

THE STATE

Versus

PETER GWARI

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO 25 MAY, 29 JUNE, 14 SEPTEMBER, & 2 OCTOBER, 2020

Assessors

1. Mrs Chikukwa
2. Mr Mushuku

Criminal Trial

Mr E. Mbavarira, for the state
Mr F. Chirairo, for the accused

MAWADZE J: The charge the accused is facing is one of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

The charge is that on 1 February, 2019 at Musavengana Village near Nyika Growth Point in Bikita, Masvingo the accused unlawfully caused the death of Moreblessing Mudakuchekwa by stabbing her once on the right cheek and once on the back of her shoulder with an okapi knife.

The 25 year old deceased was staying in a room at a village near Nyika Growth Point with one Charity Matake. They were both sex workers. The accused also stayed near Nyika growth point and was a banana vendor. At some point the accused was in love with Charity Matake. There is a dispute as to the status of their love affair at the material time. The accused alleges the love

affair was still subsisting but Charity Matake said she had terminated the love affair 5 days before 1 February 2019 due to accused's alleged violent conduct.

The now deceased and Charity Matake rented a single room. There were other rooms at this house all in a single file which were rented out to sex workers who plied their trade at Nyika growth point. The now deceased stayed with her two young children in the same room.

It is common cause that on 1 February 2019 the now deceased was drinking beer at Hightown nite club close to her residence at Nyika growth point and her two children were alone in her room. Charity Matake was also in the same nite club although not drinking beer. Charity Matake later left for their residence. As per the State this was around 0100 hrs.

The State alleges that the accused followed Charity Matake and found her in her room. It is said the accused requested to go to his nearby residence with Charity Matake but Charity Matake refused. Charity Matake was attending to one of the now deceased's younger children who was strapped on her back.

According to the State a misunderstanding erupted between accused and Charity Matake. It is alleged the accused started to assault Charity Matake. A fellow sex worker Elizabeth Tsaurai who was sleeping in the adjacent room ran to Hightown night club to alert the now deceased who was in Hightown nite club of the commotion in the now deceased's room as one of the now deceased's children was crying. The now deceased rushed to her room to confront the accused, alerting other neighbours, and closing the door of her room.

It is alleged that the accused broke a window pane of the room and jumped out of the room. The now deceased had taken possession of a pepper spray from the room and sprayed the accused in the face. Thereafter it is alleged that the now deceased took a piece of firewood intending to assault the accused who was now out of the room but was disarmed of the firewood by the accused who in turn hit the now deceased once in the back. It is said the now deceased tried to pepper spray the accused again in a bid to ward off the attack as she fled.

The State case is that the accused chased after the now deceased and caught up with her. It is said the accused produced an okapi knife and stabbed the now deceased firstly on the cheek and at the back. The now deceased collapsed and died instantly. The accused is said to have fled from the scene but was arrested the following day and the okapi knife was recovered.

In his defence outline the accused raised the defence of self-defence. He said while he was inside the now deceased's room with Charity Matake the room was surrounded by about five people who threatened to kill him. The accused said as he jumped out through the window he was pepper sprayed by the now deceased and totally blinded. He was then hit in the back with a piece of firewood. The accused said in a bid to defend himself he pulled out his okapi knife and threatened to stab whoever came close to him. The accused said in the process he blindly swerved the knife as a means of threatening his attackers after which he left.

A total of 4 Exhibits were produced by consent and they are;

Exhibit 1 is a post mortem report compiled by Dr Zihove on 4 February 2019. Dr Zihove's evidence was admitted in terms of s 314 of the Criminal Procedure and Evidence, Act [Cap 9:07]. As per Exhibit 1, Dr Zihove who examined the now deceased made the following observations and findings;

- i) the now deceased had a laceration covering the right cheek extending to the neck
- ii) she also had a stab wound 7 cm deep and 3 cm wide at the back of her shoulder on the right side
- iii) according to Dr Zihove the cause of the now deceased's death was the stab wound at the back of the chest which caused haemothorax

The cause of the now deceased's death is not in dispute. In simple language she was fatally stabbed with a knife at the back of her right shoulder.

Exhibit 2 is the accused's okapi knife, silver in colour. The accused does not dispute his possession of this knife and its recovery from him upon his arrest. It is the same knife which fatally injured the now deceased. As per Exhibit 3 the certificate of weight this okapi knife is 24 cm long and weighs 0,200 kg.

Lastly Exhibit 4 is the accused's confirmed warned and cautioned statement in which the accused said;

"I have understood the caution. I admit to the allegation of stabbing Moreblessing Mudakuchekwa once on the right cheek and once on the right shoulder using a knife which resulted in her death. I stabbed Moreblesing Mudakuchekwa because she had sprayed me on my face using an irritating chemical. That is all."

Circumstances surrounding the accused's arrest are not in dispute. The evidence of Biggie Chikomo who was part of the villagers who apprehended the accused at accused's mother's

residence the following day is not in issue and was also admitted in terms of s 314 of the Criminal Procedure and Evidence, Act [*Cap 9:07*]. The accused was apprehended near Nyika growth point. The okapi knife Exhibit 2 was found in his pocket by Biggie Chikomo who is part of the villagers who took the accused to the police.

