

THE STATE
versus
RACHEL GOMBA

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 30 September 2024 & 21 October 2024

Assessors: Dr *Mushonga*
Mr *Gwatiringa*

Criminal Trial - Murder

M Manhamo, for the State
K Munyewende, for the accused

MUNGWARI J: At times it is difficult to understand the intense attraction between incompatible couples. Such relationships often persist until tragedy strikes. The frequency and intensity of the altercations between Rachel Gomba (the accused) and Paddy Mangisa Mlambo (the deceased) were well documented highlighting the viciousness with which the deceased routinely attacked the accused. These patterns of violence were clear precursors to this tragedy which not only them but their families also, must have seen coming. Their tumultuous cycle of violent confrontations came to a conclusion on 24 October 2022, three years into their relationship, when the accused allegedly killed the deceased.

[1] After her arrest, the accused was indicted before the High Court facing a charge of murdering her husband. The state alleged that on 24 October 2022 the deceased returned to number 46, Honde Way, Old Marimba, Harare which was his home after being away for three days without explanation. His abscondment displeased the accused. She confronted him about it. Unfortunately, the disagreement escalated into a physical altercation during which the accused stabbed the deceased on the right thigh with a knife. The deceased was transported to Sally Mugabe Hospital where he was pronounced dead upon arrival. The prosecutor alleged that the when she stabbed the deceased, the accused intended to kill him or realized that there was a real risk or possibility that her conduct may cause death but regardless of that awareness, she continued to engage in the conduct that ultimately caused the deceased's death.

- [2] The accused pleaded not guilty. She argued that that she is a battered woman who endured a wretched marriage to the deceased. She stated that the relationship was characterised by frequent assaults on her by the deceased. She further revealed that she had previously sought treatment for wounds sustained from the frequent beatings. Her family members were aware of the deceased's abusive behaviour. On the fateful morning, the deceased quizzed her on why she had changed her cellphone's personal identification number or password. She explained but her brute husband was not satisfied with the explanation. As per his tradition he attacked her with bare hands. He caused her to fall in the process. Desperate and in self-defence, so she claimed, she took a weapon from the stove and struck the deceased with it on the thigh. After the deceased collapsed, she called out to his relatives for assistance.
- [3] The circumstances surrounding the deceased's death were established through the testimony of five state witnesses namely Judith Marange (Judith), Christopher Mlambo (Christopher); Tawanda Mlambo (Tawanda), Honest Mupanedengu (Honest) Adrian Isheanesu Tarugarira (Adrian) and Dr Martinez. Their unchallenged evidence was accepted by the court in terms of s314 of the Criminal Procedure and Evidence Act [Chapter 9:07] (The CPEA) as it appeared in the state's summary of evidence. We accepted the evidence as true. The witnesses' testimonies revealed what we state below.
- [4] The accused is a young woman who had been recently married to the deceased. The couple was however childless. The union, still in formative years was marked by disagreements as the two tried to adjust and settle into marriage life. The conflicts were sometimes requited but the tumultuous relationship became notorious with relatives and friends, particularly amongst the deceased's family because the couple resided with his parents. At times they attempted to mediate, while at other times they opted to allow the couple to resolve their conflicts independently in the hope that they would ultimately find each other.
- [5] On the tragic day at around 6 am, the couple's neighbour called Judith was outside her residence which is located within the same compound as that of the couple. She witnessed the deceased arriving from an unknown location and enter his home. The accused was close behind him. She had been outside cleaning the toilets when he arrived. A short while later Judith heard noise emanating from the couple's house. She said it sounded like something was falling. The noise was followed by the accused crying and calling for Judith to summon her mother-in-law Getrude Mlambo. Judith

complied but quickly rushed back to the couple's residence. Through the open door she observed the deceased lying in a pool of blood. The accused stood nearby. Overcome with emotion, the accused confessed that she had stabbed the deceased.

