

STATE
versus
BEULAH EMMA ZISENGWE

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 6, 7 and 13 February 2012

ASSESSORS: 1. Mr Tutani
 2. Mr Mutambira

Criminal Trial

Mr *E Makoto*, for the State
Ms *D Machaya*, for the defence

MWAYERA J: The accused Emma Beulah Zisengwe pleaded not guilty to a charge of murder as defined under s 47 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The state alleges that on 15 August 2110, Beulah Emma Zisengwe unlawfully and with intent to kill or realizing that there was a real risk or possibility that she may kill, cause the death of Peter Gasela Zisengwe by stabbing him with a knife once on the left shoulder below the collar bone causing some injuries from which he died.

The brief facts of the said case are that on 15 August 2010 at number 3062-41 Crescent Glen View 1 Harare, the accused and the deceased who were husband and wife had an argument when the deceased was talking to Desmond Zisengwe over the phone saying accused was a problem. The accused felt insulted and confronted the deceased and also quizzed him regarding his whereabouts during the burial of their grandson. During that quarrel the deceased pushed the accused outside and the accused picked a knife and stabbed the deceased once on the left shoulder below the collar bone. The deceased collapsed bleeding profusely and continuously from the stab wound.

The accused with the help of the deceased's friend ferried the deceased to the hospital where he later died in the morning of 16 August 2010 as a result of injuries. The said knife and post mortem were submitted into evidence by consent. The post mortem report which was marked as exh 2 by Doctor Eduardo Estrada who concluded that the cause of death was hypovolemic shock, ruptured artery due to stab wound.

The accused in her defence outline pointed out that she had an argument with the deceased over his conduct and his failure to attend the funeral of their grandson. The deceased then slapped and pushed her outside. The argument later calmed down. Later when the deceased was eating sadza in the dining room, she heard the deceased talking to their son saying she was a problem, it was then that she walked out of the kitchen where she was preparing some sandwiches and she shouted that the deceased was the one who was the problem, he was lying and a scuffle then ensued.

The deceased slapped the accused who then left and went to the kitchen. She continued preparing her sandwiches and the deceased walking in, shouting. He threatened shouting, he wanted to kill her and again slapped her. She blocked the blows to her face by closing her hands in front of her. The deceased throttled her and on realizing that she could not breathe anymore and was having problems, she stabbed the deceased with an intention to cause him pain so that he could release her and let go not with an intention to kill him.

In short the accused's defence is that she acted in self defence when the deceased had cornered her by throttling her shouting wanted to kill her, a threat he had never given in their 32 year relationship which was characterized by violence. The accused also sought to place reliance on diminished responsibility emanating from the violent nature of a relationship that she had with the deceased. We propose to comment on these issues later.

The state adduced evidence from Ngaakudzwe Zisengwe and Desmond Zisengwe. Evidence from Charles Muchemedzi, Luckson Hoyo, Constable Nyakurukwa, Constable Matongo, Doctor Estrada Eduardo, Assistant Inspector Maphosa, Constable Zerere and Assistant Inspector Gavi was formally admitted as evidence in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

What turns out from the evidence of these witnesses is that the witnesses attended the scene after being alerted in that the deceased had been ferried to hospital. The knife used to stab

the deceased was produced as exh 1, by consent. This knife matched the description of being a kitchen knife of 0.07 kilograms, full length of 32 centimeters, with a blade of 19 ½ centimeters, and approximate width on the wider side of the knife of 2,7 centimeters with a sharp end.

Ngaakudzwe Zisengwe testified at the age of 21 meaning the incident occurred when he was 20. It was apparent from Ngaakudzwe's evidence that violence was the norm at his parents' home. The parents were always quarrelling and fighting and that deceased the father would assault the mother.

Ngaakudzwe, on the fateful day brought the phone and gave his father, the deceased when his brother wanted to talk to the father. According to Ngaakudzwe when the father said, "Your mother is a problem" The accused who was in the kitchen came and shouted accused was the problem, a scuffle ensued and there was pushing, shoving and shouting. Although Ngaakudzwe did not want to commit himself in giving detail as regards the pushing and shoving, he pointed out that accused would go away from one room to the other and the deceased would follow. At one stage "things got disturbing" according to Ngaakudzwe and he tried to restrain, but was overpowered by the deceased.

