

THE STATE
versus
BALTIMORE BRIGHTON MUDHIVARI

HIGH COURT OF ZIMBABWE
JUSTICE TSANGA J
HARARE, 11, 12 and 18 March 2019 & 9 May 2019

Assessors: **1. Mr Shenje**
 2. Mr Gweme

Criminal Trial

N Mazvimbakupa, for the State
G Sithole with *M Tarugarira*, for the accused

TSANGA J: This is a case of a murder alleged to have arisen in the context of the use of gender based violence to reclaim family honour. Belonging collectively to the family and mainly held by male members, honour has been observed to exist in most communities throughout the world¹. It characteristically operates to constrain women's behaviour. As long as women adhere to social expectations particularly in their sexual behaviour, the value of family honour is preserved.

In this instance, the deceased, Emily Mudhivari, was a rural based widow who allegedly dared to openly love again whilst having purportedly chosen to remain residing at her late husband's patrilineal homestead. But it was not only her alleged flagrant display of moving on with love so soon after her husband Killian Mudhivari's death whilst remaining a daughter in law that was deemed irksome. Her choice of lover was considered equally disgraceful and an insult to her husband's family honour. He was the village head, Assanisi Mhangwa, and, was related to the family in that he was the brother to the accused's maternal grandmother. When told of the now open dalliance, her late husband's brother Baltimore Bright Mudhivari, who is the accused, took steps to reprimand her as the now family head.

¹ Johanna E. Bond, *Honor as Property*, 23 Colum. J. Gender & L. 202 (2012).

The state alleges that the deceased died on the 20th of August 2006² as a result of a brutal attack by the accused. The accused does not deny assaulting the deceased on that day in the name of “honour”. According to him, when his brother died, the family had indeed decided in line with shona custom that his wife Emily could either go back to her family if she wished to remarry, or, she could remain within the family. Emily had opted to remain. On the day she met her death, the accused he had been advised by people whilst attending his mother’s memorial that there was an open relationship between the deceased and the village head, one Assanisi Mhangwa. He had been incensed at these revelations and had taken it upon himself to get to the root of the matter. An investigative party to go to the deceased’s house to unearth the truth that night about the immoral affair had been quickly assembled. The all-male party consisted of two of the accused’s nephews then in their teens who lived in the village and who were instrumental in revealing the particulars about the open nature of relationship, as well as an adult nephew of the accused, Sidney Mudhivari.

What the accused vehemently denied was that the deceased died as a result of the attack that night when they confronted her. According to him, the sum total of his attack on the deceased that night was not in any way life threatening. In other words, his defence was that he had certainly not assaulted to kill her. His argument was that what was contained in the post mortem report was not consistent with the mild nature of the attack that he had administered to the deceased that night.

Admitted by consent in terms of s 278 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], was a post mortem report in affidavit form compiled by Dr Humberto Morales on the 28th of August 2006. He is a forensic pathologist and legal medicine specialist. The evidence of this doctor as contained in the state’s summary of evidence was also admitted by consent in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The post-mortem report described the deceased as approximately 55 years old. The pathologist’s observations at the time of examination were that her clothes were stained with faecal matter. Her body had multiple bruises. She had five broken ribs. In addition, she also had injuries to the frontal scalp (haematoma). She had what was described as extensive subarachnoid haemorrhage, a bleeding into the brain area which generally occurs as a result of head injury. The result of death was therefore concluded to be due to subarachnoid

² The delays in bringing the accused to trial had nothing to do with the accused the court was told but with the state in putting its documents together. He was out on bail.

haemorrhage, head injury and assault. It was, by all counts, a particularly vicious attack that was captured in the affidavit report.

The state called two witnesses. The first was **Sidney Mudhivari** the accused's adult nephew, who was his sister's son. With the accused and two others, they had gone that night to look for the now deceased at her homestead. She was not there but a child had come to the door. This witness had entered and indeed ascertained that the now deceased was not there. He told the court that he had gone on to uncover her bed and noticed that three pillows were lined up to deceitfully make it appear as if someone was sleeping in the bed. Upon failure to find her at home, the four of them had then left the house in search of her, using the path she would normally take if going to the village head. They had met her on their way, whereupon the accused demanded to know where she was coming from. She had responded that she was coming from seeing her relatives. The accused had then insisted that they go there to confirm her claim but she had refused.

