

STATE
versus
NICHOLAS BERE

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 23 March and 1 April 2021

ASSESSORS: 1. Dr Sana
2. Mr Mudzinge

Criminal Trial (Murder)

Ms T. L. Katsiru, for the State
L. Mhungu, for the accused

MUZENDA J: The accused was arraigned before us facing one count of Murder and second count of Attempted Murder. In count one the state alleges that on 25 November 2019 and at Bembezeni Compound, Roscommon Estate, Chimanimani, accused shot Beware Tsarara once on the chest with an optima Shotgun thereby causing injuries from which the said Beware Tsarara died. In count two it is alleged that on the same date and place the accused unlawfully attempted to kill Shingirirai Mafake by shooting him once on the upper side of his left hand and once on the left side of his chest with an optima shotgun resulting in injuries from which Shingirirai could possibly have died.

The accused pleaded not guilty to both counts.

Facts

Accused is a resident of Bembezeni Compound Roscommon Estate, Chimanimani, where he is employed as a security guard. The now deceased and the complainant were residents of Dherude 2, Dzingire Village, Chief Muusha, Chimanimani

On 25 November 2019 deceased and a group of people approached Roscommon guardroom where the accused was on duty. The group of people was shouting. The mob damaged the entrance door of the guardroom and smashed window panes. The accused fired

12 Bore optima shotgun towards the crowd and shot deceased on the left collar bone and died on the spot. Accused jumped from guardroom through the window and whilst outside the guardroom, shot complainant on the upper side of the left chest. Complainant fell and became unconscious. Both deceased and complainant were ferried to the hospital. A post mortem report shows that the cause of death was due to *acute blood loss from the gunshot wound*. The accused in his defence outline states that on both occasions he was acting in self-defence. Whilst carrying out his lawful duties he fell under an unlawful attack from both, the now deceased and the complainant who were in the company of a mob. The mob was armed with weapons and machetes. The mob pronounced its intentions to attack the guards, and accused upon sensing danger locked himself in the guardroom. Accused was spotted inside the guardroom by a member of the mob and when the windows were broken accused perceived that the mob was determined to kill him. He resolved to escape through the windows of the guardroom and fired the firearm through the window and ran away from the scene. According to the accused the means used was reasonable in all the circumstances and his conduct on both occasions was lawful.

The question for determination is whether accused on both occasions when he shot the now deceased and complainant did so in self-defence.

Issues in common cause in the matter.

The following issues seem to be uncontroverted and palpably clear from the evidence of both the state and defence:-

- (a) There has been a fairly odd and outstanding dispute between Roscommon Estate on one hand and 3 occupants resettled by the government on a piece of land claimed by Roscommon Estate proprietor. The dispute has been attaining since 2003.
- (b) The acrimony between the parties has claimed a number of lives. Matters had been referred to civil courts but without resolution. The Government ministries had been involved but without solution.
- (c) On 25 November 2019 deceased and his group indeed approached accused at his workplace armed with among other weapons machetes, the deceased was found to be lying at a place where there were 2 machetes.
- (d) Prior to the shooting of deceased, the mob damaged the door and smashed the window panes to the guardroom
- (e) At the time deceased was shot at he was four (4) metres from the guardroom.

- (f) When complainant was shot twice, he was at least 10 metres from where accused was, well outside the guardroom.
- (g) The accused admits unreservedly causing the death of the now deceased and injuring the complainant on the date in question.

Analysis of Evidence

As already observed the crystallisation of evidence resulted in what is already spelt out above as common cause. Most of the evidence led by the state was not disputed and the bulk of it was admitted in terms of s 314 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. Taurai Mafake and complainant testified and repeated and consolidated what is in the state summary. The investigating officer Detective Sergeant Badza testified and gave a vivid clarification of issues which again turned out not to be in dispute. The only eye witness hence become the accused himself. His evidence in our view would greatly assist to show the events leading to his shooting the now deceased and complainant.

