

THE STATE
versus
CAROLINE TORINGA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 22 & 26 February 2016 & 3 March 2016

Assessors 1. Mr Magorokosho
 2. Mr Chidawanyika

Criminal Trial

Ms J Matsikidze, for the State
Ms C Kanengoni, for the accused

HUNGWE J: The accused denied that she murdered the 17 year old son of her rival in a love triangle.

The accused pleaded not guilty to a charge of murder where it is alleged that on 26 June 2015 at Mapfura Village, Nyanga, with actual intent or realising that real risk or probability after death occurring stabbed Tafadzwa Tobias Dawanyi with a knife on the chest thereby inflicting injuries from which the said Tobias Tafadzwa Dawanyi died.

Most of the facts in this matter are common cause. There may be set out as follows:

1. At the centre of this unfortunate saga was one Lazarus Majagada (“Majagada”) a married man who was conducting an extra marital affair with one Loveness Mutsvairo, (“Loveness”) the deceased’s mother.
2. This relationship had endured over six months. Although Majagada believed that his wife was unaware of it, she clearly was.
3. On the night of 25 June 2015 the love birds Majagada and Loveness were surprised by Majagada’s wife’s nocturnal visit. The wife knocked on the door. The now deceased

came out in response to the knock. He met a woman who asked to see her husband. She had a baby strapped to her back.

4. As she demanded to see her husband, she welded an empty soft drink bottle.
5. The now deceased then alerted his mother about the visitors' presence. His mother came out and asked who she was. Accused identified herself and the object of her visit. Loveness went back inside to call the husband.
6. When Majagada came out, he got hold of the accused and dragged her out of the veranda of the house asking her to go home with him.

From this point on what transpired is a matter of some dispute.

The accused's version is that the deceased took away the axe and her husband took away the bottle which she admitted to have brought. These two items were then thrown away. She had put away her baby. As her husband dragged her away Loveness followed with the accused's baby. When they got to where she was with her husband, Loveness gave the baby to the now deceased and slapped accused twice before Majagada restrained her.

At that point Loveness then gave the baby to Majagada who was still holding the accused by her jersey. Accused then struggled out of the jersey thereby freeing herself from Majagada's grip. Majagada, who was by now holding the baby, urged accused to come with him home. She told him that she was going to make a report to the Village Head.

As she took her way to the Village Head's home, Majagada went home with the baby.

Accused claimed that she was crying as she passed by Loveness' residence. At that juncture the now deceased came out of the premises holding a stick in pursuit of the accused. The deceased began to assault the accused. She had warned him that she had not come for him but her husband. Loveness also came and joined her son in attacking the accused. As Loveness grabbed the accused by the collar of her top, the accused saw Loveness produce a knife. She managed to grapple with Loveness and get the knife away from Loveness. She then turned around to face the deceased who was about to strike her with the stick. She stabbed the deceased on the one arm, once. When this did not stop him from assaulting her, she again stabbed him on the arm. He only stopped after a third stab. She left both mother and son as she went to the neighboring home to get help since she was topless.

She claimed that she attacked in self-defence.

The other version was given by Loveness Mutsvairo, Majagada's paramour and the now deceased's mother. According to her, when she went back into the house to wake up Majagada she checked the time. It was 01h00 by her cellphone. Upon Majagada getting out to meet his wife, the accused, he told Loveness to remain inside the house. The couple began to make noise as they left her residence. From the door which she had opened to see the unfolding drama, she saw the couple struggle. She then realised that the wife had left their baby inside the veranda. She went out, picked up the baby and followed outside the gate where they now were. Prior to that, she had noticed her son take away the accused's axe and throw it away.

Both mother and son then returned peacefully to their respective bedrooms. This peace did not last long because, soon after, the accused came back hurling insults against Loveness. She was agitated and belligerent.

