

THE STATE
versus
ESTHER MAPISA

HIGH COURT OF ZIMBABWE
MUSAKWA J WITH ASSESSORS
HARARE, 13, 14 AND 15 FEBRUARY 2013 AND 10 MAY 2013

Criminal Trial

E. Mavuto, for the state
T.L. Mapuranga, for the accused

MUSAKWA J: This case epitomises the unpredictable nature of youth. The accused is charged with contravening s 47 of the Criminal Law (Codification and Reform) Act [*Cap* 9:23]. The charge reads as follows:

‘In that on the 9th day of May 2011 and at Chokufuna Village, Chief Mukota, Mudzi the accused unlawfully and with intent to kill, caused the death of George Nyambe by administering termite killer poison into his food which George Nyambe ate or realizing that there was a real risk or possibility that her conduct might result in death continued to engage in that conduct despite the real risk or possibility resulting in the death of George Nyambe.’

From the onset one can note that the charge was not drafted with precision. A charge of murder should specify whether the State seeks to prove either s 47 (1)(a) or (b). The prosecution adopted an omnibus approach where it wrapped all the elements in one charge. However, there appears to be no prejudice to the accused person.

It is common cause that the accused was married to the deceased although the circumstances surrounding the marriage are controversial. After a brief courtship the deceased and other church members approached the accused’s grandmother with a marriage proposal. This was said to be the practice within the Johanne Masowe Church to which the accused and the deceased belonged. A date for the customary marriage ceremony was set for 25 December 2010.

It turned out that the deceased’s delegation could not make it. The accused claimed she had not consented to the marriage although she had not voiced her disapproval. The people who had gathered to witness the ceremony then dispersed. Another ceremony was subsequently set for 26 April 2011. After the marriage the accused was accompanied by her

grandmother and another woman to the deceased's home. Rites of welcoming her as a bride were performed accordingly.

A week after the handover ceremony the accused visited her grandmother in Kotwa. She spent two nights there and later returned to the matrimonial home. On the day of her return the accused prepared bath water for the deceased. As the deceased bathed, the accused prepared sadza with cabbage and kapenta. After the deceased finished bathing he was served with the meal in the veranda. As he ate he complained of a bitter taste in the food. The accused remarked that may be there was too much pepper. A child who volunteered to taste the meal from the deceased's plate had it thrown to the ground by the accused. Thereafter the deceased commenced to vomit. He was later taken to Kotwa hospital where he died on the following day.

Having summed up the facts of the matter I now revert to the accused's defence which is somewhat unusual. The accused claims she was forced into marriage by her mother and grandmother at the instigation of the deceased. She was then raped by the deceased on four occasions.

She further claims the deceased had raped her the night before she poisoned his food. She poisoned the deceased's food as a way of defending herself against further rape.

At the commencement of the proceedings the accused actually pleaded guilty. In light of s 271 (1) of the Criminal Procedure and Evidence Act [*Cap 9:07*] a plea of not guilty was entered. The provision states that-

“Where a person arraigned before the High Court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea, the court may, if the accused has pleaded guilty to any offence other than murder, convict and sentence him for that offence without hearing any evidence.”

Chipo Chokufuna the deceased's sister stated that on the day of the incident the accused returned from Kotwa in a gay mood. They met at the river and later went to their respective homes. The witness later went to the accused and deceased's home to while time as she was used to do.

After the accused served the meal she placed a plate at the back where it was not visible to the witness. As a result she did not see what else the accused put into the plate. However, she saw the accused placing a piece of paper in the fire. As the deceased ate his food he complained of a bitter taste. The accused urged him to put some pepper. When the

witness and her sister volunteered to taste the food the accused took it and threw it at the back of the house. A cat that ate the discarded food died.

