THE STATE

versus

DOCTOR CHISHAKA

HIGH COURT OF ZIMBABWE

HUNGWE J

MUTARE, 26 October 2016 & 1 November 2016

Assessors: 1. Mr Rajah

 2. Mr Chagonda

**Criminal trial**

*M Musarurwa.*, for the State

*Ms N Nyamwanza* for the accused

 HUNGWE J: The accused was charged with murder as defined in s 47 of the Criminal law (Codification and Reform) Act [*Chapter 9:23*] (“the Criminal Law Code”). He pleaded not guilty.

 The allegations arose from the events of 7 August 2015 where it is alleged that the accused unlawfully and with intent to kill or realizing that there was a real risk or possibility that his conduct may cause death and continued to engage in that conduct despite the risk or possibility, assaulted John Siziba with a knife by stabbing him once on the left arm pit thereby causing injuries from which the said John Siziba died.

 Both the State and defence are agreed that on the day in question the accused and other farmers gathered at the accused’s residence. This residence is situated on land belonging to Wattle Company on which the farmers were occupying illegally. As at this date, the farmers had no lawful authority or permit from the relevant authorities to occupy the land, or to carry out farming operations on that land. The relevance of the status of the land will be clear later.

 However the farmers believed that because they had resettled themselves there in 2012 they had a right to be on that land. They put up some structures, part of which became central to the facts in dispute during the trial. It would appear and the parties are agreed, that the Wattle Company had sought and obtained an eviction order which the relevant authorities had enforced leading to the destruction of some of the temporary structures and huts. The accused’s granary was partly destroyed but to what extent was an issue of some dispute.

 Exhibit 5 the sketch plan, shows that it was partly destroyed at the time of the commission of the offence. The evidence led at trial which was admitted into the record in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] included the following:

1. The post mortem report of the examination by Doctor Chizaza (exh 3);
2. The accused’s warned and cautioned statement which was confirmed before the magistrate at Mutare on 26 August 2015;
3. The sketch plan drawn by Sergeant Mapfumo and confirmed by Sergeant Chifamba.

Following upon the consent to the production of the above documentary exhibits, the evidence of their makers became a non-issue and therefore the evidence of Dr Chizaza, and Sergeant Mapfumo and Chifamba was admitted without contest.

In addition to the above evidence the State relied on the following witnesses:

1. Maxwell Katevera, the Estates Manager of Wattle Company;
2. Bongani Manase, the security guard at Wattle Company;
3. Edmore Chipukutu, the chain saw operator;
4. Perfect Toopera, a general hand and
5. Tapiwa Chawasema another general hand.

The thrust of the evidence of these five witnesses established the following facts.

By 7 August the Wattle Company had effectively physically evicted the illegal squatters from this section of the estate. The work gang was deployed to go and establish a new plantation on that date. The exercise required the clearing of the indigenous trees and bushes, marking holes, marking the lines and the pit in which to establish the new seedlings. This process is commonly called “mark and pit”.

Since the section had been contested land, the estates manager decided to accompany the gang together with his loss control officer, one John Siziba, the now deceased. They commenced the mark and pit process and continued without incident until they got to the accused’s partly destroyed grain rack which is represented by the rectangular shape on exhibit 5 the sketch plan. It stood on their way. The chain saw operator got orders to rip it down. Edmore Chipukutu (“Edmore”) set upon this task. Up till then no-one amongst the Wattle Company workers was aware that the squatters or farmers were waiting somewhere within vicinity of the land. The accused and his group then emerged from nowhere.

This group ordered Edmore to desist from cutting down the structure. One of the six-member group grabbed Edmore whilst another went for the chain-saw which Edmore had first switched off. The deceased urged them to stop what they were doing. Upon hearing this caution the group turned on the deceased and announced that they actually wanted him. The group was armed with sticks. They made a horse-shoe formation around Siziba the now deceased. Upon realising that he carried a fire arm. The group shouted that the pistol must be taken.

In fear of being disarmed and the possible consequences of the fire-arm falling into their hands, the deceased passed the pistol to Bongani Manase, (“Bongani”) the security guard being the person then closest to him. Bongani Manase bolted away with it with Zorodzayi Mahumbure behind him.

