

THE STATE**Versus****TENDAI NKOMO**IN THE HIGH COURT OF ZIMBABWE
BERE J with Assessors Mr F. Dube and Mr T.E. Ndlovu
HWANGE CIRCUIT COURT 9 & 10 MARCH 2016**Criminal Trial***Miss N. Ngwasha* for the state
T. Mukuku for the accused

BERE J: It was a tragic end to the deceased's life. She was barely 23 years at the time of her death. The accused stands charged with the crime of deceased's murder to which he has offered a plea of innocence.

The material facts constituting this matter which are common cause are as follows:

The accused and the deceased were a young couple with one minor child aged three years at the time. Their relationship was on the rocks and for some time they had experienced what could be referred colloquially be referred as an "on and off" relationship. Their matrimonial discord had spilled over to the deceased's family and from the look of it they appear to have failed to successfully assist the two. This then led the deceased to take refuge at her sister's place. On 10th of September 2015 the accused walked the deceased from the flea market where the deceased was working to her sister's place of residence. Incidentally the deceased's sister had left for Harare on a private visit. There the deceased was seen doing laundry whilst the accused was helping himself to two two-litres of opaque beer whilst their little boy was playing close by. This was around 18:00 hours. The next thing of significance was that the deceased was heard by neighbours screaming for assistance. Three neighbours rushed to the place in response to this distress call. After struggling to push open the kitchen door from where the distress call was emanating from three state witnesses found the accused busy assaulting the deceased who was down and screaming in agony. No sooner had the witnesses rescued the

deceased and held the accused to restrain him from further punishing the deceased did the deceased draw the attention of the witnesses to the murder weapon, a kitchen knife that was sunk deep in her back close to her shoulder pleading with the witnesses to pull it out. The deceased's clothes were found to be soaked in blood. Like typical good Samaritans the three witnesses quickly arranged for the deceased to be conveyed to Hwange Hospital for treatment whilst seeking police assistance to unravel the cause of this tragic assault. As fate would have it the deceased died on the same evening on admission at Hwange Hospital.

Whilst the state alleged that the accused had deliberately and intentionally assaulted the deceased to death the accused pleaded innocence and said it was the deceased who had conducted herself in an aggressive manner and armed herself with the murder weapon after the two had picked up a quarrel over a love message that had appeared on the deceased's cellphone.

The evidence surrounding the origins of the dispute is privy to the accused only and the court will give the benefit to the accused. The accused person went further to raise the defence of self defence.

In terms of our codified law as informed by section 253¹ thereof this defence can be a complete defence leading to the acquittal of the accused if successfully pleaded and its requirements can be summarised as follows: there must have been an unlawful attack on the accused person, the attack must have either commenced or perceived to be imminent by the accused. In response thereto the action taken by the accused must have been necessary to avert the attack and the means used to avert that attack must have been reasonable given the circumstances of the case. See also *A Guide to the Criminal law of Zimbabwe*.²

1. Criminal Law (Codification and Reform) Act [Chapter 9:23] (the Code)
2. *A Guide to the Criminal Law of Zimbabwe* by G. Feltoe second edition published by Legal Resource Centre in 1997 at p 45

In order to ascertain whether or not the defence of self defence is sustainable the court is enjoined “to take due account of the circumstances in which the accused found himself/herself including any knowledge or capability he or she may have had and any stress or fear that may have been operating in all the circumstances.”³

It is with this in mind that we must now proceed to analyse the evidence that was presented in this court by both the state and the defence.

The state case was built around the evidence of Weston Chemhere, Moses Sanudi, Sarah Phiri, Rachel Luphahla, Dumisani Mwindi and Doctor Roberto Trecu. The defence case was limited to the *viva voce* evidence by the accused person.

The evidence of Sarah Phiri, Dumisani Mwindi and Doctor Roberto Trecu was admitted into the court record as recorded in the state summary in terms of section 314 of the Criminal Procedure and Evidence Act⁴ and so was the murder weapon, exhibit 3. The evidence of Weston Chemhere, Moses Sanudi and Rachel Luphahla was given in court and was tested through cross-examination.

The evidence of the two state witnesses Weston Chemhere and Moses Sanudi, was particularly critical in this case because it placed this court at the scene of the crime. Both witnesses testified that when they responded to the distress call by the deceased they had to force open the door and that they were shocked with what they saw. The two saw the accused viciously assaulting his wife, the deceased who was down and helpless. They were further shocked to discover upon indication by the deceased that the murder weapon was still sunk in her body and that she was bleeding profusely as evidenced by her clothes which were soaked in blood.

It is clear that the accused could not possibly have been assaulting the hapless deceased in self-defence in those circumstances.

3. Section 253 (2) of the Code (*supra*)

4. Chapter 9:07

It is not accidental that the accused did not disclose to the three rescuers of the deceased that it was him who was under threat. A person under threat or attack does not continue to attack an overpowered woman who is down and helpless. The action of the accused as observed by the three witnesses speaks volumes to his aggression towards the deceased. Even if one were to assume the deceased was initially the aggressor, what is clear is that the accused clearly exceeded the bounds of self-defence.

