

THE STATE
versus
LACKIA CHIRWA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 31 October 2022; 1 & 14 November 2022

Criminal trial

Assessors: Mr Mutombwa
Mr Kunaka

Ms V. Mtake, for the State
P Seda, for the accused

MUREMBA J: The accused pleaded not guilty to the charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law code). The deceased was her husband of 2 years and they had one child together.

The accused and the deceased had their own homestead in Ganje Village, Chief Kasekete in Muzarabani. The deceased's parents also reside in this village. It is common cause that on 14 February 2022 the accused stabbed the deceased with an okapi knife at night around 11pm at their home. She stabbed him in the stomach once. He immediately left for his parents' home where his mother, father and two brothers attended to him and had him ferried to hospital where he died on the following day. According to the post mortem report the cause of death was peritonitis, small intestine stab injury and severe abdominal trauma due to stab wound.

From the evidence led from the deceased's father, mother and brothers, it is common cause that the deceased did not explain to them the circumstances that led to him being stabbed by his wife. They all said that he was in so much pain that he only explained that he had been stabbed by the accused after a misunderstanding. He asked to be ferried to hospital and said that he would explain what had happened upon his return from hospital. Unfortunately, he did not return from hospital alive.

The accused person is the only person who has an account of what happened on the fateful night. Whilst she admitted to stabbing the deceased thereby causing his death, she explained that she was acting in self-defence. The accused's narration of events was that the

deceased came home drunk around 11pm while she was already sleeping with her small child. He was drunk and shouting that he would not stay with a prostitute and that he would kill a prostitute. In Shona he said; “Handigari nehure pamba pangu. Hure ndinouraya.” When he entered the bedroom hut, he pulled her from the bed and dragged her to the floor. She said there was light in the hut. Since she had a small child, she used to sleep with the light on. She said that the deceased caught her unaware when he pulled her and dragged her to the floor. She said that she fell facing up. The deceased sat on her stomach and punched her once with a clenched fist on the forehead and once on the nose. He then slapped her with an open hand on the cheek. The deceased said that she asked the accused why he was assaulting her. In response he said that she was cheating on him. At that juncture the deceased reached for an okapi knife which was in the cardboard box which had some plates.

Apparently, the accused had fallen in between the bed which was to the western side of the hut and the cardboard box which was to the eastern side. The head was to the northern side whilst her legs were to the southern side. She said that the door was to the south eastern side. The accused said that when the deceased reached for the okapi knife, he opened it with his mouth. As he was opening the knife, he was saying that he wanted to kill the accused. The deceased said that she managed to reach for a wooden cooking stick which was next to the cardboard box. She hit the knife with it just as the deceased was finishing to open it. The knife fell on the top side of where the accused was lying. When the knife fell, the accused pushed the deceased towards the door and he fell. She said that she stood up and picked the knife. Her intention was to prevent the deceased from picking the knife. She said that after she had picked the knife the deceased who was now in a standing position right behind her back held her left arm and twisted it. At the same time, he bit the back of her left shoulder from behind and did not let go. The accused said that she felt excruciating pain and the only option that she had at that moment was to stab the deceased with the knife that she was holding in her right hand. She said that at that moment in time her right hand was dropped. In that dropped position, she pushed it backwards thereby stabbing the deceased who was at her back. He let go of her and she ran out of the hut with the knife.

It was the accused’s evidence that when she ran out of the hut, she did not realise that she had actually stabbed the deceased. All she could think of was to run away from the deceased who had expressed his intention to kill her and had actually attacked her. She said that after she had run out, the deceased also came out of the hut as if he was following her. He then took the direction to his parents’ home as he shouted that he would not live with a

murderer. He however, did not say that the accused had stabbed him. The accused said that when the deceased left, she went into the bedroom hut, took some blankets and made a bed for herself and the child outside the hut, but within the yard. She put the okapi knife under the pillow and slept. She said that she did this because her fear was that the deceased would come back and attack her. She said that she felt safe sleeping outside.

