

THE STATE

Versus

SITHEMBISO MZIZI

IN THE HIGH COURT OF ZIMBABWE

KABASA J with Assessors Mr. P M Damba and Mr. E Mashingaidze
HWANGE 19 AND 22 OCTOBER 2021

Criminal Trial

K Jaravaza, for the State

L Nyamapfene, for the accused

KABASA J: The accused is charged with murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. She pleaded not guilty.

The state alleges that on 30 March 2019 at around 2130 hours the accused and deceased were drinking beer at Zenzele Mazwi bottle store when a misunderstanding ensued between them. The accused then stabbed the deceased with a broken bottle once on the neck resulting in him sustaining a deep cut from which he bled profusely. The deceased was ferried to Mpilo Hospital but succumbed to his injuries shortly thereafter.

A post-mortem conducted by Doctor Jekenya on 31 March 2019 concluded that the cause of death was:-

- a) haemorrhagic shock
- b) neck major blood vessels cuts and lung injury
- c) callous neck stabbing

In her defence the accused did not deny inflicting the injury which led to the deceased's death. She however explained that she acted in self defence.

The issue therefore is whether she delivered the fatal stab wound in a bid to save herself from an unlawful attack.

At the start of the trial the following were produced by consent:-

1. The broken pieces of a beer bottle
2. The post-mortem report
3. The accused's confirmed warned and cautioned statement.

Evidence was then led from three state witnesses and the evidence of eight witnesses was admitted in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07. The witnesses whose evidence was so admitted are:-

1. Obadiah Dumbu
2. Mbongeni Mpofu
3. Israel Rugare
4. Simbarashe Muchenjekwa
5. Nobuhle Sikhosana
6. Simbarashe Sithole
7. Enita Magumo
8. Thokozani Moyo

The cumulative effect of the evidence from the witnesses who testified and those whose evidence was admitted in terms of section 314 of the Criminal Procedure and Evidence Act showed that the following was not in dispute:-

1. The accused and deceased were at Zenzele Mazwi bottle store in Pumula East on the day and time in question.
2. The two had a misunderstanding.
3. That misunderstanding culminated with the stabbing of the deceased with a beer bottle which the accused broke first.
4. The deceased sustained a neck injury from which he bled profusely and later succumbed to the injury at Mpilo Hospital where he had been ferried to.

The question is, was the accused acting in self defence when she stabbed the deceased.

Section 253 of the Criminal Law (Codification and Reform) Act, Chapter 9:23 sets out the requirements for the defence raised by the accused. Where such requirements are fully met self defence amounts to a complete defence.

These requirements are:-

1. The accused must be under an unlawful attack.
2. Such attack must have commenced or was imminent.
3. The accused's conduct must be necessary to avert the attack after exploring all avenues of escape.
4. The means used to avert the attack are reasonable in all the circumstances.

5. The harm or injury caused to the attacker is not grossly disproportionate to that liable to be caused by the unlawful attack.

The 3 state witnesses who testified did not see the deceased attacking the accused. The first state witness was Rebecca Dube. She regards the accused as her sister and was at the bottle store on the night in question. This witness said she was sitted outside when the accused arrived and went inside the bottle store. After finishing her beer the witness went inside the bottle store to return the empty bottles. On her way out she observed that the accused and the deceased were having a verbal spat. The accused was leaning against the wall whilst the deceased was facing her. She remonstrated with them asking why they were quarrelling but did not hear the response. The accused then smashed a bottle and stabbed the deceased. The deceased leaned against the wall and tried to hit the accused with the bottle he was holding but missed her. The witness felt something warm on her arm and later realised it was blood.

We were satisfied this witness gave her evidence well. She was known to the accused but did not know the deceased. She could easily have testified in a manner favourable to the accused had she been bent on embellishing her evidence. Her evidence was short and to the point and she fared well under cross-examination.

