

THE STATE  
**versus**  
DIGNITY MASVIMBO

HIGH COURT OF ZIMBABWE  
MOYO J  
GWERU 30 AND 31 JANUARY 2018

### **Criminal Trial**

*S Pedzisai* for the state  
*T Kamwemba* for the accused

**MOYO J:** The accused person faces a charge of murder, it being alleged that on 26 April 2017, he stabbed the deceased Oripa Gapare several times all over the body, resulting in deceased's death.

Documentary exhibits were tendered as follows:

- Exhibit 1 - state summary
- Exhibit 2 - defence outline
- Exhibit 3 - accused's confirmed warned and cautioned statement
- Exhibit 4 - post mortem report

The cellphone that deceased owned a ZTE type was also tendered and marked Exhibit 5.

The facts of this matter are fairly straightforward, accused and deceased separated sometime in October 2016 following a domestic dispute. The now deceased left accused to go and live with her parents. Accused tried in vain to persuade the deceased and her parents so that deceased could come back and live with him. Deceased's mother insisted on lobola payment as a condition for the return of the deceased to accused's place. Later on, on 26 April accused then went to deceased's place of residence, entered the house unannounced, and had an altercation with deceased, dragged her outside and stabbed her 27 times with an okapi knife that he had brought with him.

Deceased died instantly. It is not clear exactly as to what transpired in the sitting room after the arrival of the accused, as accused gives a different narration of the events as compared to the two state witnesses who gave *viva voce* evidence in this court. We shall resolve this question in our assessment of the accused's state of mind at the relevant time. The state gave *viva voce* evidence through Hamundide Mashayamombe and Shirley Mashayamombe who are the eye witnesses in this matter.

The evidence of Brendon Mudadi, Alice Mashayamombe, Wisdom Maenzanise, David Chimombe and Dr S Pesanani, was admitted into the court record in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07].

The accused person pleaded not guilty to the charge of murder and instead tendered a limited plea to the charge of culpable homicide. The state rejected that plea and the matter proceeded to trial. We find the rejection of the plea by the state proper as we will show later in this judgment.

The post mortem report gives the cause of death as haemorrhagic shock, multiple stab wounds, assault. The facts of this matter are largely common cause, in so far as the story is simply that accused and deceased had marital issues, deceased later left to go and stay with her parents, accused tried in vain to persuade her to come back, resulting in him following the deceased on the fateful day.

We just have to analyse the verdict that should be given in the matter. At the close of the trial, the state counsel pressed for a verdict of murder with actual intent, on the other hand, the accused's defence counsel pressed for a verdict of murder with constructive intent. We proceed to look at the two types of intention constituting murder.

#### Actual intention

Professor Feltoe in his book, *Guide to Zimbabwe Criminal Law*, 5<sup>th</sup> Edition defines actual intention as:

- With actual intention the accused person, desires death, death is his aim and object.
- there will also be actual intention where death is not the aim and object, but the accused continues to engage in an activity which he realizes will almost certainly result in death.

### Legal Intention

Is where accused does not mean to bring about the death of the deceased, but he continues to engage in an activity after he foresees that there is a real risk that the activity will result in the death of a person.

In this case we have the following proven facts.

- That accused and deceased had marital issues and deceased left for her parents' place and would not return despite persuasion by accused.
- Deceased's parents insisted on payment of lobola before she could go back
- Accused did not make any effort to pay anything neither did he make an effort to engage his in laws.
- On 26 April 2017, he set upon a journey to deceased's place, walking 20km at night as he said he left his place at 3am.
- He armed himself with an okapi knife
- On the way, he avoided deceased's mother as he did not want her to recognize him.
- He was dressed in his clothes and an overall on top.
- At deceased's house he had made no appointment that he was coming
- He did not knock when he arrived there but just sneaked in
- He was seen by deceased's grandmother first, who upon enquiry got the deceased to also realize that accused was in the house.
- Deceased's cellphone was in the sitting room and accused took possession of it.
- an altercation arose between accused and deceased, accused dragged deceased out of the house, beat her with open hands and clenched fists and then later stabbed her to death 27 times, indiscriminately all over the body.
- The post mortem report, gives a gruesome account of the injuries that the Doctor observed on the deceased's body.
- The accused gave a defence of provocation and justified his plea to culpable homicide using the defence of provocation, that is, that he acted in a fit of rage and therefore his moral blameworthiness had to be reduced to culpable homicide. It would appear by the time the trial ended, the accused's defence counsel had thrown in the towel in so far as the defence of

