

THE STATE  
versus  
MEMORY MARIRA

HIGH COURT OF ZIMBABWE  
**MUNGWARI J**  
HARARE 02 OCTOBER 2024 & 19 NOVEMBER 2024

**Assessors:** Mr *Shenje*  
Mr *Mpofu*

***Criminal Trial***

*K Chigwedere*, for the state  
*L Sambadzai*, for the accused

MUNGWARI J: Memory Marira (hereinafter referred to as "the accused"), a 36-year-old woman, was indicted before the High Court on a charge of murder, as defined in Section 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], (the Code).

[1] The state alleged that on 20 January 2024, at number 401 Ushewekunze in Harare, the accused had a dispute with her husband, Lovemore Tembo (hereinafter referred to as "the deceased"). On that fateful night, the deceased, despite being already inebriated advised the accused that he was going for a beer drink. The accused objected and followed him outside. When the deceased returned into the house, the accused continued to press him not to leave. Although the deceased ultimately relented he insisted that he would attend a traditional beer-drinking ceremony instead. The accused did not accept the compromise. When the deceased attempted to leave the house once more, the accused struck him on the head with an empty bottle of coca cola. The deceased collapsed and was rushed to a nearby health centre for treatment. Unfortunately, he died the following day at Sally Mugabe Hospital. The state alleges that the accused inflicted the fatal injuries on the deceased with intent to kill, or with the realisation that her actions posed a real risk or possibility of causing death, yet she continued her course of conduct despite that awareness.

[2] The accused denied the charge of murder. She instead tendered a limited plea of guilty to the lesser charge of culpable homicide. The state however rejected the limited plea

and sought to pursue and prove the allegations of murder. In her defence outline the accused admitted that she struck the deceased with a bottle amid a heated misunderstanding. She contended however, that she had no intention of killing the deceased. She claimed that she was provoked by the deceased's drunken behaviour and taunts that he directed at her. Additionally, she asserted that he had pulled out her braids, actions which pushed her to react impulsively and violently. She maintained that in that moment of emotional distress, she did not foresee that the strike with the bottle would result in death. In essence the accused pleaded the defence of provocation.

[3] Since the accused agreed that she caused the death of the deceased by striking him on the back of the head with a bottle, the only issue that arises for determination in this case is whether the accused intended to kill the deceased and whether her defence meets the requirements to sustain the partial defence of provocation.

#### **State case**

[4] The prosecution opened its case by applying to produce the autopsy report compiled by Doctor Arianna Gourguet a pathologist stationed at Sally Mugabe Hospital. The doctor examined the remains of the deceased on 24 January 2024. Significantly she noted surface wounds and injuries which she described as:

“blunt wound in right parietooccipital region”

Further an internal examination on the head revealed:

“hemorrhagic as well as infiltrate in perineum, hemorrhagic infiltrate in both flaps in right region, epidural hematoma in the right region, cranial vault collapse in occipital region, spiderweb fracture in occipital region as well as severe brain edema”

In the end she concluded that the cause of death was due to:

- a. “Severe brain edema
- b. Skull fracture
- c. Severe cranioethoracic trauma”

With the consent of the defence the postmortem report was duly admitted into evidence as Exhibit 1. The cause of the deceased's death was therefore uncontested as was the act of violence perpetrated upon the deceased.

[5] Exhibit number 2 comprised two broken bottles and their certificates of weight. It was tendered by consent. The court observed broken pieces of a brown beer bottle weighing 350g as well as pieces of a Coca-Cola bottle weighing 740g. The state alleged that the Coca-Cola bottle was the murder weapon. The other was also used during the melee that occurred on the fateful day.

- [6] Additionally the testimonies of Richard Chitima, Mirriam Malunga and Melody Musengezi (the investigating officer in the matter) were formally admitted in accordance with s314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (CPEA) as outlined in the state's summary of evidence. In his testimony, Richard Chitima, a friend and neighbour of the deceased, stated that he had been summoned by Jessica Tembo to the deceased's residence after the accused had assaulted him. Upon arrival, he found the deceased bleeding and lying at the entrance of the bedroom. Richard transported the deceased to the doctor's rooms where he received treatment and was subsequently discharged. However, the deceased's condition worsened prompting Richard to take him again the following day to Sally Mugabe hospital. He informed the deceased's sister Melody Malunga about the assault. She arrived at the hospital with medication for the deceased only to discover that he had already passed away. Following a report of murder, Melody Musengezi a duly attested member of the Zimbabwe Republic Police was assigned to investigate the case. She proceeded to arrest the accused and, in the accused's company she visited the crime scene. There, she recovered the broken pieces of bottles that were allegedly used as the murder weapon.
- [7] The evidentiary value of the above witnesses' testimonies was somewhat diminished. The accused's admissions had already established the facts they all stated in their evidence. The only relevant piece is that Melody Musengezi recovered the broken pieces of bottles with the accused's assistance.
- [8] The state also led *viva voce* evidence from Jessica Tembo the deceased's daughter. The accused on the other hand was the sole witness for the defence.

