

THE STATE  
versus  
JULIET MUREGA

HIGH COURT OF ZIMBABWE  
MAFUSIRE J  
MASVINGO, 22 & 23 June 2017; 12 July 2017

**Criminal trial – application for discharge at the close of the State case**

Assessors: Messrs Mushuku & Mutomba

Mr *B.E. Mathose*, for the State  
Mr *M. Mureri*, for the accused

MAFUSIRE J: The deceased, Hardlife Ndlovu, died from complicated 55%, third to fourth degree burns, consistent with paraffin burns. The State has charged the accused, his girlfriend, with murder as defined in s 47[1] of the Criminal Law [Codification and Reform] Act, [*Cap 9: 23*].

The allegations against the accused are that on 19 December 2015, at her lodgings in Runyararo North West suburb of Masvingo, she caused the deceased's death by drenching him with paraffin from a burning paraffin stove and set him ablaze, intending to kill him, or continuing with her conduct despite realising that there was a real risk or possibility that it might cause death.

The accused has pleaded not guilty. The State had lined up four witnesses. The first two were the accused's co-lodgers. The last two were the investigating officer and the medical doctor who conducted a post mortem examination on the deceased and compiled a report. The summary of the evidence of these last two witnesses was uncontentious. It was admitted into evidence without objection.

The investigating officer's evidence was on the recording of statements and exhibits. The doctor's evidence was on his post mortem examination and the assessment of the extent and degree of the burns on the deceased, as set out above.

The first two witnesses, Stella Mutakwa [“Stella”] and Aletha Manatsa [“Aletha”], were key to the State case. But even before they opened their mouths, a great deal of the circumstances surrounding the death of the deceased was common cause, or uncontentious. It was this. The deceased scuffled with the accused inside the accused’s room. The deceased’s clothes had caught fire. He was severely burnt. Neither Stella nor Aletha saw how the deceased’s clothes caught fire. Efforts were made to douse the fire to save the deceased. These did not succeed. The deceased was ferried to hospital. He died eleven days later.

Stella said the deceased was assaulting the accused over some telephone call or message that the accused had received. The deceased suspected it was from some other boyfriend or boyfriends of the accused. She tried to restrain the deceased from assaulting the accused and to separate them but failed. She had been drawn into the accused’s room by the noise from the accused’s two children who were crying. Inside the house was a lit paraffin stove. It gave the only light in the room. The time was around 18:00 hours.

Stella said when she failed to separate the accused and the deceased, she decided to take the children outside. On her way back, she heard the deceased screaming. He was saying, “Juliet, you have killed me!” The deceased was burning. Stella asked the accused what had happened. The accused did not answer. But she was trying to put out the fire by pouring water on the deceased. Stella fetched a bucket and also poured water on the deceased. She also observed other people pouring water on the deceased through the window. Later on the deceased was seated outside the house. Aletha arrived.

Aletha said both she and the deceased owned stalls at some market place where they hawked goods. She and the deceased had a very cordial working relationship. On the day in question, she was in her room. She heard noises from the accused’s room. The accused was screaming. Aletha lit a torch and went to investigate. Inside accused’s room was no other light except that from her torch. Aletha did not see the paraffin stove.

From her torch light, Aletha saw the accused and Stella scuffling with the deceased. Stella was on the bed. Both Stella and the accused held the deceased by the collar. Deceased was holding the accused. Aletha shouted at Stella and the accused to let go the deceased. They did not heed her. She rushed out of the room to go and fetch a neighbour, a policeman. He was not there. When she returned to the house, the deceased was seated outside screaming. The right limb of his trousers was on fire. She fetched a bucket of water and poured it onto the deceased. She then helped him pull down his trousers. She asked the

deceased what had happened. He shouted, “I have been killed by these two women,” meaning Stella and the accused.

Aletha asked the accused what had happened. The accused retorted it was none of her business. None of the neighbours was helping out. Aletha rushed away to look for a car to ferry the deceased to hospital. She helped the deceased into the car. One of the women present insisted the accused should also accompany the deceased to hospital. On their way, it was decided to pass through the police station to make a report. On the way to the police the accused asked for forgiveness over what had happened. Aletha retorted that if she was to apologise, it was to the deceased, not to herself.

The deceased was admitted in hospital. From time to time Aletha visited him. Eventually he died from his wounds.

At one stage during her testimony in court Aletha wept. She said she was overcome by emotion from memories of seeing the accused dying.

After Aletha, the State closed its case. Mr *Mureri, pro Deo* counsel for the accused, immediately applied for a discharge of the accused on the basis that the State had led no such evidence as would warrant the accused being placed on her defence. He said none of the witnesses had seen what happened inside the accused’s room. None of them had said how exactly the deceased had caught fire. The State had failed to disprove material averments in the defence outline *inter alia* to the effect that during the scuffle inside the accused’s house, in which the deceased had been the aggressor, and the accused had been trying to wriggle out of his grip, the deceased had slipped and lost his balance. He had accidentally knocked down the lit paraffin stove. The paraffin had spilled. His clothes had caught fire and had started to burn.

