

THE STATE
versus
LUCAS CHAWATAMA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 27, 28 January & 25 February 2022

Assessors: 1. Mr Gweru
2. Mr Nish

Mr B. E Mathose, for the state
Mr O. Mafa for the accused

Criminal Trial

MAWADZE J: The accused is arraigned for contravening section 47 (i) of the Criminal Law (Codification and Reformed) Act [*Chapter 9:23*] which relates to murder.

The charge is that on 12 April 2021 at Village 24, Mukosi Resettlement scheme, Chief Nyajena Masvingo the accused intentionally and unlawfully caused the death of Tinago Chikunda, his brother in law, by stabbing with a knife on the neck once.

At the material time both the accused and the now deceased were 46 years old and residing in the same village, that is, village 24 Mukosi Resettlement Scheme, Chief Nyajena Masvingo. The now deceased was a brother in law to the accused.

The facts leading to the now deceased's death is largely not in dispute. They can be outlined as follows;

On 12 April 2021 there was a gathering of villagers called "nhimbe" or "humwe" in Shona where villagers team up to assist another villager in performing certain field chores and would be

offered food and beer. *In casu* they were harvesting rapoko. The accused, the now deceased and the now deceased son Taruvinga Chikunda were part of the villagers. They also drank the beer.

After harvesting the rapoko the accused who was using a scotch cart proceeded home with his nephew Taruvinga Chikunda. Whilst on the way the accused and Taruvinga Chikunda had a misunderstanding which resulted in a fight. Taruvinga Chikunda was assaulted by the accused and decided to go to his father the now deceased to whom he made a report. The now deceased teamed up with his son Taruvinga Chikunda and confronted the accused.

During the altercation the accused proceeded to stab the now deceased in the neck killing him instantly. Taruvinga Chikunda's finger was also cut.

The defence by the accused is one of self-defence.

The accused's version is that the now deceased and his son Taruvinga Chikunda teamed up to assault the accused. The accused said his private parts were pulled by the now deceased and Taruvinga Chikunda who also throttled him. The accused said he had no option but to stab the now deceased in order to free himself.

The cause of the now deceased's death is not an issue. As per exhibit 1 the post mortem report compiled by Dr Zimbwa who examined the now deceased observed the following injuries;

1. *"Single stab wound on left carotid area ± 1 cm wide, 3cm deep with severance of carotid artery*
2. *Catastrophic bleeding"*

The cause of the now deceased's death was haemorrhagic shock arising from the stab wound.

The accused in his confirmed warned and cautioned statement exhibit 3 gave virtually the same account as his defence outline Annexure 'B'.

The evidence of Dr Zimbwa who examined the now deceased's remains and compiled the post mortem report exhibit 1 and that of sergeant Tendai Chibaya was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Sergeant Tendai Chibaya attended the crime scene, observed the injuries on the now deceased and recorded accused's confirmed warned and cautioned statement exhibit 2.

The state led evidence from Taruvinga Chikunda deceased's son, Svinurai Chikunda who was regarded as an elder brother to the accused and an old woman and fellow villager Dzidzai Viyayi.

The accused gave evidence and did not call any witnesses.

The narrow issue which falls for determination *in casu* is whether the accused acted in self defence as provided for in section 253 of the Criminal Law (Codification and Reformed) Act [Chapter 9:23] which would absolve him of any criminal liability.

There is no doubt that both the accused and Taruvinga Chikunda were drunk on the day in question. This explains why both of them even failed to explain the cause of their initial altercation.

All the accused and Taruvinga Chikunda could recall is that they ended up having a physical altercation whose cause they totally failed to explain.

Further it is also why both Taruvinga Chikunda and the accused could not give a coherent account of how the now deceased was fatally stabbed. Taruvinga Chikunda sought to minimise the role played by his father the now deceased whom he said just watched as Taruvinga Chikunda and the now deceased had an altercation for the second time.

The accused on the other hand could not coherently explain as to why he returned to the scene where the now deceased was later fatally stabbed after being initially restrained by one Svinurai Chikunda. Again, the accused sought to down play his role.

We are more inclined to accept the testimony of Dzidzai Viyayi (Dzidzai).

