

THE STATE
versus
TAUYA VURENDE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 13, 14, 15 & 30 November 2017

Assessors:

1. Mr Dauramanzi
2. Mr Mutomba

Criminal Trial

Mr M. Tembo, for the State
Mr S. Sibanda for the accused

MAWADZE J: The accused was facing the charge of murder as defined in section 47(1) of the Criminal Law (Codification and Reform Act [*Cap 9:23*]).

The charge is that on 11 July 2017 at Mubato village, Chief Murinye, Masvingo the accused struck the now deceased Gamuchirai Vurende with an axe on his head twice causing his death.

The accused is the son of the now deceased and they stayed at the same village.

The tragic events of this day culminating in the now deceased's demise started when the accused had a misunderstanding with his wife whom he suspected of infidelity. This was in the morning on 11 July 2017. Thereafter accused left for a beer drink at the local shops. Later in the evening accused passed through his parents' home where he again raised the

issue of his suspicion of the wife's alleged infidelity. The accused then proceeded home where he picked an altercation with his wife whom he assaulted. The accused's parents intervened to restrain the accused and during that fracas accused's wife fled. The accused took an axe and pursued his wife but failed to locate her.

The state alleges the accused proceeded to the homestead of his young brother looking for his wife and in a fit of rage struck burglar bars securing the door with an axe but failed to open the screen door. The axe handle was broken. It is the state case that accused proceeded to his parents' homestead whilst dragging his mother. It is alleged that when accused's father, the now deceased, who had returned to his homestead came out of the house to investigate the commotion the accused advanced towards him alleging that he, the now deceased had been unhelpful in resolving accused's marital problems. It is alleged the accused then struck the now deceased with an axe twice on the head killing him instantly.

The defence by the accused is basically that he did not struck his father the now deceased with an axe at all.

In his defence outline the accused said after the misunderstanding with his wife in the morning about her alleged infidelity he proceeded to Chatikobo business centre to drown his sorrows. The accused said he suspected that his wife was having a love affair with one Bonface Chamakani whom he shared the same totem with. At the business centre he said he consumed copious amount of opaque beer colloquially known as super, being 9 containers of super 6 of which he shared with friends. The accused said he also mixed this opaque beer with some potent type of beer called "musombodiya" after which he proceeded home in the evening. While at home he had an altercation with his wife who fled to accused's parents' homestead. Accused said he took an axe which he wanted to use to cut some logs and searched for his wife. As he approached his parents' homestead he then removed his shoes and white t/shirt to avoid detection. Accused said he left the axe near the toilet. As he got into the yard he said he saw a log and decided to throw it away for fear that his no nonsense father may use it to assault him. During that process, as it was dark, he said he inadvertently hit his father the now deceased with the log at the back of the head causing him to fall. The accused said his father then hit his head against a rock forming part of a water trough for chickens. The accused said he realised the now deceased was unconscious and he decided to flee fearing reprisals from family members. The accused said he sought refuge in the mountains.

Upon his arrest he said police forced him to give a warned and cautioned statement which did not reflect the truth of what happened. He disowned that statement.

The confirmed warned and cautioned statement in issue was produced as Exhibit 2. In that statement the accused alluded to his altercation with his wife after which his parents intervened. He said his wife then fled. The accused said he armed himself with an axe and proceeded to his young brother's homestead to look for his wife. At that homestead he said he hit the burglar bars with the axe and the axe handle broke. Accused said he then proceeded to his parents' home where he met his father the now deceased coming out of the house. Accused said he then had a misunderstanding with the now deceased which caused accused to strike him twice on the head with the axe causing him to fall after which he threw away the axe some 40 m away. This is the statement accused said he made under duress from the police.

The evidence of Aleck Mujekenyedzi the village head and a police detail Occibience Tugwi was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*].

Aleck Mujekenyedzi was advised by the now deceased's wife of the now deceased's death on the night in question. He proceeded to the now deceased's homestead and found the now deceased's body lying in a pool of blood. He was present when police officers later attended the scene.

