

THE STATE
versus
TOGETHER RIRWA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 13, 16 & 22 June 2017

Assessors 1. Mr Magorokosho
 2. Mr Chipere

Criminal Trial

Mrs *J. Matsikidze*, for the State
Ms *P. Maganga*, for the accused

HUNGWE J: The accused pleaded not guilty to the murder of his 11 months old baby, Tabeth Rirwa (“Tabeth”) which occurred on 10 June 2016 at Maunze village, Headman Samanga, Honde Valley. He pleaded guilty to the attempted murder of Anesu Ngorima, (“Anesu”) and admitted the he assaulted Phoebe Mandeya with a machete on the head intending to cause bodily harm during the course of the same assault.

The salient facts which are not in dispute may be summarised as follows:

The accused nursed a relationship with Phoebe Mandeya (“Phoebe”) over a period of three years. This relationship resulted in the birth of Tabeth, who was 11 months at the time of her death on 10 June 2016. Phoebe Mandeya had her son from her previous relationship. When he proposed marriage to Phoebe, that proposal did not gain acceptance by her. She was content in remaining at her home which she had established with her late husband. She did not see any benefit accruing from leaving that home or joining the accused in matrimony. Instead she advised him to find someone to marry. The accused did so and married one Ellen.

The accused set up home with Ellen thereby constructively ending his relationship with Phoebe Mandeya. When the accused failed to maintain his daughter Phoebe would talk to him into doing the right thing for his daughter. Phoebe effectively ended the relationship in February 2016 when the accused got married to Ellen. According to Phoebe she had ended the relationship with the accused, as he was now, to her knowledge, married. But she was not

jealously of his new wife and in fact had maintained a good rapport with her. She regarded the accused as her nephew in terms of their extended family relationship.

In the early hours of the day in issue the accused had pitched up at her residence around 05h00 hours uninvited. She queried the purpose of his visit. His reason for the nocturnal visit was his desire to establish whether the Police has served her with certain court papers summoning them both to court over the issue of maintenance. When she quizzed him on whether such an issue deserved such a strange time to visit, he gave another reason – to see his family. Despite her threats to call his parents over the issue, the accused barged into her room where she was breast feeding. Upon entry into the room, the accused held his daughter by her legs. Phoebe screamed. He asked her not to call for help as he meant no harm but would leave. He went out and she closed the door. He came back without knocking. He suddenly took out a machete from his long jacket and struck her. She passed out. When she regained consciousness she discovered that she had suffered multiple wounds about her head and neck. Her baby had been hacked to death. Her son was also badly injured.

The doctor who examined Phoebe states that she sustained “very deep cuts on the scalp ...and neck.” He also noted that Anesu had sustained “multiple left temporal/scalp deep cuts and temporal bone fractures” among other injuries. The baby exhibited “a small laceration about 3centimetres long, exposing the skull bone. A fracture of the skull covering occipital extending horizontal from left to right, to the right root of neck.” Doctor Fonte, carried out the post mortem examination gave the cause of death as haemorrhage of sagittal sinus due to severing of the skull and sinus by a sharp object. Accused states in his extra-curial statement that he struck the deceased four times to the head. The medical reports confirm that this was a brutal and vicious attack on a defenceless mother and children.

The accused does not dispute these factual averments. He however pleaded provocation and intoxication. In respect of the defence of provocation he claimed that Phoebe had harassed his wife leading Ellen to desert him. Besides his say so, he led no evidence to support this claim. He had given an instance of a visit to his residence by Phoebe as one of the instance constituting the alleged provocation.

Counsel for the accused Ms *Maganga* correctly conceded that the requirements of the defence of provocation could not be met on the basis of the allegations raised by the accused in the killing of the 11 month old baby. She also conceded, properly in our view, that as for the charge of attempted murder, the requirements of the defence could not be met on the facts of this cases where the accused attacked a defenceless child and his mother. In any event, the

fact that this was a carefully planned and pre-meditated attack excludes the chosen lines of defence. We say that this was carefully planned and executed because the facts show the following.

After his Ellen deserted him, he blamed his predicament on Phoebe and decided to punish her for that. By his own admission he deliberated upon a plan in which he would visit her by night, hack her and the two children to death before committing suicide. He set this plan into motion by first imbibing intoxicating liquor in order to gather sufficient Dutch courage to follow through this devious plan. Around 03h00 he left the bottle store and went to his residence to fetch this weapon of choice the machete which he designated his murder weapon. He had ample opportunity to abandon this nefarious plot if he were so minded. He did not.

He then approached Phoebe's residence and attacked her and the children. By sheer luck only his 11 month old baby sustained fatal injuries. The other two survived the attack. Instead of three casualties there was only one; but that is one too many. Mother and son were left for dead but survived the murderous attack. He blamed it on the beer. Voluntary intoxication cannot be a defence in circumstances where the accused consumes alcohol in order to gather enough courage to carry out a dastardly act as the accused here did. The reason for the attack appears to have been to avoid his obligations to maintain his child, not that Phoebe had provoked him.

His admission that he had killed his daughter made to Police in his statement set out the true circumstances in which he planned and carried out a cold blooded and brazen attack against innocent lives. We find that both the mother and her children had not done anything which could remotely resemble an act of provocation. Nor do we find anything to justify a finding that this was an involuntary attack triggered by intoxication.

Consequently the accused ought to be found guilty of the murder of Tabeth Rirwa as defined in section 47 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*], the attempted murder of Anesu Ngorima and the assault on Phoebe Mandeya.

REASONS FOR SENTENCE

In assessing your sentence I take into account the fact that you are a first offender and that you admitted your guilt from the outset thereby assisting in the due administration of justice. You would have been traumatised by the sheer fact that you were burying your child whom you had killed for no reason. That is all that one can say in your favour. I say that because this is a most brutal form of murder committed by someone who was legally obligated to stand in a protective position towards the victims of violence. As you said to Phoebe, this was your family. They looked up to you as their provider, protector and father-figure. Instead, you turn against the very values upon which your relationship was built.

What I find aggravating is the fact that you pre-planned this attack against defenceless and vulnerable members of your family. This is the worst type of domestic violence that we have witnessed on this circuit. I hope that we do not encounter even worse cases in future where a father decides to exterminate an entire family simply to avoid a legal obligation. It seems to me that in your case the death penalty would have warranted had this matter been prosecuted as one of aggravated murder.

In light of the above I consider that the following sentence to be appropriate.

All three counts to be treated as one for sentence:

Life imprisonment.

*Acting Prosecutor-General, State's legal practitioners
Mugadza Chinzamba & Partners, accused's legal practitioners*