- [6] Horrified by the scene Judith hurried to the main house to inform the deceased's father Christopher Mlambo and his brother Tawanda Mlambo. Both men arrived, promptly took in the scene and witnessed the accused still crying and apologizing for injuring the deceased. Following that Christopher and Tawanda proceeded to Marimba Police station where they filed a report. They returned with Sergeant Ncube who along with Honest Mupanedengu helped ferry the deceased to Sally Mugabe Hospital. He was unfortunately pronounced dead upon arrival. The accused was subsequently arrested.
- [7] On 28 October 2022 Doctor Malagai Martinez a pathologist stationed at Sally Mugabe Central hospital examined the remains of the deceased and established the cause of death as "hypovolemic shock, lacerated arteries of the thigh and stab wound on the right thigh" The post mortem report was tendered as Exhibit 1 with the consent of the defence. The cause of death was uncontentious.
- [8] Upon her arrest a warned and cautioned statement was recorded from the accused. The statement was subsequently confirmed by a magistrate sitting at Harare Magistrates court. It was produced without contestation from the defence and we marked as Exhibit 2 in the proceedings. In the statement, the accused stated the following:

"I do not admit the charge being levelled against me. I did not kill my husband intentionally. I was trying to defend myself. What happened is that after exchanging some words, the now deceased became angry. The now deceased grabbed me by my neck and pushed me against the wall. I also pushed him against the wall and he became more angry, and he then started assaulting me. I then fought the now deceased intending to cause him to leave me so that I could go outside. The now deceased pulled me by the waist whilst holding my skirt with his left hand as he assaulted me on my face and head with his right hand. He was doing this to bar me from going outside. I continued running away as I dragged him, heading towards the door with him holding on to me. I felt pain and I stretched out for a knife which was on the stove. I took the knife hoping that the now deceased would be scared and leave me. The now deceased was not scared and continued assaulting me. The now deceased forcibly pulled my hair which pained me and I stabbed the now deceased on his right thigh. I did not apply much force. As he was drunk the now deceased staggered hitting against the wardrobe with the side on which the knife was which caused the knife to pierce much deeper." (Sic)

- [9] The accused's statement to the police quoted verbatim above, clearly indicates that the she pleaded self-defence from the outset. She denied having intentionally killed the deceased. Further, the police recovered a stainless-steel knife that was allegedly used

to stab the deceased. The knife was tendered as Exhibit 3 with the consent of the defence. The court noted that the weapon has an extremely sharp blade measuring twenty centimetres in length, with a ten centimetre black and white handle. Needless to say, its total length was the size of a ruler. Its appearance was menacing.

[10] In addition to the above common cause evidence the state called the *viva voce* testimony of Getrude Mlambo.

Getrude Mlambo (Getrude)

[11] She is the deceased's mother and the accused's mother in law. Like the rest of the witnesses, she confirmed that she arrived after the incident. Upon her arrival at the scene, she did not see the knife. She also did not also its recovery. She only saw the accused who was lying down inside their one roomed cottage. The accused was standing beside him and asking for forgiveness. Save for arranging transport for the deceased to be taken to hospital she did not participate in any other way. She confirmed that like any other couple, the two would fight. As parents they would intervene to help them resolve their differences. Her testimony was unremarkable. It did little to clarify the events that transpired inside the house between the couple. Consequently, the state's case relied heavily on circumstantial evidence and whatever little was drawn from the admissions made by the accused in her defence.

Defence case

[12] The accused testified on her own behalf and called the evidence of Tongai Mufandaedza to her aid.

Rachel Gomba

[13] She adopted her defence outline as her evidence in chief and added some detail. She explained that she and the deceased were childhood sweethearts. Although they briefly separated early in their relationship, they soon reunited, rekindled their romance and formalized their union. During their three years of marriage, they did not have any children. Their relationship was marked by frequent fights. Lately the deceased's attacks had become increasingly vicious. A week prior to this incident, she was rescued by her mother in law who bravely entered their room through the window, after the deceased had assaulted her and locked the door from inside. The deceased had severely beaten her until she lost consciousness. He even cut her feet with broken bottles while demanding to know what she had been up to.

[14] Reflecting on the fateful day Rachel said that the deceased returned home that morning after being away for three days. She was not happy. When he greeted her she did not respond. When he asked for her phone she handed it over without providing the password effectively denying him access. This incensed the deceased prompting him to slap her with open hands and pulling her braids. The situation rapidly escalated. He began to assault her with fists while she struggled to break free from his grasp. The confined space of the room limited her options. She attempted to navigate her way out manoeuvring between the gas stove, the kitchen unit and the fridge towards the door. As she reached the door the deceased grabbed her hair and pulled her towards him. In a moment of desperation, she reached for a dish positioned near the door that contained various kitchen utensils and pulled out a knife. The accused claimed she believed the deceased would release her upon seeing the knife. He however he did not relent. Instead he punched her again with fists.

