

THE STATE
versus
KUDAKWASHE MUSHANDIRA

HIGH COURT OF ZIMBABWE
BERE J
MASVINGO, 9, 10, 12 & 13 June 2014

Assessors: Mr Gweru & Mr Mutomba

Criminal Trial

E. Chavarika, for the State
C. Ndlovu, for the Accused

BERE J: On 7 July 2013 and at House number 347 Ruponeso Street Macheke, Masvingo, the deceased Linda Akim lost her life as a result of stab wounds. There are contrasting explanations given by both the State and the accused as to how the deceased was fatally injured.

The State alleges the accused intentionally stabbed the deceased to death using a kitchen knife (exhibit III) whose dimensions were given as follows: 32 cm in length, 0,069 kilograms (weight), with its blade being 19 cm in length and the width at its widest portion being 3,5 cm.

In denying the allegations of murder levelled against him, the accused sought to project the deceased as having been the aggressor on the day in question and raised three – pronged defences, viz, intoxication, provocation and self-defence. The thrust of his defence was that as he struggled with the deceased person who was firmly holding his testicles he grabbed a kitchen knife which he opportunistically picked from a push tray and stabbed the deceased in an effort to force the deceased to let loose her hold on him.

The accused argued that as the deceased and the accused struggled, the deceased fell on her back with the accused falling on top of her and in the process fatally and accidentally injuring the deceased in the abdomen.

The State case was built around the evidence of the deceased's mother Liniva Dumbura, Juliet Mwenje, Jacob Rutanha, Sergeant Simbarashe Mufiri, Assistant Inspector Bothwell Jongwe, Assistant Inspector Mhindu and Doctor Godfrey Zimbwa.

The accused's confirmed warned and cautioned statement (exhibit I), the post mortem report (exhibit II) and the murder weapon (exhibit III) were produced as additional evidence in the advancement of the State case.

The accused's case was centred mainly around the evidence of the accused himself.

The simple issue before the court was to determine and make a specific finding on how the deceased met her death in the light of the charge of murder preferred against the accused by the State.

The accused's counsel reminded the court (quite rightly in our view) that the evidence of Liniva, Juliet and Jacob requires to be approached with heightened caution because of their being close to the deceased during her life time. We will endeavour to so approach that evidence.

Nothing much turned on the evidence of Liniva Dumba as she did not witness the murder of the deceased.

Her evidence was only relevant in showing that all was not well between the accused and the deceased with whom he had sired two minor children. From this witness's testimony the court was able to conclude that the deceased and the accused had a turbulent love relationship which culminated in the deceased openly telling the accused in the witness' presence that she was no longer in the relationship.

The ending of the relationship was further confirmed by Juliet Mwenje who was also privy to some of the discussion between the deceased and the accused. Jacob Rutanha, the new suitor also confirmed the ending of the accused and the deceased's relationship as the deceased confided in him that she had closed her chapter with the accused.

It should be noted that other than cohabiting the relationship between the deceased and the accused had not been formalised. Its ending did not therefore require any formalities and from a legal point of view the indication of its ending by the deceased was sufficient.

The evidence of Liniva Dumba also spoke to the aggressive nature of the accused towards the deceased during their time as lovers. This, again was confirmed by Juliet in whom the deceased would confide and appeared to have been fairly close to.

We also did not miss the fact that Liniva Dumba had little respect for the accused whom she throughout the proceedings referred to as "Kuda". It is not usual that a potential

mother in law would address a man with whom her daughter has children by their first name. Perhaps the witness' position was understandable if regard is had to the undisputable fact that her daughter the deceased died at the hands of the accused.

Juliet Mwenje is one of the most crucial witnesses in this matter in that she had the misfortune of actually witnessing the assault on the deceased by the accused person. Because of her close relationship with the deceased and the fact that the deceased died in her room the need to exercise great caution in dealing with her evidence remained upper most in the mind of the court.

Juliet took us through the conduct of the accused and the deceased on the fateful day. The witness explained how the accused had been to her house earlier on and how he ended up playing with his young child until the child retired to bed.

She explained further the exchange of a telephone message between the deceased and his newly found boyfriend Jacob and how eventually the accused left the place with Jacob being the first to leave followed by the accused himself.

We have no doubt in our minds that Juliet, despite her closeness to the deceased gave us a credible account of what happened. She must be believed when she gave an account of what eventually happened when both Jacob and the accused returned to the house as her story partially got support from Jacob as well as from the accused's aggressive conduct in gaining entry into the house after breaking the window pane following denial of entry into the room.

