

THE STATE
versus
CHRISTOPHER RUSIKE

HIGH COURT OF ZIMBABWE
MUSAKWAJ
MASVINGO, 19 October 2015

ASSESSORS: 1. Mr Dhauramanzi

2. Mr Gweru

Criminal Trial

E Chavarika, for the state
P T Shumba, for the accused

MUSAKWAJ: The accused pleaded not guilty to a charge of murder. It is alleged that on 25 February 2015 and at plot number 341 Eastdale Ranch, Chatsworth the accused unlawfully caused the death of Samson Rusike by striking him with a pestle once on the left side of the temporal area thereby inflicting a laceration and depressed skull fracture with the intention to kill or realising that there was a real risk or possibility that his conduct might cause death but continued to engage in that conduct despite the real risk or possibility.

The accused and the deceased were brothers. On the material day the deceased had a misunderstanding with his wife. The deceased suspected that his wife was having an affair with the accused. The deceased attempted to attack his wife with a hoe handle. He was disarmed by the accused. He then picked a pestle and this resulted in a struggle with the accused. In the process the accused struck the deceased once on the left side of the head. The deceased collapsed and was rushed to Gutu Mission Hospital. He was pronounced dead upon

arrival. The cause of death was given as severe head injury.

The accused's defence was to the effect that on the fateful day he went to check on the cattle in the pen around 9 p.m. He then saw the deceased and his wife approaching. The deceased then shouted that he had finally accounted for the paramours. The deceased commenced to assault his wife. When the accused intervened the deceased turned on him. The deceased attacked him with a log. In defence of his person the accused disarmed the deceased. The deceased picked up another log and advanced towards him. The accused aimed his log against that which the deceased held. He realised that the log struck the deceased on the head. He then fled from the scene.

The evidence that emerged was that the deceased seemed to be consumed by a jealous monster. It started with the accused assaulting his wife Stellar Chigora whom he suspected of improperly associating with the accused. Stellar sought refuge at her in-laws' home. Apparently this is where the accused resided. The deceased followed up on the evening of the following day. It was agreed that the accused put up for the night with his ailing father whilst Stellar put up in the kitchen hut with accused's mother.

On the following day there was a funeral in the village. The deceased refused to attend. Instead he stalked Stellar throughout the day.

Then came the commotion during the night. Stellar testified that she requested the deceased to escort her to the toilet. When the deceased delayed she rushed out. The deceased subsequently followed and saw the accused at the cattle pen. This prompted the deceased to call out that he had caught the love birds.

Stellar stated that the deceased picked up a hoe handle which he threw at her. The mother in-law arrived at the scene. She picked up the hoe handle and threw it away. The deceased picked up a pestle. As Stellar fled the accused arrived at the scene and tried to restrain the deceased. She heard the deceased remark that it was the accused he was after. The deceased rushed towards the accused whilst wielding the pestle. When Stellar returned she said she found the accused weeping and stating that he had injured the deceased.

The deceased was taken to Gutu Hospital where he died on 26 February 2015. Stellar also stated that she had three children with the deceased. When the incident took place she was three months pregnant with the deceased's child. She also stated that prior to this incident the accused and the deceased got on very well.

Janet Rusike the accused and the deceased's mother also testified. She confirmed

receiving a report from Stellar. When the deceased followed up he was not his usual self. He looked very upset. She also confirmed that on the following day the deceased remained at home where he followed Stellar around. When they eventually discussed the issue she pointed out to the deceased that Stellar was pregnant. The deceased replied that he did not know about the pregnancy.

During the night Janet reacted to commotion within the homestead. She said she saw the deceased assaulting Stellar. She disarmed the deceased of a hoe handle and threw it away. The deceased picked a pestle. She in turn got hold of the pestle. That is when the accused rushed to the scene. At that stage Stellar had fled at her instigation.

The deceased advanced towards the accused. The witness still held onto the pestle. The accused also got hold of the pestle by its end. As they wrestled the accused managed to dispossess the deceased at the time the witness released her hold. The deceased then got hold of another log. She then said that is when the accused must have struck the deceased. She later saw that the deceased had fallen down.

Mr *Chavarika* brought to the witness's attention that her evidence was at variance with her recorded statement. She replied that she was illiterate. She was vague on whether she signed the statement. She also stated that when the deceased was struck he had bent down to pick another log with which he struck her on the shoulder.

Under cross-examination she stated that the accused is the one who rushed towards the deceased and got hold of the pestle. He managed to disarm the deceased. The deceased picked another log. Both the accused and the deceased raised their logs as the witness sought to intervene. The deceased missed the accused and struck the witness on the shoulder. The deceased attempted to assault the accused who in turn raised the pestle. The two weapons clashed and this resulted in the deceased being struck on the head. She further elaborated that the deceased had made as if to strike the accused and the log he held was then struck by the pestle. Then in another breadth she said she did not actually see what took place.

