THE STATE

Versus

JABULANI PHAKATHI

IN THE HIGH COURTOF ZIMBABWE
NDUNA J with Assessors Mrs S. Tshuma & Mr Mbizo
BULAWAYO 13, 14 & 28 MAY 2025

Criminal Trial

Mr K Jaravaza for the state
Mr S Mutandi with Mr Noel Ncube for the accused

NDUNA J: The accused who is said to be a tout in Bulawayo is alleged to have committed the offence of murder in which it is alleged that he assaulted his wife to death on the 3rd of May 2023. The accused duly advised by his counsel tendered a plea of not guilty to charge.

The details of the charge are as follows:

The accused was husband to the deceased. On the day in question he came home at about 9pm. He knocked and the deceased opened the door for him. Thereafter, there was the skirmish which led to the deceased suffering injuries from which she died in the early hours of the following day.

A PM report was written by a Doctor who, after examining the deceased, concluded that she had passed on due to injuries suffered during the assault. The post mortem was admitted into evidence as *exhibit 1*. One witness testified in open court and the rest of the other witnesses' evidence was admitted by consent of the accused in terms of *section 314* of the *Code*. The accused gave his defence outline and also gave evidence under oath in court.

The state witness' evidence was to the effect that she heard that there was commotion as accused was assaulting his wife. The witness' evidence went as follows:

> In the morning the deceased approached me and bade me farewell indicating that they had found another house. So, she spent the day packing. The accused person came at 9pm. He kept on entering and existing. I assumed they were loading their belongings in to the commuter bus he operates. I then became

> suspicious of the movements. The now deceased had told me the accused was fond of assaulting her. I opened the window. I saw them mumbling and I could not hear what they conversed. There was a time when the accused banged the now deceased against a pillar. She screamed that MaDudu come and help me the accused is killing me. I went outside to seek assistance from other residences. I was alone and there was no male figure. When I came back with residents she had fallen to the ground at house number 20129.

It is proper to add that upon so assaulting the deceased, the accused disappeared into the night. When accused came home the witness heard him although she had slept in her own compartment. She did not hear any man leaving the deceased's house neither did she hear any coming into the deceased's house save the accused.

Accused's own testimony was to the effect he came to their home at around 9pm. He knocked three times at the window until the deceased told him to go to the door. As he walked accused claimed to have observed a male figure exiting his house. Upon entering he took to inquire from the deceased as to who it was that had existed the door. He alleges the deceased slapped him first. He stated that she ran outside. He struck her with his fist and she fell banging her head against the wall. He stated that they were near a tape of water. She again fell and hit herself against the tape. He claims to have run away as he was afraid other people would assault him.

It is clear that the accused raises the defence of provocation and intoxication. Currently our criminal law is statutorised. *Section 238 and 239* deals with question of provocation on a charge of murder. *Section 238* provides as follows

> *238 Provocation in relation to crimes other than murder*
>
> *Except as provided in section two hundred and thirty-nine and subject to any other enactment, provocation shall not be a defence to a crime but the court may regard it as mitigatory when assessing the sentence to be imposed for the crime.*

It is clear by the above provision, it shall not be a defence to raise the question of provocation on a charge of murder. However, *section 239* provides as follows:

> *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.

(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 circum-stances 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.

The law is very clear that if the accused was indeed provoked, the court may return a verdict of guilty to culpable homicide. The law enumerates what and how that should be done. In order for the charge of murder to be reduced to culpable homicide on the basis of provocation, the court must make a finding that the accused did not have the intention to do what constitutes the offence as a result of the provocation; that's he would have lost all the mechanisms of self-control. The court must further determine if, whether or not, the provocation was enough to make him lose his self-control. Other wise the accused would not be entitled to a finding that he was indeed provoked.

In Zimbabwe, it is now codified as enumerated above. However, before the court considers this fact, the court must first decide as to the existence of the alleged provocative conduct by the deceased. Accused alleges that he had found the deceased in 'Pari delicto'- with a paramour. He stated that as he had gone to knock by the window and was then directed to proceed to the door, he saw a man walk away from his residence. There are two issues which need to be spoken about here.

The first one relates to the witness. She told the court that she had heard the accused got to his room. She never heard the subsequent disquiet of a person who would have found a wife's paramour in his home stead. Accused never shouted or attempted to chase after the alleged paramour. She only heard the accused fight with his wife, the deceased. It is very uncommon for a man to see another man came out of his house and

remains quiet like what the accused did. He made no relevant noise. Had he seen a man walk out of his house, he was expected to give chase or shout out the presence. The accused did not.

On the second, himself; he had recorded a warned and cautioned statement at the police. There is no suggestion in the caution which would reveal that the accused had found a wife's paramour in the house. He went on to speak of the fateful assault of the late wife as an ordinary one. It would be wishful thinking to suggest that the police would have not recorded the fact of a paramour had accused spoken of it to them.

The issue of the paramour is purely an after thought which cannot be accepted by the court. Therefore, it is no longer any necessity to revert back to the provocation as raised by the accused. It is non-existent here.