When the accused testified in court, he stated that when he got to his work place at the guardroom he got to report about the afternoon events. He was advised to be on alert. Around 2000hrs he heard dogs barking outside the guardroom and soon thereafter heard people's voice shouting and chanting slogans. He became terrified due to the nature of those people's utterances. He went on to secure the door to the guardroom. Part of the mob came to the door, and damaged it. Others smashed the window panes using machetes. The accused felt that he was going to die so he decided to fire the gun for he felt further that the mob would force entry into the guardroom. He fired the gun to scare the mob and continued to fire when he realised that the mob was dispersing. Whilst inside the guardroom he fired 6 times and according to him he directed the shots where they were people. However when he fired the first it is the bullet that shot the now deceased. When he left the guardroom he fired the seventh shot, to ascertain that it was safe to leave. He repeated that he acted in defence of self. During cross-examination and clarification sought by the court it became clear that accused shot at deceased point blank, he was seeing the now deceased when he shot him. He saw him falling. He also shot complainant from a distance of ten (10) metres not once but twice judged by the medical report produced by the state.

The accused's evidence in chief and summary of defence evinces conspicuous inconsistencies and deviations. Paragraph 2 (e) of his defence outline seem to indicate that he shot through the window to scare the mob and fired about seven times, then dashed through the window and left the scene. In his evidence in court, he did not fire randomly he aimed the

gun on the now deceased and saw him falling. He did not fire all seven shots whilst on the guardroom, the seventh shot was done whilst outside, virtually according to him when the coast was clear but in order to make sure that he would not be subjected to a surprise attack, he shot in the direction where people had fled. Medical evidence establish that complainant was shot twice and sustained two bullet wounds. If the accused discharged the gun only once whilst outside, how did the complainant sustain the second bullet wound? We are satisfied that complainant was shot at twice by the accused after the latter left the guardroom. A closer analysis of the accused's evidence shows that he faired poorly in explaining exactly what he did which led to the shooting of the deceased and complainant. His version glares with contradictions which were left unexplained to a larger extent. Although he had been invaded by the rowdy mob which had damaged the door and smashed window panes, its not clear at the time the first shot was made what form of imminent danger accused was exposed to. No warning shots were given by the accused, the first shot was on target. When accused left the guardroom he was no longer under any risk but proceeded to shoot complainant, not once but twice. The accused in his own words stated that he wanted to be sure that all was well, but patently at that point in time he was not in any form of danger at all.

Submission by Counsel.

Ms *T. L. Katsiru* for the state submitted that all facts are common cause and the crucial question according to the state is whether defence of self apply in the circumstances. She proceeded to refer the count to s 253 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] that stipulates that for the defence of self to be a complete defence to a crime committed while warding off an unlawful attack certain conditions should be met and to her the accused has failed to meet those pre-requisites. She referred this court to the matter of *S v Luke Mungoza*¹ where the court held that all the requirements encapsulated in s 253 (*supra*) should be met and that the wording of s 253 is conjunctive and not disjunctive. To the state the deceased was shot from a distances of four (4) metres from the accused and was hit on the chest. Accused did not give a warning shot and did not try to shoot on the legs, he directed on the chest, part of the body that have vital organs. The state added that by his own admission, accused could see the deceased before shooting him and when he shot at him, he immediately collapsed and died. The state further averred that although the accused may not have had the

¹ HMT 1/8

intention to kill, he should have seen the real risk and possibly that aiming at the chest the person he was aiming at would die. The same principle or approach, the state further submitted, should be applied on the charge of attempted murder. Accused was extremely reckless when he fired the seventh shot, he equally should have foreseen the possibility that when he shot towards the direction people had gone his bullet would hit someone, which it did.

The state prayed that accused be found guilty of murder with constructive intent and guilty of attempted murder in respect of count two.

To the *contra* Mr *L. Mhungu*, for the defence also conceded that most of the facts are not in dispute and posed the issue for determination as to whether or not the accused committed the offences in question or any other offences from the facts of the matter? Counsel for the accused further agreed that the appropriate section of the Criminal Law (Codification and Reform) Act, (*supra*), is s 253. He properly went on further to point out that the accused must satisfy all the requirements of s 253 for him to be entitled to an acquittal.

