

STATE
versus
ALFRED SAMALANI

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE 10, 11, 12 October 2017 & 13 October 2017

Criminal Trial

G Pendei, for the accused
H M Muringani, for the state

TSANGA J: The accused faces two counts of murder and one of attempted murder. The allegations are that on 20 August 2016, he unlawfully and intentionally caused the death of Rugare Kahlamezi and her grandchild Faith Chateya and attempted to murder Vimbai Charumbira. He had poured 1.25 litres of petrol on a thatched hut and entrance and lit it resulting in a fire which engulfed the whole hut.

It was not in dispute that the accused had lit the fire. As such all the evidence of the state witnesses was admitted in evidence as it appears in the state outline by consent of the defence counsel. This was in terms of the provisions of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Also admitted as exhibit 1 and 2 were the post mortem reports which showed that the two deceased had died from asphyxia and their bodies were also charred. Equally admitted was the warned and cautioned statement of the accused in which he narrated the circumstances leading to torching the hut. The match box he had discarded after torching the hut as well as the remnants of the bottle used to ferry the petrol to the scene of the crime were also produced as exhibits.

On the day in question he had learnt that a boyfriend was visiting Rugare Kahlameza who was according to him his second wife although the state outline said they were ex lovers. He had set off after 18:30pm to her place of residence armed with some petrol and matches. According to his warned and cautioned statement he had knocked and heard voices in the

house and confirmed that there was indeed a man inside. He believed they were making love. He had poured petrol on the hut and set it alight and fled the scene. Only Vimbai Charumbira had managed to escape before the roof collapsed on the two who remained inside.

Accused's defence was that he never intended to kill anyone but had merely wanted to smoke his wife's lover out of the hut so that he could identify him for purposes of claiming adultery damages. His counsel argued that the state had not proved that the accused's specific intention was to kill and that in the absence of such proof he should be acquitted of the murder charges. Moreover he argued that the accused had been provoked and lost self-control. He relied on s 239 (1) (b) of the Criminal Law and Codification Reform Act [*Chapter 9:23*].

The picture painted in court of the deceased Rugare Kahlameza by the accused was that of an "insatiable vixen". The accused was 85 years old at the time of the commission of the offence and Rugare Kahlameza was aged 40. He had met her in a bar sometime in the 90's when she would have been barely in her twenties. He claimed that she had already had five men whom she had lived with as husband and wife at the time and that Vimbai Charumbira would have been her seventh. Despite these moral flaws, he had taken her as his second wife having paid Z\$100.00 to her father at some point as bride price. They had two children together. According to him, her immoral ways had not abated with marriage. She would pretend to go to church whilst in reality consorting with other men. As a result he told the court that he had found another wife, whom he lived with. For reasons of his deceased's wife immorality they lived separately. She had her own place which he said though he contributed to acquiring. It was at least four and half miles away. He would spend one week with his other wife and another at the deceased's residence but his narration was that she always wanted more in terms of conjugal rights. Also she said she wanted him to be more available to look after his children.

The state argued that this was a carefully planned murder in that he had made preparations by purchasing the petrol that was used, hiding it in his barn, taking off at night to execute his plan, tying the door, sprinkling the petrol then setting the hut on fire which had caused the death of the two deceased persons. Moreover, no effort had been made to put out the fire. Instead he had fled the scene. The state therefore argued his clear intention was to kill his deceased wife and her lover Vimbayi Charumbira. The defence of provocation was said by the state not to apply to the factual circumstances in that the accused was aware

according to him of his wife's proclivities and as such it should have been no surprise to him to find her with a lover. Furthermore in the face of clear evidence of planning it was argued that it could not be said that he was provoked at that time. As such the state's submission was that he should be found guilty of murder with actual intent in relation to Rugare Kahlameza in count one, and of attempted murder in relation to Vimbai Charumbira in count three. With regards to count 2 involving Faith Chateza the state argued that although he could not be said to have intentionally intended to kill her, he ought to have realised the possibility that there would be other people in the hut. As such the state's stance was that he should be found guilty of murder with constructive intent in relation to this count.

