

THE STATE
versus
TAVENGWA MUPUNA

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 15, 16 September, 16, 17 November 2015 & 23 March 2016

Assessors: 1. Mrs Shava
2. Mr Chakvinga

Criminal Trial

B Taruvinga, for the State
Ms D Atukwa, for the accused

MAWADZE J: The accused and the now deceased were husband and wife respectively having been married for about 20 years.

The accused pleaded not guilty to the charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9 : 23*].

The charge is that on 28 December 2014 at Muzemba Village, Mt Darwin the accused unlawfully and intentionally killed his wife one CONSTANCE MUZEMBA by striking her twice in the head with an axe thereby inflicting injuries from which Constance Muzemba died.

The allegations against the accused as per the summary of facts Annexure A are that accused suspected that his wife the now deceased was having an extra marital affair with a fellow villager one FRANCIS MUPARIRA. As a result it is alleged that the accused fought Francis Muparira on 25 December 2014 but lost the fight. Accused is said to have thereafter proceeded home where he destroyed kitchen utensils and ordered the now deceased to leave the matrimonial home. It is alleged that the family members ‘intervened and managed to resolve the dispute. The accused was then summoned to the Village Head on 27 December 2014 a

development the state alleges the accused was not happy with. It is alleged that on the night of 28 December 2014 at about 0200 hours the accused who was in bed with the now deceased armed himself with an axe and struck the now deceased twice on the head after which he fled to an unknown place. As a result the now deceased died instantly due to severe bleeding and brain injuries.

In his defence outline Annexure B the accused raised the defences of provocation and self defence. The accused said on the night in question when he retired to bed with the now deceased they were not on good terms as they had argued over the fact that the accused had reported to the police that he had been assaulted by one Francis Muparira on 25 December 2014. Accused said the now deceased did not want the involvement of the police. The accused said that night at about 2300hours the now deceased woke him up and told the accused that their cattle had escaped from the cattle pen. The accused said this caused him to wake up and rush to the cattle pen, leaving the now deceased in their bedroom hut. Upon his return the accused said he found one Francis Muparira in his bedroom hut with the now deceased. The accused said this extremely angered him moreso as the now deceased's explanation of the presence of Francis Muparira in their bedroom hut was very rude and provocative. Accused said as a result he lost self-control and that a struggle ensued inside their bedroom hut. The accused said the now deceased proceeded to hold the accused as Francis Muparira assaulted the accused inside their bedroom hut. The accused said he then overpowered the now deceased who was holding him. The accused said the now deceased then took an axe intending to attack the accused and that since it was dark the accused did not know that it was an axe but he simply tried to retrieve the weapon the now deceased had. In the process the accused said he was cut and then realised that it was an axe. The accused said as the now deceased aimed the axe at him he managed to grab and disarm the now deceased. The accused said he then feared that both Francis Muparira and his wife the now deceased would gang up against him to kill him he decided to strike Francis Muparira with the axe. The accused said his intention was simply to injure Francis Muparira with the axe so that accused would have irrefutable evidence that Francis Muparira had intruded into accused's bedroom hut. Unfortunately the accused said Francis Muparira evaded that blow and the accused instead struck the now deceased with the axe. After this miss accused said he even got more angry and tried to strike Francis Muparira again but for the second time he missed

Francis Muparira and instead struck the now deceased with the same axe. The accused said in shock and in fear of further assault by Francis Muparira he fled from the scene. The accused said he had no intention at all to kill his wife the now deceased but that he simply lost self-control as a result of extreme provocative behavior of the now deceased had her lover Francis Muparira.

During the course of the trial a total of 6 exhibits were produced. Exhibits 1 to 3 were produced by consent and exhibits 4 to 6 were produced after a trial within a trial to determine their admissibility.

We shall start to deal with the exhibits produced by consent.

Exhibit 1

This is a post mortem report compiled by Dr G Mapiye. The evidence of Dr G Mapiye was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. As per that evidence Dr G Mapiye examined deceased's body at Mt Darwin Hospital on 28 December 2014 and certified her dead. He compiled the post mortem report on 30 December 2014 exhibit 1.