**Jessica Tembo (Jessica)**

- [9] Jessica, currently a sixteen-year-old girl is the deceased's daughter and the accused's step daughter testified that the accused has been the only mother she has known since she began living with the couple at a young age. The accused and the deceased also have three children together. Jessica indicated that she has maintained a positive relationship with the accused, while the same cannot be said of the relationship between the accused and the deceased which had always been tumultuous. For as long as she could remember they always fought and she had actually become accustomed to witnessing their frequent conflicts. In her view, the accused's bone of contention with the deceased was always over money. She personally witnessed the traumatic events that unfolded in their two-room house on the fateful night. Apart from the accused and

the deceased, she was the only other person present in the house, making her the sole witness to the events that transpired. She said her parents had arrived home separately that night. The deceased, who was intoxicated, requested for food from the accused. The witness further said she had dozed off while the accused was warming up the deceased's meal but was stirred awake shortly thereafter by the clinking sound of bottles. She opened her eyes in time to see the deceased gathering some bottles on the floor. From her vantage point in the dining room, where she lay, she observed and heard the accused arguing with the deceased in the bedroom. With only a torn curtain separating her from the doorway, she stated that she was able to see and hear everything clearly. She heard the deceased taunting the accused, urging her to finish him off with the bottles he had arranged for her. He encouraged the accused to ensure she did not miss her target, as she had done the last time. She then witnessed the deceased hit an empty black label bottle against the bed, shattering it. She also observed the accused, dressed only in a Zambia cloth, following the deceased outside the house, and insisting that she wanted to accompany him wherever he was headed. The deceased protested, admonishing her about her nearly naked state, and instructing her to go back inside the house.

[10] Three times, the accused and the deceased chased each other outside, quarrelling over his decision to leave. Despite the bickering, they occasionally laughed and engaged in light conversation during these exchanges, which lasted for about two to three hours. Exhausted and desperate for a moment of sleep, which was repeatedly interrupted by their arguments, she decided to go to Richard Chitima's house for help. Richard was the deceased's friend and neighbour. When she pleaded with him to intervene between the two, he refused to help.

[11] Upon returning home, she was confronted by the deceased, who cautioned her against going out at night. He closed the door behind her securing it with an empty bucket. Once inside, and from the same vantage point, she overheard the deceased, who was in the bedroom with the accused, informing her that he was now leaving for a traditional beer-drinking ceremony. As he was leaving the bedroom where the accused was and at the doorway she witnessed the deceased being struck from behind hard with a Coca-Cola bottle by the visibly angry accused. He fell to the ground face down, his upper body landing in the dining room while the rest remained in the bedroom. For a while, the deceased lay there in silence, bleeding profusely, with his blood flowing onto

the blankets on the floor and spilling onto the veranda. The witness wailed in disbelief at the horrific scene before her. She called out the accused, questioning why she had killed the deceased. According to Jessica the accused made light of the injury and even asked her why she was crying. She left the accused pouring water on the deceased as she rushed to seek help from Richard Chitima for the second time that evening. This time she was able to convince him. She returned with him in tow. When she arrived with Richard they found the deceased awake, holding a cup of water as he asked the accused what she used to assault him. Jessica heard the accused apologising to the deceased. Richard then transported both the accused and the disoriented deceased to the clinic while she remained behind cleaning.

[12] Jessica was clear in her testimony that the accused was not provoked. Rather it was the accused who provoked the deceased and prevented him from leaving the house when he wanted to. Despite that the two had bickered and argued over deceased's intention to leave the house and the accused's request for money, she did not at any point witness any physical altercation between them. She dismissed the accused's claims that the deceased had pulled out her braids or that she accidentally picked up the bottle in a moment of heated reaction. According to Jessica, the deceased had simply indicated that he was leaving for the traditional beer drinking ceremony and was on his way out when the accused struck him from behind. She firmly stated that she had no reason to fabricate any evidence against the accused, as she had lived with her for nearly her entire life. The accused is the only mother she knows and their relationship was one characterised by mutual affection.