Juliet was clear that by the time the accused entered the room Jacob had already bolted out of the room. If this piece of evidence by Juliet is accepted as it should be, then it creates a serious problem with the accused's story. This is because the accused's defence is built around the alleged aggressive conduct of the deceased in her determination to protect Jacob.

In accordance with the evidence of Juliet and Jacob himself we have no hesitation in making it as a specific finding of this court that when the accused violently entered the room Jacob who had correctly read the situation had bolted out leaving the deceased at the mercy of the accused. It is our position that Juliet and Jacob had no reason to lie or mislead the court on this point. Our finding accords well with the violent conduct of he accused even before he got into the house coupled with his demand before entry into the house that Jacob should get out of the room.

Indeed, it would have been folly on the part of Jacob to have remained in the room given the aggressive conduct of the accused. If we accept, as we are compelled to because of

the weight of evidence that Jacob had already bolted out of the room then we must also accept that the accused did not have a chance to grab or hold Jacob by his pair of trousers. It consequently follows that the accused was clearly not telling the truth when he alleged that the deceased head butted him and held his testicles in an attempt to force him to let go Jacob. That story was a concoction and our finding in this regard collapses the defence of self-defence sold to us by the accused.

There is another side of the story that justifies our rejection of the accused's defence of self-defence as against the deceased.

Juliet, whom we have already found out to have been a credible witness told the court that upon returning to the room having failed to call back Jacob to deal with the situation he had created, he found the accused throttling the deceased. Her evidence was that the accused's immediate reaction on seeing her was to threaten to stab her with a knife which he wielded towards her. At this stage the witness remained close by and hopelessly stood by the door to witness the horrors of the day.

Juliet's evidence was to the effect that at the stage the accused was throttling the deceased, the deceased was struggling to escape with the accused uttering the words "I want to bring an end to your prostitution".

The witness further enlightened the court on how the accused was holding the deceased. She said that at that stage the accused was holding the deceased by the neck with his left hand which forced the deceased to tilt her body backwards facing upwards with her arms raised whilst the accused's right hand was clutching the murder weapon exhibit III in an attacking or striking position. At that stage she heard the deceased telling the accused to leave her alone since they had already separated or "divorced".

The position of the deceased as described by Juliet at the critical moment of her life did not in any way project her as a threat to the accused and there is no room for the defence of self-defence in such a scenario.

As Juliet stood by the door, she saw the accused stabbing the deceased as the deceased desperately sought to wriggle out of the accused's grip.

But as things stand we all know that this was not the stab wound that took the deceased's life according to the post mortem report coupled with the evidence presented to us by Doctor Godfrey Zimbwa.

The credibility of Juliet's evidence is further cemented by her indication to the court that she did not witness how the accused delivered the fatal stabbing. If she wanted, she could

have easily told the court that she saw the accused delivering this decisive stab wound because she was the only witness present.

Juliet said that after having witnessed accused stabbing the accused at the back she panicked and ran into the dining room and stood hopeless behind a curtain thus depriving her of the opportunity to witness further assaults on the deceased.

It was however her undisputed or unchallenged evidence that as she stood behind that curtain she heard the accused uttering the following words: "That prostitute has died. I have cut it all over. Today I want six people dead". Juliet went on to tell the court that when the accused pulled the curtain he came face to face with her and uttered the following words: "You are another prostitute that I am after".

It was further her unchallenged evidence that when the accused went back to get the knife she shot herself out through the window and ran away to try and lodge a report to the police station with the help of his brother.

It is our view that the utterances by the accused concerning the deceased fits very well into the evidence of Doctor Zimbwa when he noted that the fatal wound was a stab and a drag of 20 cm across the abdominal wall of the deceased and that to him it suggested that this was a deliberate action on the part of the accused.

The utterances by the accused person after the stabbing clearly suggest in our view that he had successfully achieved his objective. A person who has been provoked or acting in self-defence does not go about bragging having killed the victim unless he has sought to kill or murder the victim.

Jacob Rutanha, the third State witness was visibly very uneasy when he entered the witness box. This witness was obviously aware that he was the man at the centre of the deceased's death.

There were aspects of his evidence which did not impress us. The witness's professed lack of knowledge of the accused person prior to the fateful day did not impress us particularly in the light of the evidence of Juliet who explained that she thought the two would have known each other because of the marriage between Jacob's sister Anna's mother to accused's brother Stanley Mushandira.

