

THE STATE
vs
ALEX MUCHOCHA

HIGH COURT OF ZIMBABWE
MAWADZE J.
MASVINGO, 13 & 21 July, 2023

Assessors: 1. Mrs Chademana
2. Mr Chikukwa

Criminal Trial

Ms M. Mutumhe, for the State
Ms I. Moyo, for the accused

MAWADZE J: The love triangle involving the accused, the now deceased Mercy Mupuwa (The female) and one Peter Majoka ended up tragically on 22 November 2021 at Chiredzi Town Council dumping Site, Chiredzi. The accused fatally stabbed the now deceased Mercy Mupuwa with an okapi knife three times on the thigh and on the stomach causing her intestines to protrude and loss of much blood. This is the basis of the murder charge as defined in Section 47 (1) of the Criminal law (Codification and Reform Act [*Chapter 9:23*] which the accused is facing.

The narrow issue in this matter is largely a legal one rather a factual discourse. It is whether the defence of provocation as provided for in Section 239 (1) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] is available to the accused. The accused tenders a limited plea of guilty to the permissible verdict being the lesser charge of Culpable Homicide as defined in

Section 49 of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] on the basis of provocation.

There are however ancillary factual issues which need to be resolved first before examining the accused's defence of provocation.

THE FACTS

The 47-year-old accused resides at Farm 28, Hippo Valley Chiredzi. He is employed as a cane cutter.

The now deceased Mercy Mupuwa's age is unclear but is put as between 18 years and 21 years. She was the centre of the love triangle.

The now deceased was in love with both the accused and the 32-year-old Peter Majoka. Peter Majoka was residing at some shacks which were at the Chiredzi Town Council dumping site where he irked a living with others by scavenging on the dump site.

What is unclear but amazing is how the now deceased managed the feat of co habiting with both accused and Peter Majoka. Apparently, she managed to keep both men blissfully happy until the fateful day on 22 November 2021 when she lost her life at the hands of the accused.

The state alleges that on 22 November 2021 at about 20:30hrs the accused proceeded to Chiredzi Town dumping site where Peter Majoka was residing looking for the now deceased. He found the now deceased, Peter Majoka and one Chipu Msipa seated by a fire place near Peter Majoka's shack. It is alleged that the accused pulled an Okapi knife from his pocket and stabbed the now deceased three times on the thigh and once in the stomach after which the accused fled from the scene. A report was made to the police immediately and the now deceased was pronounced dead on arrival at Chiredzi District Hospital moments later. The cause of her death is said to be haemorrhagic shock due to stab wounds. It is said the police recovered the knife the accused had used the following day on 23 November 2021 at the scene.

THE ACCUSED'S DEFENCE OUTLINE

The accused factually admits stabbing the now deceased with the okapi knife as alleged. The accused however denies that he had the requisite intention actual or constructive to cause the

now deceased's death. The accused relies on the defence of provocation and pleads that he be found guilty of the lesser charge of culpable homicide.

The accused outlines the sequence of events as follows;

The accused said he met the now deceased in Tshovani Township, Chiredzi in April 2021 after which he successfully proposed love. Thereafter he said in May 2021 he started to cohabit or live with the now deceased at his workplace at Farm 28 Hippo Valley Chiredzi. He said he intended to marry the now deceased. However, the accused said the now deceased was in the habit of stealing accused's valuables after which she would disappear ostensibly to cohabit with other different men. The accused said just like the biblical prodigal son he would forgive the now deceased and take her back each time she returned as he loved her. In fact, the accused said he took this relationship seriously and was saving his meagre earnings to raise money for paying lobola for the now deceased.

The accused said in November 2021 the now deceased returned to her bad habits and stole his Itel cellphone, a radio and US\$600 after which she disappeared. The accused said he had to abandon work and started to look for the love of his life. In the process he established that the now deceased was co habiting with Peter Majoka at the Chiredzi Town dump site.

The accused said on the fateful day and in a fit of blinding rage he proceeded to Peter Majoka's residence at the dump site. On his arrival he was incensed to find the now deceased in a jovial mood seated at night with Peter Majoka and another woman. The accused said this was despite that the now deceased had caused such misery to the accused.