The defence counsel emphasised the requirements of s 47 (i) (a) of the Criminal Law (Codification and Reform) Act, (*supra*) on the aspect of accused's action and intention² from the circumstances of this, the defence submitted there is nothing to show that accused desired to bring the death of the deceased and achieved his purpose. He did not have a specific intention and purpose to kill the deceased. The defence added further in its submission that had the mob not invaded accused's work place, nothing of this sort could have occurred. The defence counsel went on to cite the matter of *S v Mhako*³ dealing with the requirements of s 47 (1) (b) the "realisation of risk or possibility of death ensuing from conduct" under the rubric of constructive intent, that is, whether an accused's conduct might give rise to the relevant circumstances; or, the relevant facts or circumstances existed when he engaged in the conduct; further, whether despite realising that risk or possibility referred, the accused continued to engage in that conduct.

Mr *Mhungu* went on to submit that accused was under an unlawful attack which was not only imminent but had already commenced. On the aspects of warning shots, the defence submitted that the accused failed to do so because he was under extreme danger and fear. His firing in the dark, it was contended on his behalf, was to scare the mob. Counsel reemphasized

² He cited *S v Memu*, HB 143/13 and *S v Mugwanda* 2002 (i) ZLR 5 &§ (5) 581 D-E

³ 2012 (2) ZLR 73

and consolidated his argument by citing s 253 (2) of Criminal Law (Codification and Reform) Act, (*supra*) which reiterates that a

“Court shall take due account of the circumstances in which the accused found himself or herself, including any knowledge or capability he or she may have had any stress or fear may have been operating on his or her mind”.

In casu, it was submitted that the court should not take an armchair approach because accused was in a desperate, fearful and stressful situation because of the conduct of the mob. The gun was thus used as a means to avert an attack, otherwise he could have been killed or sustained serious injuries.

Alternatively the defence submitted that if the accused is adjudged to have exceeded the bounds of reasonable self-defence and kills the assailants, he may be found guilty of culpable homicide, unless the excess was immoderate. It is the defence’s prayer that the accused be found not guilty of murder as well as attempted murder. Alternatively the defence prays for culpable homicide and on second count a verdict of guilty of assault.

The Law

Section 253 of Criminal Law (Codification and Reform) Act, (*supra*) provides for self-defence as follows:

“(1) Subject to this part, the fact that a person accused of a crime was defending himself or herself or another person, against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if:-

- (a) When he or she did or omitted to do so the thing, he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent, and
- (b) He or she believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack, and
- (c) The means he or she used to avert the unlawful attack was reasonable in all the circumstances, and
- (d) Any harm or injury caused by his or her conduct-
 - (i) Was caused to the attacker and not to any innocent third party and
 - (ii) Was not grossly disproportionate to that liable to be caused by the unlawful attack”

In *S v Mandizha*⁴ it was held that the onus lies on the state to prove that the appellant did or ought to have realised that he was exceeding the bounds of self-defence to sustain a

⁴ S 200/91 as per GUBBAY CJ

conviction for either murder or culpable homicide. The measures taken by the accused must be reasonable in the circumstances.

In *R v Mpofu*⁵ it was held that a person has the same right to use force in the defence of another from a threatened danger, as he has to use force in defence of himself. The onus of disproving such defence is in either case on the state. Where an accused is a youth who has acted in a moment of crisis he should be judged with greater latitude than a more mature person.

On the issue of attempted murder count the approach of courts was clearly spelt out by KORSHA JA in the matter of *Obert Tavagwisa Dube v The State*.⁶

“In as much as the intention of a person charged with an attempt to commit an offence may in English law be inferred from evidence of the surrounding circumstances, the manner of establishing the specific intent, though markedly different from the approach in our law, yields the same result.”

Though English law has always accepted that the mental element in murder is a specific intent, the intent to kill or to cause grievous bodily harm, it has not shrunk from the view that intent may be inferred from the evidence, and not least, from the probability of the result of the physical act.

Thus LORD SCARMAN said in *R v Hancock* [1986] 1 A11 ER 641(HL) at 660g.

“In a murder case where it is necessary to direct a jury on the issue of intent by reference to foresight of consequences the probability of death or serious injury resulting from the act done may be critically important. Its importance will depend on the degree of probability; if the likelihood that death or serious injury will result is high, the probability of that result may as Lord BRIDGE noted and Lord LANE CJ emphasized, be seen as overwhelming evidence of the intent to kill or injure.”

And at 651 1(a)

“The greater the probability of a consequence the more likely it is the consequence was foreseen and that if that consequence was foreseen the greater the probability is that the consequence was also intended.”

