

THE STATE
versus
ALUWISI JOE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 6 June 2019, 23 & 28 March 2022

Criminal Trial

Ms HV Huni, for the applicant
Mr Mabhaudhi, for the respondent

FOROMA J: The accused Aluwisi Joe has been charged with the murder of Solomon Munyezi whom it is alleged he stabbed with a knife on the chest resulting in the deceased sustaining an injury from which he died.

Accused pleaded not guilty to the charge raising the defence of provocation alternatively self defence.

The State produced the post mortem report which was admitted by the accused and was marked Exhibit 1. The post mortem report established the cause of death as

- (1) hypovolemic shock
- (2) Pulmonary vein rupture and
- (3) Stab wound injury on left chest.

The State led evidence from 3 witnesses and closed its case. The first witness was one Petty Mupinga (hereinafter called Petty) a resident of Mhakwe Village in Hwedza where she resided with her child and grandparents. On the day in question the accused passed by her grand parents' homestead. The witness claims that he wanted to ask for some cigarette from her grandfather but did not get it. He then left for his residence before returning not very long after his initial departure. Petty Mupinga testified that when accused returned he was in the company of the deceased. She claimed that the deceased appeared drunk. While in her grandmother's kitchen the deceased was rowdy and demanded to know who between the deceased and accused she loved and she claims that she declined both of them indicating she was not in love with one of them. A quarrel

developed between accused and deceased and as it seemed to drag on she announced that she needed to go to bed as she needed to get up early and prepare the child to go to school. Later that evening in about an hour she was woken by her grandmother in order to follow the accused who had attacked the deceased in the scuffle. It was that attack which led to the deceased's death. She claimed that she did not witness the fight between the accused and the deceased and yet in cross-examination she also claimed that deceased had punched accused on the chin. Petty testified also that she and her grandmother took the accused to the village head's residence where the accused narrated his story to the village head whom he told that he had had a misunderstanding with the deceased resulting in a fight during which he delivered a blow to deceased with his hand which caused him to fall down. She further testified that the village head one (Sabhuku) caused villagers to gather at his house and proceeded to the Mupinga homestead where on checking on the deceased's condition pronounced that he was cold suggesting he had already died and noted that he had been stabbed with a knife. The village Head then called police from Hwedza who attended the scene in the early hours of the morning. It is significant to note that Petty's evidence was that

- (1) She did not observe any of the two (accused and deceased) holding any weapon when they arrived at the Mupinga homestead.
- (2) When deceased entered her grandmother's kitchen he was drunk.
- (3) before proceeding to Mutsa Masaiti's place and eventually proceeding to the village head's residence she had not checked on deceased's condition.
- (4) She knew that the knife used by accused to stab the deceased belonged to the accused. In fact accused admitted to the police that the knife was his. She however did not witness accused stab the deceased.

The second state witness to testify was Benilia Mupinga. She was Petty Mupinga's grandmother. She gave evidence under oath. Her evidence in summary was that on the day in question accused had passed by their homestead before returning a short while later in the company of the deceased who was in front. Both the deceased and accused were known to her. The two budged into her kitchen without knocking or seeking admission which caused her to protest why accused had come back. The deceased asked her ask Petty to indicate as between him and the accused she preferred as her lover to which Petty (had witness) indicated none of the two. As none of them reacted to Petty's response the witness then told the accused and deceased to leave as she

wanted to go to bed. The deceased asked for permission to while up time but Petty left the kitchen indicating that she was retiring to bed as she would need to get up early in order to prepare her child to go to school.

Benelia Mupinga and the deceased then remained in the kitchen. When the witness asked the accused and deceased to go as she too wanted to sleep accused left first followed by deceased who pushed the door trying to hit the accused who ducked. She then told the two (accused and deceased) to leave but not to fight. According to the witness Petty came out of the kitchen and saw the deceased try to hit the accused. When accused and deceased left the witness went into her bedroom to retire to bed but as she got into bed she heard the accused shouting “why did you beat me” and she immediately came out and saw the accused throw something in the easterly direction which she was not immediately able to identify. She then enquired what the problem was as accused was addressing the deceased who was on the ground and not responding. She then observed accused leaving and she asked him why he was going away leaving the other person who was not responding to his calling him. Accused then indicated that he wanted to report what had happened to Mutsa Masaiti. The witness asked Petty to come with her and follow the accused as she suspected the accused to be trying to escape and did not believe accused genuinely meant to go to Masaiti’s residence.

At Masaiti’s residence the accused related his story and Masaiti declined to intervene and suggested they proceed to the village head to report the matter. At the village head (Panasho Mushore’s) residence accused narrated his story after which the Sabhuku instructed the members of the village be woken up to accompany him to the scene.