It was then that the accused had struck the deceased with open hands. This witness said he had immediately stopped the assault and suggested instead that they proceed to his aunt's residence (the accused's sister) since as the eldest female person in the family, she had an important mediatory role to play in such disputes. On arrival, they had woken her up. The two juveniles in their company had at this point been dismissed to go back home to sleep. Presumably to democratise the inquisition somewhat, a male neighbour had been called but had refused to come on account of his sour relations with the now deceased. His wife, however, had come.

The deceased was yet again confronted about the affair and when she refused to own up to it, this witness was sent by the accused to fetch a switch to assault her. He had readily obliged and had gone on to break one which was said to have been about a metre and half long from a gum tree. He told the court the accused had assaulted the deceased five times underneath her foot on one leg and then another five times on the other foot as she sat with her legs outstretched on the ground. After these assaults, she had agreed to speak and confessed to having been at the village head's house. It had then been agreed that they would proceed to the chief the next day for him to hear the matter. Thereafter, they had all spent the night in that room but not before the now deceased had declared that she did not think she would live for people to hear out her issue.

In the morning, he had discovered that she was dead. According to him, they were all surprised that she had died. The accused had then sent him to the now deceased's family with

the word that she was critically ill. They had refused to believe his story and said they had seen her alive and well the previous day. It was the deceased's relatives who had gone to report the matter to the police.

The cultural processes and procedures that ought to have been followed where a person as in this instance is found to be having an inappropriate relationship due to being related, had only been discussed after the deceased had died. The witness explained to the court that the procedure is that the village heads are called, including the lover of the person together with officers from each village head. The male lover is then given his wife and relations are cut.

Susan Mudhivari was the second state witness. She is the accused's sister to whose house they had all trooped that night with the deceased to discuss the matter after they had met up with her. Her evidence was that when the accused came, he said they had caught the deceased at the headman's house that night and that everyone knew about the affair. She said that the accused had assaulted the deceased with the switch and added that the deceased was crying out. She had intervened to stop him. She revealed at the onset of her evidence that she has poor eyesight but asserted she was certain that he was assaulting her legs and not her upper body although she could not be sure whether the assault was simply on the legs or thighs. Also, she could not recall how many times the deceased had been assaulted but confirmed that she seemed fine when they arrived with her as they had exchanged greetings. She had not seen any wounds sustained by the deceased in her house either. She confirmed Sidney's evidence that after the assault had taken place, and a full confession elicited, the decision had been taken to call for a meeting the following day with the chief. She had instructed the accused to sleep next to the door to ensure that the deceased did not escape before that hearing. The events thereafter of the discovery of her death the next morning were the same as the previous witness narrated, save that she added that so incensed were the relatives when they later came with the police, that the situation had only been quelled when the police produced firearms.

She painted a picture of a dishonourable daughter in-law who brought nothing but shame to the family from the onset. She emphasised in cross examination that the deceased was a woman of bad character and loose morals. She equally told the court that the deceased's relationship with Assanisi was a known secret even during the lifetime of her late brother. She regarded the deceased as someone with no respect whatsoever for her in-laws and who would occasionally visit her lover leaving her ailing husband at home. It was clear

that she held no sympathy for what had ultimately befallen the deceased. She had helped the accused and Sidney to carry her body to her home the morning of the discovery of her death and had not seen any injuries.

The accused's evidence

The accused took to the stand. He related the same unfolding of events as captured by the state witnesses. He emphasised the embarrassment that the scandal was causing for the family as she was having an affair with someone they respected and who was related to his maternal grandmother. He therefore approached her that day with the aim of getting to the bottom of the matter since they were not staying well with the deceased. In particular, the allegations were that she would sometimes sleep at her lover's house and he wanted to find out if that was true. Among those who told him of the blatant surfacing of the affair in the public realm were his nephews who were still minors at the time and were said to be about 12 years old. They told the accused that the deceased and the village head were now being seen freely in public and that the deceased was spending nights at the village head's residence. The accused had been incensed at the disgrace to the family and by what he deemed to be a very serious moral transgression.

