

THE STATE
versus
COLLEN TINASHE JAMU

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 18 May, 12 and 16 September 2022

Assessors: Mr *Mhandu*
Mr *Chimonyo*

Criminal Trial

K Mufute, for the State
S Nyapadi, for the accused

MUTEVEDZI J: It is often unconscionable how love, one of the most basic human instincts often leads to tragedies. Collen Tinashe Jamu, (hereinafter the accused) an unassuming young man was arraigned before this court for the macabre and movie-like murder of his estranged girlfriend. The allegations were that on 17 June 2015 at house number 2330 Glen Norah A in Harare, the accused struck Mitchel Chipere (hereinafter the deceased) with a metal hoe intending to kill her or realising that there was a real risk or possibility that his conduct could cause the death of Mitchel Chipere. Despite that risk he persisted with his conduct. The deceased succumbed to the injuries caused and met her demise.

The accused denied the allegations. His defence was straightforward. He did not intend to cause the deceased's death. He explained that he had since 2011, been in a love relationship with the deceased. Shortly before the unfortunate homicide occurred, the deceased had been pregnant with the accused's child. She unfortunately had a still birth. Because of that she had returned to stay at her parents' house. The accused then discovered that the deceased was seeing another man behind him. This caused arguments between them. On the fateful day, the accused said the deceased invited him to her parents' house to discuss her alleged infidelity. The discussion took place in the deceased's bedroom. It did not end well because in the course of the discussion, a heated exchange ensued. It turned out that the deceased no longer loved the accused and wanted to end the relationship. The accused told the court that he could not stomach the rejection. In a fit of rage, he saw a metal hoe which was behind the door in the

bedroom. He picked it up and hit the deceased with it. She collapsed. He repeated that he did not intend to kill the deceased.

Prosecution opened their case by applying for the formal admission of the evidence of Moses Munyeri into evidence in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:10*] “the CP&E Act”). The defence did not object and the witness’s evidence was accordingly formally admitted. Because of the issues which arise for determination, we found the evidence of that witness completely colourless. The state also applied to tender the post-mortem report compiled by Doctor Mauricio Gonzalez who examined the remains of the deceased to ascertain the cause of her death at Harare Hospital on 19 June 2015. The defence again consented and the report was admitted as exhibit 1 in the trial. The doctor’s conclusion was that death was caused by brain damage, skull fracture and head trauma. Thereafter, the state led *viva voce* evidence from three witnesses namely Beauty Chitohwa, Hastings Anesu Mbedzi and Shamiso Tashu.

Before assessing the evidence of the witnesses, it is important to point out that there are several issues which are common cause in this case. They can be stated as that:

1. The accused and the deceased were at one time or another involved in an amorous relationship
2. The deceased got pregnant by accused. The accused and the deceased briefly cohabited until the time the deceased gave birth. The child died at birth and the deceased returned to stay with her parents at their house.
3. On the fateful day, the accused attacked the deceased with a metal hoe. The attack took place in a room inside the deceased’s parents’ house.
4. The deceased died as a result of the injuries she sustained from that assault

From the above, it is evident that the only issue for determination in this trial is whether the accused intended to kill the deceased. The evidence of the witnesses will therefore be assessed in light of the issue which needs resolution.

Beauty Chitowa (Beauty)

She is the deceased’s mother. Her evidence was largely about how she discovered the body of the deceased with the help of police officers. Earlier that morning, the witness said she left home around 0800 hours to go and fetch water from a communal borehole in the area. She returned forty-five minutes later. When she arrived at her gate, she noticed that someone had attempted to open the locked gate but had failed. She got inside the yard. The doors to the house were all locked. The keys were not where the family members usually put them when they all

went out. The deceased whom she had left at home was nowhere. She asked neighbours who all said they had not seen her. Strangely, she noticed that there was part of the deceased's property which was strewn around the drainage area which her family shared with their neighbour. The property included six pairs of the deceased's shoes, her computer monitor, CPU and table cloth. She thought there had been a break-in at the house. That prompted her to decide to make a report to the police. She fortuitously met four police officers on cycle patrol close to her gate. She narrated her ordeal to them and asked for help. The officers obliged. She gave them permission to break the door to the house. She got in with them but remained in the dining room. During a search of the house, the officers found the accused. They called her and she identified the accused. He was taken outside and handcuffed. He was quizzed as to where the deceased was and he indicated that he had taken her to an area called 'the planks' because he had plans to go and stay with her there. The officers took accused back into the house and continued their search. One of them later came out and told her that Mitchel had been killed inside the house. She suggested that they rush her to hospital but the officers advised her that it was pointless as she was long dead.

