

THE STATE

Versus

SHAKEMORE ZUNGA GUMBO

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 1 & 19 November, 2021

Assessors

1. Ms Chademana
2. Mr Chikukwa

Mr B. E. Mathose, for the state
Ms Y. Chandata, for the accused

Criminal Trial

MAWADZE J: The accused is facing a charge of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The charge of that on 17 February 2021 at Village 3 Darlington, Chief Maranda, Mwenezi, Masvingo the accused caused the death of Lloyd Makura Macheza by unlawfully and intentionally stabbing him with a knife under both armpits and the neck.

The accused then aged 27 years and the now deceased then aged 22 years are cousins and hail from the same Village 3 Darlington, Chief Maranda, Mwenezi. Their mothers are siblings.

Sometimes in November 2020, the now deceased had an altercation with the accused. The now deceased struck the accused with a machet or an axe in the face. The accused still bears a scar of that injury on his face.

It is the state case that since then the relationship between the accused and the now deceased remained strained.

On 17 February, 2021 there was a beer drink (the beer is known as mukumbi or amarula) at Ellessie Chakaveya's homestead where the now deceased resided with his wife and a child. There were a number of patrons partaking in the beer including the now deceased. The accused arrived at this beer drink at around 17000hrs.

The state alleges that upon his arrival at the beer drink the accused without saying any word approached the now deceased and stabbed him three times around the chest and in the neck killing him instantly.

It is common cause that the accused immediately fled from the scene and only handed himself over to ZRP Mwenezi on 4 March 2021 where he was arrested.

The accused denies the murder charge but tendered a plea of guilty to the lesser charge of culpable homicide. This was not accepted by the state.

The accused's defence or defences is or are difficult to follow.

In his evidence the accused said the now deceased in November 2020 attacked him with a machet as the accused passed through the now deceased's homestead. The accused said this attack was unprovoked and was for no apparent reason. As a result, the accused said he made a police report at Maranda I Police base and was treated at Neshuro hospital. The accused has a visible scar on his face. The accused said the police never acted upon his report of the attack as the now deceased was not arrested or prosecuted.

The reasoning is that the accused raised this incident because it should have a bearing on the subsequent events of 17 February 2021 in connection with this case. However under cross examination the accused said the previous attack by the now deceased on accused's person in November 2020 was water under the bridge by 17 February 2021 and is irrelevant to this case at hand.

Turning to the events of 17 February 2021 the accused in his defence outline said it is the now deceased who provoked him by saying the accused was the type of people to be killed as they were at the beer drink.

The accused said the now deceased proceeded to act on his threats by producing a small axe and advancing towards the accused. The accused said fearing an attack he decided to defend himself. However the accused said before he could act he was struck on the left hand by the now deceased with an axe. In response the accused said he pulled out a home made knife from his pocket and stabbed the now deceased after which the accused fled from the scene fearing some backlash from the beer patrons as he realised the now deceased had been seriously injured. The accused said he is nonetheless remorseful for causing the now deceased's death *albeit* in self-defence.

However in his evidence in chief accused gave a slightly different version. The accused said after the now deceased uttered the provocative words the accused was quite alert in view of the previous unprovoked attack in November 2020. The accused said he immediately stood up but was struck on his hand with a hoe handle (not an axe) by the now deceased. Thereafter the accused said the now deceased turned away and accused decided to stab him in the back. The accused's explanation was that he still believed the now deceased could turn back and injure him.

When the accused was probed further by his counsel he said the now deceased had a small axe hidden underneath the now deceased's coat. The accused said this incident happened soon after his arrival before even drinking the beer hence accused was sober.

Under cross examination by Mr Mathose for the state the accused said he acted in self defence on the day in question and that the previous attack in November 2020 was irrelevant. When he was probed further the accused said he rather took a preemptive strike which is not self defence per se.

The problem with the accused's version of evidence is that throughout his evidence he failed to explain why he did not mention the said attack by the now deceased with an axe [or hoe handle]. There is this material omission in accused confirmed warned and cautioned statement. The accused attempted to put the blame on the investigating officer who recorded the accused's statement betrays the untruthfulness of accused's evidence.

In his confirmed warned and cautioned statement Exh 2 the accused had this to say;

"I admit to the allegations of stabbing Lloyd Macheza Makura with a knife three times on his back causing his death. The reason for stabbing him was to revenge since he had struck me with a machet the previous year. When I stabbed him, I had no intention of killing him, but just to injure him only. The knife I used was mine which I made myself. "

This confirmed warned and cautioned statement is at war with the accused's evidence. In court the accused purported to have acted in self defence. In that statement he said his conduct was motivated by purely revenging the previous year's attack. These two versions can not possibly be true. They are mutually destructive. Either he acted in self defence or he was simply revenging or making the now deceased pay for the attack perpetrated the previous year.

Now what is the evidence led by the state?

It is not in issue that the accused stabbed the now deceased with a home made knife Exhibit 3 (a) which has a black handle. As per the certificate of weight Exhibit 3 (b) the said knife weighs 0.0075kg.

The cause of the now deceased's death is again common cause. The evidence of Dr Godfrey Zimbwa who carried out the post mortem examination and compiled a report Exhibit 1 was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The doctor observed the following injuries.

- "1. stab wound right scapular area ± 3 cm wide penetrates into the lung*
- 2. stab wound left scapular area ± 3 cm wide perforates into the lung*
- 3. stab wound 2cm left carotid area"*

The doctor found that the caused of death was haemorrhagic shock arising from the stab wounds.