Regarding the assault on the deceased, his version was that after her refusal to go back with them to her relatives' place where she said she had been, he had slapped her just once with his bare hands. That is when the suggestion had been made by Sidney to take her to his sister's house, which they had proceeded to do. He confirmed sending the state witness Sidney to fetch a switch on account that the deceased had continued being dodgy. He too said the assault had been underneath her feet as she sat on the ground with her legs stretched out. He too, like Sidney, said he had assaulted her about ten times consisting of five times on each foot with the switch. She had then admitted going to Assanisi's residence. He was assaulting her in his capacity as her brother in-law. After her confession, he had not hit her further since indeed a decision had been made to have a hearing in the morning. In simple terms, the accused as the two state's witnesses, basically sang the same tune paying careful attention not to be in discord on the nature of the assault.

He told the court that two officers had come to attend the scene after reports of her death had been made. He claimed that one of the police officers who came had suggested the possibility that the deceased may have died from poison since certain sounds had come from her stomach. He confirmed sending Sidney to her relatives with word that she was extremely

ill even though she was dead at the time as his intention was that if they came he would then explain everything to them.

In cross examination by the state, he expanded that his intention was to go with her relatives to the police and if the relatives wanted him to pay compensation, he would have then done so. That was his reason why he had not rushed to report her death to the police. He had moved her body back to her own house because he believed the relatives would not have come to his sister's house. He said he was surprised at her death because he did not think the switch he had used would lead to her death.

It was put to him by the State that the reason that he had not reported was because he knew he had caused her death and he hoped that the matter could be settled by paying compensation. The deceased's relationship with Assanisi had been going on before his brother died. As such he admitted that he was not hearing of the matter for the first time. He also reiterated the concern that the deceased's relationship with his parents was not good. She had not been sent away because she had children. Even though they knew of the relationship with Assanisi, they had pinned their hopes on her reform of character. So sour was the relationship that she had not even attended his mother's funeral let alone the memorial on the day in question leading to the assault. What had particularly incensed him about the affair was that as the most senior of the daughters' in-law in that family, she was supposed to lead by example and yet she had behaved contrary to these expectations.

He claimed his intention at all times was to have the matter dealt with by the chief and not to assault her when he decided to confront her. The assault was then triggered by her refusal to state where she was coming from. When he assaulted her at his sister's residence, his aim was to get her to tell the truth and the matter would then be dealt with the following morning. He also admitted in cross examination that she had been well when they met her and when they walked with her to his sister's house. He also admitted that the reason the deceased had been buried in protest by her relatives right outside his homestead was because they were unhappy at the way she had died. Culturally, such a burial right in the vicinity of someone's doorstep, is a protest burial at the manner of death.

In clarifications, he told the court that the reason why he had entertained paying compensation to the relatives was because the death had occurred whilst she was in his hands thereby complicating the issue even though he was certain he had not caused her death. His assault according to him, had only been by way of reprimanding her.

Analysis

The post mortem report by a qualified and professional doctor spoke clearly to the cause of death. The evidence of the state witnesses and the accused himself on the extent of the assault were inconsistent with the injuries observed and captured by the pathologist. It was manifest that the state witnesses had colluded deliberately to minimise the assault. Sidney's evidence that he remembered her being assaulted five times on each foot and stated as much by the accused himself was obviously contrived. The second witness admitted she had poor eyesight and in any event had not been there earlier when the deceased was first encountered. From the head injuries recorded in the post mortem report, she must have been assaulted all over the body, possibly both in the house and when they met her during that night.

It is important to emphasise the role that the medical report plays in criminal cases in shedding light on the cause of the death. As a medico-legal document its purpose is to assist the investigation and the prosecution of the accused. A doctor can be called to speak to its content. The post-mortem report in this instance, constituted the best evidence of the cause of death of the deceased and was admitted by consent. It constituted an expert's opinion of what had happened to the deceased and the severity of the nature of the assault that had caused her death. To recap, she had a total of five broken ribs and head injuries. She had been assaulted until she had even defecated on herself. There is nothing at all to suggest that these were injuries inflicted after her death. The post mortem report captured the substance of the accompanying report from the police on the cause of death, as being that the deceased was assaulted by her late husband's brothers. We therefore rely on the post-mortem report in reaching the conclusion that the evidence that the witnesses and the accused gave about the nature of the assault being mild, was deliberately manufactured to down play the assault.

