

STATE
versus
LLOYD MABITI MAHOVANA

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 3 and 5 March 2020

Criminal Trial

ASSESORS: 1. Mr Raja
2. Mr Magorokosho

Mrs J Matsikidze, for the State
I Mandikate and *T Mwayera* for the Accused

MUZENDA J: Accused is charged with Murder as defined in s 47 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged by the state that on the 13th of June 2019, the accused caused the death of Nobody Kadeya by stabbing him with a knife, multiple times intending to kill him or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility resulting in injuries from which Nobody Kadeya died.

The accused pleaded not guilty and stated in his defence outline that he acted in defence of self against a vicious and imminent attack by a heavily intoxicated police officer, the now deceased. He added that he acted on the spur of the moment to save himself from an unlawful attack as a result of strangling from the deceased. On 13 June 2019, accused denies partaking alcohol. He stated that he does not drink beer. He was approached by the deceased who informed them that he was under arrest for drinking illicit brew. The deceased ordered the accused to accompany deceased to Chibuwe Police Post and accused refused to go on the basis that he was not drinking the illicit brew. Deceased insisted that accused should go to the police post and pay a deposit fine or the accused was going to sleep in the police cells. According to the accused, he had never seen eye to eye with the deceased and deceased was always jealousy of the accused

The deceased started to strangle and choke the accused. Eric Murire reprimanded deceased and pushed him away from the accused. A police detail came and helped to calm the

situation. Deceased then gave his car keys to the police officer and instructed him to take his car to the police post. Deceased then pushed accused's wheelchair and pushed it into a pothole. The wheelchair automatically locked the wheel and the deceased fell to the ground. Upon getting up deceased was infuriated and stated that he was going to assault the accused. He started strangling accused, accused struggled to breathe. Panganai Dzvairo then threw a knife on the accused's lap. Accused took the knife and stabbed deceased on the arm. The deceased did not stop strangling accused, accused stabbed him a second time on the chin. Deceased did not let go the accused, accused then stabbed deceased for the third time on the chest, deceased then loosened the strangle and got off the accused, walked about five metres and collapsed. Accused left the scene of the stabbing on his way home the knife accidentally fell from his lap. He prayed for his acquittal.

The summary of the state states that deceased was a police detail stationed at Middle Sabi. He was attached at Chibuwe Police Post on 13 June 2019, deceased was on his way home and passed through Chibuwe Business centre, when he observed accused, Eric Murire and Panganai Dzvairo drinking home made opaque beer from a five litre container. Deceased declared to the trio that they were under arrest for possession and imbibing an illicit brew. Deceased invited all the three to the police post to pay guilty fines. Accused protested, he also shouted at the deceased but latter agreed to go to the police post. Deceased pushed accused's wheelchair, after a short distance accused locked the wheelchair wheels knocking deceased off balance. The accused then drew a knife and stabbed the deceased on the chin, upper arm and chest rendering him unconscious. He then disappeared into the night. The post mortem report concluded that death was a result of penetrating chest trauma.

The state applied to dispense the calling of Joyce Munaiwa, Talent Mucharevei Douglas Madzura, Tinashe Nyamasunda and Dr Takunda Leonard. The defence consented. Also by consent the post mortem report, confirmed warned and cautioned statement, the Mouser 440 C knife and its certificate of weight were produced.

Most facts in this case are common cause. On 13 June 2019 the deceased found accused and his colleagues at Chibuwe Business centre, the latter were imbibing an illicit brew commonly referred in local Chibuwe area as "one-day" and deceased placed them on arrest. He invited them to the police post, but the accused openly dared the deceased who was in police uniform. Deceased then gave his car keys to a colleague and opted to push deceased's wheel chair to go to the police post. On the way the accused told the court that because there was a pothole where the wheelchair was wheeling towards, he locked the wheel of the wheel chair

and that provoked the deceased who then strangled the accused. Accused version is that he acted in defence of self. On the other hand the state alleges to contrary. The state's side of the story is that the accused did not act in defence of self but deliberately locked the wheels of the wheel chair knocking off the deceased, and then accused stabbed the deceased. So the locking of the wheels and the stabbing of deceased on three places of his body are issues of common cause.

The question for determination is whether the accused acted in defence of self or not.

The state called Delence Sibiya. On the night in question, he observed deceased pushing accused's wheelchair, the deceased body was resting on the wheelchair and witness was plus or minus four metres from where deceased and accused were. The two then moved away from the crowd, 10 metres away, according to Delence Sibiya, the wheelchair was going towards the car. The witness then told the court that he saw the accused producing a knife from his attire on the front of the position accused was seated and without warning to the deceased, stabbed him. The stabbing according to the witness occurred when deceased was pushing the wheelchair. After the stabbing accused uttered words to the effect that he had finished with the deceased. The witness identified the knife as belonging to the accused.

Panganayi Dzvairo did not see the stabbing of the deceased by the accused; however the knife used belonged to the accused according to this witness. Panganayi Dzvairo also told the court that he heard accused uttering words to the effect that he had finished with the deceased. He denied throwing the knife to the accused, he did not witness the deceased throttling the accused which could have prompted the witness to throw the knife at accused's lap to help himself. The knife belong to the accused, for accused had always moved with that knife. On the issue of the knife, Brighton Mataure Mhlanga told the court that he observed accused producing the knife from his satchel and placing it on his lap.

