

THE STATE
versus
CHAMANI TSAMBOLA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 5 SEPTEMBER 2024

Assessors: Mr *Chimonyo*
Mr *Jemwa*

Criminal Trial

Mrs *P Mabundu*, for the accused
Mr *A Masamha*, for the state

MUTEVEDZI J: This murder typifies the belief held by some men, who apparently have an inflated value of their worth, that ‘if I can’t have you, then no one will.’ Chamani Tsambola, a farm worker at Dudley Estate, Marondera (hereinafter called the accused), in a fit of rage, is alleged to have attacked a woman with whom he had separated and killed her in cold blood. It resulted in his arrest and his being dragged before this court charged with murder as defined in Section 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code). The formal allegations are that on 1 October 2018 he unlawfully and with intent to kill, or realizing that there was a real risk or possibility that his conduct may cause death and continuing to engage in that conduct despite the risk or possibility, assaulted Portia Masaiti (the deceased) with an iron bar several times on the head. The deceased died from the injuries sustained.

[1] The background to the murder was that the accused and the deceased were married but were on separation because of allegations of infidelity. On 1 October 2018 at around 2000 hours, the accused, uninvited, went to the deceased's house armed with an iron bar. Upon arrival, he stormed into the room and assaulted the deceased several times on the head with the iron bar. He then dragged her onto the veranda of the house. Possibly in a bid to conceal the murder he set the house on fire. The body of the deceased was later found lying in a pool of blood at the veranda. A blood-stained iron

bar was recovered at the gate to the compound. The accused was arrested on 5 October 2018 at Dudley Estate, Marondera in a tobacco field following a tip-off.

[2] After his arrest, there were suspicions that the accused was mentally ill. It prompted his examination by two medical experts in terms of the Mental Health Act [*Chapter 15:02*]. Equally, an examination on the remains of the deceased was conducted. It concluded that the cause of death was brain damage, multiple skull bones fracture and multiple injuries.

[3] In his very brief defence outline the accused denied the charge. He said that at the relevant time he had found the deceased in the company of one Douglas Mazengera (Douglas). A fight had ensued between him and Douglas. The deceased, in defence and support of Douglas had pulled the accused's private parts. It was then that he attacked the deceased. He argued that he did not appreciate that the force he used to defend himself was excessive. He said he neither intended to kill the deceased nor did he for see her death occurring.

The state case

[4] At the commencement of its case the state applied to produce a number of exhibits. First the prosecutor sought to tender certificates of the accused's mental examination compiled by Doctors Sydney Aruturi and Vakai Nyabiko. The certificates both showed that at no time did the accused suffer from mental illness contrary to his assertion in the confirmed warned and cautioned statement that he had been possessed by evil spirits when he committed the offence. Second the prosecutor applied to tender an 80 cm long flat iron bar and a 1.1 m long iron bar (standard pole). They were both alleged to have been the murder weapons. Third, the state applied to produce the accused's confirmed warned and cautioned statement in which he explained in detail how the tragedy had unfolded. The post mortem report which detailed the pathologist's findings as to what had caused the deceased's death was also produced. The sketch plan drawn by the investigating officer depicting the crime scene from his observations and indications made by the accused and witnesses was also tendered. All the exhibits were produced with the consent of counsel for the accused person.

[5] Further the state sought the formal admission into evidence of the testimonies of Calven Muranda and Doctor Yehilyn Iglesias Capetillo in terms of s 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (the CPEA). There was no objection from the defence and the evidence was duly admitted. The evidence of Douglas Mazengera

and Takesure Mupakeni was expunged from the state's summary of evidence because the two witnesses could not be located by the police. Thereafter, prosecution called oral testimonies of witnesses. We deal with the evidence below.