[13] Cross-examination of the witness was cursory. Contrary to defence counsel's expectations it simply elicited firmer reiterations of the witnesses' evidence in chief ultimately leaving her testimony both solid and credible.

**Defence case- Memory Marira (Memory)**

[14] In her evidence in chief the accused significantly deviated from her defence outline, attempting to persuade the court that she acted in self-defence. She began by asserting that the deceased, her husband of twelve years was an abusive man who regularly assaulted her. However, she admitted that she had never reported any of the incidents she cited. On the fateful night, the deceased returned home intoxicated at around 2200 hours. After warming his food and serving him in the dining room where Jessica lay, he got up and followed her into the bedroom. Unprovoked he pulled her

braids from her head as he threatened to kill her. He then began to assault her with fists all over the body. In a desperate attempt to calm him she apologised for any perceived harm that she might have caused. He released her momentarily and then pretended to strike her with a bottle before smashing an empty Coca-Cola and a black label beer bottle together sending glass shards cascading onto the bed. He approached her demanding to know if she had seen what he had done and reiterated his intention to kill her before resuming his assault. She testified that she called out to Jessica twice, instructing her to summon Richard Chitima but Jessica did not respond. The deceased continued beating her and then began to throttle her. In a moment of desperation, she became emotional and picked up a beer bottle, striking him on the head, causing him to fall. She confirmed Jessica's account, that the impact sent the deceased sprawling into the dining room where Jessica lay. The accused further said she instructed Jessica once more to call Richard. Jessica did while she remained behind with the deceased. She tied the deceased's head with her clothing garment in an effort to stop the bleeding. She emphasised that her intention was merely to ward off the attack by inflicting pain on the deceased and not to kill him. When the deceased regained consciousness she even apologized to him in the presence of Richard and Jessica. Moreover, she accompanied the deceased to Unihealth Surgery to ensure that he received medical assistance.

[15] When questioned by defence counsel on the distance between herself and the deceased when she struck him she claimed they were some meters apart. The implications of her response appeared to elude her, as she had previously claimed that the assault occurred while the deceased was actively throttling her. This inconsistency poked holes into her narrative making it doubtful that she had been throttled. She claimed that she had no other means to defend herself because the deceased was in the habit of assaulting her. She even volunteered information of how the accused was prone to violent acts and corroborated Jessica's evidence that the relationship had become acrimonious due to constant disagreements. What stood out from her testimony was that she was a dishonest witness. She crafted a narrative that ultimately, ensnared her in contradictions.

[16] Under cross examination she was taken to task over the entirely new and inconsistent elements introduced into her narrative. Specifically, she claimed that she had been threatened with death and violently attacked, including being throttled, which she argued justified her actions in self-defence. However, her defence outline had not

mentioned these significant threats or acts of violence. It being the basis of her defence she could not have failed to include it in her defence outline. Instead, she focused on minor issues such as the deceased's drunken behaviour, taunts, and the pulling of braids, omitting crucial details about threats of death, physical assaults, and throttling. As anticipated, she struggled to provide a satisfactory explanation for this discrepancy, further undermining her assertions of having acted in self-defence.

[17] The court also inquired whether she had sustained any injuries from the alleged vicious attack. She admitted that she had only minor injuries. She neither sought medical attention nor report the incident to the police. That raised doubts about her narrative, leading us to conclude that her claims of being threatened and mercilessly attacked by the deceased were likely an afterthought and a red herring.

[18] The accused also found herself at a loss for words when asked if her narrative implied that three bottles were broken on the same night. She responded by saying that she hit the deceased with a bottle of black label making the bottles of black label that were broken in that house on that night two in number. However, she struggled to clarify why only shards from one Black Label bottle were picked up from within the house after the incident, rather than two. She suggested that they may have been thrown in the pit outside the house as she claimed to have seen some in the rubbish pit. She forgot that in her unchallenged evidence Melody Musengezi a police officer said she recovered the pieces of bottles in the presence of the accused and took them as exhibits. She could have indicated to her that others were in the dust bin. That inconsistency led us to view her assertion that she struck the deceased with a Black Label bottle on the head as an afterthought. It appeared she was desperate to introduce a second beer bottle into her narrative, so that she could claim it as the weapon she used to assault the deceased. In her evidence in chief, she had already accounted for two bottles that she claimed were shattered by the deceased and fell onto the bed. Given this significant inconsistency, we found Jessica's account more credible - that the deceased struck the beer bottle against the bed, while the accused used the heavier Coca-Cola bottle to assault the deceased. In any case even the injuries sustained by the deceased, corroborate this finding. His cranial vault collapsed from the impact and he sustained a fractured skull.

