

THE STATE
versus
MICHAEL MUNAPO

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 14, 16 and 21 May 2019 and 6 June 2019

Criminal Trial

ASSESORS: 1. Mr Magorokosho
2. Mrs Mawoneke

M Musarurwa, for the State
C. N Mukwena, for the accused

MWAYERA J: In this case the accused pleaded not guilty to a charge of murder as defined in s 47 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in which it is alleged that on 11 September 2018 at Gumtree Shop, Chitakatira Village, Chief Zimunya, Mutare the accused with intent to kill, stabbed the deceased with a knife once on the right side of the neck thereby inflicting injuries from which deceased bled profusely and succumbed to death due to massive haemorrhage. The post mortem report prepared by Dr Forgiveness Chitungo concluded the cause of death and it was tendered as exh 4 by consent. The doctor concluded that the cause of death was exsanguination secondary to haemorrhage.

The accused in his defence does not dispute stabbing the deceased but denied stabbing the deceased with an intention to kill. He raised a defence of self-defence and he explained that he feigned stabbing the deceased at the time he was under attack from the deceased and company.

The factual allegations in this case are largely common cause. The only issue that falls for determination is whether or not when the accused stabbed the deceased he was acting in self-defence such as to negate the requisite *mens rea* to commit the crime of murder.

The state adduced evidence from a total of 12 witnesses. Only four witnesses Dr Forgiveness Chitungo, Baison Nedyere and Letwin Mavoyo and Shadrek Munapo gave viva

voce evidence. The rest of the witnesses' evidence was formally admitted as it was on common cause aspects. The undisputed facts are as follows:

1. On 11 September 2018 the accused proceeded to Gumtree Shopping Centre in possession of a knife carried in his pocket.
2. The accused met with the deceased and others at the shopping centre.
3. Accused and deceased had issues of stalking the same girlfriend one Miriam Chabikwa.
4. The deceased had issues with accused after "Whatsapp message bragging about how accused snatched the girlfriend.
5. It was clarified accused had not sent any whatsapp message as clearly revealed he had not been on whatsapp line or connection for over 2 weeks back.
6. The accused challenged the deceased by getting in conduct with the chest and the deceased slapped the accused and the latter retaliated.
7. A scuffle ensued between accused and deceased who had pushed each other to a dark place.
8. The deceased was stabbed on the neck and the carotid artery was severed.
9. The accused fled from the scene.
10. The deceased profusely bled and was pronounced dead upon arrival at Mutare Provincial hospital where he had been referred by the sister in charge Chitakatira Clinic one Letwin Mavoyo.

I must point out that Dr Forgiveness Chitungo gave very clear evidence on the examination and preparation of post-mortem report of the remains of the deceased. He observed a 5cm laceration on the right side neck of the deceased. He further observed that the carotid artery was severed and came up to the conclusion that death was as a result of exsanguination secondary to massive haemorrhage. The doctor made it clear that the process of stopping blood oozing from a severed carotid artery was complex and would require use of special tools to plug the artery and this was not available at clinics like Chitakatira. The doctor was unnecessarily subjected to what this court may term harassment on his experience and qualifications. He never sought to portray himself as a specialist pathologist but was taken to task. His report was clear on history of the body he observed and the observations he made. The deceased was stabbed and he bled to death or that he lost blood to levels incapable of sustaining life for himself. Despite the unnecessary bruising and barraging cross examination the witness maintained his professional stance as he explained his observations as recorded in

the post mortem report exh 4. Given the accused's defence it was not in dispute that the deceased died following the stab wound.

Letwin Mavayo's evidence was also very straight forward. She is a nursing sister at Chitakatira Clinic. She only covered the wound with a bandage. According to her at the time she attended the deceased blood was no longer oozing out but deceased's clothes were soaked in blood. Even at the place where he was seated after being dropped off by a vehicle there was a pool of blood. The witness deduced that the deceased required hospital attention and thus referred the patient to Mutare Provincial Hospital. The witness gave her evidence well. She took a barrage of unnecessary criticism from the defence counsel as regards how she carried out her duty. The defence queried why she was not in the clinic after hours. The witness was on call and was within the hospital campus and as is expected upon receiving an emergency akin to "urgent matter" at court she immediately attended. Blood had been gushing from the scene of the stabbing at the shopping centre, a distance estimated by witnesses to be about 5 km and the flow had subsided at time of reaching the hospital. This decrease in blood flow naturally as elucidated by Dr Chitungo is not because of treatment but that the blood contained in a human being is not infinite but an average quantity of about 5 litres. The witness attended and referred the patient for specialised care. There was no failure to timeously and professionally attend to the patient and administer treatment as suggested by the defence. In so far as carrying out the duty of responding to call and attending to a patient the witness cannot be criticised. Her evidence was straightforward.