After giving her testimony, she was subjected to lengthy cross-examination most of which was, in our view, completely unnecessary. It related to whether the deceased had another boyfriend at the time she met her death. She was clear that the deceased was a child and that she did not find it necessary to involve herself in such child play. Counsel for accused only succeeded in bringing out that the accused and the deceased's romance had been utterly disastrous. The deceased insisted that there was no hope of a future together with the accused. The rest of the issues were common cause as already stated.

Hastings Anesu Mbedzi (Hastings)

His evidence corroborated Beauty's testimony. Crucially, he added that when they broke the door to gain entry, they went into the house's main bedroom. During their search they tried to lift the bed and noted that it was unusually heavy. He put his hand under the bed and bumped it into something which felt like a human shoulder. He checked and saw accused hiding between the material which covered the bottom of the bed's base and the base itself. He called his colleagues. They questioned the accused about the deceased's whereabouts. He advised the officers that she was waiting for him at a place called 'the planks'. The officers were not convinced. They went into the deceased's bedroom where they continued the search. They discovered the gory sight of the deceased's body tucked under the bed. They arrested the

accused. Nothing was advanced in cross-examination which seriously controverted the officer's testimony. It remained unscathed.

Shamiso Tashu (Shamiso)

All she told the court was how she recorded the accused person's warned and cautioned statement. The importance of that evidence was lost to us. The state did not seek to produce the warned and cautioned statement as part of its evidence. Its case hinged on evidence entirely independent of the accused's statement.

Before closing its case, prosecution applied to tender as an exhibit, the metal hoe which was allegedly used by the accused to kill the deceased. The defence once again did not object. The court noted that the hoe weighed approximately 2.5 kilograms. Its handle was about 80 cm long. The hoe blade was about 10cm long and 4cm wide. A lethal weapon indeed.

Defence case

In his defence, the accused maintained the story he had told the court in his defence outline. He however added detail to it. His narration was that on the fateful day the deceased phoned him and invited him to her parents' place to discuss the allegations of infidelity against her. It was around 0900 hours. He got to the place. The gate to the house was unlocked. He entered and wanted to get into the house via the back entrance. The deceased met him and led him into her bedroom. She sat on the bed and he did too. He questioned her if she was sure to fall in love with another man. She denied it but he confronted her with evidence that two weeks previously he had seen her with another man at the gate to their house in the evening in circumstances which indicated that she was in love with the man. He further advised her of the information he had gotten from friends. She was stunned by the revelations and could not deny it anymore. She then burst out and advised him that it was none of his business if she had another man that she was in love with. She added that in any case, her parents did not approve of him. This hurt him because on his part, he had sacrificed everything for their relationship. His own parents disapproved the relationship but he had ignored them. When the deceased was pregnant he was due to go to university. His parents gave him a choice between marrying the deceased and going to university. He had chosen her. She bluntly told him that she didn't care about that. He further asked her if she had had sexual intercourse with the other man. She admitted. This hurt him even more. To him she was everything he had. He couldn't imagine living without her. He was enraged, picked a hoe which was in the room and struck her with it once in the head. She collapsed to the floor. He ran to her calling out her name and shaking her. She could only say he had injured her. He had not intended to assault her. After about five

minutes, she was no longer talking and became motionless. The accused said he got confused and left the house. When he got to the gate, he inexplicably decided to return to the house. He locked the door from inside. He proceeded to where he had left the deceased and sat in the room.

Twenty to thirty minutes later, there was a knock on the door. It was the deceased's mother. He did not respond to the knock. He said he was still in shock. The deceased's mother went away. Later many people arrived and tried to force the door open. He remained seated on the bed. Uniformed police officers later entered the room. They saw the deceased's body on the floor. The room was bloody. Officer Hastings advised him that he had killed the deceased. They took him from the bedroom to the lounge. Hastings' colleagues went outside and got switches to assault him with. He outsmarted them by pretending to have taken poison in a bid to commit suicide. That dissuaded them from assaulting him. He was later taken to the police station. What happened there does not add any value to the determination of the case.

The law on murder

Murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] consists of the illegal and intentional killing of another human being. From the definition, it is apparent that the state must prove that the accused desired the death of the victim in one way or another. Intention is usually viewed from a two pronged dimension. It may be actual or constructive.

