

THE STATE
versus
PHILLIP NDACHENGEDZWA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 26 October 2015; 2 & 4 November 2015

ASSESSORS : 1. Mr Rajah
 2. Mr Chipere

Criminal Trial

Mrs J Matsikidze, for State
Ms Y Chitapa, for defence

HUNGWE J: The accused faces a charge of murder it being alleged that on 24 October 2014 at Ndiyadzo Business Centre, Chipinge, with actual intent or realizing the real risk or possibility that death may result, stabbed Nomalanga Magodhi with a spear several times on the body thereby inflicting injuries from which she died. The circumstances surrounding the allegations of murder are as follows. The accused and the deceased were at the relevant time, customary law husband and wife. They resided in premises behind Munashe Store managed by one Loveness Beta (“Loveness”) at Ndiyadzo Business Centre, Chipinge. Prior to the date on which the events subject of the allegations occurred, the deceased had been away for about a month. So when the altercation leading to her death occurred, she had only recently returned. Their relationship was under severe strain as a result of mutual allegations of infidelity. Around 10h00 the couple engaged in an altercation which attracted Loveness, their landlord. Deceased cried out for help and Loveness Beta came to her aid. She found that the deceased had already been badly injured. It appeared that she had been stabbed by the accused who wielded a spear. The deceased was rushed to Ngorima Clinic and later transferred to Mutare General Hospital where she subsequently died.

In denying the charge, the accused stated in his defence outline that their four year marriage had been shaken by various acts of infidelity on the deceased’s part. Despite efforts

to talk these over, the infidelity streak in his customary law wife continued to haunt their marriage. What had led to this latest altercation was the following. By September 2014, they had, as a couple, saved \$4 000.00 with which they intended to build a home. He had, that month, travelled to Beitbridge on business. When he called his wife on her mobile number, she had told him that she had left their home and proceeded to her maiden home. Upon further enquiry with his wife's relatives, he learnt that in fact she was in Chiredzi where she was spending time with another man.

By the time he returned home on 22 October 2014 the deceased was still not at home although she had undertaken to be home. She only returned home on the eve of 24 October 2014. By that date he had information that the deceased was planning to build a home with another man. He therefore asked about their US\$4 000 savings. She avoided the subject and prevaricated on the issue raising his suspicions higher. The next morning he asked her again about their savings but she rebuffed him. When he got the chance, he searched her handbag in for the money. He came across concrete evidence of infidelity in the form a love letter and a photograph of a man. Before he confronted her with this evidence, he decided to seek the wise counsel of their landlord Loveness Beta. Her advice was that it was in the interest of both of them if they separated amicably. He left Loveness Beta and went back to the deceased who he confronted with the evidence of her infidelity. Upon being confronted, the accused says that the deceased then asked him why he had searched her bag and berated him for it. She however, admitted having used the money to buy another land piece of land.

This angered him. He advised her that their marriage was over and that she should give him back his money and leave. He began to pack her clothes into a bag. At that point, the deceased picked up his spear and attempted to attack him. He grabbed the deceased's hand and elbow to wrestle the spear from her in an attempt to avert the attack. They struggled for the possession of the spear. In that struggle she bit him on the hand. They both fell to the floor. In the process, he says, the deceased was accidentally stabbed. As a direct result of this accidental stabbing when she fell onto the spear, the accused says she released her hold on the spear. He remained holding it. She however, thereafter went on to grab him by his private parts and pulled them. In a bid to cause her to free this grip, he then stabbed her on the arms.

She relented and loosened her grip on him. The spear was now on the floor. He grabbed it to prevent her from picking it up and using it on him. He maintained that he had no intention to kill her as she was accidentally stabbed. He also maintained that he did not

realise that there was a real risk that in the process of defending himself from an unlawful attack, the deceased might be fatally injured.

The evidence led from the medical doctor, Dr Matimbura, was that on 24 October 2014 she attended to a patient who had presented at a local clinic with serious injuries. She was visiting from Mutambara Mission Hospital. Upon enquiry, the doctor learnt that the patient had been stabbed by her husband. The patient bore several stab wounds and exhibited signs of severe blood loss. The doctor described the injuries as follows. She had laceration on the right forearm extending to wrist, inside the right palm and right forearm near the wrist; left upper arm, and the shoulder. She noticed a deep penetrating wound to the abdomen through which faecal matter was drawing. This latter wound implied that the intestines had been perforated. In her view, it required severe force by a sharp object to puncture the skin as well as the stomach wall into the intestines. Draining of faecal matter into the blood stream indicated that simultaneous and rapid poisoning of the patient's blood was taking place. The patient required a higher level of care than that the clinic could give.

She referred deceased to Mutambara Mission Hospital for the appropriate level of care. In her view, from her experience as a medical doctor, and going by the number of lacerations, it was highly unlikely that the injuries on the patient were sustained accidentally. In any event, when she asked the patient how she had sustained the injuries the patient had indicated to her as doctor, that her husband had stabbed her with a spear. At Mutambara Mission Hospital the patient was operated upon. Unfortunately, the patient died. The post mortem report by Dr Makange in Exhibit 6 confirmed the oral description of the injuries given by Dr Matimbura.

