

THE STATE
versus
ROBERT TEVEDZAYI

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 8 & 9 March and 16 April 2018

ASSESSORS: 1. Mr Kunaka
2. Mr Jemwa

Criminal trial

A Muzivi, for the State
Ms P Mutimudye, for the accused

TSANGA J: The accused Robert Tevedzayi is charged with the murder of his wife, Abigail Chindavata. She was a mother to his five sons. She was only 36 years old. The two had been married for about fifteen years. Her husband is alleged to have assaulted her to death using a hoe, an axe and a metal bar in their bedroom on the night of 12th -13th of March 2017. The incident happened at Village 3 Maryland Farm Compound, Macheke. He pleaded not guilty to the charge. In two sentences he provided his defence outline. He had walked into the house and had seen his wife with a lover. The lover and his wife had started attacking him and in self-defence he resisted the attack. During the course of the trial he further added intoxication to his line of defence. In addition, his far lengthier warned and cautioned statement was also before the court as exh 2.

The post-mortem report by Dr Jvangwe was admitted in evidence as exh No.1. It gave a detailed description of the injuries that had been inflicted and concluded that she had died of severe head injury consistent with mixed blunt / sharp objects. She also had face injuries. One of her ears according to the report had been hacked off.

The evidence of her friend Dainah Matyora who had attended the scene after the fatal attack as well as that of the Investigation Officer Panganayi Chando who attended the crime scene was not in dispute and was admitted in evidence in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]

The warned and cautioned statement is vital especially since the accused person sought to depart from some of its material content. It was made and signed on the 21st of March 2017 and confirmed the following day before a Magistrate. It gave a vivid and chilling account of what transpired on that fateful night. The chain of events had begun on Friday the 11th of March 2017, when the couple had gone to Craiglea Clinic for treatment for a sexually transmitted disease. This was at the accused's behest. He had been advised to buy two injections, one for each of them. His wife had also been given some tablets. When they arrived home, his wife had proceeded to the local Chairperson's residence. His explanation is that she had done so because she knew that she was the one who had given him the sexually transmitted disease. According to him, his wife had also gone to the police the following morning to report the domestic dispute and had returned home later that Saturday afternoon. In a bid to look for money to buy the two injections on that same day, the accused had gone to Durlstone farm where he now normally stayed. He too had returned around 3 pm in the afternoon without success. He had told his wife that he had failed to get money to which she had replied that it was his own problem as she had merely accompanied him to the clinic and that he was the one who was sick. This had enraged him because he was unable to have sexual intercourse with any other woman other than his wife as his wife had "sexually locked" him. He averred in his statement that as a result he had not slept with anyone but his wife. As such, this had convinced him that she was the vector of the disease he was suffering from. A dispute had ensued as a result of her perceived lack of sympathy for his plight. He had enquired where she had slept the previous night and she had told him that she had proceeded to the Chairperson's home. She had also told him that the police wanted them to come to the station that coming Monday as she had also gone there. She had then said that she was no longer interested in going to the police on Monday.

The accused described in his statement how, at that point, he had assaulted her by slapping her. She had grasped him by the throat. He had overpowered her and had picked up a hoe which was in the house and had briefly assaulted her with it. She had managed to grab the hoe. He had then picked up a small axe which was also in the house and had effected blows on her face and the head. He could not remember how many blows. He had only stopped assaulting and hacking her with the axe when she fell to ground. Thereafter he had picked up a metal bar which was also in the house and had further bludgeoned her with it on the face and head. He could not remember how many times. According to him, he had only put down the metal bar when he could hear no more cries and he could see she was limp.

In sum, the full nature of the attack on his wife according to his warned and cautioned statement, was that he had started off by assaulting her with his bare hands, proceeded thereafter to using a hoe, before escalating the attack to using an axe and concluding for final measure with a metal bar. Thereafter he had left the house and had left her lying down. He said he did not know she was dead. He had gone to Durlston where he normally stayed. On arrival he had tried to kill himself by taking a tobacco pesticide. When people came that afternoon they had found him vomiting and had taken him to hospital.