The village head and members of the village who were gathered at the village head’s residence left for the witness’ residence where the village head observed that the deceased’s body had gone cold and on lifting deceased’s shirt noted and announced that deceased had been stabbed with a knife. The village head called the police after asking the villagers to settle down.

When police arrived and asked what had happened the accused said he had stabbed the deceased with a knife and when police asked for the knife and accused suggested they ask her (witness). With the assistance of the police a search was made for the knife in the direction where the witness had observed accused throw something and using light from the witness mobile phone the knife was recovered by the police. Asked during her evidence in chief to comment on

accused's suggestion that deceased had picked up accused's axe during the fight and wanted to attack the accused with it the witness answered - "That's a lie".

Benelia Mupinga testified that she did not witness accused stab the deceased. She did not observe accused in possession of a knife when he initially passed by her residence earlier on that evening. Neither did she observe the accused with an axe the second time he got back to the witness' residence. She was not able to comment on the accused's defence outline namely that the accused dropped his axe and dispossessed deceased of the knife, that accused had produced to attack him with it and that when accused dropped the axe the deceased picked it up and chased accused intending to axe him.

Her answer was that she did not observe this as it took place, while she was inside her bedroom and by the time she came out of her bedroom the deceased had already fallen down. Before then she had tried to refrain them. She also testified that when the accused and deceased left the witness' residence he was not holding anything.

The last state witness was Danger Dongo one of the attending details and Investigating Officer. He too gave evidence under oath and briefly his evidence was that he was assigned to attend the murder report and on arrival at about 3:45am he found people gathered at the Mupinga homestead on enquiring as to what had happened the accused explained to him that he had been fighting with the deceased over a girlfriend one Petty Mupinga and that as he was losing the fight to the deceased he rushed to Petty Mupinga's bedroom where he got an Okapi knife with which he stabbed the deceased on the left side of his chest and the deceased collapsed.

When he was asked to comment on allegation that accused would say that it was the deceased who produced a knife and wanted to stab him with it the witness said "those would be lies". The witness did not see any other weapon at the scene. The witness asked accused where he had put the knife and accused informed him that he had thrown it away in the yard and he found the knife with the assistance of Benelia Mupinga and Sergeant Jack and Constable Chisadza. The witness identified the knife he had picked up at the scene which he had weighted and measured. The knife was produced as exhibit 2 and the weighing certificate was produced and marked exhibit 3.

The witness took accused to Hwedza ZRP and left the corpse under guard of a police detail namely Constable Chisadza. The witness also recorded a warned and cautioned statement from the

accused and drew a sketch plan of the indications made by the accused and first and second witness which were exhibited in court. The witness indicated that the knife exhibit 2 was disowned by Petty Mupinga. He recorded witnesses statements from witnesses and h took deceases body to Mt St Mary's Mission Hospital where deceased was declared dead. He then recorded a warned and cautioned statement at the station in which he admitted to having committed the offence.

The witness indicated to the court that accused gave his statements freely and voluntarily explaining that the reason, he stabbed the deceased was because he was losing the fight to the deceased. According to the witness Petty did not witness the events leading to the demise of the deceased because she was asleep in her grandmother's bedroom. Although Petty denied any ownership or possession of the knife, the witness indicated that the accused had told him that he knew there was a knife in Petty's bedroom.

The state closed its case after the witness was stood down but applied to reopen its case in order to produce the accused's warned and cautioned statement which was eventually produced by consent of the defence as exhibit 5 and re-closed its case.

The defence opened its case by calling accused to the witness stand. In his testimony the accused maintained the contents of his defence outline namely that after penning Mutsa Masaiti's found stray cattle he passed through Petty Mupinga's homestead on his way home. He met the deceased in Mutsa Masaiti's and confirmed having penned the cattle. The deceased then demanded that he come with him to Petty Mupinga's in order for Petty to indicate who between them was her real boyfriend and that he reluctantly agreed.

When they got to Petty Mupinga's residence deceased allegedly started lushing insults at Petty and her grannie whom deceased accused of being prostitutes for permitting Petty to have an affair with accused well knowing that she was having a love affair with him.