The accused said without applying his mind he just stabbed the now deceased and fled. According to the accused his action was caused by extreme provocation as the now deceased had stolen his hard earned US\$600 after which she had proceeded to play house wife to Peter Majoka. This, he said, incensed him.

THE EXHIBITS

A total of four exhibits were produced by consent. Their probative value is as follows;

Exhibit 1- is the post mortem report compiled by Dr Dlandhlara who examined the deceased's body. It outlines the injuries inflicted on the now deceased and the cause of death.

The following injures were observed;

- *2 stab wounds on the right thigh*
- *1 stab wound on the left thigh*
- *1 stab wound on right side of abdomen with intestines rooming out*

The cause of the now deceased's death is not in issue. It is stated in Exhibit 1 as "*haemorrhagic shock due to stab wounds by a sharp object*"

The accused admits inflicting these injuries which caused the now deceased's death.

Exhibit 2- is the accused's confirmed warned and cautioned statement. Despite the fact that it bears some resemblance to the accused's defence outline there are notable differences. During the course of the trial the accused could not satisfactorily explain the factual differences. They include the following;

- a) In that statement the accused said he had discovered that the now deceased was in love with 3 men at the same time. The accused does not specify as to when he made this discovery nor does he name or specify these 3 men.
- b) In that statement the accused said the now deceased would cohabit with him for continuous period of two weeks and would run away after stealing from him. However, during the course of the trial in his evidence the accused was now saying he cohabited with the now deceased from May 2021 to June after which she stole his US\$200 and cell phone and only returned after 2 weeks. Thereafter he said he stayed with the now deceased continuously from June 2021 to November 2021, a continuous period of 5 months. This differs from the intervals of 2 weeks specified in his statement.
- c) In that statement as the accused said what was stolen from him by the now deceased was a black ITEL cell phone. There is no mention of either the US\$200 raised later in accused's evidence or the US\$600 in his defence outline.
- d) In the statement the accused said on the fateful night when he found the now deceased seated with Peter Majoka, he uttered the following words in Shona before stabbing her;

"Yah Ndakubata" translated to mean *"Yah I have caught you"*

However later in his evidence the accused said he only uttered the following words; *"my cash and cellphone"* before stabbing the now deceased.

The importance of these variations, omissions or contradictions is simple. It speaks to whether the accused is a truthful witness in many respects. Most importantly it raises the question of whether the accused managed to lay the factual foundation of the defence of provocation he relies upon.

Exhibit 3- is the Certificate of weight of the Okapi Knife the accused used to stab the now deceased AND

Exhibit 4- is the Okapi Knife which is 13cm long and it weighs 0,03kg. The blade is 12cm long and weighs 0,02kg. The notable aspect about the knife is that it is broken as the blade is separated from the wooden handle. The accused admits that it got broken as he stabbed the now deceased which would imply that he used a lot of force.

EVIDENCE OF STATE WITNESSES

As already said the events of the tragic and fateful day are largely common cause. Consequently, the evidence of all but one state witnesses was admitted in terms of Section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The only witness who gave *viva voce* evidence is the rival suitor Peter Majoka.

The evidence of Simbarashe Mutisi, D/Sgt Nyerere Matare, D/Sgt John Nyambunga and Dr Brian Dhlandlara was admitted as summarised. It is only repeated for completeness of the record. The accused testified and did not call any witnesses.

The admitted evidence is as follows,

Simbarashe Mutisi [Simbarashe];

Simbarashe is 43-year-old. He was a fellow resident of the Chiredzi Town dump site with Peter Majoka whom he knew very well as both were engaged in the same trade of salvaging a livelihood from the dump site. He knew the now deceased as Peter Majoka's wife. He did not know the accused.