Dzidzai is a fairly old woman and related to both accused and deceased. She was sober. Dzidzai has no need to take sides in this matter.

The evidence of Dzidzai is that whilst at her homestead she heard Taruvinga Chikunda and the accused shouting at each other near her homestead. She then observed the two wrestling. This caused her to rush and intervene by pulling Taruvinga Chikunda away. Dzidzai said Taruvinga Chikunda then ran to pick a log at her residence but she held on to Taruvinga Chikunda.

The critical part of Dzidzai's evidence is that both accused and the now deceased then charged towards each other in a very violent manner. She said the two held each other and wrestled to the ground. Dzidzai said because of the fierce nature of the fight she ended up fleeing from her homestead. At a distance she turned and saw the now deceased running away but the deceased fell down. The now deceased passed on immediately.

There is therefore no eye witness as to how the now deceased was stabbed. There is no basis to reject accused's evidence that the now deceased throttled him and also pulled his private parts.

We are inclined to give the accused the benefit of the doubt that he was under unlawful attack. We have no basis to reject accused's evidence that he was being throttled and his private parts pulled. This caused accused to pull out a knife which he used to stab the now deceased in order to free himself.

The only question which remains is whether the accused used reasonable means to avert the unlawful attack and whether the use of a knife was proportionate to the attack.

It is our considered view that the means accused used to avert the unlawful attack was unreasonable. Critically the accused directed the knife on to the now deceased's neck instead of other non-vulnerable part of the body whereby he could simply inflict pain to cause the now deceased to release him. Further the accused used severe force as the knife penetrated the neck some ± 3 cm deep severing the carotid artery. The deceased died instantly.

While the accused was entitled to defend himself from the unlawful attack and was unable to escape from the now deceased's grip the means he used to avert the unlawful attack was clearly unreasonable in the circumstances. It was also disproportionate to the unlawful attack.

The defence of self defence as provided for in section 253 Criminal Law (Codification and Reformed) Act [*Chapter 9:23*] is not fully available to the accused as he failed to meet all the requirements of that defence.

At the end of the day all the evidence points to a partial defence to murder as provided for in section 254 Criminal Law (Codification and Reformed) Act [*Chapter 9:23*]. The accused was thus negligent in how he proceeded to defend himself.

The accused therefore should be found not guilty of murder but guilty of a permissible verdict of culpable homicide.

In the result we have therefore entered the following verdict;

VERDICT:

Guilty of contravening 49 of the Criminal Law (Codification and Reformed) Act [*Chapter 9:23*]: - Culpable Homicide

SENTENCE:

The accused now stands convicted of culpable homicide. The reasons for judgment are clear as to the basis of that conviction.

The now deceased is equally to blame for this tragic incident. He should not have sought to resolve the patently minor dispute in a violent manner. In fact the now deceased became entangled in a dispute essentially between his son and the accused. Further he went on to pull the accused's genitals and also throttling him. All the accused did was to fail to act in a reasonable manner in defending himself otherwise the law recognises one's right to self-defence as a complete defence.

Unfortunately the accused will now live with the stigma that he has the blood of his brother in law on his hands. This may weigh heavily on his conscience.

The accused is indeed contrite. He admitted to have used the knife. In addition to that he contributed towards the funeral expenses and has since paid seven beast out of the twenty five demanded as compensation.

The accused is a first offender. His 5 children, four of whom are minors would be greatly prejudiced if he is incarcerated as they rely on his manual labour. The burden to support them now solely rest on the wife of the accused's shoulders.

It is aggravating that a life was lost as a result of the accused's conduct. The accused should have exercised restraint and be the voice of reason between the feuding parties.

A knife is a lethal weapon. Severe force was indeed used as it severed one of the neck arteries causing instant death. It is important for the court to pass deterrent and exemplary sentences. This would send the clear message that life is sacrosanct.

The accused is therefore sentenced as follows;

“3 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition the accused does not commit within that period any offence involving the use of violence upon the person of another and or any offence involving the negligently causing the death of another through violent conduct and for which accused is sentenced to a term of imprisonment without the option of a fine.

Effective sentence: 2 year imprisonment”.

*National Prosecuting Authority, counsel for the respondent
Mutendi, Mudisi & Shumba, pro deo counsel for the accused*