Occibience Tugwi is the police detail who initially attended the scene and was asked to guard the now deceased's body until it was ferried to hospital for a post mortem.

In support of its case the state led evidence from accused's wife Mercy Matsvaire, with accused's consent, accused's mother Perekai Vurende, a police detail being the investigating officer Sgt Rashweth Mutaki and Dr Godfrey Zimbwa who carried out the post mortem on the now deceased's remains. The accused gave evidence and did not call any witnesses.

A total of 4 Exhibits were produced by consent being;

Exhibit 1 the post mortem report, Exhibit 2 accused's confirmed warned and cautioned statement, Exhibit 3(a) to (b) photographs of the now deceased's lifeless body at the scene of crime and Exhibit 4 the axe head.

We intend to deal with the cause of death of the now deceased's death first. In that regard we shall deal with the evidence of Dr Zimbwa and Exhibit 1 the post mortem report.

As per the post mortem report Exhibit 1 compiled on 13 July 2017 Dr Zimbwa made the following observations and findings;

- i. deep laceration which was about 6 cm in the occipital area penetrating and fracturing the occipital bone and partially exposing the brain
- ii. that the now deceased's neck was loose and hypermobile
- iii. that the cause of death was severe head injury

In his testimony Dr Zimbwa said the injury at the back of the now deceased's head which was penetrating and fracturing the skull bone at the back of the head partially exposing brain tissue was caused in all probabilities by a sharp instrument. He came to this conclusion because the laceration was straight with smooth edge. According to him if it had been caused a blunt object like a stone as the accused alleges that would have had a tearing effect of the skin and the edge of the injury would have been rough and rugged. Further, he said the crushing of the occipital borne shows that the weapon used was not only sharp but also heavy and was applied with severe force. He opined that this weapon was likely to be an axe like Exhibit 4 or a machete used with severe force. In relation to the neck he said it was loose and not stiff because it had been subjected to trauma.

During cross examination Dr Zimbwa was adamant that the injuries inflicted on the now deceased were not caused by a rock or blunt object. He discounted as not possible accused's version of events that he had first hit the now deceased with a log because there was no point of impact on the front of the now deceased's head. He said if the now deceased was first hit with a log on the side of the head the laws of nature or motion would dictate that he would have fallen sideways and not backwards as accused alleged.

The testimony of Dr Zimbwa in our view is clear in respect of injuries inflicted on the now deceased, how those injuries were possibly effected and deceased's cause of death. It does not support the accused's version of events for reasons explained. We thus accept his

evidence and discount accused's version as untrue. Our finding therefore is that whoever inflicted those injuries intended to kill the now deceased and indeed killed the now deceased.

In our assessment nothing turns on the evidence of the investigating officer Sgt. Rashweth Mutaki (Sgt. Mutaki). His evidence is more valuable in relation to Exhibit 2 the accused's confirmed warned and cautioned statement which the accused disowned. Sgt Mutaki said when he attended the scene of crime he observed the now deceased's body which had two deep cuts on the head which are reflected on Exhibit 3(a) and (b) the photographs he took. Further the now deceased had a swollen eye. The injuries were at the side and back of the head and they are clearly visible on the photographs Exhibit 3(a) and (b). Sgt. Mutaki said the now deceased was lying in a pool of blood some 2m from his kitchen hut and he was told the body had not been moved. At the scene he recovered the said murder weapon Exhibit 4 being the axe head some 30m from the now deceased's head. Sgt Mutaki said upon his arrest the accused opted to write his own warned and cautioned statement Exhibit 1 and that accused was very co-operative and contrite. He dismissed as totally false that he forced accused to give that statement, let alone telling the accused what to say. Instead accused who said he was drunk took responsibility of causing the now deceased's demise and said he knew very well all what had happened.

The evidence of Sgt Mutaki is straight forward. It does not at all suggest that accused was coerced to give a warned and cautioned statement. We find no possible motive for the police to have acted in that manner. Why would they put words in accused's mouth on how the now deceased had been injured? In the result we accept Sgt Mutaki's evidence.

