

THE STATE
versus
BRIAN MUPAIKI

HIGH COURT OF ZIMBABWE
BERE J
MASVINGO CIRCUIT, 1 October 2014

Assessors: Mr Mushuku
Mr Dauramanzi

Criminal Trial

T. Chikwati, for the State
F. Baloyi, for the accused

BERE J: It is one of those several murder cases that are driven by passion. It is the story of a love relationship which promised so much but ended up in a tragedy.

The accused and the deceased were in an amorous relationship and staying at the deceased's place of residence with the deceased's mother. The accused was 23 years old at the time and the deceased was 35 years old and a mother of two children.

On the fateful day the accused and the deceased parted ways with the deceased's mother who decided to go to church whilst the two went to a nearby bush to look for firewood. They had with them a wheel borough and a metal axe whose dimensions was given as follows: length of handle 65cm, length of beed 15 cm, weight of axe 3,1 kgs.

The story told by the accused and which could not be refuted as the accused is the only person privy to what happened was that whilst the two were in the bush the accused was busy cutting and gathering firewood from a distance of about 10 metres from the deceased who was lying on her stomach close to the stream and playing with her cellphone.

As the accused was busy cutting firewood he eavesdropped the deceased chatting to someone whom the accused believed was the deceased's other boyfriend. The accused claimed to have heard the deceased uttering the following words:

“That fool is around, phone later. I am causing him to work and he is now cutting firewood. Does he think I can marry him? I only want to squander his money until he is finished”

It was the accused's uncontroverted version that he had invested so much in the deceased as a lover and that he had even divorced his wife at the instigation of the deceased in order to pave way for the accused to get married to the deceased. The planned marriage had reached an advanced stage as the two had arranged to have the deceased elope to the accused's place on the fateful day. It was further the accused's position that he had in anticipation of the planned marriage to the deceased purchased a number of items for the deceased.

The accused said he was extremely provoked by the utterances of the deceased which completely caught him unaware. In a fit of rage the accused walked to where the deceased was and struck her on the head with the back of his axe thereby tragically ending the deceased's life.

When the accused came to his senses he realized he had seriously injured the deceased. The accused tried to save the deceased's life by stopping blood coming out of the injured head but to no avail. The deceased suddenly lost her life.

From these facts which appear to be common cause the State opted to charge the accused with the crime of murder whilst the accused pleaded provocation and offered a limited plea of culpable homicide.

It will be noted as observed by MANYARARA JA in the, case of *S v Muleya and Ors*¹ that:-

“The general rule of Roman-Dutch Law is that a person may be so provoked or made mad by another person's behavior that he loses control over his faculties and becomes incapable of forming the specific intent in relation to a particular offence. It is recognized that anger may be so strong as to destroy a person's “*voluntarium*” in a similar way as intoxication. If the accused lacked the intention necessary for the particular crime then he/she is not guilty of that offence but may be guilty of a lesser crime.”

¹ 1988(1) ZLR 359 (SC)

This Roman Dutch law has been imported into our law through s 239 of the Criminal Law (Codification and Reform) Act² which recognizes that murder can be reduced to culpable homicide if as a result of provocation the accused ceases to have the intention or realization to intentionally kill the deceased or even if he has the intention to kill but completely loses his self-control in circumstances where a reasonable person placed in his position/circumstances would have lost such control. This approach in our law has been looked at by adopting what is called a two stage inquiry which is a combination of the subjective approach and an objective approach.

Adopting the first inquiry, it would seem that when the accused heard the deceased uttering the words she uttered he must have subjectively formulated the intention of punishing the deceased as he walked closer to where she was talking on the cellphone by ensuring that he was not seen or detected by the deceased.

Given the dimension of exh 3 and the manner in which the accused walked towards the deceased it seems an inescapable conclusion that the accused intended to seriously injure the deceased in spite of the provocation.

This then leads the court to go to the next rung of enquiry which requires the application of the objective test. Would a reasonable man placed in the circumstances of the accused have lost self-control and acted in the manner the accused did?

In dealing with this second rung, I feel more inclined to lean on the views of G Feltoe when he observes that:

“The broad social policy must be to require persons to show restraint when subjected to provocation. In the process of social interaction, situations often arise where people are provoked: if the law allowed any type of provocation to justify violent action there would be anarchy. The law therefore seeks to encourage people to use self-restraint and to deter people from causing harm to others when they are provoked.”³

We do not believe, not for a second, that any reasonable person provoked in the manner the accused says he was would have reacted in the manner the accused would want this court to believe. A reasonable man placed in the same position with the accused would have exercised one of the several options open to him including but not limited to just talking to the deceased

² Chapter 9:23

³ A Guide to the Criminal Law of Zimbabwe by G. Feltoe [Legal Resources Foundation 2nd Edition 1997 at p.31]

about her cheating on him. The accused could have even have sought the intervention of the deceased's mother. The other option would have been for the accused to simply walk out of the relationship with honour and not to cut short the deceased's life. Even if the accused wanted to punish the deceased, he would have used a switch on the deceased's body.

We are unanimous we would be creating a bad precedent if we were to be persuaded to accept as urged upon us by the defence counsel that a provoked person in the position of the accused be allowed to take the law into his own hands by ending another person's life. The law of the jungle has no place in a civilized society.

Our unanimous position is that, the accused, having decided to punish the deceased armed himself with a dangerous axe and aimed at the most delicate part of the deceased and delivered a devastating single blow which killed the deceased.

It must be the conclusion that in aiming on the head of the deceased, the accused intended to kill the deceased and indeed he achieved that objective. In our view any other conclusion would be artificial and untenable if regard is had to exh II.

The accused is found guilty of murder with actual intent.

Both counsels could not advance any factors in support of the aggravating circumstances as envisaged by s 48(2) of the Constitution of Zimbabwe.⁴

SENTENCE

We are enjoined to consider both factors in mitigation and aggravation in an effort to arrive at an appropriate sentence.

Of note to us in mitigation are the following factors;

The accused is a fairly young first offender. He is only 24 years old now and at the time he was 23 years old. The accused can therefore easily be described as a youthful offender.

It is significant that upon his being apprehended the accused cooperated with the police and told his story as it happened. He must be rewarded for being honest enough to tell the truth about his conduct. We do not read much about the conduct of the accused person immediately after the murder of the deceased which includes his unceremonious exit from this jurisdiction to

⁴ Constitution of Zimbabwe Amendment (N. 20) Act 2013.

seek refuge in Botswana. We attributed that to mere panicking after the accused's commission of this heinous act of murder as the accused himself states.

It must be mitigatory on the part of the accused that he only reacted to the demeaning utterances by the deceased. We must accept the deceased uttered the words ascribed to her by the accused. The accused has been in custody ever since his arrest until today.

The accused has the usual family responsibilities on his shoulders.

In aggravation we note with concern that the accused unnecessarily turned from lover to a murderer of the defenceless deceased who was looking after him by sheltering him at her mother's place. The axe used is a weapon that ought not to have been used against a fellow human being no matter the level of provocation. By using that axe on the head of the deceased the accused showed no respect at all for a fellow human being.

It must not be that easy to end another person's life.

For this the accused deserves a punishment which society must feel that some form of justice has been done.

Sentence: 20 years imprisonment.

National Prosecuting Authority, state legal practitioners
Chuma, Gurajena and Partners, accused's legal practitioners