Norman Patson Matiure

[6] He is a commercial farmer at Dudley estate in Marondera. He knew the accused person who used to be a worker at a neighbouring farm owned by a white man. He also knew the deceased during her lifetime as Beven's mother. She used to work for the same white farmer. On the day the deceased was killed, he had gone out to work his fields about two and half kilometres away from the homestead. Whilst there he was advised that the deceased's house which was part of his compound at the farm was on fire. He went back and found that indeed found the house ablaze. At the burning house, he found one Nyamande of the Sustainable Afforestation Association who had brought the association's equipment to douse the inferno. The deceased's body was lying on its side at the entrance to the house. It was facing the northern direction. The witness said he got closer and noted that the body had deep cuts on the occiput. There also were blood stains which had splashed on to the walls of the house. The witness said he immediately called a police officer whom he thought was at a close -by police base called Karimba. It was between 1900 and 2000 hours. The officer attended the scene but the body was only retrieved the following day.

[7] The witness added that the deceased was friends with his neighbour. He had known her for over three years. He knew that she was once married to the accused and that at the material time they were not staying together. Rumour had it that there had been a case of infidelity which had led to the break -up. The deceased had been chased from the matrimonial home together with the children. The witness had then given her the kitchen to use whilst she looked for appropriate accommodation. She had come to the place with her minor children but at the time this occurred the children were no longer there. The murder occurred about a week after she had moved in. He said he had neither seen nor heard about Douglas at the scene. He also had not seen the accused at the scene. He had only seen him later on after he was apprehended. It was the accused who showed him and the police where the iron bar used to kill the deceased was. Through his indications it was retrieved from near the cattle kraal. No one had noticed it before. It was not part of his equipment at the homestead. The accused was arrested between one to one and half weeks after the murder.

[8] The witness's cross examination by counsel for the accused was token. Nothing came out of it.

Vimbai Kanyama

[9] She is a police officer attached to Marondera Anti-corruption unit. She was at CID Marondera when the events occurred and investigated the murder. She stated that she went to Dudley Estate on what is called scene revisit with other officers. On arrival she was directed to the crime scene by Norman Matiure. At the veranda of the house there were blood stains on the walls. Local inquiries were made and statements recorded from witnesses. A warned and cautioned statement was recorded from the accused. At the time she went to the scene, the accused had not yet been arrested. He was only arrested a week later by other detectives. He was at a farm in the fields where he had gone to seek for assistance from the guards who were on duty on that particular night. He was then handed over to her the day after. When she interrogated him, he confirmed that it was him who had assaulted his wife to death after allegations of infidelity with another man. He blamed evil spirits for his conduct. He did not mention the alleged fight with another man. It was only later in the investigations that the accused opened up and said he had killed the deceased for having an extra marital affair with Douglas. He had taken the kids from the deceased some days before the murder and left them with his mother in Chegutu for that reason.

[10] The police officer said an iron bar used to assault the deceased had been recovered from the crime scene. She was shown the bras which had been produced as exhibits earlier. She confirmed that it was the bigger iron bar which had allegedly been used as the murder weapon. She repeated her assertion that the accused had not told her about the fight with Mazengera and that basing on the narration he gave when the offence was committed there were him and the deceased only. Once more very little if anything came out of the officer's cross examination by counsel.

[11] With the above evidence, prosecution closed its case.

Defence case

Chamani Tsambola

[12] In his evidence in chief, the accused fleshed his defence outline. He said on 21 September 2018 he was at work manning the pivot system used to irrigate tobacco. He had left home around 5 pm. His wife and children were at home. Unfortunately, when

he got to work there was an electricity outage later in the evening. He remained at work until midnight but got thirsty because he had left home without water. He decided to go back home to get some water. His house was close by. He got to his house and knocked on the door but no one answered. He knocked again and his son who was six years old then responded. He asked the boy to wake up his mother to open the door. The boy advised that his mother wasn't there. The accused had to break the door to gain entry. He found the children alone in the house. The deceased's phone was on what he called the 'divider' in the room. He checked if anyone had called but there was none. He went to the messages inbox where he saw a contact which had invited the deceased to go to him. The accused searched and found that the number was registered in Douglas Mazengera's name. His house was adjacent to Mazengera's. He went round intending to go to Mazengera's house. He didn't realise that the deceased and Mazengera were outside and had seen him before he saw them. They both ran away. The accused said he didn't pursue them. He also didn't go back to work. At dawn he thought the deceased would return home but she didn't. In fact, she didn't return the whole of the following day.