The accused's explanation that he was assaulting the deceased because she was biting her feet does not add up given the state of the deceased as observed by the three state witnesses. It is not usual that credibility of state witnesses is confirmed by an accused person. This is one such rare case. We accept the version of the state witnesses as having projected nothing else but the truth. A further leaf to their credibility is the witnesses' unwillingness to be drawn to comment on what may have started the fight. They simply pleaded ignorance of that.

The accused did not project himself as an honest or credible witness basically from three fronts. His averment that the brawl with the deceased started outside the house cannot possibly be true given the evidence of the three witnesses who gave evidence in court. It is clear that if the fight had started outside the house these witnesses would have been privy to it.

Secondly and more importantly is the accused's averment that all the injuries caused on the deceased were accidentally caused by the knife as the two were tussling for the possession of that knife. This would not make sense given the various points on the deceased's body which came under attack and the depth of those wounds as described by the post mortem report – exhibit 2.

It further weakens the accused's story that of all the injuries that he purports to have sustained from the deceased, none were seen by the state witnesses and further that he was never treated for such wounds. If there were any such injuries, the police in their wisdom could not have failed to note them and facilitated his treatment.

Having accepted the evidence of the state witnesses as representing the truth in this matter, the court must now proceed to consider the appropriate verdict.

The prosecution initially pushed for the verdict of murder with actual intent and we expressed our reservations for that verdict. Our reservations stemmed from the fact that as a court we remain clueless as to how the assault of the deceased started. Our view is that it is possible the deceased may have been the initial aggressor as suggested by the accused. We are not able to completely reject that position in its entirety.

Having given the accused the benefit of doubt on this point we accept that whatever happened initially there is overwhelming evidence that the accused went over-bounds in defending himself and in doing so we find comfort in leaning on the evidence of the two state witnesses who testified.

We are also of the view that if indeed the accused had the actual intent to kill the deceased, there was nothing to stop him from pulling the knife and continue to stab her as she lay down helpless and screaming. Our reading of the evidence is that by stabbing the deceased on various parts of her body, and continuing to assault her knowing fully well that she had the murder weapon in her body, the accused must have subjectively foresaw the real possibility that he would fatally injure the deceased and he was reckless as to whether or not that occurred.

The proper verdict must therefore be murder with constructive intent. Consequently the accused is found of having committed the crime of murder with constructive intent.

Sentence

In considering what we perceive to be an appropriate sentence in this case we will be guided by the following factors.

In mitigation of the sentence we do accept that this murder was not committed in aggravating circumstances as anticipated by section 48 of our Constitution.

The accused had partaken of alcohol and this must have affected his power of perception.

The accused, despite being 32 years old, he still remains a young offender who appears to have been overwhelmed by the situation he found himself in. He appeared to love the deceased but unfortunately for him it would seem that the deceased no longer loved him if we are to accept the evidence of Rachel Luphahla, the deceased's elder sister. We are satisfied that the accused was driven by passion in committing this offence.

The accused has family responsibilities, particularly the 4 year old boy who must now grow up with one parent. Throughout the proceedings, the accused struck us as someone who was regretting his actions and to that extent we accept that he is remorseful.

In aggravation, we are extremely concerned with offences of domestic violence. Our people must be slow to resort to violence in order to resolve their matrimonial challenges.

The deceased died a painful death given the nature of the stabbing as per the post mortem report. This was a callous and brutal murder done right in front of a crying 3 year old son. We have no doubt that the little boy was subjected to psychological torture by the conduct of the accused person.

A young life was unnecessarily lost, and that life can never be reclaimed again. The sad thing about death is that it has some permanency. Once lost, life cannot be reclaimed.

I am aware of the case referred to me by counsel, the case of *S v Dzaro* but I believe that case is distinguishable. The case occurred in 1996 and during that time we had not as a country experienced an upsurge in many cases associated with domestic violence compared to our present day Zimbabwe.

Secondly, in that case the court was dealing with a young female offender who was barely 19 years old who had been kept in custody for a considerable length of time before the matter was concluded.

In dealing with that case the court was aware of the fact that in this country there are very few women recidivists or repeat offenders.

In the instant case we are dealing with a more mature individual as compared to the situation in *Dzaro*.

Whenever death occurs as courts we have an obligation to constantly remind our people of the need to respect life, there is no better way of conveying the message than by imposing deterrent sentences. Our messages must go loud, clear that killing a fellow human being has serious consequences and that these courts frown at such offences.

We sincerely hope that the sentence we will impose in this case will enable the accused to have time to reflect on this case and move towards personal reformation so that he can once more be a more useful and constructive member of society.

Sentence: 25 years imprisonment

The Prosecutor General's Office, state's legal practitioners
Maronedze, Mukuku & Partners, accused's legal practitioners