

THE STATE

Versus

SPENCER SITHOLE

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J wit Assessors M. Ndlovu and Mr J. Sobantu

BULAWAYO 19, 20 & 25 JUNE 2018

Criminal Trial

T. Muduma for the state

D. Mhiribidi for the defence

TAKUVA J: This case, to borrow MUBAKO J's words in *S v Dzaro* 1996 (2) ZLR is all about "love, sex and blood". The accused appeared before us on a charge of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act Chapter 9:23 (the Act), it being alleged that on the 11th of April 2017 and at Number 50 Diamond Drive, Four Winds, Bulawayo, the accused person struck Gugu Mbuti Mkhwananzi with a wooden stool several times all over his body intending to kill Gugu Mbuti Mkhwananzi or realising that there was a risk or possibility that his conduct may cause the death of Gugu Mbuti Mkhwananzi continued to engage in that conduct despite the risk or possibility.

In its outline which was produced as exhibit, I the state alleged that on the 11th day of April 2017 at 0700, hours the accused proceeded to his former girlfriend Josephine Morrow's house at number 50 Diamond Drive, Four Winds, Bulawayo. The accused jumped over the gate and proceeded straight to the bedroom where he found his ex-girlfriend sleeping with the deceased. The accused did not take the situation lightly and he started assaulting the deceased with fists on the face. Further, the accused took a wooden dressing table stool and struck the deceased with it severally times all over the body. Later, the deceased was ferried to Mater Dei Hospital where he was admitted in the intensive care unit until his death on the 15th day of April 2017.

The accused denied these allegations and outlined his defence in exhibit 2 which is his defence outline. In brief the defence is as follows:

- (a) that he “denies harbouring any actual intention to kill the deceased and contends that due to his state of mind he was totally incapable of foreseeing or appreciating that his conduct would result in the death of the deceased.”
- (b) that after seeing the deceased having sex with Josephine Morrow he got so “irate that in the heat of the moment he totally lost his self-control and punched the deceased on the nose and causing him to bleed from the nose. He delivered a flurry of blows on the deceased who then armed himself with a wooden stool which he tried to use to attack the accused.”
- (c) that he disarmed the deceased of the stool and struck him with it causing Josephine to scream out loud and ran out of the bedroom still screaming.
- (d) that the severe provocation to which he was subjected to led to his “loss of self control and robbed him of the ability of foresight to judge the risks and consequences of his actions.”

The state produced as exhibit 3, the accused person’s confirmed warned and cautioned statement in which he denied causing the deceased’s death intentionally. Exhibit 4 was the dressing table wooden stool weighing 6.460kg.

Finally, the State produced in terms of s278 (2) of the Criminal Procedure and Evidence Act a post mortem report compiled by Doctor Pesanai. The doctor concluded that the cause of death was;

1. Respiratory failure
2. Intrathoracic haemorrhage
3. Multiple rib fractures
4. Assault

The State sought the formal admission of the following witnesses' evidence in terms of section 314 of the Act:-

1. Violet Mamova
2. Susan Mamova
3. David Sibanda
4. Dzikai Mutiunovava
5. Tafara Sibanda
6. Legion Dube
7. Dr Pesanai

There being no objection, the evidence was so admitted.

The State then called Josephine Morrow (Josephine), the woman at the centre of this controversy. She is a 48 year old married woman on separation from her husband. The deceased was her boyfriend whereas accused is her ex-boyfriend. Their relationship lasted for 6 years, until the 23rd day of March 2017 when she terminated it. According to her she fell in love with the deceased during the 1st week of February 2017 and informed the accused that she was seeing someone whose identity she did not disclose.

Her version of events on the day preceding the commission of the offence is that she met accused around 2pm and they went to Bulawayo City Council offices to pick up her papers. After that they went to a bottle store where they purchased some beer which the accused consumed until 5pm when she joined him in the drinking until 10pm. She later dropped the accused at his house and went to a night spot called La Gondola where she hooked up with the deceased until 1am when they moved to Club 263. They remained there until 2am when she took deceased to her house.

On the following day around 7:00am, accused walked into her bedroom and found her in bed with the deceased. The accused started shouting accusing them of cheating. He assaulted deceased with clenched fists on his face. Later, he picked up a stool and used it to strike

deceased. She screamed, begging him to stop beating the deceased. The accused placed the stool down and started to beat her up. Deceased used that opportunity to flee from the room. The accused ran out to look for deceased but he could not find him. After that, he returned to the room and continued assaulting her with clenched fists. Her female relatives screamed imploring the accused to stop beating her, he stopped and she went out and hid behind some shrubs until the police came.