Even the evidence of the accused about their knowledge of each other was to us credible. Juliet said she was of the view that the two would have known each other because of that family relationship.

However, Jacob's evidence on the critical aspects of the case fitted well into the evidence of Juliet and to some extent portions of the accused's testimony. This is particularly so if one has to zero in on the evidence pertaining to the accused's aggressive conduct. The three witnesses are agreed that the accused was aggressive on the day in question given his utterance before his entry followed by his militant entry into the room where death eventually occurred.

The witness confirmed that the accused knocked at the door and that he was denied entry into the room. He also confirmed that whilst he was outside the accused demanded that the witness leaves the room and the fact that the accused also shouted that he wanted to bring an end to the prostitution that was taking place at that place.

The witness was clear and categorical that by the time the accused gained entry into the room he had already bolted out. We believe the witness was candid with us in this regard and other aspects of his testimony that found support from Juliet.

The post mortem exhibit compiled by Doctor Zimbwa made note of a +. 20 cm horizontal stab wound running through the deceased's umbilicus, and perforated bowel with faecal matter and omentum protruding through the stab wound. The report concluded it was this stab wound that took the deceased's life. He attributed death due to haemorrhagic shock and this abdominal wound.

The doctor was called to give evidence around his post mortem report.

The court noted there were omissions in the post mortem report. The report did not capture the back wound that was common cause. The doctor's explanation was that he must have overlooked recording that wound because he tended to concentrate on the stab wound on the deceased's abdomen as he concluded that this was the fatal wound.

It is imperative in the court's view that when a post mortem report is carried out it must be all embracing; all the wounds must be recorded to enhance consistency. There should be no selective approach.

The court did however take cognisance of the doctor's emphatic position that in his view it would have been naïve for one to conclude that the +. 20 cm opening on the deceased's abdomen could have been accidentally caused. When the state counsel sought clarification from the doctor on the accused's explanation of how the deceased may have sustained this abdominal injury the exchanges went along the following:-

“Q. Is it possible that the fatal injury could have been accidentally inflicted by someone who fell onto the victim holding that knife (sic exhibit III).

- A. Firstly I must say the knife in question is potentially capable of inflicting the injury observed. It has a very sharp point indeed and so it can easily cause a penetrating stab wound. As earlier own said there was a stab and a drag of 20 cm across the abdominal wall. That suggests to me that this was a deliberate action. If it was a simple stab wound yes, it could be possible to be a stab wound from someone falling from above but the 20 cm suggests it was deliberate". (my emphasis)

The doctor's cross-examination by the defence on this point provided no major shift from his position.

As earlier on said, the doctor's evidence accords well with the utterances which were attributed to the accused suggesting that he had killed the prostitute. There can be no doubt this was a purposeful attack.

The rest of the evidence by the prosecution was admitted into the record by way of admissions and it requires no detailed analysis.

I must now proceed to deal with the three defences raised by the accused in this case in the light of the evidence by the accused and juxtaposing same with the rest of the evidence.

I propose to deal first with the accused's defences of provocation and self-defence coupled with the accused's averment in paragraph 4(vi) of his defence outline when he avers that the deceased was accidentally stabbed on her stomach. This is the stab wound which the doctor deemed to have been fatal.

I have already dealt with the defence of self-defence which was built around the deceased's alleged aggressive conduct against the accused. The court made a specific finding that the evidence as earlier on analysed gives no room to the existence of this defence.

In passing, it occurs to me that the raising of the defence of provocation and alleging accidental stabbing at the same time makes the two explanations by the accused mutually destructive.

Let me deal with the defence of provocation at this stage. In dealing with this defence I am more inclined to lean on the remarks by GUBBAY JA¹ when he commented as follows:-
"The general rule of Roman Dutch Law is that a person may be so provoked or made mad by another person's behaviour that he loses control over his faculties and becomes incapable of forming the specific intent in relation to a particular offence. It is recognised that anger may be so strong as to destroy a person's "voluntarium" in a similar way as intoxication. If the accused lacked the intention necessary for the particular crime then.... he is not guilty of that offence but may be guilty of a lesser crime"

¹ S v Muleya & Ors 1988(1) ZLR 359 (SC) p 363

In Zimbabwe, the courts use a two stage approach in determining the existence or otherwise of provocation as a defence. It is a combination of both the subjective and objective approach. The first question to be asked is: Taking into account the alleged provocation by the accused in the circumstances narrated to us including the alleged imbibing of 7 pints of beer, did the accused intent to kill the deceased?