The witness also said the accused and the deceased had stayed together for two weeks. The deceased had introduced the accused at a church service. Despite her age (thirteen now) she gave her evidence well. The summary of her evidence stated that she saw the accused placing poison in the deceased's food. However, in her viva voce evidence she was candid enough to say she did not witness that. Some aspects of her evidence were confirmed by the accused. These are, the discarding of the bitter food after they were denied to taste it by the accused, the burning of a piece of paper by the accused and the death of the cat.

Chipo Chokufuna's evidence was largely corroborated by that of her brother, Tinashe Musarira. However, this witness specifically stated that after the deceased complained about the bitter food he offered some to their sister Rachel. It was Rachel's hand that the deceased struck, causing the food to fall to the ground. The accused is said to have then washed Rachel's hand. He also confirmed that a cat ate the food that had been discarded by the accused at the back of the house and died. He said the cat had remnants of the food on its mouth.

Rosemary Mushamba is the accused's grandmother. She stated that in October 2010 church members led by a youth leader visited her home in the company of the deceased. They requested permission to see the accused. The accused confirmed knowing the deceased whom she acknowledged as her boyfriend. The deceased also confirmed the affair. He was then asked by the youth leader when he intended to marry. The deceased proposed the 25th December 2010.

On 25 December 2010 there was no show by the deceased. His uncle later came and indicated that they would come later. The customary marriage was then conducted on 26 March 2011. There was the intermediary and the deceased's brother. A total of US\$260 was paid. That is the amount that the deceased claimed to have. Of that amount US\$100 was given to the accused and she used it for shopping.

The accused was accompanied to the deceased on 28 April 2011 and they left her there on 30 April. The accused visited her on 7 May 2012 and gave her a chicken in accordance with custom. She was concerned that the deceased did not return to her husband on the same day. Apparently the deceased had accompanied the accused to Kotwa but had returned home alone. The following day the witness went to Rushinga. Upon her return on 9

May 2011 she learnt that the deceased had spent another night at her home. That is when she learnt of the accused's arrest in connection with the deceased's death.

On the issue of the accused's reluctance to marry the deceased she said this occurred after the deceased failed to turn up on 25 December 2010. She said they advised the accused that the no-show by the deceased should not be the cause to change her mind. Asked about the accused's claim that she had been raped by the deceased, she stated that as a married person she was supposed to submit to her husband. She impressed as one who genuinely believes that a husband cannot rape his wife. She expressed ignorance of marital rape. She even confirmed that she was disappointed when the accused visited her one week after she had been handed over to the deceased.

In respect of the pesticide she said it was brought to her home by another nephew in 2007. She kept it in her room on the roof. After this incident Stephen, the nephew removed and hid it elsewhere.

This witness was adamant that the deceased was not coerced into marriage. She however conceded that the marriage was irregular in the sense that there were no male relatives. She however justified this on the grounds that she separated with her husband and that most of the accused's male relatives are deceased.

The summary of evidence in respect of Stephen Chikonde and Assistant Inspector Taruvinga was admitted in terms of s 314 of the Criminal Procedure and Evidence Act. A post-mortem report of the autopsy conducted by Doctor Gwisai on the deceased's remains was produced. He noted frothing from the mouth and nose. There were black granules in the stomach and froth. Black granules similar to those found in the plate from which the deceased ate were found in abundant quantities in the stomach. He then concluded that the cause of death was ingestion of poison.

Arising from this witness's evidence is what is the chemical composition of the poison? Or, what is the name and characteristics of this poison? What amounts to a lethal dose? Although the witness had attended court in the morning, the prosecutor in his wisdom dismissed him during the lunch break. This was very presumptive on the part of the prosecutor. A witness who attends court pursuant to a subpoena should only be dismissed by the presiding officer. This is in accordance with s 231 of the Criminal Procedure and Evidence Act.

The summary of evidence attributable to the investigating officer states that the samples of poison could not be examined by forensic experts due to financial constraints.

With respect this is very unhelpful. What is the cost of a forensic examination as compared to the quest to do justice to all manner of people according to law? In such a situation, why embark on a prosecution at all, if the evidence may be inadequate?