Even though the delay in the trial was said to have been occasioned by the fact that the post-mortem report which had been prepared had not found its way into the records, it was not disputed that the report admitted had been prepared on 28 August 2006 which was 8 days after the death had taken place. The deceased died in Mhondoro whilst the post-mortem report was done at Parirenyatwa hospital in Harare. As stated, it was in affidavit and was very clearly signed and attested to on 28 August 2006. Though unfortunate that it did not find its way into the record much sooner, it was not shown in any way that the report had not been prepared at the relevant time, or, that it lacked authenticity in any way. In fact, it corroborated the events of that night in so far as the accused had taken the choice to erupt in to a violent

rage, choosing to persist on a search of the deceased when he failed to find her in her own homestead.

The probability of the deceased having been assaulted five times only on each foot and yet show signs of extensive haemorrhage and five broken ribs is next to nil. Susan Mudhivari was very clear that the deceased was crying out as she was being assaulted. Sidney was equally clear that she had said she would not see the next morning. What greater evidence can there be of a brutal if not a deadly attack. Effectively she had in fact been tortured to owning up to a relationship. The process of assaulting her until five of her ribs were broken and her head literally smashed in for the purpose extracting information, with the result that she ended up telling them what they wanted to hear, parallels official torture. The distinguishing feature here was that it was taking place in the private sphere at the hands of her brother in-law. In other words, this was torture within the context of gender based violence. So badly injured was she hence her declaration that night that she would be unlikely to make it through the night. Her escape had even been prevented by ensuring that the accused slept at the door.

Even though it was the accused's stance that he had not assaulted her to kill that night, it was manifest that he must have realised that death was likely and had persisted regardless with his acts of assault. Even though the switch used was not produced, materially, it was not in dispute that a switch had been involved in the assault of the accused.

Murder is defined as follows in the Code.

47 Murder

- (1) Any person who causes the death of another person—
 - (a) intending to kill the other person; or
 - (b) realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility;
- shall be guilty of murder.

The state acknowledged in its closing submissions that what it was pursuing was murder in terms of s 47 (1) (b) on the basis that he realised his conduct might cause death and had continued to engage in that conduct. In other words, he took a very conscious risk.

S v Mugwanda SC 19-02. Also as further rightly observed by state counsel his behaviour after the commission of the offence was indeed consistent with that of a person who was aware that he had caused the death of the deceased. The state relied on the case of *S v Masawi* 1996 (2) ZLR 472(S) for the position that a person's intention can be ascertained by his conduct both before and after by assigning proper weight to each stage.

The assault was a blatant exercise of patriarchal power of dominance over a woman in order to control her sexuality and sexual choice. The accused internalised the deceased's actions as an affront to his family honour. According to the accused himself, Assanisi had been at the family memorial that afternoon, yet he had not approached him as any wrongdoer. He preferred instead to vent his anger on the deceased as the one who had the responsibility to reign in her behaviour in accordance with the expected moral code of conduct for a woman. It was as if Assanisi, a man, could only have been led astray.

Custom is often erroneously latched on as an excuse and justification and yet in this case as the evidence by Sidney revealed, the customary and cultural processes that ought to have been followed were not observed. Notably from the description of those customary processes that ought to have been followed, there is no violence or control at all. The argument by his lawyer that he acted in response to customary dictates is therefore not true and contributes to giving custom and culture a bad name instead of perpetrators facing up to ingrained patriarchal attitudes and privileges over women's bodies.

It is important therefore to emphasise that the accused's response was not in accordance with any customary dictates. Patriarchy gives men privileges which women are not entitled to the world over and that power is according to gender. It was therefore a response that at all times was in alliance with simple male power, control, and, dominance that men exercise over women and women's bodies. Assanisi himself would never have been subjected to the same cruel and inhuman treatment that the deceased was subjected to. Patriarchy deemed him blameless in the supposedly illicit affair. If she was not respecting customs and values, there were non-violent processes that ought to have been followed.

The fact that she left stuffed pillows in her bed was simply a sign of how aware she was of patriarchal control over her sexuality. There was absolutely no need for the accused to be provoked at all by her choice. It cannot be a defence in this case, for to justify his conduct on this ground, would be effectively reduce women to nothingness in terms of control over their own bodies.