Mercy Matsvaire (Mercy) who is accused's wife gave a very detailed account of the sequence of events of that day 11 July 2017 leading to the now deceased's death. The sequence of events is largely uncontroverted by the accused. Mercy did not witness how the now deceased was fatally injured. Her testimony basically demonstrates two things. Firstly, the unreasonableness of the accused's suspicion that she had a love affair with one Bonface. Secondly, accused's violent conduct on the day in question. We turn to her evidence.

Mercy married accused in 2005 and 4 children aged 11 years, 10 years, 6 years and 2 ½ years were born out of that marriage. She described her marriage of 12 years to accused as largely peaceful save for sporadic episodes of violence when accused would have consumed alcohol. She said this violence was not usually directed at her but at other persons at beer

drinks. As a result, his father in law, the accused's father who is the now deceased had washed his hands over accused's violent conduct after consuming alcohol and had told accused that he would just watch accused's conduct without reprimanding him in any manner. Mercy said this is exactly what the now deceased did on the day in question. She has since returned to her maiden home as a result of this case.

Mercy testified that the problem that day started at the garden where she was with the accused when an aunt arrived and advised her that accused's distant relative Bonface was passing his regards to Mercy. Accused for some strange reason told her that it was wrong for Bonface to send his regards to her as this may lead to an improper association between the two. She said accused's outbursts baffled her more so as accused shouted that he would even kill Bonface with an axe if he would meet him.

Mercy said accused continued in his rantings when they were at home that morning after her sister called Mercy on her sister in law's mobile phone. The accused said he did not want Mercy to use other people's mobile phones or resort to use of WhatsApp. As a result, accused caused the mobile phone to be returned to the sister in law. The accused then took US\$5.00 and left for a beer drink at the local shops.

According to Mercy they did not have enough place to house their kids so the kids would put up at their sister in law's nearby home. As usual the kids went there to sleep and she retired to bed before accused's arrival. She said when accused returned home he inexplicably had collected their children from their sister in law's place and upon entering their bedroom with them the accused started harassing and pushing around the children. This prompted her to ask the accused why he was behaving in that manner.

Mercy testified that in response accused retorted that he was poised for a fight with her and immediately assaulted her with open hands throttling her inside the bedroom. She wrestled free and ran out of the bedroom. The accused pursued her and caught up with her in the yard, slapped her thrice and proceeded to throttle her again saying he would end her life calling upon for one of their kids to give him an axe. In fear the children fled to Mercy's in-law's nearby residence.

Mercy said both her in laws being accused's mother and father the now deceased came and found accused assaulting her around 19.30 hrs. The now deceased did not do

anything or uttered any word. Instead accused's mother is the one who verbally restrained accused telling him that he was always a problem each time he drank beer. The now deceased simply went back to his residence leaving accused's mother. She said accused released her when he went to their kitchen hut to take an axe and this gave her the opportunity to flee. She hid in the nearby bush as accused ran past her wielding an axe with his mother following him. She turned back and hid in the bush near her sister in law's place.

Mercy said accused returned after failing to locate her and proceeded to their sister in law's residence where he ordered the sister in law to open the door for him to search for Mercy. The sister in law refused. In turn accused struck the burglar bars securing the screen door with the axe but failed to effect entry as he alleged Mercy was hiding in that house. In fear Mercy then fled to their nephew's homestead where she sought refuge. She said upon arrival there she heard screams at her in-law's residence and the nephew is the one who rushed there to investigate. The nephew did not return until the next morning when he came with the police. She was taken to her in-law's residence where to her utter shock she saw the now deceased's body lying in a pool of blood with a visible head injury at the back of the head.

As Mercy narrated all this she broke down crying saying the experience of that day traumatises her.

Mercy said the accused was nowhere to be found and only saw him 3 days later on 14 July 2017 at the burial of the now deceased. All accused said could say is that he did he did not know what had possessed him.