Whether the fire was deliberately started with the intention to kill

Even though there were no eye witnesses who had observed his deliberate starting of the fire, there were vital confessions in this regard. Wilfulness and malice were present in the very act as evidenced by the accused's own verbal confession to this other wife Shayiso Tendai immediately upon getting home after committing the crime. Her statement regarding the contents of that confession was admitted without question by consent. This confession about what he had done is important in that it was free and voluntary and arose from his own spontaneous act on the part of the accused. She did not induce him to make it. It was an admission of fact that he had set fire to the hut where the deceased was with her lover. This confession proved a material fact that he had deliberately started that fire. No pressure was brought to bear upon him in making that confession. Instead it was the accused who threatened Shayiso whom he told with death if she disclosed his offence.

The wilfulness and preplanning is also evident from his own warned and cautioned statement equally admitted in evidence. The legal effect and consequences of the warned and cautioned statement which was admitted had clearly been explained to the accused before it was confirmed as captured in the record. Suffice it therefore to note that confessions of a voluntary nature are an important piece of evidence which cannot be ignored.

The confessions were therefore voluntary instances. It was a fire he deliberately started under cover of darkness. Moreover these confessions were additionally corroborated by other evidence such as the box of matches which he threw away and the charred remnant of the bottle with petrol which he had deliberately ferried to the scene of the crime.

Whether the accused was provoked

The defence of provocation against the factual background presented to the court makes little sense. The accused himself was clear in his own evidence that he was aware even when he first met his deceased wife in a bar that she had many partners and had in fact never adhered to cultural stereotypes regarding her sexuality. He was clearer still that because she had not mended her ways regarding her lack of chastity and that he had in fact sought another more acceptable wife. He also lived apart from her. Moreover the state summary also said that the deceased had a child with Vimbai Charumbira with whom she had started a relationship as way back as 2002. It was not as if that relationship or in fact any other for that matter would have been shocking news to him. He simply let his own jealousy, insecurity and sense of proprietorship over her sexuality get in the way since freedom of sexual expression is seen as the preserve of men. From his imagery of her, it was apparent that he deemed her as a deserving victim of what he had meted out to her. The sense of entitlement to women's bodies is worrying at all times. (See for example *S v Dewa* HB 98/13 where a man set fire to a hut killing a woman's two children simply because she had refused his advances).

Suffice it to note that a number of socio-legal issues are surfaced by these factual circumstances that pose a real threat to the right to life for women in particular as envisaged in s 48 of our constitution as well as the various human rights instruments to which our country is a party. I am talking here for example of article 4 of the Protocol to the African Charter on Human and People's Rights on the rights of women in Africa which unreservedly mandates that every woman shall be entitled to respect for her life and security of the person and prohibits all forms of cruel inhuman and degrading punishment. This protection encompasses both the private and the public sphere.

Societies the world over continue to place different standards on sexual expression between men and women. This poses a real threat in the form of an excuse of murder women who do not adhere to expectations. In this context the sense of ownership of women's sexuality that is imposed is further given cultural legitimacy by the payment of *lobola/roora* bride price, even the merest of it. *Lobola/roora* can complicate the picture by creating a framework for a culturally legitimated excuse for men's expectations and sense of entitlement

regarding women's bodies even when parties are effectively estranged as was the case in this instance.

Ordinarily insecurities arise in marital unions due to differences in outlook, culture, and power play. The payment of *lobola / roora* may further compound these by virtue of the perceived rights which man feels he is entitled to as a result of having parted with his money for her acquisition. In this regard Article 5 of the Convention on the Elimination of all Forms of Discrimination Against Women to which we are also a party is particularly instructive in that it requires state parties to modify social and cultural patterns of conduct of men and women based on the idea of inferiority and superiority. As long as no meaningful dialogue takes place in our context on the use of *lobola / roora* as a convenient crutch in the control of women in general and their sexuality in particular, women's vulnerability to violence and abuse and murder will continue.

In the instant matter the insecurities attendant upon most marital unions were further compounded by the age-gap difference between the accused and his wife. The slight he experienced from his wife's sexual freedom was no doubt inflamed by being a much older man who certainly felt aggrieved and insecure at the thought of his wife's paramour being more appealing than he was.

