

THE STATE
versus
NYASHA TAVAGADZAMUGARI

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 26 October 2023 & 3 November 2023

Criminal Trial

Ms M. Mutumhe, for the State

T. Nyoka, for the accused

MAWADZE J: The sole issue which falls for determination in this matter is whether the accused was in self-defence when he fatally stabbed the now deceased on 28 May 2006.

The accused was then aged 22 years old and he is now 39 years old. The now deceased, a retired soldier was aged 48 years old.

The now deceased was the biological father of the accused. They were residing in Ruhlambo village, Chief Neshuro in Mwenezi, Masvingo. The now deceased had divorced the accused's mother who was now staying in Gweru as per the accused. Thereafter in 1997 the now deceased had married one SHIYANI MATHE who became a step mother to the accused. At the material time in 2006 Shiyani Mathe had two children with the now deceased. When Shiyani Mathe married the now deceased, the accused's mother had already been divorced.

According to the state the misunderstanding between the accused and the now deceased arose in December 2005 when the now deceased discovered some herbs (muti) in accused's bedroom and that the accused was frequently visiting traditional healers. As a result, the two quarrelled resulting in a fist fight which the accused lost. The accused is said to have proceeded to

pack his clothes and left the homestead soon after that fight in December 2005 but vowed to return to revenge. It is alleged that the accused returned on 28 May 2006 at around 2000hrs and found the now deceased and his wife (accused's step mother Shiyani Mathe) bathing together. The accused is said to have struck the now deceased with an iron bar on the head and stabbed him three times in the chest with a sharpened iron rod (wood piecer or muururo in shona) killing him instantly.

On the other hand, as per accused's defence outline and evidence the accused acted in self-defence.

According to the accused his relations with the now deceased soured when the now deceased divorced his mother and remarried Shiyani Mathe. She the accused said Shiyani Mathe would ill-treat the accused, deprive him of food and abuse him. He said she influenced the now deceased to also hate the accused.

The accused said things came to a head when he visited his mother in Gweru who took him to prophets where accused was given a python skin to exorcise some evil spirit. Accused said he was then suffering from chronic headaches and his father the now deceased was unhelpful. The accused said upon his return his father discovered the python skin and took accused to task. He said his explanation fell on deaf ears. He said even the intervention of the now deceased elder brother who took the accused to prophets and confirmed the curse of evil spirits upon the accused would not help to change the now deceased's mind. The relations between the accused and the now deceased even further deteriorated after the accused burnt the python skin. The accused said in December 2005 the now deceased as a result assaulted him causing severe injuries using a steel rod. The accused showed the court a healed scar on the centre of his head. The accused said the now deceased even threw two hand grenades at him forcing the accused to flee from home. The accused denied ever vowing to revenge or writing any words to that effect.

The accused's case is that on the day in question 28 May 2006 he returned home at night to collect his personal clothes. By then he believed the anger of his father the now deceased had subsided. Upon arrival the accused said he sent Shiyani Mathe's 7-year-old child to advise the now deceased who was indeed bathing the purpose of accused's a visit. Instead, the accused said the now deceased armed himself with a steel rod and proceeded to advance towards the accused. Sensing danger from the now deceased a skilled trained soldier the accused said he held the steel

bar. The two tussled over the steel bar as the now deceased was hitting the accused with fists and kicking him. The accused said he took the steel bar from the now deceased and stabbed him in self-defence. Thereafter the accused said he was arrested but released on bail. He then left for South Africa to look for a job only to be arrested upon his return years later.

The cause of the now deceased's death is not in issue. The post mortem report by Dr Simbi Exhibit 1 dated 31 May 2006 shows the following injuries;

1. *Laceration on left parietal region.*
2. *Stab wound on anterior*
3. *Stab wound on anterior abdominal wall*
4. *perforated heart with plenty blood in pericardium*
5. *perforated right lung with right haemothorax. "*

The cause of death is said to be "*cardiac tamponade and right haemothorax secondary to stab wounds.* "

The only witness who was present when the now deceased was fatally stabbed is Shiyani Mathe. She is the only witness who gave *viva voce* evidence.