When the police arrived the accused told them that he had caught the deceased with his wife inside his bedroom. A search for the deceased ensued. She said she saw a blood spoor that led them to the servants' quarters where they found him lying on a bed bleeding from the nose and mouth. An ambulance took him to Mater Dei Hospital where he was admitted in the Intensive Care Unit until his death on the 15th of April 2017.

The witness described her relationship with the accused as "on and off" meaning they would part ways and later reconcile their differences. She admitted that deceased who had returned to Zimbabwe in August 2016 started dating her best friend one Ruth from November of that year. At one time, deceased and Ruth joined her and accused and they spent the whole afternoon on a Sunday drinking beer at a pub called "The Place" at Old McDonald Club. She admitted that deceased assisted her to process her application for a restaurant licence.

The witness also stated that at one time they considered marrying but accused was not serious. She also realised that marriage was out of question because accused who is 13 years younger than her was immature at times. They had very good times and very bad ones. Accused wanted children but she did not want any. They broke up due to numerous arguments and fights. After she terminated the affair in accused's face, he met another woman and she was happy with that. They agreed to move on with their separate lives. When asked under cross-examination why if accused accepted that their relationship had ended would be so infuriated by finding deceased in her bedroom, she said accused thought that they would patch up their differences and get back together as what happened before.

The witness said accused was “very very angry” when he was beating deceased with a stool. She thought he was “not himself”. As regards the reason for accused’s uninvited visit to her house early that morning, she said it is not correct that accused had left his car keys in her car because when she dropped him at his house the previous night the accused had used his remote control which is attached to his car keys to open the gate before entering the yard. Further, she denied that accused found them having sexual intercourse. She insisted that they were fast asleep and accused woke them up.

Despite this witness’ moral bankruptcy or turpitude if one may call it that, we nevertheless find that she was a credible witness in respect of the events surrounding the assault perpetrated upon the deceased. However, her evidence as regards the termination of the relationship is hard to believe. We say so for the following reasons. (1) she did not totally and effectively terminate the affair (2) between February and March 2017, she was in love with both the deceased and the accused (3) she openly admitted that she continuously associated with the accused up to the night preceding the murder, (4) she admitted attending a funeral for accused’s relative long after the alleged termination. However, her evidence as regards the assault is truthful as it is corroborated by the accused, the only difference being that while she said deceased never got an opportunity to fight back, accused said the opposite. Her evidence is supported by the probabilities in that it is consistent with accused’s testimony that he delivered “a flurry of blows” to the deceased’s face. In any event accused’s version that deceased retaliated becomes diluted and rendered immaterial if one considers accused’s admission that he disarmed the deceased and immediately used the stool on him.

For these reasons, we accept Josephine’s evidence wherever it conflicts with that of the accused.

The state’s second witness was Siphso Moyo who was at the time employed by Josephine as a gardener. On 11 April 2017 at approximately 0700 hours he was sweeping the premises when he saw accused, a man he knows as his employer’s boyfriend jump over the gate and entered the main house. After sometime he saw the deceased walking out of the house. He

noticed that this man was injured as he was bleeding from the nose and mouth. He was holding his chest in a stooping position. The deceased said “please hide me, I have been injured.” He hid him in the cottage and continued with his work. The accused came searching for deceased but he failed to find him.

Under cross-examination, he said he was working 20 paces away from the house. He heard people shouting but he did not hear any specific words. After this witness, the State closed its case.

In our view, this witness is an unsophisticated young man with no motive to misrepresent facts. He impressed us as a truthful and unbiased witness. He gave a satisfactory explanation for his conclusion that when he saw the accused coming out of the house, he thought he was searching for the deceased because the deceased had come out of the same house injured. This is a credible explanation based on simple logic. We therefore accept his evidence *in toto*. In any event his evidence on that aspect was not challenged in cross-examination by the defence counsel.

