THE STATE
and
KEPHAS MUCHEMI

HIG COURT OF ZIMBABWE
BERE J.
MASVINGO CIRCUIT, 1 and 2 June 2015

ASSESSORS: 1. MR DAURAMANZI
2. MR MUSHUKU

Criminal Trial

T. Chikwati, for the State
T. Kuchenga, for the accused

BERE J: On 28 May 2012 and at Muchemi Village under chief Nyakunhuwa, Zaka, the deceased Shadreck Muchemi lost his life in very unclear circumstances. The accused Kephas Muchemi who was closely related to the deceased admitted to having stabbed the deceased but denied that it was his intention to cause the deceased`s death. In the process, he raised the defence of self-defence.

I must point out from the outset that this matter was poorly investigated with the result that the court has been deprived of all the evidence that ought to have been presented to it.

The state case is anchored on the following evidence which was tendered with the consent of the defence counsel: the accused's warned and cautioned statement, the post mortem report and the okapi knife which is admitted to be the murder weapon.

Further, in accordance with s 314 of the Criminal Procedure and Evidence Act[1] the evidence of constables Kapofu, Phillip Makwara and Sithole and that of Doctor Zimbwa was

[1] Chapter 9:07

accepted as recorded in the state summary. Amos Makucha and Bodias Muchemi (the deceased`s father) gave evidence in court to conclude the evidence that was available for the state.

The accused was the sole witness for the defence.

THE LEGAL POSITION

Before I comment on the evidence that we were presented with, it will be necessary for me to re-state the time honoured principle of our law that informs the conviction of an accused person in a criminal case. The position of the law was laid down as far back as 1937 by Watermeyer, the Acting Judge of Appeal (AJA) in the celebrated case of *R* v *Difford*. He put it as follows:

> "I must consider whether or not at the conclusion of the trial there was any evidence upon which I was entitled to convict the accused of the crime charged in the indictment.....It is not a question of throwing any onus on the accused, but in these circumstances it would be a conclusion which the court could draw if no explanation were given. It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal".[2]

Following on this decision Davis AJA in *Rex* v *M* put it in the following:

> "..... And I repeat, the court does not have to believe the defence story: still less has it to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true".[3]

It is with this in mind that we have looked at all the limited evidence that has been placed before us.

As already highlighted none of the evidence led or tendered by the state takes us to the actual scene of the murder of the deceased. The closest the state did was to tender the accused`s confirmed warned and cautioned statement. It was only the evidence of the accused person that took the court to the time the deceased was murdered. In other words, none of the state witnesses was able to explain to the court the circumstances surrounding the actual stabbing of the deceased. Only the accused was privy to that situation. Because of this we can only reject his story if we are satisfied beyond doubt that the accused`s story is palpably false.

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[2] 1937 AD 370 @ 373
[3] 1947 AD 1023 @ 1027

It will be noted that the summary of the state alluded to a misunderstanding earlier on between the deceased and the accused person over the village`s headship as they were drinking beer at Amos Makusha`s homestead. Amos Makusha was supposed to confirm this misunderstanding which was allegedly resolved by the intervention of his brother Bodias Muchemi.

However, when Makusha gave evidence in court, he completely denied ever witnessing any misunderstanding between the deceased and the accused. There was no attempt by the prosecution to lead him to explain why he was now departing from his recorded statement. We are more inclined to accept that this witness may not have disclosed all to the court. He was more conservative with the truth.

This is the witness who testified that there were a number of patrons partaking beer with the larger number inside the hut and a sizable number outside the hut. Ironically none of those inside or outside saw the accused being dragged outside by the deceased. The witness`s evidence that he spoke to the accused after the assault must therefore be viewed with extreme caution.

Even when he was still inside the hut, this witness was unable to confirm Bodias Muchemi`s testimony that earlier on that day the accused had slapped the deceased in the full glare of other patrons and had to be reprimanded by Bodias Muchemi himself.

Bodias Muchemi`s evidence was equally not assistance to the court as he only arrived at the spot of the murder after the fatal assault had taken place. He did not witness the assault on the deceased and was therefore not in a position to rebut the explanation given by the accused person which prompted the latter to stab the deceased in the manner he did. In fact, none of the witnesses in this case were in a position to challenge the explanation given by the accused person.

