

THE STATE
versus
TINASHE NYAKUDYA

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 17 &19 June 2019 and 11 &18 February 2022

Criminal Trial

A Chogumaira, for the state
T Chiminya, for the accused

FOROMA J: The accused pleaded not guilty to a charge of murdering one Witness Chisora on 15 September 2018 at Chiruma 1 Village Chief Nyamaropa Madziwa. It was alleged that the accused axed the deceased on the head when deceased forced his entry into one Talent Kanyongo Madziwa's bedroom where the accused was sleeping with the said Talent. The deceased on being struck on the head sustained a deep cut from which the deceased died.

Accused pleaded not guilty to the charge and claimed that he fought deceased in self defence.

The state led oral evidence of one Talent Kanyongo (hereafter called Talent) who it is common cause was in a relationship with the accused at the time the deceased was axed to death. Talent testified that on this fateful day the accused had been in her bedroom on her invitation and they were sleeping and undressed when deceased arrived at her residence and demanded that she let him in which she objected to. Deceased forced his way in armed with a brick which he hurled at and missed both the witness and the accused and broke to pieces. Accused immediately picked up an axe.

When accused was missed by the brick which broke to pieces he picked up an axe. When the witness realized the accused was going to axe the deceased she fled out of the room. Talent claimed that when deceased entered her bedroom he started tussling with the accused for possession of the axe. She did not witness how the deceased was struck with the axe.

According to this witness the deceased was once Talent's living in boyfriend but their relationship had been terminated by her which termination the deceased did not accept. For this reason deceased persisted in his attempt to revive the relationship and refused to acknowledge that she was in a new relationship with accused. In cross examination Talent claimed that the

deceased and accused tussled for possession of the axe and during the tussle the deceased threatened to kill the accused. At the commencement of the State case the state obtained the defence's consent to the production of the evidence of Marshall Mucheza, Maxwell Patsika and Wesley Zimbonja as summarized in the summary of state's evidence in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

In summary Marshall Mucheza's evidence was that on the night of the 14 September 2018 he had heard a male voice demanding that Talent let him in and heard the door being forced open. Later on he heard some footsteps of a person running in the North Westerly direction before Talent collected a torch from him. On 15 September in the morning he found deceased's body in Talent's room when he was collecting a solar panel from the said bedroom. The deceased had a deep cut on top of his head. He informed a neighbor one Munetsi Kachokoto about the deceased's body in Talent's bedroom before informing the village head who in turn called the police. Maxwell Patsika a member of the ZRP stationed at Mt Darwin ZRP received a report of murder at about 8.45 on 15 September 2018 and went to attend the scene. He too observed a deep cut on top of the deceased's head and blood was oozing from the wound. He was shown the blood stained axe by Talent who also made some indications and ferried the deceased's copse to Mt Darwin Hospital where the deceased was pronounced dead by Doctor Walter Nyazondo.

The evidence of Wesley Zimbonja was basically similar to that of the investigating officer. He collected the accused who had been arrested by ZRP Shamva and got him to make some indications at the scene from which he drew a sketch plan. He also recorded a cautioned statement from the accused which statement was confirmed by the magistrate.

The state also had the post-mortem report admitted by consent as an exhibit. The post mortem report was produced and marked Exhibit 1. According to exhibit 1 Dr Nyazondo carried out an autopsy on the remains of the deceased and considered that the cause of death was a deep cut head injury.

The accused's confirmed warned and cautioned statement was produced and marked exhibit 2. The state closed its case after producing the foregoing evidence and the oral testimony of Talent

Accused testified on oath and adopted his defence outline as his evidence in chief in defence to the charge. It is significant to note that the oral testimony of the accused is corroborated in the following material respects by Talent

1. That earlier on before deceased came to her residence the deceased had called on Talent's mobile and the accused and deceased quarrelled on the phone with each accusing the other of interfering with his relationship with Talent. Deceased was alleging that accused had snatched Talent from him and the accused was demanding that deceased stop dating Talent whom he regarded as his girlfriend. Accused's testimony was also corroborated by Marshal Mucheza who testified that a man who turned out to be deceased had forcibly opened the door into Talent's bedroom and that the deceased was axed on the head and he died in talent's bedroom from a deep cut on top of his head.

