

THE STATE
versus
SHINGIRAI HAMUNAKWADI

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 23, 24, 26 & 27 February 2015 & 4 March 2015

ASSESSORS: 1. Mr Raja
 2. Mr Chidawanyika

Criminal trial

Ms M Matsikidze, for the state
N Nhambura, for the accused

HUNGWE J: This matter is a matricide matter. A son killed his mother. The material facts in this matter are not in serious dispute. They may be summarised as follows.

In 2006 the accused consulted his mother, the deceased in the present case, about his settled intention to marry. She denied him this right. This, according to the accused, was the genesis of his troubled relationship with his then estranged and now deceased mother. She had made it abundantly clear that he was to live in bachelorhood for his entire life. In 2012 the accused decided to marry against his mother's cherished wish. She remonstrated with him and demonstrated her displeasure by absenting herself from the traditional ceremony to welcome a daughter-in-law. The problems persisted in the manner which he outlines both in his confirmed warned and cautioned statement; his defence outline as well as his evidence-in-chief.

The case against the accused was woven around his own statement to the police recorded two days after the death of his mother. That statement was duly confirmed by the magistrate on 19 May 2014 some five days after he killed his mother. It is important to quote his statement in extensor in order for the defence put forward to be understood in its proper context. He says:

“I do admit the charge levelled against me. The reason for this is that the parental bondage between me and my mother had broken down because of problems between the two of us. When I got married in 2012, my mother ran away from her duty of welcoming her daughter-in-law. ... Three days after my marriage I suffered an erection dysfunction (*sic*) and when I told her she said it was a spiritual issue and I had to go and consult prophets and traditional doctors for solution. She refused to accompany me to seek remedy saying I had not followed her wish that I should not get married and she was not my mother. I asked her that if she was not my mother could she tell me where my real mother was but she kept quite (*sic*). I then consulted a number of local prophets and traditional doctors who all pointed out that my mother was the source of all my troubles because I should have not married and she was using me as her spiritual husband. That did not surprise me because most of the time I used to dream of making love to her. I did not confront her for a while as I was gathering the courage. After a while I had the courage and I asked her about what the prophets had said and she denied having anything to do with my problems. I exchanged words with her and she had to report me to Nyanga Police. ... I was acquitted due to lack of evidence since there was no independent evidence to substantiate my mother’s claim that I had verbally assaulted her whilst pointing her a finger. I then left my mother’s homestead and went to lodge at Clive Melinda’s homestead. Even though I had left my mother’s homestead, we continued to have squabbles and I had to go to Watsomba sometime in 2013 to inform my uncles about the persistent problems between me and my mother. My uncle baba wa Nyasha and another who I only know as Longchase advised me to retain (*sic*) home and they promised to come and help solve our problems.”

He gives an insight into another possible source of problems between him and his mother on the same page where he states:

“In January 2014 my niece Tinashe Lapoyo phoned from Banket informing me that my mother was not giving him and his siblings their 50% share of the money which was realized from their father’s house rentals. Tinashe Lapoyo is my late sister’s son whose father is also late and the house of his parents which is in Norton was being administered by my mother. Tinashe had been complaining that my mother was abusing the money without giving them their share. I told my mother what Tinashe had said and she said that she could only discuss this with the bigger Lapoyos. In April 2014 I went to Banket to look for the Lapoyos and I found Sekai Lapoyo who is a sister to my late brother-in-law and I brought him to my mother’s homestead to solve the issue of how the rentals of her brother’s house was going to be managed (*sic*). Sekai Lapoyo, my mother held a meeting and we agreed that Tinashe Lapoyo was not supposed to get anything since he had refused to go to school. The money was supposed to be used to support Upenyu Hamunakwadi my late sister’s child who she sired from her previous marriage before she was married to Lapoyo and Best Lapoyo who are still going to tertiary school. In April 2014, Upenyu Hamunakwadi was given US\$200, 00 meaning that in May 2014 Best Lapoyo was supposed to be given the same amount. In May 2014 my mother said that she had lost details of Best’s bank account and she had sent Best Lapoyo’s money through Upenyu’s account. When she was later informed by Best that Upenyu had squandered his money she began to cry and in a few days she became sick possibly due to depression....”