Findings on each count

Count 1

The first count relates to Rugare Kahlameza and whether the incendiary fire which he deliberately started and which killed her amounts to murder with actual intent. The accused's confessions pointed to grievance about a boyfriend and ill feelings towards this deceased because she was unfaithful. There is no doubt that his intention was to harm her. The state summary is clear that the accused secured the door from outside in order to prevent the occupants from escaping. Furthermore, he told his wife Shayisa Tendai when he got home that he had burnt down the bedroom hut in which the deceased was sleeping and had fled the scene. From his own narrative, he had not envisaged an escape by anyone inside even though Vimbai Charumbira did manage to get out after forcing the door open. The state in our view proved beyond a reasonable doubt that the accused started the fire deliberately, and the presumption is that he intended the natural consequences of his act. The incendiary fire succeeded in killing his wife and his own grandchild. The accused is found guilty of murder with actual intent with respect of Rugare Kahlameza.

Count two

Count two relates to the death of Faith Chateya. The accused's defence is that he did not know the child was in the hut and had no intention to kill her. Our Criminal Code is very clear that "any person who causes the death of another realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility shall be guilty of murder". The gist of this principle in the criminal code has long been the position in our law. As was observed in the case of *R v Poteradzayi* 1959 R & N 31

"..It has been settled law since *R v Ngcobo* 1921 AD that a constructive intention to cause death will suffice. It is sufficient if there is an appreciation that there is some risk to life involved in the action contemplated , coupled with recklessness as to whether or not the risk is fulfilled in death."

Setting fire endangers loss of life and damage to property and deliberately setting a fire to a house which has occupants is an act of wickedness and extreme recklessness. There is no doubt that even if the accused did not have an actual intention to kill Faith Chateya, in reality by starting the fire deliberately he was reckless as to the consequences of who it killed. He is therefore found guilty of the murder of Faith Chateya in terms of s 47(1) (b) by engaging in reckless conduct which caused her death.

Count three

As regards count three involving attempted murder against Vimbai Charumbira, it is interesting to contrast his situation with the facts in *S v Bhaiwa* 1988 (1) ZLR 412 (SC). In that case an appeal had been launched against a magistrate's finding of attempted murder. The appellant had poured in petrol in a house where the complainant was following an argument. The complainant had however managed to leave the house and had sustained 10-12% burns. The Supreme Court on appeal reversed the finding of attempted murder in favour of finding assault with intent to do grievous bodily harm. This was firstly on the basis that the petrol had not been poured on the complainant but into her house. Secondly, the accused in that case had definitely expected the complainant to emerge and was waiting with a stick when she did so. Significantly, also the court found that the appellant had made no attempt to secure the doors and to prevent the complainant from coming out.

In *casu*, the accused's warned and cautioned statement that he had deliberately set the hut on fire because Rugare's boyfriend was inside. The intention had been to kill him in that

fire and tying the door outside was meant to prevent his escape. The fact that he had managed to escape with 9% burns is in my view not the point. It does not detract from the fact that there had been an attempt to kill him. The finding therefore is that of attempted murder in relation to Vimbai Charumbira.

Mitigation and aggravation

In mitigation it was argued that the accused is a first offender aged 86 and that as such he should be kept out of prison. His health condition was also highlighted in that he is a diabetic and that imprisonment would make it difficult for him to receive the necessary care and attention. Furthermore, the provocative circumstances of the offence were said to be mitigatory. He was also said not to have wasted the court's time in that he had not denied the material aspects of the offence. His counsel argued for community service as being an appropriate punishment given his overall circumstances.

The state on the other hand pointed to the sheer callousness of the offence as aggravatory as well as the careful planning that had gone into the commission of the offence. The fact that he had not intended for anyone to escape was also emphasised. The state proposed a sentence of life imprisonment on the first count of murder with actual intent, a thirty year sentence on the second count of murder with constructive intent and 10 years on the third count of attempted murder.

Reasons for sentence

The accused has come before this court as a very aged offender but facing very serious offences relating to murder. As an elderly citizen who had led a life free from criminal controversy, he should have known better. He understood the charges that were brought and presented his motives for committing the offence. Whilst cognisant of the challenges posed by advanced age from a health perspective in meting out a custodial sentence, this court is nonetheless bound to make him accountable for his actions. His temperament and actions do pose a threat to society.

This court however does not think that any useful purpose would be granted by giving him the lengthy sentences as proposed by the state as they would be no more than academic at this point given his very advanced age.

In appreciation of the view that despite the accused's age he must be held accountable for his actions and that a custodial sentence is indeed called for, all counts are however treated as one for purposes of sentence.

Accordingly the accused is sentenced to 10 years imprisonment.

Manyangadze Law Practice, accused's legal practitioners
National Prosecuting Authority, State's legal practitioners