

CHARLES JACKSON

Versus

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 17,18 27 FEBRUARY AND 13 MARCH, 2020

Criminal Trial

Assessors: 1. Mr Gweru
2. Mr Mutomba

M. Mutumhe, for the state
J. Chipangura for the respondent

MAWADZE J: The dispute in this matter is whether the now deceased died from violence arising from domestic violence or that she took her own life for reasons not very clear as a result of domestic dispute.

The accused was arraigned before this court facing a charge of murder as defined in s 47 (1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] (hereinafter the Criminal Code [*Chapter 9:23*]).

The charge is that on 1 March 2019 at House No. 537 J 6 Prayer road, Tshovani, Chiredzi the accused caused the death of Ndaizivei James, a female adult by assaulting her all over her body several times with clinched fists, booted feet and a wooden plank.

The facts in this matter can be summarised as follows;

The 44-year-old accused and 37-year-old now deceased were customarily married staying together at House No. 537 J 6 Prayer road, Tshovani, Chiredzi. Their not very long customarily law union was not blessed with any children. They were just the two of them living in the house described as room.

On 1 March 2019 the accused and the now deceased had a misunderstanding while drinking beer in a famous beer hall in Tshovani Township Chiredzi called Chigarapasi. The accused alleged that the now deceased was unfaithful as a certain unidentified man had apparently demanded his clothes from the now deceased. This prompted the accused and the now deceased to leave the beerhall as about 1300hrs proceeding to their residence with the issue still unresolved.

The state alleges that whilst at their residence the accused assaulted the now deceased, firstly with his waist belt as she pleaded for mercy. It is said the now deceased managed to grab the belt from the accused. Thereafter the state alleges the accused took a plank outside the house and indiscriminately assaulted the now deceased all over the body. The accused is said to have kicked the now deceased with booted feet. The state alleges that a neighbour Norman Chakauya who came at the scene was shown a 2 X \$2 bond notes and 2 X 50 cents coins by accused as he claimed were proceeds of prostitution recovered from his wife the now deceased. The State alleges that the accused continued to assault the now deceased until she could hardly cry out as he shouted in shona saying "*wati wamama, hausati watanga*" translated to mean "you *have defecated, you have not yet started*" as he assaulted her with the plank. The state alleges that due to the violent anger exhibited by the accused coupled with the vicious nature of the assault all people gathered outside the house were scared to restrain the accused.

The state alleges that due to the assault the now deceased fell unconscious and efforts by the accused to resuscitate her by pouring cold water on to her failed. The accused is said to have placed the now deceased on the bed. Later that day at night accused with the assistance of his young brother Godwin Domingo ferried the now deceased in a taxi to Chiredzi General Hospital where she was formally pronounced dead on arrival. An autopsy report done by a pathologist Dr Roberto Lara Diaz indicates that the now deceased died as result of hypovolemic shock, multiple and bilateral ribs fracture and left lung lesion arising from severe trauma or assault

The import of the accused's defence is that the now deceased died from an overdose of some iron tablets and ARV tablets.

The sum total of the accused's evidence is as follows;

The accused said upon arrival at their house from Chigarapasi beer hall he demanded answers from the now deceased over the issue of a man who had asked for his clothes from the now deceased. He said the now deceased denied any such knowledge. This prompted accused to pack the now deceased's clothes and threw them out of their house ordering the now deceased to leave. He said the now deceased took them back. As a result accused got angry and assaulted the now deceased with a belt which she wrestled from him. Thereafter accused said he resorted to use of clenched fists and booted feet to assault the now deceased.

The accused said the now deceased first left and sat on a pile of her clothes in a passage near where their neighbour Norman Chakauya was standing.

The accused denied that he ever used a plank to assault the now deceased. He said that Norman Chakauya is the one who called accused's father John Domingo. Accused said upon arrival his father told accused not to assault the now deceased and he complied and advised the now deceased to put her clothes back in the house. Thereafter the accused said he left for Chigarapasi beer hall leaving the now deceased alone at home at around 1500hrs.

The accused said he only returned to his house at around 2200hrs. He found the now deceased lying facing upwards on their bed with froth coming from her month. Accused said he observed two containers of tablets, one on the bed and the other on the floor. He said the now deceased could only groan, in pain saying she was feeling pain in her stomach. He unsuccessfully tried to force her to drink milk. Thereafter he alerted his relatives after which they ferried the now deceased to Chiredzi General Hospital but it was too late as she passed on. The accused said when he left the now deceased at 1500hrs she was in good health hence he believes she had taken an overdose of tablets to end her life.