Getting closer to the day of this evil deed he goes on in his own words which were not translated by anyone into English:

“On the 11th may 2014 she was discharged from hospital and she passed through my homestead on her way (*sic*) to fetch some water and I welcomed her. On the 14th May 2014 I was passing through my mother’s homestead proceeding to my friend Wonder Mudiwa’s

homestead when I saw my mother's niece Mai Emily Mhlanga whom I had a confrontation with at Nyanga hospital because of her refusal to let me use my mother's phone to phone a relative had visited (*sic*). I then went to her and asked her to explain to me why she behaved the way she did at the hospital. Before she could say any word, my mother interjected and told me that I should leave her alone and she regrets to have me as a son. I then pushed my mother into a granary hut and closed the door and chased her niece Mai Mhlanga from my mother's homestead. When I came back from chasing Mai Emily Mhlanga I was just cross and that is when committed this horrific act. I went into the main house and took a nylon cloth belt and told her that today was the end of our wars as I was going to kill her. She then fell to the ground facing down possibly frightened by what I had just said. I then used the belt to strangle her whilst pressing her down with my knees. I then set on top of her still choking her with the belt until she died. I then left her like that, got out of the hut and closed the door. I proceeded to my homestead where I found my wife at home."

He went on to describe how he had attempted to leave the area but failed in this bid when he could not raise the bus fare for the trip. He went on to give detail of how he kept his wife unaware of his dark deed by pretending to escort his visitor away from home then surreptitiously finding his way back to his mother's homestead in order to put final touches to this horrible act and make it look like his mother had committed suicide. He first went into the granary and covered his mother's body with a cloth and a tent. He went to pass time with friends but then noticed that the persistent Mai Mhlanga and two others were back at the deceased's homestead looking for the deceased. He asked her why she had not gone to report him to police as she was wont to do. She had no bus fare, she said. The ladies asked him where his mother was. He lied that he had seen her going towards her garden. They then left. Later to his wife he created a false visit to a neighbour as a means to find his way back without arousing his wife's suspicions. He described his final act in trying to stage-manage a suicide in the following terms:

".....and proceeded to my mother's homestead around 1900hours. I proceeded to the granary hut where I carried the body of my mother and took it into her bed-room. I carried it on my shoulder and as I was about to enter her bedroom I removed the body from my shoulder put it in my arms and rested whilst supporting its weight with my legs. I rested for a few seconds and thereafter entered the bedroom. I then took the belt I had used to strangle her with and tied it on her neck. I took a trunk and placed her body and tried to lift her body toward the beam but failed because of the low height of the trunk. I then went to the dining and took a kitchen cupboard and then place her body on top of the cupboard and put the belt around the truss. I lifted the body being supported with the cupboard and tied the belt to the beam. After that I removed the trunk and left the body hanging. I had a hard time in doing all this but this was the only thing I could have done in trying to cover up on what I had done."

In his defence outline prepared with the assistance of his legal practitioners the accused makes no mention of the little fight over the rentals revenue stream between him and his mother. He dwells a lot on his so-called erectile dysfunction whose effects to us remained

obscure in light of the fact that within a year of his marriage they were blessed by a child. The witnesses who testified in court were unable to confirm the allegations of witchcraft against his mother nor were they aware that he had made such claims against his mother during her lifetime. His defence was that he had killed his own mother as a result of cumulative emotional, psychological and mental pressure coupled with a high degree of provocation. I will proceed to deal with the last defence; provocation, and revert to the other defences put forward by the accused.

In our assessment of the evidence placed before us there is no doubt that the accused believed, rightly or wrongly, that his mother was responsible for all his misfortunes, real or imagined.

The witchcraft provocation defence

The Criminal Law (Codification & Reform) [*Chapter 9:23*] (“The Criminal Law Code”) has codified the Zimbabwean common law position regarding provocation as a defence.

