

THE STATE  
versus  
MAGUMISE GWAZE

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 11 and 14 February, 2019

### **Criminal Trial - Murder**

**Assessors:** 1. Mr Kunaka  
2. Mr Jemwa

*H.V Huni*, for the State  
*E.T. Tavenhave with P Mukombiwa*, for the accused (Pro-deo)

CHITAPI J: The accused is charged with the offence of murder as defined in s 47 (1) (a) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] (Criminal Code). The allegations grounding the charge were that on 1 January, 2018, the accused struck Mercy Chimanga with an axe on the head intending to kill her or realising the real risk or possibility that his conduct may cause death but continued to engage in the unlawful conduct regardless of such realization. The incident allegedly occurred at the accused's homestead at Kangava Village, Uzumba.

When the charge was put to the accused he stated as follows; "It happened. It is true." The court entered a plea of not guilty in conformity with the procedural requirement that notwithstanding that an accused charged with murder admits the offence, evidence should nonetheless be adduced by the state to prove both the *actus reus* and *mens rea*. The accused elected to give a defence outline whose gist was to admit the *actus reus* whilst pleading that he be excused from liability and be acquitted on the basis that he acted under provocation.

It is therefore appropriate before interrogating the facts to refresh on the defence of provocation so that when considering the evidence, the court remains mindful of the requirements of the defence. Sections 238 and 239 provides as follows:

“239 When provocation a partial defence to murder

1. if, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realization referred to in section forty-seven, the person shall be guilty of culpable homicide if, as a result of the provocation –

- a) He or she does not have the intention or realization referred to in section forty-seven; or
- b) He or she has the intention or realization referred to in section forty-seven but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control.

2. For the avoidance of doubt, it is declared that if a court finds that a person accused of murder was provoked but that –

- a) He or she did have the intention or realization referred to in section forty-seven; or
- b) The provocation was not sufficient to make a reasonable person in the accused’s position and circumstances lose his or her self-control;

The accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided in section two hundred and thirty-eight.”

It is apparent that whatever the circumstances of the commission of a murder by an accused person, the defence of provocation cannot result in an acquittal but at best, it will constitute a partial defence with the result that the accused is then convicted of the lesser offence of culpable homicide. The plea by the accused that he be found not guilty and be acquitted on account of acting under provocation as advanced in the defence outline is not sustainable as it does not find support from the law. The accused’s counsel in his closing submissions appears to have realised the correct position in law and prayed for a verdict of guilty to culpable homicide.

The defence of provocation as a partial defence to murder will be successfully invoked if the evidence establishes firstly that the accused was provoked. The provocation must result in the accused lacking the *mens rea* in the form of actual or legal intention to commit the murder. It will also suffice where the evidence establishes that albeit the accused having formed the necessary *mens rea* as aforesaid, he completely loses his or her self-control when he or she so acted. In the latter event however, the court would have to consider the nature of the provocation and use the reasonable person standard to determine whether a reasonable person in the circumstances in which the accused would have lost his or her self-control. The court if it answers the enquiry in the affirmative will retain a verdict of guilty to culpable homicide. Where however, the evidence shows that the accused was provoked and that he nonetheless had the requisite *mens rea* when he acted in the manner he did then provocation will only amount to a factor of mitigation. The same position will apply where the court makes a finding that although there was provocation, the nature of the provocation was not sufficient to result in a reasonable person placed in the same

circumstances as the accused person found himself losing self-control. State counsel has referred the court to the case of *State v Hamunakwadi* HH 325/15 a judgment of my brother HUNGWE J wherein he laid down what he termed as “the basic elements for a successful defence of witchcraft provocation...” Amongst other elements, the learned judge stressed that the victim of the accused’s conduct must have been performing in the presence of the accused, some act of witchcraft as understood by the accused or the community he lives in.” The court is of the view that the Hamunakwadi case albeit relying on s 239 of the Criminal Code, must be understood within the background and parameters of its facts because the nature of the provocation which the accused alleged in this case had nothing to do with entrenched beliefs like witchcraft.

