

THE STATE
versus
THEMBA MOYO

HIGH COURT OF ZIMBABWE
MOYO J
GWERU 8 FEBRUARY 2018

Criminal Trial

T Mupariwa for the state
Mashanyare for the accused person

MOYO J: The accused person faces two counts of murder it being alleged that on 23 February 2017, at Nyama General dealer, he struck the first deceased Netsai Maruvisa with an axe on the head resulting in her instant death.

The accused person further, on the second count struck the second deceased Mthabisi Moyo with an axe on the head, killing him instantly.

A plea of not guilty was entered as per procedure although upon pleading the accused person had admitted to both charges.

The state summary defence outline, accused's warned and cautioned statement and the two post mortem reports were the documentary exhibits that were tendered before this court and they were duly marked. Both post mortem reports give the cause of death as severe brain damage, skull fracture, chop wound.

A big axe and a smaller axe were also tendered as the weapons that were allegedly used in the commission of the offence.

The evidence of the following witnesses was admitted into the court record as it appears in the state summary in terms of section 314 of the Criminal Procedure and Evidence Act. The evidence of:

1. Lucia Maruvisa
2. Robert Mandiwa

3. Cst Hove
4. Dr S. Pesanai

Otilia Mapfura gave *viva voce* evidence on behalf of the state. She told the court that deceased and accused were married in 2014 and that they were always having problems. On 20 February 2017, the deceased came to live with her citing problems with the accused person. The accused person tried to persuade deceased to go back and live with him but failed. The deceased used to put up in the shop and slept with four children in there. On the fateful day, she was alerted by deceased's sister who was crying after she had gone into deceased's room early in the morning and realized that deceased had been murdered together with her son. The witness also went in and noticed that first deceased had the big axe (Exhibit 5) still stuck on her head. The axe belonged to them in the shop. She then saw the smaller axe (Exhibit 6) next to the second deceased's body. The second deceased had an injury at the centre of the head. She said accused had been drinking beer but he did not show any signs of drunkenness. She denied any knowledge of deceased's extra marital affairs. When deceased fled the accused, she told that before, accused had threatened her with death and this, deceased told the witness in accused's presence who did not challenge it. When this witness was challenged that accused had taken an axe with him for protection, she refuted this as accused left the axe where he had struck the deceased persons. The witness stated that if the axe was for protection accused would not have left it after killing the two deceased persons.

The evidence of Lucia Maruvisa which was admitted confirms that accused and first deceased had marital disputes over the upkeep of their child, the second deceased. She confirms that deceased left her matrimonial home to go and live with the first state witness. She also said that on 23 February 2017 at around 0900 hours accused came to plead with first deceased to return to their matrimonial home, but first deceased refused. He later returned at 2000 hours and begged for forgiveness, he promised to be a better husband but deceased refused. The accused then started threatening first deceased with second deceased's death through witchcraft. He then left.

First deceased, second deceased together with her other children then went to sleep inside the shop while the witness slept in a separate room. On 24 February at 0600 hours she went to the shop to collect diapers for her child, when she entered the shop, she noticed that the north facing window was wide open. She noticed an axe stuck on first deceased's head and another blood stained axe next to the body of second deceased.

The accused person did not want to respond to material questions in his evidence in chief. In fact he avoided knowledge of all the material facts of this matter. I say he avoided the material facts because he did not remember what happened later on 23 February 2017. He did not remember when he married deceased. He did not remember committing the offence and the reasons. He did not remember being arrested. He did not remember being recorded a statement. He did not remember being taken to court for the confirmation of such statement. He did not remember how old second deceased was.

He however, remembered immaterial facts or those facts that are relevant to his defence, facts like

- He drank beer on the day in question
- The beer brand was called chateau
- That a friend Stanford Moyo bought him the hot stuff he drank on the day in question.
- He remembered that he had stayed with this Standford Moyo for a long time since 2014 and yet he could not remember how long he had stayed with his own wife the first deceased.
- He remembered taking the second deceased and buying him milk and biscuits from one of the many shops but he did not remember how old second deceased was.

He remembered being taken to a prison in Zvishavane and he remembered what his inmates told him but he did not remember when he was arrested, when a warned and cautioned statement was recorded or when he was taken to court.

He also remembered that on the morning of 23 February, the second deceased was taken from him by one Mkhululi Sibanda who had been sent by first deceased.

He also remembered that, he went to eat before going back to the bar.

Clearly the accused chose to remember what he wanted to remember and avoid what he did not want to talk about, otherwise he knows everyone that transpired.

He also told the court that he had been informed by his inmates that he had committed murder and believed them hence his admission to the charges but he denied it when the state counsel told him that he had been harassing the first deceased. Naturally, if he does not remember about his life with the first deceased how come he remembered that he did not harass her? Again, if his inmates told him that he murdered the deceased and he believed them why does he not believe the state counsel? The accused person was pretending and nothing else. His confirmed warned and cautioned statement which in terms of section 256 of the Criminal Procedure and Evidence Act (*supra*) is conclusive evidence before this court, unless the accused successfully challenges it, clearly chronicles what happened on the day in question. It reads as follows:

“I admit to the charges leveled against me. On the 23rd day of February 2017, I was at Neta business centre at around 2000 hrs and I had an altercation with Netsai Maruvisa my former wife. I then drank some beer after the altercation and proceeded to my homestead to collect an axe. I returned to my ex-wife’s homestead holding the axe and entered the shop where she was sleeping through the window which was open. I observed a bigger axe while inside and I picked it up. I struck Netsai Maruvisa with it once on the head. The axe got stuck on Netsai’s head and I picked up the smaller axe which I had brought and struck our child Mthabisi Moyo once on the head with it. There were other people sleeping but I did nothing to them. I used the same window to go out of the room going to my home.”

