

THE STATE  
versus  
PATRICK KASHIRI

HIGH COURT OF ZIMBABWE  
MWAYERA J  
MUTARE, 31 July 2018, 1, 2, 9 and 30 August 2018,  
10, 13 and 27 September 2018

### **Criminal Trial**

ASSESORS: 1. Mr Magorokosho  
2. Mrs Mawoneke

*J Chingwinyiso*, for the State  
*E. L Mvere*, for the defence

MWAYERA J: The accused pleaded not guilty to a charge of murder proffered by the state. It is alleged by the state that on 19 February 2017 the accused unlawfully caused the death of Getrude Chamatumba by stabbing her with an okapi knife twice on the right shoulder, once on the chest and once on the neck with an intent to kill or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility. The accused's defence was that he did not have an intention to kill the deceased. He pointed out that he was extremely provoked by the deceased's utterance that it was his problem that he could not read that the tablets the deceased was taking were for HIV and AIDS. He was further provoked by the deceased who poured on him water she had used to bath a child with. The accused then lost self-control and stabbed the deceased. He thus denied having intentionally caused the death of the deceased but admitted to having committed culpable homicide as he reacted under extreme provocation.

As deduced from the state papers, defence papers and from evidence of witnesses the brief facts of the matter are as follows. The accused and deceased who were lovers cohabited and lived as husband and wife in Epworth. They had misunderstandings over children born to them from other unions and this prompted the deceased to leave the accused in Epworth while she proceeded to N'anga Village Buhera. On 18 February 2017 the accused followed the deceased at the rural home. The discussions for possible reconciliation were futile. On the

fateful day the accused then stabbed the deceased causing injuries from which the latter died. It is important at this stage to note that the deceased was stabbed with a sharp object. According to the state it was an okapi knife which was tendered in court as an exhibit through the investigating officer, while the accused stated that he used a pair of scissors he obtained from one of the huts.

Given the circumstances of the case as outlined by the state and defence, a lot of aspects are common cause. The only issue to be decided by the court is whether or not the alleged provocation is sufficient to vitiate the requisite intention. In other words the court is to decide whether or not the accused had the requisite intention to kill the deceased.

It is worth mentioning that evidence of 15 state witnesses was formerly admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Three witnesses namely Musa Bulani, Shepherd Nzengende and Shakeman Rakafa gave oral evidence. Musa Bulani a brother to the deceased narrated how the accused approached their homestead in a bid to reconcile with his wife the deceased. The two failed to find each other and hence for the night the accused shared the bedroom with the witness. On 19 February 2017 the accused who had earlier been escorted to the bus stop enroute to Harare made a u-turn pointing out that one of his wife's sister had suggested he goes back and be assisted to reconcile with his wife the deceased. Upon return the accused and the deceased did not agree. They exchanged harsh words following which the deceased poured some water which she had used to bath her son on the accused.

The accused moved to a distance and sat on a chair to dry up his clothes. At the time the water was poured, the state witness Stephen Nzvengende, had arrived to take the witness Musa Bulani for church. While the witness was having breakfast, his attention was roused by a scream from the deceased who was by then at the toilet/bathroom. The scream propelled the witness to rush out to investigate. He observed the deceased in a state of nudity with blood flowing while the accused was standing by holding a knife. The witness picked a log and advanced towards the accused who then fled while holding a knife. The deceased was taken to hospital and on 27 February 2017 she passed on. Stephen Nzvengende's evidence tallied on material aspects with that of Musa Bulani. The witness initially observed the deceased pour water she used to bath the baby on the accused who then sat in the sun to dry up. He later observed deceased go to the toilet to bath. It was while at the bathroom that accused followed the deceased who screamed for help. The witness observed accused stabbing the deceased

several times with a knife. Both witnesses generally gave their evidence well and they impressed the court as sincere witnesses.

The last witness who gave oral evidence is one Sergeant Major Shakeman Rakafa who was the initial investigation officer of attempted murder charge. The witness recounted how on 19 February 2017 he in the company of other police details proceeded to Chimumvuri Business Centre where the accused had been apprehended by villagers for stabbing the deceased. The witness recovered an okapi knife from the accused and proceeded on all preliminaries leading to the arrest of the accused. The witness then took the accused and the exhibit, an okapi knife to the station. On 27 February 2017, the deceased passed and the charge was upgraded from attempted murder to murder. The witness was firm that the okapi knife tendered in court, although it did not have blood stains at time of production was the okapi knife he recovered from the accused. We had no reason to disbelieve the witness' testimony moreso given accused's confirmed, warned and cautioned statement revealed accused used a knife.