However, the court was able to reach a just decision notwithstanding the flaws I have highlighted.

Lastly, the State also produced accused's confirmed warned and cautioned statement. It reads as follows:

"I have understood the caution of this offence that I am alleged to have committed. I admit to the charge I poisoned George Nyambe's food with termite killer for him to die. I did not love him. George Nyambe agreed with my grandmother, Rosemary Mushamba, and my mother Rosemary Kalulu for him to marry me against my wish. I had refused that but my grandmother and my mother forced me."

The accused testified in her defence. At the time of marriage she had turned eighteen years. She was born in Harare where she grew up until she was nine years old. Thereafter she went to live with a maternal grandmother in rural Mutoko. She attended school up to grade four only. This is because she failed to secure funds to continue with her education.

The accused testified that when the deceased proposed to marry her she turned him down. Subsequently, the deceased and others from the church went to her home. She found them there. A proposal to marry her was made and this time she accepted. The deceased promised to pay lobola on 25 December but defaulted.

She said she was upset by this development. The reason she gave was that she had been compelled to marry the deceased by her mother and grandmother. She said on that day she protested.

Another ceremony took place in March 2011. She said the gathering was not well constituted as her father's relatives were not present. Nonetheless, lobola was paid. Then on 28 March 2011 she was escorted to the deceased's home. Her attitude against marriage had not changed.

On the first night after the departure of the escorting party the deceased made his moves to be intimate with the accused. She stated that she did not want to engage in sexual intercourse. She was afraid because she was young and had not indulged before. On the other hand the deceased persisted as he said where was the love if she did not want to be intimate with him. She said she felt pain and bled profusely.

On 7 May 2011 she visited her grandmother in Kotwa to deliver a chicken. The deceased was aware of the visit. She remained there for two days. When she returned home

she had a bag. She disputed that she had declined to show the deceased the contents of the bag. Rather, she said the deceased was seated outside with her grandmother and he did not request to see the contents of the bag.

She confirmed preparing a meal as the deceased took a bath. After he finished bathing she served him with what turned out to be his last supper. Asked by counsel if there was anything special about the meal she stated that she had laced it with poison. As to why she did so she stated she had been hurt by being coerced into marriage. She further stated that she did not intend to kill as she only wanted to inflict pain. She stated she only realised the consequences of her act after the deceased had died. She maintained that she never wanted to be the deceased's wife and never wanted to be intimate with him. On their courtship she said it was brief. Specifically she said they dated for two months before the marriage. Defence counsel asked if they ever discussed marriage and she answered in the negative. Asked why she did not just turn down the marriage she said there were difficulties. On whether there were other ways to inflict pain she said there were none. On whether she could not have left her grandmother, she said she had not thought of going to stay with any other person.

Under cross-examination the accused confirmed that she accepted the deceased's proposal. In another breath she said she did not love the deceased. On the marriage proposal she said she was afraid and hurt because she was young. She agreed that she did not tell anyone about these conflicting emotions.

She confirmed that at some stage her tuition fees had been paid by her aunt who stays in Kotwa. She confirmed she trusted the aunt. Asked on why she did not seek the aunt's mediation she stated that it did not occur to her. She did not think of running away. Of the lobola amount she confirmed taking US\$100. This was used to purchase household goods. She was asked why she accepted that money and she stated that she had relented and had now committed herself to marriage. She now had accepted the deceased as her husband. But on being escorted to the deceased's home she said she grudgingly accepted as she was afraid.

On the issue of rape she said she told the deceased she did want to have sexual intercourse. She tried to push him away. Asked why she did not report the rape she said she did not think of it.

Regarding the poison she stated that she took it from the top of the wardrobe at the grandmother's home. The grandmother was away. She knew it could kill rats but did not know it can kill a human. Asked why, if she knew the poison to be lethal she administered it in the deceased's food she answered that she wanted to inflict pain. She was further asked if

she wanted the deceased to live and she replied in the negative. But when it was put to her that she intended to kill she replied that she did not foresee death. She also confirmed that a cat that ate the poisoned food died.

