

THE STATE

Versus

ZENZO SIBANDA

IN THE HIGH COURT OF ZIMBABWE
TAKUVAJ
GWERU HIGH COURT CIRCUIT 28 & 29 JANUARY & 3 FEBRUARY 2014

S. R. Mafa for the state
Mrs E. Gonese for the accused

Criminal Trial

TAKUVAJ: 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]. It being alleged that on the 18th May 2013 and at Gretina Green Mine, Lower Gweru in the Midlands Province, the accused unlawfully caused the death of Chrispen Makuvire by stabbing him with a knife once in the chest, intending to kill him or realizing that there was a real risk or possibility that his conduct may cause death and continued to engage in that conduct despite the risk or possibility.

The accused pleaded not guilty to murder. Accused raised self defence as his defence and produced Exhibit 2 as his defence outline.

In an endeavour to prove its case, the state produced Exhibit 1 which is the summary of evidence, Exhibit 3 which is accused's confirmed warned and cautioned statement, Exhibit 4 which is the post mortem report and Exhibit 5, the Okapi knife which is the weapon used to murder the deceased. The state sought the admission into evidence the 3rd, 4th, 5th and 6th witnesses' statements in terms of section 314 (1) of the Criminal Procedure and Evidence Act (Chapter 9:23). The defence consented to the production of this evidence. The evidence of those witnesses was then formally admitted.

The state then called its 1st witness one Sidhube Muchochomi a Mine Manager at Gretina Green Mine, Range Farm 2, Lower Gweru. He knows the accused as an ex-employee of the mine. Deceased was his workmate. On 18th May, 2013 at approximately 8pm accused arrived at his workplace looking for beer to buy. The witness told the accused that they had closed and in any case beer had been sold out. The accused went away but returned shortly thereafter whereupon the witness asked the accused why he had returned. The accused did not proffer any explanation or response. At that moment the deceased arrived and asked the accused why he was still there when he had been told to go away. Before the deceased finished or was answered, he was stabbed in the chest with a knife by the accused. The witness said accused used his left hand to stab deceased on his left hand side. The witness said he was standing about ½ a meter away and the visibility was good as the place was illuminated. He further went on to say the accused who was wearing a jacket had both hands in his jacket

pockets and at the time he stabbed the deceased, he suddenly pulled out his hand from the pocket, delivered the fatal blow in a flush and ran away from the scene. The witness said he failed to give chase. At that time he noticed two men running abreast the accused. These men were taller than the accused. He noticed the trio running into a bush near the compound and he gave up chase. He returned to where the deceased was and noticed that deceased was in a stooping position clutching his chest. The deceased uttered the following words, "Uncle I am now dead". The witness informed the mine owner and later secured a vehicle to ferry the deceased to hospital. He was subsequently advised that the deceased had died.

The witness denied that he called the accused a thief who was *persona non grata* at the farm. Further the witness denied assaulting the accused or witnessing accused being assaulted by anyone. The witness denied that it is the deceased who produced a knife and stabbed accused first. He insisted that the knife came from accused's pocket. He agreed that deceased was his nephew who had worked at the mine since February 2013. According to him the whole event happened "swiftly" depriving him of an opportunity to either warn or prevent deceased from being stabbed. The witness went on to tell the court that deceased was physically bigger than the accused and that deceased had taken some alcohol during the day. He said accused leapt towards the deceased and stabbed him. As regards accused's state of sobriety on that night, the witness said the accused was "drunk as he was unable to walk". Finally he said accused's refusal to leave the mine made him to suspect that accused was loitering with some intent to commit some unknown crime.

This witness gave his evidence in a calm and composed manner. He did not contradict himself during cross examination. His version was simply straight forward and he never departed from its core. He conceded that the deceased was his nephew and that he had taken alcohol during the day. Further he conceded that deceased confronted the accused wanting to know why accused was refusing to leave the premises. A biased witness in our view would not have done that but would have denied that deceased drank beer during the day and that deceased approached accused inquiring why accused was still on the premises. Most of his evidence dove-tailed with that of Portia Zvidzai. We have no hesitation in accepting his evidence in its entirety.

The state then called its second witness one Portia Zvidzai a former employee of Gretina Mine. She started working at the mine in January 2013 and left in June 2013. She testified that on 18 May 2013 she was at the mine tuck shop where she had gone to buy air time at approximately 8pm. The witness said that accused arrived in the company of two other men. Upon arrival accused pushed her with his chest at the same time asking her whether the tuck shop had been closed. She told him that the tuck shop had indeed been closed. Accused did not believe this witness because instead of going away, he went straight to the tuck shop door where the 1st witness was standing. The accused indicated that he wanted to buy beer and was told that there was no beer left and that the shop was closed anyway. Accused then left and stood in a shed in the "shadow". This was at a different spot from where the other two men were seated. Accused stood against a wall with his hands in his jacket pockets. The 1st witness came out of his house and upon seeing the accused who had moved to a spot that was lit said and "man are you still here". Accused did not answer, instead he returned to the dark portion of

