

STATE
versus
STEPHEN SIBANGE

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 7, 8, 9, 15 March 2012 and 29 January 2015

Assessors: 1. Mr Gonzo
2. Mrs Shava

Criminal Trial

P. Mpfu, for the state
S. Hofisi, for accused

MUSAKWA J: The accused is charged with contravening s 47 (1) of the Criminal Law (Codification and Reform) Act [*Cap*9:23]. He pleaded not guilty.

The facts leading to the charge are not in dispute. The accused and the deceased were related. They both resided in Marovanhidze village in Murehwa.

It is not in dispute that late at night on 2 May 2011 the deceased went to accused's home and knocked on the door. The accused's wife enquired who it was and the deceased identified himself. The wife dressed up and went to open the door. She then asked why the deceased would visit at such late hours. It is not in dispute that the deceased expressed dismay at the accused's wife's attitude. On the other hand the wife gestured that her husband was inside.

Meanwhile the accused had woken up and was standing behind the wife. Having noted the gestures by the wife and the deceased's insistence that he had paid her a visit the accused challenged the deceased in respect of his conduct *vis a vis* the wife. The deceased was defiant and proceeded to enter the house uninvited. He proceeded to punch the accused. As he punched the accused for the second time, the latter retaliated. The accused subsequently used a hoe handle they used as a wedge on the door to assault the deceased. The deceased sustained injuries from which he subsequently died.

The accused person's defence was to the effect that when he challenged the deceased as to why he was insisting on seeing his wife, the deceased entered into the bedroom and pushed the accused before hitting him on the chest with a fist. He acted in self defence and was extremely provoked by the deceased's conduct. Thus he took a hoe handle and beat the deceased on the buttocks and on the leg.

The deceased later conceded defeat whereupon the accused went to summon the village head. He learnt that the deceased had died after the deceased's father said so. The accused then went to report the matter at Murehwa Police Station.

The accused's wife Marjorie Kasiyapfumbi testified that after responding to the knock and asking the deceased why he was moving at night the deceased advanced towards the door and asked if he could no longer visit the family as he used to care for them. It was the accused's wife who then invited him inside. However, the deceased kicked the door as he entered and hurled obscenities at the accused. He then proceeded to hold the accused by the collar. After the accused had asked whether the deceased was after this witness he was struck with a fist on the jaw. After the accused was struck with a fist for the second time the two then grappled. She left to alert others when the two were grappling.

When she returned she found the deceased lying by the entrance. He was still shouting obscenities. On the other hand the accused had a swelling on the right side of the mouth. As the accused and the deceased continued to exchange words the accused struck the deceased once on the buttocks with the hoe handle. Later the accused dragged the deceased outside. The wife denied having an affair with the deceased.

Under cross examination she agreed that the deceased was violent. Her own conduct appears to have contributed to the conclusion that she was having an affair with the deceased. For example, she admitted that when she talked to the deceased she stood by the door and placed her hand on the door frame in a way that obstructed the accused from seeing outside. Even the gestures she made to the deceased were suspicious enough. All this explains why the accused also wanted to assault her. By her own admission the accused was angry.

This witness's evidence was such that she could have testified for the defence. Being the wife of the accused and having been at the centre of the dispute one could not have expected her to give evidence that was not favourable to the accused person.

Simon Kamonera the deceased's father also testified. He was roused from his sleep by the village head's son and received a report of the assault. It was dark. He then set out to the scene of the incident.

He found the accused and his wife. He did not recognize the accused. The accused told him he had fought with the deceased and could have shown him the injuries he sustained if there was light. He did not verify the details of the dispute. This witness further stated that Marjorie was not married. He had heard that she had children.

He was shown the deceased who was covered with a blanket. The deceased was cold and bleeding from the nose. He proceeded to inform the deceased's brother before returning to guard the corpse. Police officers later came in the morning and the accused was pointed out as the culprit.

Under cross-examination he denied that the deceased partook alcohol. One could note that he was defensive. For example, in response to a question on what he would do if an intruder invaded his home, he said he would do nothing. Pressed on whether he could not defend himself if attacked he said he would but without killing.

He vacillated on Marjorie's marital status. He said she used to reside in Mutoko and had been residing in their village for six months when the incident took place. Asked on Marjorie's marital status he said he had heard that she was married although he had not seen the husband. This is because he had not been officially informed. He conceded that he had initially resolved to dump the deceased's body at the accused's home. He also confirmed that Marjorie had been banished from the village.

The evidence of Adam Sibange was admitted. The state then closed its case.

In his defence the accused stated that he earned a living from selling boxes used for packaging tomatoes. He operated from Mbare. He confirmed the testimony of Marjorie concerning the exchanges that took place between her and the deceased after she responded to his knock.

Even though Marjorie must have been cheating on him, she tried to send the deceased away by informing him that the accused was present. The deceased was unperturbed. The accused knew the deceased and challenged if that is what he did in his absence.

The accused further explained that he had previously worked in the village for two years before he married Marjorie. This was at Tirivanhu's home which is about half a kilometer away from Silasi's home.