As already said the evidence of Mercy is largely unchallenged.

During cross examination Mercy dismissed as untrue that 2 months into their marriage accused had found a love letter written to Mercy's ex-boyfriend. In fact, she scoffed at this allegation as pure fabrication by the accused. She reiterated that she was not in love with Bonface, and that Bonface never proposed love from her. Mercy said accused was drunk that night.

We have already said we have no cause not to accept Mercy's evidence.

We turn to the evidence of accused's mother Perekai Vurende who in our view is a crucial witness. Perekai Vurende (Perekai) said accused came to her homestead that evening from the shops complaining that Bonface had sent his greetings to his wife Mercy. She said accused also alleged that in 2005 soon after his marriage he had found a love letter written by his wife to her ex-boyfriend. Perekai said she chided accused inquiring why he was raising this issue now 12 years later and had not at the material time showed them that letter. Infact she said she asked accused why he would now raise the matter when thereafter he had proceeded to have 4 children with his wife. The accused then left for his residence.

After a while Perekai said accused's 4 children came to her crying reporting that the accused was assaulting his wife, their mother Mercy. This prompted Perekai to rush to accused's residence and her husband the now deceased followed. She found accused assaulting his wife Mercy dragging her back into their yard. The now deceased did not intervene in any way but she verbally told accused to stop the assault and offered to go with accused's wife. The accused then released his wife but rushed to his kitchen to take an axe but his wife fled into darkness. By then the now deceased had returned to their homestead.

Perekai said accused followed his wife wielding an axe and she too followed accused for fear he would harm his wife. Accused failed to locate his wife Mercy and proceeded to his young brother's residence looking for the wife where he struck burglar bars with the axe in order to force the door open. The axe handle got broken and accused remained with the axe head Exhibit 4.

Perekai said at that stage she decided to return to her residence but accused caught up with her saying he, accused, wanted to take her to Perekai's husband being accused's father the now deceased. She said at her residence accused then met the now deceased and struck him twice at the side and back of the head with the axe head Exhibit 4 after which he fled. The now deceased died instantly and Perekai rushed to advise the village head. She said the now deceased was seriously injured as she observed that his brains were exposed. Perekai denied that the now deceased was injured when he fell on to some water trough for chickens and insisted that it is the accused who killed him. Infact she said after the fatal attack accused left his jacket, t-shirt and axe head Exhibit 4. According to her accused was moderately drunk as he was coherent.

Under cross examination Perekai vacillated on whether she actually saw accused delivering the fatal blows. In one breath she said she witnessed the attack as the now deceased was holding a torch. On the other hand, she said all she saw was accused approaching the now deceased and hearing the now deceased crying out that he was dead. Either way she implicates accused in the fatal attack of the now deceased and dismissed accused's version of events as false. Perekai said accused' marriage to Mercy was a turbulent one as the two used to fight and that accused had impregnated another woman.

In our assessment Perekai gave her evidence well. She was with the accused at all material times. We find no motive at all for her to have falsified her evidence. We therefore accept her evidence.

We turn to the crucial issue to be resolved by the court which is how the now deceased was fatally injured.

We did not find the accused to a credible witness at all in that regard. In fact, we find accused's conduct baffling from even his alleged suspicion that his wife was having an affair. If at all accused had found a love letter written by his wife Mercy to her ex-boyfriend in 2005, some 12 years ago why would he raise that issue on the day in question? Accused would have apparently condoned that conduct in 2005 as he proceeded not only to remain married to his wife but went on to have 4 children with her.

There is no iota of evidence that accused's wife had a love affair with Bonface. Surely the fact that Bonface sent his regards to accused' wife cannot even be a basis to suspect a love relationship. Bonface was accused' relation. They shared the same totem. No wonder why accused conceded that he had no tangible evidence at all to suspect infidelity on the part of his wife. All we can discern is that accused was a controlling and overbearing husband. He was very jealous to such an extent that a mere phone call to his wife from his wife's sister through the cell phone of accused's sister in law would invoke the fire of jealous in him. Perekai's evidence that accused's marriage to Mercy his wife was a turbulent one is more credible despite Mercy's attempts to paint a blissful picture.