The group set upon the deceased. The accused welded a knife. On realizing the danger faced by one of their own, Bongani then fired a warning shot into the air. By then the accused had stabbed the deceased. Upon hearing the round of a gunshot the group disengaged and fled from the scene leaving the deceased lying prostrate and writhing in agony. The fallen Siziba got up and staggered for a few meters before he fell headlong. There were shouts from the Wattle Company workers that Siziba was dead.

We preferred this version of events to that proffered by the accused for the reasons which will follow.

The accused’s defence can be summarized as follows. The farmers took occupation of this land in 2012 and cleared it to embark on their farming operations. Although they had no lawful permit to farm or occupy this land, the accused maintained that they are in the process of clearing the hurdles which remain in their way to secure authority to farm the land.

On the day of this incident they were in peaceful possession of the land upon which they had erected structures at their expense. The accused insisted that the land did not belong to the Wattle Company. Particularly relating to the fateful events, the accused stated in his defence outline that when the group of between thirty and thirty-five Wattle Company workers descended upon this field they began to dig it up. When they got to the grain rack, one of them began to destroy it using a chain-saw. This act constituted an act of provocation.

The accused ran towards this chain-saw operator. The latter pointed the chain-saw in his direction threatening to rip him to pieces. He ran away. His fellow farmer, Muswere Nyenyai approached the deceased who was the chain-saw operator’s supervisor. Meswere Nyenyai urged the deceased to instruct the chain-saw operator to stop the destruction and digging of holes since the matter was before the courts.

As Muswere Nyenyai was speaking to the deceased, other farmers gathered around the two. The deceased then drew a fire-arm and fired three shots into the air threatening to kill anyone who came near claiming that they were disturbing his work. Muswere Nyenyai moved closer to the deceased and urged the deceased to stop firing shots. The deceased then threw the pistol to his colleague who got away with it. The deceased grabbed Muswere Nyenyai. Other Wattle Company workers began to assault Muswere Nyenyai using hoes and machetes. The other farmers joined the melee.

Muswere Nyenyai was seriously injured in this melee. The deceased held Muswere Nyenyai firmly and the accused who still held a knife he had been using at his residence, decided to shake off the deceased’s grip. The accused says that in the process the deceased was accidentally “cut on his left armpit.”

In short he acted in defence of another person.

However this differs quite markedly from the statement exhibit 4, his statement to the police. In it he states:

“On that particular day I was at my home stead cutting some vegetables when several workers from Wattle Company arrived with hoes and machetes. They started digging holes in our lad and also destroying our property. I and other farmers then pleaded with them to stop their activities. At that moment the deceased produced a pistol and fired it three times in the air. One of the farmers Muswere Nyenyai then tried to take away the gun from the deceased. The deceased then tossed the gun to his colleague and grabbed Muswere Nyenyai. Whilst Muswere Nyenyai was being grabbed by the deceased he was struck on the head with a hoe and attacked by Wattle Company workers. In the midst of the commotion I then rushed to rescue Nyenyai Muswere who was still being grabbed by the deceased. In the heat of the moment I then veered the knife I was holding towards the deceased and I intended to stab him on his hand so that he would release Nyenyai Muswere whose life was in danger. However due to the rapid movements of the scuffle I failed to stab him on the hand and instead mistakenly stabbed him in the abdomen. I never intended to stab him in the abdomen and I never intended to kill him and I am very sorry.”

 If, as the accused could like the court to believe, Muswere Nyenyai was under the tight grip by the deceased when at the same time a group of workers were striking the same Nyenyai using hoes, we are unable to accept as probable his version that he intended to extricate Nyenyai from this plight without the use of brute force of the knife. In the statement the accused says he rushed “to rescue Nyenyai Muswere who was still being grabbed by the deceased. In the heat of the moment I then veered the knife I was holding towards the deceased as I intended to stab him on his hand so that he would release Nyenyai Muswere whose life was in danger. However due to the rapid movements of the scuffle I failed to stab him on the hand and instead mistakenly stabbed him in the abdomen.”

 The abdomen is that part of the body which contains the digestive organs that is the stomach. It is bounded by the diaphragm and the pelvis.