In terms of the examination Dr G Mapiye did as per exh 1 he made the following observations and findings:-

- (1) the now deceased had a deep cut on the night hand, a deep cut on the right cheek and a deep cut on the right side of the head in which the axe used to inflict that deep cut was still in situ or still stuck or embedded on the right side of deceased's head.
- (ii) the now deceased's right jaw was fractured and the axe which was in *situ* damaged the brain.
- (iii) that he deceased's cause of death was due to severe bleeding caused by injuries inflicted on the deceased's head with an axe.

It is common cause that the now deceased died as a result of injuries inflicted on her by the accused with an axe as per exh 1.

Exhibit 2

This is the accused's confirmed warned and cautioned statement given by the accused on 13 January 2015 and confirmed on 14 January 2015 in which the accused said;

"I admit the charged levelled against me. I killed my wife Constance Muzemba because she had an extra marital affair with Francis Muparira"

Exhibit 3

This is the axe accused used to strike the now deceased and its blade was left embedded in deceased's head. The blade weighs 368 grams.

We now turn to the exhibits produced after a trial within a trial.

The trial within a trial was held after the accused objected to the production of the sketch plan exh 4, the notes on accused's indications exh 5 and the photographs exhibit 6(a) to (m) taken during the indications.

The accused alleged that the indications were not made freely and voluntarily because of the following reasons;

- a) that the purpose of the indications was not explained to the accused.
- b) that the points on the sketch plan are points the police told accused to indicate and that they were based on indications already made to the police by accused's children Talent Mupuna and Nickson Mupuna in accused's absence.
- c) that the photographs in issue were taken when the police simply instructed the accused to pose for the photographs in a particular manner.

The investigating officer sergeant Cuthbert Jandura and Cst Kudakwashe Taengwa testified in support of the indications. The accused also gave evidence on the inadmissibility of the indications.

After the trial within a trial this court ruled that the indications were admissible in terms of s 258 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The accused's objections were found to be without merit. The full reasons for the ruling were given and we find no reason to repeat them in this judgment suffice to state that the accused's assertions were found to be false.

The exhibits produced after a trial within a trial are as follows;

Exhibit 4:

These are the indications made to Sergeant Jandura by the accused on 13 January 2015 and also contain indications made to Sergeant Jandura by the accused's children talent Mupuna

and Nickson Mupuna on 28 December 2014 before the accused's arrest. In brief the salient points on exhibit 4 are as follows;

Point A: this is the bed room hut the accused and the now deceased were sleeping on the fateful night.

Point B: this is a point behind the kitchen hut where Talent Mupuna said the axe exh 3 was kept. It is also the same point the accused indicated he took the axe from on the fateful night.

Point C: this is the place the accused indicated he stood in the bedroom hut holding the axe on the fateful night as he talked to the now deceased.

Point D: this is the place inside the bedroom hut where the accused indicated he struck the now deceased with an axe and is the same point Talent Mupuna indicated she found the deceased's lifeless body.

Exhibit 5:

These are notes contemporaneously made by Sergeant Jandura on the indications the accused made to Sergeant Jandura at the scene of crime on 13 January 2015 and culminated in the drawing of the sketch plan exhibit 4.

Exhibit 6 (a) to (m):

These are photographs of the accused as he made indications to Sergeant Jandura from Dotito Police Station to the scene of crime. We note that the photographs depict the following important indications;

Exhibit 6 (h)

Being the place the accused picked the axe behind the kitchen hut.

Exhibit 6 (i)

Depicts how the accused held the axe as he approached the bedroom hut in which the now deceased was sleeping.

Exhibit (j)

Shows the place the accused said the now deceased was seated inside the bedroom hut when he first struck her with the axe.

Exhibit 6 (k)

Is the place where the accused indicated the now deceased was kneeling when the accused struck her for the second time on now deceased's head.

Exhibit 6 (l)

Is the point in the bush where the accused said he took a rope in an attempt to commit suicide by hanging after striking the now deceased with an axe and

Exhibit 6 (m)

Is the tree in the bush the accused said he wanted to hang himself at.

THE EVIDENCE

The evidence of Talent Mupuna, Constable Kudakwashe Taengwa, Tonderai Chinyerere and Dr G. Mapiye was admitted in terms of s 314 of the Criminal Procedure and Evidence act [*Chapter 9:07*]. For the completeness of the record we summarise it as follows:

DOCTOR G MAPIYE

We have already dealt with his evidence when we dealt with exhibit I the post mortem report.