Ngaakudzwe as a witness was very economical with information as regards how exactly the deceased and the accused were engulfed in the scuffle although he was there. He painted a picture that he was indifferent to the on goings because it was the norm at home anyway. According to him, initially his mother was making sandwiches in the kitchen when the deceased followed her in the kitchen. In the kitchen, the fighting continued, but Ngaakudzwe did not want to give detail or shade light on how the fighting was proceeding. He was standing right there by the door, but did not want to commit himself on how they were fighting and how the accused ended up stabbing the deceased. He did not shade light on how the deceased was stabbed by the accused and could neither confirm nor refute that the accused was throttled by the deceased. His responses were just, they were fighting and he did not pay attention to the specifications because he was used to the type of violence occurring. All he knows is that he heard the deceased saying he had been stabbed me and he went and disarmed the accused who was standing holding the knife. The deceased then fell on the ground and they then call for help.

Generally, Ngaakudzwe was an indifferent witness and very economical in the manner in which he testified. He was not forthcoming and impress the court as a witness who had been

traumatized, not only by the events of the fateful day, but the volatile situation and atmosphere in the home that was brought up in. According to him, from the time he was at primary school he had seen his family engage in the violence.

The deduction that we came up with is that Ngaakudzwe observed the whole incident, even in the kitchen, but was just not forthcoming and did not care to comment. He just did not want to be committed. He even laughed at things which were not amusing. He clearly was frustrated and not interested because domestic violence was the order of day at home.

Desmond Zisengwe, the elder brother to Ngaakudzwe confirmed that he received a report that accused had stabbed the deceased, that is his mother and father respectively. Charles Muchemedzi his maternal uncle, is the one who phoned to notify him. He then reported the incident to the police and was accompanied by the police to the scene.

He testified and confirmed that the accused and deceased would have misunderstandings and they would be always be quarrelling and fighting. According to Desmond Zisengwe, this was mainly when they were both drunk. He just like Ngaakudzwe confirmed domestic violence, misunderstandings and fights were the living way or the norm of their parents, from the time when he was at primary school up to the time that he completed his secondary school. The marriage was characterized by violence with the accused when she was drunk, being verbally abusive and deceased being physically abusive. He told the court that at one time one of his brother Given attempted suicide because of the volatile and insulting relationship of their parents.

The witness's evidence was basically that their parents' marriage was characterized by violence with both parents being drunkards. On the fateful day he was not at home, he only arrived after the events. The witness gave his evidence in a straight forward manner and was truthful to the court.

Evidence adduced from the accused was that she stayed in a violent relationship with the deceased, her husband. She loved the deceased nonetheless. On the fateful day, she had partaken of alcohol, about four pints of beer known as Bollingers while she was making some sandwiches for herself, husband and children. She told the court that although she had partaken that alcohol, she was not drunk, she was in control of her faculties. According to her, they had a scuffle with the accused and he pushed her outside. She went back indoors since she felt the

noise would be embarrassing in the neighbourhood considering they recently had a funeral of their grandchild.

When the deceased was eating sadza, the state witness Ngaakudzwe brought a phone and she heard the deceased saying she was a problem. Irked by this utterance, she went and challenged saying the deceased was a problem. She was slapped and they had brief scuffle, then the accused continued eating, she went back to the kitchen where she continued with making of the sandwiches. It was then that the deceased followed her.

He then slapped her, she blocked by closing her hands in front of her and he throttled her. In a bid to free herself so as to be able to breath, she with the crossed hands holding the knife up, then stabbed the deceased with her head backwards. The witness demonstrated her posture hands crossed in front of face and head being backwards as she was throttled. She told the court that in that posture she stabbed the deceased without necessarily aiming at a specific point but blindly in a bid to inflict pain so as to be free and be able to breathe. When the accused told her she had stabbed in him, she then sort help to assist and ferry the deceased to the hospital. According to the accused, the deceased on the day in question was very drunk and very powerful. This evidence of being powerful is in line with Ngaakudzwe's evidence that when he tried to restrain the deceased, the later overpowered him and continued pushing and shoving with the accused.