Mr *Mureri* also said Stella’s evidence largely supported the defence case. He said Aletha’s evidence was discredited. Her exaggerated concern for the accused and the assistance that she allegedly rendered him on the day in question was only explainable by the fact that she was, or had been, in a love relationship with the deceased. He said the State had not disproved these material averments. As such, there was no cogent evidence on which the court, acting carefully, might convict.

Mr *Mathose*, for the State, argued that at this stage the court is not being called upon to assess the evidence on proof beyond any reasonable doubt. All that the court has to do is to see if the State has made out such a *prima facie* case as would warrant calling the accused to explain. He said the State needs not prove the commission of the crime. But it must have led

such evidence as would justify the transfer of the onus to the accused to explain her conduct on the basis of her special knowledge of the incident.

An application for discharge at the close of the State case is made in terms of s 198[3] of the Criminal Procedure & Evidence Act, [*Cap 9: 07*]. The section reads:

“If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.”

Where the court considers that there is no evidence that the accused committed the offence, it has no discretion but to acquit: see *Attorney-General v Bvuma & Anor*<sup>1</sup> and *S v Tsvangirai & Ors*<sup>2</sup>. There are three basic considerations. The court ***shall*** discharge at the close of the State case:

- [a] where there is no evidence to prove an essential element of the offence [*Bvuma & Anor, supra*, at p 102];
- [b] where there is no evidence on which a reasonable court, acting carefully, might properly convict [*Attorney-General v Mzizi*<sup>3</sup>]; and
- [c] where the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely convict on it [*S v Tarwirei*<sup>4</sup>].

In the present case, it is common cause that there was no eye witness to the deceased catching fire. At the crucial moment, Stella had gone out of the room. Aletha had not yet come in. The accused was all by herself with the deceased.

In *Matione v S*<sup>5</sup> the Supreme Court upheld a complaint by the State that a trial magistrate had misdirected herself by deciding that a State witness was not worthy of belief by accepting as evidence the version put by the accused in cross-examination. In *Tarwirei* above, McNALLY JA, commenting on a similar misdirection by the trial magistrate, said at p 577B – C of the judgment:

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<sup>1</sup> 1987 [2] ZLR 96 [S]

<sup>2</sup> 2003 [2] ZLR 88 [H]

<sup>3</sup> 1991 [2] ZLR 321 [S] @ 323B

<sup>4</sup> 1997 [1] ZLR 575 [S], at p 576

<sup>5</sup> SC 36-15

“In the present case, it seems to me that the magistrate made the same error as was made at first instance in *R v Newcastle-upon-Tyne Justices, Ex p Hindle* [1984] All ER 770 (QBD) at 777j – 778b. He believed the cross-examiner as against the witnesses being cross-examined. The cross-examiner happened to be the accused in person. But the error was to believe what he said while putting his case to the witnesses. This was not evidence. It was not adopted and accepted by the witnesses. It was denied by them. So it could only become evidence when the accused took the oath and made the statements under oath.”

That is exactly, or substantially, what defence counsel is urging us to do in the present case. The accused’s version, in her defence outline, and through cross-examination by counsel, is that as they scuffled, the deceased slipped and fell onto the lit paraffin stove. It is not an unreasonable explanation for the fire. But at this stage, no such evidence is before the court. It is just a purview of what the accused will come and say in her evidence. She has not yet said it. So we cannot pay regard to it.

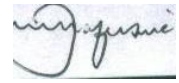
The State says the deceased caught fire because the accused drenched him with paraffin from a burning stove. It is true that none of the State witnesses has said that. It is also true that the State has now closed its case. Therefore, there is no one that shall be coming to say that on behalf of the State.

However, a life was lost. The evidence shows the deceased died from burns. Through the post mortem report which was admitted without objection, those burns were consistent with burns from paraffin. It is common cause that the paraffin burns were those sustained by the deceased on the night of his scuffle with the accused. The accused was alone with the deceased inside the room. There was a lit paraffin stove. He caught fire from it. The State is inferring that the accused intentionally caused or directed that fire on him. *Prima facie*, that is not an unreasonable inference, given all the surrounding circumstances, including some kind of a dying declaration by the deceased to Stella that the accused had killed him; to Aletha that he had been killed by Stella and the accused; and the alleged apology by the accused to Aletha on the way to the police station.

I consider that in these circumstances, the onus has shifted to the accused to explain how the deceased caught fire. How he caught fire is something peculiarly within her special knowledge. The court would want to know. It would want to hear her side of the story. Only after all the evidence is on record will the court assess her guilt or innocence or otherwise.

In the circumstances, the application for discharge at the close of the State case is hereby dismissed. The accused shall be put on her defence.

12 July 2017

A handwritten signature in black ink, appearing to read 'J. J. J.', is written over a light blue rectangular background.

*National Prosecuting Authority*, legal practitioners for the State;  
*Matutu & Mureri*, legal practitioners for the accused