provocation was concerned. The defence counsel then submitted that accused should be convicted of murder with constructive intent meaning that at the close of the trial accused's defence counsel had realized that the defence of provocation was not tenable. The facts that are relevant to our conclusion on intention are the following:

- 1) The deceased had left accused to go back to her parents as the two had problems
- 2) Accused was told that he must pay lobola for him to have his wife back.
- 3) He ignored this condition and instead decided to persuade his wife through other ways.
- 4) He failed to convince the deceased to come back, he also failed to raise even a cent towards lobola payment, he also failed to engage his in laws through other peaceful and respectful ways.
- 5) He planned on a journey to deceased's home, at night.
- 6) He armed himself with an okapi knife.
- 7) He put on overalls over and above his normal clothes most probably because he knew his mission could result in his clothes becoming dirty or stained. I say so for an overall is a form of protective clothing and there must be something the accused intended to protect his clothes from.
- 8) He went to deceased's place without an appointment
- 9) he entered deceased's house unannounced and sat on a sofa with nobody in the house knowing that he was present until deceased's grandmother bumped into him as she went to the toilet.
- 10) It is not clear, from his own version, what transpired when he got to deceased's house and the simple reason for that obviously is that a concocted story will always crumble in different directions.

In his defence outline he says a man called deceased's cellphone and claimed to be deceased's husband thereby causing him to be incensed. He however, never mentioned this vital point to the police when his mind was still fresh on the event of the day in question. The statement was confirmed by a magistrate sitting at Gweru and accused did not challenge it. He then started the usual blame game on the police trying to give an impression that they interfered with his freedom and volition at the time the warned and cautioned statement was recorded. This

is the usual song that accused persons sing once they are accosted with the truthfulness of the in warned and cautioned statement. This desperate attempt to disown the warned and cautioned statement at the last minute, is a tired trick and a very old one that has long lost its meaning. Section 256 (2) of the Criminal Procedure and Evidence Act (*supra*) provides that a confession or statement confirmed in terms of section 114 (3) shall be received in evidence before any court upon its mere production by the prosecutor without further proof. This in essence means that accused's confirmed warned and cautioned statement is real evidence in this court that this court is fully entitled to accept and rely on. The confirmed warned and cautioned statement was admitted before this court.

In terms of that section an accused carries the burden to prove that he did not make the statement freely and voluntarily. The defence accepted in terms of section 314 of the Criminal Procedure and Evidence Act (*supra*), the evidence of the police officer who recorded the statement and the evidence of the police officer who bore witness to the process. The evidence of these two police officers, namely Wisdom Maenzanise and David Chimombe was admitted into the court record as it appears in the state summary and therefore, accused cannot challenge a warned and cautioned statement, when he accepts the evidence of the two police officers who recorded it which in essence is to the effect that the statement was recorded in a free environment and accused gave it voluntarily. What is in the warned and cautioned statement is therefore the truth and nothing else.

Accused person in his defence outline, Exhibit 2 paragraph 5 says he was infuriated by deceased's mother who claimed lobola for the deceased. In fact we find that there is absolutely nothing infuriating about the deceased's mother's conduct. The infuriation was self-created on the accused's part as there is nothing infuriating when one's in laws demand that which is due to them in terms of society's accepted norms and practices. Accused simply had to engage his in laws in a peaceful manner as he obviously cannot expect to live with other people's daughters on his own terms.

In paragraph 8 of his defence outline he says he realized that deceased was not heeding his persuasion and he told her to come and collect her property so that he could start all over

again. This shows that accused had given up on trying to persuade the deceased and therefore he wanted to start a new life.