The metal bar was admitted in evidence as exhibit No 3 whilst the axe was admitted as exh No 4. The certificate of weights of both these items was admitted as exhibit no 5. The metal bar weighed 12.90 kgs and measured 86cm by 9.5cm width. The small wooden axe weighed 0.58 kgs and the wooden handle was 60cm in length.

The evidence

The accused's minor son and a form 3 pupil, who shall be referred to as X, gave evidence. He is the eldest in a family of five boys. He told the court that his father, who was in fact not staying with them having moved out some months earlier, had come home on the 12th. He was staying at Durlston Farm and would come occasionally. That day they had eaten and had gone to bed at around 8pm. His younger brother and he were sleeping in one room, whilst two other younger siblings aged 5 and 2 ½ years at the time were in the same room and the accused and their deceased mother.

He had been awoken in the early hours by his mother's piercing screams asking him to open the door. She was saying she was being injured. His younger brother who was with him had also woken up, whilst he himself had jumped out of the window to try and alert neighbours. His brother had followed. He had tried to call one neighbour who had refused to come on the grounds that he did not get along with the accused. He had managed to find another neighbour, Aaron Simbarashe Chiwara whom he referred to as Simbarashe who had agreed to come. Simbarashe had tried to intervene but had been threatened by the accused who held something in his hand although he had said he could not see what it was. They had proceeded back to Simbarashe's house who had then suggested that the two brothers go back home but they had refused, being too afraid to do so.

He told the court that they were always running away from home because of their parent's altercations. When Simbarashe refused to accompany them again, they had proceeded

to go and wake up a Mrs Chirombo. She had told them to go and sleep with her son and that they could go home in the morning.

In the small hours of the morning, they had woken up to go home. On their way there they had been met by their younger five year old sibling whom he instructed to ask for fire to light the room. The witness had proceeded to his mother's room and had observed her footsteps at the door. He had called out her name. There had been a deathly silence. He had immediately gone to call a woman called Mai Misheck (Dainah Matyora) and had alerted her that his mother was not answering to his calls. She had brought a torch with her as it was still dark and the boys had followed closely behind her. She had gone in and had immediately seen blood on the deceased's head and had started crying. She had immediately sent them to call one Chijoto who had then brought the police.

In cross examination, he told the court that he had heard his father telling his mother to sit down. He had also heard her cry out that she was being injured. Asked by the court to clarify the nature of altercations his parents always had, he told the court that they would fight over the accused's failure to provide for the family. Sometimes his mother would go to his workplace to get food. He further told the court that at one time they had left home with their mother and the accused had followed them and assaulted her. On another occasion, the accused had rolled up some tobacco using their exercise books and he had beaten their mother when she reprimanded him. He also confirmed to the court that there had not been any other adult man at the house that night besides his father. He had only heard his mother and father.

The second witness was Simbarashe Chiwara, the neighbour who had come out to try and assist that night. He described how the accused's son had come knocking vigorously on his door at around 2 am whilst calling out that his father was assaulting his mother. He had immediately woken up and had proceeded to the house with X's younger brother whilst telling X to go and alert others. He told the court that he had tried to open the door but it was locked from inside. They had managed to push it slightly and it was at that point that the accused had come to the door armed with a metal bar. He had heard the deceased apparently asking for forgiveness. The following morning he had been woken up by Mai Misheck's screams. He had rushed there and had seen the deceased lying on the ground and beside her was her youngest child - a toddler. He had observed that the walls were bloodied from the attack on the deceased.

He too corroborated the history of violence and said that it was not the first time that neighbours had been called upon to assist in resolving a dispute. He told the court that the deceased and the accused had had disputes about his failure to maintain the family. He also

told the court that the accused had suspicions about wife infidelity. The accused had moved out about a year earlier. On the night in question, he too had not seen anyone else at that house besides the two who were fighting.