[13] On 23 September the accused said he took his children to his rural home where his mother resides. He slept in Chegutu and only returned to Marondera on 25 September. He walked to his workplace and arrived after 1900 hours. He went straight to the fields where he worked. There were two men whom he worked with. He inquired after the deceased but both men said they had not seen her but that Mazengera was around. The accused went to Mazengera's house. When he arrived Mazengera thought he wanted to attack him. He immediately ran away. The accused said he remained at the house which he set on fire before going back to the fields. The following day, he went back to Chegutu.

[14] When he returned from Chegutu he once again enquired from his colleagues if they had seen the deceased. They told him that she was staying at a house at Matiure's place. The accused proceeded there. On arrival he announced his presence. The deceased answered. She was in the kitchen but was with someone else. It was around 1900 hours. That other person got up and bolted out. He noticed that it was Douglas Mazengera. The accused further stated that he then spoke to the deceased. As he did so, he saw Mazengera approaching wielding a weapon with which he tried to hit the accused who however held the weapon. They wrestled but the deceased intervened by

holding the accused's testicles. The accused finally wrested the iron bar from Mazengera who ran off. The accused said at that moment he decided to strike the deceased's head indiscriminately with the iron bar so that she could release her hold on his testicles. She released him. Thereafter, the accused decided to burn all the property which belonged to the deceased which he had bought. He threw the iron bar somewhere in the yard. He said the sight of his wife with Mazengera had really disturbed him. At that point and after cross examination by the prosecutor, the accused closed his case.

Common cause matters

[15] From the evidence available and the admissions and concessions made by the accused, this case appears to be an open and shut one. Many issues are common cause.

They are that:

- a. The accused was angered by the deceased's infidelity. In an open display of that anger, he at one time burnt down the deceased's paramour's house.
- b. After the accused had discovered the alleged affair between his wife and Mazengera, the deceased ran away. She abandoned the matrimonial home. She never returned until the time she was murdered.
- c. The accused later found out that's she was staying at Mazengera's house where he followed her on the fateful night
- d. Whatever happened, the end result was that the accused indiscriminately attacked the deceased on the head with a heavy iron bar
- e. The deceased died from the injuries he caused her.

The issue

[16] The accused's argument about all this is that he was engaged in a dog fight with Mazengera who wanted to attack him with an iron bar. The deceased intervened and held his testicles. That gave Mazengera opportunity to escape. He turned round and attacked the deceased in a bid to free himself from her grip on his privates. In other words, the accused alleges that he was defending himself.

The law on self-defence

[17] The reasoning behind the defence of self-defence is not difficult to discern. It is simply that when a person intends to kill another, that person cannot expect his right to life to be guaranteed. The defence is provided for under the Code under s 253. The provision is clear that 'a person accused of any crime including murder may call to his/her aid as a complete defence the fact that he/she committed the offence when he/she was defending

himself/herself or another person from an unlawful attack.’ See the cases of *S v Maende* HH-44-16; *S v Shavi* HH-124-17; *S v Sibanda* HB-333-16; *S v Manzonza* HMA-02-16.

[18] Section 253 provides as follows:

“253 Requirements for defence of person to be complete defence

(1) Subject to this Part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if –

(a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent, and

(b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she, believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack, and

(c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances; and

(d) any harm or injury caused by his or her conduct–

(i) was caused to the attacker and not to any innocent third party; and

(ii) was not grossly disproportionate to that liable to be caused by the unlawful attack. (2) In determining whether or not the requirements specified in subsection (1) have been satisfied in any case, a court shall take due account of the circumstances in which the accused found himself or herself, including any knowledge or capability he or she may have had and any stress or fear that may have been operating on his or her mind.”