To bolster its case the state led *viva voce* evidence from Norman Chakauya a neighbour to accused, Godwin Domingo accused's young brother, John Domingo accused's father, constable Witness Makausi who first attended the scene and the investigating officer sergeant Gladmore Gwara.

The evidence of Brighton Rukatya the taxi driver and police details Virimai Jimu and Lydia Dadirai Tshuma was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. Dr Roberto LaraDiaz the pathologist is Cuban and has since left the country.

Instead the state by consent called Dr Godfrey Zimbwa to explain the technical terms in the Autopsy report.

The accused gave evidence and did not call any witness.

A total of 4 exhibits were produced by consent being;

- Exhibit 1 – the autopsy report
- Exhibit 2 – accused confirmed warned and cautioned statement
- Exhibit 3 - a wooden bench which is 57cm long, its width is 15cm, its thickness is 5cm and has a weight of 2kg
- Exhibit 4 – (a) is an empty container of ARV tablets
- Exhibit 4 – (b) is a smaller container of iron tablets

In our assessment the critical evidence in resolving the dispute in issue is from Norman Chakauya accused's neighbour, the Autopsy report and accused's own evidence. The other evidence of witnesses, though relevant deal with peripheral issues. We simply summarised it for completeness of the matter starting with uncontested evidence as per s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Before we do so we shall briefly comment on the probative value of the exhibits.

- Exhibit 1 – the autopsy report is critical in resolving the dispute in this matter. We shall therefore refer to it in much detail later.
- Exhibit 2 – accused's confirmed warned and cautioned statement is basically the same as the accused's defence outline Annexure (B) which accused adopted as his evidence.
- Exhibit 3 – the wooden plank is made of very hard wood and can indeed be a lethal weapon especially where excessive force is used.
- Exhibit 4 – (a) and (b) are empty tablets containers of ARVs and iron tablets which tablets accused alleges the now deceased took as over dose.

UNCONTESTED EVIDENCE

Brighton Rukatya

He was hired by the accused in the early hours of 2 March at about 0030hrs to ferry now deceased from her house to the hospital. He said the now deceased did not exhibit any signs of being alive as she was not breathing or making any movements. What is critical to note is that

Brighton Rukatya said despite all this the accused insisted that the now deceased was alive. She was pronounced dead at the hospital upon arrival.

Constable Virima Jimu

The role of Constable Virima Jimu was to accompany other details to the hospital.

Assistant Inspector Lydia Dadirai Tshuma

The only role Assistant Inspector Tshuma played was to record Exhibit 2, accused confirmed warned and cautioned statement.

VIVA VOCE EVIDENCE

1. NORMAN CHAKAUYA (Norman)

Norman is a next door neighbour of the accused and resides at No. 512 Council barracks, Tshovani, Chiredzi. He was well known to the now deceased and is known to the accused.

Norman testified that on 1 March 2019 the accused and the now deceased arrived at their house from the beer hall in the afternoon. He noticed the accused forcefully pulling the now deceased into their room. This was followed by some noise from the accused's room. Norman said he heard the now deceased crying out and could tell that accused was assaulting the now deceased because of the sound of the beating and that the wife was crying out for help. As a result he said people gathered outside accused's house but were all scared to intervene.

It is Norman's evidence that the accused came out of his house without a shirt and visibly angry. He said the accused was sweating and in a violent mood. Norman said the accused came to where Norman was standing and showed him \$2 x 2 bond notes and some two coins saying they were proceeds the now deceased got from prostitution she had allegedly engaged in whilst at the beer hall.

According to Norman the now deceased who was inside the house heard the accused talking to Norman and she called out Norman's name seeking help. Norman said due to the accused's violent mood he was scared to intervene in any manner. At that stage he said the accused took out a wooden bench outside accused's house and broke its legs Exhibit 3 after which he went back into the house. Norman said he then heard accused saying to the now deceased in Shona; "*wato mama, hausati wamama*" meaning "you have defecated, but you have not yet started".

Norman said the above utterances were immediately followed by sound of beating like thudding sound inside accused's house and that the now deceased cried out until her voice was

barely audible. He said all people gathered started to walk away saying the now deceased was as good as dead. Norman also left. He later learnt the next day of the now deceased's death.

Under cross examination Norman said although he did not witness the assault he heard the now deceased screaming and the thudding sounds of assault. He further stated that the accused should have used the wooden bench Exhibit 3 because he took it outside the house into the house after which Norman heard the thudding sound consistent with beatings and the crying out of the now deceased. He said by the time Norman left with other people gathered the now deceased's cry for help had virtually faded.

As regards the duration of the assault Norman said it could have lasted for about an hour. He was asked to explain how the deceased was crying out and he said she was saying in shona; "yohwee, yohwee ndofa" (translated to mean "I am dying").

