

THE STATE
versus
ROWAYI CHIMENE

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 17, 20 & 25 June 2014

ASSESSORS: 1. Mr Magorokosho
 2. Mr Chipere

Murder Trial

Ms J Matsikidze, for the state
Ms T Gutuza, for the accused

HUNGWE J: The accused shot and killed a villager from Nyerere Village Chief Musikavanhu at Save River on 23 April 2008. He was charged with murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He claimed that he was acting in self-defence.

The circumstances leading to the charge of murder are set out in the summary of the state case, exhibit 1, and may be briefly recorded as follows. The deceased was a villager of Nyerere Village, Chief Musikavanhu, Chipinge. The accused was employed as a game ranger or game scout at Humani Ranch, Chipinge. On the day in issue the deceased and other family members went to Save River for a bath. Whilst the deceased was absorbed in some mundane river activity, the accused together with one Daniel Musakaruka arrived at that point on the river. A group of villagers were apparently chasing these two. Deceased then enquired of the accused why they were in flight. This must have enraged the already agitated accused as a misunderstanding then followed between the accused and the deceased. In the heat of this, the deceased aimed his fire-arm at the deceased and shot him. He sustained injuries from the gun shot. He was ferried to Chibuwe Clinic and later transferred to Chiredzi where he later died.

Accused's defence was quite a different version to that given above. According to him, he was on duty around the ranch together with two others. They met up with six poachers and gave chase to them. Despite firing one warning shot in an effort to effect an arrest, the poachers were undeterred. The chase led these across the Save River into the village where the accused's party managed to apprehend one of the fugitives. They arrested him. Before they could make their way back with this singular captive, they found themselves surrounded by an aggressive group of villagers amongst who were the other five fugitives. They were armed with an assortment of crude weaponry ranging from pangas to logs and slashers and anything in between. They demanded the release of their comrade. The accused fired one warning shot in an effort to scare them away. They kept advancing. The accused retreated into the river as it was clear they would attack him. The deceased was in the front of the aggressive gang threatening to take away the fire-arm from him and use it on him. Deceased was armed with a blade and kept advancing menacingly. Accused threatened to shoot him if he kept coming against him. To his surprise the deceased remained unmoved by the threat to shoot. Fearing an imminent attack from the deceased, the accused had taken aim at deceased's thigh but could not see this thigh clearly as they were both waist deep in the Save River's waters. He then realised the deceased was bleeding from the abdomen.

The testimony of the deceased's brother Collen Simango; Sergeant Mangobe and Constable Meja both of ZRP Middle Sabi; as well as Dr Tarumbwa of Chiredzi District Hospital, was not disputed. As such, it was admitted into evidence as fact in terms of section 314 of the Criminal Procedure and Evidence Act, [*Cap 9:07*].

The testimony from the medical practitioner was of a formal nature and to the following effect. He conducted a post-mortem examination on the remains of Thomas Simango on 25 April 2008. He noted that he deceased had evidence of bleeding from gunshot wounds in the anterior abdominal wall. He established that there was perforation of the small bowel. The deceased also suffered from internal haemorrhage. He concluded that death was a result of penetrating abdominal trauma and interior haemorrhage secondary to gun-shot wounds. His report was produced in court as exhibit 3.

Collen Simango's testimony was that on the day in question he was bathing in the river together with the deceased and Brighton Simango. They were approached by game scouts or game rangers. One of them was armed with a fire-arm. Behind the game scouts was a group of people shouting for the scouts to stop. The deceased alerted the scouts about the

need to stop as demanded by this other pursuing group of people. Upon hearing this, the accused stopped and indicated to the deceased that in fact they were looking for him. He took aim with his fire-arm towards the deceased at close range before firing. The accused then fled the scene in the direction taken by his fellow scouts. The deceased was injured in the stomach area and bled profusely from the injuries to the stomach legs and arms. They ferried him to the nearest police post from where he was taken to a medical facility.

The evidence from the police officers was of a formal nature from which no issues arose.

The state called three witnesses to demonstrate that the accused was not acting in self-defence thereby proving that the killing was intentional. These are Farai Muzondirwa, Wiseman Muzondirwa and Brighton Simango.

That evidence established the following.