Following the evidence from these two witnesses the defence applied for discharge in terms of s 198 (3) of the Criminal procedure and Evidence Act [*Chapter 9:07*]. Counsel also cited *S v Tsvangirai and Others* 2003 (2) ZLR 88 (H) as well as *Attorney-General v Bvuma* 1987 (2) ZLR 96 (SC).

Arising from the cited cases defence counsel expounded that an application for discharge will be granted where:

1. There is no evidence to prove an essential element of the offence charged,
2. Where there is no evidence on which a reasonable court acting carefully might convict,
3. Where the evidence led by the state is manifestly unreliable such that no court may rely on it.

Mr *Shumba* further submitted that private defence can be a complete defence. He referred to sections 252-255 of the Code as well as *S v Chatukuta* HH-326-15.

In conceding the application Mr *Chavarika* submitted that Janet was supposed fully explain what transpired. However, she vacillated in her testimony. He also referred to *S v Mandizha* S -200-91 which dealt with the requirements of self-defence.

It can be noted that Stellar and Janet could not shed light on what transpired at the critical moment when the deceased was struck. Stellar Chigora was supposed to testify that the deceased attempted to strike the accused with the pestle but the latter disarmed him and struck him instead. However, in her testimony she said she was no longer at the scene when the deceased was struck.

What Stellar was supposed to state is what Janet told the court. However, she vacillated and stated that she was in fear and did not clearly see how the deceased was struck. She added a new dimension, that when the deceased was disarmed he picked another log with which he attempted to attack the accused.

The two state witnesses were clearly recalcitrant. Mr *Chavarika* attempted to impeach Janet but did not do so formally. He explored the issue by posing questions seeking to bring to the witness's attention that she previously gave a statement that was at variance with her testimony. During his submissions I pointed out the issue of impeachment to Mr *Chavarika* he further submitted that he was satisfied by the answers given by Janet.

The procedure of impeachment is provided in s 316 of the Criminal procedure and Evidence Act in the following unhelpful way:

“It shall be competent for any party in criminal proceedings to impeach or support the credibility of any witness called against or on behalf of that party in any manner and by any evidence in and by which, if the proceedings were before the Supreme Court of Judicature in England, the credibility of such witness might be impeached or supported by such party, and in no other manner and by no other evidence whatever:

Provided that any such party who has called a witness who has given evidence in any such proceedings,

whether that witness is or is not, in the opinion of the judge or judicial officer presiding at such proceedings, adverse to the party calling him, may, after the said party or the said judge or judicial officer has asked the witness whether he has or has not previously made a

statement with which his testimony in the said proceedings is inconsistent and after sufficient particulars of the alleged previous statement to designate the occasion when it was made have been mentioned to the witness, prove that he previously made a statement with which his said testimony is inconsistent.”

In *S v Mazhambe and Others* 1997 (2) ZLR 587 (HC) at 589-590 GILLESPIE J elucidated on the procedure as follows:

“When a witness departs from his prior statement then a prosecutor is placed in a position of potentially conflicting duties and responsibilities. Where the departure is not material then the prosecutor need not necessarily take action. That witness's changed evidence, whether it favours the accused or otherwise, will stand as the evidence for the State. The prosecutor has a considerable responsibility in making the decision whether or not the departure is material and if he has any doubt he must disclose the discrepancy.

Where the departure is material, and particularly where it tends to incriminate or to increase the evidence against the accused, then the defence must be informed. Where the accused is unrepresented the court must be informed. I have elsewhere addressed the prosecutor's duty to disclose such inconsistencies. Where the material inconsistency is one which favours the accused the prosecutor might still be inclined to allow that changed testimony to stand as the State's evidence, particularly where the general tenor of the evidence remains in accordance with the State case. Even here, however, the duty of disclosure to the defence (or the court as the case may be) remains. The very fact of that departure, whether favourable to the defence or not, might be such as to cast doubt on the remaining incriminatory evidence of that witness. That doubt must be revealed. Where the departure, however, is such as tends to damage the State case then the prosecutor must, if he persists in the prosecution, act in order to discredit the damaging testimony. If he does nothing that testimony remains on record and must be given proper weight by the court.”

The procedure adopted by Mr *Chavarika* is passable. This is because he indirectly brought the discrepancies to the court's attention. Although it was apparent that the witnesses' testimony was at variance with what was stated in the summary of state case, one may not readily assume that they departed from their previous statements. This is because there could have been an error in the summary. That is why it is important for the prosecutor to inform the court.

It suffices to note that because of the inadequacies in the evidence of the state witnesses, there is no evidence on which a court acting carefully might convict. Stellar and Janet opted to save the living and sacrifice the dead. Mr *Chavarika* did the commendable thing in the process. He did not insist in flogging a dead horse. In fact, he could even have withdrawn the charge after plea. It becomes immaterial to consider the merits of private defence save to note that the defence was put to the witnesses who were not able to rebut it.

In the result the application for discharge succeeds. The accused is found not guilty

and is acquitted.

National Prosecuting Authority, legal practitioners for the state
Mutendi and Shumba, accused's legal practitioners