Another issue that requires mention pertains to the onus of proof of the defence of provocation. The onus on a balance of probabilities is upon the accused. The reference to onus must be understood as meaning no more than that the accused must lay or make out a case for provocation. In other words he should allege the facts or circumstances which he relies upon as having provoked him. It is these facts or circumstances which if not disproved by the State beyond a reasonable doubt will place the court in a position to determine using the reasonable person standard whether they would amount to provocation of such a nature that a reasonable person placed in the same situation would have been provoked, and if so, to the point of losing self control as did the accused in any given case. It must be stressed that because of the operation of the presumption of innocence until proven guilty which is the cornerstone of criminal liability in our law, the State bears the burden to prove the guilt of the accused beyond a reasonable doubt. Section 18 (4) of the Criminal Code provides that unless there is another enactment which imposes the burden of proof of any particular fact or circumstance upon the accused, “once there is some evidence before the court which raises a defence to the charge, whether or not the evidence has been introduced by the accused, the burden shall rest upon the prosecution to prove beyond a reasonable doubt that the defence does not apply.” The point which the court makes by referring to onus is therefore that, where as in this case, the accused pleads that he acted under provocation, he cannot end there. He must set out with sufficient particularity the circumstances or factors which provoked him. The prosecution then bears the burden to disprove the factors set out beyond a reasonable doubt failing which subject to the court determining on the sufficiency of the

provocation to be sufficient to lead a reasonable person to lose self-control, the defence will either apply as a partial defence or as a mitigatory factor as the case may be.

Having unpacked or interrogated the defence of provocation and understood how it is applicable and its limitations, the court noted that most of the facts surrounding the commission of the offence were largely common cause or not seriously put into dispute.

The accused was married to the deceased's younger sister. He had been married for 18 years before his marriage aforesaid fell on troubled times even though it had been blessed with two children the eldest aged 12 years whilst the age of the younger one was not established. In November 2017, the accused's wife took the initiative to end the marriage. She filed for customary law divorce before the local chief who then convened a hearing at which he gave the parties 90 days within which to attempt a reconciliation failing which the unregistered customary union would be deemed dissolved. The accused's wife was to provide a list of property to be shared in the event the reconciliation attempts failed. She did so. Unfortunately the reconciliation was not to be as the accused's wife was resolved not to continue with the union which decision she was of course free to make. Consequent on the accused's wife resolve not to be persuaded to continue the relationship, it became necessary that the parties matrimonial assets should be shared, a fact that both the accused and his wife were aware would be the eventuality.

The tragedy that surrounds the case happened on the date and occasion that the matrimonial property was to be shared. The chief's messenger Tinashe Kangara was tasked to superintend the sharing of the property. The accused from his evidence did not really have a liking for Kangara because according to the accused, Kangara was known for flexing his muscle when executing the chief's mandate. The accused's evidence was that in all the proceedings which took place, it is the conduct of Tinashe Kangara that annoyed or provoked him. It is therefore necessary to summarize from the evidence what happened in relation to the property sharing trail.

The evidence led was that Kangara first called upon to the accused's ex-wife to attend at the accused's homestead for purposes of sharing the matrimonial property. The accused ex-wife had already written down the property to be shared and the list of the property had been given to Kangara by the Chief. The accused's ex-wife invited her sister to accompany her to the accused's homestead to witness the sharing process. The sister oblivious that her agreement to accompany the accused's ex-wife was going to result in her death during the property sharing innocently and

as the elder sister to the accused's ex-wife attended as a witness. Kangara also went ahead of the accused's ex-wife to the accused's residence where on arrival, he made known to the accused, the purpose of his mission. It is common cause that the accused's relatives who included his mother, brother and sister congregated at the accused's residence to witness the proceedings. The only outsiders in attendance were the accused's ex-wife, the deceased and the Chiefs messenger.

It was common cause from the evidence that the process was not a smooth one because the accused initially was not receptive to the property distribution. It took the intervention of the accused's mother to persuade him to agree to share the property. In the confirmed warned and cautioned statement the accused stated that his brother Kurai Gwaze encouraged him to co-operate. Although the accused denied that he was persuaded to do so, the evidence and probabilities clearly support the finding that the accused was not a willing participant in the process. The property to be distributed was taken outside from the accused's house after there had been resistance shown by the accused. The accused in his evidence stated that when Kangara came to the accused's homestead he boasted that he was acting under the Chief's powers to get the property. The accused stated "We were not agreed. I said why not take the woman's utensils only since she had already collected her clothes. I then had exchanges with the Chief's messenger as I was refusing with the part of the property." The accused testified that no one else was talking other than him and the Chief's messenger.

It was the accused's further testimony that when Kangara said that the case would have to go to the next court hierarchy if he refused with the property, the accused refused with the property and stated that he had worked for the property for his children such that it would be better if the case was taken to the next court. He testified that Kangara insisted that property be removed from the house and that it was after the property had been removed from the house that Kangara then said that he was now taking away the property in a scotch cart since what he had wanted was for the property to be removed from the house. The defence counsel at this stage asked the question, "So why attack the deceased?" The accused responded, that he was overwhelmed with emotion.

