

THE STATE  
versus  
ZVENYIKA BASERA

HIGH COURT OF ZIMBABWE  
BERE J  
MASVINGO, 5, 6 and 9 June 2014

### **Criminal Trial – Murder**

*Mrs T. Matenga*, for the state  
*J. Terera*, for the accused

BERE J: The 43 year old accused and the deceased who was 36 years at the time of her death had been husband and wife since 1997. The deceased lost her life due to a severe assault perpetrated against her by the accused in the evening of 24 March 2013. The charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] was a result of the accused's conduct in cutting short the deceased's life. The accused has pleaded not guilty to the charge and offered a limited plea of guilty to the less serious offence of contravening s 49 of Criminal Law (Codification and Reform) Act [*Cap 9:23*]. The State rejected the limited plea tendered and opted to proceed with the main charge of murder.

The facts which are now common cause are that on the date of the fateful assault, the accused in the full glare of his children assaulted the deceased on her knee with a dibble (exh 3). The attack was a violent one and because of this the children screamed out of the homestead to alert other neighbours leaving the accused further assaulting the deceased.

It is not in dispute that the accused continued to assault the deceased several times on the head and ribs with the same dibble whose dimension was given as follows: 90cm in length with a diameter of 2cm, weighing 2,570 kgs and made out of iron. The deceased succumbed to the assault and died on the same evening on admission at Negovano Clinic, Bikita district.

The State summary as well as the defence outline were marked Annexures I and II respectively. The accused's confirmed warned and cautioned statement was marked exh I with the post mortem report marked exh II. The evidence of Inspector Lorraine Mhungira

and Doctor Zimbwa was admitted into the record of proceedings in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*] “the code”.

In addition, *viva voce* evidence was led from Ruramai Muzenda, Rhoda Chakanyuka and Chenekayi Muyambo for the State while the accused himself gave evidence for the defence.

The evidence of Ruramisai Muzenda did reveal the deceased’s appreciation of a serious matrimonial discord with the accused who seemed to have this strong conviction that the deceased was cheating on him.

In addition the evidence of Ruramisai also projected the deceased as a responsible and caring wife who was concerned with the accused’s welfare as evidenced by her effort to ensure that the accused had a decent meal on the evening the deceased met her fate.

Ruramisai took us through the whole episode leading to the demise of the deceased and our unanimous assessment of her evidence is that she told us all as it happened. There was no exaggeration in her testimony and in our view her evidence passed the total credibility test because it was in line with the other evidence led by the State witnesses except portions of the accused’s testimony.

The evidence of Rhoda Chakanyuka equally fitted into the evidence of Ruramisai and she too confirmed that the accused chased after the first group of people who sought to ascertain what was happening at the accused’s place in response to the noise that had attracted other concerned neighbours.

Chenekayi Muyambo who gave evidence as the third state witness did not entirely impress the court particularly her denial of the knowledge of the two men, Masure and Peace. As a court, we are unanimous that she deliberately misled the court by pretending not to know these two villagers who were known virtually by all the other witnesses. The court attributes this to the defensive position adopted by this witness when news ought to have filtered to her that the deceased was accusing her of having spread the rumours in the village about the deceased’s alleged infidelity which eventually cost her life.

We however, accept the other aspects of her evidence which were in agreement with the evidence of Ruramisai and Rhoda. All the witnesses were in agreement on the fact that the accused chased after the people who first attempted to render assistance to the deceased.

We found it quite significant that all the witnesses in this case, the accused inclusive, were in total agreement on the extent of the deceased’s injuries and the assistance rendered by the villagers to try and save the deceased’s life.

The evidence of the accused as regards the deceased's alleged infidelity was given as the main reason which led to the deceased's fatal assault by the accused.

In an attempt to justify his conduct the accused sought to rely on the defence of provocation as raised in his defence outline. That position shifted to a defence of self-defence when he gave evidence in chief.

As a court, we were far from being convinced by the attempt by the accused to try and condemn the deceased even in her grave by alleging she was promiscuous during her life time. In an effort to expand on these serious allegations the accused dwelt on a number of occasions but all pinned on two most pronounced ones.

On the first occasion the accused alleged that the deceased came home early in the morning around 0100 hours and he claimed to have seen her wiping out her privacy as testimony of her having been involved in promiscuous relationship on that day.

Surprisingly, and we believe much to the surprise of even members in the gallery, the accused said he did not ask the deceased where she was coming from during that odd hour of the day even when according to him it became clear after he allegedly saw Maseure as the suspect adulterer that morning.

On the second occasion the accused made stunning revelations when he testified to having caught the deceased in an intimate relationship with Maseure in broad day light and outside his homestead a few hours after he had penned out his cattle for grazing within a stone's throw from his homestead.

We found the story by the accused concerning the deceased's alleged adultery as both ludicrous and embellished for several reasons and we did not allow such an exaggerated version to detain or poison our mind.

We were convinced as a court that if indeed the deceased had caught the deceased in such situations on those occasions, he could certainly not have taken such a casual approach like he did. The accused would probably have exploded against either or both the deceased and Maseure or even have committed a serious offence on those occasions because of extreme provocation. No normal or possessive man like the accused whom we had the opportunity to see and hear testify would have behaved in the manner he would want this court to believe.

Secondly, the mere fact that these two incidents, prominent as they were did not even find space in the accused's defence outline heightened our unanimous position that his story was concocted and palpably false.

Thirdly, to imagine that the deceased who was projected as such a caring and lovely wife to the accused through the evidence of Ruramisai could have indulged in such an immoral conduct with Maseure literally right in the eyes of the accused did not make sense to us.