Byson Nendere also gave oral evidence. He narrated how on the day in question the accused arrived at the shops. According to the witness there was a misunderstanding over a whatsapp message. The issue involved a girlfriend common to accused and deceased. The witness was in the company of deceased one James and David when checks were made. It was confirmed the accused had not sent the alleged whatsapp message as he was not online. It was then that accused challenged deceased. The latter then slapped accused and the accused retaliated. The two grappled with each other in a dark place and then the deceased cried out he had been stabbed and injured. He fell to the ground. The witness was not taken to task on what role he played if any during the scuffle. It appears that he was at the scene and was assumed to have participated. The witness although he pointed out that the accused challenged all the people, saying there is nothing you can do to me, it was clear a scuffle ensued between the accused and deceased.

David Munapo a cousin brother to the accused confirmed the sequence of events at the shopping centre as recounted by Byson. After the check on whatsapp his brother the accused challenged all people including deceased, saying they could do nothing to him. Accused actually physically poked the deceased's chest following which he was slapped and a scuffle ensued. The witness pointed out that the two pushed each other and he latter heard deceased cry out as he had been stabbed. The witness was just observing as he was taken aback by accused's courage and challenge to the deceased who was much older than him. He wondered what it is the accused was riding on to have such courage. The minor differences in the witness' testimony and that of Byson is immaterial. The incident occurred in the evening at the shopping centre and it was for a short while. The witnesses do not have to give evidence which is word for word with each other for them to be held credible. On material aspects the witnesses corroborate the state case. The scuffle was between accused and deceased even though accused challenged the witnesses and deceased especially after verification that no whatsapp message had been sent. The issue was clearly between accused and the deceased as the accused is said to have snatched away the deceased's girlfriend, Miriam Chabikwa. The minor discrepancies on distance during observation of the scuffle one saying 3 metres and another saying 6 – 7 metres and difference on when instruction to phone the police after being stabbed was given are immaterial as they do not go to the root of the matter neither do they change the complexion of the matter. The evidence of the witnesses on what transpired is clear and both witnesses gave evidence well and in a truthful manner. In the case of *S v Lawrence and Ors* 1989 (2) ZLR 29 (S) it was held

“... discrepancies in a case must be of such magnitude and value that they go to the root of that matter to such an extent that their presence would no doubt give a different complexion of the matter altogether..”

In casu the variations on witnesses' version about distance from the shop veranda to the secluded place are minor and do not change the common cause evidence that a misunderstanding over a whatsapp message about a common girlfriend, Miriam degenerated into a challenge between the accused and the deceased. During the scuffle the two moved away by pushing each other to a dark place. Following which the deceased sustained a stab wound. The witnesses Byson Nendere and David Munapo's evidence remained intact and they cannot be said to have been lying on common cause aspects.

The last witness who gave oral evidence is Shadreck Munapo, the father of the accused. The witness as correctly observed by defence counsel did not witness the fraca at the Gumtree

Shopping Centre neither did he witness the stabbing of the deceased. His evidence was strictly “hearsay”. As if that was not enough the witness’s evidence that prior to this day the accused had sought to stab him and that on that date accused threatened him is inadmissible as it is similar fact evidence. In any event the witness oscillated from saying he was threatened on that day to saying it was on another day. However, such evidence still has no relevance to the present case. The witness had issues with the accused and accused’s mother, his wife as he took offence with why the accused was legally represented.

When viewed in conjunction with accused’s evidence there was no good or cordial relationship between the accused and the witness as clearly accused was hostile to the fact that the father was living with another woman not his mother. The accused referred to that woman as a prostitute. There was clearly tension between accused and the witness. The witness’s evidence in our view was to a large extent inadmissible, prejudicial and irrelevant to the matter beforehand. It is accordingly expunged from the record or disregarded to that extent.

The accused maintained he took out the knife and feigned to stab the deceased in a bid to wade off an attack on himself by the deceased and his companions who included Byson Nedyere and David Munapo. In his evidence however the accused did not elaborate how he was attacked. Both evidence in chief and even during cross examination of witnesses the detail of how he was attacked is missing. Only in closing submissions is there emphasis that he was held and assaulted all over the body by more than three people and that is when he produced the knife to scare off his assailants. Even in his confirmed warned and cautioned statement exh 1 the accused’s version is clear that he and the deceased Blessing Mhondera were fighting for a girlfriend Miriam when he stabbed the deceased. Failure to give such detail in the confirmed warned and cautioned statement and failure to give flesh and detail on the attack which he had to defend himself and only emphasising the defence in the defence outline and closing submissions taint the accused’s version as an afterthought. Even during cross examination by the State counsel the accused appeared to be taking a gamble on the suggested defence of self-defence as he was not firm on the defence.

The defence of self-defence as provided for in s 253 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] clearly outlines requirements which have to be fulfilled in order for one to succeed. An accused relying on the defence must prove that when he or she did or omitted to do the thing, the unlawful attack, had commenced or was imminent, his or her conduct was necessary to avert the unlawful attack or that he or she would not escape from

or avert the attack, the means used were reasonable in all circumstances, and that any harm or injury caused by his or her conduct was caused to the attacker.

