

THE STATE
versus
CLEVER DHAMBARA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 18 JULY 2017 AND 19 JULY 2017

Criminal Trial

T Muduma for the state
V Ndlovu for the respondent

MATHONSI J: The deceased, Onesimo Mudzipurwa was aged 31 years at the time he met his death on 23 December 2015 at Dulibadzimu in Beitbridge, the victim of a stabbing which occurred at No 2739 Dulibadzimu Township in the border town. He had retired to bed at his girlfriend's lodgings while waiting for the girlfriend to knock off from work and join him. The accused person, who was then aged 37 years and is said to be a former husband of the deceased's girlfriend Chipu Mushonga, is accused of stabbing the deceased to death during that night and has been brought before this court charged with murder in contravention of s47 of the Criminal Law [Codification and Reform] Act [Chapter 9:23].

The state alleges that at about 21:30 hours that night, the accused person proceeded to Chipu Mushonga's residence number 2739 Dulibadzimu Beitbridge after collecting keys from Chipu's sister. Upon arrival at that house, the accused met Chipu in the corridor and proceeded to unlock the door to her room and beheld the deceased sleeping on the bed. He assaulted Chipu with open hands and she took to her heels with the accused in hot pursuit until she sought refuge at her sister's house namely number 2266 Dulibadzimu. The accused is said to have returned to Chipu's lodgings and finding the deceased still asleep he confronted him demanding to know why he was sleeping in his ex-wife's room. As the two exchanged harsh words, the accused is said to have picked up a broken piece of glass that was on top of a kitchen unit and used it to stab the deceased on the right collar bone.

The deceased bled profusely from the stab wound, staggered out of the room but collapsed after walking a distance of about 200m from Chipo's room. Although the deceased was rushed to Beitbridge District Hospital by well-wishers he was pronounced dead upon arrival at the hospital. According to the post mortem report compiled by Dr Sanganaï Pesanaï, a pathologist based at United Bulawayo Hospitals who examined the remains of the deceased on 26 December 2015 the deceased died as a result of stab wound and assault. He observed a 5 x 2 x 10cm stab wound located 3cm from collar band, 15cm from the nipple and 9cm from midline. It had perforated the right bronchial vessels and sub clavicle. The doctor remarked that there was haemorrhagic shock due to a lacerated right bronchia and sub clavicle vessels. Clearly therefore a severe stabbing blow was directed to a vulnerable part of the deceased's body.

The accused person pleaded not guilty to the charge of murder and stated in his defence outline that he was customarily married to Chipo Mushonga (Chipo) with whom he had two children. Although the union was not dissolved he relocated to South Africa in search of employment in order to provide for his family which strained their relationship. On 23 December 2015 he had taken his children to his rural home but returned later only to collect keys to the residence of Chipo from her sister Dadirai Mushonga (Dadirai).

When he arrived at Chipo's residence he overheard her arguing with the deceased. He knocked at the door and Chipo came through the corridor and he confronted her about her affair with the deceased which she had previously denied. An argument ensued between them during which he slapped Chipo who ran away. He remained behind opening the door to her room where he found the deceased lying on the bed. The accused stated that he questioned the deceased about his affair with Chipo but he responded by hurling insults at him before becoming violent and assaulting the accused. He was forced to retaliate. It was during the fight that he said he picked up a piece of glass which was on the floor. He threw it in the direction of the deceased who had been aggressive. He did not see where he hit the deceased as it was dark.

The accused maintained that in doing so he had acted in self defence. He also acted out of "cumulative provocation." He did not intend to kill the deceased and did not see that the deceased was severely injured as he immediately fled from the room where the fight took place. He therefore prayed for his acquittal. The accused's confirmed warned and cautioned statement

which he made to the police on 28 December 2015 and was confirmed by a magistrate at Beitbridge on 5 February 2016 was produced by the state. In that statement, the accused stated:

“I do admit to the charge that I stabbed and killed Onesimo Mudzipurwa on the 23rd day of December 2015. What happened is that I found Onesimo Mudzipurwa in my room with my wife after I had queried about their love affair and they denied. On that particular time I asked him what he was doing in my room and he started to assault me. I fought him and finally picked a piece of glass and stabbed him. I did not see where actually because there was no light in the room. He fled and died when he was away from the house.”