The accused is the only witness who testified in the defence case. He pointed that he stabbed the deceased with a scissors he had obtained from the homestead of the deceased. He was adamant that he did not bring an okapi knife from Harare when he visited the deceased for possible reconciliation. It was apparent from all the evidence that the accused stabbed the deceased occasioning injuries from which she later died on 27 February 2017. The issue to be decided on is whether or not the accused had the requisite intention to kill the deceased given the defence raised. From the confirmed warned and cautioned statement and the defence outline and evidence of the accused, he was provoked by the fact that the deceased refused to reconcile with him then she poured hot water on him and that she mocked him for being illiterate and thus failed to read that she was partaking of "HIV AIDS" tablets.

The defence of provocation is provided for in the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In s 239 which states:

- "(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 47, the person shall be guilty of murder."

It is apparent that provocation is not a complete defence. For provocation to qualify and succeed as a partial defence to a murder charge leading to a conviction of culpable homicide, certain requirements must be met. In cases decided in the past it has been shown that the provocation must have been so intense as to negate intention on the part or the accused or so intense as to induce complete loss of self-control on the part of the accused.

See *S v Mafusire* 2010 (1) ZLR 417, *S v Moses Saunyama* HH 581/17 at 16 and *S v Masina* 2010 (2) ZLR 498. In the *Masina* case it was held that for provocation to reduce murder to culpable homicide, it must be such as would lead the accused to act without intention, or with intention but having completely lost self-control, the provocation being sufficient to make a reasonable person in his position and circumstances lose self-control. Given the circumstances of this case, the water which was poured on the accused was used to bathe a baby as such it could not have been hot. Admittedly the accused could have been enraged by this but he had time to cool off as clearly he did not lose self-control. His reaction to the pouring of water was to sit in open on a chair so as to dry up. Assuming the accused was mocked over illiteracy in failing to detect the deceased was taking HIV drugs and thus could have been infected this was provocation which would in sense and occasion loss of self-control. The reaction of the accused to the alleged mockery was calmness such that one wonders if there were such utterances at all. Moreso given the other witnesses at the scene did not hear such utterances. The reaction by the accused seems to support the state witnesses' version that failed reconciliations and pouring of water occurred. Then some time later when the deceased was bathing the accused attacked in a move calculated to revenge. The accused did not react instantly and spontaneously to any provocation as a sign of showing loss of self-control. The accused in a calculated and calm manner proceeded to the room where he slept the previous night. If we accept accused's version he then took a pair of scissors which he had earlier seen in the room in which he had put up for the night. He then followed up the deceased who was bathing and in a state of nudity he stabbed her. The stance of remaining calm and collected and then later go to collect a weapon and proceeded in a move likened to laying an ambush on an unsuspecting bathing deceased actually lays bare intentional attack as opposed to conduct occasioned by loss of self-control. Upon being confronted the deceased cried out for help and requested the accused to go away. The accused persisted even when the deceased took to her heels he pursued, tripped and stabbed the deceased in a manner indicative of intention to accomplish a set goal.

Clearly given the calmness and time of reaction by the accused he cannot be viewed as having reacted in a manner that a reasonable person placed in the same circumstances as the accused could have reacted. In the circumstances of this case the defence of provocation cannot be sustained.

A close look at 239 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] buttresses that the defence is not available for persons capable of formulating an intention to exert revenge. Section 239 (2) states:

“(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.”

Given the circumstances of this case the accused falls within s 239 (2) of the Criminal Code and thus the defence of provocation cannot be sustained.

The sentiments of MATHONSI J in *The State v Best Sibanda* HB 139/18 when he dismissed the defence of provocation ring true in circumstances of this case. The Honourable Judge stated:

“It occurs to me that the accused falls squarely within the provisions of s 239 (2). This obtains from the fact that provocation, by its very nature, connotes instantaneous and spontaneous reaction to phenomena in which the actor does not have any opportunity to formulate a strategy but acts on the spur of the moment having lost self-control in response to actions of another.”

*In casu* there was no spontaneous reacting or indication of reaction at the spur of the moment consistent with loss of self-control.

In closing submissions the defence conceded that the reaction of the accused to provocation was not sudden but more of a calculated reaction. For provocation to succeed as a defence the reaction must be spontaneous showing loss of self-control and thus eliminating intention. The remarks by LEWIS JA in *George Tsiga v S* AD 77/76 are true in so far as they clearly spell out the need for the reaction to the alleged provocation being sudden. The Honourable Judge of Appeal remarked that

“The reaction to the provocation must be sudden in the sense that the person provoked acts on the spur of the moment and in circumstances where he has temporarily lost his power of self-control and does not appreciate what he was doing.”