Writing about honour as property Joanna Bond observes:

“Women are agents who make decisions about their own sexuality, and those decisions either inflate, preserve, or decrease the value of familial honor property. Because the value of honor property fluctuates based on women's behavior, other family members, often males, seek to aggressively monitor and control the behavior of the women in the family. In its most extreme form, control over women's behavior manifests in honor-related violence, including murder”.³

³ Johana Bond above at p

These stereotypes about women's appropriate sexual behaviour, are imbued at a young age. It is precisely these kinds of gendered stereotypes about women's place in society or women's behaviour that state parties are called upon to address by article 5 of CEDAW.⁴ It provides as follows:

Article 5

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

The courts, in particular, have a role to play in sending a message that gender violence fuelled by stereotypes such as these will not be tolerated. (See the discussion in *S v Jeri* HH516/17). Equally, suffice it to observe that the courts can only do so much that is within their power to do when such cases come before the courts. If there is to be change in the way members of society think about what women can and cannot do with their bodies as autonomous individuals, this is not going to come about by way of the court's punishment alone.

Gender violence is learned behaviour and is socially caused. Efforts must therefore be multi-faceted and involve a multiplicity of players from all fronts. After all it is within local settings, using local examples that the real meaning of rights will gain traction.⁵ Of particular concern in this case is that two teenaged boys, by the age of twelve had already internalised dangerous stereotypes about what constitutes a well behaved woman. They were disturbingly central to the report that led to her attack and ultimate demise. In this regard, it is schools, churches and non-governmental organisations, individuals and families amongst others that must find alternative narratives on gender and sexuality that recognise that women do have rights to their own sexuality.

In the final analysis, from the nature of the brutal attack in this case, and, the manner the injuries were afflicted without regard to their consequences in this case, we find the accused guilty of murder in terms of s47 (1) (b) of the criminal code.

⁴ Zimbabwe is a party to CEDAW and its present constitution which came into force in 2013 has integrated its core values including women's rights to bodily integrity. It is also important in that it specifically binds both public and private actors and articulates the significance of international instruments in supporting the adherence to human rights. This murder occurred in 2006 before the new Constitution but a time when CEDAW was already an important local reference point for addressing gender discrimination.

⁵ A useful frame of reference on strategies can be gleaned from writings such as Abdullah An-Naim ... and See also Sally Engle Merry *Human Rights and Gender Violence: Translating International Law Into Local Justice* (USA: University of Chicago Press, 2006)

Although the accused is said to be a first offender and a family man, there is no doubt that the gravity of the offence he committed warrants a term of imprisonment. Family violence is to be completely eschewed regardless of the nature of excuses and justifications that may be proffered by its perpetrators. The argument on his behalf that not all members of society have moved apace with the understanding of women as autonomous beings with rights over their own sexuality, cannot be an excuse for treating him lightly or accepting his violence in this case.

The case of *S v Chakabva* HMT4/18 in which one brother had killed another in the context of infidelity allegations by one brother over the other was drawn on in urging the court towards a measure of leniency. Therein, the court imposed a ten year sentence and commented extensively on the need to temper justice with mercy in view of the devastation to the family that the case had caused.

The state, on the other hand, drew on the case of *S v Jeri* HH 516/17 where a 15 year sentence was imposed for a murder which also occurred in the context of stereotypical beliefs on gender. In that case a man refused to take “no” as an answer when he pestered a woman in a bar before ultimately stabbing her in an ensuing altercation.

In arriving at an appropriate sentence, this court takes into account the inordinate delay that it has taken for the accused to be brought to court through no fault of his own. However, there is also no doubt that if his case had been finalised timeously, he would have received a very lengthy sentence perhaps in the region of at least 18 to 20 years for this murder which was foreseeable. As observed, there were disturbing elements of extreme violence upon the deceased judging by the number of broken ribs and head injuries as captured in the medical report. These extreme injuries, as remarked, were inflicted in the context of torturing her to admit to the affair.

The accused told the court that he spent almost two years in custody before being released on summons. Taking his pre-conviction incarceration into account and the lengthy delay it has taken to bring him to court during which time he could have served a significant portion of whatever sentence, the accused is sentenced as follows.

Twelve years imprisonment.