The state led *viva voce* evidence from three witnesses. Chipo Mushonga stated that indeed she had been married to the accused and they have two children together. He however deserted her and the children sometime in 2014 and went to South Africa. He did not provide any support for her and the children. They were evicted from their residence. She struggled with the children until she secured employment at Chocolate City and was living at her sister's house. She was forced to take her children to live with her blind grandmother in the rural areas. It was then that she met the deceased and fell in love with him. It is the deceased who secured rented premises for her at number 2739 Dulibadzimu Beitbridge and was paying rent for her there. However they were not living together although he would visit her from time to time.

On 21 December 2015 the accused returned from South Africa and went to live with her sister Dadirai. He started bothering her demanding his clothes which he had left with her. He eventually collected them. On 23 December 2015 the deceased came to her workplace and informed her he was proceeding to their place to wait for her arrival after knocking off. She had left her keys with her sister. He must have found the window open and entered her room through it because when she arrived home later she found the deceased already inside the room.

After informing the deceased that she was going to collect her keys from her sister she met the accused in the corridor and he immediately assaulted her with an open hand and with stones. She fell down but quickly got up and took to her heels, heading to her sister's place with the accused in hot pursuit. Upon arrival there, her sister came to her rescue advising the accused to leave her alone because he had deserted her. On the advice of her sister she proceeded to their maternal aunt to seek her assistance as she was then under attack from the accused. From there she was to be taken to the police to obtain a peace order against him.

She was later called by her sister to return to her residence as a lot of blood had been found where the deceased had been lying. She later assisted the police locate the accused at his friend's house after learning that the deceased had died from stab wounds. Most of what Chipso said was corroborated by Dadirai who added that the accused and Chipso had separated after the accused deserted her and the children. She went on to say that after she had sent Chipso to their aunt, she had sent her son Callisto to run and lock Chipso's room which had been left unlocked.

Callisto quickly returned to tell her that he had found a lot of blood in her room and on the bed. It was then that she took the keys and proceeded to that place. She found people having gathered there and was directed by the landlord to open the door to the room. Indeed there was blood all over – on the walls, on the floor, on the bed and in the corridor- but the deceased was not there. She managed to lock the room before calling her aunt to advise Chipso to immediately return and attend to the problem.

Dadirai confirmed that she is the one who had called Chipso and the accused after the latter's return from South Africa on 21 December 2015 and sat them down to try and resolve their differences. Although the accused wanted to reconcile Chipso was not interested. She then counseled them to find time to go to their rural home and discuss the matter there. They did not do that as the accused committed the offence on 23 December 2015.

Callisto Moyo, Dadirai's 13 year old son also gave evidence. He corroborated the evidence of her mother on the discovery of blood at Chipso's residence. He went on to state that for two nights after his return from South Africa, the accused had put up at their residence. During that time his children had been staying at their home as well. Although Chipso used to pass by their home every morning on her way to work, she would not talk to the accused at all. She deliberately ignored him all the time.

The evidence of the state witnesses was straight forward and was given well. In fact there was no meaningful controversy even under cross examination. We have no reason not to accept that evidence. In addition, the evidence of the rest of the state witnesses, the seven of them, was admitted in terms of s314 of the Criminal Procedure and Evidence Act [Chapter 9:07] as it appears in the state outline. From the evidence of Nokuthula Ndlovu who found the deceased lying on the ground next to the road leading to Mbedzi Business Centre we learn that

the deceased had run out after being stabbed only in a pair of shorts. There was blood all over his body and on the ground where he lay as he struggled to breathe.

The accused gave evidence as well. His evidence was given badly. He insisted that he was still married to Chipu but said he did not know where she lived. He had hoped that Dadirai would lead him to Chipu's residence. It does not make sense that if the two were still together the husband would not know where the wife lived. He confirmed that for two nights he had been putting up at Dadirai's residence after his return from South Africa. He could not explain why that was so if all was well between him and his wife.

The accused stated that he had visited Chipu's residence on the night in question in order to be with his family which included his children. This again does not make sense because we had already been told by the state witnesses that his children were staying with Dadirai. In fact that part of his story sharply contradicts his defence outline where he stated that he had earlier that day taken his children to his rural home.