On why she prevented another child from tasting the deceased's food she replied that her target was the deceased. She was further asked if she poisoned the deceased's food on the day she returned from Kotwa and she confirmed so. She also agreed that she had not slept at the matrimonial home on the previous day. It was then put to her that she had lied about being raped on the previous night and she admitted. It was then put to her that she could have gone elsewhere to which she replied she had nowhere to go. It was also put to her that there was no unlawful attack on her and she stated that she was afraid of being sexually abused as she thought the rape would recur.

A cousin of the accused, Martha Kalulu also testified. She told the court she was informed about the accused's intended marriage. She attended the family gathering. The accused told her she was not ready to marry. When the deceased's delegation failed to turn up the accused pointed out that was why she did not want to get married. As they waited for the deceased's delegation the accused went to the shops as she said she could not wait. The accused is said to have shouted after the non-appearance of deceased's party.

In his closing address Mr *Mavuto* drew the court's attention to the requirements of self-defense as provided in s 252 of the Code. He submitted that even if it were accepted that the accused was under attack, her conduct was not necessary as she could have sought sanctuary elsewhere. In that vein the means she used were disproportionate to the attack. He thus prayed for a verdict in terms of s 47 (1) (a) of the Code.

On the other hand Mr *Mapuranga* submitted that what the accused endured was unimaginable. He submitted that this case is typical of that of battered wives who kill. Until the enactment of the Code it was inconceivable that a husband could rape his wife. Forced marriages are prevalent especially within the church the accused and the deceased attended. Mr *Mapuranga* further submitted that the perpetrators of such acts are never accounted for. He made reference to the case of *S v Banana* 1998(2) ZLR 533 (HC) in which the victim of sexual abuse at the hands of the President endured the abuse for several years without reporting.

He further submitted that the accused did not have a chance to express her wish regarding the marriage. There is no evidence from which an intention to kill can be inferred.

Mr *Mapuranga* further submitted that the requirements of self-defence as provided in s 253 have been met.

The facts of this matter are largely common cause in as much as some aspects are peculiar to the accused. For example, the allegation of rape at the hands of the deceased is the word of the accused. That appears to be the motive for the killing.

The accused appeared to vacillate on whether or not she willingly married the deceased. It is not in dispute that she and the deceased had a brief courtship. When the deceased and church elders asked for her hand in marriage, the accused did not demur. However, when the deceased's party failed to turn up on 25 December 2010 the accused threw tantrums. Her evidence was that she was protesting against marriage. On the other hand, her grandmother was of the view that she was expressing displeasure at the no-show.

However, going by the accused's own evidence, she ultimately relented and consented to the marriage proceedings that took place in March/April 2011. What is not clear is why she willingly consented to the handover ceremony effectively becoming the deceased's wife. If she had protested against marriage at the initial occasion on 25 December 2010 one would have expected her to persist with the denial. That she was coerced into marriage may not be what actually took place. It may be that she was pressured if not goaded into marriage when she was experiencing conflicting signals on whether "to marry or not to marry".

That uncertainty appears to have prevailed up to the time of consummation of the marriage. She claims she was reluctant to engage in sexual intercourse and that despite her unwillingness the deceased imposed his will on her. She did not report this to anyone and one can understand her predicament. It is unlikely that her grandmother would have appreciated that. We all know that the grandmother expressed surprise that a wife may deny her husband conjugal rights and get away with it.

It is significant to note that in the warned and cautioned statement the accused made no reference to rape as the motive for the killing. She simply stated that she had been coerced into marriage when she did not love the deceased. Unfortunately, she was not cross-examined on this omission. However, notwithstanding that omission, it is probable that the deceased might have forced his will on her. This is because the accused impressed as one who had mixed emotions in relation to the deceased. Her grandmother did not approve of her spending two nights away from the matrimonial home so soon after becoming a wife.