Deceased got up and started assaulting him with clenched fists as a result of which Petty's grannie intervened to stop the assault and suggested that the accused leave the room and go outside which he did. While outside deceased pushed the door and Petty's grannie and the door got damaged. In that scuffle the axe which accused had fell down and accused produced a knife which he wanted to stab him with. The accused further testified that the deceased then hit him on the head and in the process dropped the knife and picked up the axe with which he tried to deliver a blow on accused but he missed. Accused then picked up the knife and stabbed the deceased. He then

placed the axe on the bench. He then proceeded to Mutsa Masaiti's house to report the incident. The witness claim that he informed Mr Masaiti that he had stabbed the deceased during a fight and he fell down. Masaiti advised accused to make a report to the Sabhuku which he did. The Sabhuku and other villagers proceeded to Mupinga's homestead where the deceased was. When police came he confessed to killing the deceased but did not mention the issue of the axe as he was afraid of the police. Accused admitted that he told Benelia Mupinga that he had hit deceased with bare hands but told Masaiti that he stabbed the deceased. He also claimed that he told the Sabhuku that he had stabbed the deceased. After the witness was stood down the defense closed its case.

ANALYSIS OF EVIDENCE

The following matters are common cause:-

- (1) The deceased and accused fought over Petty Mupinga whom both claimed to have been in a relationship with.
- (2) The accused stabbed the deceased with an okapi knife as a result of which deceased died.
- (3) The cause of death was the stabbing which the postmortem report described as
 - (1) hypovolemic shock
 - (2) pulmonary vein rupture as a result of a stab wound on the left chest.
- (4) The accused in his defense outline did not challenge the production of his confirmed warned and cautioned statement in which he
- (5) Admitted that he had stabbed the deceased with an okapi knife.

Having outlined the foregoing facts that are common cause it is necessary to decide whether the deceased was stabbed as described by the accused in his warned and cautioned statement or as explained in his defence at the trial namely that the accused stabbed the deceased in self-defence as the deceased wanted to stab him (accused) before accused dispossessed him of the knife which fell down during the fight. According to the accused both protagonists were armed at the time the fight was taking place and each one of them lost possession of his weapon which then ended up in the hands of the opponent. The deceased who was now in possession of the accused's axe tried to attack the accused who was now holding the deceased's knife. Neither Petty Mupinga nor Benelia Mupinga observed the weapons alleged by the accused according to these two witnesses they did not witness how the deceased had been stabbed by the accused. In fact they

only got to know that the deceased had been stabbed when the Sabhuku indicated so as all along the accused had claimed that he had fought deceased with bare hands. Benelia in particular, denied that the accused had been in possession of an axe on the two occasions he had been at her residence. Petty Mupinga on the other hand denied having owned the okapi knife used by the accused to stab the deceased. According to the investigating officer Petty Mupinga did not witness the accused collect the okapi knife from her bedroom as she was asleep in her grannie's bedroom. Petty however denied that she or anyone at the homestead owned the okapi knife used to stab the deceased. Whether or not the accused had the knife on him before he decided to use it to stab the deceased or he collected it from Petty Mupinga's bedroom as indicated by the accused is not material. Accused had no axe on him and he did not make any mention of it in the confirmed warned and cautioned statement nor to the police nor to the village head. The introduction of the axe in the accused's defence must be a recent fabrication. It is significant to note that the accused did not challenge the confirmed warned and cautioned statement in his defence outline despite the provisions of s 115. Accused however ought to have realized that the defence he introduced at the trial was not mutually consistent with what he had described in the confirmed warned and cautioned statement. The court has no basis for throwing out the accused's warned and cautioned statement as it is admissible in terms of s 115B (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] clearly his defence at trial cannot possibly prevail over what he said in the confirmed warned and cautioned statement which is properly inconsistent with each other.

In the circumstances accused's guilty is dependent on what he claims took place as narrated in his confirmed warned and cautioned statement.

The Court is alive to the criticism levelled against the evidence of Petty Mupinga. The defence considers her evidence that she was not in a relationship with either the deceased or accused to be utterly false. The Court considers this observation to be justified even though nothing turns on this piece of dishonesty as it was refuted by the evidence in the accused's warned and cautioned statement. Besides it is improbable that two adult men who are mere secret admirers would engage in a fatal physical encounter over her undeclared affections. The Court accepts that she deliberately dissociated herself with the accused and deceased in her testimony in Court out of a guilty conscience on amount of her double doping. The Court must comment on whether the deceased was drunk on the night in question. Although Petty Mupinga and the accused seem to be

agreed that the deceased appeared drunk as he had been rowdy and was shouting abuse on the residents of Mupinga homestead Benelia did not make similar observations despite the fact that she considered him the aggressor. Petty Mupinga appears to have taken sides with accused when she claimed that deceased was the first to punch the accused on the chin. This was not corroborated by Benelia Mupinga who testified that as accused left the kitchen hut deceased tried to punch the accused who declined the blow as Benelia was trying to restrain the two men. The Court finds the testimony of Benelia Mupinga to be truthful and dismisses Petty Mupinga's evidence as Petty contradicted herself by claiming that deceased punched the accused first as she also claimed that she did not witness the fight between accused and deceased as she had already excused herself and left to sleep as she needed to get up early and prepare her child for school.