The accused went on to say that he had known about the affair between Chipu and the deceased through a whatsapp message sent to him by a friend but upon asking the two about it they had denied it. He said he had gone to Chipu's residence on the night of 23 December 2015 to put up only to find the deceased lying on the bed and Chipu reprimanding him for bothering the accused the father of her children. He admitted assaulting Chipu forcing her to flee before confronting the deceased who was lying on the bed.

The accused stated that the deceased had then insulted him before assaulting him. His evidence was however scanty on details. For instance he did not state how he was insulted and how he was assaulted only saying that there was a fight between him and the deceased. It was during that fight that he fell next to the kitchen table and groped in the dark for a piece of glass which he picked up and threw at the deceased. After hitting the deceased the latter immediately ran out of the room. He also proceeded to Dadirai's home to inform her about what had happened before going to put up at his friend's place.

The nature of the accused person's defence is two pronged. He relies on provocation as well as self-defence. On provocation, the accused claims that when he found the deceased lying on the bed in Chipu's room he asked him about their affair. The deceased responded by hurling insults at him. He did not particularise the nature of the insults. It is therefore not possible to

find provocation on the basis of unknown insults. In fact, that the accused is unable to even specify what was said to him as to provoke him to act the way he did means that there were no such insults.

Mr *Ndlovu* for the accused person submitted that the provocation also took the form of discovering the affair between Chipu and the deceased. But then the accused is the one who testified that he had known about the affair through a whatsapp message which was sent to him by a friend of his in September 2015 when he was still in South Africa. Upon his return to Beitbridge he had questioned the deceased at the rank as he seeped a beer chiding him for taking away his wife. Although the deceased had been rude to the extent of even throwing away his beer, he had not been offended referring to the deceased as his “nephew” because of their common totem. Surely finding the deceased lying in that bed that evening could not have come as a surprise. We also do not understand how it could have acted as provocation.

It is the policy of our law to encourage people to use self-restraint and to deter them from causing harm to others when they are provoked. Therefore if the law were to allow any type of provocation to justify violent action, there would be anarchy. For that reason our law applies a twofold approach to provocation. The first stage is to apply the normal subjective test to decide whether there was intention to kill. If there was intention, the court should proceed to the second stage which was formulated in *S v Nangani* 1982 (1) ZLR 150 (S) as: Was the provocation such as would reasonably be regarded as sufficient ground for loss of self-control that made the accused act against the deceased the way he did? If the answer to that question is in the affirmative then the accused must be found guilty of culpable homicide.

In our view, a person who deserts his customary wife and two children and escapes to South Africa for several months without contact, who learns while still in South Africa that the woman has moved on and is having an affair with a known person in public, does not get provoked as to lose self-control by coming to the residence of the new couple only to confirm what is already known. This is a person who was no longer in talking terms with Chipu as stated by Callisto. He had tried reconciliation but Chipu was not interested. Care must be taken not to confuse revenge with provocation.

It occurs to us that the accused, who had already spent two nights squatting at Dadirai Mushonga’s residence after being rejected by Chipu only visited her residence on the night of 23

December 2015 for no other reason but to exert revenge. This explains why he first assaulted Chipo and chased her all the way to her sister's residence before coming after the deceased whom he knew to have been sleeping in the room all the time. The circumstances of this case and the manner in which the accused person acted do not satisfy the requirements for provocation to present a defence, partial though it is, to the accused person. It would be recalled that this is a person who says that he had on a previous occasion discussed the issue of the deceased taking Chipo away from him in a casual and relaxed manner with the deceased. Not only had Chipo moved on, the accused had also accepted that reality and therefore cannot seek to rely on the relationship as constituting provocation.

The second leg of the accused's defence relates to self-defence.

In our law a person is entitled to take reasonable steps to defend himself against an unlawful attack and harm or even death may be inflicted by a person on the assailant in order to ward off the attack. For self-defence to be available to an accused person the following requirements must be satisfied;

1. there must be an unlawful attack;
2. the attack must be directed at the accused or a third party, where the accused intervenes to protect a third party;
3. the attack must have commenced or be imminent;
4. the action taken must be necessary to avert the attack; and
5. the means used to avert the attack must be reasonable.

Therefore even where the accused person acts in self-defence he must not exceed the bounds of self-defence. If he does he may either have a partial defence or no defence at all depending on the circumstances of the case. See G Feltoe, *A Guide to the Criminal Law of Zimbabwe*, 3rd edition LRF at pp 43-44; *S v Ncube and Others* HB 303-16.