The accused's conduct that night does not show that he was excessively drunk to the extent that he did not appreciate what he was doing. Although accused initially gave the impression that he had partaken very intoxicating copious amounts of alcohol he had a clear

recollection of events of the night in question as he was able throughout the trial to give a blow by blow account of all what happened, in sequence on the day in question. Again accused conceded that he fairly appreciated what he was doing and that contrary to his earlier on averments he said he was moderately drunk. This explains why he could run after his wife and apprehend her. The impression we get is that he had simply consumed alcohol to gather Dutch courage as thereafter he raised issues which had happened in the morning when he was sober.

We are not convinced at all by the accused's explanation that he had mistakenly caused the death of the now deceased. With all due respect to the accused this is a very poorly thought out explanation which even a kindergarten kid would not buy. To start with accused gave a bizarre explanation as to why he decided to arm himself with an axe. What poles did he want to cut in the middle of the night? Why would he violently strike burglar bars at his sister in law's residence? Why would he remain with axe head Exhibit 4 even after the axe handle had broken? Why would he, with such determination, hunt for his wife who had fled? The answer is simple. Accused was poised for a fight.

The evidence of Dr Zimbwa is corroborated by Perekai's evidence on how the now deceased was injured. We have no doubt in our minds that the accused struck the now deceased with the axe head Exhibit 4. This explains why he immediately fled from the scene into the mountains without rendering any help to the now deceased. It is fanciful to allege the now deceased hit his head against some rock on a water trough for chickens. In any case how would accused see that in the darkness.

There is no basis at all for accused to challenge his confirmed warned and cautioned statement. The accused dismally failed to show on a balance of probabilities that he was coerced to give that statement by the police. The accused is simply trying to belatedly distance himself from the truthful explanation he gave to the police and allowed the statement to be confirmed by the Magistrate. No wonder why that confirmed warned and cautioned statement is consistent with Perekai's evidence and Dr Zimbwa's testimony on how the now deceased was injured.

The inescapable conclusion is that accused struck the now deceased with the axe head Exhibit 4. The attack was a vicious and brutal one as the occipital bones were broken exposing brain tissue. A lethal weapon was used to devastating effect. The now deceased died

instantly. The intention of the accused is clear. He intended to kill his father the now deceased. Indeed, he killed him.

In the result the accused is found guilty of murder with actual intent as defined in s 47(1)(a) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

VERDICT: Guilty of contravening section 47(1)(a) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]: - murder with actual intent.

SENTENCE

This is the second case in as many days in which this court has dealt with a murder case involving fathers who perished at the hands of their own sons! This is very saddening indeed. This court wonders what has gone with our morality. In our traditional African custom, we are expected to respect our parents. Even if one goes biblical, one of the ten commandments is that we ought to respect our parents if we are to be blessed with a longer life. Society should introspect and ask itself what has really gone wrong. Why would young men shed the blood of their own fathers? The sanctity of human life cannot be over emphasised.

We understand the invidious position accused's counsel was in when called upon to address the court in mitigation. Other than the personal circumstances one cannot find anything meaningful to say in accused's favour.

We accept that you are a first offender with 4 young children. You are unemployed with neither savings nor assets. Your marriage was virtually terminated when you committed this offence. To some extent you had consumed alcohol when you committed this offence although in our view this was simply to gather Dutch courage. Beyond this nothing material can be said in your favour.

This was a brutal, callous and unprovoked murder. Your father the now deceased had not wronged you in any way. He did not deserve to die such a painful death at the hands of his own flesh and blood. What is amazing is that you are not even contrite at all. Were it not for the fact you had taken some alcohol a term of imprisonment for life would have been appropriate.

In the result, you are sentenced to 25 years imprisonment.

National Prosecuting Authority, counsel for the state

Mupindu Legal Practitioners, pro deo counsel for the accused