THE STATE
versus
LUKE MUNGOZA

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 12, 13, 14, 15, 18 and 19 June 2018

Criminal Trial

ASSESORS: 1. Mr Chipere
2. Mr Chagonda

Ms *J Matsikidze*, for the State
T P Jonasi for the accused

MWAYERA J: The accused was charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged by the State that on 10 January 2017 and at Tsungwesi Business Centre, Odzi, the accused unlawfully and with intent to kill or realising the real risk or possibility that his conduct may cause death and continuing to engage in that conduct despite the risk or possibility stabbed Trymore Chivandire with a knife thereby inflicting injuries from which the said Trymore Chivandire died. The accused pleaded not guilty to the charge and proffered a defence of self-defence.

The accused's defence outline which was later adopted as evidence in chief was basically to the effect that the deceased assaulted the accused using bare hands and fists. Later the deceased took out a knife which the accused wrestled to get and stabbed the deceased in self-defence.

The summary of the State case was that on the day in question, the accused, who passed by Tsungwesi Business Centre to collect his phone which he had earlier left for charging had an altercation with the deceased. The two had a tumultuous history which came about over the headmanship of their village. The deceased's father as village head had been dislodged by the accused who was the chairman of the village following resettlement. The deceased and his family were aggrieved by the dislodgment of the deceased's father one Isaac Chivandire from the position hence the friction between the parties. This culminated in the parties obtaining a

peace order from the Magistrates Court. On the fateful day the deceased who could not stand the sight of the accused, ordered the latter out of the shop and while outside the two had a misunderstanding which culminated in the accused stabbing and ripping open the deceased's stomach exposing the intestines. Following the stab wound the deceased later died and the cause of death was established as hypovolemic shock secondary to bleeding bowel. Post-mortem report by Dr Forgiveness Chitungo exh 3 refers.

The State adduced evidence from 9 witnesses as follows: Evidence of all the other witnesses except the first Ngwarai Satuku and Doctor Chitungo was formally admitted as it appears on the summary of the State Case in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The evidence of Israel Muguti was expunched from the record as the witnesses could not be located. Ngwarai Satuku gave *viva voce* evidence. It was clear from the witness that there was bad blood between the deceased and the accused as they struggled over leadership of the village. The witness recounted how the deceased was in the habit of harassing the accused every time they met and how he would seek to violently drive the accused off. On the fateful day the witness restrained the deceased twice when the latter ordered the accused to leave the beer outlet. According to the witness he and the deceased and colleagues were drinking opaque beer commonly known as "supa" and that the accused was also drinking the same beer seated at the other side of the beer outlet. The witness told the court that when the accused left the deceased also left. He observed the deceased try to kick and punch the accused but missed as accused evaded the attack, and shortly thereafter, he heard deceased call out to the accused that he had been injured by the accused. He further heard the accused retort that the deceased had pursued him for too long. The witness observed the deceased's intestines were out and he was taken aback. The witness' evidence was straight forward, as he spoke of the common cause aspect of acrimonious relationship that existed between the accused and Chivandires and in particular the deceased.

Dr Chitungo also testified orally. He basically narrated how he observed the body of the deceased and compiled the post mortem report. The doctor's evidence was clear evidence to follow as he explained his observation. He was highly professional in the manner he testified. Even though he was unnecessarily subjected to lengthy cross examination by the legal counsel, he did not lose his head. He did not attend to the deceased as a patient but carried out a post mortem examination. He observed injuries consistent with assault by a sharp object. His conclusion was well anchored on his observations. The doctor was candid with the court when he pointed out that the injuries could be described as moderate to severe. We must point out

that we wondered where defence counsel got the impression that the Doctor said the injuries were neither moderate nor severe. The doctor's evidence could have easily been formally admitted in terms of s 314 as it was clearly not controversial. We hasten to say the doctor who was highly professional assisted the court on medical science.

The State also tendered in evidence the sketch plan exh 2 depicting the scene of crime as indicated by the witnesses and accused. The sketch plan just as pointed out by the accused shows that accused was way ahead of the deceased such that one wonders how the two ended up together at the point when the deceased was stabbed. The State further produced exh I, a confirmed warned and cautioned statement by accused which in principle was to the effect that the death occurred when the accused was defending himself.