[19] Even worse was that the accused struggled to clarify how she struck the deceased on the back of his head while they were allegedly facing each other and

fighting at the door. The pathologist observed injuries on the deceased's "*parieto-occipital region*," which is located from the centre to the right rear part of the head, rather than the front. In addition to this the accused's attempt to demonstrate to the court how she could have inflicted such injuries while both were squeezed into a standard-sized doorway only served to highlight the implausibility of her account. The most logical conclusion is that she could not adequately explain her version of events because she struck the deceased while he had his back turned to her. This clarification is consistent with the testimonies of both the witness, Jessica, and the accused herself, who both confirmed that the deceased fell into the dining room in a prone position. He was already moving out of the bedroom, leaving the accused behind, when she struck him with the heavy empty bottle that Jessica witnessed. We conclude therefore, that the injury noted on the back of the deceased's head could only have been inflicted if the deceased was walking away with his back to the accused. In that regard, the allegation that the deceased was attacking her is not only false but outrageously so. The belated defence of self-defence that she intended to craft does not even begin to arise.

### **The provocation**

[20] Similarly, the defence that she was provoked, is unsustainable. In Zimbabwe, provocation can only serve as a partial defence to the crime of murder. In all other instances, it is merely mitigates sentence. It is legislated in s 239 of the Criminal Law Code which provides as follows:

“(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 realization 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 realization referred to in section forty-seven; or

(b) He or she has the intention or realization referred to in section forty-seven and 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 realization 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.”



[21] The law requires that all individuals must exercise restraint and temperance, even when faced with provocation. If all forms of provocation were to provoke a violent response, society would descend into chaos and anarchy. For this reason, specific criteria must be met for provocation to serve as a partial defence in homicide cases. Safety valves have been created to evaluate such claims. Authorities indicate that the provocative conduct must be so extreme that a reasonable person would lose self-control and respond in the same manner as the accused. See the cases *S v Kashiri* HMT 13/18 and *S v Liberty Chirimudombo* HH 582/23

[22] In *S v Netsai Mafusire* HH 130/10 the High Court laid down a two-stage test of the defence of provocation which a court examining the veracity of that defence must undertake. A court must initially ask itself the question whether or not at the time of the murder when the accused says he was provoked, he had the intention to kill. If he/she did not have the intention to kill he/she cannot be convicted of murder. The court can only find him/her guilty of the lesser offence of culpable homicide. The second stage is if the court finds that the accused had the requisite intention to commit murder, the court must proceed to examine whether the accused lost his or her self-control and killed intentionally in circumstances where a reasonable person, put in the same circumstances and provoked in the same way would have also have lost self-control. If the answer is in the affirmative and in the case before it, the accused actually lost self-control where a reasonable person would have done the same, then the partial defence of provocation will be available to him/her. He/she can only be convicted of culpable homicide.

[23] I read the law to say that it is not sufficient to simply say a reasonable man in the accused's circumstances would have lost self-control. Instead, it is critical that an accused demonstrates that he/she indeed lost self-control as a result of the provocation. A court must therefore dissect the provocative words or conduct in determining the sustainability of the defence of provocation.

[24] In this case, the first question which must be asked is whether or not the accused intended to kill the deceased or not. As we know, intention in our criminal law is in three forms. The first is direct intention where an accused actually sets out to kill his/her target. The second is knowledge which in simple terms means that an accused has the knowledge that what he or she is doing will result in death. The third is the realisation of a real risk or possibility that the conduct one is pursuing may result in death but

nonetheless continues to engage in the conduct despite the realisation of the risk or possibility.

[25] We have already stated that the deceased was severely assaulted on the head with a heavy Coca-Cola empty bottle. It weighed almost a kilogram at 740 grams. The bottle shattered on impact. The deceased collapsed immediately. The strike shattered the deceased's cranial vault and fractured the skull. It resulted in severe brain oedema. There is no doubt to us therefore that the force which the accused used was extreme. Given such circumstances, the accused cannot escape that she must have and indeed realised that there was a real risk or possibility that assaulting another with such a lethal object on the head could result in death. Nonetheless she did not care and proceeded with it despite the realisation of the risk or possibility.