The defence case

In his defence, the accused reiterated the events of the day as captured in his warned and cautioned statement about going to the clinic for treatment. However, he elaborated on the defence he had introduced in his defence outline, which departed from his warned and cautioned statement. There had indeed been a misunderstanding with his wife that night after supper over her refusal to cooperate about going to seek medication the following day. Angry about it, he had left to go to where he was now normally staying. He had stopped at a bar to ease his mood. He had however returned home when he realised that he had forgotten his clinic cards. He had walked into the house and had seen his wife with a lover. The two had, according to him, started attacking him. He had fallen down and his wife had grabbed him by the testicles. He had not seen the male assailant clearly but had fought both of them. The assailant had managed to bolt. It was then that he had picked up what he thought was a stick but was in fact an axe and started assaulting his wife on what he thought were her shoulders but was in fact her head, in an endeavour to get her to let go of her grip to his private parts.

He told the court that he had previously heard of his wife's infidelity from the children but had not caught her.

The legal position

The accused relied on three primary defences for his actions that night. He relied on self-defence arising from the fact that he was defending himself from an attack by his wife and her lover. He also relied on provocation in that he caught his wife with a lover when he abruptly returned home that night. He also drew on intoxication in that he had consumed alcohol that night before he returned home to fetch his clinic cards.

In terms of s 253 of the Criminal Code [*Chapter 9:23*] self-defence and defence of another can be a complete defence where an unlawful attack had commenced or was imminent, or, where the accused believed on reasonable grounds that the unlawful attack had commenced or was imminent. Other conditions must be fulfilled. The conduct must be necessary to avert the attack or the accused must believe as such and that they could not otherwise escape from or avert the attack. The means used to avert the unlawful attack must be reasonable in all the circumstances.

Provocation in so far as it applies to murder is dealt with by s 239 of our Criminal Code. It can be partial defence to a charge of murder. Where an accused did not have the intention to kill when he was provoked, then he or she will not be convicted of murder but only of culpable homicide. Where there was an intention to kill, the court has to decide whether the accused lost his or her self-control and killed intentionally, in circumstances where even the reasonable person, faced with that extent of provocation, would also have lost self-control. If the accused lost self-control and a reasonable person would have done likewise, the accused has a partial defence and will be found guilty of culpable homicide and not murder. *S v Nangani* 1982 (1) ZLR 150 (S). However, as highlighted in *S v Madalitso Ranchi* HH-155-17 in cases such as this where an accused has murdered his wife, the partial defence of provocation comes squarely in conflict with s52 of the Constitution which is clearly protective of those who generally experience violence in the hands of private actors. In other words, violence in the home for whatever reason is distinctly constitutionally prohibited.

Voluntary intoxication is governed by s 221 (1) of the Criminal Code. Since murder is a crime of requiring “proof of intention, knowledge or realisation of a real risk” in order to negate intention, the degree of intoxication must be such that the accused did not form the intention or have the knowledge, or, realise the existence of risk required. Where an accused despite being intoxicated is still able to form and did form the requisite subjective state of mind, the court may regard his or her intoxication as mitigatory to the crime charged.

As to the type of murder, where an accused intends to cause death or where he foresaw that the death was substantially certain to occur, then in terms of s 47(1) (a) of the Criminal Code he is guilty on the basis of actual intention. Where on the other hand an accused does not have actual intention to cause death, but realises that there is a real risk that death would result, then such an accused is deemed guilty on the basis of what used to be referred to as legal intention. *S v Mhako* 2012 (2) ZLR 73 (H)

Factual and Legal Analysis

As regards self-defence, the evidence of the witnesses was important. X, the son who gave evidence, was very clear that there was no other adult person that night besides his parents when the violence occurred. The persons in the house that night were the witness’s parents, himself and three other siblings. The fourth sibling was staying with his maternal grandmother at her rural home. The accused also did not mention that he had been defending himself from anyone when he gave his warned and cautioned statement. If this had been the case, the gist of

his lengthy statement would have been on this precipitating factor as the material cause of the violence. The fact that the door was locked from inside does not corroborate the evidence of the accused that there was a man in the house that night. We do not believe his version that he left the house at all that night and that on his return to pick forgotten items he had then stumbled on a lover who engaged him in battle.