In the view of the court, there was nothing in the circumstances of the case that should have provoked the accused since the goings on related to the outcome of court proceedings which must be respected or lawfully challenged and even if he subjectively was provoked, the court was of the

view that the circumstances as they unfolded would not have provoked a reasonable person placed in the same position as the accused, let alone to the point of losing self-control. In the defence closing submissions counsel submitted relying on *S v Mokonto* 1971 (2) SA 319 (A) that the concept of provocation indicates a situation in which the provoker elicits anger or wrath of the provoked by means of a challenging or defiant behaviour, and the latter in reaction to the provocation behaviour, commits a criminal act.” The court agrees with counsel’s submissions and the dicta in the *Mokonto* case cited. In *casu* however, the deceased was not the provoker but an innocent bystander yet the accused made her victim of his murderous act. The accused himself failed to explain why he attacked the deceased who was not an active participant in the proceedings. In the defence outline the accused stated that he was provoked by his wife and wife’s sister (the deceased). The provocation that he alluded to was that the accused’s wife and the deceased “took all the property leaving the accused with nothing. The outline further states; “The accused will tell the court that he had no intention to kill the deceased but was provoked by her actions when she took all her (sic) property to give it to his wife.” The impression created was that the deceased was the one who was parceling out the property. In evidence in chief the accused then gave a different reason for his provocation and blamed the conduct of Kangara for making him angry.

The accused did not impress the court in his demeanour and the fact that he gave conflicting versions to explain the nature and cause of the provocation he pleaded for his defence adversely dented his credibility as a witness. Against his contradictory evidence stood the State witness’s evidence which complemented or corroborated each other in material respects as regards the accused’s initial refusal to have the property distributed, the accused’s ex-wife’s offer to only take a share of rapoko and maize leaving the rest of the property to benefit the children, the accused’s sudden reaction in entering the house for purposes of getting an axe, the accused’s threats of attack on the Chief’s messenger, his ex-wife and the deceased, the latter who unfortunately and unlike the other two failed to escape the accused wrath. The account given by the State witness pitted against the contradictory accounts given by the accused was not only to be preferred but accorded with the probabilities which were that the accused did not want to have the property shared and viewed the messenger Kangara, the accused’s ex-wife and the deceased as the impostors whose presence was not welcome at the accused’s homestead.

The accused exhibited a complete disregard for authority and considered himself as a law unto himself. He was determined that the property should not be shared despite the existence of the Chief's order and the presence of the Chief's messenger acting under the Chief's orders. The provocation if it can be said to have existed was self-created by the accused through his conduct of consciously deciding to defy authority. In the reasoning of the court, a person cannot choose to defy lawful authority and when the law is applied against his will, he then cries that law enforcement amounts to provocation. Self-induced provocation must be held to fall outside the purview or ambit of the provocation defence as envisaged in s 239 of the Criminal Code.

In *casu*, the accused resolved consciously that he would have his way by attacking the Chief's messenger, the accused's ex-wife and the deceased. He did not attack any of his relatives clearly showing that at all times he did not lose self-control but was aware of the target of his attacks. He consciously armed himself with an axe which was not just lying by but he fetched it from the house. He made direct aim for the deceased and struck the deceased on the frontal part of the head causing the brain tissue to protrude from the wound. The deceased was not accidentally hit but the accused aimed to hit the target. The conduct of the accused in the circumstances constitutes a borderline between actual and constructive intent. He acted with reckless abandon using a dangerous weapon, an axe directed at a vulnerable part of the body. The real risk of the possibility of death resulting was not just a possibility but a near certainty. The accused will however benefit from the fact there was a background of parties not being *ad idem* on the sharing of the property and emotions must have been high. Had it not been for this consideration a verdict of murder with intent would have been appropriate. The accused is accordingly guilty of murder with constructive intent or as defined in s 47 (1) (b) of the Criminal Law Code.

### Sentence

In assessing sentence for murder, the starting point should always be to recognise that the right of every person to life as provided for in s 48 of the Constitution is the number one fundamental right. This must logically be so because in order to enjoy any of the rights that may avail themselves, there must be life. The crime of murder is the only crime for the time being which may be punished by the imposition of the death penalty where the murder is committed in aggravating circumstances or a sentence of not less than 20 years imprisonment where the murder is committed in aggravating circumstances but the court does not consider the imposition of death

sentence as merited. The circumstances of each case to include striking a balance with the offenders personal circumstances will in every case inform the proper and judicious exercise of the discretion on the sentence to be imposed.

