

THE STATE

Versus

TINEYI TSHUMA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mrs C. Baye & Mr Shumba
GWERU CIRCUIT COURT 24 & 26 SEPTEMBER 2018

Criminal Trial

T. Kamwemba for the state
S Pedzesayi for the accused

MAKONESE J: On 24th August 2017 and at around 21:00 hours the deceased, Nester Dube was asleep in her bedroom hut together with her young sister Trinity Dube and other minor children. An intruder entered the bedroom hut and stabbed the deceased in the chest and the upper part of the body with an okapi knife six times. The juvenile Trinity Dube heard the deceased groaning. She pushed aside a curtain that divided the room and using lighting from a solar lamp, observed the accused sitting astride the deceased upon her stomach and stabbing the deceased. The accused bolted out of the room. Trinity shouted for help. Joseph Dube who was in another room rushed outside and using a torch chased after the accused, who, however managed to escape and disappeared into the darkness. The deceased was ferried to Mberengwa Hospital but died later that day from stab wounds.

The accused appears in this court on a charge of murder. He denied the allegations. He raised the defence of mistaken identity and alibi. Accused avers that he was at a mine in Shurugwi at the time of the commission of the offence and was nowhere near the crime scene.

The state tendered an outline of the state case into the record of proceedings. It shall not be necessary to repeat the entire contents of the summary of the state case. A defence outline was also tendered in support of accused's defence case. The accused alleged that on the day his spouse was murdered he was at work at Vital Mine at Shurugwi guarding elution tanks belonging to one Madzibaba Minister. The accused contended that Trinity Dube, Joseph Dube and Abraham Dube

are mistaken as to his identity. He asserts that Samson Hove wrongly implicated him as he never visited his mine at Mberengwa, on the morning after the murder. The accused vowed that he loved his wife dearly and had no reason to bring about her death, in such a callous manner.

The state produced the accused's confirmed warned and cautioned statement. In his warned and cautioned statement, the accused gave his defence in the following terms:

"I do not admit the allegations levelled against me. On the day in question, I was in Shurugwi at Vital Mine where I am employed. I proceeded to Gweru the following morning where I washed my clothes and returned to Shurugwi on the 25th of August 2017. After I was later arrested on the same day on the allegations of murdering my wife, Nester Dube. I did not kill my wife because I loved her."

This statement was confirmed by a magistrate at Zvishavane on the 23rd November 2017. The next documentary exhibit entered into the record is the post mortem report compiled by Dr S. Pesanai at United Bulawayo Hospitals on the 25th August 2017. The report was filed under report number 811/810/2017. The pathologist examined the remains of the deceased, whose age at the time was recorded as 22 years. The cause of death is listed as:

- (a) Haemorrhagic shock
- (b) Bilateral haemopneumothorax
- (c) Perforated heart
- (d) Stab wounds

An okapi knife used in the commission of the offence was produced as the last exhibit. The knife was recovered from the accused upon his arrest by the Investigating Officer Brian Chimonyo. The knife has the following measurements:

- (a) Length of blade 10.5cm
- (b) Length of handle 13cm
- (c) Total length 23.5cm
- (d) Width (widest part) 2cm
- (e) Weight 0.063kg

The state case

The state opened its case by leading evidence from a juvenile, **TRINITY DUBE** aged 10 years. She knew the accused person prior to this incident as he was married to her sister (the deceased). On the night of the 24th August 2017 she was about to retire to bed and was with the deceased and other minor children who were sleeping on the other side of the room. There was a curtain dividing the room. The witness testified that as she was about to fall into slumber she felt someone stepping on her. She opened the curtain and lit a solar lamp to see the person who had stepped on her. She then observed that the accused was sitting on the deceased's stomach and was stabbing her with a knife. She saw the accused directing the stabbing on deceased's upper body. The deceased groaned in pain. At that moment the panic stricken witness, terrified, got up, opened the door and ran out screaming. Joseph Dube emerged from a kitchen hut holding a lit torch. This witness positively identified the accused who she knew very well. Joseph Dube chased the accused but was outpaced. He returned to the homestead. The witness informed Joseph Dube and Abraham Dube that she had observed the accused stabbing the deceased twice in the chest. This witness confirmed that she witnessed the deceased being ferried to hospital. She later learnt that her sister had died from stab wounds sustained in the attack.