In the present case the accused person, who I have said was a hopeless witness whose evidence was not worthy of belief, stated that he confronted the deceased as he lay on the bed in Chipo's room naked except for a black pair of shorts he had on. He says he desired to know what the deceased was doing in his room. We know of course that if such a question was indeed asked, it must have been a ridiculous one because the room was not for the accused but Chipo

with whom he had separated for a long time. Quite to the contrary the room had been secured by the deceased who was responsible for paying rentals.

Whatever the case, the accused claims that the deceased responded by hurling insults at him before he attacked him with his hands resulting in a fight. He says the deceased then pushed him forcing him to fall to the floor next to a kitchen unit or table. He then groped in the dark picking up a piece of mirror which he threw at the deceased from close range. He does not know where the mirror landed as it was dark but he is certain that immediately after being struck, the deceased ran out of the room. He does not know what became of him thereafter and only learnt of his demise the following morning after his arrest.

In our view the requirements of self defence do not exist even if one goes by the version of the accused person. Clearly the accused was the aggressor who went to Chipo's residence where the deceased was lying on the bed smarting for a fight. He had bottled anger for two days after being denied entry into that residence by none other than the person he claimed to be his wife, Chipo who was ignoring him as stated by Callisto and certainly wanted to have nothing to do with him. There is no way the deceased could have been the aggressor because, not only was he scantily dressed he was also lying down. Infact after being stabbed he was seen a while later by Nokuthula Ndlovu still dressed only in a black short while fighting for his life with blood all over the place.

There is no doubt that when the accused inflicted the mortal wound on the deceased he was not under attack. Even if one may want to assume in the accused's favour that there was a fist fight, by his own admission the deceased was not armed with any weapon. Therefore the means used, that of stabbing the deceased with a broken mirror, was not necessary to avert whatever attack was there whether real or imagined. We conclude therefore that none of the essentials to sustain self-defence exist in this matter. That defence is therefore not available to the accused person.

The findings of the doctor who performed the post mortem on the deceased' body show that he was stabbed on the upper part of the body with a sharp instrument which has been shown to have been a broken mirror. A person who uses such an object to stab a human being the way the accused did surely must have engaged in that activity foreseeing that there is a real risk that

the activity will result in the death of the victim. He however proceeded with that activity not withstanding that risk.

Accordingly the accused is hereby found guilty of murder with constructive intent.

Reasons for sentence

In considering sentence we take into account that the accused person is a first offender who is now 39 years old. He lost his wife Chipo Mushonga after he abandoned her and their two children and was in the process of pleading with her to be taken back when he committed this offence. He has been in custody for one year seven months as he was never granted bail from the time he was arrested. He generally admitted the offence.

In a way this was a crime of passion by a man who could not stomach losing his wife to someone else who was able to look after her, a feat which the accused himself had dismally failed to perform. This is a man who was smitten by spikes of mortal passion who, during an episode of envy or jealousy, took leave of his senses venting his anger on the hapless deceased person who had won the heart of the woman the accused regarded as his. Those circumstances obviously played havoc to the accused person's capacity to reason rationally at that particular moment.

That is however all that can be said in favour of the accused person in this matter. He appears to belong to that class of men who believe that a woman is a piece of chattel to be owned, possessed, kept and abandoned at will by a man. Those people who believe that it is their birth right to do as they please to a woman who is not allowed to terminate their relationship and move on. This court has repeatedly reminded the likes of the accused person that they will not be allowed to prey on women simply because at some point the woman would have agreed to enter into a relationship with them. We live in a free society where people are free to engage and disengage as they please. It is their constitutional right to do so. Men should learn that when a woman says "no" she means exactly that. She does not mean "no but yes."

It is the duty of this court to protect both the women and those that they choose to associate with. We will not allow people who refuse to be rejected to prey on women and their lovers because they would not accept rejection. As it is, a precious life was needlessly lost when the accused person would not allow the woman to move on. We will always uphold the sanctity

of human life and as such it is incumbent upon this court to impose a sentence that underscores that fact.

Of course we will take into account the period that the accused person has spent in custody while awaiting trial.

Accordingly the accused is hereby sentenced to 20 years imprisonment.

National Prosecuting Authority, the state's legal practitioners
Mweli Ndlovu and Associates, respondent's legal practitioners