The accused was the only witness in his case. He told the Court that he was acting in self-defence and that when he cut the deceased the deceased was actually on top assaulting him with clenched fists. The accused gave an incredible story of how he reached out for a knife on the ground using his leg while the deceased was mounting and pinning him down. A lot of questions come out from the accused's version given he told the court he used the knife and that the knife was not his. If the knife fell from the deceased's grip given the lying down position of the deceased pinned down and facing upwards, one wonders how he could see the knife for him to pull it with his leg and then stab the deceased's buttock and "cut" (accused's words) the stomach to the extent of having intestines out. The account of what transpired between the accused and the deceased left the Court with questions as to how the man described by the accused as very drunk would have over powered the accused who was sober and had taken a 20 or 40 metre head start. The accused when probed on events of the day in question buckled on recounting sequence of events outside. He waited ready for confrontation as he felt justified since the accused had for too long pestered, harassed and belittled him. This was clearly read from his remarks when the deceased cried out over injuries, "you have got what you deserved for you have pestered me for far too long."

Upon considering the totality of the evidence adduced before the court, the following factors are common cause;

(1) That the deceased and accused were sworn enemies over leadership wrangles.

(2) That on the fateful day the accused was aggressive toward the deceased and had to be restrained twice when he was ordering the deceased out of the beer outlet.

(3) That the deceased stabbed the accused with a knife per his say so even though the knife was not recovered.

(4) That the deceased sustained injuries from which he bled leading to his death due to hypovelcamic shock secondary to bleeding.

(5) That the deceased was drunk and using open hands and booted feet.

We must point out that at the close of the State case the defence applied for the discharge of the accused on the basis that there was no *prima facie* case upon which a reasonable court acting carefully would convict the accused. We dismissed the application and pointed out that our reasons would be clear in the main judgment. It was apparent at the close of the State case that the deceased and the accused on the day in question had an altercation. Further that during the physical encounter the deceased sustained injuries which occasioned his death. The accused was within the vicinity as could be discerned from the State witnesses. The deceased was pierced by a sharp object and the accused's defence outline points to accused's use of a knife. At the close of the State case the court is not looking at proof beyond reasonable doubt as it would do at the close of all the evidence but is rather looking at whether nor not from the evidence adduced the State has proved or shown a *prima facie* case. Put in other words whether or not at the close of the State case there is evidence linking the accused with the commission of the offence. Clearly from the State case there is evidence linking the accused with the offence. Phrased differently, if the accused were to choose to remain silent in the defence case, is there evidence upon which the court can convict. If the answer is in the affirmative then the accused ought to be placed to his defence, and vice versa.

The fact that the deceased was the aggressor in the past and on the day in question is not a defence to the alleged criminal offence. The charge as preferred by the State, murder as defined in s 47 has a two pronged facet of intention namely, actual intention or the common law constructive intent that is foreseeability intention as defined in s 47 (1) (b). The defence proffered is provided for under s 253 of the Criminal Law (Codification and Reform) Act [*Chapter 9:*23] and is a complete defence to murder, provided the requirements as outlined in s 253 are met.

Given the evidence that the deceased was unarmed and that he was stabbed when he came into conduct with the accused it would be an improper exercise of assessment of evidence to frown at evidence linking the accused to the commission of the offence at the close of the State case.In the face of the *prima facie* case established by the State at the close of the State case we dismissed the application for discharge of the accused.

An analysis of the totality of the evidence and the applicable law falls under scrutiny as we seek to come up with a disposition of the matter. The charge of murder as defined in s

47 can only be proved where there is both action and intention on the part of the perpetrator. This court and the Supreme Court has in several cases sought to define what would constitute intention. In *S v Memu* HB 143/13 the court stated that actual intention exists when an accused sets out to cause the death of the deceased and where he foresaw that death was substantially certain to occur but none the less persists with his conduct.

See *S v Mugwanda* 2002 (1) ZLR 574 (S) at 581 D-E the Supreme Court held that:

"For a court to return a verdict of murder with actual intent it must be satisfied beyond reasonable doubt either;

(i) the accused desired to bring about the death of his victim and succeeded in completing that purpose; or
(ii) that while perusing another objective, the accused foresaw the death of his victim as a substantially certain result of the activity and proceeded regardless."