In spite of intrusive and protracted cross-examination, this witness maintained her version of events. The witness was challenged to describe the clothes the accused was wearing and despite minor discrepancies on the colour of the clothes accused was wearing on the day in question, the court found the evidence of the witness to be candid, compelling and truthful. The witness had no motive to lie. In spite of her age, she gave evidence in an impressive manner and was not shaken at all under cross-examination. She was able to narrate the events to the best of her recollection. We have no hesitation in accepting the witness's evidence as being credible and reliable.

The state then led evidence from **JOSEPH DUBE**. He resided at stand 39 Village Reign Moyo, under Chief Bvute, Mberengwa. He is known to the accused. He knew the deceased during her lifetime as his sister. On the day in question and around 2000 hours the deceased and the first witness and other children retired to bed. He was whiling up time in the kitchen with Abraham

Dube when he heard someone screaming outside. He ran outside holding a lit torch. He observed a person bolting from the bedroom hut where the deceased had been sleeping. He directed his torch towards the intruder and recognized the accused person as the person who was fleeing. He chased the accused but he was outpaced. The accused jumped a perimeter fence but fell in the process. Accused gathered himself up and managed to escape. The witness shouted “*thief*”, “*thief*” in order to draw attention. The witness confirmed that he knew accused as “*Baba Tanya*”. He was well known to the accused and there was no question of him having mistaken his identity. The witness stated that at one stage he was facing the accused at close range as he directed his torch at the accused. The witness indicated that he had no axe to grind with the accused and had no motivation to lie against him. He drew the court’s attention to the fact that he was aware that accused was having some matrimonial problems with the deceased. In spite of robust cross-examination the witness was not contradicted in any material respects. The witness indicated that he was not concerned with the accused’s clothing on the relevant day because he had identified him by observing his face. We found the evidence of this witness easy to follow. There was no exaggeration on his part and he gave his evidence comfortably. We found his evidence to be credible and worthy of belief.

The last state witness to give oral testimony was **SAMSON HOVE**. He resides at Cell 14 Mine Compound, Mberengwa. He is self employed as a miner. He knew accused before the commission of the offence. He knew him as Meck Tshuma’s brother who was employed at D L Syndicate, Mutekedza Mine, Mberengwa. The witness was asleep at his mine on the 25th August 2017. Around 3am the accused knocked on his door. The witness enquired why the accused was moving at the late hours of the day. The accused indicated that he had had a misunderstanding with his wife Nester Dube at Clifton Farm. The accused further indicated that he had been assaulted by deceased’s brothers and had been chased away by Joseph Dube and Abraham Dube. The accused pointed out that he had assaulted the deceased with a stone. The accused was asking for shelter for the night. The witness agreed to allow the accused to sleep over in a tent next to where he was sleeping. Accused indicated that he was afraid that deceased’s brothers would follow up on him and assault him. The following morning, the witness invited the accused to take a bath. The accused chose to bath away from his compound saying he was afraid of being spotted by his