[26] State witnesses reported that blood was gushing from the deceased, staining the blankets and flowing onto the veranda—a truly horrific sight. Jessica, upon seeing the deceased lying comatose on the floor, initially feared he was dead and questioned the accused about why she had killed him. While the accused attempted to downplay the severity of the situation, she could not hide her alarm; she began to pour water on the deceased. That once more paints a gory picture from which it cannot be disputed that at the very least, the accused must have realised the real risk or possibility of causing the deceased's death. We hold therefore that the accused had the intention to kill the deceased.

[27] Once we make the above finding, the second rung of the test ought to kick in. The accused contended that she was provoked by the deceased. The provocation is alleged to have emanated from the deceased's drunken state; that he taunted her and challenged her to assault him. He also purportedly pulled her braids.

[28] The evidence presented indicates that the couple frequently engaged in confrontations at home, to the extent that Jessica, regarded such incidents as a common occurrence. The accused herself acknowledged the acrimonious and topsy-turvy nature of her relationship with the deceased. Those findings and the accused's admissions suggest that what transpired on that fateful evening was not unprecedented. Indeed, by their own rowdy standards, the events could be deemed child's play. Jessica actually said when it started and they were insulting and running rounds on each other around the house, the altercation was punctuated by moments of laughter between the two of them. There was no physical altercation but only mutual chasing and bickering

interspersed with taunts and playful banter. How the accused could become provoked to the extent of killing the deceased then defies logic. She could not have suddenly become provoked by banter which the couple traded almost on a daily basis.

[29] Further it is undisputed that the deceased was thoroughly inebriated on the day in question. That fact was confirmed by both the accused and the state witness. Jessica reported hearing the deceased taunt the accused, inviting her to assault him with a bottle and instructing her to ensure she did not miss like she had done the last time. That chattering confirms that the brawling was part of the couple's lives. Jessica also observed the deceased breaking a bottle against the bed while insisting on leaving. He only wanted to leave but the accused did not want him to.

[30] Even if we give the accused the benefit of doubt that she may have been provoked, we have evidence as already stated that for over twelve years, the couple had built a tumultuous marriage marked by frequent fights. They had managed to co-exist within that riotous framework. They had likely come to understand each other well. As previously noted, on the fateful night, the deceased had turned his back on the accused to exit the house. At that moment, he was not pulling her hair or assaulting her. This provided the accused with ample opportunity to regain her composure. Instead, she chose to seize that fleeting moment to prepare for the deceased's impending demise, picking up an empty bottle and striking him from a distance of over one meter. The defence of provocation requires that the accused must not have had a cooling moment between the time of provocation and the time he/she acts. The defence would once again fail this particular test.

[31] Lastly, the fact that the two were married did not disentitle the deceased from going wherever he wished to. If the accused disapproved of that conduct she had the responsibility to consider alternative courses of action, particularly given their history of conflicts. Options could have included allowing him to leave, leaving the house herself (we were not told that she was prevented from leaving) or asking family members to mediate. A reasonable person would have chosen such options and not to perpetrate a vicious attack on the other spouse. It was unreasonable for the accused to have done that. In the end we are constrained to conclude that the actions of the deceased did not constitute sufficient provocation to justify the violent reaction that ensued. No reasonable person in the accused's position would have acted in the same

manner that she did. To us, she appeared motivated by a desire for revenge against him for leaving her at home.

[32] In the final analysis, the accused's defence fails and there is no basis for us to find her guilty of the lesser crime of culpable homicide. Given all the issues discussed above and the time which she had from when she became aware that the deceased wanted to leave the house, it would be an affront to the administration of justice were she to be afforded the protection of the defence of provocation. If the deceased's actions can be termed provocation, it was so mild that no reasonable person would have acted in the manner that she did. She simply does not qualify for it. The evidence adduced by prosecution tore apart the accused's claim to the defence. The requirements for provocation were not met. We have no alternative but to reject that defence as a patently false narrative. In equal measure the circumstances surrounding the assault, the inferences drawn from those circumstances, the accused's choice of murder weapon, the injuries sustained by the deceased, and the shortcomings of the provocation defence she attempted to invoke all collectively demonstrate the accused's intention to kill the deceased. We are convinced that the state has proven beyond reasonable doubt that the accused is guilty of murder. Consequently, she is found **guilty of murder as charged**.

**MUNGWARI J:** .....

*National Prosecuting Authority, the State's legal practitioners  
Jaricha & Partners, accused's legal practitioners*