It is important to note too that the accused did not testify to deceased throwing a brick at both accused and Talent which according to Talent on missing them both broke to pieces. Neither did accused testify to any tussling with deceased for the axe as suggested by Talent in her evidence. The court finds Talent's evidence to be unreliable in all the respects that it does not reconcile with that of the accused's version of the events of 15 September as narrated in accused's warned and cautioned statement. Accused in his warned and cautioned statement alleges that as accused was forcing his way into Talent's bedroom deceased was threatening to assault him but not to kill him. (Underlining is for emphasis. Accused closed his case without calling any witness

Analysis of evidence

It is common cause that the deceased demanded and forced entry into Talent's bedroom where the accused felt he was lawfully invited by Talent as the owner of the room. The mere fact that the two (accused and deceased) had earlier on engaged in an exchange on the mobile phone would have made the arrival of deceased at Talent's residence a risk to accused. The issue is what was the nature of the risk? Was it a risk to his life or mere bodily harm considering the deceased threatened to assault accused for "snatching his wife." The state in its summary of evidence regarded Talent to have been seeing both men as her boyfriends at the same time. The court does not accept Talent's claim that her relationship with deceased had long terminated. Such claim is not considered to be a truthful position. Here is a woman who on account of her double dating had caused the demise of one of the boyfriends at the hands of the other. In an effort to play an innocent girlfriend Talent found it easy and convenient to claim

that the deceased was an ex-boyfriend who would not accept the termination of his relationship with her.

That notwithstanding the question remains was the accused justified to kill the deceased on account of his claim to self defence?

Section 253 of the Criminal Law (Codification and Reform Act provides the requirements for the defence of person (self defence) to be a complete defence. The section reads as follows:

“253 (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;
- 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 other 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 requirement specified in sub section (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 him or her mind.”

In casu when the deceased broke into Talent’s bedroom where accused was the deceased only threatened to assault the accused and not to kill him. The court accepts the threat was of an unlawful attack for the purpose of s 253 (1) of the Criminal Law (Codification and Reform) Act aforesaid and that it (the threat) had commenced or was imminent. Having accepted that the unlawful attack had commenced the next inquiry is/was accused’s conduct necessary to avert the unlawful attack and could the accused not otherwise escape from or avert the attack and did the accused believe on reasonable grounds that his conduct was necessary to avert the unlawful attack and could he not otherwise escape from or avert the attack? Considering that Talent managed to escape no explanation has been advanced why accused could not similarly escape. Besides no evidence independently exists or was led to establish that the deceased was armed with a lethal weapon. No justifiable reason exists or was given to justify the accused axing the deceased on the head which clearly was an act with foreseeable

consequences of death. As death was foreseeable it can scarcely be argued that killing the deceased was not grossly disproportionate to the threat of assault.

Accused never considered the possibility of escaping from the unlawful or averting the attack.

It is accordingly the finding of this court that accused's conduct was grossly disproportionate to that liable to be caused by the unlawful attack. The accused ought not to have directed his blow to the vulnerable part of the human anatomy where loss of life was the most probable consequence. He could easily have targeted other parts of the lower anatomy like the legs in order to immobilize the attacker to enable him to escape alternatively he should have avoided using the axe and instead use the axe handle.

It is therefore this court's considered view that the accused in all the circumstances exceeded the boundaries of self defence. In the circumstances and regard being had to s 254 of the Code the means accused used to avert the unlawful attack were not reasonable in all the circumstances.

