR 574 (S), at p. 581 D-F where he put it thus:

“For a trial court to return a verdict of *murder with actual intent* it must be satisfied beyond reasonable doubt that:

- (c) Either the accused desired to bring about the death of his victim and succeeded in completing his purpose; or
- (d) While pursuing another objective, foresees the death of his victim as a *substantially certain* result of that activity and proceeds regardless.”

[18] In this case, the aim of the accused as per his own testimony was to punish the deceased as a form of avenging the suffering wrought by the woman's infidelity. In all that we have described above he foresaw the death of the deceased as a substantially certain result unless if his mind was unhinged. Any sane person would have seen the certainty of death from such a macabre beating.

[19] Even if we could give the accused the benefit of doubt, and hold that he did not set out to kill his wife (which we are not doing), it is apparent that he undertook conduct in which he foresaw the real risk or possibility of the deceased's death. After foreseeing that possibility, he continued assaulting her heedless as to whether death occurred or not. He would therefore still be guilty of murder.

[20] It is for the above reasons that we reject the accused's contention that he never intended to kill the deceased. He did, as we explained above. We are therefore convinced that the state managed to prove its case beyond reasonable doubt as required at law. We accordingly find the accused guilty of murder as charged.

MUTEVEDZI J:

National Prosecuting Authority, State's legal practitioners
Legal Aid Directorate, accused's legal practitioners