attackers. When a meal was prepared, the accused failed to eat, citing lack of appetite. At around 12:30 pm that same day the accused and the witness parted ways when the witness proceeded to Zvishavane. In so far as this witness is concerned the issue of mistaken identity does not arise. The witness and accused were together for an extended period of time. The accused suggested that this witness was fabricating evidence against him. The accused's defence counsel put it to the witness that the witness had a motive to lie because he was related to the deceased's father. This proposition did not withstand scrutiny as it became evident that the witness and deceased's father merely shared the same totem. There was no blood relationship. There was no reason for the witness to concoct a false story against the accused. In any event, and more crucially, there was no need for the witness to build a case against the accused as he had not been informed about the death of Nester Dube at the time he met the accused. As the witness gave evidence it became apparent that accused's defence of alibi had all but collapsed. The accused could not have been in Shurugwi on the day of the murder as he was at Cell 14 Mine Compound, hours after the murder. It was established that Samson Hove's mine compound was not very far from the scene where the murder was committed. This witness gave his evidence clearly and logically and was not contradicted in any material respects. We have no difficulty in accepting this evidence as a correct version of events as they relate to the movements and activities of the accused person after the commission of the offence. This witness's testimony is worthy of belief. His evidence corroborates the testimony of the other state witnesses.

The evidence of the under listed witnesses as it appears in the outline of the state case was admitted by consent and by way of formal admissions in terms of section 314 of the Criminal procedure and Evidence Act (Chapter 9:07), namely:

- (a) Abraham Dube
- (b) Reason Moyo
- (c) Ignatius Madziva
- (d) Itai Hapazari
- (e) Tafadzwa Kuvavairwa
- (f) Ncube Young

- (g) Brian Chimonyo
- (h) Constable Khabo
- (i) Dr S. Pesanai

The state then closed its case.

The defence case

The accused, **Tinshe Tshuma**, gave evidence under oath in his defence. Accused's defence was essentially that he was a victim of mistaken identity. The accused further proffered the defence of alibi. He testified that at the time of the offence he was not at the murder scene. Instead, the accused was at Vital Mine, Shurugwi where he was guarding elution tanks. The accused dismissed the evidence of all three state witnesses, Trinity Dube, Joseph Dube and Samson Hove. He indicated that all the witnesses suffered from false and mistaken identity. The accused averred that the juvenile Trinity Dube did not see him in the bedroom stabbing the deceased. He stated that he was never in the deceased's bedroom and loved his estranged wife so much that he could not kill her. The accused ventured to say that the juvenile was coached on what to say. He suggested that the deceased's father was behind his arrest. He was falsely implicated in this matter. The accused stated that Joseph Dube was also mistaken about his identity. The accused did not deny that he was well known to all the state witnesses and that he knew them all well. The accused did not disclose the nature of the disagreement between himself and the deceased's father. He made an attempt to allege that the dispute was about lobola. When this did not sound convincing enough, the accused shifted ground and said the deceased accused him of having an eye on his wife (deceased's mother). It became apparent that his defence of mistaken identity could not stand. All the three witnesses were no strangers to the accused. They knew him and observed him at close range. As regards accused's assertion that he was at Vital Mine, Shurugwi at the time of the murder, the allegation is disproved by the evidence of Samson Hove. It cannot be mere coincidence that accused visited Samson Hove's mine compound around 3am on the 25th of August 2017. It cannot be coincidence that accused informed Samson Hove about a fight with deceased's brothers on the night of the murder. Accused was undoubtedly at the scene of the crime on the

night of the stabbing. He was seen by Trinity Dube and Joseph Dube at the deceased's homestead at the time of the stabbing. He was by two witnesses fleeing from the crime scene. Accused cannot explain his movements on the night of the murder. If accused was at Vital Mine, Shurugwi on the night of the murder, he would not have sought refuge at Samson Hove's mine compound that same night in Mberengwa. The owner of Vital Mine, one Itai Hapazuri denied that accused was employed at the mine. In fact he was known at that mining location. The accused was arrested days after the murder by the police. An okapi knife was recovered from him. Tafadzwa Kuvavairwa who was a co-tenant with accused at house number 819 Woodlands Park, Gweru indicated that accused had been last seen at that house during the first week of August 2017. We find the accused's defence not only false but to be completely irreconcilable with the facts as established by the evidence. We reject the accused's version. His version of events is not reasonably possibly true. It is false.

