

THE STATE
versus
ACKIM CHIRWA

HIGH COURT OF ZIMBABWE
MAKONESE J
GWERU 19-21 MAY 2015

Mrs *R.T Takuva* for the state
Mr *V. Masvaya* for the accused

Criminal Trial

MAKONESE J: The accused is a self-proclaimed prophet. He appears in this court on a charge of murder. The allegations are that on 13 December 2011 and at Bonaccord Shopping Centre in Redcliff, the accused wrongfully and unlawfully caused the death of Esdom Mukazi, a male adult aged 25 years, by stabbing him with a knife on 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 tendered a plea of not guilty to the charge and the matter proceeded to a full trial.

The state tendered into the record of proceedings Exhibit 1, being the outline of the state case. It shall not be necessary to repeat the entire contents of the summary of the state case which now forms part of the record. The defence outline was tendered by the accused as Exhibit 2. In brief the accused's defence was that on the fateful day he was confronted by one Johnson Dhliwayo who demanded that accused should buy him beer. Accused refused to comply with Johnson's demands and the two had a misunderstanding which generated into a fist fight. Accused avers and it appears common cause that Johnson who was visibly drunk broke accused's spectacles. Accused and Johnson continued to exchange blows and when Johnson appeared to have an upper-hand accused armed himself with an iron-bar with which he used to strike Johnson on the arm. Johnson fell down and struggled to raise himself from the ground. Accused avers in his defence outline that during the melee the accused was trying desperately to

free himself from the accused's grip when Rangarirai Mhondiwa tried to intervene. Accused alleged that Rangarirai had pulled out an okapi knife in an attempt to stab the accused. The accused had somehow managed to dodge resulting in the accidental stabbing of the deceased.

The state then tendered Exhibit 3, the accused's confirmed warned and cautioned statement. In this statement the accused gave the version of events as follows:

"I do not admit to the allegations laid against me. What happened is, I had an argument with John at Bonaccord Farm, who said that I had divorced my wife. He slapped me on the cheek, broke my spectacles by stepping on them. I then approached Meki Sibanda who tried to reconcile us, but John did not listen to him. He assaulted me again on the cheek and I retaliated by hitting him with a fist on the face. I fought with John but I ran away. Four of John's friends Esdom, Rangarirai, Robert and Privilege, ran after me and started to beat me up. I tried to run away from these people, that is when one of them produced a knife but I did not see who stabbed the deceased. I only saw that the knife resembled an "Okapi" knife. This is all I can say in connection with this case."

The next documentary exhibit produced by the state is the Post Mortem Report (Exhibit 4). The Post Mortem report number 46657C was compiled by Dr Zimucha at Kwekwe General Hospital on 15 December 2011. The observations are indicated as follows:

- (a) knife stab wound – left chest wall
- (b) massive left haemothorax

As a result of the examination, the pathologist opined that the case of death was:

- (a) hypovolaemic shock due to massive haemothorax from knife stab wound, left chest wall.

The state sought and obtained formal admissions from the defence in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07], and the evidence of the following witnesses was accepted as it appears in summary of the state case:

- (a) Takawira Albert Mukazi
- (b) Daniel Fanuel Banda
- (c) Patience Shambare
- (d) Dr T Mahachi

The state then led evidence from two witnesses before closing its case. The first to take the witness stand was Pilot Meki.

This witness testified that he was known to the accused before this offence was committed. He knew the accused to be prophet who regularly conducted his services at Bonaccord Farm. Accused belonged to an Apostolic sect. The deceased was known to the witness as a neighbor and they shared the same totem. He therefore regarded deceased as a younger brother. On the day in question he had just arrived at the shops when a dispute erupted between accused and one Johnson Dhliwayo. The witness led the two, (Johnson and accused) outside the shop to try and reconcile them. Once outside the shops a fist fight ensued between accused and Johnson. Johnson who appeared to be drunk and still holding a beer bottle in his hand was the initial aggressor. Accused who realized that he would be no match for Johnson picked an iron bar which he threw at Johnson, hitting him on the arm. Accused took to his heels but before he could go far he was intercepted by the deceased who grabbed him by his waist from behind. At that stage deceased had just appeared at the scene and was trying to prevent the accused from fleeing. The witness stated that he observed the deceased shielding the accused from persons who were baying for his blood and saying he must be beaten. The witness then heard the deceased shouting that:

“ah, this young man has stabbed me with a knife.”

The deceased fell on his knees clutching his chest with both hands. At that stage the witness said that he observed accused wielding a knife towards Rangarirai Mhondiwa and Robert Dube. The witness said he also realized that in that commotion, the accused had also stabbed Rangarirai Mhondiwa on the back below the armpit. Rangarirai was also bleeding from the hand. The accused fled the scene. The deceased was ferried to hospital at Kwekwe where he later died.