[15] Recalling the previous incident when he had cut her with broken bottles she feared a similar outcome if not worse. As he continued the assault, she stabbed him in the right thigh with the intent to ward off the attack. Pushing him away with all her strength he collided with the wardrobe. She rushed to the door and called out for Judith's help. Meanwhile the deceased informed her that she had injured him.

[16] The accused said she saw the deceased pull the knife from his thigh and fall to the ground as blood gushed from the wound quickly spreading everywhere. Horrified, she could only cry. When he asked for water she brought him some. She carried him towards the door where there was better ventilation but it did little to alleviate his condition. By the time a motor vehicle arrived to transport him the deceased was already declaring that he could no longer feel his legs. He died on the way to hospital.

[17] During cross-examination she confessed that she was uncertain whether it was the push and resulting impact that caused the knife to sink further into the accused's thigh, or if the injury was solely due to the stab. She acknowledged that everything had transpired so quickly that even now she struggled to fully grasp the events. She never expected that a stab to the thigh could result in fatal injuries let alone rapidly claim the deceased's life right before her eyes. Despite that, she admitted that her decision to use a knife was unreasonable in the circumstances. She conceded that in hindsight she realises that she should have opted for other kitchen utensils that were available in the dish but because she had no time as she was under pressure to ward him off she simply

picked up the first utensil that she laid her hands on. She had no time to carefully select which item to use from the dish. In her fear of being hurt and her desire to frighten and ward him off she had chosen to wield the knife instead. She made it clear that she unintentionally caused the death of the deceased.

Tongai Mufandaedza

[18] The witness's testimony was immaterial. He did not witness the assault. He wasn't at or anywhere close to the scene. His testimony was pure hearsay. While he attempted to trump up the accused's version that she was in an abusive relationship, he confessed that he had never seen her being abused. He only relied on the accused's narrative. However, the aspect of abuse had already been made common cause as the state did not rebut it.

Issue for determination

[19] The only issue which lies for resolution in this case is whether the accused acted in self-defence when she killed the deceased. On one hand, counsel for prosecution, Mr *Manhamo* urged the court to find the accused guilty of murder. He stated that in the very least the accused must have reasonably foreseen death ensuing from her conduct but regardless of the said, continued with her actions. On the other hand, defence counsel Ms *Munyewende* insisted that the accused acted in self-defence. She asked the court to outrightly acquit the accused.

[20] As stated elsewhere in this judgment, the accused's story is simply that she was defending herself. That defence is provided under s 253 of the Criminal Law Code. It is titled 'defence of person.'

The law

[21] The requirements for the defence of person are provided in the Code under s 253 as follows:

“253 Requirements for defence of person to be complete defence

(1) Subject to this Part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if

(a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent; and

[Paragraph as substituted by sec 31 of Act 9/2006]

(b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she believed on reasonable

grounds that that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack; and

[Paragraph as substituted by sec 31 of Act 9/2006]

(c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances; and

(d) any harm or injury caused by his or her conduct

(i) was caused to the attacker and not to any innocent third party; and

(ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.

(2) In determining whether or not the requirements specified in subsection (1) have been satisfied in any case, a court shall take due account of the circumstances in which the accused found himself or herself, including any knowledge or capability he or she may have had and any stress or fear that may have been operating on his or her mind”

[22] For it to suffice as a complete defence all the above listed requirements must be met. From those requirements it is clear that for the accused to benefit from it, he or she needs to show that he or she or another person whom the accused was defending was under an unlawful attack. “Unlawful attack” is defined in s 252 of the said Act as any unlawful conduct which endangers a person’s life, bodily integrity or freedom. It is crucial to note that in determining whether or not the requirements have been satisfied a court must take due account of the circumstances of the case and any knowledge or capability the accused may have had and any stress or fear that may have been operating on his or her mind. In other words, a court must not take an armchair approach in examining the matters at hand. Rather it must take regard of the practical exigencies which obtained at the time of the incident. Put differently it must strive to put itself in the shoes of the accused and assess whether given the circumstances, the accused ought to have acted differently.

[23] I have said above that an accused who wishes to rely on the defence cannot do so by satisfying one or two of the requirements. He/she must meet all of them. In this case, there is no doubt to us that the accused was under attack by the deceased. He assaulted her. The witness Judith indicated that she had heard noise coming from the couple’s room followed by cries from the deceased. That evidence supports the accused’s testimony that she was under siege by the deceased. In any case, it was common knowledge that he habitually assaulted her. In the not too distant past the deceased’s mother had come to her rescue after one such attack. The state did not adduce any evidence to rebut that aspect.

