

THE STATE
versus
TINOS MUDYANEMBWA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 16, 17 JANUARY and 7 FEBRUARY 2020

Criminal Trial

T. Chikwati, for the state
O. Mafa, for the accused

MAWADZE J: The accused was arraigned before this court facing the charge of murder in contravention of s 47 (1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

The charge is that on 29 June 2019 of Mutumwapasi Village, Chief Shumba, Masvingo the accused unlawfully and intentionally caused the death of Clever Guvuriro by stabbing him in the neck with a knife.

The 24-year-old accused is from Mugove Village and the 28-year-old now deceased is from Pedzisai Village both in Chief Shumba, Masvingo. Apparently, they were not known to each other.

The facts in this matter are largely common cause and are as follows;

On 29 June 2019 there was a church gathering for an all-night prayer at one Mutupo Madondo's homestead in Mutumwapasi Village, Chief Shumba, Masvingo. It was attended by villagers from the surrounding villages. The accused was present with his friend one Moses Gundiuro. The now deceased and his friend one Simbarashe Gumbochuma also attended the church service.

It is not in dispute that earlier in the day with the now deceased and his colleague (Simbarashe) had spent the day from 1000hrs drinking opaque beer at the local shops. At around 1900hrs whilst now visibly drunk they proceeded to the church gathering. At the church gathering before the all-night prayer had started food was being served they asked for food. One Marko Gundiuro and a woman Melody Mugore served them with sadza with dried vegetables of 'munyemba' as relish. As they ate the now deceased in his drunken state complained that they were being served sadza with poor relish which was like human hair. Marko Gundiuro was unimpressed and retorted that the now deceased and his colleague Simbarashe should instead have eaten food and their own homestead. The now deceased's colleague Simbarashe reacted by hitting Marko Gundiuro, a young boy, with a morsel of sadza. Marko Gundiuro in turn proceeded to make the report assault upon him to his older brother Moses Gundiuro who was in the company of the accused. Moses Gundiuro and the accused decided to confront Simbarashe and the now deceased in order for them to explain their conduct of assaulting Marko Gundiuro. A misunderstanding then arose. Simbarashe and Moses Gundiuro confronted each other holding and pushing one another. Meanwhile the now deceased confronted the accused. It is then alleged the accused and the now deceased engaged in a fist fight.

The State case is that the accused was overpowered during the fist fight. It is common cause that the accused pulled out the knife and stabbed the now deceased on the left side of the neck. The accused fled from the scene and proceeded to his homestead some 3km away where he disposed of the knife in some field, in a contour ridge. The accused was arrested the next morning and led the police for the recovery of the knife. Meanwhile the now deceased after being stabbed staggered and fell down. He died immediately.

The accused in denying this charge raised the defence of self-defence. In his defence outline the accused said that he and his colleague Simbarashe were drunk disturbing church proceedings. He said when he tried to talk to them to stop them from behaving in that manner a scuffle ensued between him and the now deceased. The accused said he was held by the throat by the now deceased who had a knife in his other hand threatening to stab the accused. The accused said he was in the process suffocating as he was being throttled. He said this caused him to pull out his own knife from his pocket and in self-defence stabbed the now deceased. The accused denied therefore that he had any intention to kill the now deceased.

The cause of the now deceased's death is not in issue. As per the post mortem report compiled by Dr Godfery Zimbwa Exhibit 1 the following was observed;

- “ - *single stab wound in the left supraclavicular fossa ± 3cm wide severing major neck veins, ± 10 cm in depth into the neck.*
- *catastrophic haemorrhage noted on clothing”*

The cause of death is said to be haemorrhagic shock arising from the stab wound. The accused does not dispute that he is the one who inflicted this stab wound on the now deceased on the left side of the now deceased's neck with an okapi knife. The okapi knife in issue was tendered as Exhibit 3 (a). Its dimensions are outlined in Exhibit 3(b). It is 22cm long, the blade is 9 cm and 2 cm in width, the handle is 13.5cm and it weighs 0.0062kg.

It is clear from the post-mortem report that the accused used severe force. This can be discerned from the nature of the wound the accused inflicted. A lot of force was used as the knife severed major neck veins and penetrated into the now deceased's neck for 10cm. The injury caused the now deceased to lose a lot of blood and died immediately.

The narrow issue this court has to resolve is whether the accused acted in self-defence in fatally stabbing the now deceased and thus absolved at law of any criminal conduct.

To support its case the State relied on the evidence of Mark Gundiro, Gonovi Guvuriro, Simbarashe Gumbochuma, Moses Gundiro, Melody Mugore and Sgt Christian Gatsi. In addition to Exhibit 1 on the post-mortem report and Exhibit 3 (a) the okapi knife and its certificate of weight Exhibit 3(b) the state also relied on Exhibit 2 the accused's warned cautioned statement. On the other hand in refuting the charge the accused gave evidence and did not call any witnesses.