1. That he did not intentionally cause the death of the two deceased persons as alleged.
2. That on the 23rd of February 2017 he got too drunk to the extent that he never appreciated the consequences of his actions.
3. The Accused will further state that he had partaken beer namely chateau brand to excess and he had no motive or reason to cause the death of the two deceased persons.
4. He will aver that he was not himself when he struck his then wife and son but was under the extreme influence of alcohol and extreme provocation as the first deceased, his then wife had indicated to him that their child was not his child. She had also packed her belongings from their home and was having an extra marital affair.

This confirmed warned and cautioned statement clearly shows that he planned the murder of the both deceased after an altercation with first deceased.

I will not assess his defence outline as he disowned its contents before this court. He only adhered to his defence outline in so far as the aspect of drinking chateau was concerned. It is therefore common cause that accused killed both the deceased persons in the circumstances as tabulated in the state case. The accused did act wrongfully and unlawfully on the day in question. The accused person sought to use drunkenness as a way to reduce his moral blameworthiness.

This court will reject that the accused person was drunk to an extent that he did not appreciate his actions for the following reasons;

On the morning of 23 February 2017 he pursued his wife, while drunk and persuaded her to come back home she refused.

He later went again on 23 February 2017 at about 2000 hours to beg his wife to come back and promised to change and be a good husband, she again refused.

He then proceeded to his home to collect an axe, Exhibit 6. He went to his wife who was sleeping at the shops. He entered through the window. He then observed a bigger axe and picked it up. He struck first deceased with it, once on the head. The axe got stuck on first deceased's head and he left it there. He then picked the smaller axe and struck the second deceased on the head.

There were other people sleeping in the same room, he did nothing to them because they had nothing to do with his mission. He then went back to his home and subsequently fled to Filabusi. The accused person clearly appreciated his actions and carried out his plan with much application of one's mind

This was a plan meticulously executed, and the accused was in total control of his faculties as from the bar, he went home to collect an axe, managed to go into the room that first and second deceased were sleeping in through the window. He managed to see that in fact there was a bigger and better axe to do his job. He picked the bigger axe and struck first and second deceased as per his threats stated by Lucia Maruvisa and Ottilia Mapfura, and he did not strike

the others in there as they had nothing to do with his motive. The accused on the day in question set upon a mission to kill first and second deceased as per his threats and he did accomplish that mission. He thus desired the death of these two, death was his aim and object. If the axe remained stuck in first deceased's head until the police came, it means it had been thrust deep into first deceased's head and thrusting an axe that deep into a fellow human being's head cannot be held to be due to some other intention unless to bring about that person's death.

The accused person is accordingly found guilty of 2 counts of murder with actual intent.

Sentence

The accused person is convicted of two counts of murder with actual intent. He is a first offender aged 32 years old. He spent 10 months in remand prison and had gone up to Grade 7. He killed the first deceased who was his ex-wife because he could not stomach her leaving him and yet clearly the first deceased was running away from problems that she had with him. He could not respect first deceased's decision to move away from the chaos that prevailed in their house hold. He then decided to penalize the first deceased by ending her life in the most brutal of circumstances. He decided that if he could not have the first deceased then she had to die. How cruel? He also in the process ended the life of a baby who did not know anything about the altercation he had with the first deceased. Two lives were lost in the most brutal of circumstances, he struck first deceased with an axe on the head and the axe got stuck and he left it there, per his own admission in the confirmed warned and cautioned statement. Domestic violence is escalating to unprecedented. Just in these two weeks, this court has dealt with three accused persons who followed their estranged spouses and committed murder. Women who find themselves in violent marriages are not caught between a rock and a hard surface. They cannot stand the abuse in these marriages, neither are they safe after fleeing from the violence. Perhaps government should come up with safe havens for abused spouses to flee to once a marriage fails, I say so for even if a woman flees an abusive spouse, many a time, they will be followed and butchered to death. Whilst appropriate sentences will be meted out to deal with the culprits, it still has to be made sure that women and children who flee from violent spouses are housed in

safe houses at least for a certain period of time until tampers cool down so that this scourge is tamed.

In this case the accused person committed the murder in aggravating circumstances as provided for in amendment number 3 of 2016.

- Firstly, he committed the murder having unlawfully entered a dwelling house.
- Secondly, he killed two persons
- Thirdly one of the deceased is a minor.
- Fourthly the murder was a pre-planned. This is a very bad case and the only befitting punishment is capital punishment.

Accused person is accordingly sentenced to death.

National Prosecuting Authority, state's legal practitioners
Mavhiringidze and Mashanyare, accused's legal practitioners