Generally the accused seemed to have nothing to hide, she did not seek to exaggerate that she was throttled by both hands. Her evidence was uncontroverted by state witness, Ngaakudzwe who did not see or commit himself as to how it happened and who also did not see how the deceased was stabbed. Her credibility was displayed when she disclosed even her own misdemeanor and what she did on the day in question. She did not seek to hide behind having partaken alcohol to point out that she was drunk or exaggerate the manner in which she was grabbed by the deceased.

Given the totality of evidence from both the state witnesses and the accused person, the state counsel Mr *Makoto* in our view correctly conceded in his submissions that there is no evidence that the accused planned to murder the deceased and as such that a charge of murder with actual intent is not sustainable in the circumstances. The state sought to argue that the accused ought to have foreseen the real risk that her conduct would result in the death of the

deceased, and that murder based on constructive intention or that a competent verdict of culpable homicide be returned, that is if it proved that the accused was negligent in the manner she conducted herself.

Mr *Makoto* argued that in circumstances of the case, the defence raised could not be supported because accused could have used other means to free herself. For this argument, Mr *Makoto* placed reliance on Ngaakudzwe's evidence. He pointed out that although witness appeared to be reluctant and said he did not pay attention to the happenings because the fighting was the norm, he was by the kitchen door. He pointed out that Ngaakudzwe did not witness the throttling or the deceased threaten to kill the accused. Of interest, however is the fact that the witness Ngaakudzwe said that he could not confirm or refute the throttling and that he did not see how the accused stabbed the deceased. To that end, therefore the witness's evidence is not of assistance. The witness said he was not paying attention, whereas the accused on other hand was paying attention.

What turns up from the scenario is the uncontroverted evidence of the accused on one hand and the reluctant witness Ngaakudzwe's evidence on the other hand. We are inclined to accept the uncontroverted evidence of the attentive witness. The question is whether or not the defence raised can be sustained in the circumstance that is the defence of self defence. Before attempting to get an answer to the question from the facts and law before us, it is important to take note of the common knowledge aspects in the present case.

It is common cause that the accused and deceased were wife and husband respectively. The two lived together as husband and wife in a mutually abusive relationship. The violent relationship was relationship was common knowledge to their children and neighbours. In most cases, the accused will be overpowered by the deceased and free herself by biting him. The fracas would normally occur when they were drunk. Violence was the norm in the home.

On the fateful day deceased and the accused had misunderstanding over the delays or none attendance of their grandson's funeral. The violence was further sparked off when one of their sons phoned to talk to the deceased, the father. When deceased stated accused was a problem, the later could not take it and that went to the phone and shouted deceased was a problem. This then calumniated in the deceased, slapping, pushing and shoving accused and finally throttling of the accused by the deceased and stabbing of the deceased by the accused.

It is not in dispute that the deceased gave in to injuries and passed on at hospital. The accused is raising a defence of self defence, in other words saying she stabbed the deceased in order to serve her own life. This defence is provided in s 253 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Section 253 of the CODE provides as follows: Subject to this part, the fact that a person accused of a crime was defending himself or herself or another person against on unlawful attack when 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 omit to do the theme, the unlawful attack had commenced or was eminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was eminent.

(b) His or her conduct was necessarily to abate the unlawful attack and he or she could not otherwise escape from or abate the attack or he or she believed on reasonable grounds that his or her conduct was necessarily to avert the unlawful attack and that he or she could not otherwise escape from the attack.

(c) The means that she or he uses to abate the attack or unlawful attack were reasonable in all the circumstances.

(d) The harm or injury caused by his or her conduct:

(i) was caused to the attacker not to an innocent third part and that

(ii) was not grossly disproportionate to that liable to be caused by the attack.

