

THE STATE
versus
BLESSING CHIMBIRAI

HIGH COURT OF ZIMBABWE
BERE J
MASVINGO CIRCUIT COURT, 9 & 10 June 2015

Assessors: 1. Mr Mushuku
2. Mr Dhauramanzi

Criminal Trial

T Chikwati, for the State
R Fambasai, for the accused

BERE J: On 2 October 2014 Fidrez Ruvinga (the deceased) who was a police officer based at Bikita Police Station tragically lost his life through stabbing at Zvionerei Shop at Baradzanwa Business centre in unclear circumstances. The accused stands charged with the deceased's murder.

The facts which this court finds to be not in dispute are as follows:

On the fateful day the deceased gathered that the accused person who was on police wanted list was at Chihowa Bar at Baradzanwa Business Centre. On approaching the accused the deceased then took the accused outside the bar and then to some secluded spot behind Zvionerei Shop where the two engaged in some discussion. It was in the process of such discussion that the deceased was fatally stabbed by the accused in circumstances which only the accused is privy to. The post mortem report (exh II) concluded that the deceased had died of "Haemothorax aorta dissecting and chest wound."

In his defence outline the accused stated that whilst he and the deceased were behind Zvionerei Shop, the deceased held him by his belt and demanded that he pays the sum of

\$800-00 to him for the money the accused owed one Mr Hwami failing which the deceased would hurt or shoot him with a gun.

The accused went on to suggest that the utterances by the deceased terrified him and that he was under the influence of alcohol. The accused further stated that in an effort to scare the deceased away he used a home-made knife which landed on the deceased's chest. The accused concluded by saying that he had no malicious intention to cause the deceased's death.

In support of its case the state relied on the following evidence: the accused's confirmed warned and cautioned statement (exh I), the post mortem report (exh II), the evidence of Loveness Zhou, Hondo Paguti and Doctor Gongalez all of which was admitted into the record of proceedings as summarised in the state summary in terms of s 314 of the Criminal Procedure and Evidence Act¹. In addition, reliance was also made on the *viva voce* evidence of Leonard Dzingirai, Clopas Maibva, Fradreck Ngungu and Margaret Gwese.

The accused was the sole witness for the defence. Pinimidzai Dube was called by the court in terms of s 232 of the Criminal Procedure and Evidence Act (*Supra*).

The evidence of Leonard Dzingirai merely confirmed that the accused was taken out of Chihowa Bar by the deceased as confirmed by the accused himself and to some extent by Clopas Maibva. The main thrust of the evidence of officer Fradreck Ngungu was to confirm that the accused had made an abortive attempt to resist his arrest at Pinimidzai Dube's homestead and that both himself, another officer and the accused himself were injured in the process of arresting the accused. Because the murder weapon save for its pictorial photo was not brought before the court the evidence of officer Margaret Gwese was brought in to try and explain the murder weapon as she had seen the knife used during the course of her investigation of this matter. The witness confirmed the knife as shown on exh 3. She said it weighed 100 grams and that it was 25 cm in length and that it was a home-made knife with its blade made out of steel.

It will be noted that when the accused had his confirmed warned and cautioned statement he stated as follows:

"I have understood the caution and I admit the charge which is being levelled against me. I stabbed the deceased FIDRES RUVINGA once on the left side of his chest with a home-made knife. I wanted to scare him so that he would release me since he was holding me by the belt of my trousers after he had informed me that he was going

¹ Chapter 9:07

to shoot me with a gun if I do (sic) not give him money for Hwami amounting to US\$800-00 which I had borrowed. That is all”

The consistency of the accused person in his confirmed warned and cautioned statement and his defence outline is unmistakable. It cannot be missed. However, in his evidence in chief the accused then introduced something completely new. Whereas his defence outline and confirmed statement suggest that the accused had consciously stabbed the deceased in order to scare him in order to release him, in his evidence in chief he spoke of having accidentally stabbed the deceased as the accused was assaulting him demanding the US\$800-00 and at the same time threatening to shoot him with a gun. He said as he battled to free himself from the grip of the accused person he produced the knife (exh 3) and as they struggled and fell down the deceased was accidentally stabbed.

It is not in dispute in this case that none of the state witnesses were privy to the actual circumstances surrounding the stabbing of the deceased. Only the accused knows what happened. That there was a disagreement between the accused and the deceased is confirmed by Clopas Maibva who was watching both the accused and the deceased from a distance before he attempted to move closer to where the two were. The witness said he was driven by curiosity to see what was happening. This witness appeared to have placed himself at a vantage point and we adjudge his evidence to have been fairly and credibly given. He would certainly have seen the accused struggling or wrestling with the deceased if the two had involved themselves in such a fracas. The witness must therefore be believed when he says the accused and the deceased were in a standing position when he saw the deceased staggering and falling down with the accused fleeing from the scene of crime.

