

THE STATE
versus
LAMECK MANYANGA

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 20, 22, 26, 30 November 2018 and 24 January 2019

Criminal Trial

ASSESORS: 1. Mr Chagonda
2. Dr Sana

J Chingwinyiso, for the State
Mrs V Zviuya, for the accused

MWAYERA J: Precious human life was unnecessarily lost in a horrific manner, in a domestic violence related crime of passion. The accused pleaded not guilty to a charge of murder as defined in s 47 1 (a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations levelled against him being that on 9 December 2014 at Inyati Mine Compound the accused unlawfully and intentionally caused the death of Tendai Mufaranyuri by striking her with a hoe once on the head and burnt the body with fire, with intent to kill her or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility resulting in injury, from which Tendai Mufaranyuri died.

The brief facts forming the basis of the allegations are that on the fateful day the accused person had an altercation with the deceased, his live in girlfriend for a period of about 2 years. On the fateful day the accused struck the deceased with a hoe on the head as the deceased lay on the bed. The accused set the bedroom ablaze and he fled to the mountains where he stayed in a cave from 9 December 2014 until 2 October 2017 when he was arrested for the murder allegations.

The accused's defence was basically that upon his return from work the deceased insulted him accusing him of being stupid, surviving on piece jobs and thus his future was bleak. The accused was also insulted by the deceased who labelled his mother a witch and was further insulted by the deceased's refusal to be intimate with him. The accused went away after

the insults so as to cool off. However, the insults kept hounding him to the extent of causing him to abscond and leave his guard duty at his place of employment. According to the accused, upon return he requested the deceased to be intimate with him and she rebuffed him repeating the earlier insults.

The accused in a fit of anger then armed himself with a metal hoe handle and blade and struck the deceased on the head. The accused observed that the deceased died instantly as a result of the blow and in panic mode decided to take away his own life and thus left a suicide note at the homestead. He further, in a bid to conceal evidence set alight the bedroom house in which the deceased lay. Upon reflecting while in the mountains, the accused decided not to take his life and was eventually arrested about 3 years later.

The accused in his defence sought to raise and rely on the defence of provocation and pointed out that he was negligent and had no intention to kill the deceased proffering a plea of guilty to culpable homicide. The State did not accept such a plea and thus the trial proceeded. The issues that fall for determination are:

- (1) Whether or not the accused had the requisite intention to kill deceased.
- (2) Whether or not the alleged insults and denial to sexual intimacy afforded the accused the defence of provocation thus occasioning a defence to the charge of murder reducing it to culpable homicide.

The State adduced evidence from 15 witnesses, 3 of whom gave oral evidence and 12 of whose evidence was not contentious and on common cause aspects was formerly admitted as evidence in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Post Mortem examination by Dr Roberto Trecu and Dr Ivian Betoncourt's affidavit of evidence was tendered as exh 1 by consent. The doctors observed the remains and concluded that the cause of death was carbonisation. The doctors further observed that there was head trauma occasioned on the head.

Further tendered as exh 2 in evidence was accused's confirmed warned and cautioned statement. The statement was basically to the effect that the accused assaulted the deceased following insults on his person and refusal by the deceased to be intimate with him. The sketch plan depicting the lay out of the scene of crime as indicated by the witness Tamari Mufaranyuri and as observed by the recording detail one Detective Assistant Inspector Zifungo was also produced.

The witness Tamari Mufuranyuri testified at the age of 15. At the time of the alleged offence she was 11. The witness regarded the accused as a father as he was her mother's

boyfriend. She pointed out that all along the accused and deceased would get along well but as from 1-8 December 2014 the two had a heated argument in which the deceased was accusing the accused of squandering his salary. On the fateful day the witness went to put up for the night at the mother's friend's house. In the morning she went back to her mother's homestead and as routine swept the campus. It was during that morning that the cousin Leeroy Munongwa who had got inside to get some body lotion or oil alerted her that the bedroom was burnt. The witness and Leeroy upon checking and not finding the deceased alerted a neighbour Tawanda Chieza whose evidence was admitted. The witness then entered the bedroom in which everything was burnt and the charred remains of the deceased were recovered from the position where the bed lay before being set ablaze. The witness's evidence was straight forward. She did not witness the fraca but observed the bedroom was burnt. She later learnt the charred remains were the body of her mother. The witness gave her evidence well.

The other witness who gave oral evidence, Kelvin Taurai Temberere's evidence was basically that on the day in question he met the accused with whom they exchanged greetings. The accused advised him that he wanted to shift and move from staying with the deceased with whom he cohabitated. The witness did not ascertain why. According to the witness the accused and deceased were co-habiting and this was common knowledge in the locality. Nothing arises from the witness's straight forward testimony.