In determining whether or not the requirement specified in the subsection 1 of s 253 have been satisfied in any case, a court shall take due account of circumstances in which the accused found himself or herself including any knowledge or capability, he or she may have had any stress or fear that may have been operating on his or her mind. Self defence can be a complete defence if all requirements cited above, 1a to d are met or satisfied. In coming up with our decision we have had occasion to peruse other decided cases by this court and also the Supreme Court in respect of circumstances similar or closer to the circumstances of the present case. Mention would be made of few of the cases.

In the case of *State v Monica Siyamasimbo* HC20/99, brief facts of that case being that the accused had jilted the deceased. She discovered the deceased who was aware on dating that she had children, was not prepared to take care of her children and the deceased could not accept

to be divorced. The deceased would on every occasion that he met the accused subject the accused to antagonizing threats, assault and beat her up. On the fateful day, he pursued the accused despite her flee from one place to the other, he followed her threatening to assault her and then threatened to kill her. He intimated that there was not going to be any peace. She eventually realized, she could not run anymore, she picked a knife from a dish which had some fish and stabbed the deceased. The deceased passed away as a result of the injuries sustained due to the same. On trial, the accused raised self defence. She was found not guilty and acquitted.

Gwanza J as she then was cleared spelt out the need to analyze the requirements of the defence of self defence or person in relation to factors laid before the courts. The learned judge pointed out that in order to decide whether the state has discharged the onus of negating, the accused's plea of defence or self defence, the requirements had to be considered in relation to the facts and evidence before the court.

In *casu* the state in address conceded that the accused did not plan or premeditate to stab the deceased in the present case. The evidence of Ngaakudzwe and accused shows that the accused was under attack as she was slapped, pushed and shoved and would go from one room to another. The deceased followed suffices to say the accused was under unlawful attack from the deceased. The attack had commenced in the sitting room and then into the kitchen, culminating into the slapping, throttling and threat of death that she will be killed (if nothing was happening them one wonders why Ngaakudzwe was following from one room to the other).

It is apparent from the evidence before the court that there was an unlawful attack which had commenced and there was imminent threat of death to which no help was forthcoming. The deceased had earlier resisted being restrained by Ngaakudzwe. He overpowered Ngaakudzwe and the deceased was undeterred by the intervention of his son as he continued following the accused and assaulting. It was in response to the real threat to her life that the accused stabbed the deceased.

The next question that comes is whether the action taken was necessarily to avert the attack. In other words, was that the only way out for the accused or could the attacker have been averted in any other manner. State counsel suggested the accused could have run away or bite the deceased as was the norm. Mrs Machaya on the other hand presented that there was no other way accused could have bitten the deceased in the circumstances. She had been followed in the

kitchen, she was throttled and was having difficulties in breathing, her life was under threat, and that is her head was bend backwards and could not bite anyone in that state.

From evidence on record, the deceased was aggressive and he overpowered Ngaakudzwe who was making effort to restrain. The accused was grabbed, throttled with her head backwards and was having breathing difficulties. It has not been disputed that the accused is asthmatic. Given the manner she was cornered, she could not flee or bite the accused and the only way out was with hands crossed armed with a knife she was using in the kitchen to make sandwich, use the same to inflict injury on the deceased so that she could be freed. She had earlier moved from room to the other and accused followed. In the circumstances we are inclined to agree with Ms Machaya that the action taken was necessarily to avert the attack.

Still on the requirements of self defence, the court has to consider whether the means used to avert the attack were reasonable. In the case of *State v Chamunorwa Munyaradzi Mandizha*, SC 200/91. *Munyaradzi*, stabbed his father who used to be very violent and attack the mother. He stabbed more than once, raised self defence, he was defending a life. The defence was successful, held as a full defence and he was acquitted. The important principle to note from that case is the learned judge, said the reasonableness of a person's behavior when he is acting in self defence must be assessed in the light of the situation as it existed at the time and in relation to particular person one is considering.

