THE STATE

AND

EZRA MANENJI

AND

SIMON TONGOONA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
GWERU 7 AND 8 FEBRUARY 2013

Mr Mupariwa for the State
Mr L. Mudisi for the accused

Criminal Trial

MAKONESE J: The accused is appearing before us on a charge of murder. He pleads not guilty. The allegations are that on the 17th October 2011 at village Manenji, Chief Jiri, Gokwe South, the accused unlawfully and with intent to kill stabbed Molly Sibanda, a female adult aged 60 years old, with a spear on the left shoulder, realizing that there is a real risk or possibility that his conduct may cause death and continued to engage in that conduct despite the risk or possibility that his conduct may cause death, thereby inflicting injuries that resulted in her death.

The salient facts of this matter which are common cause are as follows:

There was a long drawn dispute between the accused and the Matsanza family over a piece of land. The accused claimed ownership over a piece of land under Manenji Village alleging that he had allocated it to his son one Simon Tongoona in his capacity as Village head. Tendai Mahokoto also claimed rights, title and interest over the same piece of land. It is not in dispute that the Matsanza family and the accused are relatives. It is also not in dispute that the dispute was between accused and the Matsanza family. The deceased was not a party to the land dispute. The accused person was the village head at the relevant time. It is beyond dispute that the deceased Molly Sibanda was stabbed by the accused, on her left shoulder with

a spear whilst on the disputed piece of land and subsequently died as a result of the injuries sustained from the stab wound. What is disputed is whether the accused or someone else stabbed the deceased, leading to her death.

The State case

The State introduced into evidence the summary of the State case marked Exhibit 1. The State also tendered into evidence, by consent of defence counsel the accused's warned and cautioned statement (Exhibit 3). It is necessary to repeat the contents of the accused's confirmed warned and cautioned statement which are as follows:

> *"I have understood that caution and admit to my charge. What happened is that I went to my son's field to cut down the shrubs, I was with my son. The field in question had a long standing dispute between me and the family of the person I later killed. I went to the field with a spear while my son armed himself with an axe and a catapult as we anticipated that we could be fought. The deceased and her family later came and told us to stop clearing the land. My son started pelting stones from his catapult. The deceased's sons drew nearer me as I was holding my spear. The deceased was shouting from my behind ordering his sons to fight me, she suddenly went to my front in a bid to refrain her children and this is the moment I threw the spear intending to stab Solomon Matsanza and the spear stabbed the deceased. I pulled out the spear from the deceased and ran to my homestead where I left the Spear and proceeded to Sengwa Police Base on my own....."*

I shall comment on the confirmed warned and cautioned statement later in the judgment.

The State further tendered into evidence a Post Mortem Report by Dr E. T. Manyarara (Exhibit 4) wherein the cause of death is stated as:

(1) Hypovolemic shock

(2) Haemo-pneumothorax

The Dr. also observed the following injuries on the body of the deceased:

"4th intercostal space laceration (7cm).

The State then produced by Consent of defence counsel Exhibit 5, a Home-made steel spear, weighing 0.630 kg, and with a length of 65cm, the blade being 30 cm long. The width of the blade is 4cm at its widest point. The court noted that the spear is a very dangerous and

lethal weapon which under normal circumstances would be suitable and ideal for hunting wild game.

The State then proceeded to lead viva voce evidence from the first of its two witnesses, Joshua Matsanza. This witness stated that he resides at village Manenji, Chief Jiri, Gokwe South. The second state witness, Tendai machokoto is his biological mother, whilst the accused was his village Head prior to the commission of this offence. He testified that on the day in question he was at a work party (commonly known in venecular as "nhimbe"), at Tendai Machokoto's field. They were cutting bushes and shrubs and clearing the land. The land that was being cleared belonged to Tendai Machokoto and it is the disputed land. The work party comprised at least twelve adult persons all of whom were using axes to cut the shrubs and tree branches. The deceased was also in the work-party. He testified that soon after they had commenced the bush clearance he observed the accused person and his son Simon Tongoona coming in their direction. The accused was welding a spear and his son had a catapult. The accused person ordered them to stop clearing the land and immediately thereafter Simon Tongoona started pelting them with stones using the catapult. He says people in the field started running away in different directions. He says that as they ran the deceased due to her advanced age failed to escape and to run and he observed the accused person stabbing her on the left shoulder with the spear. He said that he was standing at a distance of between 6 metres to 12 metres away. He says the accused approached the deceased, pulled out the spear from the body of the deceased before fleeing from the scene.

Joshua testified that he together with other villagers rushed to the deceased and tied the wound using a wrapping cloth and a shirt in a bid to stop the bleeding. They carried the deceased home and later secured a tractor from a neighbour which conveyed the injured person to a clinic. The deceased died on the way to the clinic. The witness went and made a report to Sengwa Police Base.