The state led evidence from four witnesses three of whom were at the beer drink and the fourth one is the investigating officer D/Cst Amanda Tshuma. The three other witnesses are Ellesie Chakaveya, Clear Muza and Lazarus Sibanda. We turn briefly to their testimony.

D/Cst Amanda Tshuma (D/cst Tshuma)

(D/cst Tshuma) attended the scene on 18 February 2021 a day after the now deceased's death. Her evidence is basically of a formal nature.

She confirmed observing three stab wounds on the now deceased, two near the arm pits and one on the neck. She recorded statements of eye witnesses. The accused had fled but

he handed himself over to the police on 14 March 2021. He recorded accused's statement Exhibit 2 and took him for indications. It is the accused who led to the recovery of the knife used to stab the now deceased Exhibit 3 (a). The accused had pierced the knife into the ground between two mopani trees.

D/cst Tshuma said accused never raised the defence of self defence nor did he say the now deceased had an axe. She said all accused said is that the now deceased had attacked the accused the previous year and when D/cst Tshuma investigated this she failed to find evidence that the accused had made such a report to the police.

Ellesie Chakaveya [Ellesie]

The beer drink was at Ellesie's homestead. She is an elderly woman. Both accused and the now deceased are her grandsons. She stayed with the now deceased, the deceased's wife and deceased's child.

The material part of her evidence is that when accused arrived at the beer drink at about 1700hrs the accused sat with her. This was about ± 5 metres from where the now deceased was seated. She said after a brief period the accused stood up and approached the now deceased. When Ellesie turned she saw the now deceased trying to flee but failed as he had been injured. She said the now deceased cried out that he had been stabbed by the accused and Ellesie saw three stab wounds two near armpits and one on the neck. She said the now deceased started to vomit. The stab wounds, were visible and the now deceased was bleeding. He died instantly. The accused had fled.

Ellesie said when the now deceased was stabbed he was holding a cup of amarula beer. She denied the now deceased had an axe or any weapon. She dismissed as untrue that the accused acted in self defence. She was aware of previous injury inflicted by the now deceased on the accused in 2020.

Clear Muza (Clear)

Clear is 26 years old and regard both accused and the now deceased as nephews. He was amongst the patrons at the beer drink on 17 February 2021.

Clear said when accused arrived at around 1700hrs accused sat initially with other men but quickly moved to sit with Ellesie and other elderly women. He said the accused stood up and approached the now deceased whom he stabbed thrice on the neck and around the chest. He said the now deceased tried to flee but failed. The now deceased sat down vomited and died immediately. By then accused had fled.

Clear said when the accused stabbed the now deceased all accused said was, "You know the issue."

Clear said the now deceased was unarmed and was not in possession of any axe.

Lazarus Sibanda (Lazarus)

Lazarus is the Village head of Village 3, Darlington Chief Maranda, Mwenezi.

The now deceased was married to his daughter. He also regarded accused as a son in law.

Lazarus was present when the accused arrived at the beer drink. He said accused initially sat with other young men but quickly joined Ellesie and Lazarus. Lazarus said he admonished accused telling him that accused could not sit with elders and his in laws. Lazarus said accused then stood up and moments later he saw deceased. The now deceased fell down and the accused fled. Lazarus rushed to where the now deceased was and observed that the now deceased bleeding from three stab wounds.

Lazarus said as the accused chased after the now deceased the accused was holding a knife Exhibit 3 (a). The now deceased was unarmed. Lazarus said accused's story that the now deceased attacked him is simply false.

The evidence of Ellesie, Clear and Lazarus was not disputed in any meaningful manner. These witnesses were at the beer drink. They all saw what happened, they are all related to both accused and the now deceased. We find no reason at all not to accept their evidence.

The fact of the matter is that the accused indeed stabbed the now deceased in the manner explained by the witness especially Clear. The accused was not under any attack as he alleges. The now deceased was unarmed.

Given the uncontroverted facts the defence of self defence as provided for in section 253 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is not available to the accused

at all. The accused was not under any attack. In fact his attack on the now deceased was unprovoked on that day.

The last issue to consider is the accused's intention.

The accused used a lethal weapon a knife. He stabbed the now deceased three times. By his own admission he used severe force. Indeed two of the stab wounds perforated or penetrated the lungs. The three blows were directed at vulnerable parts of the body, that is near armpits and the neck. The now deceased died instantly.

As was said *State v Mugwanda 2002 (1) ZLR 574 (S)* there is no doubt that the accused desired to bring about the death of the now deceased and he achieved that objective. If indeed he simply wanted to inflict pain or injury surely the manner he stabbed the now deceased clearly shows that he foresaw the death of the now deceased as substantial certain result of his conduct but proceeded regardless of such consequences.

We reject the accused's defence of self defence. The accused was not under any attack and the now deceased was unarmed. In all probabilities all the accused wanted was to revenge the attack perpetrated on him the previous year in November 2020. We share the state's view that the accused's plea of guilty to the permissible verdict of culpable homicide is unacceptable and wrong at law.

Consequently we find the accused guilty of murder with actual intent.

VERDICT: -

GUILTY of contravening section 47(1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]: - Murder with Actual Intent

SENTENCE:÷

"20 years imprisonment "

National Prosecuting Authority, counsel, for the state
H. Tafa & Associates, pro deo counsel for the accused