That a fight took place between the deceased and accused is common cause. The Court does not find any justification for accused's use of an okapi knife to stab the deceased in the chest. Even assuming he was losing the fight he ought to have run away to escape further assaults. On his own explanation in the confirmed warned and cautioned statement he did not need to collect the okapi knife and return to fight further. He should have seized that opportunity to escape from the deceased who in any event does not appear to have been in pursuit. His intention to kill the deceased was made when he got the knife to use in the fight. He must have realized and infect realized that the use of such a dangerous knife to stab his opponent in a fight which he was losing according to what he told the investigating officer would lead to death or that there was a real risk that it could lead to the death of his opponent and proceeded regardless.

Disposition

It is clear that accused's defence as pleaded in the defence outline cannot hold. The Court has found that the introduction of the knife and axe in the fight by accused is a recent fabrication on his own confirmed warned and cautioned statement. Accused used the knife to stab the deceased when he realized that he was losing the fight. The delivery of a blow from such a dangerous weapon as an okapi knife to an opponent's chest betrays recklessness as to the obvious consequences of which death was a probability. In the circumstances the court finds accused guilty of murder as defined in s 47 (1)(b) of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

The offender has been found guilty of murder as defined in s 47 (1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In mitigation of sentence the court has been told that at the time of the commission of the offence the offender was 19 years old. Although the state did not raise issue with the age attributed to the convicted person in terms of the form 242 his age was put at 23 years and the form 242 reflects the date of arrest as 7 November 2018 which is the day following the commission of the offence as deceased was stabbed on 6 November 2018. Unfortunately the form 242 reflects that the accused was not the holder of a National Registration on Certificate. It is therefore not clear what the correct age of the offender is for the purpose of sentence. Section 48 (2)(C)(1) of the Constitution of Zimbabwe of 2013 prohibits the imposition of the death penalty on a person who was below the age of 21 years when the offence was committed. It would have been helpful if the state had addressed itself to the correct age of the convicted person for purposes of the sentence. The court will in the circumstances accept the age of the offender to be as submitted by the defence counsel in his address in mitigation.

It is accepted that the offender is a youthful offender and would ordinarily have deserved to be treated more leniently but for the seriousness of the offence he stands convicted of. It is aggravatory that the offender on realizing that he was losing the fight decided to stab the deceased instead of fleeing in order to save himself from further assaults by the deceased. The wrong choice he made resulted in the needless loss of human life.

The law regards human life as sacrosanct and Constitution of Zimbabwe regards the right to life as a fundamental human right. Unfortunately once lost human life is irreplaceable. For this reason courts guard jealously the life of every human being. According to the post mortem report the deceased's age at the time of his death is put at 32 years. Clearly the deceased was deprived of the previous god given gift at its prime.

Courts have a duty and they will continue to remind all and sundry that resort to violence in an order to settle scores should never be an option as in that violence is an inherent risk to life and limb.

In assessing an appropriate sentence *in casu* the court has correctly been urged to consider to the offender's credit the 3 years of pre-trial incarceration, which though not in ordinate is not insignificant. The sad part in any sentence that the court will consider appropriate is that it does not relieve either the deceased's family and dependants neither does it absolve the offender from

the stigma associated with the loss of human life a stigma which will haunt him the rest of his life even after serving his sentence. This makes the assessment of an appropriate sentence no mean a task. The court in assessing sentence will take into account that it cannot suspend any portion of the sentence of imprisonment which the court normally resorts to as a measure of mercy - see s 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Section 47 (4)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] provides for an imprisonment term of not less than 20 years where murder is committed in aggravating circumstances as provided in subs (2) or (3) of s 47 of the said code.

Subsection 4(b) gives the court discretion to impose any other penalty of imprisonment for any definite period. What this means is that if the court finds that murder was committed in aggravating circumstances other than those provided in subs 2 and 3 of s 47 of the code the court can impose a sentence below 20 years imprisonment.

Considering the offender's age at the time of the offence, that only one blow was inflicted with a lethal weapon to the chest which is a vulnerable part of the human anatomy providing protection to sensitive and susceptible organs such as the heart, liver and lungs in circumstances where death could have been avoided by the offender simply running away from the deceased the court considers a moderate period of imprisonment will do justice to the interests of both the offender and the society also taking into account the 3 years of pre-trial incarceration. The offender is accordingly sentenced as follows:-

You are sentenced to 15 years imprisonment.

Hove and Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

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