

THE STATE
versus
STEVEN TSHUMA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 26 JUNE 2018

Criminal Trial

T Muduma for the state
Ms T Dube for the accused

MATHONSI J: At the time Pedzisai Mpofu met his death on 11 December 2017 at Bazha Business Centre under Chief Malaki Masuku in Matobo, Matabeleland South, he was 36 years old. He was the victim of an okapi knife attack, the stabbing being directed to his back and right side of the neck. It killed him instantly.

The then 30 year old accused person has been charged with the murder of the deceased in contravention of section 47 (1) of the Criminal Law [Codification and Reform] Act [Chapter 9:23] it being alleged that he is the one who stabbed the deceased once on the back and once on the right side of the neck intending to kill him or realizing that there was a risk or possibility that his conduct may cause death but continued engaging in it. The accused pleaded not guilty to the charge and gave a version in his defence outline which is diametrically different from that presented by the state. He put in issue all the allegations made by the state.

According to him, on the day in question, he arrived at Bazha Business Centre from Bulawayo, at about 1700 hours and entered into Bazha store intending to buy candles. He observed the deceased and Marvellous Tshuma consuming alcohol and the deceased was visibly drunk as he immediately started insulting him. The deceased approached him scolding him and making remarks to the effect that he, the deceased, was having an affair with the accused's wife. Although the accused initially ignored the deceased's insults telling the deceased to leave him

alone, the deceased would not relent. He pulled out an okapi knife which he used to stab the accused in the hand causing him to fall down writhing in agony.

The accused stated further that although he had sustained a stab wound on the hand and had fallen down, he was able to grab the deceased's hand and disarm him of the okapi knife. He used the same knife, in defence of his person, to stab the deceased on the back of the shoulder.

After stabbing the deceased on the shoulder the accused says he ran away fearing for his life. As he walked towards his homestead somehow he met the deceased again. This time the deceased had armed himself with an iron bar which he threw at him hitting him on the ribs thereby inflicting excruciating pain and again causing the accused to fall to the ground. As the deceased charged at him intending to inflict more pain to him, the accused says he gathered strength and withdrew the same knife he had snatched from the deceased earlier on which he again used to stab the deceased on the neck but in self defence. The deceased then ran towards the clinic but collapsed to the ground.

The accused says he managed to limp his way back to the business centre where he reported the matter to a policeman by the name of Mutisi who took him to the police base where he was later arrested and detained in cells. According to the accused, the state witness Robert Moyo who is his own uncle, was not present at the scene but has fabricated evidence against him because he has a long-standing grudge against his family. Moyo is using this case in order to fix him. As shall become apparent later, Robert Moyo was not the only eye witness.

The accused relies on defence of person to ward off the charge leveled against him. In order to succeed, the accused must satisfy the requirements of that defence set out in section 253 of the Criminal Law Code [Chapter 9:23]. It provides:

- “(1) Subject to this Part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack and he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if—
- (a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent; and
 - (b) his conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she believed on reasonable grounds that he or she could not otherwise escape from or avert the attack; and

- (c) the means he or she used to avert the attack were reasonable in all the circumstances; and
- (d) any harm or injury caused by his or her conduct—
 - (i) was caused to the attacker and not to any innocent third party; and
 - (ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.”

Subsection (2) of section 253 requires the court determining whether these requirements have been met to take into account the circumstances in which the accused person found himself or herself in including any knowledge or capability the accused person may have had including any stress or fear operating on his or her mind at the time.

The question which arises is whether the accused was under any unlawful attack at the time that he stabbed the deceased twice— once on the back and once on the right side of the neck—inflicting fatal wounds. Let me begin by making the critical point that defence of person or what is collectively referred to as “private defence” in criminal law, has evolved out of public policy considerations. Natural reason permits a person to defend himself or herself against danger. The following passage in Jonathan Burchell’s book, *South African Criminal Law and Procedure*, Vol 1, 4th ed, Juta, Cape Town, 2011, is apposite:

“A person who is a victim of an unlawful attack upon person, property or another recognized legal interest may resort to reasonable force to repel such attack. Any harm or damage inflicted upon the aggressor in the course of such private defence is not unlawful. As a general rule, the law does not permit persons to resort to force or violence to protect their interests, expecting that they will invoke the protection of the law and the agencies of law enforcement for this purpose. To allow otherwise would be to permit and condone private vengeance, retaliation and other forms of self-help to the detriment of peace, good order and the rule of law. However, it is not always possible for the state, through the police and the courts of law, to provide the immediate and necessary protection due to every citizen with respect to their legal rights and interests. In such circumstances it is that individual’s inherent right, ‘accepted by all law, both natural as well as civil’ to resort to private defence. In doing so, the citizen acts for the state and thus his or her actions are necessarily lawful. Although allowing this right to the citizen, society must carefully limit its ambit.”