The evidence of Vengai Chivava the now deceased's elder brother, Sikoliwe Mapepa a daughter in law to Vengai Chivava, Assistant Inspector Innocent Gondongwe the investigation officer, Cst Felix Kaseke who also attended the scene and Dr Simba who examined the now deceased's remains was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. We simply summarise it for completeness of the record.

VENGAI CHIVAVA (Vengai)

He is the now deceased's elder brother. The accused together with Shiyani Mathe came to his homestead on the night of 28 May 2006. The accused revealed that he could have fatally injured his father the now deceased. The accused wanted Vengai's donkey drawn scotch cart to ferry the now deceased to hospital. Vengai went with accused, Shiyani Mathe and Sikoliwe Mapepa to the now deceased's home. He found the now deceased already dead in his bedroom hut. He went to advise the village head with Shiyani Mathe and Sikoliwe Mapepa. The accused followed them asking Shiyani Mathe where the now deceased's sleeping bag was. The accused was told it was on top of the ward robe and accused left. The accused came back and caught up with them. Without saying anything the accused tripped Vengai and kicked him. The accused also proceeded to attack Shiyani Mathe by stabbing her randomly with an iron rod all over the body. Sikoliwe Mapepa

helped Vengai to escape. The next morning, they found Shiyani Mathe hiding in the bush badly injured. They took her to hospital and reported the matter to the police. He identified the now deceased's body to the police. The police recovered two sharpened blood-stained iron rods, one near the now deceased's body and the other along a foot path where the accused attacked him and Shiyani Mathe.

SIKOLIWE MAPEPA (Sikoliwe)

She regarded the now deceased as a father-in-law and accused a young brother to her husband. Sikoliwe said indeed the now deceased ill-treated the accused by occasionally denying food, tearing his clothes and that at one time the now deceased threw explosives at the accused. She explained the accused's conduct on the fateful day in this context.

Sikoliwe confirmed the accused's visit to their residence with Vengai on the night in question and that they all went to the now deceased's home whom they found dead. She too proceeded Vengai and Shiyani Mathe to the village head. Before that she asked accused as to why he had fatally attacked the now deceased. In response the accused said this was because the now deceased had previously ill-treated the accused and that Shiyani Mathe had poisoned the accused in 2005 and causing the now deceased to hate the accused. The accused was seething with anger and she advised Shuyani Mathe to flee. However, Shiyani Mathe who was in distress and sobbing refused. Sikoliwe confirmed how accused firstly attacked Vengai on their way to the village head and also Shuyani Mathe. She escaped with Vengai.

ASSISTANT INSPECTOR INNOCENT GONDOGWE (Ass Insp GONDOGWE)

He was a sergeant at ZRP Rutenga at the material time. He attended the scene and found the now deceased a lying in a pool of blood wearing clothes with no shoes. He observed 3 penetrating wounds in the chest and an open wound on the head. A blood-stained iron rod was near the now deceased's body and it was ±40cm long. He arrested the accused on 4 June 2006 when he attended the deceased's funeral, recorded accused's statement and took him for indications.

CONSTABLE FELIX KASEKE

He attended the scene with Assistant Inspector Gondogwe. His evidence is materially similar to that of Assistant Inspector Gondogwe on what he observed. There is no need to repeat it.

DR SIMBI

Dr Simbi examined the now deceased's remains on 31 May 2006 at Masvingo General hospital and compiled the post mortem report Exhibit 1 already alluded to.

We now turn to the critical evidence of Shiyani Mathe.

SHIYANI MATHE (Shiyani)

As already said Shiyani gave *viva voce* evidence.

Shiyani confirmed that accused and the now deceased's relations soured when the now deceased discovered some herbs (muti) in accused's bedroom hut. She however said the two only quarrelled but did not fight as a result in 2005. She said the next day they discovered accused had packed all his clothes and left. She saw the following words inscribed on the yard.

"Stupid soldier I will come for revenge. "

Shiyani denied ever ill-treating the accused. She said she did not witness any attack on the accused with hand grenades or explosives.

Turning to the events on the fateful day Shiyani said she was bathing in the yard with the now deceased at night. She finished bathing first, wore her clothes and waited for the now deceased who was still bathing. This was well after the accused had left the homestead.

