

THE STATE
versus
CLEPHAS MUREMBA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 24, 25 February and 20 March 2020

Criminal Trial

Assessors

1. Mr Nish
2. Mr Mutomba

Ms M. Mutumhe, for the state
D. Hwacha, for the accused

MAWADZE J: The issue in this matter which fails for determination is how the now deceased was fatally injured on 18 July 2019.

The accused is facing the charge of murder as defined on section 47 (i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] [hereinafter the Criminal Code *Chapter 9:23*].

The specific charge is that on 18 July at No. 37 Victoria Ranch, Masvingo the accused unlawfully and intentionally caused the death of Elizabeth Dzingi by stabbing her with an unknown sharp object on the neck.

The background facts to this case are as follows;

The 30 year old accused and 29 year old now deceased were lovers cohabiting at No. 37 Victoria Ranch, Masvingo owned by Patience Egnesi Njiri and they rented a room. The now

deceased was the tenant. The accused and the now deceased had fallen in love in April 2018. The now deceased had been a tenant at this house since 2016. The now deceased had in July 2018 invited the accused to come and stay with her at her lodgings as a live in boyfriend. The accused had moved in only with his personal clothing as all utensils and bedding belonged to the now deceased. All what the accused possessed were his personal clothes certificates and a satchel. They shared expenses relating to rentals and food. At the maternal time the now deceased was employed as a Pharmacy Assistant in Chiredzi and she would come to Masvingo during her off days and weekends to join the accused at No. 37 Victoria Ranch, Masvingo. The accused was employed as a brick moulder in Masvingo. No child was born out their relationship although each one of them had a child of their own.

As regards the events leading to the now deceased's death, the now deceased had come from Chiredzi to Masvingo on 17 July 2019 and spent the night at their lodgings with the accused. The following morning on the fateful day 18 July 2019 the now deceased had in the morning paid their rentals. Thereafter her 25 year old young sister Rudorwashe had visited her and they had proceeded to town leaving the accused. In town the now deceased and her young sister had drank beer and later on in the evening proceeded to Dunira business centre in Victoria Ranch where they joined accused and continued to drink beer. Accused was the first to leave the bar for their lodgings and was shortly followed by the now deceased.

At their lodgings the misunderstanding continued. The cause of this misunderstanding was that the now deceased was alleging that accused was being unfaithful bringing other women at their lodgings in the now deceased absence. Accused disputed these allegations of infidelity. As the quarrel continued whilst inside their room the accused decided to take his satchel and clothes and left proceeding to his rural home in Gokomere that night. The now deceased followed him and caught him at the gate of the house. What thereafter transpired leading to the now deceased's death is what in dispute.

The state alleges the accused whilst about 2 meters from the gate stabbed the now deceased with a sharp object on the shoulder, around the neck, pulled out the sharp object and fled from the scene after which he disposed of the sharp object he later disclosed to be a knife. The now deceased shouted calling out the landlady's name that she was dying saying "*mai Dzimiriri ndofa*" [I am

dying]. The landlady found the now deceased's head trapped by the gate bars and she had passed on. A report was made to the police.

The accused fled from the scene leaving his satchel containing his clothes and certificates. The accused proceeded to Harare where he later sold the now deceased's mobile phone and raised bus fare to buy poison after which he proceeded to his rural home in Gokomere. The accused tried to commit suicide by taking poison and he was hospitalised and arrested.

The accused's version of events is that as he was out the gate with his satchel leaving the now deceased called him to stop. He obliged and the now deceased was holding his trousers which she used to hit him. The accused grabbed the trousers and threw it away. He said suddenly he realised the now deceased had pulled out a kitchen knife and was about to stab him. Accused did not see where exactly the now deceased pulled the knife from. In self-defence he held the now deceased's hand holding the knife and twisted it with his back on the durawall. Accused wanted to escape. He pushed the now deceased away unaware that the blade of the knife was now pointing at the now deceased. The now deceased was stabbed in the process and she called out to him that she had been injured. She asked him to pull out the knife which he did. The accused realised the now deceased had been badly injured on her left shoulder. He panicked and fled from the scene leaving his satchel. He threw the knife away at the scene. The knife was not recovered.