Dzokai Mafaranyuri a sister to the deceased confirmed that the accused and deceased cohabitated for about 2 years. The witness confirmed what the other witnesses, stated that the two had cordial relationship. She however, pointed out that sometime before the demise of the deceased the couple was having problems about issues of salary. This tallied with Tamari Mafaranyuri's evidence that on the day in question she had heard the mother complain about accused squandering his salary. Dzokai Mafaranyuri told the court that the issue of the salary was a source of argument as the accused would go to work but his father would collect his salary. The witness did not witness the misunderstanding which culminated in the death of the deceased.

The accused maintained he was insulted and denied sexual intimacy and that he assaulted the deceased negligently causing her death. From the totality of the evidence it is common cause that that the accused and deceased cohabitated for a period of about 2 years prior to the fateful day. Further, it is not in dispute that the accused returned home from his duty post on the night in question. It is also apparent the accused had a misunderstanding with the deceased which culminated in him striking the deceased on the head and also burning the

deceased as he set the bedroom on fire. It is not in dispute that the accused left a purported suicide note to the effect that he had killed the deceased and would proceed to take his own life.

It is also common cause that the accused set on fire the bedroom in which the deceased was. Further, it is common cause the accused did not commit suicide as he sought sanctuary in the mountains until he was arrested about 3 years later. It is not in dispute that the deceased died as a result of carbonisation and that the deceased had sustained head injuries. Also common cause is the fact that accused caused the demise of the deceased.

What the court is to consider is the degree of liability given the defence of provocation raised by the accused. The defence of provocation raised by the accused is provided for in s 239 (a) (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which states:

“If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be on essential elements of the crime of murder if done or omitted as the case may be, with the intention or realisation referred to in section forty-seven, the person shall be guilty of culpable homicide if, as a result of provocation;

- (a) he or she does not have the intention or realisation referred to in section forty-seven’
 - (b) he or she has the intention or realisation referred to in section forty-seven but has completely lost his or her self control, the provocation being sufficient to make reasonable person in his to her position and circumstances lose his or her self control.
- (2) For 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 realisation 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 herself 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 for in section two hundred and thirty eight”

In the circumstances of this case the accused alleges he was insulted by the deceased who labelled him “stupid, surviving on piece jobs, and that his future was bleak. Further that his mother was a witch.” The deceased further refused to have sexual intercourse with the accused. According to the accused this angered him but he managed to temporarily restrain himself and went away to cool off. While at work at night, the accused failed to cool off as the insults hounded him and he decided to go back to clarify and resolve their impasse. Upon requesting to be intimate with the deceased he was rebuffed and insults were repeated.

The accused proceeded to the dining from where he took the metal hoe and returned to the bedroom whereupon he struck the deceased on the head. After striking he wrote a suicide note and then set ablaze the bedroom in which the struck deceased was lying.

The question is simply whether or not the alleged insults and reaction vitiate intention or phrased differently did the insults occasion loss of self-control so as to negate any formulation of intention. The remarks by MUSAKWA J with the concurrence of MAFUSIRE J in *S v Kazembe* HH 15/14 go a long way in defining when provocation can be sustained as a partial defence to murder. In *Kazembe* case, it was stated:

“A provoked man loses the power of self control... Provocation may go beyond a man’s endurance. It may render a man unable to form an intention to kill... The provocation must be such as to have actually caused the accused to have lost his self control though not necessarily his capacity to intend to kill. The provocation must also have been such that in the circumstances an ordinary man would have lost his self control and acted in such a manner.”

It is clear that if a person is capable of some self control he is capable of forming the requisite intention and liable for his actions. See *S v Stephen* 1992 (1) ZLR 115, *S v Musina* 2010 (2) ZLR 498 and also *S v James Chishakwe* HH 17/19.

In this case, the accused after being insulted went away to cool off and then came back to resolve the impasse. The same insults were heaped at him and there is no basis why he would have snapped and lost it given the repeated insults. In fact going by his reaction he thought of getting a stick with which to assault the deceased and then proceeded to the dining room. He made a choice between a stick and a hoe. He retrieved a hoe with which to assault the deceased. He then came back struck her head, wrote a suicide note and then set on fire the bedroom in which the immobilised now deceased was. Evidence adduced showed the accused after the insults also packed his clothes and other belongings and took them out of the campus before setting the bedroom on fire. He had time to plan and pack his belongings to ensure they would not be burnt by the fire. Such sequence of events is not consistent with instantaneous and spontaneous reaction to provocation. The accused had time to ponder over the insults and rejection of intimacy and sought to punish the deceased for that.

In dismissing the defence of provocation, MATHONSI J in *S v Best Sibanda* 139/18 made it clear that in circumstances where provocation is not sufficient to make a reasonable person lose self control then the defence is not available. He remarked;

“... provocation, by its very nature connotes instantaneous and spontaneous reaction to phenomena in which the actor does not have any opportunity to formulate a strategy but acts in the spur of the moment having lost self control in response to the actions of another.”