Accused is accordingly found guilty of Culpable Homicide and is acquitted of murder. Although the convicted person was charged with murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] he has been convicted of culpable homicide as defined in section 49(a) of the said Code. The court found that although the convicted person was entitled to defend himself from an unlawful attack by the deceased the means he used to avert the unlawful attack were not reasonable in the circumstances as he used an axe (a dangerous weapon) which he aimed at a vulnerable part of the body (the head). The court also found that (the convicted person did not attempt to escape yet Talent this woman over whom deceased and the convicted person were fighting over) had successfully escaped from the room.

The deceased in a sense was the aggressor in that he sought to attack another man whom he knew was being entertained by his erstwhile girlfriend in (order to patronise the woman). It is unfortunate that two mature men were prepared to fight over a woman in these days of the HIV and AIDS scourge when their discovery that a girlfriend was not faithful would have been a blessing in disguise as that should have presented an opportunity to protect oneself from the risk of HIV infection by immediately putting an end to the relationship with the unfaithful woman. Instead of doing the right thing both men (deceased and the now convicted person) stubbornly stuck to their *guns* at the risk to life and *limb*

The court has a duty to protect every person's right to life which right is sacrosanct as envisaged Section 48(1) of the Constitution of this country. The deceased's life was needlessly lost in this case. While the convicted person by committing the offence (he stands convicted of) has exposed his dependants that is, minor children and his own widowed mother to unnecessary hardship as he was their bread winner when he is taken away from them through a sentence of imprisonment the deceased's dependents have similarly been deprived of their sole provider by the offender. In this matter the court has to carefully balance the interests of the society which has wrongfully been deprived of its member and those of the offender who must content with punishment when he would have considered himself entitled to protect himself from the unlawful threat posed by the deceased. It is a universal principle of sentencing that the punishment should as far as possible fit both the crime and the offender taking into account the injured societal interests. Indeed every punishment should reflect a measure of mercy on the part of court when all circumstances are taken into account.

The offender is in the class of youthful offenders as he was 28 years of age at the time of commission of the offence. The court finds itself in complete agreement with defence counsel's submission that the offence was not pre-planned. This is evident from the fact that as soon as deceased arrived at Talent's bedroom demanding entry both Talent and the offender made an effort to keep the deceased out by resisting the deceased's forceful attempts to push open the door in the hope the door would remain closed and prevent deceased from entering the room where the offender and Talent had been sleeping. Even though the offender was entitled at law to defend himself the court does not lose sight of the fact that deceased was not armed. It will be assumed in the offenders favour that he would not have been able to tell whether the deceased was armed or not and if so with what kind of weapon. However the fact that the offender would have been pre-occupied with his own defence cannot avail him much given that the deceased threatened to beat up the offender and not to kill him. In his warned and cautioned statement the offender says:

“The moment he stepped inside the hut, I then struck him once on the head with an axe”

Clearly the offender did not observe any lethal weapon in the deceased's possession which would have justified his use of the lethal weapon (the axe) directing the blow to deceased's head which as indicated herein above is regrettably a vulnerable part of the human anatomy.

The State considered it aggravating that the offender caused a loss of human life and indicated a sentence of 20 years imprisonment. In the circumstances of this case the sentence urged upon by the State would in our view be unduly harsh and would have the effect of breaking the offender. Although the defence counsel did not indicate the type of sentence that it considered appropriate it is the court's view that any sentence other than an effective imprisonment would be inappropriate and a travesty of justice.

The message must be sent in the clearest of terms that human life is sacrosanct and the courts will jealously guard against its unjustified loss. In assessing an appropriate sentence in this case the court has been guided by the case of the *State v Innocent Shongani Mutayi HMT* 2/18 a judgment of MWAYERA J as she then was and finds that a short imprisonment sentence would meet the justice of the case.

The offender is accordingly sentenced as follows:-

you are sentenced to six (6) years imprisonment two (2) years of which are suspended for 5 years on condition you are not during the said 5 years convicted of an offence involving assault on the person of another and for which you are sentenced to imprisonment without the option of a fine or community service

Effective sentence 4 years imprisonment.

*National Prosecuting Authority, state's legal practitioner's
Chiminya & Associates, legal practitioners for the accused*