It is common cause that when the deceased got to his parents' home and said that he had been stabbed by the accused, the deceased's mother proceeded to the accused home. She found the accused sleeping in the yard just as was narrated by the accused. The deceased's mother asked for the knife that the accused had used to stab the deceased with. The accused was cooperative. She gave her mother in law the knife and they both proceeded to the deceased's parents' home. She stayed with them until the police came to arrest her after the deceased had passed on.

There having been no State witness to the stabbing of the deceased, the State was not able to dispute or rebut the testimony of the accused with regards to what caused her to stab the deceased and how she stabbed him. The question that arises is was she acting in self-defence or she stabbed the deceased with the intention to kill him or she realised that there was a real risk or possibility that her conduct could cause the deceased's death and continued to engage in that conduct despite the risk or possibility?

To answer this question the State counsel said:

"In the case before the court the accused stabbed the deceased with a knife in the stomach. She did not only stab and leave the knife, she actually removed the knife and ran with it. For her to say that she did not notice that she had stabbed the deceased would be a fallacy. The accused did foresee the possibility of that by stabbing the deceased in the stomach would cause death but nevertheless persisted with her conduct (sic). It is the state's submission that the accused realised the real risk or possibility that her conduct of attacking the deceased with a knife that death would ensue and despite the realisation stabbed the deceased in the stomach. The deceased sustained severe abdominal trauma which led to his death".

The State prayed that the accused be found guilty of murder as defined in s 47 (1) (b) of the Criminal Law code. On the other hand, the accused prayed for her acquittal on the basis that she had acted in self-defence when she stabbed the deceased. The defence of self-defence raised by the accused is a defence which is provided for in s 253 of the Criminal Law code. If all its requirements are met, it can suffice as a complete or absolute defence to the charge of murder. The provision reads:

"(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 the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent; and
- (b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or 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 were 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.

(2) In determining whether or not the requirements specified in subs (1) have been satisfied in any case, 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 and any stress or fear that may have been operating on his or her mind.”

The provision shows that for the defence to succeed, the accused must prove that he or she was under an unlawful attack. An unlawful attack is unlawful conduct which endangers a person’s life, bodily integrity or freedom. See s 252 of the said Act. The defence is available as a complete defence in cases where the accused used reasonable force to defend himself or herself. If all the other requirements are met, but the means used by the accused to avert the unlawful attack on her by the deceased were not reasonable or disproportionate, the defence will suffice as a partial defence and the accused will be found guilty of culpable homicide. See s 254 of the Criminal Law Code. Self-defence therefore means that it is lawful to use reasonable force in the defence of oneself. Put differently, this is a defence based on justification that allows an accused person to use physical force to protect himself or herself from injury or death. In terms of s 253 (2) the question whether the degree of force used by the accused was reasonable is to be determined by reference to the circumstances the accused found himself or herself in including the circumstances as the accused genuinely believed them to be. The question is whether a reasonable person in the same situation would have perceived the same.

In *casu* considering the circumstances of the case, the court is not in agreement with the State that the accused is guilty of murder. It is in agreement with the defence that the accused acted in self-defence when she stabbed the deceased. It was the State counsel’s submission and argument that the accused should have pushed the deceased and escaped from the bedroom since the deceased was drunk to the extent of staggering. We do accept that in terms of our law and in particular the portion of s 253 (1) (b) which reads “...*he or she could*

not otherwise escape..”, the accused has a duty to escape before using deadly force against an attacker. Our understanding is that what this provision means is that the accused must attempt to escape if he or she can do so safely instead of using deadly force in self-defence. However, it is not in every case that the accused has to escape. To adopt such an approach would be to take an armchair approach. The circumstances in which the accused found himself or herself in on should be considered holistically.