Surprisingly, he then in paragraph 9 of his defence outline says he set on a journey of 20km at night to solve his domestic problems with the deceased. What domestic problems again when in paragraph 8, he says he had given up on the deceased? He then throws in the aspect of the man who called while he was at deceased's house, claiming that he was deceased's boyfriend, we have already dismissed this assertion on the basis of the contents of the warned and cautioned statement which was confirmed by the magistrate and was not challenged in terms of the proviso in section 256 (3) of the Criminal Procedure and Evidence Act (*supra*).

Accused person is a liar who built his defence as the matter progressed. That is precisely the reason why the phone call by the man is not in his warned and cautioned statement. That is also the reason why in his defence outline he says he was infuriated by the caller but in his evidence in chief he adds that deceased had said that the child was not his. He could not have omitted this crucial point in both his warned and cautioned statement and the defence outlines, he just threw it into his evidence-in-chief after he heard the child witness Shirley Mashayamombe say the deceased had denied, after they had met the accused when they came from fetching firewood, accused was Natasha's father. The child witness did not explain the context of that and in any event, even if deceased did deny that to the witness, the context and her intentions were not known. The accused was trying to build a defence as the matter progressed. His version is therefore thrown out entirely as he is unreliable as a witness.

We thus infer intention from the following:

- pre-planning when accused set upon this journey on 26 April 2017, he planned carefully his mission, packed a knife, wore protective clothing in the form of an overall.
- set upon a mission to persuade deceased yet he knew the conditions he had to meet prior to deceased's return but decided to ignore them.
- He went with no appointment and he sneaked in without knocking and sat on a sofa. Even then, he did not announce his presence until when the grandmother bumped into him. This conduct means that he was lying quietly as an intruder waiting for an opportunity to strike.

- he stabbed deceased 27 times indiscriminately inflicting several fatal wounds. The depth of some of the wounds as per the post mortem report show that severe force was used.

Accused could not have had any other motive in the circumstances, except to butcher to death the deceased, making sure in the process that he left no chance at all of the deceased regaining life. He thrust the knife ruthlessly 27 times into deceased's body, to make sure that indeed deceased had died for there could be no other reason to stab a fellow human being 27 times.

It is for these reasons that the accused is held to have had the requisite actual intention to kill the deceased.

The accused person is accordingly found guilty of murder with actual intent.

### Sentence

The accused person is convicted of murder. He is 26 years old, he was one child, he is a first offender. The accused killed the deceased, who was his wife in a callous manner, in cold blood, stabbing a defenseless woman 27 times, thereby inflicting fatal wounds. A reading of the post mortem report, sends chills down one's spine. The deceased died a cruel death. Even animals are not killed in that manner. Domestic violence is nagging cancer in our society. People like the accused person want their way or no other way. If they cannot have their way with issues then other people must die in the most brutal of ways. This court frowns at the loss of life in any circumstances. This was a gruesome pre-planned murder committed in aggravating circumstances as defined in section 48 of the cost of Zimbabwe as read with section 8 (3) (a) of the General Laws Amendment Act No. 3 of 2016. The murder was pre-planned, and it was committed in cold blood. The circumstances of the commission of this offence require the upper limit of sentences, in such cases. It is the worst case scenario in our view. This is one case where aggravating features for outweigh mitigation as conceded by accused's defence counsel, so much so that unless if capital punishment is removed entirely from our statutes, if in this particular case the accused person escapes capital punishment then, no other case may deserve it. A wrong message may be sent out there that these courts are unwilling to prescribe appropriate punishment in cases where clearly only capital punishment will serve the interests of justice. It

is for these reasons that, unless, the jurisprudence of our country is developed by the superior courts in a certain direction, cases such as this are clearly meet the requirements of capital punishment as an appropriate.

Dignity Masvimbo was duly convicted of the crime of murder with actual intent and sentenced by the said court that he be returned to custody and the sentence of death be executed upon him according to law.

*National Prosecuting Authority, state's legal practitioners*  
*Tavenhave-Machingauta and Associates, accused's legal practitioners*