In our assessment Norman's evidence is very clear. His evidence was not meaningfully challenged. Further we did not find any motive for him to falsify his evidence. He simply limited himself to what he actually saw, heard or perceived. We are therefore inclined to accept his evidence.

2. GODWIN DOMINGO (Godwin)

Godwin who is accused's young brother said on 1 march 2019 he was with the accused and now deceased at their parents's house No. 6090 F Naudi barracks drinking beer. Later he said accused and the now deceased left as the now deceased said she was a bit unwell around 1300hrs. At around 2200hrs the accused came to his house breathing heavily seeking his help saying the now deceased was unwell. Upon arrival at accused's house he found the now deceased lying on the bed motion less frothing at the mouth. He inquired from accused what had happened and accused said he had assaulted her in the afternoon in a non-serious manner over her alleged infidelity. Godwin then suspected she could have been attacked by goblins or evil spirits. He said their father arrived after Godwin's wife had called him. They ferried the now deceased to the hospital where they were advised on arrival that the now deceased had died.

Godwin confirmed that when the accused called him the now deceased could not talk and was motionless. The only injury he saw on her was on the forehead. All he noticed was that the clothes inside accused room were scattered or strewn all over. According to Godwin the report accused made to him was that accused had fought the now deceased (she had hit back). Lastly he

said it is accused who showed him Exhibit 4 (a) and (b) two empty bottles of tablets and said the now deceased had taken an over dose of tablets.

All we noted is that Godwin was very guarded in the manner he testified. He sought to insinuate that the now deceased was feeling unwell that day prior to the assault. This is not even mentioned by the accused and cannot possibly be true. Further, all other witnesses other than accused disputed that the now deceased was frothing on the mouth. The doctor even discounted that possibility. Be that as it may Godwin's evidence contradicts accused's evidence that when accused left his house at 1500hrs leaving the now deceased all was well because he found clothes strewn all over the house.

3. JOHN DOMINGO (John)

He is the accused's father. On 1 March 2019 in the afternoon he passed by accused's house and realised all was not well between the accused and the now deceased. He noticed the now deceased seated on a pile of clothes in the passage of accused's room. The accused was telling the now deceased to leave. John said he implored accused not to be violent and left. Later that night he was called to accused's house. Upon arrival he found the now deceased lying on the bed motionless. The accused reported to him that she had taken an overdose of tablets. Contrary to Godwin's evidence and that of accused the now deceased was not frothing from the mouth and there was no vomit in the room. John's evidence was virtually unchallenged.

4. CONSTABLE WITNESS MAKAUSI (Cst Makausi)

Cst Makausi attended to the hospital after the now deceased had died on 2 March 2019. Upon examining the now deceased's body, he noticed fresh bruises on the now deceased's face. He inquired from the accused the cause and accused's explanation was that, he, accused, as a boxer, normally trained at times with the now deceased hence the now deceased sustained those bruises during such sparing sessions. Thereafter he proceeded to accused's house where accused gave him Exhibit 4 (a) and (b) saying the now deceased could have taken an overdose of tablets since those containers were now empty. He said accused said this was because earlier on the accused had a misunderstanding with the now deceased over an issue involving her ex-boyfriend.

Our brief comment is that the accused told a material lie to Cst Makausi in relation to the bruise on the now deceased's face. Secondly accused did not disclose that he had assaulted the

now deceased. Lastly accused was keen to convince the police that the now deceased had taken an over dose of tablets.

5. SGT GLADMORE GWARA (Sgt Gwara)

Sgt Gwara is the investigating officer in this matter which he said had been initially been reported as a sudden death. His perception changed when he saw fresh bruises on the now deceased's body on the face. Upon asking the accused, the accused said he did not know the cause of the bruises. This heightened his suspicion. The accused then advised him that the now deceased had taken an overdose of ARV tablets and iron tablets after they quarrelled in relation to the now deceased's alleged infidelity. Upon further questioning accused disclosed that he had assaulted the now deceased with a belt but that the now deceased had not sustained any injuries. Accused said he had thereafter left the now deceased in good health proceeding to the beerhall only to be shocked upon his return that night to find the now deceased barely conscious frothing on the mouth.

Sgt Gwara then interviewed other witnesses including Norman Chakauya who contradicted the accused version. This caused him to request for a post mortem examination but Dr Dube at Chiredzi who also had his own suspicions advised that an autopsy examination by a pathologist was necessary. He then caused the examination of the deceased's remains by a pathologist and was favoured with Exhibit 1. During investigations he also recovered the wooden bench or plank Exhibit 3. This leads us to the autopsy report.

