

THE STATE
versus
TAPIWA TAVAZIVA CHINYAMA

HIGH COURT OF ZIMBABWE
MABHIKWA J with Assessors Mr W.T Matemba and Mrs L Sithole
GWERU CIRCUIT 29, 30 & 31 JANUARY 2019

Criminal Trial

Ms N Ndlovu for the state
Masango for the accused

MABHIKWA J: The accused is charged with murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23], it being alleged that on 8 January 2018 and at village 3, Beconkop Farm, Shurugwi he unlawfully caused the death of Batsirai Shava, by striking her with an axe once on the head and once below the left jaw, intending to kill her or realizing the real risk of his conduct causing death and continued to engage in that conduct nonetheless.

It was the state's case that the accused was 32 whilst the deceased was 37 at the time of the fateful incident. The two were co-habiting at the deceased's place of residence. On 8 January 2018, the deceased was accompanied by her 8 year old daughter to a neighbour's house at about 2000 hours. Whilst there, the deceased raised concerns about her relationship with the accused. The accused also arrived and was invited into a kitchen. Ms Murimi (the neighbour) engaged the couple in an elderly discussion basically counselling them. Accusations and counter accusations were made between the accused and the deceased. Apparently, the deceased indicated that she no longer loved the accused and that he should leave her home.

The deceased and her daughter bade farewell and left when all seemed well at that stage. After a few minutes of their departure, the accused caught up with them. He demanded to know

why deceased did not want to talk to him. He was armed with an axe. The deceased did not respond to his demand.

Without warning, the accused struck the deceased once on the head with the axe. After that blow, the 8 year old girl ran for dear life and hid in the bushes. The accused struck again on the jaw causing instant death. After the first blow, deceased had fallen down and cried out “Mai wee ndofa” which is a dying cry.

The accused’s defence was that a cocktail of events cumulatively amounted to extreme provocation causing him loss of self-control. He states in his outline that he had been living with the deceased and her 4 children for over a year and had fully committed to her. He states that despite that commitment, he discovered that deceased had trapped him into a relationship by lying about her age. She also had in fact deserted a husband dying of AIDS and went on to infect him.

He states further that on the fateful day in the morning, the deceased had told him to leave her house as she wanted to bring home a male visitor. She had then advised him to leave and spare himself the agony of watching the visitor making love to her. He states that as a result he left at about 1100 hours to visit a relative. When he returned, he found that the deceased had hidden his clothes, wallet containing his identity card and driver’s licence as well as USD57. He was upset as he needed those items at work as a driver.

Be that as it may, he claims that he left to cut firewood about a kilometer away. From cutting firewood, he says he went to report for work leaving the axe with his friend, one Sibanda. At work, he was told by his employer to report back later. He returned later and found the deceased and her daughter present. He and the deceased were counseled about their relationship.

The deceased and her daughter left at about 2100 hours. He followed just about 15 minutes later. Along the way, he saw Mitchell (daughter) standing alone on the road and on enquiring, she pointed him to where deceased was, in the bush. He states that when he approached the spot, the deceased was with a man who ran away. She then shouted at him that he was chasing away her customers- “urikubhururutsa shiri dzangu”. He states that this was the final stroke, the culmination of a series of provocative acts. He says he lashed out blindly at the deceased as he had lost self-control. He swung the axe not necessarily aiming any part of the

body as it was very dark. He did not realize the axe would strike the head. He stated that he did not intend to kill the deceased nor did he foresee the possibility of causing death attacking her as he did.

Mitchell Jairos, the deceased's 8 year old daughter testified that on the fateful day, she accompanied her mother to Mai Taku's place. Whilst there, the accused also arrived and a discussion ensued. She referred to the accused as "father" ("baba") shortly after the start of the discussion, a quarrel started between the accused and the mother. She and the other children were told to leave the room.

After that, she and her mother left. As the two of them walked in a single file with her in front, the accused joined them. He kept talking seemingly alone. He then asked the deceased why she was not responding. The deceased kept quite. When she turned to look back, she saw the accused striking her mother with the axe. She ran away and hid in the bush and switched off her torch. She watched the rest of the attack from her hiding place. After the attack, the accused threw the axe on the road and ran away. Before running away however, he briefly looked for her shouting that he would kill her as well.

When accused had gone, she got out of her hiding place. She went to advise the Murimis and other villagers about the murder. Thereafter, she went home to sleep leaving scores of villagers gathered and still gathering at the murder scene.

