

FEZEKILE MATEKETA V THE STATE

SUPREME COURT OF ZIMBABWE,
DUMBUTSHENA, CJ, BECK, JA & GUBBAY, JA, HARARE, OCTOBER 11 &
NOVEMBER 1, 1985.

R.M. Fitches, for the appellant

F.S. Chambakare, for the respondent

DUMBUTSHENA, CJ: The appellant was convicted by the High Court sitting at the Masvingo Circuit of murder with actual intent. The trial Court did not find extenuating circumstances and sentenced the appellant to death.

She now appeals against that sentence.

Briefly the facts of this case are as follows: The appellant and the deceased were married to each other. They had been so married for twenty-one years. They had six children of the marriage. They were teachers at Mutsime Primary School, a school whose head teacher was the deceased. Besides teaching, the deceased had two stores. He managed one store and the appellant ran the business of the other store.

Although the State called a number of witnesses the only evidence that implicated the appellant was her own evidence. It is significant to note right from the beginning of this judgment that her evidence was not contradicted by the State because there was no State evidence adduced which was material to the proof of the offence with which she was charged.

What emerges from the appellant's evidence is that the deceased used to assault her in the privacy of their home. He only assaulted her once, in March 1983, in public at their store. There were people present including her own school pupils. The State did not adduce evidence contradicting that allegation. If anything, the prosecution witnesses to some extent corroborated her allegation. The two State witnesses Ephias Dube and Simbarashe Dube were brothers of the deceased. Ephias Dube was aged twenty- one years at the time of the trial. He was a grade six pupil at Mutsime Primary School. The sum total of his evidence was that he had never noticed any assaults on the appellant by the deceased. He never received reports of ill-treatment of the appellant by the deceased. He stayed with the appellant and the deceased.

On 6 April, he had, together with the family, an evening meal. After the meal the deceased and the appellant retired to bed. There was nothing abnormal that evening in the conduct of the deceased and the appellant. It was only in the early hours of the following morning that the appellant told him that an intruder had broken through a window and was in the bedroom of the deceased. She said the man was armed with a weapon. She advised that the neighbours should be awakened and informed. Afterwards he learnt the truth.

Under cross-examination he agreed that he had heard a rumour that the appellant had been heavily assaulted in March 1983 by the deceased but he was not personally told of the assault. He confirmed that the appellant left her home for four days during that time.

The next State witness was Simbarashe Dube, then a Grade Three pupil at Mutsime Primary School. At the time of the trial he was fourteen years of age. At the time the offence was committed he had lived with the deceased's family for one year and three months. During that time nobody had told him of any problems between the deceased and the appellant.

He did not see anything unusual on the evening of 6 April, He retired to bed with others. Early the following morning the appellant told him and his companions that there was an intruder in the house. He and the appellant went to Munyaradzi's kraal. The rest of his story relates to what transpired afterwards.

But under cross-examination he said in reply to a question whether the appellant had left home in March 1983: "Yes I did not see her". He could not remember the day. He also could not remember for how many days she was away from home. The appellant's mother also came to find out what had happened. The appellant did not tell her.

These vague memories of the rumours of assault on the appellant and her absence from home in March 1983 are to some extent important because they are supportive of the appellant's evidence. The prosecution did not seek to contradict that allegation by calling people who were present in the store when, as she said, she was being assaulted.

She also testified to her husband assaulting her on many other occasions. She testified to his dreams and treats. Because her allegations eventually led to the events of 6 April, 1983 I would like to set out her evidence-in-chief as she described those events:-

"Q. You indicate that your husband used to assault you on many occasions, were you making any reports to any members of his family?

A. No, I did not. I did not find it necessary to tell the public or other people about our domestic fight.

Q. Mrs Mateketa, let us now come to this incident.

You indicate in your defence outline that your husband had a dream on 3rd of April, 1983. Can you advise the court as to the nature of the dream or what your husband advised you about this dream?

A. We were having an evening meal. My husband told me that he had a bad dream and that he was going to die a very sad death or bad death, I asked him why he was taking a dream seriously.

He said he was joking. That day I thought he was going to do something, but he continuously said he was joking. On the 6th we were in bed.