We found the evidence of Joshua Matsanza to be clear and straight forward. The evidence reads well. The evidence of this witness was not controverted in material respects under cross-examination. This witness impressed us as an honest witness whose eye-witness account is credible.

The second witness for the State was Tendai Machokoto. She also resides in the same village with the accused and the accused was her village Head up to the day of the offence. She is the mother to Joshua Matsanza the first witness. She narrated that there was a long standing dispute between her and the accused person over a piece of land. She chronicled how the accused had removed her from the piece of land and proceeded to allocate the same piece of land to his son Simon Tongoona. The witness says that she took the matter to Chief Jiri who ruled in her favour. She produced a letter from the Chief dated 8th October 2011 (Exhibit 6) which was tendered into evidence by consent of both State and Defence Counsel. The letter only serves to confirm that there existed a land dispute between the witness and the accused person and that the Chief allowed the witness restoration of the disputed land. It is important to note that the deceased was not a party to the land dispute.

The events of the fateful day as witnessed by Tendai Machokoto are that on the day in question she was at work party (commonly known in venecular as "nhimbe"). She says they arrived at her field around 7am. She was in the company of at least twelve adult persons and some children. They were busy clearing the land when the accused and his son Simon Tongoona arrived. At that stage she was the person closest to the deceased. She says that accused shouted at them indicating that they should stop clearing the land. She says that accused was armed with a spear whilst his son Simon had a catapult. She says Simon started pelting them with stones using the catapult. She could not run away (because as observed apparently she is crippled.) The deceased also failed to run away because of her advanced age. The witness said that the accused came up to her and said:

"You should be grateful to the child you are carrying on your back. It was you whom I wanted."

She says accused then advanced towards the deceased and when he got to about a metre from her he threw the spear at her. The deceased had her back to the accused. The spear struck the deceased on the left shoulder and the deceased fell down. Accused rushed to pull out the spear from the body of the deceased and then ran away from the scene. The rest of her evidence corroborates the evidence of her son Joshua Matsanza in all maternal respects

as to what then transpired after the deceased had been struck with the spear by accused person.

We find the evidence of this witness to be clear or and to the point. Inspite of her admission that there was a long standing dispute between her and the accused there were no traces of bias or exaggeration in her testimony. She is a credible witness and she was not shaken under intensive cross-examination by defence counsel. Her version of events is accepted by the court as being true.

The State sought and obtained formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] in respect of the evidence of the following witnesses:- Solomon Matsanza, Kumbirai Chitera, Allibious Gandiwa, Robert Dzwike, Admire Makuni and Dr E. T. Manyarara.

The Defence Case

The Defence case is outlined in the summary tendered into evidence as Exhibit 2. The thrust of the defence case is that the deceased was accidentally stabbed by one of her sons or one of the people in the group who threw spears indiscriminately at the fleeing accused person. The accused made a feeble attempt to challenge the confirmed warned and cautioned statement by stating that he did not freely and voluntarily give the statement.

The accused does not dispute that he was at the disputed piece of land on the 17th October 2011 in the early hours of the morning. He does not dispute that at around the same time there was a work-party at the same field. He says the number of persons there was in excess of twenty eight people, comprising of men and women. He does not dispute that at the field was the deceased person, Joshua Matsanza and Tendai Machokoto, as well as his son Simon Tongoona. What is in dispute is what the accused did or did not do whilst at that field. According to his testimony he went to the field in the company of his son Simon Tongoona for the purposes of clearing the land in preparation for the planting season. He says whilst he was at the filed there was no one else except his son and himself. They were busy clearing bushes when a group of people numbering about twenty eighty came carrying a variety of weapons including spears, knobkerries and axes arrived. He says he and his son ran away in a western

direction as they came under attack from the group. Before they reached the western end of the field another group armed with spears and axes emerged in front of them. When accused was running away he heard a female voice crying saying that she had been stabbed by her sons.

We do not accept the accused's version of events. We find him to be an unreliable witness. He was argumentative and his defence is patently false. Even where the evidence clearly established that the Chief Jiri had ruled in favour of the second state witness Tendai Machokoto on the land dispute he wanted to give the court the impression that he had more powers over the land then the Chief. In fact we found the accused to be clearly contemptuous of the Chief's court and his avowed intention was to overrule the order by the Chief. The accused's demeanour was not impressive. He was evasive under cross-examination and he gave lengthy explanations whilst side stepping questions put to him. He could not, however say that he had any dispute with the deceased prior to this incident.

We note that the accused did not challenge the warned and cautioned statement at the confirmation proceedings.

