

THE STATE**Versus****LAKELA SWESWE**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr P. Damba and Mr Ngwenya

BULAWAYO 3, 4 & 5 JULY 2018

Criminal Trial*Ms N. Ndlovu* for the state*Ms M. Sibanda with K. Phulu* for the accused

MAKONESE J: The accused is a female adult who at the time of the offence was aged 23 years. The deceased was accused's husband. He was aged 33 years when he met his tragic death. The parties had been married for 3 years. Two children were born out of the union. The marriage was not a happy one. The accused complains that she was frequently physically abused by the deceased and had reported several such incidents at Hillside Police Station. The accused is facing a murder charge. The allegations being that on 8th June 2016 and at around 1am the accused murdered her husband by stabbing him in the neck once with a kitchen knife. The accused pleads not guilty to the charge.

In support of the state case the state outline was tendered into the record and marked exhibit 1. It shall not be necessary to repeat the entire contents of the summary of the state case which now forms part of the record. The accused tendered a defence outline exhibit 2 as part of her defence case. The defence outline is in the following terms:

- “1. That as a result of long history of severe verbal, emotional and physical abuse, she suffered from the battered woman's syndrome and the events of the 5th June 2016 took place against that background.
2. On the 8th of June 2016 the deceased person Anofa Mlauzi came home drunk. He insulted, beat up the accused was the norm when he was drunk. On the day in question the deceased even tried to stab the accused.

3. The accused will admit that she stabbed the deceased once on the neck in self defence but she would deny that she had the intention to kill him. The deceased person used to assault the accused person now and again, and the accused would report these incidents at Hillside Police Station.
4. Sometime in 2016, the deceased was charged with assault with the accused person as the complainant. Unfortunately, the accused had to withdraw the matter as she was heavily pregnant with their second child and he was the breadwinner.

The accused will pray that she is found not guilty of the charge of murder as defined in section 47 of the Criminal Law (Codification & Reform) Act (Chapter 9:23) and be acquitted.”

I must state at the onset that as the facts of the matter unravelled the accused did not pursue her defence of self defence with any seriousness and her defence counsel pleaded with the court to find her guilty of negligently causing the death of her husband.

The state produced the accused’s confirmed warned and cautioned statement recorded at CID Homicide, Bulawayo on the 4th of July 2016. The accused gave her statement in Ndebele and the translated version is in the following terms:

“My name is Lakela Sweswe. I live in Silobela in the Mtshikitsha area at Ndaya. My address is Ndiamutali Primary School, P.O. Box 730, Kwekwe. I admit the charge of killing Anofa Mlauzi which is levelled against me. The deceased and I have been quarrelling all the time, he would say I am a prostitute. It was on the 8th of June 2016 around 0100hours while I was in the house at Buenavista number 156 in Bulawayo the now deceased came drunk and insulting saying he did not want prostitutes. He again said I chased his niece Nomusa Mchingwe who he had said I should remain with while he was away having gone to the rural areas so that I would remain being promiscuous. The deceased then started assaulting me with fists and open hands. After that he took a knife and tried to stab me with it. I evaded and he threw the knife and got out. I remained picking up the knife, when he was coming back while entering the door, I stabbed him on the neck once and he fell down. When he was on the ground, I was frightened, I poured some cold water onto him but he no longer had the strength to get up. I guarded him there and he later died in the morning around 0700 hours. I took his corpse, dragged it and hid it in a disused house. It remained there for two days. I later smelt an odour I took some paraffin which we were using and went and poured it onto it, after covering it with a blanket, I burnt it. After that I remained living there. On the 18th of June 2016 I went to the now deceased’s uncle Ncube’s place of residence in Kensington and lived there. I told uncle that the deceased had gone to South Africa/Johannesburg. On the 1st

of July 2016, I went with uncle where I had been staying with deceased that is whereupon arrival, I was taken by neighbours to Hillside Police whereupon arrival I told the police what happened. I was defending myself from the deceased because he had always been assaulting me. I did not expect him to die.”

It is observed that the accused’s defence outline and confirmed warned and cautioned statement confirm that accused person admits stabbing the deceased. The circumstances surrounding the stabbing have no independent confirmation. It is the accused’s narration of events that the court has to rely upon. Her conduct, and intention, before, during and after the murder, would have to be determined from the totality of the evidence placed before the court.