Conclusion

In *Nkomo & Anor* 1989 (2) ZLR 117 (S), the court held that the identification will be unreliable if the witness caught a flitting glimpse of a person from a considerable distance in poor light. In this case there was positive identification by persons who were well known to the accused. The two state witnesses Trinity Dube and Joseph Dube both observed the accused at a close distance. Trinity was in the same room with the accused when the murder occurred. She had adequate illumination and observed accused stabbing the deceased. Her evidence of identification is accurate and consistent with the cumulative evidence presented by the state. See *Mutters & Anor* SC-66-89 and *Makoni & Ors* SC-67-89.

In the result, we are satisfied that the state succeeded in proving its case against accused beyond a reasonable doubt. The accused was positively identified and the question of mistaken identity does not arise. The court is satisfied that accused is the intruder who entered the deceased's bedroom and stabbed her multiple times leading to her death. In order to ascertain the intention of the attacker it is necessary to examine closely the contents of the post mortem report. Dr Sanganai Pesanai made the following observations:-

“Marks of violence

1. Stab wound right forearm 3 x 1cm x 6cm
2. Stab wound medial part (2 x 1cm)
3. Stab wound right chest medial upper part (3 x 1 x 14cm)
4. Stab wound mid medial part of breast (4 x 1 x 14cm)
5. Stab wound (0.5cm) located 6cm from midline
6. Stab wound lateral upper part of left breast (2 x 1cm)
7. Laceration on the left medial forearm (10cm)

The post mortem report further reveals that the deceased suffered a perforated left ventricle. The blade went through the heart from front to back. The right atrium was also perforated, and the blade went through from front to back. An examination of the lung indicated that there was bilateral haemothorax. From these injuries there can be no doubt that the attacker intended to bring about the death of the deceased. The deceased was stabbed while lying down. She never got up after the attack. The wounds were deep and penetrating. The force used was excessive. There was little if no chance for her to survive the attack. It is beyond dispute that the murder was committed with actual intent. We accordingly find the accused guilty of murder with actual intent.

Sentence

In assessing an appropriate sentence the court shall take into account the mitigating features of the case as outlined by *Mr Kamwemba*, appearing for the accused. The accused is a middle aged man with the usual family responsibilities. He has several dependants whose lives will generally be affected adversely by this conviction and sentence. The accused is a first offender who finds himself at the deep end. *Mr Pedzisayi*, appearing for the state argued for a lengthy custodial sentence. Accused has been convicted of a serious offence. The murder was committed in aggravating circumstances for the following reasons:

- (a) The accused unlawfully entered the bedroom where the deceased was sleeping.
- (b) The attack on the deceased was pre-meditated

- (c) The deceased was stabbed multiple times and sustained 6 stab wounds in the chest area and upper part of the body.

In terms of section 47 (4) (a) of the Criminal Law (Codification and Reform) Act (Chapter 9; 23) it is provided as follows;

“4 A person convicted of murder shall be liable-

- (a) Subject to sections 337 and 338 of the Criminal Procedure and Evidence Act (Chapter 9; 07) to death, imprisonment for life or imprisonment for any definite period of not less than twenty years imprisonment, if the crime was committed in aggravating circumstances as provided in subsection (2) or (3) ; or
- (b) In any other case to imprisonment for any definite period.”

The attack on the deceased was an opportunist attack on a defenceless young woman who was stabbed whilst sleeping. This was a surprise attack. The attack was vicious. Deep and penetrating wounds were inflicted by the accused. This case brings to the fore the scourge of violence against women. The courts will not condone the use of violence in the resolution of matrimonial disputes. The accused mounted a false and spirited defence. He has shown neither remorse nor contrition. He has fought his case to the bitter end and has not shown any form of regret for his actions. This court must impose an exemplary sentence that reflects the court’s aversion with violence against women. A lengthy custodial sentence is called for. In the result, and accordingly, the following sentence is deemed appropriate.

“Accused is sentenced to 30 years imprisonment.”

National Prosecuting Authority, state’s legal practitioners
Tavenhave & Muchingaua & Partners, accused’s legal practitioners