Farai Muzondirwa told the court that on the day, the villagers were supposed to meet at the Save River at 8 a.m. in order to make certain alterations to the water course in the river in order to effect irrigation. Together with his brother Wiseman they were at the gathering point before the appointed time waiting for the arrival of their fellow villagers. Up the river nearby, was the deceased who was in the company of his brother Brighton in the river bed. The main group of villagers had not arrived by then. Then the accused and fellow rangers or scouts arrived. They asked them if they had seen some people who had gone past that point. The witness answered in the negative. This drew the ire of the accused and his group. The rangers insisted that they had seen these people. According to the witness, the accused and his colleagues had spent the night in the village drinking a local brew with the villagers. When this incident took place, the rangers were now on their way back to the ranch, the incident took place on the village side of the river bank. Across the river was the ranch where the accused were employed. When they asked about the people who had gone past them, the accused had not by then realised the presence of the deceased and his brother down the same side of the river bank. The witness and his brother could see the deceased who was bathing in his brother's company. When they remained adamant one Daniel Musakaruka struck the witness with a knobkerrie. According to this witness, when the rangers arrived, Daniel carried the fire-arm. The deceased wielded the knobkerrie. Daniel took the knobkerrie from the accused and struck him. Upon being struck Farai fell down and was unconscious for a few moments. He later heard the sound of a gun-shot. He noticed that the deceased had injuries to

the stomach, the hand and the genital area as they ferried him to hospital. He denied that the deceased had threatened to harm the accused prior to being shot.

His brother took up the story. Wiseman Muzondirwa confirmed that they had arrived at their work site earlier than other villagers. They decided to bask in the sun to wail away time as they waited for the other villagers to arrive. The accused and his fellow villagers came from the direction of the village. They asked the two brothers if they had seen some people who had gone past that way. They responded in the negative. At that time the deceased and his brother were in the river upstream. One of the then struck his brother with a knobkerrie as the other pointed a gun at him. After they knocked his brother out, the rangers proceeded on. He heard the sound of a gun-shot in the direction where the deceased and his brother were. He rushed there only to find that the deceased had been shot in the stomach. The deceased was naked. He had been taking a bath. The scene of the shooting is a place where the water is shallow and people use this part to bath. According to Wiseman, the villagers, comprising largely women and children, responded to his scream for help after the rangers had struck his brother and shot the deceased. The villagers were not armed they were responding to shouts from the river. When asked whether the deceased may have threatened the accused with a machete just before he was shot, the witness was unable to confirm or deny this since he arrived at the scene well after he had been shot. He however maintained that he was naked. After shooting the deceased, the accused and his group ran away.

Brighton Simango had been with the deceased and Collen earlier that morning before they left for the river. A while later he was alerted to the shooting of the deceased at the river. They had not carried any weapons with them to the river as they had gone for a bath.

The accused's version in his evidence-in-chief largely followed that set out in his defence outline. In other words he maintained that they had taken an early morning patrol of the ranch's river boundary when they encountered a gang of poachers. They gave chase and tried to effect an arrest by firing into the air to no avail. After a 20 metre chase, they caught up with one poacher, who was then struck with a knobkerrie by one of the rangers. They handcuffed him whilst his fellow villagers made good their escape. As they walked back, they suddenly found themselves surrounded by a large crowd which was demanding the release of the detained poacher. These people numbered anything up to 300 or 400. They were armed with a variety of crude weapons including machetes. The deceased, a former ranger himself, who had turned poacher, and was amongst this group. The accused fired a

warning shot hoping the crowd would disperse. It did not. The deceased kept advancing towards him. He charged towards the deceased who also charged towards him. They were both in waist-deep waters of the Save River when he decided that he needed to act. He felt that his life was in danger and fired at the deceased who was threatening to attack him.

The accused's version, contrasted with that given by the villagers, cannot possibly be true. For example, the accused wishes the court to believe that they had stumbled upon a gang of poachers who they chased, apprehended one and placed him under hand-cuffs. They were then attacked by villagers after they had shot one of the poachers. They fled leaving the hand-cuffed poacher to his own devices. How likely is it for villagers to attack an armed ranger soon after one of them had been fatally shot and wounded? High unlikely. His whole version of the sequence of events has no ring of truth. We preferred the version given by the state witnesses because it accords with the probabilities of this case. The state evidence showed that there were some level of poaching known to be undertaken by some of the villagers. The deceased was suspected to be one such poacher. On the day, it is our finding that the accused and his fellow rangers had spent the night in the village imbibing locally brewed beer. In the morning following this night out they came across the deceased who they tracked towards the river but had lost sight of him for a while. They quizzed the Muzondirwa brothers, bludgeoning one of them in the process, before spotting the deceased who was taking a bath just down the river. They accosted him and accused shot him at point blank range. By that time however the villagers were running to the scene of the first incident where the accused's party had assaulted one of the villagers.

The accused called his fellow gang scouts to give evidence in his favour. However the evidence tended to contradict that given by the accused in its material respects.