TALENT MUPUNA

She is a daughter of the now deceased and the accused. Her evidence is that on the fateful night between 27 December and 28 December 2014 at 2000hrs she left their home to go and sleep at her grandmother's home and left that accused, her mother the now deceased and her brother Nickson seated in the kitchen hut. She is the one who first discovered the now deceased's body on 28 December 2014 in the bedroom hut of her parents when she returned home at about 0600 hrs.

CONSTABLE KUDAKWASHE TAENGWA

He is a police officer based at Karanda Police Base and received the report of murder on 28 December 2014 about 0700hrs after which he attended the scene of crime later with Sergeant Jandura. His testimony is that at the scene of crime he was shown the now deceased lying in the bedroom hut with an axe embedded on her head. The accused was nowhere to be found. He said

the accused was later arrested at the Mozambican border on 12 January 2015. Lastly he said he accompanied Sergeant Jandura when the accused made indications at the scene of crime and photographs exhibit 6 were taken.

TONDERAI CHINYERERE

He is a mortuary attendant at Mt Darwin Hospital and is the one who received the now deceased's body from Sergeant Jandura on 28 December 2014 for safekeeping awaiting a post mortem.

We now turn to *viva voce* evidence which was led.

NICKSON MUPUNA

He was 19 years old and is now deceased's and accused's first born child. He said in their family there are 4 children and Talent is the last born child.

Nickson Mupuna (Nickson) said it is the accused who advised him that on 25 December 2014 the accused had fought a fellow villager one Francis Muparira and he was not aware of the reason the two had fought. He said the accused proceeded to report that incident to Karanda Police base on 26 December 2014.

Nickson testified that on the fateful day all was well between his parents the accused and the deceased as they were talking and laughing together. In the evening he said the now deceased cooked supper which they all ate and retired to bed. He said it was only the next morning when his young sister Talent alerted him that the now deceased was dead in his parents' bedroom hut causing him to raise alarm and people gathered. His father the accused was nowhere to be found.

Under cross examination he told the court that the accused and the deceased had quarreled over a report made to Village Head arising from the fight between the accused and Francis Muparira. He said on the fateful night he did not hear any noise from his parents' bedroom hut and that it is the accused who came to Nickson's bedroom hut at about midnight to charge accused's cellphone. Nickson said he was not aware of any cattle which escaped from their cattle pen that night.

The evidence of Nickson is not challenged and is therefore admitted.

SHUWA MUPUNA

He is an elder brother to the accused.

Shuwa Mupuna (Shuwa) said he was aware that the accused and Francis Muparira had fought at the local business centre on 25 December 2014 but was unaware of the cause of the fight. He said he was called to the accused's homestead on 28 December 2014 where people had gathered in the morning and was led to accused's bedroom hut where he saw the now deceased lying face down with an axe embedded in her head. He is the one who went to report the matter to the police and said accused was nowhere to be found.

Shuwa said the now deceased's posture was that her head was on the floor and the lower part of her body was on the bed and that she was dressed. He said he was not aware of any marital problems between accused and the now deceased nor of the alleged love affair between Francis Muparira who is their nephew and the now deceased. Shuwa said the axe blade was fully embedded in now deceased's head and the axe handle was still there.

Again the evidence of Shuwa is uncontroverted and we accept it *in toto*.

SGT CUTHBERT JANDURA

He is the investigating officer in this case and first attended the scene of crime on 28 December 2014 where he found the now deceased body lying on the floor of the bedroom hut. He said he observed the following;

- a) that there was a deep cut on now deceased's cheek.
- b) an axe was embedded in now deceased's head being the whole axe blade.
- c) there was a lot of blood in that room and there were no signs of any struggle.

He said accused who was not present was arrested on 12 January 2015 at the border between Zimbabwe and Mozambique after a tip off by some villagers. He recorded accused's warned and cautioned statement and caused it to be confirmed. He said he caused post mortem to be done on now deceased.

Under cross examination Sgt Jandura said accused never told him about the version accused was now giving in his defence outline that on the night in question he found one Francis Muparira inside accused's bedroom hut. He said all what accused told him was that accused suspected that Francis Muparira was having an affair with the accused's wife and that accused had reported an assault case against Francis Muparira at the local Police base. Sgt Jandura said during his investigation he was not able to contact Francis Muparira to inquire about the alleged

love affair as Francis Muparira did not come to the Police Station after he left a note for him to report to the Police.