In the present case the accused had time to ponder over insults and planned to come back at night in order to discuss the issue. Upon seeing deceased who denied to be intimate with him and repeated the same insults he actually went out to get a weapon with which to assault. He made a choice between a metal hoe and stick and opted for a metal hoe. The accused packed his belongings then struck the head and lit a fire leaving the deceased to burn while he fled after having written a purported suicidal note. It is apparent the accused caused the death of the deceased. The court is only to decide whether or not the accused committed the offence of murder with actual intention or legal constructive intention. Actual intention was described fully and with clarity in *S v Mungwanda* 2002 (1) ZLR 574. The court held that for a court to convict an accused of murder with actual intention the State must prove beyond reasonable doubt that:

- (a) the accused desired to bring about death of his victim and succeeded in completing that purpose or
- (b) while pursuing another objective, the accused foresaw the death of his victim as a substantially certain result of his activity and proceeded regardless. In other words the question is whether or not when the accused engaged in the conduct complained of he had the requisite intention to kill as contemplated in s 47 (1) (a). See also *S v Lloyd Mukukuzi* HH 577/17.

The sequence of events *in casu* depict clear formulation of intention in circumstances where a reasonable person could not have lost self-control. The defence of provocation raised by the accused cannot be sustained in the circumstances. The accused in this case while bent on torturing the deceased for denying him sexual intimacy, struck the deceased in the head and set on fire the bedroom in which she was, in circumstances where the accused foresaw that the deceased's death was substantially certain. The hacking with a metal hoe and setting on fire connotes *mens rea* of actual intention. See *S v Mema* HB 143/13.

Accordingly the accused is found guilty of murder with actual intention as defined in S 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

In coming up with an appropriate sentence I have considered all mitigatory and aggravatory factors submitted by Mrs *Zviuya* and Mr *Chingwinyiso* respectively. We have also taken note of the standard sentencing principle which places duty on the court when passing sentence to seek to match the offence to the offender while at the same time ensuring the society does not lose confidence in the justice delivery system.

The accused is a first offender with some family responsibilities. He accepted liability although not to the degree proved by the State. He acknowledged assaulting and setting the deceased on fire was wrong. Further in mitigatory is the fact that accused has been in custody for over a year awaiting the finalisation of the offence.

That offence was committed in 2014 and it took 3 years for the accused to be apprehended as he fled from justice and hibernated in a cave is aggravation. As correctly observed by the State counsel, the circumstances surrounding the arrest of the accused are aggravatory. The accused resisted arrest and fought to avoid being brought to terms with the law. The accused sought to conceal the heinous murder by burning the deceased and also inscribing a stone to create the impression that he was dead and had been buried when he inscribed a stone "Lameck's grave". His arrest was just fortuitous given the accused had left a suicidal note.

Further in aggravation is the fact that the accused killed his 2 year old live in girlfriend for no reason at all. The circumstances are clearly an indication of a cruel man bend on torturing a woman "in a clear move of if I cannot have you no one else can". The accused in a dehumanising manner sought to punish the deceased for exercising the right to refusal of sexual intimacy. The alleged insults and denial of intimacy did not justify the callous and brutal murder of a mother at a tender age. The deceased lost her life at the merciless hands of the accused and such precious human life cannot be replaced. The courts have to express displeasure at inhuman and degrading treatment resulting in loss of life. See *State v Robert Tevedzayi* HH 206/18. Also see *S v Chipo Madondo* HMA 24/17 wherein MAWADZE J commenting on the evils of domestic violence between spouses occasioning loss of life made these pertinent remarks:

"This matter brings to fore the scourge of domestic violence which has afflicted our society leading to ghastly consequences which include loss of life. It is saddening to note that spouses are meeting their demise at the hands of those who have taken vows to love them forever."

In this case the accused and deceased lived in as husband and wife for 2 years such that one would have expected love and care and not violence to prevail. The courts have to move

in and signal that domestic violence is not acceptable. Moreso given the loss of life occasioned in this case.

The right to life is clearly enshrined in our Constitution, no one has a right to take away the God given constitutionally provided right. The courts have to protect the sanctity of human life by passing appropriate sentences. The sentence should not only deter accused but like-minded people. The message has to be sent loud and clear that courts do not condone domestic violence and clearly resolving disputes by violence has no place in a civilised and progressive society like ours.

The accused in a heartless manner struck the deceased with a metal hoe and had the audacity to set her on fire. Such conduct has to be visited with appropriate punishment. The moral blameworthiness of the accused is high. He stands convicted of murder with actual intention in circumstances where such offence could have been avoided. The society looks up to husband and wife or lovers to exercise duty of care and protection of the other and not brutally taking away the life of the other.

The legislature in enacting the penalty provision which provides for capital punishment, life imprisonment and imprisonment sought to express that murder is viewed as a serious offence. In the present case upon considering all mitigatory and aggravatory circumstances the offence is deserving of a lengthy custodial term. You are sentenced as follows:

25 years imprisonment.

National Prosecuting Authority, State's legal practitioners
Legal Resources Foundation Mutare, accused's legal practitioners