Q. Just on the question of when you say you were in bed, were you sleeping on the bed or on the floor?

A. We had spread our bed on the floor because he said it was too hot that night.

Q. Were the windows of your bedroom closed?

A. One was opened with the curtains drawn and the other one was closed.

Q. And what time did you retire to bed?

A. I did not check my time but we went to bed early.

Q. Can you then describe in detail the incident?

A. After we had slept for some time, I think it was about 9 or 10 p.m., he shook me and said, 'Do you still remember the dream I told you about that day?' I again said to him, 'Why do you take a dream as truth?' After I said that he got up. He spoke in a loud voice. He was shaking. He said, 'I swear. Today I am going to kill you.'

Q. When he said these words were you still lying down?

A. Yes,

And where in relation to you in this room was he standing?

He was just next, stood up and stood straight next to me. He had not taken a step. He said, 'I will kill you today, thereafter hang myself'. And he said, 'Tomorrow there will be two dead bodies here'.

Did he tell you the reason why he would kill you as well?

He said he would kill me because he did not want me to be inherited after his death by other men.

Did he tell you how he was going to kill you?

He did not say how he was going to kill me, but he said he was going to hang himself.

Did you think at the time that your husband would carry out that threat?

I believed so because all the time each time he said a thing after swearing he would carry it out.

If you can continue to describe the incident?.

After he had said that there would be two dead bodies that day, he went to a corner where there was a basin. He relieved himself. He was breathing heavily, shaking and trembling as he was talking as though he had been possessed by some spirits.

During your married life had he ever behaved in that manner?

Not the manner of his talking and breathing.

You say after he had relieved (himself), did he do anything else?

He repeated that he was going to kill me that day and kill himself. He got into the blankets.

Were you still in the blankets yourself?

I was.

What did he do when he came back to sleep?

He slept on his side still breathing heavily but did not talk to me.

Q. For how long did this breathing continue?

A. He took some time, but I cannot estimate it until the breathing changed and I realised he had fallen asleep.

Q. Had you at any stage fallen asleep?

A. I couldn't sleep. I was in fear because I knew he was going to carry out his threat as before.

Q. Mrs Mateketa after you had realised that your husband had fallen asleep and thinking that he might carry out his threat, why didn't you sneak out of the house and seek help?

A. I got out of the blanket, got hold of the door, trying to pull it, the door was locked. The key was not on the door.

Q. One of the windows was open, why didn't you use the window?

A. Below this window was a two legged table and on the table were some bottles. I couldn't have managed to climb out through this window,

Q. Then you advise the court, what did you do when you woke up? You say you tried the door, you found it was locked and the key wasn't there. What did you do after that?

A. I felt that death was imminent, I felt it within my body. I then looked around for a weapon to injure him so that if he got up he would be helpless.

Q. Where did you look for a weapon?

A. Under the bed because under this bed he kept some of his tools.

Q. Did you then find any weapon?

A. The first thing I got hold of was an axe,

Q. And then what happened?

A. As soon as I got hold of this axe I was possessed with an extra power, I just felt like injuring, injuring him so much that when he gets up he would not hit back. I quickly struck blows one after another three times without resting.

Q. Was there any light in this room when you did that?

A. We had a candle light but it was off.

Q. Did you then manage to get out of the house?

A. I took some matches, put on the, candle, took a long time looking for the key and I found it at the foot of this table near the window."

Her story is amply supported by what she said in reply to the warned and cautioned statement. There is a ring of truth in her version of the events of that night. She said:-

"On Sunday the 3rd April, in the evening, my husband said he had dreamt a very bad dream about his death. He said he was going to die a very painful death. So he said he did not want to die that type of death. He said he wanted to hang himself before that day.

He said before I die I want to kill you first so that no one will inherit you. I asked him why he took dreams to be a true thing. He said he was joking.

From that time, he did not show that he would do anything. On Wednesday at about 9-10 pm I was asleep and he woke me up and asked if I still recall his dreams he had told me of. I said again why he took dreams to be a true thing. There he talked in a trembling voice and said I am about to die and before I die I am going to kill you first. There I started to tremble with fear. He stood up and went to a place where there was a chamber and passed urine. After that he stood there for some time and later got into the blankets quietly. From that time I did not fall asleep and I was shivering with fear. I heard him snoring asleep. I then stopped shivering. I then thought of killing him first.