Our view is that Sgt Jandura gave his evidence very well and we found no cause why he would mislead the court. His evidence on what he did is largely unchallenged. As was observed during the trial within a trial he has no motive to falsify his evidence. We therefore accept his evidence.

THE ACCUSED'S EVIDENCE

The accused adopted his defence outline as part of his evidence.

The accused said on 25 December 2014 he failed to find his wife the now deceased at home and he called her on her mobile cellphone and she said she was at the local business centre. Accused said he went to the local business centre and that when he got to the business centre in the bush he saw a light of a cellphone and on approaching the place he found his wife having sexual intercourse with Francis Muparira. Accused said he confronted the two and Francis Muparira assaulted him but he did not retaliate. The next day 26 December 2014 the accused said his sister in law resolved the dispute between the now deceased and the accused amicably. The accused said he advised the village head about the assault by Francis Muparira and the Village Head advised him to report to the Police which he did to Cst Taengwa.

The accused said his wife was not happy that he had reported the incident to the Police and the Village Head but that accused explained that he had to report the assault to Police for him to be treated.

As regards the events of the night in question the accused said his wife said their cattle had escaped from cattle pen and he went to drive the cattle back into the cattle pen. Upon his return accused said he found Francis Muparira and his wife in his bedroom having sexual intercourse. The accused said he asked who was in his bedroom and Francis Muparira arrogantly asked accused who he was as Francis Muparira rose from accused's bed.

The accused evidence is that it is Francis Muparira who started to assault accused and that accused's wife assisted by holding the accused. The accused said it is his wife the now deceased who took an axe intending to hit the accused and that accused held the axe in self-defence.

The accused said he dispossessed his wife of the axe and wanted to strike Francis Muparira in order to have evidence that he has found Francis Muparira in his bedroom. Instead accused said Francis Muparira ducked the blow and accused struck his wife the now deceased who was behind Francis Muparira. Accused said he did this twice but ended up striking his wife.

It is accused's evidence that Francis Mupariri fled and that the accused chased after him.

The accused said this is the same version he gave in his warned and cautioned statement but the police chose not to record it.

The accused said his defence counsel erred by wrongly recording his defence outline when he is alleged to have said his wife provoked him causing him to lose self-control. He said the truth of the matter is that his wife never talked to him at that point.

In explaining how he ended up striking his wife with the axe the accused said his first blow was aimed at Francis Muparira who ducked and he hit his wife who was behind Francis Muparira. As regards the second blow accused said he struck at his wife who was now in front of Francis Muparira because accused was now angry.

The accused said when he fled from his homestead he was not aware he had fatally injured his wife. The accused said he would not dispute that he left the axe embedded in his wife's head.

Under cross examination accused was taken to task about the truthfulness of his version of events in night in question and he insisted that that it is what happened. The accused however said his wife did not provoke him that night.

ANALYSIS OF EVIDENCE

It is common cause that the now deceased died as a result of being struck with an axe on the head by the accused. This is not disputed by the accused and is confirmed in exh 1 the post mortem report.

The only narrow issue to be resolved by this court is whether the defences of provocation and self-defence are available to the accused.

In terms of s 239 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] the defence of provocation can only be a partial defence to the charge of murder and may reduce the charge of murder to Culpable Homicide if the elements outlined in s 239 (1) and (b) of the

Criminal Law (Codification and Reform) Act [*Chapter 9:23*] are satisfied. If those elements are not satisfied then the issue of provocation may simply be mitigatory to the charge of murder.

The defence of self-defence is as provided for in s 253 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is a complete defence to a charge of murder. However the requirements outlined in s 253 (1) (a) to (d) should be satisfied. In terms of s 254 the defence of self-defence may be a partial defence to the charge of murder if all other requirements outlined in s 253 (1) are met except the requirement that the means used to avert the unlawful attack were not reasonable in the circumstances.

Our assessment is that the accused is not a truthful witness at all. While it may be true that accused suspected that the now deceased had a love affair with one Francis Muparira and that he fought Francis Muparira at the local business central on 25 December 2014 the rest of the accused's evidence is manifestly incredibly to the extent that it is completely false. Why do we say so?