In the circumstances of the present case what this means is that the actual stabbing of the deceased should not be taken in isolation. The entirety of the circumstances right from the time the deceased arrived home must be considered. The deceased arrived home shouting that the accused was a prostitute. He said that he would not stay with a prostitute and that he would kill her. When he entered the bedroom hut, he pulled her from the bed to the floor when she least expected it. He pinned her down by sitting on her stomach. He punched her a couple of times on the face and reached for a knife which he opened with his mouth as his other hand was pinning her down. At the same time, he was making utterances that he was going to kill her. She hit the knife with a wooden cooking stick when he had just finished opening the knife. Clearly the deceased wanted to stab the accused just as he had arrived home threatening to do. It should be noted that even after having been disarmed, the deceased went on to grab the accused left arm from behind and twisted it. At the same time the deceased went on to bite the accused's left shoulder. The bite was continuous. It was at that moment that the accused stabbed the deceased. The accused was not facing the deceased. The deceased was at her back and both were facing the same direction. She did not decide where to stab the deceased. It was a stab which was inflicted in the heat of the moment at that moment in time when the accused was in excruciating pain from the shoulder bite and the arm which was being twisted. The accused managed to show that when she stabbed the deceased, she was under attack by him. An unlawful attack on her had commenced. S 253 (1) (a) of the Criminal Law Code was therefore satisfied.

The accused used her right hand which was the only hand that was free to defend herself from the deceased. It so happened that this hand was holding the knife that the deceased had tried to use against her. Apart from simply saying that the accused ought to have pushed the deceased away and escaped from the bedroom hut without stabbing the deceased, the State counsel did not suggest how the accused ought to have done this considering that the deceased was twisting her left arm and at the same biting the shoulder of the same arm. The accused was able to physically demonstrate how the deceased was biting her on the back of her shoulder

and twisting her arm at the same time. From the demonstration that she made; it was clear that the accused's only choice in freeing herself was to use the arm that was holding the knife. The knife was the only weapon that was at her disposal and since she was already under attack, she had no option, but to use the knife. The accused was in a pressured and dangerous situation. She had to take immediate defensive action or measures the moment the deceased tried to wrestle the knife from her. She had no time to ponder upon which weapon to use as she already had the knife in her hand. G. Feltoe in *A Guide to the Criminal Law of Zimbabwe Third Edition 2004* at p 42 said:

“If a person is faced with the terrifying prospect of an attacker who's about to kill or gravely injure him, he will have to respond immediately with whatever weapons are at hand.”

Therefore, in the circumstances of this case, the accused believed on reasonable grounds that her action was necessary to avert the unlawful attack that she was already under. She had no other way of escaping from the grip of the deceased. This conduct by the accused therefore satisfies the requirement of s 253 (1) (b) of the Criminal Law Code which provides that the accused must believe 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. This also satisfies the requirement of s 253 (1) (c) which states that the means used by the accused to avert the unlawful attack must be reasonable in all the circumstances. In other words, self-defence requires that the force used be proportional to the threat faced. The accused may not use deadly force to respond to a threat that was not itself deadly. At the time the deceased attacked the accused, the accused was already holding a knife in her hand. The deceased was stabbed with the knife by the accused at the time when he was twisting her arm and biting her shoulder. She said that she was in excruciating pain. Besides, the deceased had made it categorically clear that he wanted to kill her. Deadly force is appropriate in self- defence when the attacker threatens death or serious bodily injury. In *casu* the use of the knife on the deceased by the accused was thus reasonable under the circumstances.

In terms of s 253 (1) (d), for the defence of self-defence to suffice, the harm caused by the accused must be caused to the attacker and not to an innocent third party. This is exactly what happened in the present case. The accused stabbed the deceased who was attacking her and no other person. It was just the two of them and their small child in their bedroom hut.

The accused managed to satisfy all the requirements of the defence of person that are listed under s 253 (1) (a) to (d) of the Criminal Law Code. She is therefore entitled to this defence as a complete defence. The accused is therefore found not guilty and acquitted.

National Prosecuting Authority, State's counsel
Masango Seda Mutema, pro deo counsel for the accused