Accused has raised a second defence; to wit intoxication. There are two forms of intoxication; voluntary and involuntary intoxication. Accused refers to voluntary intoxication. He relates to the consumption of four quartz of alcohol. What seizes the court's mind is *section 221 and 222* of the *Criminal Law Code*. *Section 221* which states as follows:

> *221 Intoxication no defence to crimes committed with requisite state of mind*
>
> *(1) If a person charged with a crime requiring proof of intention, knowledge or the realisation of a real risk or possibility−*
>
> *(a) was voluntarily or involuntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime; but*
>
> *(b) the effect of the intoxication was not such that he or she lacked the requisite intention, knowledge or realisation;*
>
> *such intoxication shall not be a defence to the crime, but the court may regard it as mitigatory when assessing the sentence to be imposed.*
>
> *(2) Where a person is charged with a crime requiring proof of negligence, the fact the person was voluntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime shall not be a defence to any such crime, nor shall the court regard it as mitigatory when assessing the sentence to be imposed.*

And *section 222* states that;

> 222 *Voluntary intoxication leading to unlawful conduct*

> *If a person charged with a crime requiring proof of intention, knowledge or the realisation of a real risk or possibility (hereafter in this section called "the crime originally charged") and it is proved that−*
>
> *(a) the accused was voluntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime originally charged; and*
>
> *(b) the effect of the intoxication was such that the accused lacked the requisite intention, knowledge or realisation;*
>
> *he or she shall be guilty of voluntary intoxication leading to unlawful conduct instead of the crime originally charged and liable to the same punishment as if−*
>
> *(i) he or she had been found guilty of the crime originally charged; and*
>
> *(ii) intoxication had been assessed as a mitigatory circumstance in his or her case.*

The totality our of law is that where intoxication is proven, the court may still find the accused guilty of voluntary intoxication leading to the unlawful conduct and can then impose the same sentence as if it would have found the accused guilty of the original offence. However, the finding would be mitigatory.

Intoxication happens after you consume alcohol or other substances that affect how your brain works. It affects elements like your mental capabilities, mood and coordination. One cannot, with precision, remembers all his acts at a time when he was intoxicated. In this case accused recalls very well his fight with the deceased, where he went and slept and woke up the following morning or day attending to his commuter omnibus repairs. And he did not expect the deceased to have died. Clearly, accused may have been intoxicated, but such intoxication may not have been as severe as to make him not aware of his conduct. He gave a detailed outline of his conduct on the day in question. On the day he was arrested he gave his warned and cautioned statement very, very well. The finding that is made is that accused may have been slightly drunk and that is different from the intoxication he wants us to adopt.

The defences raised fail. The state case remains stack against him. He committed a very serious offence and he is accordingly found guilty of murder with actual intent.

Sentence

The accused has been convicted of a very serious offence in which he murdered his wife. The wife had a small child who was then left motherless.

Now is the time for me to met out an appropriate sentence to you for the crime of which you had been convicted. The determination of a suitable sentence does not entail a mechanical process in which predetermined sentences are imposed for specific crimes. In each case, the sentencing court has to consider all relevant factors, afford the appropriate weight thereto and strike a balance between the various interests to consider. In determining a sentence which is just and fair, the court has regard to the triad of factors that have to be considered as set out in the case of *S v Zinn 1969 (2) SA 537 (A).* The Court must therefore consider your personal circumstances as the accused and the person convicted of the crime, the nature of the crime including the gravity and extent thereof and the interests of the community. In determining such a sentence, the Court must tinge the sentence with a measure of mercy and strive to meet the objectives of punishment being retribution, prevention, deterrence and rehabilitation.

The general rule as held by the Appellate Division in *S v Rabie 1975 (4) SA 855 (AD) at 862 G-H* is that:

> "…punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances."

In mitigation of sentence, your counsel did not lead witnesses but had placed factors before the court which the court should consider in order to impose a lesser sentence to you in respect of the crime of which you had been convicted. Counsel for the State, on the other hand, also made submissions which in his mind are aggravating and warranting of the imposition of a harsher punishment.

We take note of your situation that you are a first offender and you are merely aged 32 years old. You are now the only surviving parent of the three-month-old child and you are unfortunately in prison. It follows that the minor child shall not have one to call to as a parent. You had two more children whom you had in your previous marriage.

With regard to the interests of society it is undeniable that we are experiencing high levels of violent crime and in particular with reference to this case, violent crime against women.

Murder committed by a man on a woman should not be treated lightly. It becomes worse where the perpetrator, as in this instance, was the deceased's husband, who had the duty and the responsibility to protect her and not to harm her. It is killings like the

one committed by the accused which necessitate the imposition of sentence to serve not only as a deterrent but also to have a retributive effect. Violence against women is rife and the community expects the Courts to protect women against the commission of such crimes.

Your conduct in assaulting your wife to death breaches the provisions of the *Domestic Violence Act [Chapter 5:16]* which forbids the use of violence in marriages. It therefore goes without saying that your conduct is very deplorable. A severe penalty is called for in the instant case.

In conclusion, we have considered various sentencing options. For the reasons set out above we are satisfied that a sentence of long-term imprisonment is called for in these circumstances and that the punishment meted out to you should exceed the sentence of 15 years which will meet all the objectives of sentencing and will be manifestly fair and just.

The accused is therefore sentenced to **26 years imprisonment**.

National Prosecuting Authority, State's legal practitioners
Sandi & Matshakaile Attorneys At Law, Accused's legal practitioners