- (a) In his defence outline the accused never raised the issue that on 25 December 2014 he found Francis Muparira and his wife having sexual intercourse in the bush near the local business centre. The accused only raised this in his evidence in chief and it is clearly an afterthought.
- (b) The version the accused gave on how he located the now deceased and Francis Muparira on 25 December 2014 having sexual intercourse in the bush is totally incredible. Accused want us to believe that he simply coincidentally found the two being intimate in the bush at night.
- (c) The accused's story of the events of the fateful night cannot possibly be true by any stretch of imagination. It is poorly thought out and cannot be seriously considered by this court. It is incredible that the deceased would invite a boyfriend into their bedroom after the accused had just gone to the nearby cattle pen to attend to cattle at night. How did the now deceased know the time the accused would spend at the cattle pen and why would she take such a foolish risk? Further why would even Francis Muparira agree to such a poorly thought out arrangement. No reasonable court would accept such an account.

(d) The existence or presence of Francis Muparira in accused's bedroom hut on the night in question is simply not true. This is why accused did not mention it in his warned and cautioned statement exh 2. It is also why it did not form part of accused's indications as per exh 4, exh 5 and exh 6. It is simple something the accused later conjured up hoping to pool some wool over the eyes of the court. We therefore reject it with the contempt it deserves.

Our conclusion is that the accused's defences of provocation and self-defence are underpinned by falsehoods. Consequently the defences cannot be available to the accused. This explains why the accused was not even consistent in his evidence. Few examples will suffice.

- (i) in his defence outline the accused said he was provoked by the utterances of his wife when he found Francis Muparira in his bedroom but in his evidence he said his wife never uttered a single word.
- (ii) in his defence outline he said he fled in shock after realising he had killed the now deceased with an axe but in his evidence he said he left his residence running after Francis Muparira.
- (iii) The version of how he struck the now deceased with an axe twice in his defence outline is different from the version he later gave in his evidence.

In the result we totally reject the accused's version of events on the night in question and accept the version proffered by the state. The simply inescapable conclusion is that the accused was consumed by jealous and was suspicious of his wife's infidelity and he callously murdered her in cold blood.

Consequently the accused is found guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relate to murder with actual intent.

VERDICT:

Guilty of contravening s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] – Murder with actual intent.

SENTENCE

In arriving at the appropriate sentence we have to balance the mitigatory and aggravatory factors of this case.

The State has urged this court to impose a sentence of imprisonment for life. The accused on the other hand has asked that we impose a sentence of 10 years imprisonment or less.

We have considered the accused's personal circumstances. The accused is 39 years old and has 4 children, three of which are still minor children. Since the accused is now the only surviving parent it means that the children would be adversely affected if accused is incarcerated for a long period of time.

Since the accused is a first offender he deserves to be treated with some measure of leniency. We have considered the accused's favour that he has suffered from pre-trial incarceration period of about one year and two months. The accused was arrested on 12 January 2015 and had been in custody to date. It is clear that accused was anxious for all that period to know how this criminal trial would be finalized.

From the facts of the case of the accused believed that his wife the deceased was unfaithful hence accused's fight on 25 December 2014 with the alleged lover Francis Muparira his nephew. To add salt to injury the accused lost the fight and should have felt further humiliated. The accused proceeded to report the matter to the Police but it would appear the police did not take immediate action. This probably explains why accused decided to take the law into his own hands. We therefore accept that the suspicion of infidelity of his wife inflamed tempers and passion and that this resulted in accused's violent conduct. To that extent we find an element of provocation in that accused subjectively harbored the belief that his wife was unfaithful.

The courts on the other hand have a duty to always uphold the sanctity of human life. No person has the right to shed the blood of another, whatever are the circumstances.

It is disheartening that cases of domestic violence leading to loss of lives are very prevalent. A lot of spouses, especially females have lost their lives at the hands of their loved ones.

Instead of being perpetually loved they have instead been rewarded with violence or even death.

From the facts of the case the accused's suspicious of unfaithfulness on the part of his wife were not well founded. Even if they were true accused should not have resorted to violence.

It is clear that this was a well pre-planned and premeditated murder. The deceased lost her life in a cruel, violent and callous manner. The accused simply ended the life of his wife in cold blood. In our view a deterrent sentence is called for.

The accused is therefore sentenced to 15 years imprisonment.

*National Prosecuting Authority, State's legal practitioners
Sande & Atukwa, Accused's legal practitioners*