[24] The next requirement is that the accused’s conduct must have been necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack. In this case, we have already admitted that the accused was under attack. She

described the commotion that was in the room and how the deceased had cornered her. She tried to escape but he caught up with her, dragged her by her braids and hounded her. The furniture items which were in the room left her with little if any avenue for escape. It is clear therefore that she could not have averted the attack or escape in any other way other than to also attack the deceased. In our view, the accused once more laid a solid basis in establishing that requirement. The prosecutor's evidence did nothing to dispel it.

[25] The third requirement is that the means used to avert the unlawful attack must have been reasonable in all the circumstances, the phrase in all the circumstances is loaded. It means that each case must be assessed on its own merits. There is no one size fits all. Put in another way, some means which could be regarded as outrageously disproportionate in one case may be completely reasonable in another. It all boils down to what obtained on the ground in a given case. Once more, in assessing the proportionality of the means used, judicial officers must not be theoretical about the issue. Instead, a common sense and practical approach is required.

[26] In this case, we have evidence that the couple frequently fought. Therefore, the accused cannot claim to have been caught off guard by the deceased's attack. In fact, we know that it wasn't the deceased who was belligerent first. The accused admits that she was beside herself with anger on account of the deceased's disappearance from home for three days. She didn't want to speak with him when he arrived. He went straight into the room on arrival as per Judith's evidence. The accused followed him immediately. We are not suggesting that what the accused did justified the deceased's attack on her. No. It is the reason why we have already said the attack was unlawful. Rather, it leads us to the crucial question of the weapon used. The accused does not allege that the deceased was armed when he attacked her. In her own words, he used his bare hands. We described the measurements of the weapon and held earlier that it was a lethal weapon. In as much as she was under the cosh, the danger exhibited by the knife could not have escaped her attention. She even admitted during trial that she concedes that it was unwise of her to take the knife, out of all the utensils which were in the dish. She admits that at first it was meant to scare the deceased. It means that contrary to her assertions that she had no time to think, she actually had time to consider her options. The accused was drunk and his attacks on the deceased were possibly a

blind assault. It may explain why the accused did not have any injuries to show from the assault by the deceased.

[27] Against the above background, our conclusion on this requirement is that while the accused may have been under attack by the deceased, the means that she resorted to in warding off that attack were unreasonable in the circumstances. As already stated, we are vindicated in finding so by her own concession on that aspect.

[28] The requirements whether the harm or injury caused by the accused was caused to the attacker and not to an innocent third party and was not grossly disproportionate to that which would have been caused by the unlawful attack is academic in this case. The court will not belabour this judgment with a discussion of the same as they clearly have no application in the matter at hand.

[29] Having reached the conclusion in the paragraph before the one above, and regard being had to our earlier holding that an accused who wishes to rely on self-defence must prove not some but all of the requirements, the temptation would be to throw out both the baby and the bath water. Section 254 of the Code however proscribes that approach. It provides that;

“254 When defence of person partial defence to murder

If a person accused of murder was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything that is an essential element of the crime, he or she shall be guilty of culpable homicide if all the requirements for the defence of person specified in section two hundred and fifty-three are satisfied in the case except that the means used to avert the attack were not reasonable in all the circumstances.”

[30] We have stated and held above that the accused satisfied all the other requirements for the defence of person except that the weapon she chose to ward off the attack was unreasonable given what obtained on the ground. We agreed that she was frightened and in a desperate attempt to defend herself, plucked a knife from a dish with various other kitchen utensils. We found as a fact that she did not immediately use it but only did so when the deceased persisted with the assault. She knew he was not armed. She knew that the knife was lethal. She could have and indeed had ample time to pick any other non-lethal ‘weapon’ from the dish. It is on that basis that we find that she exceeded the bounds of reasonable means in her quest for self-defence in this instance. As such, whilst she satisfied the other three requirements without difficulty, she could not clear the hurdle of the use of reasonable means. The law says when that

happens, an accused is entitled to self-defence as a partial defence and must be convicted of the lesser offence of culpable homicide instead of murder.

[31] It is against the above conclusions, that we are not satisfied that the state managed to prove beyond reasonable doubt that the accused is guilty of murder. **We therefore find the accused not guilty and acquitted of the charge of murder but guilty of the competent charge of culpable homicide in contravention of s 49 of the Criminal Law Code.**

MUNGWARI J:

National Prosecuting Authority, state's legal practitioners
J Mambara & Partners, accused's legal practitioners