THE STATE
versus
TICHAONA MUTUVHA TARWIREI

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 20 May 2024 and 7 November 2024

Assessors: Mr *Gwatiringa*
Mr *Jemwa*

Criminal Trial

D H Chesa, for the state
M V Masuku, for the accused

MUTEVEDZI J: The deceased Clara Pukayi is yet another victim of domestic violence. She was attacked by the accused Tichaona Mutuvha Tarwirei, to whom she was married. The state alleges that on the 20 August 2022 at Huni village, Chief Svosve, Wedza the accused unlawfully and with intent to kill or realising that there was a real risk or possibility that his conduct could cause death but persisting with his conduct despite the realisation of the risk or possibility struck the deceased with a brick on the back of the head and stamping on her head several times. The deceased sustained mortal injuries.

[1] The background to the murder as alleged by prosecution was that the accused and the deceased were boyfriend and girlfriend. They resided separately in the same village in Wedza. On the fateful day the accused visited the deceased at her homestead. A misunderstanding ensued. The deceased fled from the wrath of the accused. He pursued her and caught up with her. He had a brick in hand. He struck the deceased on the head with the brick and she immediately collapsed to the ground. In a merciless rage, the accused then repeatedly stamped on the deceased as she lay on the ground. He subsequently fled the scene and left her for dead. A Good Samaritan called Tichaona Muvhake found the deceased groaning by the roadside. He called for help from the shopping centre where he had been coming from. He further alerted both the police and the hospital. The deceased was

subsequently ferried to a local hospital where they further referred her to a bigger hospital in Harare. Unfortunately, she succumbed to the injuries from the assault about a month later. The pathologist who conducted the post-mortem concluded that her death was due to brain damage, severe brain oedema and severe head injuries due to assault.

[2] In his defence the accused denied that he intentionally killed the deceased. He told the court that the deceased and himself were married and indeed lived as husband and wife in Wedza. He said on 20 August 2022 in the afternoon he left the matrimonial home to go to work at a mine in the same area. On his way he met his friend who then offered to buy him a beer at a nearby bar. There he partook about four king size bottles of a beer called black label. The size of the bottle is popularly referred to as a quart. He also played a game called snooker. At around 1900 hours, the accused said he decided not to go to his workplace at the mine. Instead, he opted to return home because it was late. When he arrived home, he found his wife having sexual intercourse with another man in the bush about forty metres away from their homestead. The accused said he shouted at the adulterous pair to draw their attention. The man who the accused said he could not identify was wearing a white jacket. He ran away the moment the accused called out. He went in the direction of the shops. The accused pursued the man but failed to catch him. He then decided to return to where he had earlier seen the man and his inamorata. To his surprise, he found his wife still standing there. She had a half a brick in her hand. The accused then asked his wife who her paramour was but she refused to disclose. An argument ensued resulting in the deceased hurling the half brick at the accused. He ducked the strike and then picked the same weapon.

[3] The accused added that with the brick in hand he started walking towards the deceased who was now back peddling away from the accused. He caught with her and insisted on knowing who she had been with but the deceased still refused to disclose her lover. It was at that stage, that the accused hit the deceased on the left side of the head with a brick. She fell to the ground. He then kicked her three times on the buttocks while she was on the ground. He left the scene and went back in the direction that the man in the white jacket had taken. When he couldn't find him, he decided to continue drinking beer at the shops until the next morning.

[4] When he went home the following morning, his wife was not there. He approached his mother's homestead. On his way there he was advised by a local man that the police were looking for him. His first suspicion was that his wife had reported him for the assault the previous night. He still proceeded to his mother's homestead. When he got there and removed his shoes, he noticed that the shoes had blood stains on them. A short while later, he saw a police vehicle approaching. He signalled to the officers to come to him. They did and apprehended him without any resistance.

State Case

[5] The state opened its case by applying for the deletion from their summary of evidence the fact that they would produce as exhibits a pair of black and white shoes, the blood-stained brick and its certificate of weight because such exhibits were not available. Further the prosecutor indicated that his case was based on the evidence of four witnesses whose evidence was not contested by the defence. He therefore applied to have the testimonies of all the four witnesses namely Aaron Nyarumwe who was the investigating officer; Farai Dambanomweya another officer who assisted in investigating the case; Doctor Laurelien Malagon Martinez the pathologist and Tichaona Muvhake formally admitted into evidence in terms of s 314 of the CPEA as that they appeared in the state's summary of evidence. The defence once again confirmed to the court that indeed they were making the sought admissions. As a result, the evidence of the four witnesses was duly incorporated into the record of proceedings. It was common cause. It does not affect anything in this case given the concessions made by the accused. We do not need to restate it here.

Defence case

[6] The accused gave evidence in his defence. He essentially repeated his defence outline. The little additions he made related to the time he said he went to the shops following his wife's love but could not find him and decided to continue with his drinking binge. He said he literally slept at the shops with his drinking mate. In the morning, he said he thought his wife had gone to report him to the police. He thus decided to follow her to the police station. On his way there, he saw a police vehicle with seven officers aboard. He observed it pass through the garage and later driving in the direction of his homestead. He followed the police to his residence and watched them from a distance. When they were about to leave his place, he called

out to them. The officers asked whether he was Tichaona. He admitted he was and they ordered him to sit. He complied and was arrested.