*In casu* the accused exercised self-restraint after water was poured on him. He sat down to dry himself. After insults were hurled at him he took his time and when the deceased was bathing he then went on to arm himself and proceeded in a furtive manner to attack the deceased. This clearly depicts a man who knew what he was doing and was capable of formulating an intention as he did not lose self-control but exercised self-control. See *S v Stephen* 1992 (1) ZLR 115 H at 121 at F-6 where it was held that:

“Once a person is capable of some self-control of his actions he becomes capable of forming *mens rea*”

The accused might have been angered by rejection, the pouring of water and mockery over illiteracy but remaining calm and collected is a clear indication of self-control. There was nothing that he did to show that he reacted in the heat of the moment without applying his mind to his actions. In the case of *Zimpack (Pvt) Ltd v Magarabi SC 196/94* it was clearly spelt out that provocation should only be accepted as a partial defence if there was spontaneous reaction showing loss of control, mere anger and resentment is insufficient. See *State v Sibanda (supra)* and *The State v Ranch HH 515/17*.

Having pointed out that the alleged provocation in this case is not sufficient to negate intention to commit the crime, the court has to decide on whether or not the accused committed the offence of murder with actual intention or legal intention. In the case of *S v Lloyd Mukukuzi and Another HH 577/17* the court aptly formulated the test for intention when it stated that in cases of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] the question is whether when the accused engaged in the conduct complained of, he had formed an intention to kill as defined in s 47 (1) (a). If he did not have the relevant intention to kill the deceased, the question becomes whether he realised that in “stabbing” the deceased in that manner there was a real risk or possibility of death occurring, but notwithstanding such realisation, he continued to engage in that conduct which then culminated in death. Actual intention was ably described in the case of *S v Mangwanda 2002 (1) ZLR 574*. The court held that for a court to convict an accused of murder with actual intention the state must prove beyond reasonable doubt that:

- a) the accused desired to bring about death of his victim and succeeded in completing that purpose or
- b) while pursuing another objective, the accused foresaw the death of his victim as a substantially certain result of his activity and proceeded regardless.

In respect of the second scenario it is clear that it is the reckless disregard of the risk associated with the conduct which provides the requisite *mens rea* in the case of a specific intent crime like murder. In the present case the accused set out to revenge for the failed reconciliation and that in total reckless disregard of the risk associated with his conduct stabbed the deceased on the neck and shoulder which are vulnerable parts of the body. The stabbing was in circumstances he foresaw that death was substantially certain to occur. Given the nature of weapon, a sharp object okapi knife or scissors and the number of blows aimed at a vulnerable

part of the body one cannot fail to detect the *mens rea* of actual intention. In *S v Mema* HB 143/13 the court made it clear that the nature of attack, weapon used and position where attack is directed at are some of the factors to consider in deciding the intention of the perpetrator. In the *Mema* case (*supra*) it was held that actual intention is present when the accused sets out to cause death of the deceased and where he foresaw death was substantially certain to occur.

I must mention that we found no reason to disbelieve the state witness Musa Bulani, Stephen Dzvengege, Sergeant Major Shakeman Rakafa on the murder weapon. This was more so upon considering the totality of the evidence and the accused's confirmed warned and cautioned statement. This statement was recorded when events were still fresh in accused's mind and he indicated just like the state witnesses that he used a knife. It appears the change of heat on the murder weapon came in during trial as a way of negating premeditation given the accused would be held to have brought the knife from Harare in anticipation of rejection. Even if there was evidence that the accused used a scissors as he mentioned the issue of intention has been illustrated by the manner in which he stabbed the deceased. Given the finding that there was no extreme provocation occasioning loss of self-control it follows the accused had the requisite intention to commit the crime.

During the defence case the accused raised the defence of self-defence pointing out that he was struck with a stone on the mouth by the deceased. It was apparent from evidence adduced that the accused is the only one who spoke about this attack on him by a stone as he moved away into Musa Bulani's room. Interestingly this defence was not pursued even in closing submissions. The accused later engaged and pursued the deceased who was bathing as evidenced by the running out of the toilet/bathroom in a nude state. This sequence of events clearly shows that when the accused stabbed the deceased he was no longer under attack assuming it had occurred. The defence of self-defence as provided for in s 253 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] shows that certain requirements have to be met for this defence to be sustained as a complete defence to murder. The requirements can be summarised as follows:

1. that there is an unlawful attack
2. that the conduct was necessary to avert the attack
3. that the means used to avert the unlawful attack was reasonable
4. that harm caused was caused to the attacker.