Having been attacked the accused fought back. When he realized that he was being overpowered, he panicked as the deceased was by the door. He looked around and saw a hoe handle which was used to secure the door. He then struck the deceased from the mid extremities downwards. He said he did not aim at the face. The deceased hurled insults at him. After striking him the deceased capitulated and leaned against the wall. The deceased further stated that the accused was lucky to win otherwise he would have knifed him.

The accused claimed that the deceased used severe force against him. As a result he sustained a swollen cheek and leg. Eventually he pushed the deceased outside. He left him by the door as he went to the headman's home. He returned with the headman and the deceased's father. Since the deceased's father said he was leaving body at the accused's home, the accused decided to go and report the matter to the Police.

Under cross-examination the accused did not dispute the contents of his warned and cautioned statement although he claimed that his testimony was the truth. He conceded that he overpowered the deceased who fell down. He also conceded that the warned and cautioned statement made no reference to the deceased possessing a knife.

The two defences in issue are that of defence of self and provocation. In terms of s 238 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] provocation may be a partial defence where the accused lacks intention or realization of risk in terms of s 47 or he has the intention or realization referred to in s 47 but because of provocation has completely lost self-control in circumstances where a reasonable person would have lost self-control.

On this score the state urged the court disregard the defence of provocation on the basis that a reasonable person would not have lost self-control. On the other hand, counsel for the defence submitted that the accused was extremely provoked by the deceased's conduct.

We are satisfied that the accused person was provoked by the deceased who was belligerent after he had made the suspicious nocturnal call on the accused's wife. Even if a reasonable person might have lost self-control, the accused did not. This is because apart from challenging the deceased's visit, the accused did not react in any other way. He did not fight the

deceased or even shout at him. The accused only reacted after he had been attacked by the deceased.

Loss of self-control cannot just be invoked without elaboration. Even if not explained, it must be exhibited in the conduct of the accused person. It would appear that the provocation experienced by the accused may have arisen from being attacked by the deceased as opposed to the suspicious night visit. The accused appeared to have been angered by the wife's gestures to the deceased after his fight with the deceased. It is not easy to assess how a person may lose self-control. In the present case the provocation seamlessly dovetails with self-defence.

Whilst mindful that the state bears the burden of proving its case beyond a reasonable doubt, such proof is not necessarily adduced through viva voce evidence. As in the present case, the confirmed warned and cautioned statement is one aspect of evidence tendered against the accused person. Defence counsel submitted that it should be noted that the accused person was not legally represented when the statement was recorded. Two aspects deflate this submission. Firstly, the statement was confirmed by a magistrate. That procedure, if judicially conducted normally addresses concerns about impropriety in the recording of the statement. On that score, it is inadequate for counsel to submit that the statement was recorded from an unrepresented accused. Secondly, a challenge to the statement could have been mounted at the time it was tendered by the state. In this respect see s 256 of the Criminal Procedure and Evidence Act.

Regarding self defence, whilst submitting that it is a partial defence, the state urged the court to return a verdict of murder. On the other hand, the defence, just as it has done in respect of the defence of provocation, sought an acquittal. Regarding defense of person s 253 provides that-

“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
- (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.”

Applying these requirements, it is self-evident that the deceased was the aggressor. Therefore an unlawful attack had commenced. The accused was entitled to defend himself against the attack. It is the means used by the accused to avert the attack that poses a problem. By his own admission as evidenced by the confirmed warned and cautioned statement that was produced as exhibit 1, the accused overpowered the deceased. The relevant part of the statement reads as follows-

“As we were fighting I overpowered him and he fell down. I then jumped and stamped him (*sic*) on his ribs several times. I then took a hoe handle and assaulted him all over the body with it. I then noticed that he was unable to stand up on his own. That is when I dragged him out of the house and left him lying on the ground.”

The post-mortem report noted the following injuries-

- “-fracture left proximal femur
- Abrasions on right shoulder, both forearms and buttocks
- fractured left 5th and 6th ribs, fractured right 4th rib
- swollen right upper lip, loose jaw
- bleeding from the nose.”

The cause of death was given as multiple organ damage arising from assault.

The use of unreasonable force in legitimately defending oneself or another person from unlawful attack incurs liability for culpable homicide if it results in the death of the attacker. Section 254 of the Code provides that-

“If a person accused of murder was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything that is an essential element of the crime, he or she shall be guilty of culpable homicide if all the requirements for defence of person specified in section *two hundred and fifty-three* are satisfied in the case except that the means he or she used to avert the unlawful attack were not reasonable in all the circumstances.”

Once the accused person managed to overpower the deceased he was no longer in danger. He was not expected to continue attacking the deceased person especially using a weapon. The means he used were not proportionate to the attack that he had experienced. Therefore the means he used were unreasonable in the circumstances. You cannot continue to assault a person who is

down thereby inflicting fatal injuries and claim that you were defending yourself from an unlawful attack.

Accordingly, the accused person is found guilty of culpable homicide in terms of s 49 of the Code.

*Civil Division of the Attorney General's Office, for the State
V. Nyemba & Associates, accused's legal practitioners*