

THE STATE

VERSUS

VASCO DA GAMA NGOLE

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
GWERU 19 SEPTEMBER 2011

Mr Pedzisa for the state
Mr Chikanda for the accused

Criminal Trial

MATHONSI J: The charge against the accused is that of murder, the allegations being that on 1 July 2009 at Village 8, Chief Wedza Zvishavane, he unlawfully and intentionally struck his mother in law, Ety Maronga, then aged 50, three (3) times on the head with an axe causing her death.

The accused pleaded not guilty to the charge and tendered a two (2) pronged defence namely;

- (1) That of non pathological criminal incapacity as a result of being subjected to severe mental stressus which had increased progressively over the years as a result of being deserted by his wife and her subsequent improper association with other men and in particular a certain Mr Phiri who was employed by Mimososa and drove a Nissan Bakky.
- (2) That he was severely provoked by the deceased who had hurled insults at him accusing him of being sterile, that his children with his wife Unite, were not his, he had not paid lobola, was a pauper when she wanted a son in law with money. As a result of the insult he had lost his senses and struck the deceased in the heat of the moment.

The state led evidence which was simple and straight forward. Most of the evidence is generally common cause.

The accused, who was 66 years at the time of the incident and is now about 68 years old, was customarily married to one Unite Maronga, who was regarded as a daughter of Ety Maronga, the deceased, in the extended family set up. The said Unite was some 41 years younger than the accused. They have two children born of the union.

The accused's homestead is directly opposite his in laws' homestead and the two are separated by a road. The distance between them is such that one can see what is transpiring at the other homestead and vice versa.

Some few months before the events which led to the death of the deceased, the accused's wife, Unite, had deserted him after he had refused to co-operate when she wanted to go and look after a sick relative in Zvishavane. She proceeded to Zvishavane notwithstanding and remained there for a while. Upon her return to the village, she did not go back to accused's homestead electing to return to her parents.

The parents then decreed that Unite would not return to the accused until he had paid the bride price which was outstanding. This did not go down well with the accused, who kept on insisting that his wife and children should return to him.

On 1 July 2009, the accused had been aware that Unite would be proceeding to Mimosa to sell milk as the two had had some discussions earlier in the morning after Unite had tried to borrow an axe from accused which she intended to use to chop firewood but had aborted that assignment at the behest of the deceased who wanted her to go and sell milk instead.

The accused had then waylaid Unite some 1km away from the homestead as she went to sell milk. He was armed with a knife and an axe. The axe of it is an ominous 1,412kg weapon which is 60cm in length.

When Unite arrived accompanied by one Taritha Ncube the accused unceremoniously got rid of Taritha directing her to disappear. He told her she was not going to see Unite alive again. Left alone with Unite the accused is said to have declared to Unite that on that day he was going to kill her and that their children were going to be orphans. He said this as he held Unite's right hand.

What followed was an hour long pitched battle between the two during which the accused assaulted Unite, stabbed her twice on the leg with a knife, attempted to strike her with

an axe (exhibit 5) and she tenaciously fought back. She removed part of her clothing and fled from the scene going back to her parents' home.

The accused, who by then was extremely angry, followed Unite still armed aforesaid. He was spotted by Fungai Zhou entering the homestead walking very fast. A short while after that a noise was heard and when Fungai Zhou investigated, she saw the accused deliver blows with an axe directed at the deceased's head sending her to the ground.

Fungai Zhou ran to render first aid as the accused proceeded to Hlambi Mkwannanzi's homestead which is next to deceased's homestead. He was still pursuing Unite who had fled to that homestead.

Hlambi Mkwannanzi, whose evidence was admitted by the accused in toto, says that when he heard Fungai Zhou crying he went to investigate. Whereupon he saw the accused standing over deceased who was lying on the ground at the back of the hut. He hid Unite but accused came after her telling this witness that he wanted to kill Unite. After this witness had persuaded the accused to abandon his mission, accused said to the witness;

"Let me go and finish off the one I struck."

He proceeded to where the deceased was lying and struck her on the back of the neck with the blunt side of the axe. After causing a commotion, the accused is said to have burnt down three (3) huts and a granary at deceased's homestead before retiring to his home.

Accused later absconded and was arrested three (3) days later some 50 to 70km away in Fort Rixon as he was attending a funeral there. He says he wanted to sell his cattle there to raise money to pay bail.

While the circumstances of the deceased's death are common cause, the accused says when he got to deceased's homestead wielding an axe he was desirous of discussing her problems with Unite, a person he had stabbed a kilometre away from the scene. He says by then he was so angry that he did not care how the episode would play out and he was no longer afraid of or respected his mother in law.