Shiyani said the accused suddenly appeared wielding an iron bar. She was scared and screamed. The accused hit the now deceased in the head with the iron bar. The now deceased who was naked tried to flee to their bedroom hut but fell. The accused was chasing after him. The accused then used a sharpened iron rod to stab the now deceased in the chest several times. Thereafter the accused lifted the helpless now deceased into their bedroom hut. The accused ordered Shiyani to dress up the now deceased. She complied. The accused force marched her to Vengai's homestead. The accused wanted a donkey drawn scotch cart. They returned home with accused, Vengai and Sikoliwe. Vengai saw the now deceased's lifeless body and took her and Sikoliwe to the village head.

Along the way the accused caught up with them and asked Shiyani as to where the now deceased's sleeping bar was. She replied it was on top of the wardrobe. The accused went back. However, the accused caught up with them again. The accused suddenly attacked Vengai. Thereafter the accused turned to her.

She was stabbed several times all over her body with a sharpened iron rod. She lost consciousness. Later after gaining consciousness, she crawled in the bush where she spent the night. The next morning fellow relatives rescued her. She was taken to a local hospital and later to Masvingo General hospital where she was discharged after 4 months of treatment.

Shiyani denied that the now deceased attacked the accused on the night in question. She disputed that accused had returned on the night in question to collect his clothes as he had taken them well before. She insisted the now deceased was attacked whilst naked.

ANALYSIS OF EVIDENCE

It cannot be denied that the relations between the accused and the now deceased were not good. The accused could not have just left the homestead in December 2005 for no apparent reason.

It may also be true that the accused harboured the belief that Shiyani had created a wedge between accused and his father the now deceased. Again, it may well be true that Shiyani and the now deceased did not treat the accused well.

It is also clear that the accused had entrenched traditional beliefs. He attributed whatever misfortunes he experienced to evil spirits. His mother may have strengthened this belief by taking him to prophets where he was given all sorts of paraphernalia to exorcise such evil spirits. Indeed, it would appear the now deceased did not share the same views.

Be that as it may the real question remains as to whether the accused in fatally attacking the now deceased he acted in self-defence.

In our assessment we find Shiyani to be a well-meaning and truthful witness as to the events of that night. She may have down played the issue of relations between her and the accused and the now deceased. Accused himself to a great extent confirms Shiyani's evidence. He found the now deceased bathing. It is incredible that while bathing and naked now deceased would suddenly arm himself with an iron bar upon mere arrival of the well-meaning accused. Why would accused not simply flee if at all the now deceased came to him naked armed with an iron bar.

The version given by Shiyani is more probable. Shiyani gave a free-flowing account. She was not meaningfully challenged in cross examination Shiyani was clear the now deceased was approached while bathing. He was naked and had no weapon. He never fought back but tried to flee.

The defence or defence of a person as provided for in section 253 of the Criminal Law [Codification and Reform] Act [*Chapter :23*] can only be available to an accused who would have been under an unlawful attack and all other requirements are satisfied.

It is our finding that the accused was not under any unlawful attack at all. The accused's version fails on the very first hurdle.

The intention of the accused was clear. The background facts of the matter clearly shows a bitter son who was irking for revenge against an unloving father (the now deceased) and a stepmother who all treated him (Shiyani). How also can one explain the accused's attack on Shiyani later that same night?

It is clear the accused arrived on that night unannounced. He was already armed. The injuries he inflicted on the now deceased shed light on his intention. He targeted the head and the chest vulnerable parts of human anatomy. Severe force was used. The heart and lung were perforated. Death was instant and intend to bring death of the now deceased. He proceeded to do so. The accused was the aggressor. In order to cover up that he attacked his naked defenceless father he ordered Shiyani to dress him up after ferrying him into the bedroom before alerting Vengai.

Accordingly, therefore the accused as found guilty of murder with actual intent.

VERDICT: - GUILTY of contravening section 47 (i) (a) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*] – murder with actual intent

MAWADZE J

National Prosecuting Authority, counsel for the state

Muzenda & Chatsama, legal practitioners pro deo counsel for the accused