In the case cited by the State, *S v Alexander Dzomoroda* HH 03/06 CHATUKUTA J, stated at page 8 of the cyclostyled judgment as follows:

> "The fact that the warned and cautioned statement was confirmed before a magistrate shifts the onus on to the accused to prove that the warned and cautioned statement was not made by him, and was not made freely and voluntarily. The accused did not discharge the onus."

In *casu* the accused failed to discharge the onus. We also observe here that some of the facts mentioned in the accused's defence outline appear in his was warned and cautioned statement. As correctly pointed out by State Counsel, *Mr Mpariwa* such inside information contained in the accused's warned and cautioned statement could not have been "smuggled" by the police into the warned and cautioned statement.

We find that the accused was the aggressor on the day in question. He armed himself with a spear and his son Simon Tongoona, with a catapult. The two proceeded to Tendai Machokoto's field well aware that they would attack deceased and those in the work-party. Accused's evidence was full of exaggeration and falsehoods. He sought to blame his legal counsel *Mr Mudisi* by claiming that he had not been given ample time to give him full

instructions. When asked whether he needed more time to brief his counsel accused became evasive and was not keen to take the offer. We therefore totally reject the accused's version of events on the day in question.

We are satisfied that the State's version should be preferred instead of the defence version.

Whether the Accused had intention to kill

The issue that now falls for determination by this court is whether the accused had at the critical time the requisite *mens rea* to kill the deceased person, or whether the State has only managed to prove that accused is guilty of murder with constructive intent.

The State has cited the following cases:

Robert Mugwanda v The State SC 19/02, *Tichaona Mudzana vs The State* SC 76/04, *S v Sigwanda* 1967 (4) SA556 and *S v Siluli* 2005 (2) ZLR 141 (SC).

In the cases cited the general rule is that where there is no clear evidence that the accused had an intention to kill the proper verdict to return is that of guilty of murder with constructive intent.

I will however, proceeded to examine the facts and circumstances surrounding this offence to decide whether accused did have the requisite *mens rea* to commit murder. The accused person took a hunting spear to the field in dispute. Upon arrival at the field he told the people there to stop clearing the land. He was welding a spear. He advanced towards the group who ran away. The deceased and Tendai Machokoto failed to escape. Tendai Machokoto is crippled, and the deceased is aged 60 years and therefore could not escape because of her advanced age. Before striking the deceased the accused confronted Tendai Machokoto and stated:

> *"You should be grateful to the child you are carrying on your back. It was you whom I wanted."*

The accused then charged towards the deceased and threw the spear at her at close range with fatal consequences. Accused then pulled out the spear from the deceased's body before fleeing the scene. When he got home he hid the spear in a pole near a granary. As

stated before the accused had no bone to chew with the deceased person prior to this incident. After this incident he went to the police where he alleged that he had been attacked a group of person. He was arrested by the police and charged with murder.

The intention of the accused person must be ascertained from the surrounding circumstances.

It has now been well established that actual intent to kill exists where:

(a) X has as his aim object the desire to cause death

(b) X does not have death as his aim and object but continues to engage in an activity which he realises will almost certainly result in death.

See Guide to Criminal Law by Prof G. Feltoe page 110.

I have also examined the case of *Mbembe Porusungazi v The State* SC 63/07.

The facts of that case bear some resemblance to the present case. The appellant had shot the deceased with an arrow in the chest leading to his death. The appeal court held at page 8 of the cyclostyled judgment as follows:

> "The appellant must have aimed at the deceased and shot him with the arrow. That he aimed to the side would, even if such a version were to by accepted, not absolved him."

The learned judge went on to say:

> "Whether the appellant was reckless or not does not arise in this case in view of the finding by the trial court, which finding, I agree with, that the appellant aimed his arrow at the deceased and then shot him with it."

In *casu,* the accused has proffered a defence of a complete denial. He has chosen to argue that he never threw the spear at the deceased but preferred to claim that the deceased was struck by one of her sons. We have already rejected the accused's version of events and therefore the accused's intention when he threw the spear must be decided from an analysis of the facts;

We are satisfied that the accused must have at the very least have forseen the possibility of killing the deceased as having been substantially certain. In the circumstances, this court is of the view that the accused intended to bring about the death of the deceased when he threw the spear at her at close range. He must have realised that death was a

substantial and real possibility. The accused was not directing the spear at a wild animal but at a human being. He killed the deceased and achieved his objective.

We are satisfied that the accused foresaw death as a real possibility and accordingly we find the accused guilty of murder with actual intent.

Extenuating Circumstances: We did not find any extenuating circumstances.

Sentence: we accordingly imposed the death sentence.

Criminal Division, Attorney General's Office, State's legal practitioners
Chidawanyika Chitere & partners, accused's legal practitioners