Defence counsel likened the acts of rape to the scenario inducing “battered woman syndrome”. Battered person syndrome seems to be gaining currency as a defense. In an article “Battered Woman Defence” on Wikipedia, the term is defined as-

“The **battered woman defense** also referred to as **battered woman syndrome** is a defense used in court that the person accused of an [assault](#) / [murder](#) was suffering from [battered person syndrome](#) at the material time. Because the defense is most commonly used by women, it is usually characterised in court as *battered woman syndrome* or *battered wife syndrome*. There is currently no medical classification to support the existence of this "syndrome" in the sense used by lawyers, though it has historically been invoked in court systems. Although the condition is not gender-specific, the admission of evidence regarding battered woman syndrome as relevant the defense of [self-defense](#) is commonly understood as a response by some jurisdictions to perceived [gender-bias in the criminal law](#). Thus, this is a reference to any person who, because of constant and severe [domestic violence](#) usually involving [physical abuse](#) by a partner, may become depressed and/or unable to take any independent action that would allow him or her to escape the abuse. The condition explains why abused people may not seek assistance from others, fight their abuser, or leave the abusive situation. Sufferers may have low [self-esteem](#), and are often led to believe that the abuse is their fault. Such persons may refuse to press charges against their abuser, or refuse all offers of help, perhaps even becoming aggressive or abusive to others who attempt to offer assistance. This has been problematic because there is no consensus in the medical profession that such abuse results in a mental condition severe enough to [excuse](#) alleged offenders. Nevertheless, the law makes reference to a [psychological condition](#),^[1] even though neither the DSM nor the ICD medical classification guides as currently drafted includes the syndrome in the sense used by lawyers.”

However, the probable acts of rape were of short duration. The accused even lied that the night before the fateful day of poisoning she had been raped. Yet it is common cause that she had been away in Kotwa. Apart from the claim by the accused that she was raped repeatedly over a few days, there is no evidence on the psychological effect this may have had on her.

Killing in self-defense can be exonerated completely. Section 253 of the code provides that-

- “(1) Subject to this Part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if ·

- (a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent, and
 - (b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she, believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack, and
 - (c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances; and
 - (d) any harm or injury caused by his or her conduct
 - (i) was caused to the attacker and not to any innocent third party; and
 - (ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.
- (2) In determining whether or not the requirements specified in subs (1) have been satisfied in any case, a court shall take due account of the circumstances in which the accused found himself or herself, including any knowledge or capability he or she may have had and any stress or fear that may have been operating on his or her mind”.

When the accused actually poisoned the deceased’s food, she was not under attack. She had been attacked in the past. She said she wanted to prevent further attacks. It is however, probable that she could have been raped again as she was to spend that night with the deceased.

The conduct of the accused was not necessary to avert any further attack. If she was unwilling to indulge in sexual intercourse, the least she could have done was to leave the matrimonial home. When she went to Kotwa from where she procured the means with which she killed the deceased, she could have stayed there. After all she spent two nights there. Even if her grandmother would not have entertained her presence, she could have turned elsewhere. There is evidence that she previously stayed with an aunt when she attended school. Clearly, there were available options other than returning to the deceased. It is not like she was in captivity.

If we accept that the accused’s conduct to poison the deceased’s food was not necessary to prevent possible rape, it follows that the means she used were unreasonable in all the circumstances. The accused procured poison with which she laced the deceased’s

food. She prevented a child from sampling that food. She ensured that no innocent third party was caught in the cross-fire. A cat that ate the discarded food died. The accused claimed she wanted to inflict pain on the deceased. She wanted to put a stop to the rapes. It can only mean that she desired to kill the deceased and indeed killed him. She is accordingly found guilty of contravening s 47 (1) (a) of the Code .

Chihambakwe, Mutizwa & Partners, accused's legal practitioners