The defence called the accused to the witness stand. He told the court he is a single 34 year old man who is self employed as a “transport broker”. The accused apologised for the loss of life and the grief he caused to the deceased’s family. As regards the events of the fateful day, he said he could not find his car keys in the morning and suspected that he could have left them in Josephine’s car the previous night. He then decided to jog to her house in search of the keys. Upon arrival, he opened the gate and entered the yard. He entered the bedroom where he found deceased and Josephine having sexual intercourse and he asked what was happening. The deceased jumped out of bed and wore his boxer shorts while Josephine also got up asking what the accused was doing in her bedroom. Accused said he asked them why they were doing this behind his back and Josephine pushed him out of the room. Deceased said accused should leave as he was not married to Josephine. As deceased walked towards him, a fight ensued between them. They exchanged blows until the deceased came out second best. Deceased swung the stool at him hitting him on his left arm. He got hold of it with one hand while he punched the

deceased with the other until he disarmed him of the stool. He then hit him with that stool a number of times but he could not say how many times. When asked why he acted in that manner his reply was, “I was infuriated to see a woman I thought I was going to marry with someone I considered my friend who was assisting us with our businesses. In hindsight I should have rather walked away, but I lost all self control.”

The accused denied striking the deceased while the latter was lying down. He also said he had known deceased for 6 months prior to this day. Since deceased was in love with Ruth, the four of them would go on drinking sprees quite often. Deceased assisted them to fast track the application for a licence. As regards his relationship with Josephine, he said he loved her with all his heart despite the 13 year age difference between them. He considered her his adviser especially in financial matters. At one time he saw Josephine with divorce papers she intended to serve on her husband.

Asked what he meant to achieve by assaulting the deceased in that manner, he said he just wanted to injure him but not to kill him. He said the whole episode lasted less than a minute and at the time he was not thinking rationally. When he stopped assaulting the deceased, the latter left the room and he also left for the kitchen to look for matches to light a cigarette. He used a stove instead and went out to smoke. During that time, he did not look for or see the deceased around. Further, he denied that Josephine had terminated their affair on 23rd March 2017 and that their relationship could be described as “on and off”. He said the 2 were together on 27 – 28th March, 8th April, 9th of April and on 10th April. Under cross-examination, the accused admitted assaulting the deceased first, disarming him and then striking him with the stool. The reason he gave was that he was angry and had lost all self control. However, accused said he did not think deceased would die because he did not hit him hard enough to cause death.

As pointed out above, the accused’s evidence dovetails with that of Josephine in many material respects. However they differ in certain respects, some of which are immaterial. In our view, the accused tried to downplay his role in the death of the deceased by suggesting that it is the deceased who introduced the stool. We reject this evidence as false because although

accused said he was hit on the left arm with a stool, he did not have even a scratch or swelling to show the police who arrested him. Further, he is silent about that in his confirmed warned and cautioned statement. Surely, if deceased had fought back, he could have at least caused some sort of injury to the accused. The totality of the evidence proves that there was no fight at all. The accused simply out of anger viciously attacked the deceased.

However, we accept accused's version on the status of their relationship as at 11 April 2017. We find that it is true that the two had been seeing each other. As regards the nature of their relationship, it is clear from both parties' testimony and circumstances that it was a casual one characterised by numerous fights and disagreements that led to occasional disagreements leading to occasional break-ups followed by reconciliation. We say so for the following reasons;

1. although they had been seeing each other for 6 years, they had no children,
2. they were living apart from each other,
3. although they loved each other, they had fundamental differences that made marriage impossible,
4. Josephine is legally married to another man and she has her own children. She does not want to have children with the accused,
5. on the other hand, accused is single and wants to have children
6. they did not jointly own any movable or immovable property,

Facts which are common cause

- 1) The accused and the deceased had known each other for 6 months prior to the murder
- 2) The deceased was in love with Josephine
- 3) On the 11th April 2017 Josephine and deceased were in bed naked at the former's house
- 4) The accused entered the bedroom which was unlocked and shouted the following words to both of them, "you guys have been making me a fool out of this."
- 5) The deceased got out of bed and wore is boxer shorts
- 6) The accused assaulted the deceased with clenched fists on the face several times

- 7) The accused struck the deceased with a dressing table stool all over the body several times
- 8) The deceased sustained multiple rib fractures that caused intrathoracic haemorrhage and respiratory failure
- 9) The deceased died from these injuries
- 10) On the 10th of April 2017 the accused and Josephine were drinking beer together until late that night

Facts found proved

1. Josephine was in love with both accused and deceased at the time of the murder
2. On the morning of the 11th April the accused who had a hangover went to Josephine's house
3. Upon arrival the accused jumped over the gate and entered the premises. He saw the gardener Siphon Moyo working
4. When accused entered Josephine's unlocked bedroom he found the two in bed naked
5. The accused was angered by this and he proceeded to assault the deceased with clenched fists on the face several times causing bleeding from deceased's nose and mouth
6. The deceased did not get an opportunity to fight back. The accused then picked up a stool – exhibit 4 and struck deceased with it repeatedly and indiscriminately while deceased was lying down
7. Josephine screamed and urged the accused to stop assaulting the deceased which he did.
8. As a result of the assault, deceased sustained serious injuries described in the post mortem report – exhibit 5
9. The deceased died from these injuries

The issues

1. Whether or not the accused acted with the requisite intent to kill the deceased?

2. Whether or not the accused completely lost his self-control as a result of provocation?
3. Whether or not the provocation was sufficient to make a reasonable person in accused's position and circumstances lose his self control?