 As pointed pout above in his defence outline he acknowledged that “incidentally he was cut by the knife in his left arm pit.”

 A cut may be superficial or deep lateral incision of the skin, whilst on the other hand a stab connotes a deep penetration perpendicular to the skin where the skin represents a horizontal plane. In court the accused suggested an even more bizarre manner by which the deceased met his death. He said he grabbed Siziba’s left biceps with his both hands in which he held the knife. Siziba then shook off his grab and “accidentally” Siziba was stabbed.

This version suggests that had Siziba not tried to shake off the accused’s grip the accidental stab would not have succeeded. Put differently, according to the accused it was deceased’s fault that the deceased was stabbed. The knife was said to have no handle so he had wrapped a newspaper around it to increase grip. It is also possible that the knife was wrapped in a newspaper to conceal its presence to the Wattle Company workers.

Exhibit 3 gave us an idea of the nature of the injury from which the deceased died.

It says;

“A penetrating laceration was noted on the left 4th intercostal space which is 2cm wide deep through to the penetrate the thorax

(in the axillary area)

…………………………”

On the left pleural space left lung had a penetration wound with bruising and collapse.”

 In simple laymen’s terms the force on the knife was sufficient for the knife to penetrate the space between the ribs next to the arm pits and onto the chest wall and go far enough to bruise and collapse the lung.

 Clearly, in our view it could not have been as a result of any of the ways severally described by the accused in his statement to the Police or in his defence outline or here in court.

 The version given by the State witnesses is that the illegal settlers set upon the deceased. The deceased then must have thought that they were after his fire arm. He then passed it on to Bongani. In our assessment we are of the view that had the deceased fired three shots, it is highly improbable that the farmers, would have dared to disarm him in such a show of bravado as the accused claimed.

 In all probability the farmers knew that the deceased would be carrying a pistol and wanted to disarm him before he could use it. In his own good judgment the deceased must have thought it safer to avoid being a disarmed or risk shooting his attackers. He picked the first choice with fatal consequences for himself. Had he seen the knife, which accused wrapped in a newspaper, he probably would have realized the grave danger he was in and would have fired to warn the farmers. In short we do not believe he fired the gun.

 Instead we find that the evidence establish beyond doubt that Bongani fired the shot as they viciously attacked the deceased. As described by the first State witness, the accused was trying to get an opening to land stab wound as his fellow farmers assaulted the deceased.

 The left cheek bruise and the left leg bruise confirms that besides the stab wound, the deceased also suffered other types of assault from the marauding gang.

The defence witnesses could not give an account of how the accused stabbed the deceased. This is not withstanding their claim that they were peaceful and intended only to disarm the deceased. Farai Zikumva gave the clear impression that he was seated away from it all, when he heard a gunshot. He decided to leave the scene. He confessed that he did not see much of what took place.

 Zorodzai Mahumbire says that as Muswere Nyenyai approached the deceased the latter fired three shots. People gathered around the deceased who then passed the gun to Bongani. He chased after Bongani. He did not see how the deceased was assaulted or stabbed.

 The accused raised two defences. The first defence was that of property.

 It cannot succeed for the simple reasons that the evidence adduced in proof of the property was far too tenuous to establish what property he was defending. He did not own the land upon which the wooden property destroyed structure stood. A built structure accedes to the land on which it was built. Therefore even if it was by some reasoning his “structure”, then it had reverted to the owner of the land on which it was built since he had no right to the land. In any case it was Edmore, not the deceased, who was destroying that structure.

 In our view provisions of s 257, 258, 259 of the Criminal Law Code are not available to him. These sections provide:

 “**257 Requirements for defence of property to be complete defence**

(1) Subject to this Part, the fact that a person accused of a crime was defending his or her or another person’s property 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; and

(*b*) his or her conduct was necessary to avert the unlawful 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.

(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.

(3) In determining whether or not any means used by a person to avert an unlawful attack were reasonable, or whether or not any harm or injury caused to an attacker was proportionate to that liable to be caused by an unlawful attack, a court shall have regard to the nature of the property which the person was trying to protect and its value to him or her.

