

THE STATE
versus
NYASHA MANDANDA

HIGH COURT OF ZIMBABWE
MATHONSI J
GWERU 29 MAY 2018 AND 30 MAY 2018

Criminal Trial

T Mupariwa for the state
Z Tapera for the accused

MATHONSI J: The accused is charged with the murder of his wife Natsiwe Moyo who, at the time of her death, was aged 23 and lived with the accused at Vanguard Mining Compound in Mberengwa. The specific allegations are that on 23 March 2017 at that Mining Compound, the accused had unlawfully caused the death of the deceased by stabbing her with a knife above the collarbone intending to kill her or realizing the real risk or possibility of that conduct causing death but continuing with it notwithstanding.

The accused pleaded not guilty to the charge and surprisingly did not even offer a lessor plea of guilty to culpable homicide given the circumstances under which his wife died. Instead the accused appeared to raise in his defence outline the defence of person in an effort to ward off the charge. He stated that on the fateful day the deceased had become abusive towards him by insulting him over a cellphone issue which had long been resolved. She had then become violent and started assaulting him with a frying pan inflicting injuries on the back of his head.

After assaulting him with a pan the deceased picked up a knife and advanced towards him intending to harm him and screaming that she would kill the accused. This forced him to flee with the deceased in hot pursuit. At some point the accused disarmed the deceased who still jumped at him resulting in her being stabbed as he tried to defend himself against the deceased. Appearing to contradict himself given he had claimed to have stabbed the deceased in self-

defence, the accused stated that he stabbed the deceased accidentally before assisting in ferrying her to the clinic.

The doctor who conducted the autopsy on the body of the deceased observed only one wound which was 2 x 1cm on the right clavicular region, 2cm from the neck's base and 10cm from the right shoulder. On conducting an internal examination the doctor made the following observations;

“Haemorrhagic infiltration around right clavicle.

- Wound number (1) is penetrating inside body through right clavicle and 1st rib of this side up superior lobe of right lung and produced wound of 2cm of superior lobe of right lung and penetrated thoracic cavity. No ribs neither clavicular fractures.”

He also observed circular haemorrhagic infiltration of the right parietal scalp and a circular haemorrhagic infiltration of right parieto-occipital scalp. He concluded that the cause of death was:

- “1. Hypovolemic shock
2. Damage of right lung, haemopneumothorax
3. Stabbing injury.”

Most of the evidence of the state, except for that of Nemelia Moyo and Sifelumusa Zhou was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] as it appears on the state summary. The evidence so admitted is to the effect that Fortune Siziba, a motorist residing at Vanguard Mine Compound, responded to an SOS on 23 March 2017 to ferry what he described as the “badly injured” deceased to Mberengwa Hospital in his Subarn motor vehicle. Although he quickly responded to the call and rushed the deceased to the hospital in question, she was pronounced dead on arrival. Getrude Zhata, a police officer based at Zimbabwe Republic Police Mberengwa, conveyed the deceased's body to United Bulawayo Hospitals for a postmortem and the body did not suffer any further damage.

The investigating officer, Nkululeko Ncube, a police officer based at ZRP Mberengwa, attended the scene of crime and observed a stab wound on the body of the deceased. After charging the accused with murder, he recorded a warned and cautioned statement from the accused on 24 March 2017 which the accused gave freely and voluntarily without any undue influence being brought to bear upon him. This witness also took the accused for indications at

the scene. On 25 March 2017 following a thorough search he recovered the knife which was used to stab the deceased, exhibit 5, which had been thrown away at a bush near the scene.

Constable Mandiva witnessed the recording of the warned and cautioned statement from the accused by the previous witness. He also witnessed the indications made by the accused both of which were done in accordance with the law. There is also the evidence of Dr Roberto Trecu who conducted the post mortem and compiled a report which I have already alluded to above.

Having made reference to the warned and cautioned statement of the accused it is appropriate to state that it was confirmed by a magistrate on 24 March 2017, the very day of its recording. It was therefore admitted by this court as evidence on its mere production by the state. This is in accordance with the law. In that statement the accused said:

“I admit to the charge of murdering my wife Natsiwe Moyo leveled against me. I had a misunderstanding with my wife whilst at work in the afternoon on the 23rd of March 2017 over an issue of a cellphone which had already been resolved by her parents. I found my wife already with a cellphone when I came from work yet in our house I know that there was no money. I then asked her about the cellphone she had bought and where she had found the money from, she said it was not my business to know where the money came from and I ignored her. She then started the same issue when I returned to Vanguard while at work and I reprimanded her and told her that matter had been resolved and said that if she had a deadly poison, she would lace my food with it. I ignored her and when we got back home, I changed my clothes and went out for about two hours, I then returned, she continued again with that same issue and that is when she stood up and picked a pan and struck me at the back of my head and then threw it on the floor and took a kitchen knife and advanced towards me. I retaliated and somehow snatched that knife from her and began to use it to defend myself with it and it was then that she got stabbed by it. That is all I can say.”