On 22 November 2021 at night, he was woken up by Peter Majoka who was seeking help as the now deceased was being attacked. When he got at the scene the accused had vanished. The now deceased was bleeding severely injured with her intestines protruding. Police were called and

the now deceased taken away. He was present the following day when the police recovered the okapi knife Exhibit 4

D/Sgt Matare Nyerere (D/Sgt Nyerere)

D/Sgt Nyerere visited the scene with other officers and recovered the okapi knife Exhibit 4 on 23 November 2021. He observed that it was broken with the blade detached from the handle. He is the detail who asked the Dr to perform a post mortem as per Exhibit 1. He also recorded the accused's confirmed warned statement Exhibit 2

D/Sgt John Nyambunga (D/Sgt Nyambunga)

D/Sgt Nyambunga also visited the scene of crime with D/Sgt Nyerere. His evidence is materially the same. He witnessed the recording of the accused's confirmed warned and cautioned statement Exhibit 2

Doctor Brian Ndhandlara (Dr Ndhandlara)

Dr Ndhandlara examined the now deceased's remains on 24 November 2021. As a result of that he generated the post mortem report Exhibit1.

The material evidence which accused vainly put in issue is of the rival suitor Peter Majoka.

Peter Majoka (Peter)

Peter testified that he started to co habit with the now deceased his lover at the Chiredzi Town dump site in January 2020. He said until her tragic death in November 2021 the now deceased was cohabiting with him save for two or three days she would leave on the pretext of visiting her mother or sister. Peter knew the now deceased's sister and aunt despite that he had not formalised his relationship with the now deceased into a marriage. He did not know the accused until just few days before the fateful day on 22 November 2021.

Peter recounted the events of the few days preceding the now deceased's death.

Peter said he first met the accused on a day accused came at the dumpsite asking for him. After confirming that he was Peter, he said the accused then asked where Peter's wife the now deceased was. The accused introduced himself as the now deceased's uncle. Peter said he directed the accused to the tent where the now deceased was cooking lunch. The accused said he had bought clothes for his niece (*referring to the now deceased*) and that he, the accused, wanted the

now deceased to collect the clothes at the accused's place. Thereafter Peter said the accused went to converse with the now deceased at the tent. After that the accused bid farewell and left.

The following day Peter said the now deceased left saying she was going to the accused's place. She was away for only one day and returned. Peter never inquired about the said clothes. They stayed together for some few days.

Peter said the now deceased then left again saying she was visiting her mother in Chiredzi. Peter did not know where her mother stayed. On that very same day the accused came (*now for the second time*) looking for the now deceased. Peter advised accused that the now deceased was not present and the accused left. The now deceased later returned.

According to Peter that same day at night he was seated by their tent with the now deceased and a fellow resident Chipu around 8pm. He explained how accused attacked the now deceased. Peter said he suddenly saw accused who was walking in a bending position stealthily towards them. As he turned, he saw it was accused who was wielding a knife already opened. In panic Peter fled seeking help from fellow residents at the dumpsite. The now deceased could not escape as the accused immediately pounced on her. When Peter returned with other people the accused had vanished. The now deceased had been fatally stabbed and on her death bed. As they say the rest is now history.

According to Peter he first got to know the accused about two weeks before the fateful day 22 November 2023. He took accused's word that the accused was an uncle to the now deceased. He only learnt that accused was also in love with the now deceased after accused's arrest and the now deceased's death.

Peter said when the now deceased left to see the said uncle or her mother she never brought any clothes, property or money. He was therefore unaware of the alleged thefts. He denied that the accused uttered any words before attacking the now deceased nor did accused announce his arrival. Peter said the now deceased was attacked whilst seated.

Commenting on accused's evidence that he cohabited continuously with the now deceased from May to June 2021 and then from June/July 2021 to November 2021, Peter said the accused is simply lying as the now deceased would only leave the dumpsite at most for 3 or 4 days ostensibly to visit her mother or sister (*the sister was known to Peter*). Peter flatly denied that the now deceased was ever away for any such longer period.

Peter gave his evidence well. No meaningful questions were put to him in cross examination. His testimony was largely unchallenged. The impression one gets is that Peter is a simple unsophisticated person. He was even overawed by the surroundings of the court as he had to be told to put his satchel down which he had remained carrying as he stood in the witness stand. He did not even appreciate which direction he should face whilst in the witness stand. His account was well meaning, devoid of any possible rancour or malice. His credibility cannot be doubted. From his narration he did not have any motive to lie. None could be suggested by the accused. Like any normal person he was in love with the now deceased whom he apparently trusted wholeheartedly. As they say matters of the heart cut across the various classes of society and even professions. He cannot be faltered to have trusted the now deceased. He had no cause not to.