It became clear that the accused was near the entrance at the relevant time and the witness's testimony that she could have left had she wanted to makes a lot of sense. This witness was on her way out when the bottle was smashed and the deceased stabbed. She was close enough to the two as evidenced by the blood on her shoulder.

Whilst she did not know how the misunderstanding arose, as at the time of the stabbing the accused was not under attack from the deceased. The place

was well lit and she could see. She was also not drunk for it to be suggested that her drunkenness militated against her ability to comprehend what was happening around her.

Her evidence was materially corroborated by Sihle Zulu, the second state witness. This witness is the accused's friend and they had been drinking at the accused's house before they later made their way to this bottle store. This witness went there first and accused later followed. There was music playing and people were dancing. She then noticed that the accused and deceased were having a misunderstanding. She heard the deceased saying 'I do not want you' to which the accused responded that she also did not want him. The accused then insulted the deceased by his mother's private parts. The accused was leaning against the wall whilst the deceased was facing her. Both had black label beer bottles in their hands. The accused then smashed her bottle and stabbed the deceased who fell to the ground close to where the witness was. She then called David and one Mgcini to come and assist the deceased.

It was suggested that there were inconsistencies between the two witnesses' evidence. The only inconsistency, if it can be called that, was in relation to what deceased did after he was stabbed. The first witness said he tried to hit the accused but failed whilst this witness said he promptly fell to the ground bleeding profusely. The second witness also mentioned what she heard the two say to each other which the first witness did not say. Given that the first witness was not inside the bottle store until she went in to return the empty bottles, it cannot be said she ought to have heard this verbal exchange.

The discrepancy on the deceased's reaction after he was stabbed is not of any great significance and did not detract from the overall credibility of both witnesses.

Even if the deceased did try to hit back, the point is the fatal blow had already been delivered.

Like the first witness, the second witness is accused's friend and so she enjoyed a good relationship with her. Had the deceased been the belligerent aggressor who had cornered the accused whilst attacking her surely this witness would have seen that and would have had no reason to state otherwise. She however said she never saw the deceased raising his hand to the accused, all there was, was this verbal spat before the breaking of the bottle and the subsequent stabbing.

Both witnesses said the place was well lit and there was nothing militating against their ability to see. She too was not drunk so as to cast doubt as to her ability to focus and observe.

We were satisfied this witness was a credible witness who did not seek to exaggerate what she observed.

The last witness was David Ndlovu, the one accused said offered her a sip from his beer bottle and remonstrated with the deceased when the deceased insulted the accused and slapped her with an open hand.

David however said he was outside the bottle store but the deceased had at one stage approached him complaining about a lady who was bothering him. Thereafter patrons started fleeing from the bottle store and Sihle Zulu, the second witness, informed him of what had befallen the deceased. His attempts to render first aid were in vain and the deceased succumbed to his injuries shortly after they had taken him to hospital.

If David was in the bottle store and witnessed the altercation between the accused and deceased would Sihle have needed to call him? We think not.

Whatever the cause of the misunderstanding between accused and the deceased, the fact is the witnesses did not see the accused being attacked warranting her reaction of breaking a beer bottle and stabbing the deceased.

David regarded the deceased as his brother-in-law and so could have easily placed himself at the scene of the attack but he did not.

We were unable to find fault with David's testimony. He appeared to have restricted himself to the little he knew and no more.

In analysing these witnesses' evidence we did not lose sight of the accused's version of what happened. We are mindful of the fact that the accused need not convince the court as to the truthfulness of her story, whatever explanation she gives, no matter how improbable it may be, the court cannot dismiss it unless it has been shown to be not only improbable but beyond doubt false (*R v Difford* 1937 AD 370).

In her defence outline the accused painted a picture of one who was cornered, had nowhere else to turn to and so lashed out in order to save herself. A reading of her defence outline was clearly meant to cover every aspect of the self defence requirements as stipulated in section 253 of the Criminal Law Code.