Failure to do it I was going to die, I got up and looked around for anything nearby and then got hold of an axe. Having obtained the axe, I felt possessed of much power which I had never got of and I then struck him with full force on the head. I then repeated twice or thrice. He did not make a move. I then realised that he was dead. I thought of reporting myself to Sandawana Police. I then thought if his relatives learnt that I had killed him, they will kill me. Therefore I took that it was a thief who got in through the window and left having killed him. I took the axe and put it in the car and then I woke up children and told them a lie that I had seen a thief who was armed with something and that they were to go and advise his young brother that

""that a thief had gone in the house. I and the other boy went to the Village of Munyaradzi Gumbo. I told, him a lie and he said that he was not going by himself as the thief had a weapon. We then stayed until it was daylight. He then went to another and they went to that house and he came back and said father was dead. When the police came, I told them the same lie because I was afraid of the relatives of the deceased. When they took me away, I told them the truth and as to why I did it."

That the appellant was telling the truth is underlined by what she told the court in her evidence-in-chief. In a case where the prosecution depends for conviction on an accused person's own evidence it is not advisable to try and

contradict that evidence without adducing evidence in support of the prosecution version, nor is it advisable for a trial court to speculate on mere assumptions of what might have happened when the only evidence the trial court relies on for conviction is that of the accused person.

In my judgment the appellant's evidence and her confession statement provide the motive for the killing and establish the intention, I find it difficult to understand, why in the light of what I have said above the court a quo rejected the appellant's account "about the dream, the conversation about the dream before she killed her husband".

I do not believe that the appellant was trying to put up "a half-hearted attempt to set up a defence of self-defence."

I agree with Mr Fitches, who appeared for the appellant, that what was put up by the appellant was a defence of necessity. The court a quo ought to have viewed the appellant's defence subjectively. Instead of rejecting her defence the court should have put itself in the position of the appellant who was in that room alone with the person who was threatening her with death. She said herself: "Yes, death was imminent", She was in reasonable fear of her life.

See Burchell and Hunt. South African Law of Procedure Vol. 1 pp. 285 and 286. But we are not here considering the defence of necessity because there is no appeal against conviction but as a defence on the merits it could not have succeeded.

I find it strange that the court a quo without any supporting evidence commented as follows on the reason why the couple slept on the floor:-

"The court notes that on that night the couple slept on the floor. The accused states that it was the deceased who suggested that they slept on the floor, but it must be generally known that if you are going to chop anything then you want a firm base upon which to put the object you are about to chop up. That is, for instance, if the accused had attacked her husband while she slept on the bed, the mattress would have given in on impact of the axe upon the neck or the face and the volume or degree of force would not have rendered the same deep cuts that are shown in the photographs and were found by the doctor. In other words, if you are going to chop effectively and efficiently and rapidly with good results you want a firm based upon which to chop."

The only evidence on this aspect of the case was from the appellant who told the court that the deceased suggested sleeping on the floor because it was hot. That too was the reason given for leaving one of the windows open.

This appeal is against the sentence of death because the court a quo did not find any extenuating circumstances. It said: "The court has considered your submissions and rules that there are no extenuating circumstances" No reasons were given for coming to that conclusion. The omission to give reasons is an irregularity which gives this Court the opportunity to interfere with the trial court's finding. See S v Masuku & Ors. 1985 (3) SA 908 (AD) at 912D. Having found that no extenuating circumstances existed the trial court went on to receive submissions in

mitigation of sentence.

When there is no extenuation the death penalty is mandatory. There is no room for a plea in mitigation. Because the trial court found no extenuating circumstances and

did not provide reasons for so finding, this Court is entitled to examine the evidence on the record to find out whether there are extenuating circumstances. I say this because this Court is obliged to consider the question of extenuating circumstances as I have already stated above, by looking at the evidence and deciding on the question of extenuation afresh. In *S v Masuku and Ors. supra*, at 912J-913B, NICHOLAS AJA stated the way an appellate court goes about examining afresh the issue of extenuation as follows:-

"The way in which the question should be approached has often been stated. See for example *S v Ngoma (supra ubi cit)* where CORBETT JA said:

'The determination of the presence of extenuating circumstances involves a three-fold enquiry: (1) whether there were at the time of the commission of the crime facts or circumstances which could have influenced the accused's state of mind or mental faculties and could serve to constitute extenuation; (2) whether such facts or circumstances, in their cumulative effect, probably did influence the accused' state of mind in doing what he did; and (3) whether this influence was of such a nature as to reduce the moral blameworthiness of the accused in doing what he did. In deciding (3) the trial Court passes a moral judgment. (See *S v Babada* 1964 (1) SA 26 (A) at 27-8; *S v Letsolo* 1970 (3) SA 476 (A) at 476G-H; *S v Sauls and Others* 1981 (3) SA 172 (A) at 184C-D; *S v Smith and Others* 1984 (1) SA 583 (A) at 592H-593C.)'

In this case the appellant was convicted on her own evidence. There was no prosecution evidence contradicting what she said in her evidence and what she said in reply to the warned and cautioned statement. From her evidence the intention the court a quo found emerged clearly. Besides that, there also emerged factors which, although not discounting her guilt, measurably reduced her moral blameworthiness.

The sad story told to her by the deceased will feature prominently in searching for extenuation. He told her he was going "to die a very painful death. He did not want to die that type of death." He was going to hang himself. And more importantly, for the purpose of searching for factors of extenuation, he told her that he did not want her to be inherited by someone else. Then there is that frightening dream. She was told it once on 3 April, 1983 and then it was repeated on the Wednesday the offence was committed. She was asleep, He awakened her. He reminded her of the dream. "He talked in a trembling voice and said I am about to die and

before I die I am going to kill you first," As he talked he "was breathing heavily and shaking and trembling as though he had been possessed". She trembled with fear. He passed urine into a chamber. Then he stood for a while and then went to sleep. He started snoring. The appellant could not sleep. She was in fear of her life because she thought he would carry out his threat. She was forced by threats to murder the deceased. I believe the reasonable fear was created by the threat of death.

That fear operated in the mind of the appellant. It is that fear that affected her thinking at the time that the court must look at.

In the instant case the appellant's state of mind must be looked at, having regard to the circumstances prevailing in that room. She could not find the key to the door. She feared climbing on to the bed in order to jump out through the open window. In desperation, so it would seem from her evidence, she looked for a weapon. In her own words she said: "As soon as I got the axe I was possessed with extra power, I quickly struck blows one after another three times without resting," That was the state of mind in which she was, I would like to think that she was completely possessed with fear, the type of fear which instills strength and courage because one is desperate.

The court a quo should have considered whether these factors which caused the appellant to commit the murder were extenuating or not. The fact that she committed the murder in the manner she did and with actual intent is irrelevant at this stage of the exercise. The relevant inquiry is whether the factors which subjectively influenced the mind of the appellant to commit the murder were extenuating. See Chaluwa v The State, Supreme Court Judgment No. 75/85 (as yet unreported) and the cases cited therein at 8-11.

In a case in which an accused person has been convicted on evidence given by the accused herself and the facts in that evidence reduce the moral blameworthiness of the accused the trial court should give them their due weight when considering the existence or otherwise of factors of extenuation. In Chaluwa v S, supra, at 12-13 I said:-

"In this case the appellant was convicted on facts that were largely contained in his warned and cautioned statement and his statement on indications. Those facts, which the court a quo accepted, reduce measurably his moral blameworthiness and yet the court a quo did not give them their due weight when considering extenuating circumstances.

I am indebted to my learned brother, MR JUSTICE BECK, for translating S v Septhuti 1985 (1) SA 9 (AD), a judgment delivered in Afrikaans, because in that judgment SMALBERGER AJA dealt with the proper approach to a consideration of extenuating circumstances when the proven circumstances include the appellant's own version of events, which are improbable but which may be reasonably and possibly true and which were relied upon by the trial court for convicting him. SMALBERGER AJA said (according to MR JUSTICE BECK's translation) at 18 E-I:-

'Extenuating circumstances must have their foundation in the proven circumstances of each case. (S v Ndlovu

1970 (1) SA 430 (A) at 433H). The proven circumstances include those facts on which the conviction is based together with such other facts