Mitchelle struck the court as an innocent and honest child witness. She was clear, emphatic and non-hesitant both in her evidence-in-chief and in cross examination. She certainly had no reason to create false stories about something as serious as her mother's death. She explained that when the accused struck her mother, the three of them were walking in a single file, she being approximately 3,5 metres from the accused. When she turned her head, she saw him strike her mother. In cross-examination, it was suggested that she did not see the way the accused swung the axe as it was dark. She was adamant that she did and went on to demonstrate how he swung the axe.

She again remained unshaken that when the accused caught up with them, they were moving in a single file. She was in front and her mother behind. She denied suggestions that she

was found standing alone along the path whilst her mother was in the bush. She denied being asked by the accused and pointing to the bush to indicate where her mother was.

When asked about the events of the morning of the fateful day, she said that the accused had left home after attempting to stab her mother and after prophesy about death. She was corroborated in this evidence by the second witness, (Ratidzai Murimi) who also testified that the accused had allegedly attempted to stab the deceased earlier that morning. She remembers seeing the accused sharpening an axe and leaving home.

It is pertinent to mention that the accused was himself asked by his counsel to narrate the events of the same morning. He narrated that he had gone to his workplace the previous day. He however had taken the deceased's eldest son with him and they spent the night at his workplace. When they got home the following day, the son did not do a certain job that the deceased had wanted him to do. The accused explained that the deceased got angry and accused him of being a bad influence to her son. After they had exchanged harsh words and insults, he decided to take an axe for the sole purpose of going to look for firewood and cutting poles. The accused throughout his testimony, did not mention the story in his defence outline that he had peacefully left the home that morning after the deceased had told him to go elsewhere as she was bringing a male visitor home and therefore he would save himself the agony and embarrassment of having to watch another man making love to her. This is something he would not forget if it had happened. He only feebly made reference to it when it was read to him by the state counsel in cross examination.

The actual murder incident appears to have been just short but brutal. The first witness also narrated it as simply as that. It was the 2nd witness evidence that the deceased clearly stated that she no longer loved the accused. She (deceased) had even said she had already packed the accused's clothes and so that he should leave immediately. It was also the witness's evidence that the accused on his part vowed that the deceased cannot dump him after infecting him with HIV Aids. The accused followed shortly after the departure of the deceased and her daughter.

This corroborated the first witness's evidence that the accused followed about 2 minutes later. She was even honest enough that she did not see the axe or the accused carrying it at any stage. Not very long after all three had left, the little girl returned and informed her that her

mother had been killed. She, together with the girl, informed other villagers. When villagers gathered at the murder scene, the body of the deceased was found along the road, not in the bush as suggested by the accused's defence and evidence in court.

It is the court's finding that the two state witnesses were credible. In any event, the second witness refuted suggestions that she was related to the deceased. Further, the accused's own evidence suggests that he was closer to the Murimis as he was employed by them.

The accused testified as the only defence witness. He did not make a good witness. He contradicted his defence outline in a number of aspects. It should be remembered that it has often been stated that the closeness in relationship between the accused and his counsel is much more than that between the prosecutor and his witnesses. The accused is therefore unlikely to keep contradicting his own defence if it is the truth.

The accused's evidence was also not convincing concerning the issue of the time spent from the time the deceased and daughter left the Murimi home and the time he followed, whether it was the same time, just a few (about 2 minutes later), 15 minutes later or 45 minutes. Ultimately, it was clear that the accused was evasive on that point and would give an answer convenient to him at any given time.

The accused never explained why he almost always had the axe within reach on that day. The court does not buy the "firewood and poles" story. If it was true that the cutting of firewood and poles was the sole purpose for which he carried the axe during the day even at different times and places, why did he find it necessary to first go to Sibanda's house which is in the opposite direction from theirs, at night to collect the axe before following the wife home.

The court also does not buy at all the story of the man allegedly found in the bush with the deceased. The deceased had left the Mirimi home with her 8 year old daughter. They had spent quit some considerable time there. The other children were obviously alone at home. She had had a brief altercation with her husband at the Murimi home. She obviously expected him to be following behind them anytime. There is no way such a woman would have been in the mood to be looking for men. It is not surprising that the alleged incident is as fictitious as the old Gulliver's travel stories. It sounds fictitious from his defence outline and even more fictitious when he attempts to narrate it in evidence. Surely after 45 minutes, the deceased and her

daughter would have long arrived at home. Yet he says he found Mitchell standing alone on the road.