However in her confirmed warned and cautioned statement, which defence counsel initially wanted to object to but later withdrew the objection, the accused said:-

"I admit to the charge levelled against me. What happened is that I was given some beer by a man whom I knew as Givy but his real name is David. The now deceased then said, why are you giving prostitutes beer. David reprimanded the now deceased saying he should not do that to our sister. Having said that, the now deceased stretched out his hand and slapped me on the face. He then slapped me again. At that stage, he

threw a bottle at me and I dodged. At that time, I was annoyed by the behaviour of the now deceased. I then broke the beer bottle I was holding against the wall and I stabbed the now deceased once on the neck.”

This narration does not speak to a person who was under attack and cornered to the extent that she had no avenue of escape. She said the bottle was thrown at her. This in itself suggests that there was some distance between the two, more so when one has regard to the fact that she said she dodged the bottle. If they were so close and she was cornered as she would have the court believe, the deceased would have simply hit her with that bottle whilst holding it, making no room for dodging.

Equally interesting is the fact that this statement was recorded on 2nd April 2019, a day or so after the incident. This was the first opportunity the accused had to tell her own version of what had happened. Curiously she makes no mention of the fact that her use of the broken bottle was so as to ward off an attack. She said she was annoyed and that is what caused her to break the bottle and stab the deceased.

If she was indeed cornered with no room of escape, such would have come out in her warned and cautioned statement.

Even if it were to be accepted that the deceased slapped her, was breaking a bottle and using it to stab a human being on the neck, an undoubtedly vulnerable part of the body, commensurate with whatever attack she perceived herself to be under? Certainly not. The injury caused to the deceased was grossly disproportionate to the harm the accused said she feared. What possible harm could a slap cause to warrant breaking a bottle and inflicting the injury which took the deceased’s life? The accused sought to explain why she decided to break the bottle before stabbing the deceased by saying she only wanted to

scare him. As to why she directed the blow to the neck she said she could not see as it was dark and so did not really aim at the neck.

We find this untruthful. This is so because the witnesses said the place was well lit. They could see clearly what was happening and we are not persuaded to accept that the first witness only saw that it was blood when she went out of the bottle store because it was too dark for her to see whilst inside the bottle store. If she was cornered and could not move away, what militated against her seeing where she was stabbing? This incident occurred in town not a rural set-up where there could be the possibility that the facility would not have electricity.

By seeking to underplay the breaking of the bottle and aiming it on the neck with such severe force that she cut the major blood vessels extending to the lung, the accused showed her lack of truthfulness. She could see clearly and aimed her blow at the neck fully aware of what she was doing.

In *State v Farai Kapenga and Anor* HH 14-2018, HUNGWE J (as he then was) had this to say regarding self defence: -

“The question whether an accused can successfully claim the defence of private defence is determined by examining objectively the nature of the attack and defence to determine whether they conform to the principles of law that are set out above. This means that each requirement of the attack and defence must be judged from an external perspective rather than in terms of the accused’s perceptions and his assessment of the position at the time he resorted to private defence. In applying this test the court must be careful to avoid the role of arm-chair critic weighing the matter in the secluded security of the court room. Instead the court must adopt a robust attitude, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence. See *S v Ntuli* 1975 (1) SA 429 (A) at 436 D.”

That said, we have demonstrated that the accused's actions as clearly shown in her confirmed warned and cautioned statement, were precipitated by annoyance and not fear of an attack. The calculated move to smash the bottle and plunge it into the deceased's neck speaks to that annoyance. She wanted to teach him a lesson.

She said she only wanted to cut him a little bit and yet the force used resulted in "a 40mm vertical skin wound just to the right and below the voice box (Adam's apple) area of the right neck. The wound moves downwards, inwards and to the left. It ends by making a 10mm wound on the surface of the left lung apex and about 14mm deep in the lung. The right brachiocephalic artery and superior venacava cut on the right and on crossing to the left the left carotid is cut. The distance from the skin wound to the end in the left lung apex is about 9cm."