In this case, the accused used a knife to stab the deceased in the stomach albeit once, intestines were exposed leading to loss of blood which occasioned death. The weapon used and the manner in which it was used given the part of the body to which it was directed established the requisite *mens rea* in commission of the offence. Given the nature of injuries occasioned, the weapon used and the manner in which the assault was perpetrated one cannot fail to read realisation of risk or possibility of death ensuing from such conduct. In the case of *S v Mhako* 2012 (2) ZLR 73 the court discussed the common law concept of "constructive intent" (on defining legal intent behind murder) and its replacement under the Criminal Law Code [*Chapter 9:23*] with "realisation of risk or possibility of death ensuing from conduct." As discussed in *Mhako* case (*supra*) there are two components to be considered the first being whether or not the accused realised that there was real risk or possibility other than a remote risk or possibility that (i) his conduct might give rise to the relevant consequence; or (ii) the relevant facts or circumstance existed when he engaged in the conduct. The second element of recklessness, that is, whether despite realising that risk or possibility referred the accused continued to engage in that conduct.

In this case the accused struck the deceased with a knife in the stomach. The accused in this case was not being attacked by an armed attacker. The accused was reacting to past harassment and conflict with the deceased. That would be a suggestion of provocation but certainly not a defence to the charge of murder. The accused personally raised self-defence as his defence. A close look at the requirements of the defence when viewed with the totality of evidence reveals that the accused does not have that defence available for want of meeting the

requirements. For the defence of self-defence to succeed as provided for in s 253 the following requirements have to be all met that:

i. there must be an unlawful attack.
ii. the attack must have been imminent or have commenced.
iii. the conduct must have been necessary to avert the attack and the accused otherwise had no other way to escape from the attack.
iv. the means used to avert the attack were reasonable.
v. the harm was directed to the attacker and was not disproportionate to the harm that the accused could have received.

Worth noting is the wording of s 253 on the requirement of the defence of self-defence by the use of the word 'and.' It is apparent that the requirements are conjunctive and not disjunctive. Thus a person pleading self-defence ought to meet all the requirements in order for the defence of self-defence to be available as a complete defence. (underlining my emphasis). See *S v Mabvume* HH 39/16 and also *S v Muchairi* HB 12/13.

In casu the accused on being confronted by the deceased to leave the beer outlet existed, upon realising the deceased was not budging to the restraint by his colleagues. The deceased was belligerent to the accused but the evidence before the court is that he was observed by the State witness trying to punch and kick the accused and the latter evaded the blows. This evidence was not refuted by the accused who actually pointed out that the deceased was very drunk on the night in question and that he used blows and open hands on the accused. Given this state of affairs then the question that begs of answer is what unlawful attack was the accused under other than being ordered to leave the shopping centre. Assuming the deceased was punching the deceased given the undisputed evidence that the deceased was heavily intoxicated, the next question in relation to the requirements of the defence of self-defence would be, given that the deceased was in that heavy or hopeless state of intoxication and not using any weapon on the accused, was it necessary to slice open the stomach to avert an attack of blows fists and booted feet from a man under the influence of alcohol. In the circumstances of this case the answer is in the negative.

The harm was directed to the deceased but given his drunken state and that there was plenty of open space for the accused to make good his escape. One cannot help but conclude that using a knife to thwart an unarmed drunken man's attack is disproportionate to the attack and thus unreasonable in the circumstances. Going by the accused's evidence and state witnesses the accused left way ahead of the deceased such that he could have made good his

escape without any engagement in combat or confrontation with the deceased. The deceased never used the knife on the accused such as to justify the stab wound that exposed intestines leading to the fatal bleeding.