THE ACCUSED'S EVIDENCE

The accused's evidence is better understood in the context of his confirmed warned and cautioned statement, the defence outline and evidence in court as he took the witness stand. A proper assessment of that evidence reveals the following.

- (a) It cannot be disputed that the accused was in love with now deceased. What remains unclear or doubtful are the dates accused gave as the period he fell in love with the now deceased and the length or duration of that relationship. The accused was staying in a compound in Hippo Valley and if he had continuously cohabitated with the now deceased from June 2021 to November 2021 surely such a fact could have been notorious in the compound and not a secret. Accused could have called fellow residents of the compound who would have known the now deceased as his wife or live in girlfriend for almost half a year.
- (b) The accused had not been truthful about the period he spent with the now deceased at his workplace cohabiting. This finding is made on the basis of Peter's clear evidence as regards the duration of the period the now deceased would be away from the dumping site.
- (c) The accused's evidence that the now deceased would steal cash and property from the accused seem improbable. The reason is that the amount of US\$200 is not raised in accused's confirmed warned and cautioned statement. It is not part of his defence

outline. The amount of US \$600 is only raised in the defence outline and not in his statement. The accused's explanation to blame the police who recorded his statement and his counsel who compiled the defence outline cannot find traction. At most he could have spent money on the now deceased as his lover not that property and cash he mentions was stolen.

It is on these factual issues that one is inclined to accept the version of the state rather than that of the accused.

THE LAW

As was said at the beginning the issue which really falls for determination is whether the defence of provocation has been successfully raised by the accused.

It may be necessary to first refer to Section 239 of the Criminal Law [Codification and reform] Act [*Chapter 9:23*] it states as follows

“239 When provocation a partial defence to murder

- (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 intention or realisation referred to in section forty-seven, the person shall be guilty of culpable homicide if, as a result of provocation*
- a) He/she does not have the intention or realisation referred to in section forty-seven,*
or
 - b) He/she has the intention or realisation referred to in section forty-seven but has completely lost his/her self-control, the provocation being sufficient to make a reasonable person in his/ her position and circumstance lose his/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 of realisation referred to in section forty-seven, or*
 - b) The provocation was not sufficient to make a reasonable person in accused's position and circumstances to 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 in section two hundred and thirty-eight”

Reduced to its bare bones the defence of provocation can only be mitigatory to all other crimes as provided for in Section 238 of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] except for the crime of murder where certain requirements should be met before it can be a partial defence rather than mitigatory.

The Legislature has decided therefore that provocation, in specified circumstances can be a partial defence to a charge of murder and in all other crimes it should be mitigatory. One may surmise that this policy is informed by the view people should show restraint even in circumstances where they are subjected to provocative conduct or behavior. However, the law does not operate in a vacuum. Generally, people are not faultless. They are fallible and in some cases cannot suppress emotions. The emotions may take the better of rationale judgment hence they end up unable to control themselves and reacting violently or illegally to provocation. However, for any other crimes the effect of proven provocation can at most be mitigatory.

In relation to the crime of murder, if proven provocation is not a complete but a partial defence. Its net effect would be to reduce to the charge of murder to a permissible verdict of culpable homicide.

The obvious starting point is to establish whether as a fact an accused person was provoked. The factual foundation for the defence should first be laid. In some cases, such facts may speak for themselves. An example which may come to mind is finding a marital partner in act of adultery or a parent finding a child being raped or sodomised. In fact, the provocation if it can be a partial defence to a charge of murder should be considerable not fanciful or minor like being slapped with an open hand once and you take the other person's life.

In my respectful view the way Section 239 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*] is couched is that it entails both the subjective and objective test. Thus, after laying down the facts which gives rise to provocation, one should answer the following simple questions;

Did the accused have the intention to kill taking into account the provocation? If not as the intention is vitiated then one is guilty of culpable homicide. This is the subjective test.