Given the accused's sound recollection of almost every minute detail of what occurred on the day, we are left in no doubt in our minds that the accused must have intended to kill the deceased?

This would then force us to invoke the next rung: Would a reasonable man placed in the position of the accused have killed the deceased?

Our position is a unanimous 'No'.

If followed to its logical conclusion the accused's testimony suggests that he suspected that Jacob was now having a love relationship with the deceased. He saw Jacob heading to the deceased's place and followed him. The accused cannot possibly give the impression to the court that he was provoked by the conduct of Jacob because by following Jacob he was inviting anger upon himself and one cannot provoke a situation in order to benefit out of such self-created provocation.

The accused, by following Jacob must have been prepared to go and cause trouble at Juliet's place. He formulated this intention long before he got to Juliet's place. By the time he got there he was already in a combative mood and the knocking on the door, the utterances whilst outside coupled with the subsequent violent entry into the room all add up to a properly planned violent conduct.

I have already said that the raising of the defence of provocation and alleging death due to accident on one hand as the accused has done in this case is self-destructive. The two are incompatible.

Where one alleges provocation one does not deny or find another explanation for the consequences of his conduct. He accepts his conduct but attributes it to provocation and nothing more.

The raising of these two mutually destructive defences demonstrate to the court beyond doubt the accused's desperation to clutch at anything to allow him to remain afflot. It demonstrates lack of candidness on his part.

I will deal briefly with the defence of intoxication. This defence would succeed as a partial defence if the court makes a specific finding that the accused had lost control of his senses to the extent that he became incapable of forming the specific intent to murder the deceased.

The accused did not impress us in raising this defence and the defence made an informed decision by not pushing this defence too far. The narration of the events in the manner done by the accused in this court, which narration fitted to a large extent into the evidence of Jacob and Juliet did not suggest to us that the accused had reached the stage where he lost control of his faculties. The amount of detail which were loaded in the accused evidence in chief cannot possibly be the recollection of a hopelessly drunken man.

In any event all these defences were shot down by the accused person himself the moment he told the whole world about his desire to bring an end to the deceased's prostitution and his bragging after he had accomplished his mission.

The accused was overallly a hopeless liar when it came to the specifics surrounding the deceased's death. He conspired to lie against the deceased even in her grave by alleging the deceased was the aggressive part when the evidence shows that it is the inverse which is true.

We are satisfied beyond doubt that the accused deliberately attacked the deceased with the intention to cause fatal injuries. He achieved his objective. There can only be one finding in such circumstances.

Verdict – Guilty of murder with actual intent.

EXTENUATION

Extenuating circumstances in the context of murder are regarded as facts surrounding the commission of the crime of murder that work to mitigate or lessen it and assists the court in considering the non-imposition of death penalty.

Both the accused's counsel and the State counsel concurred that the triangle love relationship involving the deceased, Jacob and the accused qualified this case to be regarded as a crime of passion.

The accused was clearly obsessed by the deceased to the extent that he found it extremely difficult to imagine that the deceased was now in a new love relationship with Jacob at a time the accused strongly believed there was still room for reconciliation with her as evidenced by his indication to the deceased's mother that he intended to bring his uncles to try and reconcile the two.

That the accused desperately loved the deceased was demonstrated by his request to rope in a potential suitor Jacob to assist in the desired reconciliation between the deceased and the accused.

The prosecution was unable to refute the accused's allegation that he had been drinking before he committed this heinous murder.

In the court's view, a combination of all these factors amount to extenuation.

SENTENCE:

The factors accepted in extenuation suggest that the accused felt betrayed by the conduct of both the deceased and Jacob.

There is overwhelming evidence that the accused desperately sought to save his relationship with the deceased for the sake of the parties two minor children whom the accused appeared to genuinely love.

We consider it mitigatory that the evidence accepted suggests that the knife used was opportunistically picked from the kitchen drawer. For almost a year the accused was kept in custody awaiting finalisation of this case.

In aggravation we have considered the brutal nature of the murder.

We are particularly concerned that even after murdering the deceased, the accused appeared to have been determined to cause more harm to Juliet who was forced to escape through the window to save her life.

It is equally disturbing that the accused still had the energy to threaten the police officers who attempted to handcuff him by wielding another okapi knife.

Such belligerent conduct did not project the accused as someone who regretted his conduct in murdering the deceased.

In all the circumstances of this case we believe a fairly long period of confinement is appropriate.

Sentence: 30 years imprisonment.