A post mortem report compiled by Dr Ivian Betancourt after an examination of the remains of the deceased was tendered into evidence by the state as exhibit 5. The report was filed under post mortem number 559/554/2016. The cause of death could not be determined and the post mortem report reflects that the cause of death would be determined after toxicology tests had been conducted. The report however reveals the following on internal examination.

- “1. Multiple burnt clothes remains. Body in complete carbonization stage. Dry and toast skin. Eyeball is absent. Body in boxing position.
 2. The thoracic cavity was opened. Immediately it is observed haemorrhage infiltration around the neck’s muscles under the skin around the neck. No hyoid’s fractures.
 3. Trachea without any smoke remains, so, no bone black inside trachea’s tract neither bronchies’s tract.
 4. The internal organs with sings of decomposition all of them.
 5. Stomach: the foods still intact inside stomach. Complete.
 6. Laceration on the left side of the mouth, no mandibular fracture.
- . Head: Brain in complete liquefaction stage so is difficult to see any signs of trauma here. Blood and brain remains, but is difficult to determine any signs of internal haemorrhage or trauma. No skull bones fractures detected”.

The remains of the deceased were taken for toxicology tests and the report was produced by the state. The report was not of much assistance. The actual cause of death was not established. The pathologist Dr Ivian Betancourt concludes in an affidavit (exhibit 6) that despite the burns on the whole body, haemorrhagic infiltration around the neck muscles under

the skin was detected as indicated in the post mortem report. The pathologist could not conclude on the main cause of death.

The murder weapon, the kitchen knife exhibit 8 was produced by the state. Its measured length was 24cm. The blade was 24cm. The plastic handle was 12cm and it weighed 0.065grams. It is not in dispute that the accused used this knife to stab the deceased in the neck region. The deceased bled and died as a result of the stab wound. A bundle of photographs exhibit 9(a) –(r) taken at the scene of the crime, following indications made by the accused indicate that the deceased's body was burnt beyond recognition after the murder. The accused admits that she doused the body with paraffin before setting it alight.

The state case

The state led *viva voce* evidence from two witnesses. First to take the witness stand was **GEORGE NCUBE**. He is an uncle to the deceased. The evidence however revealed that the witness was not a blood relative of the deceased. This witness resides in Kensington. He was known to both accused and he deceased before the murder. He was not aware of the parties' matrimonial problems prior to the death of the deceased. On the 18th June 2016 at about 7pm he was at Springs Farm when he received a call from one Memory Dhlamini who informed him that the accused was waiting for him at his place of residence. The witness asked Memory Dhlamini to take in the accused for the night since he had gone with his house keys. The following morning the witness then went to his house where during the course of his interaction with accused, the witness enquired about the whereabouts of the deceased. The accused informed the witness that the deceased had gone to Johannesburg, South Africa. The accused remained at the witness's residence until early July 2016 when the witness received information to the effect that accused's husband had been found dead. The accused had since disappeared when he received the information. The witness went to a police base where he made a report. He was advised of the discovery of the body of the deceased. The witness confirmed that when he later caught up with the accused she was sleeping in a field. The witness testified that he later took the accused

to Hillside Police Station in the company of accused's neighbours. Accused was arrested and detained on allegations of murder.

The second witness for the state was **DINGILIZWE MPOFU**. He is an Assistant Inspector in the Zimbabwe Republic Police with 16 years experience. Upon the accused's arrest he interviewed her. Initially the accused tried to deny any involvement in the murder. The witness then informed the accused that he knew her as she had previously made reports of domestic violence against the deceased. At that stage, the accused opened up and confessed to having stabbed and killed her husband. Accused stated that she had acted in self defence as the deceased had threatened to kill her. The witness indicated that the matter was thereafter referred to CID Homicide who carried out further investigations.

Both state witnesses gave their evidence well with no exaggeration. Their evidence is credible and consistent. The court accepts their evidence as an accurate reflection of their recollection of the events. Their evidence was not contradicted in any material respects under cross-examination.

The evidence of the following state witness as it appears in the summary of the state outline was admitted by way of formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07), namely:-

- (a) Sipiwe Munsaka
- (b) Bongani Ncube
- (c) Constable MacDonald Madungwe
- (d) Inspector Laiti
- (e) D/Sgt Ngwenya
- (f) D/Sgt Sibanda M.
- (g) D/Ass Inspector Matsika

The state then closed its case.