The law

Intention

Murder is committed when a person kills another person unlawfully with intent to kill. Previously, the intent to kill used to be actual and direct or constructive intent. The Criminal law Codification and Reform Act as changed that. Murder is now defined in section 47 (1) (a) (g) as follows:

“47 (1) Any person who causes the death of another –

- (a) intending to kill the other person; or
- (b) realising that there is a real risk or possibility that his or her conduct may cause death and continues to engage in that conduct despite the risk or possibility

shall be guilty of murder.

Intention is defined in section 13 as follows:

“13 (1) Where intention is an element of any crime, the test is subjective and is whether or not the person whose conduct is in issue intended to engage in the conduct or produce the consequences he or she did..

(2) ...”

Section 15 deals with the test for realization of risk or possibility. It states;

“15 (1) Where realization of a real risk or possibility is an element of any crime, the test is subjective and consists of the following components –

- (a) a component of awareness, that is, whether or not the person whose conduct is in issue realised that there was a risk or possibility, other than a remote risk or possibility, that –
- (i) his or her conduct might give rise to the relevant consequences; or
 - (ii) the relevant fact or circumstance existed when he or she engaged in the conduct;
- (b) a component of recklessness, that is, whether despite realising the risk or possibility referred to in paragraph (a) the person whose conduct is in issue continued to engage in that conduct.
- (2)...
- (3) where, in a prosecution of a crime of which the realization of a real risk or possibility is an element, the component of awareness is proved, the component of recklessness shall be inferred from the fact that –
- (a) the relevant consequence actually ensued from the conduct of the accused; or
 - (b) the relevant fact or circumstance actually existed when the accused engaged in the conduct;
- as the case may be.
- (4) For the avoidance of doubt it is declared that the test for realization of real risk or possibility supercedes the common law test for constructive or legal intention and its components of foresight of a possibility and recklessness where ever that test was formerly applicable.”

Applying these principles to the present case we find that the accused turned from friend to killer inside Josephine’s bedroom. We are of the view that the evidence does not justify a conclusion that the accused had actual intent to kill. However, we are of the firm view that the evidence established the two elements of realization of a real risk namely (i) awareness of the fact that there was a risk or possibility other than a remote risk or possibility that his conduct might give rise to the death of the deceased and (ii) recklessness in that despite realising the risk or possibility the accused continued to assault the deceased.

In our view, when a man lifts up a weapon like the stool *in casu*, (weighing 6.6kg and made of very hard and thick wood), and strikes a human body several times with it on the chest and back causing numerous fractures of the ribs, it would be artificial to say the least of it, to hold that he did not realise that his conduct might give rise to the death of the deceased. The evidence shows that the accused realised that the stool was a dangerous weapon which he did not want used against him. Despite overpowering the deceased, the accused continued to recklessly thrash a man lying helplessly before him and then to repeat it several times. In these circumstances, the conclusion is inescapable that the accused realised that there was a real risk or possibility that his conduct may cause death but continued to engage in that conduct despite the risk or possibility.

The defence of provocation

The general rule of Roman-Dutch Law is that a person may be so provoked or made mad by another person's behaviour that he loses control over his faculties and becomes incapable of forming the specific intent in relation to a particular offence. It is recognized that anger may be so strong as to destroy a person's "voluntarium" in a similar way as intoxication. See *S v Dzaro* 1996 (2) ZLR 541 (S); *S v Nhangani* 1982 (2) ZLR 150; *S v Ncube* S-4-14-87.

I must point out however that by virtue of section 3 of the Criminal law Codification and Reform Act, the Roman-Dutch criminal law is no longer applicable within Zimbabwe to the extent that the code expressly or impliedly enacts, re-enacts, amends, modifies or repeals that law. However, the courts are not prevented when interpreting any provision of the Code from obtaining guidance from judicial decisions and legal writings on relevant aspects of –

- (a) the criminal law
- (b) the criminal law that is or was in force in any country other than Zimbabwe.