The State led evidence from Charity Matake, Elizabeth Tsaurai and Inspector Lorraine Zishiri. The accused testified and did not call any witnesses.

The only issue in this matter is whether the accused acted in self-defence. This is so despite the accused's belated and misplaced attempt to deny that he fatally stabbed the now deceased.

The evidence of Inspector Lorraine Zishiri is common cause and irrelevant to the issue in dispute. It is largely formal evidence. Inspector Lorraine Zishiri attended the scene and examined the now deceased's body before taking it for a post mortem examination. She observed the laceration on deceased's cheek and a stab wound on the back. Inspector Lorraine Zishiri confirmed that the accused was apprehended by local villagers the following day. The knife Exhibit 2 recovered from the accused was handed over to her. She then recorded Exhibit 4 the accused's confirmed warned and cautioned statement. Lastly, at the scene she established that when this tragic incident happened there were 6 people present contrary to the crowd the accused later alluded to.

It is testimony of Charity Matake (Charity) and Elizabeth Tsaurai (Elizabeth) which is contested and relevant to how the now deceased was fatally injured on the night in question. Their evidence would be juxtaposed with that of the accused. We turn to that evidence.

Charity Matake (Charity)

Charity testified that she had terminated her love affair with the accused five days before this incident as she realised that accused was of violent disposition. She denied ever cohabiting with the accused besides just visiting his residence during their love affair which she said only lasted for a month.

As already said Charity was staying in single room with the now deceased Moreblessing Mudakuchekwa. The now deceased had two very young children.

Turning to the events of the fateful day Charity said she was in Hightown nite club with the now deceased when she saw the accused who was drinking beer. Charity was not drinking beer. She said she then left the nite club in a bid to avoid the accused. He accused followed her.

He found the door locked and started to bang the door. This forced Charity to open the door of their room. By then Charity had strapped the now deceased's child on her back who was crying intending to take the younger of the minor children to the now deceased who had remained at the nite club. Upon entry she said accused ordered her to remove the child from her back as accused demanded to have sexual intercourse with her. She refused as their love affair had ended. Charity said accused was incensed. He started to assault her using a necklace chain.

Charity said a neighbour Elizabeth who was in her room heard this altercation and rushed to call the now deceased from the nite club. The accused had blocked Charity's intended exit from this room which was closed.

Charity said upon her arrival the now deceased inquired as to what the accused was doing in the room. The now deceased asked for Charity to give the now deceased a pepper spray. Charity said she did not know what this was or let alone where it was. She said the now deceased entered the room to get the pepper spray. Charity managed to bolt out of the room and the accused remained inside the room with the door closed. She said the accused then broke a window pane and jumped out of the room through the window. In the process he was pepper sprayed by the now deceased who took issue with him for assaulting Charity.

Charity said the accused tried to flee but ran towards a fence close by and came back. The now deceased then picked a piece of firewood intending to hit the accused but she was disarmed by the accused who in turn hit the now deceased on the back with the piece of firewood. Charity said the now deceased pepper sprayed the accused again in the face and the accused fled. Charity said she still had the younger of the deceased's children strapped on her back but they did not see where the elder of the deceased's child had gone to in this commotion. As a result the now deceased started to look for the other child. At that stage the accused came back. As Charity fled she hid behind Elizabeth and one of the persons close by took her away into Elizabeth's room in a bid to hide from the accused. Few people had gathered as accused broke the window pane and jumped out.

Charity said as she fled she heard the now deceased crying out that had been stabbed by the accused'. This was at the juncture the accused turned towards the now deceased to confront her.

Under cross examination Charity denied that any person threatened to kill the accused. She insisted that when the now deceased was stabbed the now deceased had focussed her attention to looking for her elder minor child who had also stealthily bolted out of their room. Charity denied that the accused was blinded by the pepper spray when he confronted the now deceased and stabbed her. She also disputed that the now deceased assaulted the accused with the firewood but that accused disarmed her and hit the now deceased with it. Charity said accused's version of being blinded by the pepper spray and swinging the knife to threaten people was false. In fact she said when the now deceased cried out that she had been stabbed the accused retorted that he was not done yet.

The evidence of Charity is simple, clear and straight forward. She was sober. She could see what happened as the scene was illuminated by some lights. Despite being an estranged girlfriend of the accused she did not exhibit inherent malice towards the accused. Charity maintained her evidence despite the lengthy and rather immaterial cross examination. Her evidence reads well.

Elizabeth Tsauroi (Elizabeth)

Elizabeth said on 1 February 2019 around midnight she had retired in her room. She heard the now deceased's child crying and the door of the now deceased's room was being banged, opened and closed. She woke up to check what was going on. As she opened the door of her room she saw Charity trying to get out of the now deceased's room but was pulled back and the door closed. Realising the gravity of the situation she ran to the nite club to call the now deceased who came running in front of her.

Elizabeth said when she arrived at the now deceased's room the now deceased said she had locked accused inside the room as she wanted to see what the accused was doing. The accused shouted from inside the room that he would nonetheless find his way. The now deceased then asked Charity to give the now deceased some pepper spray, but Charity could not find it.