Section 239 thereof sets out the circumstances under which provocation can successfully be raised as a partial defence to a charge of murder.

Section 238 provides that provocation shall not be a defence to crimes other than murder. Section 239 then elaborates when it may be a partial defence to the crime of murder. It is a partial defence, if, after being provoked, and as a result of provocation, the accused does not have the intention or realisation referred to in s 47 or; although the accused has the intention or realisation referred to in s 47 but has completely lost his self-control in circumstances where the provocation was sufficient to make a reasonable person lose his or her self-control. Then in those circumstances, the charge of murder will be reduced to culpable homicide.

Put differently, if a court finds that a person charged with murder was provoked but what he did here the intention on realisation referred to in s 47 or the provocation was not sufficient to make a reasonable person in the accused’s position; lose his self-control; the accused shall not be entitled to a partial defence in terms of s 239 (1) but the court may regard the provocation as mitigatory only.

The question then arises whether, when the accused says he was provoked by his mother’s practice of this dark art, the court ought, in the peculiar circumstances of this case,

to accept that as a partial defence in terms of the Criminal Law Code. Witchcraft and the law are different arts; the former residing in the realms of cultural norms and the latter in legal norms. When legal norms and cultural norms conflict, the law must resolve the conflict.

Many cultures across Africa embrace traditional healers and a persistent belief in witchcraft. The African concept of a witch does not encompass the potentially benign Wiccan or Pagan which, in some western countries, enjoy the status of an alternative religion. To the contrary, there is little redeeming about African witches who, through sheer malice, either consciously or sub-consciously employ magical means to inflict all manner of evil on their fellow human beings. Someone is either born a witch or can learn witchcraft from a traditional healer.

The attempts of the common law courts to address witchcraft-inspired violence differed markedly from the suppression tactics of the various legislative initiatives. Whereas legislation recognises the widespread violence and seeks to curtail it, the criminal law has often recognised the belief that gave rise to the violence and carved out a witchcraft-provocation defence that could be offered as a mitigating factor in cases of witchcraft-related violence.

Under this theory accused persons could reduce their crimes or punishments upon proof that they believed they, or persons under their immediate care, were being bewitched and that this belief caused them to temporarily lose self-control. In some ways, this theory provides tacit recognition that in certain communities killing a “witch” is not merely explainable, or excusable but praise worthy.

In our jurisdiction in 2006 the Witchcraft Suppression Act was amended to legalise accusations of witchcraft and to allow the State to convict a person and punish her when it deems witchcraft harmful.

(See Chandra Kumar “*Witches, Witch Doctors and Men of Reason*”

Mail & Guardian Online September 11 2006 on <http://www.mg.co.za>)

There is thread of cases both in our jurisdiction as well as in South Africa which show a vacillation between the recognition of witchcraft and a willingness to aid the suppression of the belief in witchcraft. This takes the form of treating the belief as only mitigatory but only as affecting the element constitution a defence to a charge.

In my respectful view at least the basic elements required for a successful defence of witchcraft provocation should be;

1. The act causing death must be proved to have been done in the heat of the passion, that is in anger; fear alone, even fear of immediate death is not enough.
2. The victim must have been performing in the actual presence of the accused some act which the accused genuinely believed and which an ordinary person of the community to which the accused belongs would generally believe, to be an act of witchcraft against him or another person under his immediate care.
3. A belief in witchcraft *per se* does not constitute a circumstance of excuse or mitigation for killing a person believe to be a witch or wizard when there is no immediate provocation act.
4. The provocation act must amount to a criminal offence under criminal law.
5. The provocation must be not only grave but sudden and the killing must have been done in the heat of passion.

See *Eria Galikuwa v Rex* 1951 (1) E. Afri Court of App 175 (@ 176-178); an appeal case from Uganda.

Where this criteria is met, the court in other jurisdictions have considered and accepted the witchcraft provocation defence as long as it can be shown that the accused killed in the heat of passion.