The deceased got out to remove the accused who was now making a nuisance of herself. The deceased had for that purpose armed himself with a stick from their wood rack. The deceased approached the accused. Upon seeing that weapon, the accused back pedaled as if to coax the deceased into believing that she was relenting and therefore leaving the premises. The teenager fell for this ruse. His mother wisely called upon him to leave the accused alone and not to get out of the gate. He did not heed the admonition and wise counsel from his mother. The accused continued to make provocative insults against his mother. This appears to have strengthened the deceased's determination to drive the accused out of the premises.

Loveness, the mother, got out to approach the two. When she got to where these two protagonists were, they both seemed surprised by her sudden appearance at the scene. She immediately grabbed the accused but the accused in not time slithered out of the apparel which Loveness held her by, leaving her holding only the clothing she was free. At that time, her son fell down. She asked the accused what she had done to her son. It was a moonlight night.

Loveness tried to get the deceased to sit up but the deceased was weak. He was bleeding heavily. She returned into the premises to fetch a wheel barrow.

She managed to ferry him into the verandah. The deceased was fading away slowly but surely due to bleeding. The accused disappeared into the night. By the time her neighbours came

to assist her, the deceased had died. She called her lover and advised her of the result of his wife's nocturnal visit.

A post mortem conducted by Dr Jokomo revealed that the deceased had deep penetrating chest wound about 6 cm long extending to the heart. He also had 2 lacerations on his left arm. He concluded that death was a result of hypovolemic shock and penetrating chest trauma.

The sketch plan shows that the deceased was stabbed outside the perimeter fence to his residence. It also show that the accused had taken the route opposite the one she had used to get to this homestead.

The one version placed before the court is that the deceased had attacked the accused who had by then abandoned any hostile invasion of the Mutsvairo homestead having achieved her purpose of fishing out her errant husband. In the attack she had been in imminent danger of her life or limb as two people, the deceased and his mother both manhandled her.

In the moon lit night she had noticed that the female combatant welded a lethal weapon. In good time and before it was used against her by a person who held her by the shirt collar, she had grabbed it away and into her possession. Because the teenager persistently attacked her with a stick he felt compelled to deal with him first as he constituted a real and present danger to her life. She then stabbed the stubborn youth who managed to deliver two or more blows before he was stopped on his tracks by the third and possibly fatal stab blow to the chest.

The other version posts a very different scenario. It is this.

The tranquility of the moon-lit night had been violently disturbed by the accused who had invaded the privacy of the two love birds and the teenage son. The female lover had alerted her male counterpart that their cover had been blown. He went to attend to his wife who he had to take home in shame. The wife, was understandably quite upset and made a scene. He managed to drag her out of the premises leaving their baby at the lover's residence in the process. His lover had dutifully followed up to give over the baby.

In the fracas that followed outside the gate, Loveness had used the opportunity to slap the accused. Her son had dutifully assisted her by disarming the belligerent stranger of her axe and bottle.

The mother and son left the couple to their devices outside their gate as they retired to bed. The embarrassing scene appeared to have been resolved by the apparent departure of the

couple. To their utter shock the lady was not done yet with them. She came back and began a tirade of insults against her rival. She accused her of depriving her of her conjugal rights. She called Loveness names at the top of her voice in the middle of the night. To save his mother the embarrassment, the son got of the house, armed himself with a stick and went on the attack.

The accused was more than prepared for him. She lured him out of the premises into the road. In the engagement that followed as he struck her she went for the kill. She lashed out three stabs in quick succession using her husband's knife. The accused had managed to conceal the knife all along. Clearly, she had itched for its use in action that night especially after being disarmed of the obvious weapons that she had carried into the war zone. Because the mother and son had initially been all peaceful, their tactic had frustrated accused's plans for a violent confrontation. On this version, the deceased's mother realized the danger attendant in her son approaching or engaging a scorned woman in the absence of the man of the house.