Fourthly, the fact that the accused declined the opportunity to call further evidence to support his story was a clear indication that he fully understood the folly of his own conduct. He did not have the conviction of his own pack of lies hence his full appreciation that none of his many relatives he mentioned could sustain such a story.

We therefore, had not the slightest hesitation in rejecting the embellished story told by the accused. Let me at this stage deal briefly with the defences raised by the accused starting with that of provocation.

In specific intent crimes such as the crime of murder, the defence of provocation can, if properly established act as a partial defence<sup>1</sup>. In order for such a defence to succeed the evidence must establish beyond doubt that the accused in this case, when he fatally assaulted the deceased on 24 March 2013 lacked the intention to kill because he was so angry due to the provocation that he did not realise his actions would result in the death of the deceased.

I must hasten to say that the evidence presented and accepted in this case through Ruramisai Muzenda showed that when the accused came into the hut where the deceased was seated and unsuspecting the accused was firmly armed with the dibble (which turned out to be the murder weapon) which he was holding behind his back to ensure its non-detection before the assault began. Such conduct is not consistent with provocation but premeditation to commit an offence.

Even the exchanges which were carried out between the accused and the deceased which preceded the fatal assault did not give room to the existence of provocation as a defence.

I must now consider the second defence peddled by the accused as he clearly shifted from provocation to the defence of self-defence as he gave his evidence in chief.

The requirements of self-defence as a defence recognise that in appropriate situation an accused may be justified to inflict serious harm against the victim in order to ward off an attack against self.

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<sup>1</sup> See A guide to the Criminal of Zimbabwe 2<sup>nd</sup> Edition, by G. Feloe published by Print Holdings (Pvt) Ltd 1997 pp 30-31

Again, this is not just a fanciful defence but must be borne out by the particular circumstances confronting an accused person before he acts in the manner that he does.

The accused himself gave an explanation as to the circumstances which were present when he attacked the deceased. In one breath he said he hit the deceased in order to punish her for encouraging his enemies Maseure and Peace to pierce his eye and in another breath he said he struck the deceased with a dibble as punishment for her alleged promiscuous conduct.

In the court's well considered view, none of the explanations given by the accused come anywhere nearer to supporting a defence of self-defence.

If one accepts the suspicion which the accused had about the deceased and the explanation given by the accused as the reason for the assault one clearly sees in them a properly defined movement towards the formulation of an intention to seriously injure the deceased with reckless abandon.

This brings me to another critical aspect of this case. The accused in his confirmed warned and cautioned statement admitted to have struck the deceased with a dibble whose dimensions I have already given earlier on. In his evidence in chief and in cross-examination the accused maintained his consistence as regards the manner he struck the deceased several times on the head with such a dangerous weapon.

Exhibit 2, the post mortem report confirmed that the deceased's death was caused by the skull fracture and cervical spine fracture.

It is difficult to imagine what else other than the death of the deceased the accused could have hoped to achieve if regard is had to the weapon used and the targeted part of the deceased's body.

In the court's view, the assault on the deceased was brutal, well planned and well executed starting with the strike on the knee to immobilise the deceased and then followed by persistent strikes on the head to ensure the assignment was neatly carried out to its logical conclusion.

There can only be one verdict and as a court we are unanimous in this regard that the accused be found guilty of murder with actual intent.

**VERDICT** – guilty of murder with actual intent.

**EXTENUATION:**

A finding on extenuation softens the rigidity of the imposition of capital punishment.

In this case, we accept this was a crime of passion. The deceased confided in Ruramisai that the accused strongly believed that the pregnancy she was carrying did not belong to him and that this had created a serious matrimonial discord between the two. We accept this as extenuation.

### **SENTENCE**

Whenever offences of this nature occur the court is enjoined to emphasise or re-state the sanctity of human life. We are also cognisant of the fact that once lost that life is lost forever.

We do accept in this case that the accused being the sole remaining parent has cast upon him the responsibility over his 5 minor children. He has endured some form of punishment by having been kept in custody for 1 year 5 months awaiting the conclusion of this case. That is some form of punishment. This is the first time the accused has come before our courts. That the accused has attempted to find peace with his in laws by paying them some cattle as compensation has not escaped our minds. That there are other customary consequences associated with the murder of a fellow human being will also be taken as some form of mitigatory.

We are extremely concerned with the clear absence of contrition or remorse in this case as demonstrated by the accused's stout effort to continue denigrating the person of the deceased even in her grave by concocting falsehoods about her conduct.

The assault that took the deceased's life was callous and brutal. We agree with the State Counsel that this fatal assault did not only end the life of the 36 year old deceased but it also prematurely ended the life of the unborn baby which she was carrying.

The accused used a dangerous weapon with reckless abandon against this defenceless woman who showed so much love to him.

Women generally expect their husbands to protect them and not to prematurely end their lives like what happened in this case.

The accused had the opportunity to call upon the elders in Mudzingwa Village if indeed he felt his marriage was under threat as opposed to killing the deceased in the manner he did.

That this offence was initiated in the full glare of the deceased's own children shows recklessness on the part of the deceased. The whole episode will probably permanently

remain imprinted in the minds of these little minors whom I believe will be richer without the accused than with him.

A fairly long custodial term is called for. We believe the justice of this case requires the accused to be incarcerated for a period of 25 years imprisonment.

Sentence – 25 years imprisonment.

*Criminal Division of the Attorney General, State's Counsel  
Messrs Mwonzora and Associates, Accused's Legal Practitioners*