That the accused must have been conscious that he had seriously injured the deceased from the time he left the scene is clearly demonstrated by his unexplained and irrational conduct after the event. According to the accused, he was running a take away enterprise at the business centre and his wife was also staying at the same place. On the fateful day, the accused said he had intended to go and slaughter a bovine hence his having the murder weapon in his pocket. Surprisingly, after the deceased’s assault the accused made a swift and unceremonious departure from the Business Centre. In fact he ran away and completely shelved the mission of going to kill the bovine. As correctly observed by the state counsel it would be an idle appreciation of the events of the day in question if this court were to allow itself to be detained by the story told by the accused person.

The accused story further gets complicated when it emerges that even when he got to Pinimidzai Dube, he did not confide in him about the alleged “fight” he had had with the deceased. Further, the accused’s stout effort in resisting his arrest adds another uncomfortable dimension to his story.

Our unanimous view as a court is that the accused must have been fully conscious that he had fatally stabbed the deceased at the scene of crime. The accused must therefore not be believed when he said he accidentally stabbed the deceased. He deliberately stabbed the deceased as a result of the deceased’s demand of some money from him and when he did so, he acted in circumstances that did not justify the defence of self-defence which he tried peddle in this court because Clopas Maibva testified against that.

As properly conceded by defence counsel, even the defence of drunkenness would not come to the aid of the accused in this case.

Despite the accused having projected himself as someone who had partaken of liquor in large quantities on the day in question, he remained fully conscious of the activities of the day to the extent that it was apparent that he was desperately trying to exaggerate his situation. It could not be said by any stretch of imagination that the accused lacked the requisite intention to injure the deceased in the manner he did as envisaged by Part IV of the code.

We must now proceed to make determination as to whether the accused had actual or constructive intention to kill.

These two concepts are lucidly explained by professor G Feltoe² as observed by Chidyausiku J (as he then was) in the case of *Robert Mugwanda v The State*³

It is difficult for the court given the circumstances of this case to conclude that in stabbing the deceased the accused intended to kill the deceased. The evidence as assessed does not justify that conclusion.

However, what is inescapable in our view is that given the nature of exh 3 in this case from the moment the accused pulled that knife and plunged it on the deceased’s chest the

² *A guide to the Criminal Law of Zimbabwe published in 1989 by Legal Resources Foundation P. 110.*

³ *S.C. 19/2002 at P. 9*

accused must have foreseen that there was a real risk that the stabbing would result in the death of the deceased. Indeed it came as no surprise that immediately after the stabbing the deceased's fate was sealed.

Verdict

Guilty of murder with constructive intention.

EXTENUATION

The irrefutable position explained by the accused in this court was that on the day in question he had been to Ziki beerhall where he was drinking beer referred to as ZED and pints. None of the state witnesses who testified were in a position to rebut this. As a court, we are not able to confidently deny this.

We have already said that the accused is the only person who is privy to what happened between him and the deceased. Clopas Maibva confirmed that there appeared to have been a misunderstanding between the accused person and the deceased. The accused person said he was taken to some secluded place behind Zvionerei Shop where the deceased made outrageous demands for money from him. We must accept that the accused was provoked by the conduct of the deceased person. It is not usual that when a police officer wants to effect an arrest he does so in a secluded place. That conduct by the deceased was highly suspicious and did not find support from his boss during his life time Officer Fradreck Ngungu who admitted that the conduct by the deceased was improper. We have already made a finding that the accused is guilty of murder with constructive intent.

Our view is that all these factors cumulatively looked at speak to the existence of extenuation. Accordingly we find that extenuation exists in this matter.

SENTENCE

In sentencing the accused person we are enjoined to take into account the factors in mitigation and aggravation as submitted by counsel.

In mitigation we accept that the accused had partaken liquor and was provoked by the outrageous demands made to him by the deceased who appeared to have departed from his mission of apprehending the deceased. This case is a clarion call to police officers to always endeavour to perform their functions professionally. It is highly unlikely that the deceased

would have been fatally assaulted if he had performed his mandate in the full view of other people inside Chihowa Bar.

The accused person has fairly heavy family responsibilities but these must be weighed against the fact that the deceased has equally been deprived of the opportunity to look after his own dependants.

In aggravation we will take into account that there is no evidence of remorse on the part of the accused. We watched the accused throughout these proceedings and there has been no sign of contrition on his part. There has been no sign that he regrets his conduct.

We are concerned that the accused showed bizarre determination to resist his lawful arrest on 4 October 2014 at Pinimidzai Dube's homestead by armed officers. Two police officers and the accused himself were unnecessarily injured during the accused's arrest. The accused's close relative Pinimidzai Dube confirmed the belligerent attitude exhibited by the accused during his arrest. Such conduct is deplorable.

Offences of murder are on the increase and this is terrifying to our citizens. As a court we are concerned with the ease with which the accused resorted to the use of a knife to deal with the situation that confronted him. Our people must learn to exercise restraint when in such situations.

Those who show brazen determination to indulge in unlawful killing of fellow human beings must be kept away from society for a considerable length of time. Our desperate hope as courts is that by the time the accused will finish serving he would have matured to the extent of being able to play a positive role in society.

25 years imprisonment

*National Prosecution Authority, The State's legal practitioners
Legal Resources Foundation, accused's legal practitioners*