The bulk of the evidence of the State witnesses is not in dispute as already summarised from the facts not in issue. In fact the evidence of Marko Gundiro, Gonovi Guvuriro, Cst Nigel Javachava and Dr Godfrey Zimbwa was admitted in terms of s 314 of the Criminal Procedure and Evidence, Act [Cap 9:07]. We simply summarise it for completeness of the record as follows:-

Marko Gundiro (Marko)

Marko is accused's cousin and a young brother to Moses Gundiro. He was not known to the now deceased. He is the one who served the now deceased and his friend Simbarashe Gumbochuma with sadza at the church gathering. The complaints by the now deceased and Simbarashe Gumbochuma about the poor or tasteless relish was directed at him. He is the one

who was hit with a morsel of sadza by Simbarashe Gumbochuma after which he proceeded to report to his brother Moses Gundiuro who was in the company of the accused. He did not witness what ensued thereafter.

Gonovi Guvuriro (Gonovi)

Gonovi is the now deceased's father and was also at this church gathering. He is not known to the accused. Gonovi did not witness how his son the now deceased was stabbed. All he knows is that the now deceased came to him at a fire place saying he had been stabbed. He noted blood oozing from his son's neck. He said the now deceased collapsed groaning. He rushed to look for a motor vehicle to ferry the now deceased to hospital but found none as most people had no fuel. Upon his return he found that the now deceased had passed on.

Cst Nigel Javachava (Cst Javachava)

Const Javachava simply assisted the investigating officer Chrispen Gatsi to conduct indications at the scene of crime and to carry out other investigations.

Dr Godfrey Zimbwa

Dr Zimbwa examined the now deceased's remains and compiled the post mortem report Exhibit 1 already alluded to.

The State led *viva voce* evidence from Simbarashe Gumbochuma, Moses Gundiuro, Melody Mugove and Sgt Christian Gatsi. Again the bulk of that evidence is not useful to the resolve the issue in dispute. We turn to that evidence.

Sgt Christian Gatsi (Sgt. Gatsi)

Sgt Gatsi is the investigating officer and also the lead attending detail. Unfortunately for him all the State Witnesses disowned the material parts of their statements which he recorded from them on how the accused and the now deceased fought. He alluded this to the fact that that Melody Mugove and Moses Gundiuro could be having second thoughts as they are accused's fellow church members.

On his part Sgt Gatsi confirmed observing the fatal injury on the left side of the now deceased's neck. The accused upon his arrest led him some 3 km way from the scene where he, on accused's indications recovered a blood stained okapi knife (Exhibit 3(a)) disposed of in some field.

Simbarashe Gumbochuma (Simbarashe)

The 19 year of Simbarashe was the now deceased's colleague. He was employed as a herd boy at the now deceased's homestead and was not known to the accused.

The bulk of his evidence is already alluded to on how he drank beer with the now deceased and later proceeded to the church gathering. He explained the genesis of what caused the misunderstanding between him and the now deceased on one hand and the accused Moses Gundira on the other. He is the one who hit Marko Gundiro with a morsel of sadza. He said Marko's brother Moses held him by the collar of his shirt and as he tried to wrestle free his shirt was torn. Meanwhile Simbarashe said the now deceased confronted the accused saying he, the now deceased, could not be disrespected by accused and Moses Gundiro. He said the now deceased is the one who first slapped the accused with an open hand. As he was embroiled in a scuffle with Moses Gundiro he did not see how accused the now deceased allegedly fought. All he heard was the now deceased crying out that he had been stabbed after which the now deceased collapsed and died.

Simbarashe denied that the now deceased had a knife. He denied joining forces with the now deceased to attack the accused. He said all he saw was that the now deceased first hit accused with open hand and delivered about three blows with fists. He denied that they disrupted any church service but admitted that he and the now deceased were indeed drunk, moderately though.

We did not find anything averse about Simbarashe's evidence. He was candid that his colleague the now deceased was the aggressor who hit the accused first. He admitted that he and the now deceased were drunk. He admitted assaulting Marko Gundiro with a morsel of sadza. Simbarashe restricted himself to what he saw and did not seek to exaggerate his evidence in order to falsely incriminate accused.

Moses Gundiro (Moses)

Moses was in the company of accused. They are cousins. He was not known to the now deceased.

Moses said his young brother Marko came to report to him that he, Marko, had been assaulted by Simbarashe who was in the company of the now deceased. Marko led them to where Simbarashe and the now deceased were. As they got there they were flashed by Simbarashe and the now deceased in their faces with mobile cellphone torch. He said upon inquiry of what was

going on Simbarashe threw a fist at him. He blocked it pushing Simbarashe away. He advised accused to retreat.

Thereafter he heard the now deceased saying he had been stabbed. The accused just disappeared and he later found him at home. He was present when accused was arrested the next morning and explained how accused led the police to the recovery of the okapi knife Exhibit 3(a) thrown in the fields. Moses said it was dark hence he could not see how the accused and the now deceased allegedly fought.

Again one cannot falter Moses's evidence. He may truthfully not have seen how the now deceased was fatally injured. This is so because he was engaged in a scuffle with the deceased's colleague Simbarashe and it was dark. He nonetheless admitted that it is him and the accused who confronted or approached Simbarashe and the now deceased.