Common cause issues

[7] We have already said this case is remarkable in that the entirety of the state witnesses' evidence is not contested. From it, what is apparent is that the accused and the deceased were in love. The accused said they were married but prosecution says they were simply boyfriend and girlfriend. The evidence we have which was not disputed is that the accused and the deceased were not husband and wife. The accused equally admits that he assaulted the deceased with a brick on the head and that the deceased died from injuries sustained from that assault. His contention is that he assaulted her after he found her having sexual intercourse with another man in the bush. To us he appeared to be raising the defence of provocation. This court has stated it before that in cases where an accused is represented by counsel, the defence which he/she raises must be specifically pleaded. The court must not be left to grope in darkness on what exactly an accused's defence is.

Issue for determination

[8] The only issue for determination therefore is whether or not the accused was provoked to act in the manner he did.

The law on provocation

[9] The defence of provocation is provided for under s 239 of the Code in the following terms:

"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*."

[10] From the above provision, it needs no explanation that provocation can only serve as a partial defence to the crime of murder. Put differently, a person who kills another after being provoked and satisfying all the other requirements for the defence cannot be fully absolved of liability. At the very best, he will be found guilty of negligently causing the death of the deceased person.

[11] For a claim of provocation to succeed, it must be proven that the accused person was in the first place indeed provoked. That in my view relates to a subjective state of the accused's mind. It matters not that another person in the accused's shoes would not have been provoked by the conduct complained of. Where the person is not provoked, the investigation into the defence does not even begin. The matter must simply end there. If, however the accused was provoked, a further inquiry must be undertaken. In that test, it must come out clear that the conduct complained of as having provoked the accused person must have been so intense that a reasonable person in the position and circumstances of the accused would lose self-control and act in the manner that the accused did. See the cases of *S* v *Kashiri* HMT 13/18, *S v Thsuma* HB 171/22 and *S* v *Machokoto* HH 461/23.

[12] As is apparent the defence of provocation is built upon suddenness and spontaneity. It means that because of the intense circumstances, the accused person did not have opportunity to think through what he/she was doing. The allegation is that he/she acted in the heat of the moment. In *S v Kumire* HH 63/24 this court remarked that:

> "The phrase in the heat of the moment means acting whilst in a state of temporary anger, being so engrossed in the activity and without opportunity to stop and think. It must be shown that the accused did not have time to calm down and calculate his next move before reacting to the provocation. He/she must in that state of anger have lost self-control and temperance."

[13] As already said the first leg of the test is subjective. The accused must, as a result of the provocation by the deceased, have been afflicted by a 'sudden and temporary loss of self-control. It must be shown that when he lost self-control, the accused was overtaken by passion such that he/she for the moment, could not control his faculties.

[14] Because of the sudden and spontaneous nature of the defence, where the accused had time to cool off and reflect he/she is barred from relying on the defence. As such, an accused must always be aware that when he/she pleads provocation, his/her defence must satisfy the above onerous requirements.

Application of the law to the facts

[15] In this case, assuming for a moment that the events occurred in the way that the accused narrated them, it is clear that his claim to have been provoked is a long shot. He said he got to the scene and witnessed his wife having sexual intercourse with another man. Admittedly, if that were true, it is a sight that very few men can stand. The accused falls into that small group of brave men who may remain unperturbed in the face of that kind of spectacle. He does not tell us that he was shocked by his repulsive discovery. He said he called out to the two adulterous to draw their attention. The man immediately fled. He does not describe to us in what posture the two were making love. When that occurred, he did not approach the deceased. Instead he pursued the man. He chased him for some distance. When he couldn't catch up with him, he returned to the scene of the sexual intercourse. The deceased was still standing there. He did not attack her. Rather, he asked her to tell him the name of the man with whom she was having sexual intercourse. She refused to say. He doesn't say that he was overtaken by emotions even at that stage. He kept his cool. IT was the deceased who must have lost her temper because he said she tried to attack him with a half brick that she was holding. He dodged the strike. He then picked the brick. Even then he did not do anything. It was only when the deceased then attempted to escape that he caught up with her and struck her with the brick on the head. When she collapsed he stomped on her three times. He then left the scene and went to the shops where he continued drinking beer.

[16] There are a number of issues from the above narrative that betray the accused's story as one not worth of belief. First there was a significant period between the time he first saw the deceased and her alleged lover having sexual intercourse, the time he chased the man and then returned to the scene. When he did, another significant moment lapsed as he conversed with the deceased asking her about the identity of the man she was with. Those moments on their own constitute sufficient cooling off time. The accused ought to have regained control of his senses during those periods. He ought to have rationalised whatever he intended to do, think it

through and make a conscious decision therefrom. With that in mind, this court cannot countenance the claim that the accused suddenly lost self-control and attacked the deceased.

[17] In any case, the accused's story itself is preposterous. The evidence we have which was not disputed is that the accused and the deceased were not husband and wife. They were boyfriend and girlfriend. They did not stay at the same homestead. It is unthinkable therefore that the deceased left her homestead to meet with her secret lover at some place along the way that led to the accused's homestead in the full knowledge that they could be seen there. Further, that when they were caught in *flagranto delicto* and the accused chased the man, she did not only remain rooted where they had been found but actually attempted to attack the accused for no reason. The story simply doesn't add up. It is patently false. We must reject it for being the lie that it is.

[18] In the end we do not hesitate to hold that the evidence available rubbishes the accused's claim of provocation. The state has therefore managed to prove that beyond reasonable doubt, the accused committed this murder. **Accordingly, the accused is found guilty of murder as charged.**

MUTEVEDZI J: ……………………………………….

National Prosecuting Authority, for the State
Sawyer & Mkushi, for the accused