Section 239 of the Code deals with provocation as a partial defence to murder. It states;

- “239 (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 realization referred to in section forty-seven, the person shall be guilty of culpable homicide if as a result of the provocation –
- (a) he or she does not have the intention or realization referred to in section forty-seven; or
 - (b) he or she has the intention or realization referred to in section forty-seven but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self control.
- (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 realization 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 (1) but the court may regard the provocation as mitigatory as provided in section two hundred and thirty-eight.”

In my view the proper interpretation of subsection (2) *supra* is that the “two pronged approach” first enunciated by TREDGOLD CJ in *R v Tenganyika* 1958 is no longer applicable to the defence of provocation in Zimbabwe. That being the case in view of my earlier finding that the accused acted with the requisite intent, there will be no need to determine whether or not a reasonable person in accused’s position and circumstances lost his self-control.

However, assuming I am wrong, I shall proceed to consider whether or not the accused lost his self-control. In *S v Howard* 1972 RLR 247 at p 233 BECK J (as he then was) cautioned as follows;

“One must be careful, however, not to infer too readily from the very extravagance of the accused’s behaviour the reasonable possibility of a complete loss of self-control sufficient to deprive him of the capacity to form an intention to kill, when such extreme behaviour may be the result of the accused having yielded to a passion which aroused in him an actual desire to bring about the death of his victim.”

In *S v Henry* 1999 (1) SACR 13 (SCA) SCOTT JA said;

“By the very nature of things, the only person who can give direct evidence as to the level of consciousness of an accused person at the time of the commission of the alleged criminal act, is the accused himself. His *ipse dixit* to the effect that this act was involuntarily and unconsciously committed must therefore be weighed up and considered in the light of all the circumstances and particularly against the alleged criminal conduct viewed objectively. It is not sufficient that there should merely have been a loss of temper. Criminal conduct arising from an argument or some or other emotional conflict is more often than not preceded by some sort of provocation, loss of temper in the ordinary sense is a common occurrence. It may in appropriate circumstances mitigate, but it does not exonerate. On the other hand, non pathological loss of cognitive control or consciousness arising from some emotional stimulus and resulting in involuntary conduct, i.e psychogenic automatism, is most uncommon. The two must not be confused.”

In *S v Eddie* 2002 (3) SA 919 (SCA) NAVSA JA stated that;

“It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism. It is by its very nature a state that will be rarely encountered. In future, courts must be careful to rely on sound evidence and to apply the principles set out in the decisions of this court. The message that must reach society is that consciously giving in to one’s anger or to other emotions and endangering the lives of motorists or other members of society will not be tolerated and will be met with the full wrath of the law.”

In *S v Kok* 2001 (2) SACR 106 (SCA) it was stated in respect of an accused’s lack of control that;

“Loss of temper that is to say a failure to control one’s emotional reactions, is not to be confused with a loss of cognitive control. The fact that he could recall these events some days later indicates that he knew what he was doing and is inconsistent with the hypothesis that he was re-enacting some memory in a dissociative state.”

In the present case, the accused showed an awareness of what he was doing. There was a series of deliberate actions by the accused before, during and after the assault. Also accused was able to distinguish his victims. He recalled going to Josephine’s house and the reason thereof. He testified that he lost his temper as a result of something Josephine and the deceased had said to him and what he observed happening. Also, the accused’s behaviour after the assault was not what one would have expected of someone who had no recollection of the assault. For these reasons we find that the accused did not lose his self control but acted consciously and

voluntarily despite the provocation. The accused's actions before, during and after show that the assault on the deceased was planned, goal-directed and well focused. As a result we reject the accused's defence that he lost self-control as a result of the provocation.

Having concluded as we have, the question of whether or not a reasonable man would have lost self-control becomes academic. Be that as it may, a reasonable man in accused's position and circumstances would not have lost self-control. A reasonable man would have walked away from this sugar mummy who was morally bankrupt. A reasonable man would not have resorted to the use of such a lethal weapon.

Further, Josephine and the deceased were not in accused's house. They were not in accused's bed.

For these reasons, we find the accused realised that there was a risk or possibility that his conduct may cause the death of the deceased but continued to assault the deceased despite the risk or possibility. In the circumstances we find the accused guilty of murder with "constructive intent".

*National Prosecuting Authority, state's legal practitioners
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