Defence case

The defence led evidence from the accused. She stuck to her defence outline. She admitted stabbing the deceased in the neck once. She stated that on the night in question the deceased arrived home late around 1am. This was not unusual, and the deceased frequently physically assaulted her when deceased was drunk. She stated that their marriage was a troubled one on account of deceased's abusive tendencies. She had previously reported the incidents of domestic abuse against her husband, only to withdraw the complaints on realizing that she depended on the deceased for sustenance. She did not want the deceased to go to prison as she and the minor children depended on him as the sole breadwinner.

Accused testified that before she stabbed the deceased he had tried to stab her with the kitchen knife. In the scuffle the knife fell to the floor. The deceased had briefly gone outside their bedroom. She believed that deceased had gone to fetch some other lethal object. It was at night and visibility was poor. She stood behind the door and as soon as the deceased returned and attempted to enter the bedroom she struck him with the knife once in the neck. The deceased collapsed to the ground and was bleeding profusely. She panicked. She took a bucket of water and poured water on him. She thought in her wisdom or lack thereof, that the deceased would regain strength and get up. Accused tried to lift up the deceased and failed. She decided to retire to bed. The next morning, she discovered that her husband was dead. After two days she dragged the body of the deceased to a disused room. She covered the body with a blanket, doused it with paraffin and set the body alight. Accused stated that she believed that the body would burn to ashes. This did not happen. The charred remains of the deceased remained inside the disused room. Accused decided to leave the crime scene and went to George Ncube's residence where she remained before she was eventually handed over to the police at Hillside.

Analysis of the evidence

In this matter most of the facts are common cause. The accused by her own admission caused the death of the deceased by stabbing him once with a knife in the neck. Accused admits that after two days she burnt the body of the deceased. Under cross-examination she testified

that it was her belief that the body would be “*burnt to ashes*”. Put differently, she tried to destroy evidence. The accused was surprised when the body of the deceased was burnt beyond recognition but the remains of the body remain in the unused room next to her bedroom. The accused was forced to leave her residence and sought shelter with George Ncube. The accused essentially relied on the defence of self defence. The only difficulty encountered by the accused in raising this defence is that the deceased was not under threat her when she stabbed him. Accused instead, waited, and pounced on the unsuspecting husband. The accused was not at that time under any imminent attack or danger. In terms of section 253 of the Criminal Procedure and Evidence Act self defence and defence of another can be a complete defence when an unlawful attack had commenced or was imminent or where the accused believed on reasonable grounds that the unlawful attack had commenced or was imminent. The other requirement is that the conduct must be necessary to avert the attack or the accused must believe as such that they could not otherwise escape or avert the attack. The means used to avert the unlawful attack must be reasonable and proportionate in the circumstances. It was argued on behalf of the accused that she acted recklessly and that she lacked the requisite *mens rea* to commit the crime of murder. In terms of our law, where an accused intends to cause death or where he foresaw that death was substantially certain to occur, in terms of section 47 (1) (a) of the Criminal Code he is guilty on the basis of actual intention. Where on the other hand, accused does not have actual intention to cause death, but realises that there is a real risk that death could result, then such an accused is deemed guilty on the basis of what is generally referred to be referred to as legal intention, or *dolus eventualis*. See *S v Mhako* 2012 (2) ZLR 73 (H).

The legal position and conclusion

The defence of self defence is clearly not available to the accused. She was not under imminent attack. She took possession of the knife. She waited behind the door to deliver her blow. She aimed at the neck, a very delicate part of the body. Her conduct after the murder belies her claim that she did not intend to kill the deceased or did not foresee death as a possibility. If she panicked after seeing the deceased lying hapless on the floor bleeding why did she burn the body after two days? The accused attempted to destroy evidence. She did not call

for an ambulance at the first instance. She had the courage to sleep inside the same room with the deceased who was possibly dead before the break of dawn. She then surprisingly collected some paraffin, doused the body with it before setting the body alight. The only inescapable conclusion is that accused planned the killing, or foresaw death as a substantial possibility.