The witness was subjected to extensive cross-examination but he stuck to his version. He was not contradicted in any material respect. His evidence is consistent, credible and reliable. The court does not find any tinge of exaggeration in this witness's testimony.

The state called as its next witness, Rangarirai Mhondiwa

To a large degree the evidence of this witness corroborated the evidence of the first witness. He confirmed that the deceased was related to him. He also knew the accused as a self-styled prophet who was well known in the area. The witness confirmed that when the deceased was stabbed by accused he was the nearest person at the scene. He saw the accused drawing a knife

and stabbing the deceased. He made an attempt to retrieve the knife from the accused person but he was also stabbed at the back behind the arm pit by the accused. He also suffered a cut on his right hand. The witness showed the court the mark that he now carries from the stab wound. The witness produced a medical report which confirms that he sustained a stab wound. The witness apologized to the court for producing a torn and tattered medical report. The report now forms part of the records as Exhibit 5.

The defence attempted to tear into the evidence of this witness suggesting that he was merely protecting himself because he is the one who had accidentally stabbed the deceased. The defence made futile attempts to prove that the witness was fabricating evidence. It became apparent that this witness had no bone to chew with either the deceased or accused person. He had no motivation to lie and mislead the court. He was simply narrating events as he perceived them. He conceded that accused was running away when he was grabbed by his waist by the deceased. He indicated that deceased was not party to the earlier dispute between the accused and Johnson.

The court concluded that the evidence of Rangarirai Mhondiwa was credible. His evidence sounds true and must be believed.

The state closed its case and the accused took to the witness stand and gave evidence under oath. The pith of accused's defence was that he did not stab the deceased. The deceased was stabbed by Rangarirai who had joined the fight on the deceased's side. The accused testified that his version as contained in the warned and cautioned statement contained certain false information because he had been wrongly influenced by the policeman who dealt with the matter. The accused failed to stand by his warned and cautioned statement but his version did not make logical sense. The accused was seen by Rangarirai stabbing the deceased. Rangarirai himself was also stabbed at the back by the accused. It is inconceivable that Rangarirai would stab himself at the back and on the hand.

Accused's defence counsel had no option but to concede that the accused's story was not sustainable. His position was unenviable because there was overwhelming direct evidence that accused had committed this offence. As state counsel pointed out most of the issues are common cause and for that reason she submitted that the accused ought to be found guilty of murder with

constructive intent. The court was referred to the case of *State v Mugwanda* 2002 (1) ZLR 574 (S). In this matter, CHIDYAUSIKU (CJ) stated at page 581 as follows:

“--- a verdict of murder with constructive intent requires the foreseeability to be possible (as opposed to being substantially certain, making this a question of degree more than anything else.)”

I have no doubt in my mind that from the established facts, when the accused struck the deceased with an okapi knife in the chest cavity he knew that the deceased could die. Accused foresaw death as a substantial possibility but nevertheless engaged in that conduct.

In the result, the accused is found guilty of murder with constructive intent.

Sentence

In assessing an appropriate sentence the court shall take into account all the mitigating features of the case that have been highlighted by accused's defence counsel. The court takes into account that accused was aged 24 years at the time of the offence. The court takes into account the delay the case has taken to finalise. The accused is not to blame for the delay. The court further takes into account the anxiety the accused has suffered as a result of such delay. The accused spent a total of 8 months in remand before this trial. Accused's personal circumstances and background shall also be considered. As against that the court shall take into account the aggravating features of the case which are:

The accused on surrendering himself to the police gave a false defence and sought to blame an innocent man for inflicting the fatal blow on the deceased. The accused continued with his false defence in court and sought to mislead this court. The accused has not shown any remorse up to the very end. He has not shown any form of contrition and has not been apologetic for his conduct. His position as a prophet is not consistent with his behavior. At the very least he could have tendered an apology and come out clean in the face of the overwhelming evidence against him. The court notes that the accused used excessive force in stabbing the deceased. The post mortem report shows that deceased suffered hypovolemic shock due to massive haemothorax from a knife stab. The knife pierced the deceased's chest cavity. This indicates that the accused acted recklessly. He fled the scene and concealed the knife. The sentence the court must impose must fit the offence and the offender. The court will impose a deterrent sentence to show its

displeasure at the use of violence in resolving conflicts. Whilst there was some amount of provocation, prior to the stabbing, the evidence led shows that deceased was not in any way attacking accused. He died because he was called by his sense of national duty as a soldier, to prevent the accused from fleeing. Deceased even prevented the accused from being assaulted.

In the result, the appropriate sentence in this case would be as follows:

(1) Accused is sentenced to 15 years imprisonment.

*National Prosecuting Authority's office, state's legal practitioners
Mkushi, Foroma & Maupa, accused's legal practitioners*