Taken simply, actual intention implies that the accused specifically desired the deceased to meet his/her demise. In furtherance of that predilection he/she activates a scheme by which he attains his objective. Put differently, the death of the deceased is the accused's motivation for the conduct he exhibits. He/she particularly wishes to achieve the deceased's death. See the case of *The State v Josephat Hanzu Mukwena* HH 719-15. Constructive intention also known as legal or indirect intention, on the other hand, relates to the realisation by an accused that there is a real risk or possibility that his or her conduct may cause death. In spite of that realisation he/she continues to engage in that conduct. Although the objective to kill is not expressly communicated, the inferences deduced from admitted and proven facts and circumstances may point to the fact that the accused realised the risk or possibility of causing death or serious harm which was attendant upon his/her conduct.

Commenting on the traditional distinction between actual and constructive intention in murder cases, the Supreme Court, in the case of *Tafadzwa Mapfoche v The State* SC 84/21 held that given the wording of s 47 of the Criminal Law code, the contrast between those two forms

of intention has lost significance. At p 10 of the cyclostyled judgment, it expressed the view that:

“Thus, under the section, it is not necessary, as was the position under the common law, to find the accused guilty of murder with either actual intent or with constructive intent. Put differently, it is not necessary under the Code to specify that the accused has been convicted under 47(1) (a) or (b). Killing or causing the death of another person with either of the two intentions is murder as defined by the section.

It further appears to me that the distinction between a conviction of murder with actual intent and murder with constructive intent, which under the common law greatly influenced the court in assessing sentence is no longer as significant or material as it was.”

Clearly therefore, the species of intention which an accused harbours has become of nominal importance if any.

Application of the law to the facts

As already stated, the issues in the instant case are fairly straightforward. To begin with the state on one hand, alleges that the accused ambushed the deceased when her mother and little sister had gone to the borehole to fetch water. The accused on the other hand argues that he was invited by the deceased to come to her parents’ place to discuss the accusations which he was making against her. Those two versions are mutually exclusive of each other. In our view, the accused’s version does not make sense for a few reasons. First, he was aware that the deceased’s mother did not approve of his relationship with the deceased. In fact, it was a relationship which had failed. The deceased was equally aware of her parents’ position. It would have been unreasonable if not utterly stupid for her to invite the accused to her parents’ home under those circumstances. Our conclusion in that regard is that the accused went to the house uninvited.

To support that finding when the accused arrived at house 2330 Glen Norah A, the gate was locked. If the deceased had been aware that he was visiting she would have either waited for him at the gate or at the very least unlocked it before his arrival. The evidence we accepted is that the accused had tried to forcibly unlock the gate and failed. Secondly, by his own admission, the accused had previously stalked the deceased. He had surreptitiously watched her converse with another man whom he suspected of being her paramour. That behaviour is consistent with someone who must have been pursuing the deceased with unmitigated obsession. In fact, the accused in his testimony, inadvertently confessed to those obtrusive and intrusive tendencies. He even collected information about the deceased’s movements from friends. We undertake this analysis and make these findings because they have a bearing on

showing the accused's intention when he assaulted the deceased. A man who was visiting in peace would not behave as the accused did.

If his version about how he got to be in the deceased's house did not make sense, his entire story is rubbished by his behaviour soon after the assault on the deceased. He maintained that he did not intend to harm the deceased but what he did can only be explained on the basis of mental illness or some other abnormality if it was not intended. The accused however did not allege any such affliction. He was perfectly normal, was in full control of his faculties and fully appreciated what was going on. He was aware that the deceased was badly injured. The first thing that should cross the mind of anyone who has accidentally injured another is that the injured person needs medical help. The incident did not occur in the wilderness where help was difficult to come by. It occurred in town, in broad day light, in a high density suburb where a simple shout could have easily attracted the attention of multitudes of people. Instead and going by his own version, he decided to leave his victim lying helplessly in the room as he nonchalantly stepped out, walked to the gate before deciding to return to the crime scene. Curiously, he did not say he returned to try to help the deceased. He thought he could hide inside his victim's house. To illustrate that he indeed was under that illusion, he locked the door to the house from inside. It is possible that by the time the deceased's mother returned from the borehole, the deceased was still alive and if she had been assisted promptly she may have survived. Her mother however failed to access the house because the accused had locked the door. She went away. Even in his confusion, the accused admits that it was long before the deceased's mother returned with other people. They then took another long episode trying to break down the door to gain entry into the house. The police officers found him, not sitting on the bed as he alleged but sandwiched between the base of the bed and the material which protects it on the bottom. He was in the house's main bedroom and not the deceased's bedroom like he alleged. That evidence by Hastings was corroborated by Beauty. We are convinced it is the truth because there was no benefit that the witnesses would derive from placing the accused in that bedroom and not the deceased's. Certainly, that behaviour is once more diametrically opposite to that of someone who was remorseful and ready to take responsibility of a mistake he had made. His reaction to the incident was reasonably expected to have been totally different when he realised that the deceased was severely injured. One would expect to hear that he was found hysterical and doing all that he could to assist the deceased. Our view therefore is that the accused adopted a scorched earth attitude that if he could not have the deceased as his woman, then no one else would.

