

THE STATE
versus
TENDAI TAVARWISA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 28 May 2024 and 12 November 2024

Assessors: Mr *Gwatiringa*
Mr *Mawoneke*

Criminal Trial

T Mukuze, for the State
K I Munyoro, for the accused

MUTEVEDZI J: Tendai Tavarwisa (the accused)'s marriage to Killian Dheka (the deceased) was not rosy for many years if it ever was. At some stage in his life, the deceased became dependent on alcohol. He lost his job and consequently his status as a breadwinner for the family, a position that many Zimbabwean men find quite fulfilling and prestigious. Once knocked from that perch, the effects can be disastrous for some men and make them spineless. The deceased appeared to have fallen into that bracket. As if that was not enough, his health seriously deteriorated. We are not sure whether it was from the alcoholism or from natural causes. The accused on her part believed the ill-health was a direct result of alcohol and other substances abuse.

[1] On the night of the alleged murder, the deceased returned home stone-drunk. The accused who had spent the entire afternoon of that night toiling at the markets trying to eke a living not only for the children and herself but for the deceased also could not stand the site of this drunken man. Things became worse when the deceased actually opened a bottle of some illicit brew and emptied the contents into his belly in the accused's full view. A scuffle ensued. It resulted in the deceased going out of the house. He returned later and slept in an outside toilet. The state's version is that the accused refused to open the door for him. He spent the night therein. It was at the height of winter. The accused found him unconscious in the toilet the next morning around 4 am

when she had woken up to prepare for another hard and long slog at the market place. She called her children to assist her carry the deceased into the house. They all tried to warm him. Their desperation was evident from the unconventional methods they resorted to. They boiled water and packaged it into plastic bottles which they stuffed into the blankets in which the deceased had been wrapped. They also called medical help by summoning a doctor from the neighbourhood to attend to the deceased. All their efforts were in vain because the deceased passed on later that afternoon.

[2] The above events led to the arrest of the deceased on a charge of murder. She was arraigned before us on the allegations that on the 15 August 2023 at House Number 6017, Stoneridge, Harare, she unlawfully and with intent to kill, or realizing that there was a real risk or possibility that her conduct might cause death but persisting to engage in that conduct despite the risk or possibility, sat on the chest of Killian Dheka and smashed his head on the cement floor, causing injuries which led to his death.

[3] In her defence the accused person argued that she loved the deceased dearly and did all that she did in order to protect him. she could not imagine being accused of killing him. She said she did not assault him. She neither intended to kill him nor realized that there was a real risk or possibility that her conduct could cause his death. They had married in Bikita in 2002. The marriage had been blissful in the formative years. Problems started around 2010 when the deceased started drinking illicit brews and lost his job. From then, she bore the burden of fending for the family. Despite those challenges there still was love between the couple. The marriage was blessed with two children Tadiwanashe born in 2004 and Tashinga born in 2009. Because of abuse of illicit beers, the deceased developed a medical condition. He suffered from swollen legs which together with his hands and neck had turned black. He also suffered from elevated blood pressure. The deceased's condition worsened between October 2022 and June 2023. It was for that reason that she was trying by all and any means to stop the deceased from drinking.

[4] She said on fateful date she returned from work around 2000 hours. On her way home, she saw the deceased drinking beer at some shops. When he arrived home, he found her seated on a couch. He was visibly drunk. She questioned why he was still drinking. He did not respond but just sat down gulping the alcohol which was in a pepsi bottle. An argument ensued with the accused trying to forcefully take the bottle from the deceased. During the altercation, the deceased fell from the sofa. The accused was standing while

the deceased was on the floor. She said she was straddling him. It was at that time that their neighbour called Ropafadzo Jairos came into the house. She said she was trying to take away the bottle of illicit beer from him given that he was already heavily inebriated. When she succeeded the deceased stormed out of the house and went back to the shops. She said he did not return home that night. The following morning, she woke up early intending to take a bath before going to work. She found the deceased lying unconscious in the toilet as already stated. She denied banging the deceased's head on the floor at any point. She said if she had intended to kill the deceased she would not have taken all the steps she did including calling a medical doctor to assist him recover.

State Case

[5] At the commencement of its case, the prosecution applied to tender the autopsy report which was compiled by Doctor Ephraim Sunhwa. His conclusion was that death was caused by "subdural haemorrhage". The defence agreed and the report became exhibit 1. The state also sought to produce the accused's warned and cautioned statement which was recorded at ZRP Southlea Park on 13/9/23 and confirmed by a magistrate at Mbare Court on 14/9/23. Once again with the defence's consent it became exhibit 2. Further, the testimonies of witnesses Brighton Gutsa, Pedzisai Mapurazi, Blessmore Muchando and Georgina Muchanja were by consent, formally admitted into evidence in terms of Section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] (the CPEA). The State then led *viva voce* evidence from three witnesses. Below, we summarise the critical aspects of their evidence.