[19] Taken from the provision itself, the requirements to successfully plead self-defence are apparent. Despite the onerous nature of the requirements the accused is not supposed to prove the defence himself. All that he needs to do is lay a basis for the defence. It then becomes the responsibility of prosecution to disprove it. Below we deal with the requirements and juxtapose them against the facts of this case.

The unlawful attack had commenced or was imminent

[20] The attack alleged by the accused appears to be imaginary at best and an outright lie at worst. The accused by his own admission had been hunting the deceased from the day she escaped. He on several occasions enquired about her whereabouts from his colleagues at work. He finally ascertained that she was staying at Matiure’s place. He followed her. After the deceased was murdered there was no evidence that Douglas Mazengera had ever set foot at the deceased’s place. In fact, the evidence given by Matiure was that he had not seen Mazengera at his place at any time. What makes the accused’s story of an attack by Mazengera more unbelievable is what he did after assaulting the deceased. The logical thing was for him to go to the police to report that

he had visited his estranged wife but had been attacked by both the wife and her paramour; that during that attack he had defended himself and possibly injured the deceased in the process. Instead, he chose to flee. He is alleged to have hidden in the mountains for days on end. It actually appears that he had no intention of giving himself up. He was only arrested after the police set a trap through his colleagues at work.

[21] A further damning aspect of the tragedy is the accused's behaviour before he killed the deceased. The deceased was living with the couple's children. That fact was confirmed by Matiure who said he had seen the children with their mother at the place which he had given them to stay. That confirmation is contrary to the accused's story that when the deceased ran away from home he remained with the children and then took them to his mother's place in Chegutu. What becomes clear is that a few days before murdering the deceased, the accused had taken away the kids from her. It betrays his plan to murder her. Once the children were safely away, he returned to commit the crime. If indeed he had been attacked by Mazengera, it must have been the first thing he would have advised the police upon his arrest. He was silent about it. He only mentioned that his wife had been having an extra marital affair with Mazengera. He ambushed, attacked and killed the deceased in cold blood. After severely bashing her with an iron bar, he dragged her outside the house and left her to die. If the attack had been an accident occasioned by a desire to defend himself, upon realising that the deceased was severely injured, the accused ought to have attempted to help her. That he failed to do so shows that he actually intended to kill her. Matiure said the iron bar used to commit the murder was not from his homestead. If it wasn't it is possible that the accused had brought it with him. If he did, then he had clearly planned the offence and that further trashes his defence of self-defence. He was the aggressor against a defenceless woman. As if that was not enough, the accused burned down the deceased's house after committing the offence. His explanation for it is that he was burning the deceased's clothes. Either way that does not make sense. It is also noteworthy that it was not the first time he had committed arson. A few days earlier he had burnt down Mazengera's house in an attempt to fix him. The only possible explanation is that he deliberately burnt down the deceased's house in the hope that he would destroy the evidence incriminating him for the murder. Clearly, therefore his defence that he was attacked by Mazengera is a hopeless afterthought.

[22] The injuries detected on the deceased's body were ghastly. She had deep cuts on the occiput area. The investigating officer said the deceased's blood had splattered and stained the walls of the room from which she was attacked. That showed that she was savagely attacked possibly from the back. The brutality of the attack is not consistent with someone who had simply assaulted the deceased in order to loosen her grip on his privates.

[23] Against the above findings, it is clear that the evidence irrefutably contradicts the accused's claim of an attack on himself by either Mazengera or the deceased. He cannot jump the first hurdle. It therefore becomes needless to even consider the other requirements. There was no attack which had commenced upon the accused or was imminent. The defence must fail.

[24] For the above reasons, we conclude that the accused's defence is totally unbelievable. The lies apparent in it makes the situation worse. We are therefore convinced that the state has managed to prove the accused's guilt beyond reasonable doubt. **In the circumstances the accused is found guilty of murder as charged.**

MUTEVEDZI J:

Mabundu & Ndlovu Law Chambers, accused's legal practitioners
National Prosecuting Authority, state's legal practitioners