Nemelia Moyo and Sifelumusa Zhou, both relatives of the deceased, gave oral evidence on behalf of the state and corroborated each other in many respects regarding what transpired on the night the deceased met her death. According to Nemelia, the deceased's elder sister, the deceased had been married to the accused for quite sometime and their oldest child is 8 years old. However their marriage was an abusive one and the deceased would from time to time leave the accused returning to her parents owing to the abuse she was regularly subjected to.

On 23 March 2017 at about 1600 hours she had accompanied the deceased to the borehole to fetch some water as they lived at the same compound although she occupied a room

behind that of the deceased and accused. The deceased had confided in her that each time the accused was drunk he became abusive resulting in quarrels. She had sought the witness's advice and she had reminded the deceased that their mother had counseled that she should return home if she encountered problems.

Later the accused had gone to the shops to buy relish for his family only to return having bought milk for supper. He instructed the deceased to prepare supper before inviting the witness to join them against her will. Although she had supper with milk with the accused and the deceased before retiring to her own room, the deceased soon approached her requesting to be accompanied to the shops to buy chicken cuts as the accused was then insisting he wanted to eat meat. When they returned with the meat the deceased proceeded to cook for the accused while she went to take a bath.

While bathing, Sifelumusa came to inform her that the accused and the deceased were quarreling. She called their mother on the phone to report the latest squabble and as she bathed, she heard the noise of a breaking window pane followed by the screams of the deceased calling out her name and stating that she was being killed. This was shouted four times causing her to rush to the scene. Upon arrival, she beheld the deceased kneeling by the veranda holding a blanket on her left hand suggesting that she had tried to flee from the accused before being stabbed. She observed blood oozing from her and on further inspection she noted the blood was coming from a stab wound inflicted on the deceased's neck. On inquiring what had happened the deceased informed her that she had been stabbed by the accused as they quarreled over relish, the accused having taken her to task for preparing supper with milk when he wanted meat. Those were to be the deceased's last works because, although she bandaged the wound with a pillow before covering it with the blanket, the deceased stopped talking. She was ferried to hospital in a motor vehicle she had sent for but had already died.

The witness added that the deceased was crippled after she had fallen from a tree at the age of five as a result of which she sustained a head injury which caused her speech to stammer and paralysed her right hand. It made her right leg longer than the other giving her a limp.

After stabbing the deceased the way he did the accused left the scene and only emerged in front of the motor vehicle before it took the deceased to hospital. Most of Nemelia's

testimony was corroborated by Sifelumusa who added that when the accused and the deceased started quarrelling, the former was heard shouting aloud accusing the deceased of bending over too much as she prepared food without a wrapping cloth exposing herself for gold panners to ogle her. She stated further that from the time she started staying with the couple (she occupied a room behind theirs) on 13 January 2017, she observed that the accused would frequently assault the deceased each time he arrived home drunk.

The state witnesses presented their evidence very well. Although it has been suggested that the two state witnesses are interested parties, most of the evidence that they presented was either common cause or was corroborated by the accused person himself, as shall become apparent in due course. We have no reason whatsoever not to embrace that evidence.

The accused person stated that he had bad relations with virtually all the members of the deceased's family except for Sifelumusa whom he says he related well with. Although he did, he still took the view that the young girl is bitter over the loss of her cousin sister and was being influenced by others to falsify evidence against him. His father in law was angry with him because he had not paid lobola for the deceased and therefore influenced the deceased to reject him which she did in the presence of her parents. His mother in law was angry with him and preferred to take the deceased away. The two parents told him in the face that they would rather let the deceased engage in prostitution and make money for them than remain in a marriage when the accused had not paid lobola. The deceased's maternal aunt was also bitter that she had married someone from a wrong clan and wanted the marriage dissolved. Nemelia, the deceased's sister, is a prostitute who wanted to take the deceased away and introduce her into the world of prostitution. The deceased herself behaved so improperly that not only did she come up with a cellphone suspected to have been procured through prostitution, she told him in the face that she would rather engage in prostitution than to be pestered by the accused. She was also in the unacceptable habit of putting on indecently short skirts and bending over while cooking exposing herself to gold panners.

It is therefore strange that the accuse still wanted to hold onto the deceased when he despised everything to do with her family and herself especially as he claims that this crippled

woman, who was also despised by his own family members, was also abusing him. He claimed she would regularly and systematically assault him. I think the accused needs help.

Be that as it may the accused's version is that after they had part-taken in the supper with milk they retired to bed. It was then that the deceased, whom he described as an irritable person who easily got angry each time they had a misunderstanding and would assault him regularly without him retaliating, had suddenly raised their dispute over a cellphone which had been resolved amicably six months earlier in September 2016. His idea of amicable settlement however is that he confiscated the phone and kept it until she died.

As they slept on the floor the deceased stood up and armed herself with a frying pan which she used to strike him at the back of the head. He pushed her causing her to fall and as she rose she picked up a knife, exhibit 5, and advanced at him intending to harm him.