His added motive which he presented only at the trial being that he acted in self-defence against an assault by his wife and her lover, was clearly an afterthought. It was far from being clear how the lover was said to have gotten out of the house that night since the house was locked from inside. The accused did not mention re-bolting the door at any point – something he forgot to do because he was making up his version as the trial unfolded.

The only person armed that night was the accused. His explanation that he omitted to mention the fact of the lover in his warned and cautioned statement because he was afraid to contradict what the police had told him to say, is simply unbelievable. There was no allegation from him that the confirmation procedure had not been properly followed. In fact he admitted that when his statement was confirmed he was asked whether he was making the statement freely and voluntarily and that he told the court that it indeed was a freely made statement.

His defence that his wife was also squeezing his testicles is equally unconvincing. His hands were free enough to get hold of an axe and then a metal bar and he could just as easily have used them to loosen her grip. In any event this version of events was again made up as the trial unfolded. In his warned statement he had claimed that she had held him by the throat. We are in agreement with the state that the defence of self-defence as a whole is merely calculated to send the court on a wild goose chase. He was clearly in charge that night blaming his wife as a vector of disease and seemingly oblivious to the contradictions in his own statements that he was chaste. How else did he discover his purported inability to sleep with women unless he had tried to sleep with droves of them?

By shifting blame he merely hoped to get away from the consequences of his actions. It is easy for the accused to spin a version of events designed to ensure that the deceased was at fault for what happened to her. Yet, as courts know only too well, there are always two sides to a story. The accused's narrative about what happened that night was from the onset an incomplete one as the victim was dead. It was therefore a narrative told only by the accused as regards the causes behind the fight that day. This story that he found her with a man appears to be simply a continuation of his assault and vilification of her even in her grave. As if mutilating her body was not enough, the accused simply resorted to mutilating her honour from a

conviction, most likely from months of prison talk among inmates, that an explanation that he acted in self-defence would exonerate him. The defence of self defence against an attack by a phantom boyfriend is a fantasy of his imagination and cannot succeed.

His defence of intoxication was also not raised in his warned and cautioned statement and neither did it emerge in his defence outline. It was equally also an afterthought. If he had indeed left home and on his way to where he was staying and had stopped by to purchase some alcohol, this would have been a fairly straight forward piece of evidence to have corroborated. But even assuming that he had drunk any liquor on that day, there was no evidence led to convince this court that he did not have the requisite state of mind when he committed the offence. The onus is on the accused to demonstrate that his intoxication rendered him incapable of forming the requisite intention to murder.

The act of provocation which he alluded to in his detailed warned and cautioned statement was his wife's refusal to go for treatment for the sexually transmitted disease. He could have gone himself for treatment so this was clearly no reason to kill. Sexually transmitted are a common occurrence and people generally do not go killing each other. What emerged from his son's evidence and what is crucial to understanding the accused's action is that he had a history of perpetrating domestic violence. This reflects his choice of dispute resolution as something he was accustomed to. The evidence led spoke to various forms of abusive behaviour that characterised the home life of the accused's relationship with the deceased.

An increasing number of cases brought before the courts reveal that far too frequently the bedroom has become a deadly environment for women as a result of men's violent outbursts in the resolution of disputes. Women have been clobbered, booted, strangled, stabbed, or slashed to death by their spouse in the confines of the bedroom, all the while by men who would have the courts believe that but for their wife's sluttish conduct, their behaviour was out of the ordinary. See cases such as *S v Ranchi (supra)* *S v Karadzangare* HH 794/16; *S v Ndachengedzwa* HH 45-16 These cases reveal the depth of a societal problem of violence where violence in the home has become an all too frequent killer. As often happens where there is a cycle of domestic violence, situations rarely get better but get worse. This time, as the facts show, the accused had erupted into a deadly rage.