The accused boarded a bus to Harare to go and advise his elder brother what had happened. The elder brother had left for South Africa. The accused called his friend in Masvingo who told him the now deceased had passed on. He became confused and decided to take his life. When he fled he still had the now deceased's mobile handset. His own mobile handset was defective. He sold the now deceased's mobile handset to raise money to buy some poison and raise bus fare to return home in Gokomere. The accused proceeded to his rural home at Gokomere and on arrival at the bus stop he alighted and took poison. He fell unconscious but arrived only to realise he had been arrested.

The cause of the now deceased death is not in issue. As per the post mortem report Exhibit 1, the doctor observed the following;

- “1. *stab wound in left supraclavicular fossa ± 2cm wide, deep cutting through great neck veins and reaching lung apex.*
2. *large amount of blood on the body.”*

The cause of death is stated as haemorrhagic shock arising from the stab wound. The accused's confirmed warned and cautioned statement Exhibit 2 is in sync with his defence outline and evidence in court. The accused has been consistent therefore in his explanation.

The evidence led by the state is largely common cause. The evidence of the now deceased's young sister Rudorwashe Dzingi, Galant Sibanda who is accused's friend and Dr Godfrey Zimbwa who carried out the post mortem examination and complied Exhibit 1 was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It shall only be summarised for the completeness of the record.

The state led *viva voce* evidence from the now deceased's landlady Patience Egnesi Njiri, police details constable Sidney Sibanda who also attended the scene and the investigating officer Assistant Inspector Gifton Mushovu. The accused gave evidence and did not call any witnesses.

We shall summarise the evidence admitted in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as follows;

Rudorwashe Dzingi (Dzingi)

She is the now deceased's young sister. On 18 July 2019 she visited the now deceased at her lodgings. The now deceased told her of her problems with the accused and that they had not had sexual intercourse as she no longer trusted the accused. She proceeded to town with the now deceased where they spent the day drinking beer. Later they proceeded to Dunira business centre in Victoria Ranch where they joined accused and continued drinking beer only to be advised later of the now deceased's death. Dzingi's evidence shows that the now deceased spent the fateful day drinking beer hence at the time of her death she should have been drunk.

Gaviant Sibanda (Sibanda)

The 26 year old Sibanda is accused friend. On 18 July 2019 he was with accused drinking beer at Dunira business centre in Victoria Ranch in the afternoon as accused was frequently communicating with the now deceased who was in town on her mobile phone. The now deceased joined them drinking beer at Dunira business centre at about 1800hrs. He left the two who were having a misunderstanding as they were drinking beer. He did not know the nature or cause of the misunderstanding. He too was later advised of the now deceased's death. Again Sibanda's evidence shows the accused and the now deceased had spent the better part of the day drinking beer and that they had a misunderstanding.

Dr Godfrey Zimbwa

As already said Dr Godfrey Zimbwa examined the now deceased's remains and compiled Exhibit 1 the post mortem report which outlines the nature of the injury sustained by the now deceased and the cause of her death.

We now turn to *viva voce* evidence.

1. Patience Egnesi Njiri (Patience)

We have already alluded to the bulk of Patience's evidence when we outlined the background facts in this matter. She was the now deceased's landlady.

Patience said on 18 July 2019 she saw accused and the he now deceased at about 0600hrs making fire outside the house talking to each other. At about 1000hrs the now deceased gave her money for the rentals. The now deceased's young sister Dzingi arrived and the two left for town. The accused later left but came back home around 1400hours and again left. At about 2100hours he was called out by the now deceased who was at the gate saying she was dying. Upon checking on her using a torch she found her head trapped in the gate bars and she pulled her out. She was lifeless. She proceeded to the local police base to make a report. The accused was nowhere to be found. She had not seen how the accused and the now deceased had left their room.

Patience explained that the only altercation she had witnessed between the accused and the now deceased was in September 2018 when she intervened as the accused was assaulting the now deceased inside their room with a belt as he alleged infidelity on the part of the now deceased. Patience's evidence is not in issue.