Elizabeth said the accused used a fist to break the window pane of the deceased's room. This prompted the now deceased to rush into her room (deceased's room) where she took the pepper spray as the accused was jumping through the window.

Elizabeth said the now deceased pepper sprayed the accused who in turn cried out asking why he was being pepper sprayed and advanced towards the now deceased. She said the now

deceased picked a piece of firewood but the accused disarmed the now deceased and hit the now deceased with it on her back. The now deceased reacted by pepper spraying the accused again in the face forcing the accused to retreat.

According to Elizabeth when accused had retreated the now deceased started to look for her other child who was no longer in the room. At that point Elizabeth said she saw the accused running back charging at the now deceased who was now standing near Elizabeth's room looking for her child. Elizabeth said she shouted alerting the now deceased of the accused's impending advances. She said as the now deceased tried to flee she heard her crying out that she had been stabbed. Two men Joseph and Blessed who had arrived tried to reprimand the accused who was saying he would finish off the now deceased. At that stage the now deceased collapsed and died as the accused fled from the scene. A report was immediately made to police.

Under cross examination Elizabeth denied that any persons surrounded the now deceased's room. Instead she said at the scene were Charity, the now deceased, accused, some other lady, Joseph and Blessed only.

Elizabeth denied that anyone threatened to kill the accused but that instead it is the accused who made those threats. Besides being pepper sprayed twice in the face Elizabeth said no other attack was perpetrated on the accused. Elizabeth dismissed as untrue that when the accused confronted the now deceased before stabbing her he was blinded because accused specifically ran towards the now deceased. Further she said when the now deceased cried out that she been stabbed she was fleeing from the accused.

Again the evidence of Elizabeth is very clear. No plausible reason was given or could be discerned as to why she would falsify her evidence. She was indeed an eye witness to all what happened. Her cross examination did not change the colour of her evidence at all. We have no cause not to accept her testimony.

The accused's evidence

It was quite difficult to follow the accused's testimony on what exactly he said obtained in this matter.

Initially the accused said many people surrounded the room he was in threatening to kill him but under cross examination he conceded that there were just 6 people at the scene.

While the accused's confirmed warned and cautioned statement Exhibit 4 was produced by consent under cross examination the accused sought to disown the confirmed statement alleging the police told him what to say in that statement. This is understandable because in that statement the accused does not raise the question of acting in self-defence but revenging for being pepper sprayed by the now deceased.

While all the State witnesses said this incident happened around midnight, the accused under cross examination alleged it happened at around 20.00 hrs. Whereas Charity and Elizabeth clearly explained that the accused was involved in an altercation with Charity the accused was heard to say that he was discussing amicably with Charity. The mind boggles as to why Elizabeth would wake up to go and call the now deceased if all was well and why the accused would break the window pane of the now deceased's room and jump through the window if all was well.

Despite the accused's insistence that he was still in love with Charity the evidence before us shows us that in all probability that the love affair had ended.

In our view the most incredible part of the accused's evidence is that he never felt that he had stabbed any person or object. The accused even developed this further and alleged that he did not know how the now deceased was fatally injured and that he did not stab the now deceased. This evidence is at war with accused's confirmed warned and cautioned statement.

It is improbable that the accused was totally blinded by the pepper spray when he fatally injured the now deceased. Firstly, the accused would not have been able to disarm the now deceased of the piece of firewood if indeed he was blinded. Secondly, the accused would not have been able to charge specifically towards the now deceased. It is clear that the now deceased was stabbed in the back because she was fleeing. He could not fail to realise he had stabbed the now deceased.

The defence of self-defence is provided for in s 253 of the Criminal Code (Codification and Reform) Act, [Chapter 9:23] and if all requirements are proved it is a complete defence which would absolve the accused of any criminal liability see *S v Banana* 1994 (2) ZLR 271; *S v Collet Baira Manzozza* HMA 2/16.

While it is conceded that the attack by the now deceased of the accused with a pepper spray was unlawfully the accused's conduct of pulling out a knife to avert the unlawful attack was not necessary. In fact the accused had the opportunity to flee but came back to take revenge. This is

clear from even his statement Exhibit 4. The means the accused used to avert the attack with a pepper spray is not only unreasonable in the circumstances but totally disproportionate to the danger he faced. Worse still at the time he stabbed the now deceased the now deceased is the one who was running away from the accused.

It is clear therefore that the defence of self-defence cannot be sustained and is not available to the accused.

The accused used a lethal weapon, a knife, which he thrust 7 cm deep into the now deceased's back. There is no doubt he used severe force. The now deceased was fatally injured and died instantly. Our finding is that the accused indeed subjectively foresaw that his conduct could cause death. He continued with such an act despite such risk or possibility. The accused therefore had constructive intent to cause death.

VERDICT

Guilty of contravening s 47(1) (b) of (Codification and Reform) Act, [*Chapter 9:23*]:-
murder with constructive intent.

National Prosecuting Authority, counsel for the State
Chirairo & Associates, pro deo counsel for the accused