the shed. At this point deceased arrived to collect his cellphone from the 1st witness. The 1st witness entered his house to collect the cellphone. Upon his return accused again moved out of the shadow and 1st witness asked accused why he was still on the premises despite his earlier explanation. Deceased then said, "Man if its closed it means its closed." Accused remained standing while deceased and 1st witness were conversing and laughing. Shortly thereafter she saw accused "jumping towards deceased and his hand touched deceased's chest." Next she saw deceased touching his chest where he had been "touched". Deceased bent down and said, "Gentlemen I am now dead these people have killed me." When the deceased removed his hand from his chest she saw blood "gushing" out upwards. Accused and his two companions then fled and the 1st witness then made arrangements for deceased to be ferried to hospital. The witness said she was standing approximately 10 metres from the scene and could see and hear clearly.

When it was put to her that (1st witness) assaulted accused she said nothing about that happened. She also denied that deceased is the one who pulled a knife intending to stab accused with it. Asked where the knife came from she said it came from the accused pockets since he had his hands in his pockets. The witness denied knowing the accused prior to this day. She also told the court that she does not have any reason to falsely implicate the accused. Like the 1st witness she thought accused and his companions were thieves.

Under cross-examination she stuck to her story. When it was put to her that there was nothing peculiar in accused wearing a jacket with a hood and placing his hands in his pockets, the witness' answer was, "The unusual thing is he went to a shed where there was a shadow twice – why not go to where his colleagues were." She told the court that she was not related to both Muchochomi and the deceased. When it was put to her that there were discrepancies between her statement to the police and her *viva voce* evidence, the witness said she gave her statement in the Shona language and she suspected that some of what she said was omitted.

This witness is what can be termed an independent witness in that she has no conceivable interest in the matter apart from telling the truth. She gave her evidence confidently and truthfully. Her evidence flows naturally. Even under cross examination she did not pause to think about her answers. Her answers would just come out naturally and spontaneously. The witness' demeanour was good and her evidence is corroborated on material respects by that of the accused himself and Muchochomi (the 1st witness). She did not exaggerate her testimony, for example she could have said she saw accused producing a knife from his pocket, instead, she said she only inferred that the accused had the knife in his pocket. Most of her evidence dovetails with that of the previous witness. For these reasons we accept her evidence *in toto*.

The state closed its case and the accused gave evidence in his defence. Accused's version is basically that on the day in question, he went to Gretina Mine to buy beer from the 1st witness. He agreed that he was advised that there was no more beer. He said the 1st witness told him that he (1st witness) did not want to see accused at the mine since he was a thief. The 1st witness started assaulting him with open hands on his cheeks. He said as he was trying to run away "Chrispen" got hold of him by his "trousers" around the waist and 1st witness continued to assault him with open hands accusing him of being a thief.

According to the accused "Chrispen" then stabbed him with a knife on the wrist and he got hold of "both hands" and "disposed him of the knife" then stabbed him with the same knife. That is when they let go of the accused and he ran away. The following morning he threw the knife into a thicket on his way home. He was arrested that morning and he showed the police the knife. On the day he said he had been drinking beer at a tuck shop at a place called Shamrock. The accused denied being drunk that night but said he had smoked dagga and felt an urge for more alcohol. He denied seeing Portia at the tuck shop but saw her husband.

The accused's version is highly improbable and incredible. This is so because the accused himself did not perform well as a witness. He contradicted himself on a number of occasions. For example in the warned and cautioned statement he said his hand was cut in the process of disarming the deceased of the knife, yet in the defence outline he said the deceased stabbed him with a knife before he took it.

Secondly, in the defence outline he admitted being in the company of two male "friends" a fact he vigorously denied in his evidence in chief. Thirdly, in the defence outline, it is not denied that Portia was present at the scene and witnessed the incident, yet in his evidence in chief he strenuously denied that Portia was there.

Fourthly, as regards his state of sobriety he initially said he was not drunk although he had taken alcohol in the afternoon, later under cross examination he changed and said he was drunk and this made it difficult for him to escape. Apart from this prevarication accused failed to answer questions promptly and meaningfully. He would take time to answer and in some instances he would avoid the question despite it being repeated several times. It became clear to us that the accused was bent on fabricating his evidence in a bid to exonerate himself from those portions he felt were incriminating. For example while the accused admitted that he had a jacket, he continuously said this jacket had one pocket which was on the left side. When he said this he was trying to mislead the court for he knew that the witnesses had said the knife came from the right hand side pocket. Also despite the fact that both witnesses said they saw two men with the accused and that these 2 ran away with the accused, the accused denied this fact. The reason he denied this is that he realized rather belatedly that it would not make sense that his friends would stand and watch while he was being assaulted. By saying he was alone he was hoping to portray himself as a victim of the assault by the 1st witness and the deceased.