All these requirements have to be met in order for the defence to be availed to an accused person. In this case given the circumstances of the case as postulated by the accused,

he escaped after being struck with a stone as such he was no longer under attack. The means used was unreasonable given the deceased was in the bathroom/toilet and not in any attacking mode to warrant being stabbed in the neck as occurred. We took this issue of self-defence as not having been raised seriously but given as a gamble in the event that the provocation defence raised failed. Generally the accused lacked the disposition of telling the truth. Both defences of provocation and self-defence cannot be sustained in the circumstances.

The state has discharged the required onus and proved beyond reasonable doubt that the accused took out the murder weapon with an aim to stab and kill the deceased by stabbing her on the chest, neck and shoulder in circumstances where death was substantially certain. The accused is accordingly found guilty of murder with actual intention as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

### **Sentence**

Following the conviction of the accused both the state and defence counsels addressed us in mitigation and aggravation respectively. We have considered all the mitigatory and aggravatory factors advanced for purposes of assessing an appropriate sentence of the convict who stands convicted of murder with actual intention.

The convict is a first offender. Mr *Mvere* requested the court to take into account the personal circumstances of the accused. He is a father of one juvenile daughter and has an old mother to take care of. Further in mitigation is the fact that the accused person has been in custody for one year while awaiting the finalisation of a grave offence. The period of suspense is traumatic and hits hard on the individual. We have also considered the circumstances surrounding the commission of the offence to be mitigatory. The court will not pay a blind eye to the fact that although he did not lose self-control such as to justify his reliance on the provocation defence he was annoyed and angered by the deceased's hostility. It is a fact she poured dirty water on him and that they also exchanged bad words. Cumulatively this reduces his moral blameworthiness. Further in mitigation is the fact that the convict cooperated with the police by handing over the murder weapon and also accepting having physically stabbed the deceased. Even during trial his evidence was clear that he stabbed the deceased with a sharp object.

However, the offence for which the accused stands convicted of is a very serious offence. As observed and pointed out by the state counsel Mr *Chingwinyiso*, the accused has started the criminal enterprise on the deep end. The accused occasioned loss of precious human

life in circumstances where it could have been avoided. No one has a right to take away the God given and constitutionally enshrined right to life. The deceased, a young mother was robbed of her life at a tender age. Her child and relatives will always feel the pain that goes with the void created by her death.

What further aggravates the offence is the total disregard of the deceased's feelings. She was no longer interested in staying with the accused as husband and wife. For her to be stabbed in the manner that she was stabbed because accused did not accept rejection is clear indication of superiority complex on the part of the accused. Courts have expressed their displeasure on the use of violence as a tool of resolving disputes by passing severe sentences on the perpetrators of violence. In this case the violence is gender based and it was meted out in the most cruel inhuman and degrading manner. The deceased was attacked in a nude state while in the privacy of a bath room. See *The State v Robert Tevedzayi* HH 2006/18 where TSANGA J sentenced the convict to 35 years imprisonment for gender based violence occasioning the death of his wife. In the *Tevedzayi* case (*supra*) the learned Judge expressed displeasure at gender based torture inhuman and degrading treatment. See also *S v Arnold Jeri* HH 516 and *S v Chimbira* HH 558/15.

A conviction of murder with actual intention attracts severe punishment including life imprisonment and or capital sentence. The legislature in enacting the penal provision for murder with actual intention under s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] underscored the gravity of the offence. In the present case the accused used a lethal weapon, an okapi knife, possession which is unlawful in terms of our law. The blows were forceful and aimed on vulnerable parts of the body, the chest, neck and shoulder. Such cruel intentional gender based violence occasioning loss of precious human life should be visited with an appropriate sentence which will not only send warning bells to perpetrators of violence in general but domestic and gender based violence. The infraction of other people's rights through violence is unacceptable in a progressive and civilised community. It ought to be discouraged by the courts moreso given it occasions harm to the society at large. In this case a mother was brutally murdered for ending a relationship with the accused. Having considered all mitigatory and aggravatory factors and circumstances of this case the removal of the convict from the society is called for. It is hoped that the sentence will deter the accused and likeminded violent people in the community. As we pass sentence we are alive to the universal sentencing principle that in exercising sentencing discretion the court should seek to strike a balance between the offence and offender while at the same time tempering justice with mercy so as to

ensure the societal interest of proper administration of justice. The accused is sentenced as follows:

25 years imprisonment.

*National Prosecuting Authority, State's legal practitioners  
Mvere, Chikamhi and Mareanadzo, accused's legal practitioners*