Defence counsel, *Mr Phulu*, has raised an interesting argument arising from certain decisions of the English courts. As I understood the argument made on behalf of the accused the court must take note of the fact that accused's conduct was driven by the violent conduct of the deceased. To that end, it is contended that the court must find that the accused was at most guilty of the negligent killing of her husband. I have had occasion to examine the authorities cited by defence counsel. In *R v Ahluwalia* [1992] ALL ER 889 it was held (per headnote) as follows:-

“The appellant, Ahluwalia, suffered abuse and violence from her husband for years. After one violent evening, she went to bed thinking about her husband's behaviour and could not sleep. She finally went downstairs poured petrol into a bucket, lit a candle, went to her husband's bedroom and set it on fire. Her husband died from these injuries. Ahluwalia pleaded manslaughter on grounds that she did not intend to kill him, only to inflict pain. She also pleaded the defence of provocation on grounds of her treatment during the marriage. Ahluwalia was convicted of murder and appealed the decision.

At the time of the trial there was a medical report showing that at the time of the killing, the defendant was suffering from endogenous depression. It was overlooked and the appellant was not consulted as to the possibility of investigating it further. The appeal was therefore allowed and a re-trial was ordered.”

The above cited case is clearly distinguishable. In the present matter the accused was not suffering from any depression or medical condition. The accused did not plead provocation. The accused in this matter admitted stabbing her husband and conceded that she made a mistake. She stated in her own words that she regretted her actions and was ready to face punishment.

The other decision brought to my attention is *Director of Public Prosecution v Champlin* 1978 2 ALL ER 168.

In that matter the court considered and held, that the unqualified proposition that, for the purposes of the “*reasonable man*” test any unusual characteristics of the accused must be ignored no longer applied. The court in that case held that the court was enjoined to look at my unusual characteristics of an accused person in applying the reasonable man test. For the purposes of the matter before this court the facts are simply that the accused stabbed the accused who died as a result of injuries sustained in the attack. The accused did not raise the defence of provocation and her defence of self defence is not sustainable on the law and the facts. In my view, the English decisions referred to do not find application the circumstances of this case. The accused person was educated up to Ordinary level although she did not write the exams due to financial constraints. She is not the typical unsophisticated person. She is articulate and was able to narrate her version in logical sequence.

What I do not accept, however, in this matter is the uncontroverted evidence that the accused was a victim of domestic abuse. There was the independent evidence of the police officer Dingilizwe Mpofu who confirmed that the accused had previously reported a case of physical violence at the hands of her husband. The court may not close its eyes to this background to this murder. There are pieces of legislation enacted to deal with the scourge of domestic violence in the form of the Domestic Violence Act (Chapter 5:16). This murder arises from domestic violence. The accused’s conduct must be measured on the basis that she was a victim in the first instance. I do agree with counsel for the state, *Ms Ndlovu*, that from the evidence led it was not sufficiently proved that the accused had the requisite intention to kill at the material time.

For a court to return a verdict of murder with actual intent, the court must be satisfied beyond reasonable doubt that either the accused desired to bring about the death of the victim or reasonably foresaw that as a result of her conduct death was a substantial possibility. On the facts of this matter which cannot be disputed, it is possible that the accused must have panicked upon realising that she had fatally injured the deceased. See: *S v Mugwanda* 2002 (1) ZLR 574 (S) and *S v Sigwala* 1967 (4) SA 566 (A) on the test for legal and actual intention.

In the result, and accordingly, the accused is found guilty of murder with constructive intent.

Sentence

In assessing an appropriate sentence the court must take into cognizance the fact that accused was aged 23 years at the time of the commission of the offence. She was an immature young woman who had just been married for less than 3 years. In sentencing the accused person the court shall have particular regard to “*the battered abused woman syndrome*,” that has been raised by the defence. This court must carefully balance the interests of the accused against considerations of the sanctity of human life. In general, women suffer extreme levels of violence and emotional and physical abuse in our society. In this matter, the accused was known by police officers at Hillside police station, for having made previous complaints related to domestic violence against the deceased. For the sake of her children and because her husband was the sole breadwinner she had withdrawn such complaints. On the fateful day accused states that she was abused physically and threatened with death by the deceased. She, unfortunately, decided to take matters into her own hands. It is regrettable that a life was needlessly lost. The court does not condone the use of violence in any shape or form. However, the circumstances of this case bring into sharp focus the scourge of domestic violence. In this regard I will refer to the remarks of TSANGA J in the recent case of *State v Robert Tevedzai* HH-206-18. It is my view, however, that a lengthy prison term is called for.

In the result the accused is sentenced to 18 years imprisonment.

National Prosecuting Authority, state’s legal practitioners
Vundhla-Phulu & Partners, accused’s legal practitioners