

THE STATE
versus
STEWARTCHIDYAMUDUNGWE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 11, 19, 20 March 2014 and 12 May 2014 and
1, 23 September 2014 and 18 May 2015

Assessors: 1. Mr. Musengezi
2. MR. Mhandu

Murevanhema, for the state
Ms I. Pasi, for the defence

BHUNU J: The accused is charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He is alleged to have intentionally and unlawfully killed his young brother's father in-law. The circumstances under which the deceased Nicholas Manyika met his death are by and large common cause.

The undisputed facts are that the accused runs a tuck-shop at Hurumutumbu Business Centre in Mutoko district. The deceased used to run a grinding mill at the same business centre. The accused's brother Elismus Chidyamudungwe was married to the deceased's daughter one Talent Manyika. The marriage was however not a happy one as it was mired in controversy arising from Talent's alleged infidelity.

On the day of the alleged murder Elismus acting on information confronted his wife Talent about the alleged infidelity at her father's grinding mill. Talent denied the allegations resulting in a scuffle between the two. During the scuffle Talent fled to go and make a report to her parents that is to say the deceased and his wife Loveness Chimutedza who were working in their tobacco field. Upon receipt of the report the deceased and his wife proceeded to the scene in order to confront Elismus and settle the misunderstanding between their daughter Talent and her husband.

At this juncture the State case differs materially from the defence case. Talent and her mother's version is that upon receiving the report the deceased instructed Talent and her

mother to go to the grinding mill while he would follow after collecting his shoes. When the two got to the grinding mill a scuffle ensued between Talent and her husband Elismus during which she struck and seriously injured him with a plunk. Upon realising that she had seriously injured Elismus she fled from the place when she observed the accused approaching holding a lethal weapon. As she was running away she met the deceased who was now on his way following her and her mother to the grinding mill. After the report the deceased proceeded towards the grinding mill while she took refuge in the bush.

She went to the scene about an hour later only to find that the deceased had been stuck and seriously injured on the head. In her own words this is what she had to say:

“I assaulted Elismus using that plunk. That is when he went out crying as he was bleeding. I realised that I had injured him. My mother was standing by. That is when my husband came out bleeding. I then saw the accused coming holding a lethal weapon. I did not clearly observe the weapon but I saw that it was a hoe handle.

He was coming from his home about 200m from the grinding mill. This happened around 3pm. I then started running along the road that passes through my parents' residence. That is when I met my father. He asked me what was wrong. I told him that my brother in law was running after me wielding a lethal weapon.”

She later returned to the scene from the bush where she had been hiding only to find that her father the deceased had been seriously injured and was bleeding profusely from the head. Apart from what she was told she has no independent knowledge as to how he was injured because she was not present when he sustained the injury.

The deceased's wife Loveness Chimuteza, an eye witness to the events leading to the deceased's death also gave evidence on behalf of the State. Her evidence differs materially from that of her daughter Talent. While Talent told the court that she assaulted and injured her husband the accused's brother Elismus she sought to defend her daughter saying that he was accidentally hit by a plunk when the door was pushed from inside the grinding mill. This is what she told the court:

“Talent's husband went into the grinding mill. The door opens outwards. As he got inside, the door was pushed and one of the plunks got off the door and struck Talent's husband. I did not get into the grinding mill.

Talent's husband left the scene and proceeded to his brother's shop. I remained standing. I later saw Talent running. As she was running that is when I turned around and I saw the brother Stewart Chidyamudungwe (accused) holding a hoe handle chasing after Talent.

That is when the deceased was also coming from home. They met. Talent did not stop. She

went past the deceased. That is when the accused person struck the now deceased on the head with the hoe handle using both hands. The hoe was broken. I don't know who is the owner of the hoe, but I only saw the accused being in possession of the hoe handle. The spot where the deceased was struck is about 100m from the grinding mill.

When the deceased was struck he fell down and he fainted. That is when I went to collect water and started pouring water on him and he responded. I was alone.”

Loveness started by lying that Elismus was accidentally struck by a plunk when Talent openly told the court that she deliberately struck and injured him in the presence of her mother. Her evidence in this respect materially differs from that of Talent and the summary of the State case.

The accused's defence is basically that of defence of a third party. It was his testimony that while he was sitting at his shop he received a report from his wife. As a result of that report he rushed to the scene empty handed. When he got to the scene he found the deceased, his wife Loveness and daughter attacking his brother with the hoe handle, a log and bricks. His brother was lying helplessly on the ground as he was being attacked. He then snatched the hoe handle from the deceased who retreated for about 3 to 4 metres to pick up bricks to continue with the attack. In a bid to rescue his brother he then threw the hoe handle at the deceased striking him on the head in the process, thereby causing the fatal injury.

The crisp issue for determination is whether or not the accused was acting in defence of his brother. The onus of proof lies on the State to prove its case beyond reasonable doubt. Wherever the court entertains any reasonable doubt the benefit of the doubt is to be given to the accused person. In this case there was no independent witness regarding what actually transpired when the fatal blow was delivered. All the witnesses who testified on this crucial aspect of the case were interested persons prone to be biased one way or the other.

The defence sought to buttress the accused's defence by saying the accused and his brother also sustained injuries during the fracas for which they were also detained at the local hospital together with the deceased. No clear evidence could be preferred because both the police and hospital authorities did not keep proper records of the patients. The net result was that the State was unable to rebut the accused's defence in this respect.

As we have already seen, the only eye witness for the State started by giving biased unreliable evidence meant to shield her own daughter from any wrong doing in circumstances where her daughter was admitting striking the accused's brother with a plunk. To that extent, this critical witness tarnished her own credibility as a witness to the extent that she portrayed herself as an aggrieved widow who is prepared to twist facts in order to avenge for the death

of her husband.

Both the accused and his brother struck the court as honest, credible and believable witnesses. The accused was not involved in the fracas between his brother and in-laws until he was alerted by his wife of the attack on his brother. It is unlikely that he would have attacked the deceased first in circumstances where the deceased had not wronged him in anyway. The probabilities favour the defence's story that the deceased and her family were the aggressors in a bid to avenge the attack perpetrated on talent by the accused's brother. Although the attack was on his brother the accused had the legal right to intervene and rescue him from the unlawful attack. The means used was commensurate with the nature and severity of the attack. The intention was to prevent any further attacks on his brother and not to kill the deceased. There is a ring of truth in his evidence that he attempted to assist the deceased after injuring him. This explains why the police initially treated the matter as a domestic fracas and sought to reconcile the feuding families.

The requirements for the defence of defence of a third party are amply summarised in Feltoe 's *Guide To Zimbabwean Criminal Law* 1984 at p 32 as follows:

1. Unlawful attack.
2. Upon accused or upon a third party where accused intervenes to protect that third party.
3. Attack must have commenced or be imminent.
4. Action taken must be necessary to avert attack.
5. Means used to avert attack must be reasonable.

The facts of this case establish that the accused intervened to protect his brother who was under an unlawful attack. He wrestled the hoe handle from one of the attackers and threw it to prevent further attacks on his brother with bricks. His conduct was rational and reasonable throughout. No sane brother would not have reacted in that manner considering that his brother was in mortal danger of serious injury or death.

The court therefore comes to the unanimous decision that the accused legitimately acted in defence of a third party when he struck and killed the deceased. His conduct in this case amounts to justifiable homicide **he is accordingly found not guilty and discharge.**

The Prosecutor General's Office, the state's legal practitioners.
Gill, Godlonton & Gerrans, the plaintiff's legal practitioners.