The accused stated that he then exited the room but the deceased followed him to the veranda. It was there as he treated that he succeeded in disarming the deceased and got possession of the knife. Although the accused was now armed with a knife, the deceased still charged at him and flung herself at him. He does not say what the deceased intended to do by that course of action but says he has forced to lift both his hands in an effort to defend himself with one hand holding the knife. The deceased then got herself stabbed by the knife.

At that stage the accused says he realized he had hurt his wife but by accident. Instead of rendering assistance to her, he says he froze but still walked away and stood at a safe distance from where he witnessed the state witnesses rendering first aid. He only surfaced to get into the vehicle which was transporting the already dead wife to hospital.

The accused confirmed the evidence of the state witnesses that the deceased and himself were always fighting. He confirmed that on the night in question they had had supper with milk. He confirmed that at some point he had reprimanded the deceased for bending indecently without a wrapping cloth while preparing food and that on the night in question he clashed with the deceased noisily which noise was heard by Sifelumusa. He corroborated the evidence of the state witnesses that immediately after she was stabbed the deceased had cried out calling Nemelia by the name of her child and that he had left the scene after stabbing the deceased only to re-surface when the vehicle was ferrying her to hospital.

In that regard, it becomes extremely hard to accept that these witnesses would be on point in respect of all that only to falter on the cause of the fight and that he was an abusive husband. In fact he also admits that the deceased would leave him to return to her parents owing to squabbles they had.

The nature of the accused's defence is that of defence of person. It is a defence which is available to an accused person who is able to satisfy its requirements as set out in section 253 of the Criminal Law Code [Chapter 9:23]. It provides:

- “(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, and
 - (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 he or she could not otherwise escape from or avert the attack, and
 - (c) the means he or she used to avert the 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.”

Subsection (2) of section 253 requires the court determining whether the above requirements have been met to take into account the circumstances in which the accused found himself or herself in including any knowledge or capability the accused person may have had including any stress or fear operating on his or her mind.

In our view the requirements of this defence have not been satisfied by the accused. There can be no doubt that he was not under an unlawful attack when he stabbed the deceased. Even by his own version, which is a tissue of lies, he had disarmed the deceased of the knife and was under no threat at all. The deceased was unarmed when she was stabbed and only had a blanket in her only effective hand, regard being had that her right hand was paralysed. Indeed no attack was imminent at all even by his false version. He cannot seriously expect anyone to accept that the attack was in the form of the deceased flinging her body at him. Therefore the act

of stabbing the deceased was not necessary at all and the means of stabbing an unarmed crippled woman cannot by any standard be reasonable. We therefore reject the defence of defence of person as being unavailable to the accused.

It must have been upon the realization of that fact that *Mr Tapera* for the accused sought to side step that defence and suggest that the stabbing was accidental. In our view the accused cannot shelter under that either because he did not even tender a limited plea of guilty to culpable homicide which shows his lack of *bona fides*. More importantly, the mortal wound sustained by the deceased cannot be said to be an accidental one. This was a stab wound which penetrated the body through the right clavicle and the first rib and went on to puncture the lung producing a 2cm wound on the lobe of the right lung. It penetrated the thoracic cavity suggesting that a lot of force was used.

We conclude therefore that in stabbing the deceased the way the accused did he realized the real risk or possibility of death resulting from his actions but continued notwithstanding.

Accordingly the accused is hereby found guilty of murder with constructive intent.

Reasons for sentence

In considering an appropriate sentence we take into account the accused's personal circumstances namely that the accused is now 34 years old. He was married to the deceased with whom he had an 8 year old child as well as a 6 year old one. Those children are now orphaned.

The accused spent fourteen months in custody while awaiting trial which period should be discounted from the sentence that the court was going to impose in order to encourage the state to also make an effort to bring accused persons to trial within a reasonable time. We also recognize that the accused is a first offender who had led a blameless life until the fateful day.

What we however have here in an extreme case of gender based violence which has no place whatsoever in a civilized society. The deceased was subjected to an extended period of domestic violence by a coward and pathologically jealous man who would not even allow her to earn a living gold panning on her own. A man who would prefer to engage in that activity with her and not only stalked her throughout but elected to choose her wardrobe for her. A man who did not recognize the independence of the wife to such an extent he chose her wardrobe for her.

Throughout her sorry marriage accused still systematically subjected her to beatings as if for fun quite oblivious of her disability. Something had to give and indeed the accused eventually drove a kitchen knife into her in a violent manner thereby ending her life tragically. This court has repeatedly counseled men still stuck in a time-capsule of the rudimentary feudalists who still believe that women are objects of appropriation to be treated with disdain before being killed the way the accused killed the deceased, that their time is up. We live in a society where women enjoy full legal rights and should be respected.

This is a matter calling for a sentence which shows not only that human life is sacrosanct but that women should be protected by our courts at all times. These courts will not stand akimbo as women are subjected to this kind of treatment at a whim.

In the result, the accused is hereby sentenced to 17 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Magodora and Partners, accused's legal practitioners