Melody Mugore (Melody)

Melody a middle aged woman was known to both the now deceased and accused. She is the one who with Marko served Simbarashe, and the now deceased with food. Her evidence is that the now deceased and Simbarashe were very drunk as they spoke in high pitched voices demanding food, they were staggering and had their pants literally dropping. She heard the two complaining of poor relish.

Melody said later she heard some commotion behind a house. She could hear the now deceased's voice as he said;

"I will beat you up"

Melody said in response she heard accused's voice saying he would stab the now deceased and would not be beaten up. Thereafter she heard sounds of someone being hit with an open hand. Moments later the now deceased emerged crying that he had been stabbed. All what Melody said is that she heard the now deceased threatening to assault accused and accused in turn threatening to stab the now deceased. She said as she was on the other side of the house, albeit within hearing distance. She nonetheless did not see the actual confrontation between accused and the now deceased save for sounds of claps and the now deceased crying out that he had been stabbed.

In our view there is nothing inherently incredible about Melody's evidence. All she did was to confirm that accused and the now deceased indeed confronted each other but she did not witness the actual physical confrontation.

As already said therefore none of the state witnesses saw how accused and the now deceased allegedly fought or how the now deceased was fatally stabbed.

The accused's evidence

In our assessment the accused's version of events cannot possibly be true when one considers his confirmed warned and cautioned statement, his defence outline and evidence in court. This is further compounded by his conduct after fatally stabbing the now deceased.

In terms of section 253 of the Criminal Code [*Cap 9:23*] the defence of self-defence is a complete defence if all the requirements listed therein are fully met. The issue *in casu* is whether as a fact the accused indeed acted in self-defence.

The accused gave a flimsy explanation that he is from the Varembe tribe and is obliged to always carry a knife hence his possession of the okapi knife Exhibit 3(a). One may give him that benefit of doubt.

It is however untrue that accused confronted Simbarashe and the now deceased because they were disturbing church proceedings. All the witnesses were clear that church proceedings had not started. The truth is that accused confronted the now deceased and Simbarashe as a result of Marko's report of assault.

The worst part of accused's evidence is the contradiction which emerges when one considers his confirmed warned and cautioned statement, his defence outline and evidence in court.

In his confirmed warned and cautioned statement he said upon inquiry from the now deceased why the now deceased had assaulted Marko, the now deceased hit him on the mouth and that Simbarashe joined in attacking him. In that statement he said he pulled out his knife because he was being attacked by two people, the now deceased and Simbarashe. He said his intention by pulling out the knife was not to act in self-defence but to simply scare them. Fortuitously he stabbed the now deceased after which he went home some 2 km away and disposed of the knife in some fields which he later showed the police the next morning upon his arrest.

In his defence outline he gave a different version. Firstly, he now alleges that only the now deceased attacked him and not Simbarashe. Worse still he now alleges that the now deceased had a knife and was threatening to stab him as he was being throttled. He now says the reason he pulled out his own knife was self-defence as he was suffocating. This is clearly a completely different version from his confirmed warned and cautioned statement. The accused was sober and cannot be mistaken as to what exactly happened.

In court the accused utterly failed to reconcile which of these contradicting versions is true. Was he attacked by two people? Did the now deceased have a knife? Was he throttled? These are simple issues the accused was not consistent about. What compounds accused's woes is that he wrote his confirmed warned and cautioned statement in his own handwriting. He cannot therefore blame the police for misunderstanding him or misrepresenting facts. The fact of the matter is that accused is simply being untruthful hence these contradictions.

To cap it all the accused's conduct after stabbing the now deceased raises a lot of questions. He literally fled from the scene to his residence some 2 – 3 km away. He peacefully retired to bed without checking what became of the now deceased. Worse still he carried with him the knife for 2 – 3 km and disposed it in the fields. If he had simply acted in self-defence why would he flee from the scene and let alone dispose of the knife so far away? Further if the now deceased had his own knife surely it would have been recovered at the scene as the now deceased was not only very drunk but collapsed and died at the scene. It is for these reasons that we cannot believe the accused.

Our finding is that while the now deceased was initially the aggressor who attacked the accused with open hands and fists the accused had no reason to resort to the use of lethal weapon like a knife. Accused was never attacked by two people. The now deceased did not have a knife. The accused's life was not in danger. All the accused did was to cruelly hit back at a drunken now deceased in a disproportionate manner with a lethal weapon.

The accused's intention was clear. He directed the blow at a vulnerable part of the body being the neck. He used a lot of force. He severed major neck veins. The knife penetrated some 10 cm into the now deceased's neck. While accused may not have acted with actual intention he nonetheless realized that his conduct may cause death if he stabbed the now deceased in that manner but continued to engage in that conduct despite the risk or possibility. The accused cannot escape liability on the basis of having the requisite constructive intent to cause death.

Verdict: Guilty of contravening section 47(1) (b) of the Criminal Law (Codification and Reform) Act [*Cap* 9:23] – murder with constructive intent.

Mutendi, Mudisi & Shumba, pro deo counsel for the accused
National Prosecuting Authority, counsel for the state

NB Accused defaulted court on 7th of February, 2020 and warrant of arrest issued