In this instance, the accused's intention was manifest given that there was an attempt by his sons to get help. A neighbour came and was chased away with a metal bar. This evidence was not challenged when the neighbour gave his evidence about what had occurred that night

when he got to the scene. If the accused had not intended to kill his wife, he would not have resisted attempts to stop him. Instead, he had chased the witnesses away and threatened those who came to assist with a metal object. The savagery of his furious attack is significant in that it is captured in his own words in his warned and cautioned statement. He had hacked her to death repeatedly without count and most probably even after he had inflicted enough blows to kill her given his own description of the various instruments he had used that were within his reach. He had also aimed them at the head, a very delicate part of the human body. His statement that he had aimed at the shoulders is simply a lie and even that would have been deadly in itself. He had meted out many blows showing his determination and perseverance to ensure that he inflicted maximum damage. He said himself he had never seen so much blood.

The court is satisfied that he had every intention to kill. Suffice to mention that this case is not just about the murder of the spouse in a vacuum. It is about an intimate murder in the context of gender based violence against women as much as it is a heart wrenching case of how such violence in the home impacts families especially children when left unchecked. The children were exposed to gender based violence and ultimately their mother's death as result of violence in the home. No key players should ever take such violence lightly on account on it being "domestic" be it community members or state actors encompassing the police, the prosecutors or the court itself. The core obligations of state parties in particular under CEDAW are well articulated. They are to respect, protect and fulfil women's rights to non-discrimination and the enjoyment of *de jure* and *de facto* equality. One wonders if the outcome of events that day would have been different if the police had reacted differently to their protective duty when she made her report earlier that day instead of simply telling her to return on Monday. Such attitudes of procrastination, whether influenced by tradition, culture, or religion or economic constraints reflect a poor implementation of domestic violence legislation contrary to recommendations and the guidelines to state parties that have implemented CEDAW. Inaction further contributes to a violation of a litany of rights that are crucial for women to enjoy a life free from gender based violence. As observed in para15 of **General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19:**

"Women's right to a life free from gender-based violence is indivisible from and interdependent with other human rights, including the right to life, health, liberty and security of the person, the right to equality and equal protection within the family, freedom from torture, cruel, inhumane or degrading treatment, freedom of expression, movement, participation, assembly and association."

See s 48 of our Constitution¹ on the right to life; s 49 on the right to liberty; s 51 on the right to human dignity; s 52 on the right to personal security; s 53 on freedom from torture; s 56 on equality and non-discrimination and s 58 on freedom of association and assembly.

One wonders too if more members of the community had come out that night, especially men, if that could have made a difference.

The accused did not care about the impact of his actions. He had not been deterred at all in his brutal attack by the presence of four of his children in the house that day. They are the ones who have been tragically left to deal with the aftermath of violence in the home when all around seemingly took a softly, softly, approach to it. Those children who were in the house and those who returned to their mother's bloodied body with her 2 ½ year old next to her, will forever have to live with these haunting memories of the loss of their mother at the hands of their father. The five year old who had to witness all this in the room that day can only be but a broken child. These are not memories a father should be bestowing on his children.

Experts tell us that the psychological scars will be with them forever, not just from the severity of the final act against their mother, but from having lived a life of exposure to domestic violence and years of witnessing brutality.

“Trauma caused by witnessing abuse between parents can manifest itself in the child through a number of symptoms. These symptoms range from withdrawal and inattention to suicidal tendencies. The problems that a child develops from witnessing abuse will often plague the child for the rest of her life. Yet most courts refuse to classify the trauma or the enduring symptoms as child abuse. To protect these children, courts should change their view and consider the specific effects that witnessing abuse has on a child”.