The defence of self-defence relied upon by the accused person stems from his confirmed warned and cautioned statement the relevant part of which is quoted as follows:

> "…. The now deceased held my left hand and dragged me outside uttering words to the effect that I would not repeat the tendency of trying to overthrow his father Bodias Muchemi`s village leadership. While outside I tried to free myself from his grip but he continued to hold me and announced to me that, that was my last day to live. I then produced my okapi knife and stabbed the now deceased once on the chest, as I feared that he would stab me first since he always moved with a knife. My intention was to stab his hand so that he would release me. He then released me and I ran away……".

No matter how difficult to swallow it might be, as a court we cannot speculate and deny what the accused person says happened when he was conversing with the deceased during the last moments of the deceased`s life.

In this regard, I am more inclined to re-state the sound observations made by my brother Uchena J in the case of the *State* v *Webster Choruma and Action Choruma* where he remarked as follows:

> "He feared the deceased and must have been spurred by his knowledge of the deceased to act in the manner he did. It would be taking an arm chair approach, to expect him to have reacted other than he did. He acted in the spur of the moment. He did not have time to rationalise things, as one would in the comfort of a court room or a judge`s chambers. I would in the circumstances find that the first accused acted in circumstances where self-defence should be accepted as a complete defence to the charge he is facing".[4]

Commenting on the defence of self-defence, G.Feltoe, one of the most respected legal writers in this country has this to say:

> "The courts do not adopt an armchair approach to situations of self-defence. It would be wrong for the courts to fail to take into account the fact that X under attack is in a pressurised and dangerous situation. When dealing with the question of what a reasonable person would have done in those circumstances, the courts (sic) must try to place itself in the predicament faced by X. It must be aware of the fact that X, who is already under attack, will have to take immediate defensive measures and will not have the time to ponder upon what weapon and how much force he should use. If a person is faced with the terrifying prospect of an attacker who is about to kill or gravely injure him, he will have to respond immediately with whatever weapon is to hand....."[5]

If this court accepts the evidence of Bodias Muchemi (as it should) that earlier on that day he witnessed the accused slapping the deceased and had to intervene, then we must as a court accept that from that moment the stage had been set for an explosive interaction between the deceased and the accused and this would fit properly into what the accused person said subsequently happened that day leading to the untimely death of the deceased.

Even if we accept as a court that the deceased had earlier on that day raised issue with his perceived fear that the accused was trying to undermine his father`s headship of the village, again that would tend to confirm that all was not well between the deceased and the accused. Again this would fit very well into the alleged violent conduct of the deceased against the accused as narrated by the accused person, which no one can rebut.

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[4] HH 103/2010 @ p 6

[5] A Guide to Criminal Law of Zimbabwe, by G. Feltoe 2nd Edition, published by Legal Resources Foundation at p 45

As a court we were concerned with the various positions of the deceased as described by the accused person at the time the accused stabbed him. In one explanation he stated that he was about to open the knife by his mouth/teeth, in another he said he was about to stab him and in the confirmed warned and cautioned statement he alludes to the thought that he had that the deceased always moved with a knife.

As we reflected on the case, we believe that nothing much tends on these conflicting versions. The bottom line is that the accused person was at the critical time placed in a frightening and terrifying situation by the deceased who made it clear to him that he was going to die that day because of the utterances he said the deceased made to him. It is these utterances coupled with the accused`s natural fear of the deceased which informed the accused person to react in the manner that he did.

In our view the conduct of the accused person, irrebutable as it is, squarely satisfies the requirements of self-defence as informed by both precedent and section 253[6].

In passing let me say that this case is quite distinguishable from the situation which my sister Judge Moyo J had to deal with in the case of *State* v *Ncube*[7] and the situation my brother Takuva J had to grapple with in the case of the *State* v *Onisimo Maruvhi Fichani*[8] as well as in the case of *State* v *Zenzo Sibanda*.[9] It will be noted that unlike in the case before us, in each of these three cases there was viva voce evidence that was led in court in rebuttal of the evidence of the accused person. There was evidence tendered which successfully challenged the position proffered by the accused person.

In the case before us, the accused`s explanation is unchallengeable and for that reason, the accused must be given the benefit of doubt.

He is found not guilty and acquitted.

National Prosecution Authority, State's legal practitioners
Legal Aid Directorate, Accused's legal practitioners

[6] Criminal Law (Codification and Reform) Act [Chapter 9:23]
[7] Judgment No. HB 110/14
[8] Judgment No. HB 33/14
[9] Judgment No. 35/14