Accused's explanation of how he disarmed deceased is improbable in that initially he admits that he was being assaulted by 1st witness before deceased arrived at the scene. One wonders why if this is what happened, the accused failed to run away. On his own admission he was not being held but he was being "pushed". Further in view of the fact that deceased and 1st witness were stronger than accused, it is unlikely that accused would be able to twist deceased's arm, take the knife and stab him while 1st witness was just watching. Also according to accused's explanation, that deceased was behind him holding him by the belt it would not have been possible for the accused to stab deceased on the chest simply because deceased was taller and from accused's indications he swung the knife with his hand at his waist level therefore the blow should have landed either in deceased's groin or lower abdomen.

From the above we find that the central issue is whether or not accused was acting in

self defence when he stabbed the deceased. We make from the totality of the evidence the following findings:

- (i) that the accused went to Gretina Mine in the company of two men;
- (ii) that upon being told that there was no beer and that the shop had been closed the accused did not go away;
- (iii) that the accused was armed with an Okapi knife Exhibit number 5;
- (iv) that at no stage before the stabbing was accused assaulted by anyone;
- (v) that deceased died from the stab wound;
- (vi) that although accused had consumed alcohol he was not so drunk as not to appreciate what he was doing.

Murder consists in unlawfully and intentionally causing the death of a human being who is alive – G. Feltoe, *A Guide to the Criminal Law of Zimbabwe* p 101. It can also be committed where an accused caused the death of the deceased realizing that there was a real risk or possibility that his conduct may cause death and continued to engage in that conduct despite the risk or possibility.

Further, there must be actual or legal intention to kill. There is actual intention where the accused desires the death, that is death is his aim and object. There will also be actual intention where death is not the aim and object, but accused continued to engage in an activity which he realizes will almost certainly result in death.

There will be legal intention where an accused does not mean to bring about death but continues to engage in an activity after he foresees that there is a real risk that the activity will result in the death of a person. Its elements are;

- (a) subjective foresight;
- (b) of the real possibility of death, and
- (c) recklessness. G Feltoe *supra* pages 103 – 104

In casu the accused does not deny the *actus reus* that is the physical element of stabbing the deceased. He also admits using the knife. As a result, the only issue is whether the accused committed the crime with the requisite intention. Both the state and defence counsels submitted that the accused be found guilty of murder with constructive intent. The defence counsel submitted that although accused was acting in self defence, the means he used exceeded the bounds of reasonable self defence.

We do not agree with counsel that this defence fails for this reason. The real reason is that from our factual findings, there was no unlawful attack on the accused. For this reason the rest of the requirements for this defence fall away. We however, agree with defence counsel's submissions that the accused was reckless and that at that time he had consumed some alcohol.

Mr Mafa for the state submitted that accused be convicted of murder with constructive intent. He relied on the following cases;

- (i) *Mugwanda v S SC-19-2002*
- (ii) *Tichaona Mudzana v S SC-76-04*

(iii) *Witness Siluli v S SC-146-04*

The common thread running through these cases is the principle that “the expression intention to kill” does not, in law, necessarily require that the accused should have applied his mind to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis*, as distinct from *dolus directus*.”

In casu, we agree with counsel that the proper verdict is one of guilty of murder with constructive intent. We say so for the following reasons:

- (a) accused plunged a knife into deceased’s chest without any provocation at all
- (b) the accused did so recklessly
- (c) accused delivered one blow only and fled from the scene
- (d) accused stabbed deceased on the upper part of his body i.e the left front of his chest, causing an injury on the deceased’s heart
- (e) the medical evidence shows that it was a deep stab wound
- (f) accused subjectively foresaw the possibility of his act causing death.
- (g) accused had consumed some alcohol but this did not prevent him from knowing what he was doing in approaching Muchochomi, asking if he could purchase some beer, producing a knife which we find to have already been opened, stabbing deceased with severe force and fleeing into the bush.

Accordingly the accused is found guilty of murder with constructive intent.

Extenuation

It is trite law that constructive intent on its own or taken together with other factors can constitute extenuation. There is evidence from Muchochomi that accused was drunk – his violent reaction to deceased’s utterance that accused should leave the premises can only be explained by reference to the influence of the alcohol he had consumed. On these facts we find that there are extenuating circumstances in this case.

Aggravation

Accused is aged 30 years, married with 3 minor children. He is a gold panner who makes \$150 - \$200 per month. Accused is a first offender who acted under the influence of alcohol. He spent 8 months awaiting trial.

Mitigation

- an innocent person was needlessly killed;
- there is need to emphasize the sanctity of life in assessing sentence
- courts must show disapproval of the use of knives whether as instruments of attack or defence by imposing stiffer penalties on those found guilty of having done so.
- accused committed a very serious offence – callousness, inherent wickedness
- a lengthy period of imprisonment is called for.

Sentence

In assessing an appropriate sentence we took into account the mitigating and the

aggravating factors. The sentence should reflect the importance the court attaches to the sanctity of human life. The use of knives be it in self defence or in any other occasion is frowned upon by the courts. For these reasons accused is sentenced to 22 years imprisonment.