What is to be resolved in this matter is the cause of the now deceased's death. In order to grapple with this issue we make recourse of Exhibit 1 the autopsy report and Dr Godfrey Zimbwa's evidence.

6. DR GODFREY ZIMBWA (Dr Zimbwa)

Dr Zimbwa took us through Exhibit 2 the autopsy report. He is fairly experienced Dr with 24 years' experience and also carries out post mortem examinations. He is therefore competent to explain contents of Exhibit 1 the autopsy report. We now deal with his evidence.

(a) External Findings (or marks of violence)

- (i) The pathologist found multiple ecchymosis anteriorly on both sides of the chest. This is bleeding underneath the skin on front of chest, abdomen, and both sides of abdomen and chest.

- (ii) Ecchymosis frontal region and both cheek bone. Again this is bleeding underneath back, cheek bones and forehead.
- (iii) Abrasion on palate on left temple. Dr Zimbwa explained that this was a cut on the surface of the skin at end of the mouth on the left side.
- (iv) Ecchymosis in both arms and legs. This means there were multiple area of bleeding under the skin of both arms and thighs.

The above were the visible external injuries observed by the pathologist on the now deceased. The now deceased's body was then opened and the pathologist made the following finding and observations;

2. Internal Examination or Findings

- (i) Contusion foci in the inner part of the scalp in the right occipital region. Dr Zimbwa explained this as a puncture wound or prick on the skin of the head more to the back of the head on the right side. He explained that such an injury cannot be seen externally because of the hair. The now deceased had no skull fracture and there was no bleeding in the brain.
- (ii) The now deceased's chest and neck were found to be normal.
- (iii) In relation to the trachea or voice box, the wind pipe and the lungs Dr Zimbwa said the pathologist noted multiple bilateral rib fractures in its interior and lateral arches with lesion of the left lung and intra thorax haemorrhage. The now deceased had multiple rib fractures on both sides of the chest, fractures on the right side of the chest and both side of the chest. The now deceased's left lung was injured most probable by one of the broken ribs, and this caused bleeding inside the chest cavity. This internal bleeding was also in the mouth, tongue and oesophagus.
- (iv) Most critically Dr Zimbwa said the now deceased's stomach contents were normal
- (v) Congested liver – this relates to excess blood in the liver although the now deceased's pancreas and spleen were normal.
- (vi) In relation to the kidney or ureter the pathologist noticed what is called pale cortex which means there was less blood flow to those organs and also cyanotic pyramids caused by lack of oxygen.

The pathologist went on to comment on Exhibits given to him being Exhibit 4 (a) and (b) (empty containers of iron tablets and ARVs); a black belt. The pathologist's said the contents of the now deceased's stomach did not show any overdose of tablets. Dr Zimbwa explained that if there is such an overdose there would be black and not pink or pale pigment if it is iron tablets. In relation to an overdose of ARVs Dr Zimbwa said there is no unknown specific immediate result or colour effect. He however said that such an overdose would not cause immediate death as it normally affects the liver and kidneys which effect manifests after days or weeks. Dr Zimbwa explained that an iron tablets overdose would be slow effect since iron tablets are called slow acting toxin and that generally the body can counter this on its own without fatal consequences. All one would do is to pass black stool.

The pathologist noted that the severity of the rib fractures could not be caused by a belt given to him but by other weapons.

The pathologist did not take blood samples to see if there was any damage to blood vessels caused by any chemical agent. This is called histology and the samples would be viewed microscopically. In addition to that no stomach, blood or urine sample was staked to look for any chemical cause of toxicity or poisoning. This process is called toxicology.

Dr Zimbwa explained at length as to why the deceased did not die due to an overdose of tablets. He said there was no such evidence observed by the pathologist is the contents of the now deceased's stomach. The stomach contents were found to be normal. He said this explains possibly as to why both histology and toxicology were not done.

Dr Zimbwa said even if iron tablets are taken as an overdose they have low toxicity and the effect would be felt after days or weeks as it is a low acting substance which cannot give immediate or acute effect. He also said ARV drugs are low toxicity drugs and would not cause an immediate acute effect. As per the type of ARVs in Exhibit 4 (a) container they have low toxicity and would affect the bone marrow. Dr Zimbwa said the immediate effect of such an overdose would simply be hallucinations or short-term confusion and damage to the liver not death in 3 to 6 hours. *In casu* he said the congestion observed in the liver was due to trauma or injury inflicted on the now deceased. He further explained that in acute poisoning it is the stomach and the liver which bear the most brunt of the effect of toxicity or poison. This would be observed because of excessive bleeding in organs of small blood vessels and that the liver would change its structure

as if it is decomposing. However this was not the case with the now deceased as per Exhibit 1. Lastly Dr Zimbwa said while frothing on the mouth can be a result of chest injury, the pathologist did not find such evidence of froth in the lungs, wind pipe or mouth. This would mean that the accused and his young brother simply fabricated the issue that the now deceased was frothing.