In cross examination and in his evidence the accused claims that Mitchell, who was literally with her mother and the accused on the road is lying because due to the darkness, she would not see how accused was swinging the axe, even if she was 3.5 metres or nearer and even if this was on the road.

He also states in paragraphs 9 and 10 of his defence outline that

“As it was dark, he did not realize that the axe would strike the head.”

But when it comes to the issue of the man in the bush, the accused suddenly has the monopoly of seeing in the dark. Mitchell allegedly points to the bush and the accused goes straight to where the deceased is without going astray or calling out the wife. Further, he does not see only a human but a man and in the bush 5.5 metres away and that he is running.

It is clear and it is the court’s finding, that the accused’s version is not only improbably possible but that it is outrightly false.

From his narration, unlike the impression given in his defence outline, he learnt quite early that the deceased was widowed. She did not conceal that she had four children. The court’s finding is that he knew she was older than him. In fact he found out within two months of stay with the deceased according to his evidence. Thereafter, he said they agreed to leave together as husband and wife and forget about what had happened. The alleged buildup of events cumulatively amounting to extreme provocation is false. The fateful day’s events, according to his evidence took place a year after the alleged shocking and provocative discovery of deceased’s lies.

The court’s finding is that the accused could not stomach the fact that the cohabitation with the deceased was over as he was told most likely from the morning that his clothes had been packed already. He spent most of that day making threats of death and with an axe within reach. The final straw was the rejection the Murimi’s house when he was told he should leave. When the deceased and her daughter left the Murimi home, he decided it was the right time to strike. He took the axe, which he always had within reach and struck just as narrated by Mitchell, rendering terrible blows with a heavy and sharpened axe in the head area. He knew exactly what

he was doing. He cannot forget everything about the attack and only remember the man. The fictitious nature of his defence tempts the court to believe that it was crafted to make it comply with section 239 of the Code. But the court can see through the attempt. He attacked viciously a defenceless woman with blows to the head. Exhibit 5 (the axe) is heavy and is the type which would kill, whichever side of it is used, the sharp or blunt side.

The state has submitted that the accused be found guilty of murder with actual intent. The court is convinced that the accused never lost his mental faculties. The only reasonable inference is that he foresaw death as a substantially certain result of his conduct but he proceeded nonetheless with that conduct. Having regard to the cases

- a) *State v Farai Ncube* –HB-218-15
- b) *State v Robert Mugavanda* S-19-02 and other cases, the court is satisfied that the state proved its case beyond reasonable doubt.

In the result, the accused is found guilty of murder with actual intent.

Sentence

As regards sentence, the court has taken into account all that has been said in favour in mitigation by counsel. The court will also consider that the murder was preceded by a misunderstanding between accused and deceased.

Although no documentary proof has been provided, the state has not contested the allegation that the deceased may have a year earlier, confessed to having infected the accused with the Aids virus. Also the fact that the court has already found as a fact that accused may have been unable to stomach rejection by the deceased especially after they had agreed to live together with the new found HIV status.

However, the accused's reaction and subsequent attack on the deceased was reckless and callous. It was made more callous and wicked in that he carried it out in the full view of deceased's 8 year old daughter. No child deserves to watch the murder of a human being, let alone that of her own mother and in circumstances such as the current, where she clearly remained feeling exposed, helpless and unprotected. Being a child, she did well in running for dear life and hiding, but even then the accused briefly looked for her before running away. That

right's events will traumatise her throughout her life. They will in fact sound like real "Halloween" or "Friday the 13th."

I must say that our young people have cultivated a trend that they are failing to handle which is alien to our culture. They are increasingly getting into a situation where they live with these widowed women and think they have gotten easy life and accommodation. In the meantime, they spend their energies and money at these women's homes and houses but fail to stomach rejection when the time comes.

The accused also pointed a very bad picture of the deceased. He portrayed her as a total whore, who tortured him with infidelity for a whole year, yet as already found by the court, the alleged acts of infidelity on the fateful day are fictitious and improbable. This smacks of a non-repentant accused, not contrite at all even after causing the death of a person he purports to have loved so much. Even in court, the accused's actions smacked of disrespect and showed no signs of remorsefulness at all.

The accused is accordingly sentenced to 28 years imprisonment.

National Prosecuting Authority, state's legal practitioners
J Masango Attorneys-at-Law, accused's legal practitioners