Daniel Musakaruka gave a totally different version of the events. He estimated the villagers at around 25 when the accused said they were between 300 and 400. His description of the scene included a dramatic reference to the fact that the accused should be arrested as he had no bullets! The machete which they both say the deceased carried was never put in cross-examination of the witnesses. The impression we got is that the witness was trying his best to save his colleague's skin by telling this court a pack of lies. Ms *Gutuza*, for the accused, had a torrid time leading evidence from one of the defence witnesses especially Daniel Mtetwa. It was clear to everyone in court that his sole purpose was to regurgitate certain evidence deemed to be favourable to the defence without regard to its truthfulness or otherwise. We

had no difficulty in rejecting it out of hand especially where it contradicted that given by the State witnesses.

Accused's version gave the impression that he had no choice but to shoot to kill in order to defend himself. He fired three rounds before the fatal shot. The defence witness, on the other hand, maintained that the accused fired up to four rounds to frighten off the villagers who kept coming.

Clearly, the witness was trying to give a rehearsed version of what happened which the court could possibly accept as constituting or amounting to self-defence.

In order for the defence of self-defence to act as a full defence to a charge of murder the following requirements must be met.

- a) There must be an unlawful attack;
- b) upon the accused;
- c) which attack must have commenced or must there been commitment;
- d) the action taken must have been necessary to avert the attack;
- e) the means used to repel the attack must have been reasonable.

These common law requirements have been captured and restated in s 253 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. It provides:

“253 Requirements for defence of person to be complete defence

(1) Subject to this Part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if:-

(a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent, and

b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she, believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack, and

[Paragraphs (a) and (b) substituted by section 31 of Act 9 of 2006.]

(c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances; and

(d) any harm or injury caused by his or her conduct:-

(i) was caused to the attacker and not to any innocent third party; and

(ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.

(2) In determining whether or not the requirements specified in subsection (1) have been satisfied in any case, a court shall take due account of the circumstances in which the accused found himself or herself, including any knowledge or capability he or she may have had and any stress or fear that may have been operating on his or her mind.”

An instance of an accused offering what was found to be false evidence is *R v Shevill* 1964 (4) SA 51 (SRAD); 1964 RLR 292. At p 52 (page 293 of the Rhodesian report), MACDONALD AJA, as he then was, said:

"It is not in the broad interest of the administration of justice that courts should invent explanations and excuses for accused persons which are unsupported by evidence. Such conduct might tend to encourage accused persons to withhold their version of the facts in the hope that a more favourable explanation might occur to the court.

Once, however, the magistrate found that the appellant's version was untrue it became necessary for him to ascertain as best he could on the evidence available the truth of what happened. The fact that the appellant had given a false account did not justify the court in accepting of the two possible explanations the less favourable (to the appellant) and less probable explanation."

R v Mlambo, 1957 (4) SA 727 (AD) was a case in which, in the face of incontrovertible circumstantial evidence an appellant had falsely denied killing the deceased, it was necessary to decide whether the appellant had the necessary intent to constitute murder. In a dissenting judgment with which PRICE AJA, concurred, MALAN JA, said at page 738:

"An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.

Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so."

In a case of the nature of that which we are now considering it is the appellant's state of mind when he shot and injured the complainant which is vital to the decision. And in order to arrive at a proper finding as to appellant's state of mind it is important to know what facts can be relied on as indicating that state of mind. It is only against those facts that it is possible to say whether the appellant was in fear of his life and acting in self-defence and, if so, whether he exceeded the bounds of self-defence in striking the blows he did. The determination of these issues is made the more difficult by the fact that we do not feel we can accept the appellant's evidence of the events which led to the discharge of the fire-arm by him. But the fact that the appellant has given false evidence of these events is by no means

conclusive against him, because the onus is on the prosecution to refute the defence of self-defence and as I have said we are not satisfied that the evidence of the state witnesses is necessarily the full truth.

In our assessment two completely irreconcilable versions given. This led us to find that only one version could possibly be closer to the truth than the other. That version is the one given by the state witnesses. We come to this conclusion fully aware of the inconsistencies which are apparent in the state case. We are of the firm view that these do not go to the material aspects of our factual findings. The story as told by the villagers makes better reading as opposed to the poorly rehearsed version of the defence witnesses. The explanation for the shooting resides in the long-held view by the rangers that the deceased was a troublesome poacher who needed to be put down. The occasion for it was quite clearly not such that an act of that nature would constitute a justifiable homicide.

Self-defence is a complete defence at law against a charge arising from conduct associated with repelling an unlawful attack. In our view the accused has not established as fact that he was under any attack; lawful or otherwise. Therefore his conduct in firing at the deceased who was naked and taking a bath cannot be termed an act of self-defence.

In the result we decided the matter on the facts and found that the accused shot and killed deceased who he believed to be a poacher.

He is guilty of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

National Prosecuting Authority, state's legal practitioners
Messrs Bere Brothers, accused's legal practitioners