Such an injury could only be described as having been as a result of plunging that broken bottle into the neck and not a mere cut with the force commensurate with making or causing a mere cut. Granted the doctor's use of the words "callous neck stabbing" does not guide the court in terms of the intention but it merely speaks to the force used to inflict the kind of injury observed by the doctor.

The accused still sought to underplay the force used by saying:-

"I do not know what happened but I am on medication and have no energy in me at all." No energy at all and yet she was able to smash the bottle and plunge it into the deceased's neck with enough force to cause the kind of injury as detailed in the post mortem? We got the distinct impression that the accused was being untruthful. We therefore preferred the witnesses' evidence over hers as regards the attack on the deceased.

It is therefore not adopting an arm-chair approach to hold that the accused was not defending herself when she inflicted the fatal injury. There could have been provocation but there is nothing to show that she completely lost her self-control and so lacked the requisite intention. She actually said she was not offended by being called a prostitute as she is used to such name-calling when in bars. It follows therefore that whatever provocation there was, it did not make her lose self-control.

That said, can it be said the accused desired death and that was her aim and object (*State v Herold Moyo* HB 19-17). There is no doubt a broken bottle is a lethal weapon and when used with force to strike a vulnerable part of the body, dire consequences may result, as happened *in casu*.

However in *State v Mugwanda* 2002 (1) ZLR 547 (S) CHIDYAUSIKU CJ stated that for a verdict of murder with actual intent, a trial court must be satisfied beyond reasonable doubt that the accused desired to bring about the death of the victim and succeeded in doing so.

We are not satisfied such has been proved. However given the weapon used, the part of the body stabbed and the force used, the accused must have realised that there was a real risk or possibility that her conduct may cause death but continued nonetheless despite that risk or possibility.

In the result the accused is found guilty of murder as defined in section 47 (1) (b) of the Criminal Law Codification and Reform) Act, Chapter 9:23.

Reasons For Sentence

In assessing sentence I take into account what defence counsel said. You are a 56 year old female first offender. You are a bread winner and look after 5 grandchildren.

You are of ill health and prison is likely to impact on you more than it would on a relatively young and healthy individual.

You expressed regret for your actions and you also took responsibility for the funeral expenses. The knowledge that you took a life is likely to haunt you for the rest of your life.

Although there is no evidence that you were intoxicated, not that voluntary intoxication would have availed as a defence, the fact is you had taken some alcohol and alcohol does tend to make one excitable and to some extent numb one's ability to exercise self restraint.

You also said being called a prostitute did not provoke you. There was however some measure of provocation which resulted in the verbal spat between you and the deceased.

Aggravating is the fact that a young life was needlessly lost. At 20 the deceased was in the prime of his life.

Your conduct has caused pain to his loved ones. Society frowns at the use of violence to resolve disputes and it is the duty of the courts to ensure the message is sent out loud and clear that the use of violence can never be tolerated.

Life is a gift given to each one of us once and once taken it cannot be given back. No one must lose their life at the hands of another.

The use of a broken bottle to stab another human being denotes a callousness that cannot be condoned.

In assessing the length of imprisonment however the court must never assume a vengeful attitude (*S v Tsibo Ndlovu* HB 46-96).

Tampering justice with mercy is an approach that shows compassion but not necessarily maudlin sympathy for the offender. (*S v Rabie* 1975 (4) SA 855)

In *S v Chishakwe* HH 17-20, which the state referred to with regards to the appropriate sentence, a sentence of 20 years imprisonment was justified in that the aggravating factors outweighed the mitigatory ones whereas *in casu* I find that the mitigatory factors outweigh the aggravatory ones. The courts have also always treated women offenders with some measure of leniency.

For these reasons you are sentenced to 10 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Masiye-Moyo & Associates (Inc. Hwalima; Moyo & Associates) accused's legal practitioners