And further:

“The child begins to associate violence with dispute resolution. Every time the child witnesses a violent episode, it reinforces the child's belief that violence solves disagreements. Children who grow up witnessing spousal abuse have a greater chance of becoming an abuser than children from non-violent homes.”²

¹ Constitution of Zimbabwe Amendment (No.20) 2013

² Derek J. Timm, *Mommy, Daddy, Please Stop Fighting: A Legal Analysis of How Witnessing Spousal Abuse Harms a Child*, 2 U.C. Davis J. Juv. L. & Pol'y 29 (1997)
In support of counselling for such children see also, Laurel A. Kent, *Addressing the Impact of Domestic Violence on Children: Alternatives to Laws Criminalizing the Commission of Domestic Violence in the Presence of a Child*, 2001 Wis. L. Rev. 1337 (2001)

These children will no doubt require counselling to help them deal with their traumatic experiences. This is particularly so with the two older boys who went to seek help who will need assistance so that they do not live thinking that they could have prevented their mother's death. For the eldest son, having had to re-live the experiences of that day through testifying in court will no doubt have re-traumatised him. Constitutionally children are entitled to adequate protection by the courts, and in particular the High Court as their upper guardian. See s 81(3) of the Constitution. As such, and as part of that mandate to protect, this matter is therefore brought to the attention of the Director of Social Welfare to render the necessary psychological and other assistance to the children who are now staying in Wedza, Musengezi, Chaza village with their grandmother in the event that none has been rendered.

Verdict: The accused is found guilty of murder with actual intent in terms of s 47(1) (a) of the Criminal Code.

Sentence

In mitigation the accused is said to be a first offender. He has, however, been found guilty of murder with actual intent – a very serious offence. Whilst he has spent a year in custody, this is barely of consequence in this instance given that he was found guilty of murder with actual intent under s 47(1) (a) which attracts strict punishment including a life sentence or the capital sentence in some instances. In aggravation, the full impact of this murder on a wider family scale has been addressed and is indeed to be considered in arriving at an appropriate sentence. Whilst it is argued that he is a family man it cannot be said that he is any sort of role model for his boys other than a negative one. It also cannot be argued that his family will suffer as a result of lengthy incarceration when he was not looking after the children.

Section 47(2) (c) of the Criminal Code provides that in arriving at an appropriate sentence for murder, it shall be taken as an aggravating circumstance if:

“the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim”.

That gender based violence may amount to torture or cruel, inhuman or degrading treatment in circumstances of domestic violence is clearly addressed in para 16 of the General Recommendations to state parties that I have alluded to above. Moreover, our own Constitution in s 53 guarantees freedom from torture or cruel and degrading treatment or punishment from state actors as well as private individuals. This no doubt includes freedom from torture resulting from gender based violence since official torture and gender based torture, though each unique

in its egregiousness as has been argued³, are ultimately said to share commonalities in terms of process, purpose, and consequences.

Factually, there is no doubt that the deceased was subjected to cruel, unusual and degrading treatment. The fact that she was heard to be asking for forgiveness was simply an indication that she could bear the pain no more. She would have said anything to stop the physical torture as she was being hacked and mutilated. Indeed as the State rightly pointed out as aggravating, she died an extremely painful death. Throughout the trial the accused showed absolutely no remorse for his actions. A lengthy custodial sentence is called for to enable him to reflect on the impact of his actions for which at present he shows absolutely no remorse.

Accordingly, the accused is sentenced to 35 years imprisonment.

Prosecutor General's Office, State's legal practitioners
Gambe & partners legal practitioners, accused's legal practitioners

³ See Rhonda Copelon., *Intimate Terror: Understanding Domestic Violence as Torture in R Cook (ed) Human Rights of Women: National and International Perspectives (Philadelphia University of Pennsylvania Press) 1994.*