

THE STATE
versus
TIMOTHY DERA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 24 & 27 February 2015 & 3 March 2015

Assessors: 1. Mr Rajah
2. Mr Chidawanyika

Criminal Trial

Ms JR Matsikidze, for the State
J T Fusire, for the accused

HUNGWE J: The accused pleaded not guilty to a charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The allegations of murder arose from the events of 18 March 2014 at Dera Village, Mutasa, where it is alleged the accused unlawfully and with intent to kill, struck the deceased Tendai Dera with stones several times on the head thereby causing injuries from which the deceased later died.

The following facts were largely common cause or not in serious dispute.

The accused and the deceased stayed together as uncle and nephew respectively. On the day in question there was a dispute between the two. The State alleges that the dispute arose as a result of the deceased refusing to take his malaria medication. On the other hand the accused states that the altercation arose from the deceased's habit of stealing from the homestead anything and everything he could. When he confronted him over this, a fight ensued. In the fight the deceased, according to the accused, reached for a cobbler's needle. He feared for his safety and fled. According to the accused, the deceased was catching up with him when he decided to repel this unlawful attack by pelting him with stones. When he struck the deceased to the head, the latter stopped and began to bleed. The deceased went into his room and died the next day without receiving medical treatment. The State maintained

that the accused rained stones directed at the deceased's head even after the deceased had fallen to the ground. The deceased died after a day or two.

The issue before this court is whether the accused intended, when he struck the deceased with stones, to kill him; or if he did not have such an intention, he realised that in so doing, there was a real risk that death or serious injury could result from his conduct but persisted with that conduct notwithstanding the real risk or possibility. It seems to us that the fact that the accused admits that he had struck the deceased with stones is indicative of the extent to which he was prepared to go to punish the deceased for his perceived misdemeanours. However using a stone to strike the head of a person is potentially fraught with obvious danger. In our view, the accused cannot be heard to say that he did not realise that there was a real risk of death or serious injury resulting from such an act. He claimed in an oblique manner that he acted in self-defence. That claim is not, in our view, supported by evidence. Rumidzai Dera who was at the garden and who witnessed that several stones thrown by accused found their mark on deceased's head did not witness the chase. That chase, if it occurred, could be the basis for an act of self-defence which the accused claimed prompted the savage pelting of the deceased with stones.

Although we were unable to make a specific finding as to how the alleged fight broke out, there is evidence from a bystander confirming the main averment that the accused had not once or twice but on several occasions pelted the deceased with stones some of which found their mark on the deceased's head. This continued even after the deceased had fallen to the ground. When a man is down, it is cowardly in our view, to continue to hit him. Where a person continues to do so, any claim of self-defence cannot possibly succeed since the threat would have fizzled out.

The defence of self is upheld only when certain requirements are met. These requirements are strict. These include the requirement that the force used must only be sufficient to repel the unlawful attack; that the means used to repel the attack must also be commensurate with the means used in the attack. If the victim of an unlawful attack resorts to excessive force, then the defence of self-defence cannot avail him. There was no suggestion by the defence that the deceased used some such weapon like stones. In fact the claim is that he used a cobbler's needle with which he intended to stab the accused. The cobbler's needle is only mentioned when the accused is asked to give evidence in open court. It is not mentioned in the defence outline as well as to the police when the police visited the scene. The accused's version to the police is that the deceased had refused to take his medication.

This explains why this version appears in the State Summary. We assume this could only have come from the accused since Rumbidzai categorically states that she was unaware of the genesis of the assault. If the cobbler's needle was actually used by the deceased to threaten the accused, there is no reason why the accused would have omitted to raise it the first time he was asked to give his own version of events.

In our view, although the accused may not have desired the death of the deceased, he however realised that there was a real risk of death or serious injury occurring when he struck him several times in the head with stones causing him to fall down and bleed from the head. That the accused proceeded with his conduct notwithstanding the realisation of the real risk is demonstrated by his reckless abandonment of a bleeding nephew preferring to go and pen his cattle. He did not care whether his conduct resulted in the death of the deceased or not. In our view the State was able to prove the existence of legal intention in respect of the consequences. As such the accused ought to be found guilty of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

National Prosecuting Authority, the State's legal practitioners
Legal Aid Directorate, accused's legal practitioners