See *S v Sibanda* HB 139/18, *S v Manzanza* HMA 2/16 and *S v Tafirei Runesu* HMA 37/17. In *Tafirei Runesu* case, MAFUSIRE J in discussing the law on self-defence pointed out that

“A person who is a victim of an unlawful attack is entitled to resort to force to repel such an attack. Any harm or damage inflicted on the aggressor in the course of such an attack or when the attack is imminent is lawful.”

See also *S v Ncube* SC 58/17. Central to this defence of self-defence is whether the harm caused to the attacker was reasonably necessary to avert the unlawful attack and that the means used were reasonable in the circumstances.

In casu, the accused who challenged the deceased was slapped by the deceased. He fought back and the two engaged in a fight. There is no evidence that deceased was armed, there was pushing and shoving by the two in an open space when the accused took out his knife. His story or version that he feigned to stab given the nature of injuries sustained and the body part to which the blow was aimed is not only unbelievable but false. If it was mere producing of a knife then the question is how then was the deceased stabbed with significant force. The accused had consciously left his home armed with a knife which according to him would have become handy in case he met some muggers. It is the same knife that he resorted to use when a fight erupted between him and the deceased.

The question is whether the accused acted unlawfully and that he realised or ought reasonably to have realised that he was exceeding the bounds of self-defence and foresaw or ought to reasonably have foreseen the possibility of the resultant death. If the answer is in the affirmative basing on evidence adduced by the State proving the case beyond reasonable doubt then the accused is liable for the offence. In this case the evidence of state witnesses was well presented and the witnesses who were at the scene impressed us as, truthful and reliable witnesses. They maintained their version which to a great extent tallied with accused's version that the fight between the two was over a girl.

The afterthought defence of self-defence cannot be sustained given all the requirements cannot be met. The accused certainly exceeded the limits when he stabbed the unarmed deceased he was fighting within an open space. Even if it were to be accepted that deceased had companions in attendance fear of being attacked by unarmed man who have been shown

not to be actively involved in the fight would not warrant use of a knife. The action taken was disproportionate to the perceived danger sought to be averted.

The crime of murder faced by the accused consists of unlawful and intentional killing of another human being. In *S v Kurongera* HH 267/17 HUNGWE J opined that:

“Where there is no expression of such intent the law can infer such an intention from the accused’s conduct and circumstances surrounding the commission of the offence and conclude that such an intent existed in accused’s mind.”

In this case, accused cannot be said to have set out with an aim to kill and proceeded to achieve his goal but he definitely went out armed with a knife ready to use if attacked. When involved in a fight which he started by poking deceased he consciously took the knife and stabbed the deceased in the neck severing the carotid artery. Such conduct of using a lethal weapon on another’s delicate part of the body gives the impression the accused had the requisite legal intention.

Accused is legally liable for the death of deceased and cannot escape conviction for he engaged in conduct of stabbing the deceased in circumstances where there was realisation that there was real risk or possibility that the conduct might cause death. He is accordingly found guilty of murder as defined in s 47 1 (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

In assessing sentence we have taken into account all mitigatory factors and aggravatory factors submitted by the defence and state counsels. The accused is a youthful first offender who committed the offence at the age of 19. We have considered that the accused was affected by growing up in a broken family where sins of the father and mother were visited on him. The accused clearly lacked parental guidance as the father was not staying with him but staying at another home with another woman. The mother was away at her work place. We have also considered the background of the accused and the beliefs in witchcraft as reducing the moral blameworthiness moreso upon considering the attitude of the accused’s father. He took issue with the accused being legally represented and immediately after testifying largely in a malicious way sought to be excused to attend to his own business. Such parenting when given the age of the accused clearly displays that the accused lacked parental guidance and love.

In aggravation we have considered all submissions made by the state counsel. Precious human life was needlessly lost over a petty issue. The accused indeed carried on like a bully as

he posed to show his fiscal process not only in snatching the deceased's girlfriend but physically assaulting and stabbing the deceased. The accused used a lethal weapon a knife on a delicate part of the body and cost life of the complainant at a tender age. That life can never be replaced. After the commission of the offence the accused went into hiding and such conduct is unacceptable.

It is important in passing sentence for all the circumstances to be considered and seek to match the offence to the offender while at the same time tempering justice with mercy. The maturity of the accused is quite central in mitigation and ought to be reflected by departure from lengthy imprisonment term. However, the youthfulness should not be over emphasised to the detriment of the justice delivery system. The society has to get fair and just decisions so as to continue to have confidence in the justice delivery system. An appropriate sentence which reflects that the courts frown at use of violence on others especially intentionally occasioning death has to be passed. A custodial term is called for.

10 years imprisonment.

Tanaya Law Firm, accused' legal practitioners
National Prosecuting Authority, state's legal practitioners