Indeed the circumstances of the case came into play on assessing the reasonableness or otherwise of the means used to avert the attack. The question that comes to mind is, was the accused in a position to weigh pros and cons and think of the best means to avert the attack from the deceased. Dealing with the present case the accused was throttled and having breathing problems. Did she have chance to wait and think of the best means to avert the attack. The attacker was about to kill her as he threatened. Her life was in danger as such, she was desperate to serve her life. The immediate response was to defend herself with the weapon at hand, in this case it happened to be a kitchen knife which she was already in possession of.

Sight should not be lost of the fact that domestic violence characterized the accused and deceased's relationship, to the extent of affecting even the children with one of them Beaven Zisengwe attempting suicide and the other Ngaakudzwa taking it that fighting was the norm in the home. This also prompted Ngaakudzwe to be merely gapping while the two were struggling

in the kitchen. He said he did not pay attention to who was doing what and what they were doing.

We are persuaded by Ms Machaya's submissions that the accused was a battered woman affected by the stress of abuse over a long time. It was a volatile relationship. According to the accused, she ended up partaking alcohol as to manage the affair. Desmond confirmed the accused and deceased would alternate coming home late drunk and they would quarrel and end up with accused being assaulted. The accused was faced by the deceased of superior strength to her physical strength. She had gone away from him, but he followed with his physical prowess. When things got disturbing according to Ngaakudzwe, the later tried to restrain, but was overpowered, showing the physical strength of the deceased over the accused. Faced with this situation and desperate for life the accused stabbed the deceased once, the post mortem report does say it was one blow. The knife was not imbedded in the deceased's body. The stab was to work off an attack, and one cannot say such an attack in a move to serve self was unreasonable. The means used was commensurate with the danger that was being averted, that is danger of loss of life. Accused cannot be said in the circumstances to have exceeded the limits of self defence. She stabbed with head bends backwards without deliberately aiming to a specific vulnerable part of the deceased's body. She did not have time to think, but was aiming at inflicting pain so as to escape impending death.

Having stated that, if the requirements of self defence are all met, then it can be a complete defence and that the onus of negating the accused's defence for self defence raised rests on the state. We must, hasten to say, circumstances of this case are in support of the defence explanation of events of the day in question. The sanctity of human life is important and it is unfortunate the deceased and accused chose, or decided to live in volatile relationship living by the sword so to speak. It is that mutually volatile relationship that culminated in the events of the fateful day as a result of which deceased lost his life due to a stab wound.

The accused herself indicated, she loved her husband and did not know that the scuffle would end up in him throttling her and her stabbing him. The events of the day in question will live with her all her life and that is punishment. The events of the day in questions clearly spell out the evils associated with domestic violence. and reveal the need to weed out such violent practice and avoid mutually volatile relationships. Such volatile relationships will inevitably end

up in regretted loss of human life like what transpired in this case. The declaration of human rights and indeed our constitution proclaims the right to life of all humans. It is not discriminative on gender or sex.

Upon considering the totality of all the evidence before the court, the following observations are made. That in the case of the impending death due to throttling and threat of death, the accused who was asthmatic and encountering breathing problems. She fought back by blindly stabbing to inflict pain on the deceased so as to be freed. Unfortunately the blow turned out to be fatal. The accused can however not be held liable for defending her own person. She acted reasonably in an effort to survive and all the requirements of self defence namely, that there must be an unlawful attack that the attack must have commenced or be imminent. That the action must be necessarily to avert the attack and that the means used to avert the attack must be reasonable.

The requirements of self defence have been met and de jure once the requirements are satisfied self defence is a full or complete defence. The accused did not get out of her way to look for a knife. She was attacked when she was holding a knife and throttled, she stabbed deceased in a bid to fight for her life. The case of *State v Choruma and Another* 2010 (1) ZLR 40 is instructive. Once the requirements of the defence of self defence are met or satisfied, it becomes a complete defence or a full defence.

Accordingly, regard having been given to the totality of the evidence before the court and the defence of self defence raised, the accused is entitled to an acquittal. Accused is accordingly found not guilty of murder and is acquitted.

Attorney general's Office, state's legal practitioners
Chara & Associates, defence's legal practitioners