Ropafadzo Jairos

[6] She was neighbours with the accused and the deceased. On the fateful day she heard noise from the couple's house. After about an hour she went to check. When she opened her door, she saw a boy in her yard who asked her why she was sleeping when people were killing each other. She rushed to her neighbour's house. When she got in she saw the accused sitting on the deceased banging his head on the floor. She asked accused to stop. She sat them down and started counselling them. The accused relented but insisted that deceased was not going to sleep in her house. The deceased took his jacket and left the house. Before he left he spoke to his son. The witness said she pleaded with the accused to change her mind but she refused. At that point she left for her place. The next morning the accused came to her house. She met the witness's younger sister who

was sweeping the yard. The accused told them that deceased had woken up frozen in the toilet. The witness confirmed the efforts that the accused made to warm the deceased in an effort to resuscitate him. The deceased's relatives were notified. They prepared some porridge for him but he couldn't eat it.

[7] Needless to state, the deceased later passed on. His funeral had proceeded without incident until the body went to Murehwa for burial. At the burial, the witness said she spoke to one of the deceased's relatives and told him what had transpired. As a result of that revelation, the burial was stopped. She said she returned to Harare before the body was buried. Under cross examination the witness said she was in good books with accused even though at one time the accused had mediated between her and her husband. The couple had started staying in Stoneridge in 2016. She did not know when the accused and the deceased had gotten married but she knew that it was accused who had bought the house.

Takundwa Chigume

[8] He was not only a neighbour to the couple but regarded the deceased as his brother-in-law. On 15 August 2023 he had arrived at his house around 2000 hours and was advised by his son's friend of the altercation between the deceased and accused. He rushed to the accused's place in the company of his wife. He did not immediately enter the house but heard the voice of Ropafadzo Jairos trying to quell the disturbances. He also said he heard the accused shouting that she could not be overpowered. He took the altercation as normal disharmony in homes and decided to go back to his house. He was informed by the accused of the illness of the deceased the next morning and that he had slept out of the house and had been found frozen in the toilet. Under cross examination the witness confirmed that the deceased and accused normally had disputes due to the deceased's drinking habits. The witness was also not able to comment on the sobriety of the deceased on the particular day.

Francis Dheka

[9] The deceased was his brother. He was informed of his brother's deteriorating health on 16 August 2023. He rushed to the deceased's place of residence intending to take him to hospital. When he got there, he learnt that the deceased had already died. He made a police report. He showed them the deceased's medical records which illustrated his history of illness. On the basis of such history, the family requested for a waiver of a post-mortem to determine the cause of death. He admitted that he had not had occasion

to inspect the corpse before its removal from the house. It was only when they got to Murehwa for burial that rumours started filtering that the deceased had died from an assault by the accused. The rumours were confirmed by the people who had come from Harare led by the first witness who had seen what had transpired.

[10] Under cross examination by counsel for the accused the witness indicated that besides this incident he had a cordial relationship with the accused and the family. Even though he lost a brother that would not amount to any bad blood between them. He had done his best to stand with the accused during the periods that his brother was indisposed. Commenting on the deceased's ill health he indicated that deceased had remarkably improved. Asked if he had seen the assault on the deceased the witness indicated that from what he heard it confirmed that the deceased had been assaulted by the accused. On being cross examined further if he was aware that there was bad blood between accused and Ropafadzo Jairos the first witness, the witness dismissed it and said that neighbour had always stood with the accused family's right up to the end. With Dheka's evidence, the state closed its case.

Defence Case

[11] The accused chose to testify in her defence. She incorporated her defence outline into her evidence in chief. She conceded that there was a scuffle with the deceased when she wanted to take away the illicit drink from him. She admitted that the deceased had fallen off the sofa as they battled but that the scuffle had not degenerated into an assault or a fist fight. In her view, the first witness Ropafadzo was fabricating parts of her evidence because she believed that the accused had not adequately assisted her when she had marital problems and the accused was mediating. She was however at pains to explain why the first witness would be so kind to intervene and stop the fight between her and the deceased and to assist the accused care for the deceased the following morning if indeed there was bad blood between them. Further, when it was suggested to her by the prosecutor that she had forced the deceased to sleep outside after being hurt by his drinking behaviour, the accused indicated that deceased had gone out on his own volition. Further probed that she had ordered the deceased out of the house the accused indicated that the deceased had threatened to go and buy more beer to drink. It was the reason why he had chosen to sleep outside. She insisted that she had not assaulted the deceased and that he had died because he had always been of ill health which was exacerbated by alcohol and substance abuse.

Tadiwanashe Dheka

[12] The accused called her daughter called Tadiwanashe to back up her story. The witness confirmed her father's drunken behaviour and drinking problems. She confirmed the accused's story that the accused came home very drunk that night. She was doing dishes in the kitchen when he arrived. The accused was in the lounge. The witness said she then heard the accused berating the deceased. Soon there was a scuffle. The two were fighting over a bottle of beer which the deceased had. The deceased fell from the sofa. He later took his jacket and went out. He did not return home that night. She said when Ropafadzo Jairos came the accused showed her a bottle with beer and was told that the deceased had returned to his drinking habits worsening his ill health. The following day they saw the deceased frozen in the toilet and they called the doctor. It was her evidence that they stayed amicably as a family and that the accused wanted the deceased to stop abusing alcohol.