He says if the deceased had not come in his way he would have allowed her to continue with her laundry as the person he was after was Unite. He says that when the deceased confronted him – he says the two of them went to each other which is to say the accused

charged towards the deceased while the latter also charged towards accused- the deceased uttered the insults he complains of. This resulted in him having a blackout secondary to the provocation.

He does not know what transpired thereafter. He says as he heard people mourning, he underwent a Damascan experience as he embark on his “sermon on the mount” by the nearby hills which resulted in him piecing together the events which led to the demise of the deceased. He was then able to give a statement to the police stating how it had happened.

For the defence of non-pathological incapacity to succeed the accused must have lost self control so much that he could not refrain from committing the offence. He must have been unable to control himself. A brief emotional disturbance would not satisfy the defence.

Here is a man who had been deserted by his young wife a couple of months earlier. His in laws had told him to pay a paltry sum of R1400 to get his wife back. He had the wherewithal to raise that money. The wife had repeatedly assured him that if he paid the money or part of it, she would gladly return to him.

Three days earlier his mother in law had called him in and they had a fruitful and amicable discussion during which she encouraged him to pay something of the money due, to have his family back. Earlier on in the morning of the same day the wife had met him behind her mother’s back and they had an amicable discussion in between the homesteads.

We are unable to see what the source of his emotional stressus is. In short he was not emotionally distressed. He had no reason to.

The inescapable conclusion is that the defence of non-pathological incapacity is clearly not available to the accused. He was firmly in control of his mental faculties. He made decisions, planned his actions meticulously and when the time came he implemented his project.

It remains for us to consider the issue of provocation.

At what stage was the accused provoked? By his own admission, he was already so angry that he was prepared to do anything and did not care how his problem with Unite was going to be resolved before he left the bush a kilometre away in pursuit of Unite.

By his own admission, albeit with tongue in cheek, as he says he was only scarring Unite, his avowed intent was to kill Unite. Hence the menacing way he chased away Taritha Ncube.

He was seen rapidly walking into the homestead, determined to accomplish his avowed intent. He did not take time before he was seen landing two vicious blows on the head of the deceased.

It cannot be said that Unite provoked him in the bush encounter because the accused did not tell us how she did except to say that she was a liar. Neither can it be said that the separation provoked him. He had lived with that reality for a while.

In respect of the provocative words allegedly uttered by the deceased, our view is that when the accused got to the deceased's homestead, he was already in a menacing mood, he had already declared his intent to kill and as such it is unlikely the deceased would have had the courage to confront him as alleged or to utter the words complained of.

It was virtually impossible that there would have been time for the conversation to take place as Zhou says the time was very short. Whatever noise Zhou heard was associated with the imminent assault.

In addition, when the events of 1st July 2009 were still fresh in his mind the accused gave a statement to the police on 9th July 2009 in which he took full responsibility for what he did and gave the main reason for assaulting the deceased as the fact that the deceased had taken away his wife from him accusing him of preventing Unite from having affairs with other men. The insult issue was secondary and was not even well articulated.

We therefore reject the defence of provocation as would reduce the offence to culpable homicide.

We have already alluded to the accused's avowed intent as witnessed by Mkwanzizi of going to finish off the deceased. He was also heard saying that he wanted to wipe out the Maronga family and even burnt down the homestead. There can never be a clearer way of expressing an intent and a more determined way of setting about compassing that desire.

Accordingly the accused is found guilty of murder with actual intent.

Ruling on extenuation

The accused person had been deserted by his young wife, in fact she was 41 years younger than him. He was smitten by uncontrollable jealousy which made him suspect that the comparably younger and affluent Mr Phiri of Mimosa was behind his misfortunes. He lost his head as a result.

For someone who lacked sophistication, was already very old and was sickly in love with a young woman who was unwilling to return to him, his human frailties are understandable. This was a crime of passion.

Accordingly we find extenuating circumstances in this matter.

Reasons for sentence

In arriving at an appropriate sentence we have taken into account the factors in mitigation that have been set out by your defence counsel, namely that

- you are a 69 year old first offender;
- you have lost your young wife forever
- you paid compensation to the deceased's family in the form of 8 head of cattle, a scothcart, a cultivator, a plough and contributed to the funeral expenses.
- you have spent more than 2 years in remand prison

Against that is the fact that this was arguably the most heinous attack on a defenceless woman. Our courts have always underscored the sanctity of human life. This was a completely senseless killing and for it you deserve to be put away for life.

However in view of your old age and that you are already in the twilight of your life, we will temper justice with mercy so that you do not spend your last days in prison.

Sentence

15 years imprisonment

*Criminal Division, Attorney General's Office, applicant's legal practitioners
Chikanda & Maputsenyika accused's legal practitioners*