The ratio decidendi as it does, that a proposition that a person has the mens rea of murder if he knows that it is highly probable that his act will cause death or seriously bodily harm.....

“It seems to me that the approach in our law to the establishment of guilty as regards inchoate crimes, is not only eminently logical and reasonable, but also so deeply rooted that it cannot be swept aside by a stroke of the pen without deep, sober and profound reflection” (my emphasis)

The conviction of attempted murder depends, as BECK JA, put it in *R v Henderson*.⁷

“.....on whether the evidence established beyond a reasonable doubt that the appellant, when about to fire the shot that struck the complainant must have foreseen, and therefore did

⁵ 1968 (2) RLR 319 per GREENFIELD J

⁶ SC 225/92 at pp 10-11

⁷ SC 17/84

*subjectively foresee, the real possibility that he might kill (one of the men before him) but nevertheless chose to fire, reckless as to whether or not he might do so”.*⁸

Applying The Law To The Facts

The accused in his evidence in chief and under cross-examination told us that when he shot the deceased, deceased had left the window whose window panes had been damaged as well as the door which had been vandalised and had gone back to re-join his companions who were 4 metres away from the guardroom. None of the mob members attempted to scale the window, nor physically attempted to harm the accused. In our view at the time accused fired the first shot, one cannot say there was imminent danger to the accused. At that time the breaking of property had ceased and the accused was safe inside the guardroom. He then fired a shot at the deceased, he did not fire above the heads, he did not fire at a side nor fire a warning shot or shots in the air but aimed at the breast of a visible deceased. We are satisfied that the accused should have seen the real risk and possibility that by aiming at the chest the probability of a consequence the more likely it was that the consequence was foreseen, and that if that consequence was foreseen, the greater the probability that such a consequence was also intended. It was highly probable that accused’s act would cause death to the deceased.

In respect of the second count of attempted murder, as already captured herein, if an accused fired at the complainant in the appreciation that there was some risk to life involved in his action, and he was reckless as to whether or not the risk was fulfilled in death, then there was sufficient mental element for a verdict of attempted murder.⁹

The accused when he discharged the seventh shot outside the guardroom, he was no longer under any perceived threat. From the distance of 10 metres he shot complainant on the left shoulder and breast, the complainant is alive by God’s grace, he should have died right on the spot. The way the accused reacted whilst outside was in our view immoderate and unnecessary. By his own admission he fired the shot in the direction the survivors had fled. The elements of recklessness abound on the part of the accused.

Accordingly the state had managed to discharge the onus reposed on it to show that the accused failed to meet the conjunctive elements spelt out in s 253 of the Criminal law (Codification and Reform) Act and the following verdicts are returned.

On count 1: Murder: The accused is found guilty of Murder in terms of s 47 (1) (b).

On count 2: Attempted Murder: The accused is found guilty as charged.

⁸ See also S v Bhauwa SC 81/83

⁹ See Bhaiiwa v S supra

Sentence

In arriving at the appropriate sentence I will take into account what has been submitted by both your counsel and the state. You are a first offender, married with a family to look after.

The circumstances of this matter are unique in that although your action would not meet the requirements of self-defence but the accepted truth is that you were raided by a mob and you reacted to a situation although you over-reacted. You were under a deep apprehension of fear and that is very mitigatory and in your favour. You have also been found guilty of murder with constructive intent and that again is to your benefit as far as sentence is concerned. You cooperated with the police during investigations and you provided vital information which enabled the court to make a value judgment. That is to your credit.

I am aware of the sanctity of life but the conduct of the deceased and his group on the date in question is highly reprehensible, deceased was armed with machetes in order to deal with a land dispute. In a way the deceased contributed to his demise. However the situation is different from complainant, he was unfortunate for being curious, if he had not diverted his route to find why people were quarrelling, he would not have been shot. On the other hand the accused should not have discharged the seventh shot which shot the complainant. As already pointed out herein the complainant sustained two bullet wounds at the hands of the accused which in principle was unnecessary.

Having looked at the totality of all these issues, you are sentenced as follow:

Count one: 6 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition within that period accused is not convicted of any offence involving violence to the person of another to which upon conviction he is sentenced to imprisonment without the option of a fine.

Count two: 2 years imprisonment

The sentence in count two will run concurrently with that in count one.