

THE STATE
versus
JUNIUS TSHUMA

HIGH COURT OF ZIMBABWE
MOYO J
HWANGE 6 NOVEMBER 2018

Criminal Trial

Mrs *C Gorerino* for the state
Ms *J Change* for the accused person

MOYO J: The accused person faces a charge of murder, it being alleged that on the 15th of March 2017 he assaulted the deceased Milika Mbangeni twice on the head with an axe causing her instant death.

The following were admitted into the court record.

- authority to prosecute
- psychiatrist report
- state summary
- defence outline
- post mortem report – it gives the cause of death as
 - 1) severe cerebral damage and oedema
 - 2) subarachnoid haemorrhage. Stellate depressed skull fracture
 - 3) severe head trauma due to blunt trauma
- accused's confirmed warned and cautioned statement
- the axe that was allegedly used in the commission of the offence

They were all duly marked.

The evidence of Moddy Tshuma, Khulani Ncube, Blessing Sasiros and Dr Robert Trecu was admitted into the court record as it appears in the state summary in accordance with the law.

Maluza Ndlovu and Jabulani Mpofo gave *viva voce* evidence for the state. The facts of this matter are largely common cause. Accused and deceased cohabited as husband and wife. It is not clear how their marital relationship started but they later lived together at accused's mother's homestead as husband and wife. At some stage accused suspected that deceased had extra marital affairs with some boys and that he also developed an STI that he attributed to deceased's conduct. It appears they quarreled over deceased's conduct leading to them going to the bush on the fateful day with deceased going to make indications to the accused as to where she slept with the boys. It appears deceased also claimed that she had been raped by one Mxolisi Ncube. In the bush it does not come out clearly as to what happened as there is no eye witness but accused ended up striking deceased twice on the head with an axe. He then fled from the scene. Deceased was later found after a search by accused's uncle.

Accused denies that he killed the deceased with the intention to do so but that he acted out of anger at the deceased's conduct. He also told the court that upon the discovery that he then had an STI, he then examined the deceased and found that she was worse, inflicted heavily with pus in her genitalia. There is only one issue for determination by this court whether the partial defence of provocation is available to the accused.

Our finding is that the accused's actions on the date in question were indeed due to his belief on the deceased's promiscuity and that she had transmitted an STI, to him, we however find that in the circumstances we cannot find that the provocation was to such an extent that reasonable man in accused'swould have lost self-control. We say so, for accused himself did not lead any evidence to show that in the process when they were in the bush with deceased he lost self-control. From his own version, they had been fighting with deceased over some period, he had seen footprints of boys getting into his bedroom, he had developed an STI, he had found a soiled towel under the bed, he had discovered that deceased also had an STI, he had tried to send the deceased away but she did not go. He had sought his mother's intervention but to no avail. It cannot thus be held that after all this, when they were in the bush, he then suddenly become provoked to the extent of losing self-control. He had long endured this and it

come as no surprise or shock to him for him to lose self-control instantaneously and strike the deceased without thinking. The accused person did not express how he felt when deceased pointed at the spot where she had been raped on, had sexual encounters with the young boys. This court has not been shown that indeed the accused person lost self-control as a matter of fact.

Neither has the court been shown any facts upon which it can infer loss of self-control for striking the deceased with an axe does not on its own amount to lack of self-control due to provocation. Accused might have been angered by deceased's conduct resulting in him then striking deceased with an axe but that series of events does not on its own mean that then he had lost self-control to the extent that clouded his judgment and thus strip him of the requisite intention. We hold the view that accused was indeed provoked to the extent that his sentence should take that into account as a factor but not to the extent of stripping him of the requisite intention or making his actions justifiable to a certain extent. The nature of the weapon used and the injuries sustained allow this court to draw a conclusion that the accused person, although he might not have wished for the deceased's death, he realized the real possibility that deceased could die from such injuries as he used a lethal weapon an axe and aimed at the head, a vulnerable part of the body and the use of excessive force can also be inferred as deceased suffered a fractured skull per the post mortem report.

It is for these reasons that the accused person is convicted of murder with constructive intent.

Sentence

The accused is convicted of murder. He is a first offender, he killed his wife which he suspected of infidelity. The wife did admit to sleeping with other men although she said she had been raped. In accused's favour, is the fact that the deceased could not have been raped and kept it to herself until when confronted on allegations of infidelity. The deceased must have been a woman of loose morals and accused has in his favour a mitigatory feature of provocation. The accused nonetheless committed a serious offence in that life was lost unnecessarily. Accused had options, of either letting go of deceased on seeking mediation. He seems to have tried but without success. The accused person, although normal per the psychiatrists report, his

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demeanour in the witness box and the dock, shows that he seems subdued, or might have a slight retardation. He struggled understanding questions and expressing himself. This court cannot turn a blind eye to all that since the interest of justice demand that the accused's personal circumstances, the circumstances of the commission of the offence and the public interest at large, all be balanced carefully by a court in metering out a sentence. It is for these reasons that the accused person shall be sentenced to 10 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Muvhiringi and Associates, accused's legal practitioners