See *John N Rudowiili v Redubliz* 1991 TLR 102 (CA). In that case the Tanzania Appeal Court reduced the accused's capital murder conviction to manslaughter with a 12 year prison sentence after considering accused's mitigation plea based in defendant's belief in witchcraft. The accused had axed his grandfather to death after the latter had allegedly threatened to kill the accused through witchcraft. These cases aslo in a way introduce the concept of anger as being intertwined with provocation. In my respectful view provocation and anger are different concepts just as cause and effect are.

In criminal law the term provocation seems to be used to include both concepts thereby throwing light on the accused's conduct. Thus when considering the phrase "in the heat of passion" a court is assessing the subjective frame of mind which has triggered the act.

The concept of provocation indicates a situation in which the provoker elicits anger or wrath of the provoked by means of a challenging or defiant behaviour, and the latter in reaction to the provocative behaviour, commits a criminal act. See *S v Mokonto* 1971 (2) SA 319 A.

Legally, the emotional response of the victim to the assaulting or provocative words or conduct is relevant. When a person has been provoked, anger and rage are the predominant emotions that are experienced.

We have considered the accused's defence throughout this grim and macabre episode. We have scrutinized his own description of the events leading up to the killing of the deceased. We were unable to find that she had in any way provoked him in the plain and ordinary meaning of this word. He did not act in the "heat of passion" which would have resulted in loss of self-control as would prevent him from formulating the requisite intention or to realise the risk involved in the act constituting the crime charged. On his word, the accused planned the timing of the execution of his mother. He chose the method of killing her. He knew that there would be relatives who would visit her to check upon her as she had recently been discharged from hospital. He planned on how to deal with that too. He did not want his wife to know what he was determined to achieve and effectively deflected her by various ploys. He casually announced his decision to kill her causing his victim to pass out, probably in shock. He then proceeded to strangle her in a most crude fashion instantly and mercilessly killing her as he had intended. His belief in witchcraft played no part in this chilling murder. The accused wanted his mother out of the way so that he remains the only person in charge of the two deceased estates of his late father and late sister.

Put in another way we find that accused did not react to an act of provocation; plain or witchcraft provocation. He carefully planned this murder and executed it with cold blooded precision feigning suicide at the end of it all to deflect attention from himself.

There is a small issue of the two estates which his mother was the executor. These revenue streams from his late father and sister, in our view, provided sufficient motive to wish his mother out of the way so that he is left in physical control of the estates. This in our view explain why despite his belief in witchcraft he remained physically closely connected to his mother in spite of the advice from his uncles that he should migrate to a more distant location from his mother.

In the end we are satisfied by his own admission that when he announced to his mother that he had decided to end the war between him and his mother on 14 May 2014 by killing her, he was genuinely announcing his true desire and intention to kill.

He was under no emotional stress when he planned to kill her over time.it cannot be argued with any conviction that he was suffering from some mental disorder which induced

in him non-pathological criminal incapacity as a result of emotional stress. The defence of witchcraft provocation appears to be a carefully engineered ploy to raise a red herring to deflect this court from making a finding regarding his true state of mind. We are convinced that the detail reflected in his warned and cautioned statement correctly reflects a perverted mind rather than an emotionally psychologically stressed mind. This is the reason why, in our view, there is no mention of the two deceased estates in the defence outline as well as in his evidence in chief. So carefully rehearsed in his mind was this defence that counsel for the State failed to pursue this aspect during cross-examination. Even if it were to be assumed in his favour that his belief in witchcraft played a part in prompting him to kill his mother, the act causing death was not done in the heat of the passion. His victim was not performing an act which the accused genuinely believed and which an ordinary person of the community to which he belongs would generally believe to be an act of witchcraft against him or another person under his immediate care. She was going about her normal domestic chores when the accused announced to her that her time on earth was up since he had resolved to end their wars by killing her.

We find that when he tied his mother with the nylon belt, he intended to kill her by that means. He was not reacting to anything her mother had done or said. He was not angry but determined to carry out a well-planned plot kill her.

He is therefore found guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

National Prosecuting Authority, state's legal practitioners
Mugadza Chinzamba & Partners, accused's legal practitioners