**258 Killing in defence of property**

A person accused of a crime involving the killing of another person shall not be entitled to rely upon a defence in terms of this Part unless:-

(*a*) the accused resorted to killing after taking all other possible steps to protect the property concerned; and

(*b*) the property concerned could not have been defended by any means except by killing; and

(*c*) the property concerned was of vital importance to the accused; and

(*d*) the accused believed on reasonable grounds that he or she would not receive adequate compensation for any destruction, damage or injury caused to the property concerned by the unlawful attack.

**259 When defence of property partial defence to murder**

If a person accused of murder was defending his or her or another person’s property 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 specified in sections *two hundred and fifty-seven* and *two hundred and fifty-eight* 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.”

As for the defence of another person, in order for the accused to escape conviction for murder he must meet the requirements set out in s 253 of the Criminal Law Codification and Reform Act, [*Chapter 9:23*].

That section 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.”

The evidence accepted by this court was that the accused and his group were the aggressors. They initiated the violence. They went initially or the chain-saw operator Edmore. When the deceased intervened they set upon him. The accused used a knife after the deceased had given up the fire-arm. He therefore paused no threat to him or to Muswere Nyenyai. There is a claim that Muswere Nyenyai was struck by one of the workers.

We were unable to accept this evidence as constituting an unlawful attack, if it happened, because by then there is overwhelming evidence pointing to the fact that it was the deceased who was under attack rather than Muswere Nyenyai. Nyenyai and the accused remained belligerent through and through and therefore an attack on Muswere Nyenyai was not unlawful at that time.

If Nyenyai suffered an attack it is curious that no-one amongst the Wattle Company workers was identified as the culprit till the day of trial. It is not surprising that Nyenyai did not report this assault on him by Perfect Toopera to police subsequent to his being identified. He was the aggressor. In our view Perfect Toopera was not even cross examined on that allegation for that reason. We therefore rejected the claim that Toopera struck Nyenyai in the commotion.

The evidence clearly establish that the farmers set upon the company’s agents, especially the deceased out of their frustration with other lawful processes which resulted in the eviction from this piece of land.

In the final analysis therefore the picture painted by this evidence in its totality is that the accused was highly incensed by the destruction of his structure. He had his fellow farmers in tow who had the same grievance over land against the company. When its workers set upon the land with an armed man, they sought to deal with the deceased once and for all by assaulting him. For the accused, this was a perfect opportunity to demonstrate that he was going nowhere. He was armed with a kitchen knife which he concealed in a newspaper. He wanted to punish the chain saw operator’s supervisor for the orders he was giving. When his men set upon the hopeless deceased, he stabbed him once striking the fatal blow.

In our view whilst he had not planned to kill the deceased as his aim and objective, he clearly realised the real risk involved in stabbing the deceased with a knife in the arm pit so as to cause death but dispute the realisation of the risk or possibility of death resulting, he persisted with his action.

He cannot avoid a finding of guilty of murder as defined in s 47 (1) of the Criminal Law Code. He is accordingly found guilty of murder as defined in s 47 (1) (b) of the Criminal Law Code.

SENTENCE

 In assessing sentence I take into account what counsel submitted in mitigation of sentence. Basically it is that you are a first offender with the usual family responsibilities with a large family to look after. The only other factor is your misplaced claim of right to this piece of land when the courts had clearly pronounced themselves on the matter. You acted without regard to the effect of the legal processes which resulted in your eviction.

 I find that there are more aggravating factors than mitigatory ones. It is a serious matter that a life was unnecessarily lost. The Criminal Law Code provides for the ultimate penalty for this type of crime. Clearly society takes a dim view of such wanton disregard of the value of human life. What further aggravates this case is that this was a gang attack on a person who was doing his job in the employ of your perceived opponent on the land question. Clearly, it was not his fault that you had lost all legal battles to remain on this land. You should have remained in the courts rather than resort to self-help. I have been urged to exercise mercy and I am of the view that the call is appropriate taking into account all the circumstances of this particular case.

In the result you will be sentenced as follows:

**18 years imprisonment.**

*Nyamwanza & Associates*, accused’s legal practitioners

*Attorney general’s Office*, state’s legal practitioners