The deceased had for long harassed the accused but such is not a defence for the accused given the events of the day in question. The accused when he testified in evidence in chief and under cross examination emphasises that he had endured a lot of humiliation at the hands of the deceased and his family. Whereas this might be the correct position and would amount to provocation it certainly is not a defence neither does it bolster the requirements of self-defence. The built up of past experiences at the rough hands of the deceased only bolster and depict a man who stood ready to show that it was time to clearly say enough is enough. The accused's evidence on how he ended up having a knife and stabbing the deceased was not only incredible but false or fallacious beyond reasonable doubt. It was apparent from the accused's evidence that earlier on in the morning of the fateful day the deceased had approached him while in the comfort of his home. The deceased was then, armed with a knobkerrie and threatening the accused who fled to the mountains. In the evening, the accused was ready for the deceased hence the confrontations. The accused used a knife and no evidence was adduced to show it was not his. All that the accused said was refer the court to the history of harassment at the hands of the deceased and punctuate it with question "if you were me what would you have done." These words resonated well with his last words when the deceased revealed he had been injured. The accused felt even and that the deceased had got what he deserved. Even if the accused was a victim of the unlawful harassment over the wrangle of village headmanship recklessness and unreasonableness in the exercise of the right of self-defence does not amount to a defence. As in this case the attack by a knife on an unarmed, very drunk individual was grossly disproportionate and unreasonable in the circumstances. The defence of self-defence cannot be sustained.

The accused in this case realised the real risk or possibility that his conduct of attacking the deceased with a knife, that death would ensue and he despite the realisation stabbed the deceased below the umbilicus exposing the bowel/intestines. The deceased sustained injuries from which he bleed leading to his death being occasioned by hyprovelomic shock due to bleeding.

Accordingly the accused is found guilty of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act.

Sentence

In our endeavour to reach an appropriate sentence we have considered all mitigatory and aggravatory factors submitted by both Mr *Jonasi* for accused and Mrs *Matsikidze* for the State respectively, we must commend both counsels for filing helpful closing submissions timeously. We further commend both counsels for addressing in aggravation and mitigation.

Sentencing is a delicate exercise which calls for proper exercise of the sentencing discretion taking into account the circumstance of each case. Further in sentencing it is imperative that the court considers and seeks to strike a balance between the offender and societal interest. Thus in sentence the court has to match the crime to the offender and satisfy the societal interests of administration of justice. The sentence should not make the society loose respect and trust in the justice delivery system and at the same time in a progressive society the sentence should not be one which breaks the accused but one which is blended with mercy so as to rehabilitate the accused.

The accused is a first offender. He, as given by Mr *Jonasi* is a family man with family responsibilities as he is a father of 9 children, 5 of whom are still minors. The accused is given as the bread winner of his whole family and two wives. Further in mitigation are the circumstances surrounding the commission of the offence. For over a long period the accused had been subjected to harassment, assault and humiliation at the hands of the deceased. On the day in question, the deceased was unrelenting. He aggressively order the accused out of a beer outlet. The accused had been subjected to degrading treatment as a member of the community. Further in mitigation is the fact that the accused had as a move to avoid taking the law into his own hands obtained a peace order but the accused would breach the same and harass him. Efforts by the accused to get assistance from the police when he reported this breach was futile as the police did not assist. The accused ended up resorting to self-help leading to the offence. This frustration reduces accused's moral blameworthiness. The manner in which the deceased carried on when he saw the accused further reduces the moral blameworthiness of the accused.

However, as already stated by Mrs *Matsikidze* precious human life was lost in circumstances where it could have been avoided. The deceased was a nuisance but that does not give the accused the right to take away a God given constitutionally provided for right to life, section 48 of Zimbabwean Constitution is instructive. The deceased was a fairly young family man with dependants. These people will never have the bread winner back. The manner

in which the accused stabbed the deceased although it was one blow cannot be condoned given where the blow was aimed.

Further in aggravation is the fact that from the time of stabbing the deceased to conclusion of trial the accused seemed to brag about getting even with the violent deceased. Such lack of contrition and remorse where human life has been lost should be frowned at. The message has to be send loud and clear that the use of violence as a tool of resolving disputes is frowned at by the courts as it shows lack of civilisation.

Upon weighing all mitigatory and aggravatory factors, a prison term is called for. The fact that the deceased was convicted of murder with constructive intention and not actual intention is also taken as reducing the moral blameworthiness.

Accordingly the accused is sentenced as follows:

10 years imprisonment.

HDC

National Prosecuting Authority, State's legal practitioners
Mhungu & Associates, accused's legal practitioners