Crucially, the evidence led from Loveness Beta establish that on the day following the deceased's arrival the accused had approached her with a letter which tended to confirm accused's claims of infidelity by his wife. She had advised him that a cordial separation was the best in the circumstances. The accused conceded that his wife had previously strenuously denied any allegations of infidelity. He now held in his own hands, hard evidence of that infidelity. This had angered him beyond measure by his own admission. In our view, these factors provide sufficient motive for the accused rather than the deceased to have been the aggressive of the two. Put differently, it is in our view, the accused who had reason to be on the offensive rather than the deceased as the accused would have us believe. In any event, the argument over the money only provides further reason for the accused to be angry with her. This court therefore finds that the State witness Loveness Beta's evidence is more reliable on

the factual situation obtaining inside their room than the version given by the accused. This is particularly made more cogent by Loveness Beta's version as to how the accused took her advice. According to her, after she advised him to cordially separate from the deceased, the accused indicated that he would resolve the issue his own way. A few minutes later Loveness heard the deceased shout for help. Loveness Beta had no idea of what she was to witness shortly thereafter. She went on to say that she heard the deceased scream and shout that that she was dying. She ran to the couple's quarters and upon arrival at the couple's quarters, she saw the accused stabbing the deceased on the left shoulder with a spear. Deceased was by then bleeding from wounds inflicted earlier on. She shouted at him to stop. The deceased was in a bending position holding her right lower abdomen. She had pulled the accused outside their room. The deceased followed outside the room. When the three were outside, the accused attempted to stab the deceased again. She pushed him away. She arranged for the injured wife's evacuation to nearby Ngorima Clinic.

We have assessed the credibility of the witnesses led by the State and are satisfied by the veracity of their versions. We are satisfied that they were truthful and their versions accord with the probabilities in the matter. We find it highly unlikely that the deceased suffered multiple wounds in the manner the accused described. His version is so improbable that we are satisfied that it is false beyond doubt.

In our finding, upon a fair consideration of the facts of this matter, the accused was on this day provoked by the continued infidelity of his wife, which had been confirmed by hard evidence, as well as her decision not to share the US\$4 000.00 which he said they had saved for the construction of their own home. In the heat of the moment he had attacked her by stabbing her with the spear on the abdomen. This would have led the deceased to scream for help. When he pulled out the spear, she must have defensively tried to hold the spear hence the injury to her palm and wrist. He was found by Loveness Beta delivering the left shoulder stab wound. He attempted to stab her even after Loveness's intervention.

The question which arises is whether, in those circumstances, the accused can be said to have lost self-control and acted in the heat of passion in stabbing her. In other words, can a defence of lack of intention to kill be upheld on the facts? Can this court uphold his partial defence of provocation to the charge of murder? Generally, provocation is not a defence to a crime. In certain circumstances however, the law recognises that situations may arise in which a person is virtually pushed to act in a manner constituting a crime because the amount of provocation he would have been subjected to literally prevents him from exercising control

over his faculties. In other words in order to provide or act as a partial defence, the provocation would have resulted in the accused losing self-control. Short of that it constitutes no defence. Section 239 codifies the common law position thus:-

“239 When provocation a partial defence to murder

- (1) If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realisation referred to in section *forty-seven*, the person shall be guilty of culpable homicide if, as a result of the provocation-
- (a) he or she does not have the intention or realisation referred to in section *forty-seven*;
 - or
 - (b) he or she has the intention or realisation referred to in section *forty-seven* but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control.
- [Subsection amended by section 31 of Act 9 of 2006.]
- (2) For the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that-
- (a) he or she did have the intention or realisation referred to in section *forty-seven*; or
 - (b) the provocation was not sufficient to make a reasonable person in the accused’s position and circumstances lose his or her self-control;
- the accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided in section *two hundred and thirty-eight*.”

In *S v Nangani* 1982 (1) ZLR 150 (SC) the court confirmed the common law position that provocation can, in appropriate circumstances, have the effect of excusing or reducing an intentional killing at least to the point of reducing murder to culpable homicide, even where the killing is intentional. The court however pointed out that in order to meet this threshold, the provocation must be such as to have actually caused the accused to have lost self-control, though not necessarily his capacity to intent to kill. It added that it must also be such that in the circumstances an ordinary man would have lost his self-control and acted in the manner the accused did. (See also *R v Bureke* 1960 (1) 49 (FC); *S v Turk* 1979 (4) SA 621 (ZR).)

Ms *Chitapa*, for the accused relied on *Nyangani’s* case in urging us to find that there was sufficient provocation to reduce the charge of murder to culpable homicide. It seems to me that her argument ignored the fact that the accused did not dispute the evidence given by Loveness that after finding the letter inside his wife’s handbag, the accused had sought her advice as how he should handle the situation he found himself in. in our view, he had the opportunity to reflect on the possible courses of action that were open to him. He had, so to speak, an opportunity to reflect on his action and reaction. He opted to ignore the sound, sensible and sober advice from his landlord and practically took matter into his own hands as

he said to the landlord. In our view, a reasonable man in his position, having walked out to seek advice and such advice having been rendered, would not have acted in the manner that he did. He would have heeded the landlord's advice and not settle on resorting to the use of a spear on the cheating wife. He expressed his wish to resolve the matter his own way. He was at that stage, not armed with a weapon of any description, let alone a spear. The act of arming himself was a deliberate one, borne out of the desire to punish the wife for her so many transgressions which included infidelity. If he did not intend to kill her when he stabbed her in the abdomen he certainly realised the obvious risk associated with the puncturing of the abdominal area using such a weapon as a spear.

In our view, the accused cannot escape conviction for murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

He is therefore found guilty as charged

National Prosecuting Authority, State's legal practitioners
Henning Lock, accused's legal practitioners