Common cause issues

[13] The accused and the deceased had an altercation on the night in question. The altercation became physical as the couple fought for the bottle of illicit beer that the deceased was drinking from. When the witness Ropafadzo entered the house, the accused was astride the deceased who was on the floor. The deceased later went out of the house after taking a jacket to warm himself. He did not return but was only found unconscious in the family's toilet the next morning. He later died. The cause of his death was subdural haemorrhage.

The issue for determination

[14] The issue for determination is whether or not the deceased was assaulted by the accused person and if he was, whether the accused had the intention to kill him.

[15] To us the first question, that is whether or not the accused assaulted the deceased, is an issue that turns on the facts largely. There is no denying that the accused was angry with the deceased. Her anger was clearly not borne out of hatred but out of love for the deceased. None of the witnesses including the deceased's brother could deny that in more than one way, the deceased had drinking challenges which had resulted in his health and general life being on knife edge. The accused was battling to have the accused turn the corner. There is no doubt that she is a woman who loved the deceased as her husband. She admits that she scuffled with the deceased on that night. He fell from the sofa during the scuffle. She said when that happened she went astride

the deceased as he lay on the floor. Put differently, she was holding the deceased whilst he was between her legs. Her intention was not to assault him but to take away the illicit alcohol he was drinking. She therefore was adamant that in that sense, she did not assault the deceased in any way.

[16] The only witness who alleged that there was an assault is Ropafadzo. Her evidence was that she found the accused sitting abreast the deceased and banging his head to the floor. We take note that the witness came into a house where there was commotion. She had had noise even before she came. She found the accused astride the deceased. Surely the witness may be forgiven for thinking that an assault was taking place. But the problem is that she wasn't aware how this had started. If she had appreciated that the accused only wanted to take away the illicit brew from the deceased she would have probably understood and appreciated and taken in what was unfolding differently.

[17] The accused's witness Tadiwanashe confirmed that the deceased was not assaulted but that the couple was grappling against each other for control of the bottle of alcohol.

[18] We equally note that there is a possibility that the deceased banged his head on the floor at the time of the scuffle over the bottle. What makes us apprehensive is that even Ropafadzo who claims that there was an assault did not mention any injuries on the deceased's head at the time she stopped the altercation between the couple. She had ample time to make such observations. She spoke to both the deceased and the accused after her intervention. She observed the deceased talking to his son and later going into the bedroom to take his warm jacket and leave the house. Ropafadzo did not speak of any difficulties in walking or talking that she observed on the deceased during all that time. If he had been mortally wounded during the scuffle, we believe such injuries would either have been visible or if not would have significantly affected either his speech or his gait.

[19] In its rudimentary sense, an assault occurs when one aims blows on the person of another intending to cause that other person bodily harm or realising that there is a real risk or possibility that bodily harm may result. We are aware that assaults can occur in various other ways but in this case, we are concerned about this definition of assault. It is only this kind of assault, which if perpetrated with the intention to kill would result in a conviction of murder. In other words, a murder cannot be proved without the

physical assault being proved. We have narrated above, that the accused's objective in the brawl that occurred was never to harm the deceased. If anything, she wanted the deceased to refrain from harming himself. The prosecutor must have become aware of that constraint because it was not idle in the course of the trial, he tried to insinuate that the accused had caused the deceased's death by locking him out of the house. We do not appreciate how that would amount to murder. In any case, the accused denied that she locked him out of the house. Instead, she said that the deceased threatened that she had not won by taking his beer because was going out to buy more beer. He carried out his threats, took his jacket and left. No one has testified as to what happened when the deceased went out. Anything could have happened.

[20] We have already pointed out that it is possible the head injuries were sustained during the scuffle but the matter does not end there. When he was discovered in the morning, the accused's head was rested on the toilet seat. He was in a drunken stupor when he went out. If he took more of the illicit brew, he could only have been worse by the time he thought of sleeping in the toilet. The possibility that he could have hit his head either on the toilet seat or on something else at the time he was outside the house cannot be discounted. He was already of ill health as admitted by everyone else. A combination of the head injuries and the general ill-health could have contributed to his death.

[21] In the premises, it is difficult for us to reach the conclusion that the accused assaulted the deceased in the first place. There is just no evidence that she did. If she locked him out of the house on a bitterly cold night then she was cruel. But we are a court of law and not a church which would judge a woman on the basis of morality. Crimes are different from sins. Locking the deceased out of the house is not murder. It would at worst amount to domestic violence but that crime is not a competent verdict of murder.

[22] If there was no assault, the second question on whether or not the accused had the requisite *mens rea* does not arise. Any discussion on it would be academic. Needless to state, the courts do not determine academic questions but real disputes.

[23] From the foregoing we entertain serious doubt that the accused person assaulted the deceased. Her story relating to what happened is reasonably possibly true. That said, it can only mean that prosecution failed in its bid to prove that beyond reasonable doubt, that the accused committed this murder. We have no choice but to find as we hereby

do, that the accused is not guilty and is acquitted of the charge of murder that she was facing.

MUTEVEDZI J:

*National Prosecuting Authority, State's legal practitioners
Macharaga Law Chambers, accused's legal practitioners*