It is for the purpose of limiting the ambit of the defence that section 253 (1) makes it available as a complete defence to only an accused person who was under an unlawful attack. Even where the accused person was under an unlawful attack certain essentials must still be satisfied before the defence is availed. The unlawful attack must have commenced or was

imminent. What this means is that fear alone is insufficient to justify a defence as there must be an actual or imminent attack upon the accused person in a case such as the present. When referring to the imminence of the attack the law draws the line that the defence cannot be resorted to where the accused person has the time or opportunity to seek other forms of protection like fleeing. The attack must be immediately about to begin in order for it to be imminent.

Regarding the means used to avert the attack the law requires that they be reasonable in all the circumstances and should not be disproportionate to the harm sought to be averted. An accused person facing an unarmed aggressor or one wielding a small switch cannot pull out an okapi knife and use it to stab the aggressor as a means to avert the attack.

I have had to discuss the law relating to defence of person in order to demonstrate that this is not a defence available to any accused person who has nothing better to say. The difficulty confronting the accused in this case is that we have eye-witness accounts of what transpired at Bazha Business Centre immediately before the deceased met his violent death. In that regard I must express my concern at what appears to have been an attempt by state witnesses to assist the accused person evade the consequences of his actions. If one looks at the state summary, there are two witnesses, namely Robert Moyo and Marvellous Tshuma, who were present inside Zamangothando Bottle Store when the accused entered and an altercation started between him and the deceased. At the trial Marvellous Tshuma did not come to testify at all and a summary of his evidence had to be expunged from the record. It means that the court has to close its eyes to that evidence.

Robert Moyo did appear in court and gave evidence. However his evidence is now substantially different from that summarized in the state summary. Suddenly Moyo was not present inside Zamangothando Bottle Store when the fight erupted. He told the court that instead he was seated outside Adams Cocktail Bar when he saw the deceased coming from Zamangothando Bottle Store. He was walking fast, not running, while holding his T/Shirt in his hand. When he got close to the witness the deceased muttered something to the effect that he had been stabbed and was indeed bleeding from a wound at the back. Although Moyo says he asked the deceased twice as to who had stabbed him the deceased did not respond.

The witness says he then went inside the cocktail bar and reported to a police officer, Trymore Tinashe Mutisi, that someone had been stabbed and together they went outside to attend the scene. It is then that he observed the deceased and the accused dashing towards the clinic. As they were about to get to the road Moyo observed the accused lunge at the deceased and stabbing him on the neck “on the throat part.” By the time the witness, who says he had to mount his bicycle to get to the scene a short distance away, arrived at the scene the deceased had fallen to the ground and was dying. The accused was escaping forcing the police officer to chase after him. He was apprehended.

I think Moyo and the entire village community of Bazha should hang their heads in shame for daring to assist a person who committed a heinous crime at a business centre in broad daylight by trying to suppress the evidence. I say so because the attack on the deceased must have been witnessed by a lot of people most of whom did not see the need to come and assist the court dispense justice. Moyo, who is a fairly old man who should have wisdom, is testimony to the saying that at times old age does not come with wisdom, but may come strolling alone. The fact is that even by the accused person’s own version, the deceased came out of Zamangothando running for dear life. He had been stabbed. The police officer, Mutisi, who was in the company of Moyo and had been summoned by him, actually saw the accused chasing after the deceased holding an okapi knife on his right hand. It is therefore disgraceful that Moyo decided to suppress the chasing aspect.

According to the post mortem report compiled by Dr S Pesanai, a pathologist at United Bulawayo Hospitals, after examining the remains of the deceased on 13 December 2017 the cause of death was haemorrhagic shock and stab wound on the neck due to assault. The stab wound perforated the right subclavian vessels. The doctor also observed that the stab wound on the neck had taken the direction from front to right and top to bottom. This is consistent with Robert Moyo’s evidence that he saw the accused stab the deceased “by the throat part.”

The accused person’s defence that he acted in self-defence clearly does not hold water. According to him he went into a bottle store, which, in the normal course of things sells alcohol, to buy candles. This was despite the fact that he had just arrived from Bulawayo where he had gone to buy seed maize and would have been expected to buy his groceries in Bulawayo. He does not drink at all but still went into a bottle store where the deceased was drunk and abusive.

According to him, although the deceased was used to making disparaging remarks about his wife Sinikiwe Moyo claiming to be having an affair with him for 11 years, he again repeated those claims at Zamangothando Bottle store leading to a fight.