The accused in his defence stuck to his defence outline. He did not call any defence witness.

The defence submitted that accused found himself in a precarious situation, accused was in a wheel chair and was helpless. He only acted to defend himself, he was throttled, almost suffocating and stabbed the deceased. Defence added that accused was under attack by the deceased and took an immediate defensive measure he had no time to ponder upon what weapon to use. Further his situation was compounded by his disability being on a wheelchair, he was vulnerable, and could not defend himself. Hence it was argued by the defence that accused used a knife intending to protect his life.

The state submitted that the accused did not meet the requirements of s. 253 of the Criminal Law (Codification and Reform) Act, (chapter 9.23) to satisfy the defence of self. It submitted that deceased was doing his work as a police detail. Accused resisted arrest and refused to go to the police post. The state further submitted that accused actually removed the knife from a satchel at the back of his wheelchair and placed it on his lap. He allowed the deceased to push the wheelchair, accused then suddenly brought it to a stop and then stabbed deceased.

Having critically examined the evidence of both the state and the accused, we have come to the conclusion that the accused failed to establish the basis for a defence of self. Accused was at Chibuwe Business Centre with his friend, Panganayi Dzvova, Accused was carrying a 5 Litre plastic container of an illicit brew and was seen imbibing it from a cup. Deceased arrested accused and told him to go to the police post. The accused resisted and according to him, accused, he was not willing to go to the police post and cause to be detained in holding cells. In our view and conclusion, the accused had all the reason to be angry with the deceased. Deceased had nothing against the accused other than that he (deceased) had seen accused committing an offence, the accused pretended that he had changed his mind in order to cooperate with the deceased, but then deceased did not read accused's mind well. The accused deliberately withdrew from the madding crowd and allowed deceased to push the wheelchair to an isolated place. He further non-chalantly locked the wheelchair wheels to draw deceased's violently. Accused was highly incensed by deceased's arrest and sensing that the deceased was going to detain him, he resolved to stab deceased using a knife. Although one can not say the stabbing was generally preplanned, from the time he took it from satchel and placing it on his lap, he had resolutely decided to use to stab the deceased. He chose an opportune moment at a dark place and chose particular position's to stab the deceased. The stabbing of deceased on the upper part of his body was ruthless and brutal. The upper body of a human being hold very vital organs of the body. No wonder the blow on the chest of the deceased damaged the breast and the lung. The chest and the lung are separated by a lean membrane and the use of the lethal weapon on a defenceless police detail was unavoidably fatal. The accused was not under any attack from deceased, his version is totally fanciful and fathomed. In our view accused wanted to create a dire situation premised upon his disability and use it as an excuse to stab the police detail. From the evidence before us, we fail to see any factual basis why deceased could have wanted to strangle accused to death. Instead it was the

accused who wanted to deal with the deceased who was forcing accused to go to the police post.

We also dismissed the accused's version on the basis that the accused's confirmed warned and cautioned statement, produced before us, does not allude to the fact of deceased strangling the accused. Accused spoke of deceased grabbing his shirt collar. The accused was at pain to explain the two statements in court. We also failed to find an explanation from the accused why his own colleagues could lie against him about the knife. Accused could not explain why he could have uttered words to the effect that he had finished with deceased. The admitted evidence of Talent Mucharwei is to the effect that he found accused's wheelchair stuck in the sand after accused had stabbed deceased. He was told by the accused that he (accused) had stabbed someone at the shops. Accused produced the knife and showed it to the witness, accused then threw away the knife into the bush. He did not tell Mucharwei that the knife belonged to Dzvairo or that he had been strangled by the victim of the stabbing. We thus concluded that the issue of the defence of self, more particularly that deceased had almost choked accused to death is an afterthought and we reject it.

The accused viciously stabbed the deceased on the left side of the chest, a vulnerable part of the human anatomy housing heart and lungs. He plunged a lethal sharp weapon with sufficient force to cause death. Indeed deceased collapsed barely 5 metres from the point where accused had stabbed him. Accused was not acting at the spur of the moment, he was not under any unlawful attack nor under any imminent danger but intentionally assaulted the deceased for causing him to leave the bar and detain him at the holding cells. We are satisfied that the accused has the pre-requisite *mens rea* to commit murder and stabbed the deceased on a vulnerable part of the body. Accordingly the accused is found guilty of murder with actual intent.

SENTENCE

Accused has been found guilty of murder in aggravated circumstances of killing a police detail who was carrying out his duties. He used a lethal weapon and the post-mortem report shows very serious injuries which led to the death of the deceased. Without police details, society will be anarchical and the killing of a police detail is viewed both by society and the courts as a very serious offence. Accused did not render any assistance to the deceased when deceased collapsed, accused boasted about what he had done upto this date is remorseless. The conviction calls for stiffer penalties even death penalty, but tempering justice

and mercy and looking at your physical disability I have decided against life imprisonment. Accused needlessly caused deceased's death, he would have lost nothing had he gone to the police post and clear his name. Having looked at the mitigatory and aggravatory factors before me accused is sentenced as follows:

25 years Imprisonment .

*National Prosecuting Authority, state's legal practitioners
Mugadza Chinzamba and Partners, for the accused*