"facts as may be proved when the enquiry into extenuation is undertaken, provided that such last-mentioned facts may only amplify or temper the findings on the merits but may not alter them (S v Vortsteen 1972 (4) SA 551 (A) at 558D). In R v Samson 1959 (1) SA 893 (C) it was decided that where the Court, in convicting an accused of murder, makes certain findings that form an integral and necessary part of the findings on which the conviction rests, those findings have to be accepted for purposes of deciding whether or not there are extenuating circumstances. (See too R v Maïke 1961 (2) SA 240 (N) at 244G; Du Toit Straff in Suid-Afrikaanse (South African Criminal Procedure) (3rd Ed. at 596); and compare S v Shepard and Others 1967 (a) SA 170 (W) at 180 D-H). In the course of his judgment in Samson's case at 894 A-B VAN WYK J said;

"In the present case in considering whether the accused is guilty of murder the Court found that his evidence might reasonably possibly be true. His evidence presents the facts in as favourable a light for himself as is possible. In view of the onus that rests on the Crown the Court accepted the essence of the accused's version, but nevertheless found him guilty of murder. The probability is that the accused's account is false, but in my view the Court cannot now, when considering whether extenuating circumstances are present, reject the accused's account because of the probabilities."

This is the approach to a consideration of extenuation which in the circumstances of this case the court a quo should have followed."

In the instant case we do not know how the trial court came to reject the existence of extenuation because no reasons were given. In the view of this Court the factors I have enumerated above constitute extenuation. Accordingly the verdict of the court a quo is altered to read "Guilty of murder with actual intent and with extenuation".

Now I come to consider the appropriate sentence the appellant ought to be given having regard to the manner in which she committed the crime and her personal circumstances.

The deceased and the appellant were married to each other. They had lived together for twenty-one years. They were both teachers at Mutsime Primary School.

They helped each other in running their two shops. They had six children. The last child now lives with a relative of the deceased. It seems to me that the couple loved each other. They were doing well. They sent their children to school. That they loved each other becomes clear from the fact that the appellant did not tell other people whenever she was assaulted. She even refused to tell her mother that she had been assaulted in public in March, 1983, I would like to think that in so refusing, she was protecting their marriage and their reputation as teachers. The deceased did not want to die and leave his wife, the appellant, to be inherited by someone else. This one would like to assume, shows a high degree of his love.

The events of 6 April changed all that. The appellant witnessed the deceased in a terrible state of mind. He spoke in a trembling voice. He was shaking when he said:

"I swear today I am going to kill you". The appellant decided to do something before he killed her. She was seized by fear, fear for her life, I believe she became frustrated and frightened and she felt in that state of mind "that death was imminent". She had to do something to save herself. She did but unhappily she murdered her husband. In my view the above circumstances are mitigatory. Besides she was a first offender with no history of a violent past.

But the crime she committed fills one with revulsion. She delivered with great force three blows with an axe in the vital areas of the head. Dr. Dahlia who conducted the post mortem examination on the deceased's body found a 4 centimeter long wound through the left ear of the deceased. There was a long deep cut at the back of the neck which was more to the left side of the neck extending to the cervical spine. It was 12 centimeters long. The third cut was also 12 centimeters long. It was a long deep cut in the region of the lower part of the neck extending down towards the left shoulder. The doctor's opinion was that death was due to the deep cut into the cervical spine. It was a gruesome and callous murder.

These injuries accord with the appellant's description of how she felt possessed of great strength and hacked her husband to death. She brutally murdered the deceased who was asleep and snoring and therefore defenceless.

The sentence I am going to pass should in my view fit the offender while at the same time meeting the approval of society. I admit it is not always that society approves sentences imposed by the Courts. Sometimes the disapproval is justifiable and at other times society's reaction is not justified because society does not have the full story. The court has the advantage of seeing the offender and of comparing his personal circumstances with the crime he has committed. The court is thus able to assess an appropriate sentence having taken into account mitigatory and aggravating factors. It is in the main a value judgment. In my view the appellant's mitigatory features considering the circumstances surrounding the commission of this murder call for a sentence that fits a woman who has been left with a great deal of responsibility and who on the evidence was goaded into committing this offence.

Accordingly the sentence of death is set aside. In my view justice will be met by substituting the death penalty with a sentence of 10 years' imprisonment with labour.

BECK, JA:

I agree.

GUBBAY, JA:

I agree.