At the end of the day the cause of the now deceased's death is said to have hypovolemic shock which means sudden loss of circulating amount of blood leading to lack of consciousness and stoppage of the heart. The multiple and bilateral rib fractures and the injury to the left lung resulted in the bleeding into the chest. This therefore explains the loss of circulating blood. The pathologist said all this was caused by severe trauma attributed to assault.

Dr Zimbwa was also emphatic that despite absence of histology and or toxicology results the now deceased did not die of toxicity or poisoning. He even remarked that the tablet put in the container for iron tablets was not even an iron tablet as it is not brownish but white.

In our assessment the allegation by the accused cannot possibly be true that the now deceased took an overdose of iron and ARV tablets. The evidence of Norman Chakauya is very clear on how the accused brutally assaulted the now deceased for a prolonged period of time and even using the plank Exhibit 3. That evidence remained unchallenged. We find no motive for Norman Chakauya to lie. Further the injuries sustained by the now deceased especially multiple rib fractures are consistent with such a brutal assault. Severe force was used targeting vulnerable parts of the body in an indiscriminate manner.

We are not surprised that counsel for the accused Mr Chipangura found it difficult to meaningfully challenge all the incriminating evidence inclusive of medical evidence placed before us. No wonder why he declined to make any closing submissions. Even the accused himself under cross examination virtually capitulated indicating that his defence cannot be sustained in the face of such clear medical evidence. We are convinced that the story of the now deceased having taken an overdose of iron and ARV tablets was simply a poorly thought ruse by the accused. The truth of the matter is that the accused simply fatally assaulted the now deceased and thereafter tried to stage manage what he says is an overdose of tablets.

As has been said the assault perpetrated by accused on the now deceased especially with Exhibit 3 the wooden bench was brutal, indiscriminate and prolonged. As Norman Chakauya said all persons who had gathered left saying the now deceased had died. Severe force was used. It is

our view that the accused wanted to take the now deceased life. Indeed he proceeded to do so as the now deceased should have died immediately as a result of that brutal assault. The accused cannot therefore not escape criminal liability on a charge of murder with actual intent.

VERDICT:

Guilty of Contravening Section 47(1) (a) Criminal Laws (Codification and Reform Act) [Chapter 9:23]: - murder with actual intent

SENTENCE

This has not been only a difficult case to defend during trial but also to mitigate. Besides the accused's personal circumstances there is virtually very little one can say in accused favour.

As already said the accused is 44 years old. He has three minor children born from his previous marriage. These minor children were in the custody of his mother who has since passed on.

The accused is self employed as a tailor, a trade he learnt when he was previously incarcerated.

After the death of his first wife he married the now deceased in July 2017. The now deceased has now passed on and accused is responsible for her death. He shall forever live with the stigma that he killed his wife and this should haunt him forever.

As at now the accused has been in custody for a full year awaiting finalisation of his case. We do accept that accused's conduct was provoked by his conceived belief that his wife the now deceased was unfaithful to him.

On the other hand the accused is not a first offender. He was convicted of robbery on 13 March 2000 and sentenced to 3 years with one year conditionally suspended for 5 years on 14 October 2010. He was again convicted of assault and fined \$40 or in default of payment 1 month imprisonment. It is clear that accused is a person of violent disposition. He has learnt nothing from being incarcerated in the past.

The offence of murder is inherently a very serious offence. The sanctity of human life cannot be over emphasised.

We are amazed and shocked by the accused's lack of contrition soon after killing his wife and up to now. The accused was so callous that he sought to blame the now deceased for her death

by stage managing this tragic event alleging suicide. This is a lie the accused has pursued until his conviction.

The assault the accused perpetrated on the now deceased was callous and brutal. It was prolonged and indiscriminate. The now deceased's cries for mercy fell on deaf ears. She indeed suffered a painful death.

The courts take a dim view on domestic violence especially where the result is loss of life. It is saddening that many spouses are losing their lives at the hands of those who should love and protect them. It is foolhardy for the accused to have exhibited his boxing skills on his defenceless spouse.

It is our view that the full wrath of the law should descend heavily on the accused.

The accused is therefore sentenced to 35 years imprisonment

National Prosecuting Authority, counsel for the State

Chuma, Gurajena & Partners pro deo counsel for the accused