Although it is the deceased who was provocative and for his part the accused kept his cool telling the deceased to leave him alone, it is again the deceased who withdrew a knife and stabbed him on the right hand disabling that hand. He had fallen to the floor as the deceased was bearing down on him armed with an okapi knife. The accused says he was still able to achieve the insurmountable feat of using his left hand, he says he is left handed, to grapple with the deceased and disarm him. He then used the same okapi knife to stab the deceased, not on the front as would ordinarily happen where the aggressor is charging at you, but at the back next to the spine. The accused says that the deceased exited the bottle store running away, which is of course different from his claim in his defence outline that it is himself who ran away.

Denying that he chased after the deceased as witnessed by Mutisi, the accused says he was on his way home carrying his luggage on his head while still clutching the okapi knife in one of his hands, when he somehow met the deceased who was by then armed with an iron bar, never mind that the deceased had in fact taken flight after being stabbed in the back. The deceased threw the iron bar at him from a distance of about 6 paces hitting him in the rib cage and causing him to fall. The deceased still charged at him while on the ground and pressed him to the ground. Even though the accused was in that position of disadvantage, he says he still managed to stab the deceased in the neck in self-defence inflicting a wound which took a front to back, left to right and top to bottom trajectory as observed by the pathologist.

That kind of story only exists in the world of fiction. I reject it as demonstrably false. The accused's own relative, Robert Moyo who I have already said tried desperately to protect the accused by suppressing part of the evidence, saw the accused stabbing the deceased on the neck. Mutisi saw him chasing after the deceased wielding an okapi knife produced in court as exhibit 5. Clearly the accused was under no attack of whatever nature. It was not imminent and was not going to commence. He was simply an aggressor who preyed on a drunk person armed with a lethal okapi knife. He directed his blow to an extremely vulnerable part of the human body, the neck by the throat fatally cutting blood vessels. He knew what he was doing.

I am required to consider the accused person's state of mind in deciding on the appropriate verdict to be returned. *Mr Muduma* for the state urged the return of a verdict of murder with actual intent. That kind of verdict has its own consequences in respect of sentence. We must therefore carefully examine the issue because actual intention is the most blameworthy state of mind in criminal law given that the accused deliberately causes the criminal consequence. As stated in *S v Mugwanda* 2002 (1) ZLR 574 (S) at 581 D-E:

“--- for a trial court to return a verdict of murder with actual intent it must be satisfied beyond reasonable doubt that:

- (a) either the accused desired to bring about the death of his victim and succeeded in completing his purpose; or
- (b) while pursuing another objective foresees the death of his victim as a substantially certain result of that activity and proceeds regardless.”

It occurs to me that whatever prompted the accused to stab the deceased inside the bottle store, if he had not intended to bring about the death of the deceased he would have stopped there. He did not. Instead he chased after the deceased who was running away armed with the murder weapon. When he caught up with him, he aimed another blow at the neck “by the throat part” accomplishing his design, that of bringing about the death of the deceased.

The accused is therefore found guilty of murder with actual intent.

Reasons for sentence

The relevant mitigating factors are that the accused person is 31 years old. He is married with three or four minor children depending on what one chooses to work with given that when giving evidence the accused claimed to have four children but his legal practitioner stated that he has three children. He is unemployed, his wife has left him following his arrest and his children are now under the care of a great grandmother. The accused in a way showed remorse by paying compensation to the family of the deceased in the form of two head of cattle.

There is also this aspect of the accused's belief that the deceased was having an affair with his wife. Although the accused tried to dramatise it by making false accusations that it was the deceased who was bragging about it, we are not prepared to elevate it beyond the status of a suspicion. It is however relevant for purposes of sentence as it goes to show that he was driven by jealousy which caused him to commit the crime.

There is however no doubt that resort to taking the life of a person over a woman cannot be tolerated in a civilized society. As it is the deceased was not even given an opportunity to defend himself or state his case and may have died for nothing at all when the accused took leave of his senses. What is apparent is that the accused behaved like a village bully who targeted his own uncle whom he stabbed in broad daylight killing him instantly. After committing the offence he walked away as would someone who had just killed a wild animal. It was callous in the extreme. The lack of contrition was perpetuated all the way to the end as the accused person unflinchingly pursued a worthless and fanciful defence.

This court has to protect human life and is required by law to impose a sentence which underscores the sanctity of human life. We cannot allow people to move around armed with okapi knives, which they use to take other people's lives on the basis of a whim. The sentence must therefore reflect society's revulsion at that kind of animal behaviour.

Accordingly the accused is hereby sentenced to 25 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Ndove and Partners, accused's legal practitioners