2. Constable Sidney Sabande (Constable Sabande)

Constable Sidney Sabande attended the scene and proceeded to the now deceased's room. He found clothes scattered in the room. He recovered the accused's Exhibit 3 with clothes. Nothing turns on his evidence.

3. Assistant Inspector Gifton Mushovu (Assistant Insp Mushovu)

Assistant Inspector Mushovu is the investigating officer. After accused's arrest he recorded Exhibit 2 accused confirmed and warned statement. The accused who had attempted to commit suicide was taken for indications. He failed to recover the knife used to injure the now

deceased. Assistant Inspector Mushovu said he did not believe the accused's account of innocence because of the following reasons;

- (i) the knife which fatally stabbed the now deceased was not recovered.
- (ii) why accused had fled from the scene without assisting the badly injured now deceased.
- (iii) why accused failed to raise alarm with landlady, neighbours or make a report to the police
- (iv) that accused was arrested such after two days.
- (v) that accused took poison to avoid prosecution.
- (vi) that accused was not contrite as he sold the now deceased's mobile handset.
- (vii) that the fatal injury was too deep to have been self-inflicted.

According to Assistant Inspector Mushovu all this pointed accused's guilt rather than innocence.

The Accused's Evidence

We have already alluded to the accused's version of events. The accused maintained that version throughout the trial that he acted in self-defence and that the now deceased was in mistakenly stabbed as he pushed her away.

The accused explained his conduct thereafter and alluded to him panicking and being confused. He first fled from the scene leaving his satchel and also threw away the knife. He failed to assist the now deceased as he panicked and was shocked by the nature of the injury. He failed to report or render any further assistance due to panick. Despite not being the one who stabbed the now deceased he still felt responsible hence his decision to take his own life by drinking poison.

The accused explained and demonstrated in court with the help of the court orderly how he acted in self-defence resulting in the now deceased being fatally stabbed as he pushed her away with his back to the durawall.

ANALYSIS OF THE EVIDENCE

The starting point is that there is no eye witness as to how the now deceased was fatally injured. Reliance is placed on circumstantial evidence and the accused relies on his own version. The accused's version raises the defence of self-defence.

The often referred case *R v Blom 1939 AD 188 at 202 – 03* outlines how a court, in criminal trial, deals with circumstantial evidence. The two cardinal principles are that;

- (a) the inference sought to be drawn must be consistent with all proved facts otherwise the inference cannot be drawn.
- (b) that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they not exclude other reasonable inferences then they must be a doubt whether the inference sought to be drawn is a correct one. See *S v Tambo 2007 (2) ZLR 33(H)*; *S v Marange and Others 1991 (1) ZLR 244 (S)*; *S v Tonderai Ganizani Maibiki HH 318/16*.

Indeed it is competent for the court to found a verdict of guilt solely on circumstantial evidence. See *S v Shoniwa 1987 (1) ZLR 215 (S)*; *S v Vhera 2003 (1) ZLR 668 (H) at 680 C*.

We now proceed to apply these principles to this case.

There are indeed a number of proved facts in this case which are as follows;

- (a) the accused and the now deceased had a misunderstanding on the day in question arising from the accused's alleged infidelity which he disputed.
- (b) the accused and the now deceased had spent the better part of the day drinking beer and at the time the now deceased was fatally injured both were clearly intoxicated although the degree of intoxication remain unclear.
- (c) the accused packed his clothes into a satchel and left their room when the now deceased was fatally injured.
- (d) the now deceased was fatally injured at the gate outside at their room and there is no evidence that she was forcefully taken out of the room.
- (e) the cause of the now deceased's death was haemorrhagic shock arising from a stab wound inflicted with a kitchen knife.
- (f) the kitchen knife was not recovered.
- (g) the accused fled from the scene leaving his satchel and did not make a report to anyone or render any help to the now deceased after pulling out the knife.
- (h) the accused attempted to commit suicide by taking poison.

The question which arises from the above is whether the inference sought to be drawn exclude every reasonable inference.