In this case the offence would not have been committed had the accused respected the authority of the local Chief exercised through the Chief's messenger. Chiefs play a judicial role in this country. There laid down procedures which a party dissatisfied with a chief's ruling should follow. The accused decided to defy the authority of the Chief. Courts are loathe to countenance people who defy judicial authority because to allow such conduct is inconsistent with promoting, protecting and fulfilling the rule of law. It breeds anarchy. The accused's intransigence in this matter is to be considered as an aggravatory circumstances as it resulted in an unnecessary loss of life.

The deceased was just killed when she had not done anything to arouse the accused's wrath except to bear witness to a chief's court sanctioned process. Even the accused had no rationale explanation for attacking the deceased save to blame his emotions. The fact that the accused's emotions were again self-created is a further factor of aggravation. The court cannot allow a situation where a bully deliberately created a provocative situation to benefit from the fact that he then becomes angry from that situation and seeks to be forgiven for it.

The accused used a dangerous weapon in the form of an axe. The axe did not come into the possession by chance but he fetched it from the house in order to use it on other persons. He was conscious of his intended targets being the Chief messenger his ex-wife and the deceased. The accused struck the deceased on the front or interior skull. Brain tissue protruded through the wound opening made by the axe strike. The sight of the deceased in such a condition must have been ghastly. Instead of rendering assistance or handing himself in to law enforcement agents to show contrition, the accused ran away from the scene and became a fugitive from justice until arrested in April, 2018. Such conduct does not endear him to the court and the sympathies of the court wane. The accused cannot therefore justifiably expect the court to sympathize with the length of his pre-trial incarceration because he disqualified himself as a suitable bail candidate by absconding from the scene. The long arm of the law as expected caught up with him.

The personal circumstances of the accused are ordinarily. He is an unsophisticated rural dweller aged 42 years. He is unemployed and lives on subsistence farming. His ex-wife said that

he also manufactures axes for sale. The axe that he used to strike the deceased was one such axe that he had manufactured and was one of four axes awaiting disposal by sale. He has 4 minor children and is a divorcee. It was submitted that the children are being cared for by his septuagenarian mother who also looks to him for sustenance. Fortunately, the accused has siblings who can chip in to assist the children who unfortunately must suffer because of their father's actions.

Counsel submitted that the accused is a first offender who otherwise pleaded guilty in the sense that he admitted committing the offence. In the view of the court the accused had no choice but to admit because the offence was committed in the glare of witnesses. He however raised a spurious defence that he was provoked yet the deceased never provoked him. By creating a false defence that the deceased in sharing the property gave everything to her sister (the deceased's ex-wife) this affected this court's judgment on making findings as to whether the accused was remorseful. At least when testifying an oath in his defence he capitulated and confessed that the deceased was a victim of the accused's unmitigated wrath but that she had not wronged him in anyway.

The court considered that the factors of aggravations set out in s 47 (2) and (3) of Criminal Code were not present in this case. Where the factors listed therein are present, the death sentence becomes a competent sentence to be imposed. Where it is not deemed appropriate a sentence of life imprisonment or imprisonment for any definite term of not less than 20 years is the competent sentence.

The circumstances of aggravation listed in s 47 (2) and (3) as aforesaid are not exhaustive. The court can consider any other factors of aggravation as sufficient in any given case to merit the imposition of the death sentence. *In casu*, the deliberate use of the axe which did not land in the hands of the accused by accident coupled with the fact that the accused used the weapon in furtherance of the act of defying the authority of the Chief's Court ruling are sufficiently serious aggravatory circumstances as would make the consideration of the imposition of the death penalty not a remotely fitting sentence. The circumstances in casu are however sufficient to merit the imposition of a sentence which is not below the minimum sentence that the court should impose where a murder is committed in aggravating circumstances but the sentence of death is considered inappropriate. It is important that where a murder has been committed, society should not be left

in doubt that courts will adequately punish the offender as a mark of society's abhorrence for the offence.

Accordingly, taking into account the circumstances of the commission of the offence and balancing them with the personal circumstances of the accused, tampering justice with mercy and further taking into account that the murder arose from what was largely a domestic dispute involving parties who had fallen out of love and divorced, the moral blameworthiness of the accused is not of the highest order. Albeit the deceased was only the accused's sister in law, her death is also a loss to the accused and his family. Customarily the deceased was deemed as a close relation of the accused's family. An appropriate sentence is as follows and the accused is so sentenced:

20 years imprisonment.

*Tavenhave & Machingauta*, accused's legal practitioners (*Pro deo*)  
*National Prosecuting Authority*, State's legal practitioners