We prefer this version because one would be entitled to ask the hypothetical question: what gave the accused the temerity as well as the courage to invade the Mutsvairo residence at night? Her husband was nowhere to be seen. She must have been prepared for a violent confrontation with her rival that night. It was therefore unwise for the son to engage accused. This must be the reason why she discouraged him. When her son persisted, she came out and followed behind him. She did not expect what then happened.

As Loveness attempted to fight off her rival, her son fell down in a heap. Loveness was left holding a fleece top after the accused slipped from her grip. Accused had stabbed the deceased and his mother too.

In our view the accused exaggerated the role played by the deceased and his mother.

It cannot be ruled out that accused was attacked by the deceased. However if she had been attacked or assaulted with the stick exhibit 10, as persistently as she claimed, she undoubtedly would have carried some marks at the time of her arrest to show for it. The police would have confirmed her version on the point. They did not do so.

As for the attack by the deceased's mother, she was unable to say how Loveness held her by the collar and managed to partially produce and open the knife at the same time.

The improbability of what she said occurred in our view serves to confirm that the fact it is so highly unlikely that we have no hesitation to dismiss it as false. Her husband, on the other

hand, was quite generous in accepting as possible, the probability of the knife having been misplaced, at either of the two women's residences. However, in our view, if the knife had been kept secretly by Loveness, because she had attempted to use it on this fateful night, as accused claims, then the accused would have no reason to want to conceal it from the police once she snatched it away from Loveness during the scuffle.

She would have been keen to take it to the village head as evidence of how evil minded the attack on her was by her rival was. She would not here tried to evade arrest. But more importantly, in our view, it is the accused rather than the deceased or his mother, who was prepared for a show down at night by arming herself to the teeth.

She had known of the affair earlier than her husband suspected. She knew the location of the love nest. She knew the rival woman and her son. She prepared to go and smash down her door. In short she had planned for, or anticipated the events of this day.

In our view it is more likely that she had included the okapi knife as part of her arsenal. We are fortified in this finding by the fact that it is highly unlikely that she would have seen the knife before it was used but unable to say where from the bearer had produced it.

She had the knife. In order for the accused to successfully invoke the defence of self defence she must meet the criteria set out in s 253 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

If she satisfied the criteria set out in s 253 but was able to demonstrate that she had not used excessive means to defend herself, then in that event the accused would be guilty of culpable homicide.

In this case we find that the accused had prepared to attack the residents of this homestead even after her husband had left. She was the aggressor. She is not entitled to the defence in s 253.

Consequently she is found guilty of murder as defined in s 47 (1) (a) of the Criminal Law, (Codification and Reform) Act.

SENTENCE

In assessing sentence this court takes into account the mitigating features of this case as well as the aggravating features. Your learned counsel submitted in mitigation of sentence that

the court takes into account that you are a first offender and a mother of four children, that you committed this offence in an effort to preserve your marriage to Majagada, well as the fact that you expressed remorse.

On the other hand the court must not lose sight of the fact that a young life was needlessly lost. The deceased was not part of your marital problems nor can it be said that he in some way contributed to these. Clearly, as we found in our judgment, you planned to use violence to settle a score with your rival. This was a premeditated crime as you armed yourself with dangerous weapons and set out to confront your husband at his lover's residence. Your husband contributed, in a large measure, to the problems you believed Loveness was responsible for because he sought her out and consorted with her whilst keeping you at home. This is a species of domestic violence which is unfortunately on the rise. What particularly aggravates your case is the fact that you vented your frustrations with your husband not on him or his lover but on a third party who was enjoying the security of his home. You stabbed him not less than three times in the chest. It was a cruel manner to end the teenager's life for merely trying to get you out of his home. Your husband was no longer there when you stabbed the deceased. There was no justification, even assuming that the teenager deceased was about to assault you with a stick as you claimed, to use such deadly force with a lethal weapon like an Okapi knife.

In light of the above the following sentence meets the justice of this case.

15 years imprisonment

*National Prosecuting Authority, State's legal practitioners
Gonese & Ndlovu, accused's legal practitioners*