The objective test can be summed up as follows; if the accused had the intention to kill did, he do so after losing self-control as a result of provocation and would a reasonable person in the accused's position faced with the same facts or situation have lost self-control and acted in the same manner? If yes then the accused is guilty of culpable homicide. If not, then the accused is guilty of murder.

It is important to note that Section 239 (1) (a) and Section 239 (1) (b) of the Criminal Law [Codification] Act [*Chapter 9:23*] are disjunctive rather than conjunctive.

APPLYING THE LAW TO THE FACTS

The first issue is whether the accused is a truthful witness in a material respect and whether he has laid the factual foundation of the defence of provocation?

All what is common cause is that the accused was in love with the now deceased. It has not been shown that the now deceased was his wife either at customary law or common law. Again, it cannot be said on the evidence like in Peter's case he was in a civil partnership with the now deceased as contemplated in Section 41 of the Marriages Act [*Chapter 5:15*].

Secondly what is it which provoked the accused? The evidence clearly show that accused may have not taken kindly to the fact that the now deceased was unfaithful. There is no evidence to suggest that the now deceased stole the US\$200 or US\$600 from the accused. This is simply an afterthought. Peter's clear evidence is that after accused's first visit to the dump site the accused saw and talked to the now deceased. The next day the now deceased left Peter's residence visiting the accused and spent the day at accused's residence. Thereafter she returned to Peter. By his own admission the accused by then knew that the now deceased was also in love with Peter.

The question therefore is what then provoked the accused on the night of 22 November 2021 to cause him to stab the now deceased? The accused did not discover that night that the now deceased was cohabiting with Peter as Peter's wife.

It is common cause that on the first visit the accused was in control of himself as he even lied to Peter that he was the now deceased's uncle. He admits to this. As Peter explained the accused conversed with the now deceased and still left her with Peter. The only conclusion one can draw is that the accused has not been truthful as to what provoked him on the night in question. This has deprived the court to properly assess the nature of provocation. At most the accused may simply have been consumed by jealous.

For some reason he now could not withstand sharing the now deceased's love with any other man Peter included, despite having seemingly accepted this scenario.

As per his own evidence the accused has a clear recollection of the events leading to the fateful day and also what he did on that fateful day. He was not bewildered or disoriented at all.

Even in the absence of evidence from a psychiatrist or psychologist one can safely deduce that he was thinking rationally. He armed himself with a knife. He decided to visit the now deceased at Peter's place at night after first failing to find her present during the day. He approached the now deceased stealthily. He did not announce his arrival. He found the now deceased simply seated outside a tent not only with Peter but also with Anna. Nothing untoward was happening then to trigger an attack. One can simply say that he had planned it. He uttered no word but went straight to attack the now deceased.

The attack itself was swift and brutal. The now deceased was unarmed and unexpected to be attacked. The accused's silly story that he measured the length of the knife blade he ploughed into the now deceased's body using a handkerchief is not only untenable but an afterthought. In any case he prised open the abdomen leaving the intestines protruding. Despite lack of specific nature of the stab wounds in terms of length and depth in Exhibit 1 he delivered a total of 4 stab wounds, three on thighs and one on abdomen. The degree of force was severe as the knife broke. Thereafter he fled from the scene. He disembowed the now deceased

Given such evidence one cannot say that the accused did not have the intention to kill whether actual or constructive. He did and nothing possibly provoked him as envisaged in Section 239 (1) (a) of the Criminal Law Code [*Chapter 9:23*].

Even if one would assume he had the intention to kill there is nothing on the evidence to show that he completely lost self-control and that a reasonable man faced with similar situation of a cheating lover would have behaved in that manner as envisaged in Section 239 (1) (b) of the Criminal Law Code [*Chapter 9:23*].

CONCLUSION

The defence of provocation as provided for on Section 239 (1) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] is not available to the accused.

The evidence clearly shows that when the accused attacked the now deceased, he had actual intention to cause death as in envisaged in Section 47(1) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*].

In the result the accused is found guilty of murder with actual intent.

VERDICT: Guilty of Contravening Section 47 (1) (a) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]; Murder with actual intent.

National Prosecuting Authority, counsel for the state

Mutendi, Mudisi & Shumba, pro deo counsel for the accused.