The murder weapon

We have already described the weapon with which the accused attacked the deceased. It was by any standard quite lethal particularly because it was aimed at a vulnerable part of the human anatomy. The handle of the hoe was almost a metre long. It would have given the accused quite some swing when he hit the deceased. The blade was 10 cm long and 4 cm wide. To his credit however, we do not have evidence that the accused brought it with him. We accept his evidence that he found it in the room. The choice of weapon was therefore opportunistic because he found it at the homicide scene. Despite that finding in accused's favour, the choice of a metal hoe of that size clearly shows that the accused did not simply want to express his anger at the deceased for rejecting him and ending their tumultuous romance but that he wanted to kill her. At the very least he must have realised the existence of a real risk or possibility that he could kill or seriously injure the deceased. He was unconcerned about the outcome. Again the conclusion is inevitable. He had the intention to kill.

The deceased's injuries

The accused alleged that he assaulted the deceased once on the head with the hoe. The medical report in contrast details wounds that are consistent with a frenzied attack where several blows were thrown at the deceased. The doctor indicated that she had multiple injuries on the head. In his examination, he found two wounds in the frontal area which were 4 cm and 5cm deep. He observed another wound on the right ear which was 2cm. In addition, there were two other wounds in the occipital area measuring 7cm and 6 cm. His conclusion was that all the wounds which he observed on the deceased were ante-mortem injuries. In common parlance, that simply meant they were inflicted before the deceased met her death. In the end the blows fractured the deceased's skull. Her brain was damaged and she suffered head trauma. Clearly, the wounds demonstrate that the amount of force used was extreme, that the accused hit the deceased on multiple occasions in different parts of the head. He was targeting a part of the body that he was sure would cause the severest injuries to the deceased. For that reason, the inference that he intended to kill the deceased or cause her serious injury could not be stronger. Needless to say the deceased was mortally wounded. The wounds are consistent with the state's allegation that the accused did not intend to simply cause pain but to murder the deceased.

Provocation

In Zimbabwe, provocation can only serve as a partial defence to the crime of murder. In all other instances, it merely mitigates sentence. It is legislated in s 239 of the Criminal Law Code which provides 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 murder.”

The law requires everyone to exercise restraint and temperance even in the face of provocation. The world would be chaotic and anarchy would reign if every kind of provocation were to be met with a violent reaction. It is for that reason that certain requirements have to be fulfilled and safety valves have been designed for provocation to succeed as a partial defence to a homicide charge. Authorities illustrate that the provocative conduct must be so intense that a reasonable person would lose self-control and act in the manner that the accused did. See *S v Kashiri* HMT 13/18

In this case, the accused alleged that he was provoked by the way the deceased rejected him. In his own words he says the deceased advised him that “it was none of his business if she was in love with another man.” There was nothing provocative about that to the extent of triggering the murderous reaction which followed. The evidence before us is that the two’s relationship had long fizzled out. At the very least, the accused had known that the deceased was in love with another man for at least two weeks. There was nothing new about what he was told by the deceased on the fateful morning if at all he was told anything. The signs that the deceased no longer loved him were there for a long time. Any reasonable person would have prepared for the eventuality that the relationship would end. To claim that he then acted at the spur of the moment is being untruthful and seeking to stretch the defence of provocation too far. As already said, he had at least two weeks within which to deal with that reality. He had enough time to cool off. He did not. Instead he seems to have used that time to prepare for the deceased’s Armageddon. He wanted to take his revenge for being jilted. He had for long felt capriciously rejected by the deceased. Because of that he falls squarely into the realm of s 239(2) of the Criminal Law Code which states that:

“(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 realisation 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

The accused was not married to the deceased. They were merely boyfriend and girlfriend who at one time co-habited. Even if it were to be assumed they were, the era when some men thought marriage gave them a licence to appropriate women as their objects of amusement is long past us. A woman is free to make an election of the man she wants to love. In fact, she can make and unmake such choices as and when she pleases. Any man who claims to be provoked when a woman he is in a relationship with decides to end their romance acts unreasonably.