The fact that the now deceased was fatally stabbed does not mean that it is the accused who intentionally stabbed the now deceased. It remains possible that the now deceased could have been injured in the manner explained by the accused. This is so regard being made to the fact that the now deceased should have been angered by the accused's alleged infidelity perpetrated in the very room in which she was the tenant. In all probabilities it is the now deceased who followed the accused out of the room to the gate and stopped him as the accused was leaving and had packed his clothes into the satchel. The question is why would she follow him? It is clear that the now deceased was fatally injured outside their room at the gate as there was no trail of blood from the room. The landlady Patience did not hear the now deceased being forcibly taken out of the room. When the now deceased was fatally injured she simply cried out that she was dying not that she had been stabbed, let alone by the accused. No reliance can be placed on a dying declaration to implicate the accused.

The mere fact that it is the now deceased who was fatally injured does not exclude the fact that she could possibly have been the aggressor. It remains possible she followed the now accused hiding the knife and pulled it out intending to stab him for his infidelity and walking out on her. It remains plausible and probable she was injured in the manner accused demonstrated. There is nothing inherently improbable or unreasonable in how accused explained and demonstrated how the now deceased was fatally injured. This means therefore that the manner the now deceased was injured does not exclude every other inference except the one that it is the accused who intentionally stabbed her. A doubt is therefore created as to whether that inference made by the state is the correct one.

The accused's conduct after the now deceased had been fatally injured while relevant in trying to infer a guilt mind on the part of the accused, again does not exclude any other reasonable inferences. Indeed the accused could have fled from the scene without assisting the now deceased, after disposing of the knife and without reporting the matter because he was guilty. He could have decided to take his life because he could not face the consequences of his actions. The danger however is too fold. Firstly, accused's conduct is after the event and does not necessarily explain how the now deceased was fatally injured or exclude accused's explanation. Secondly no single inference can be drawn from his conduct moreso as he left his satchel with clothes at the scene thus showing irrationality. Indeed accused could have panicked and was confused hence the

sojourn to Harare and back to Masvingo within two days. Why did he not flee from Masvingo? The decision to take poison may not necessarily imply that his was criminally liable but may simply be moral guilt. Again no single reasonable inference can be drawn from the accused conduct after deceased had been fatally injured. There is no single explanation why the knife in issue was not found.

Our view therefore is that the proved facts do not lead to one reasonable inference pointing to the accused's guilt. A doubt remains as to whether the inference sought to be drawn by the state is a correct one.

This leads us to the accused's defence of self-defence.

The defence of self-defence as provided for is section 253 (1) of the Criminal Code [*Chapter 9:23*] is a complete defence if all the requirements outlined in section 253 (1) (a) - (d) are met. These factors in section 253 (1) (a) to (d) are assessed in accordance with the proviso in section 523 (2) Criminal Code [*Chapter 9:23*] which takes on board the circumstances the accused found himself in, accused's capabilities, and any stress or fear operating in his mind.

In the case of *S v Collet Baira Manzonza HMA2/16* at page 11-12 I discussed at length how the court should apply the defence of self-defence and the relevant case law.

In casu it has not been disproved that the accused was under unlawful attack with a lethal weapon brandished by an angry intoxicated woman who felt betrayed by an ungrateful lover. The accused version which has not been disproved is that the attack was imminent. The now deceased had stealthily pulled out a knife as he alleges. The accused's conduct to hold her hand and push her away was simply to avert the attack. He had his back against the wall. The means the accused used of punishing her away were reasonable and could not be said to have been disproportionate to the harm posed by a knife. It may well be unfortunate that in that process the now deceased was inadvertently fatally injured.

From the facts there was clearly a misunderstanding between the accused and now deceased who were lovers. The accused chose to flee but he said the now deceased pursued him. It has not been disputed that the now deceased was of a bigger body frame compared to accused, *albeit* being a female. The fatal blow was inflicted as accused pushed the now deceased who had been persisting in pursuing him.

In our view therefore the accused did not exceed the bound of self-defence.

Accordingly we find the accused not guilty and acquitted

VERDICT:

Not Guilty and Acquitted.

National Prosecuting Authority, counsel for the State

Ndlovu & Hwacha legal practitioners, pro deo counsel for the accused