Given all the issues discussed above and the time which the accused had from when he became aware that the deceased no longer loved him, it would be an affront to the administration of justice were he to be afforded the protection of the defence of provocation. If the deceased's words can be termed provocation, it was so mild that no reasonable person would have acted in the manner the accused did. The accused simply does not qualify. The requirements for provocation have not been met. We have no alternative but to reject it.

Disposition

In the end we have shown that the accused's version of events is palpably false. The circumstances under which the assault occurred, the inferences drawn therefrom, the accused's choice of the murder weapon, the injuries sustained by the deceased and the inadequacies of the defence of provocation he sought to raise all cumulatively weigh to prove the accused's intention to kill the deceased. After all is added up, we are convinced that the state managed to prove that the accused had the requisite *mens rea*. The physical element of the offence, that is the assault, was expressly admitted by the accused. In the circumstances, we are convinced that the state managed to prove the accused' guilt beyond reasonable doubt. He is accordingly found guilty of murder as charged.

Reasons for sentence

In mitigation, counsel for the accused urged the court to pass a sentence which fits the offender being dealt with here, which fits the offence and which also takes societal interests into consideration. He is right in that regard because that is what the law requires.

The accused is a fairly mature man at the age of 31 years. We have not lost sight however that at the time the offence was committed he was 24. Generally in Zimbabwe and all things being equal, at 24 years an individual would have just completed or will be in their final years in university. That illustrates that a fair measure of immaturity must be ascribed to a person of such age. Society tends to downplay the dangers of immaturity but in the court's

view, it is a beast that has within it the seeds of self-destruction. Yet it is a process that every individual necessarily goes through. No one is born mature. We noted in our judgment that the accused exhibited obtrusive and intrusive behavior towards the deceased. He was excessively jealousy. His self-proclaimed love for the deceased was clearly obsessive. All his actions reeked of teenage fantasies. That in turn affected his decision making.

We have also already indicated that the accused did not bring the murder weapon to the homicide scene and held that its use was opportunistic. That defeats the suggestion that the accused may have premeditated the commission of the murder. It is a plus to him.

Counsel for the accused also urged the court to consider that the accused lost a wife, lost someone that he dearly loved. That submission is a paradox. The accused did not lose this woman. He killed her. Love is meant to be enjoyed by the two individuals involved in it. It is reciprocal. It cannot be unilateral. Where one loves but the other does not, it ceases to be love. It assumes negative monikers and conjures up paradigm images. To imagine a man who blindly loves a woman who in turn openly rejects him would certainly be comic if it did not lead to tragic endings such as this one.

After a careful analysis, we are not in agreement with counsel for the state that this was a murder committed in aggravating circumstances. Circumstances in aggravation are clearly outlined in s 47(2) and (3). We considered all those and found none to be present in this case.

What we however found abhorrent is the accused's thinking that if he could not have the deceased as his woman, then no one else would. In the judgment we expressed the view that the accused was not married to the deceased. They were merely boyfriend and girlfriend who at one time co-habited. He had no claim whatsoever on the girl. In these modern days, young men and women, in fact men and women of all ages fall in and out of love countless times. We reiterate that the era when some men thought they have some measure of dominance over women and that they are licenced to appropriate women as their objects of amusement must be confined to the stone -age grave yards where it is buried. Women, just like men must be free to choose men they love. In fact a woman can make and unmake such choices as and when she pleases. It is the reason why in this country we have elaborate divorce laws. If married people are allowed to undo their unions we cannot imagine any excuse for a mere boyfriend murdering his girlfriend because she no longer loves him. That view, illustrates the high moral blameworthiness that the court should view the accused with. It is unfortunate that his baneful acts of envy, lust and jealousy were catastrophic and cannot be undone.

Despite that, this court however remains with the duty to ensure that an appropriate message is communicated to people of like mind. Their actions will remain a concern for the courts and once caught they will be visited with commensurate punishment.

That we have found that the statutory circumstances in aggravation are absent in this case unties our hands in regards to sentence. We are at large to impose a sentence which we consider appropriate in these circumstances. The accused has been in pre-trial incarceration for a cumulative period running into almost three years. That is punishment on its own which the law requires the court to take into account. We heed it.

In the circumstances, the accused is sentenced to **15 years imprisonment.**

*National Prosecuting Authority, State's legal practitioners
Muza and Nyapadi, accused's legal practitioners*