

THE STATE
versus
MOSES SAUNYAMA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 12, 13 & 22 June 2017

Assessors 1. Mr Magorokosho
 2. Mr Chipere

Criminal Trial

J. Chingwinyiso, for the State
C. Chibaya, for the accused

HUNGWE J: The accused pleaded not guilty to a charge of murder it being alleged that on 16 December 2016 at Pfumai Village, Mutasa, the accused with actual intent or realising the real risk or possibility of death occurring stabbed Robert Masasa (“the deceased”) once on the left side of the chest thereby inflicting injuries from which the said Robert Masasa died.

Most of the facts surrounding this tragedy are common cause or not in serious dispute. These facts can be summarized as follows:

The deceased escorted his mother-in-law to the accused’s residence. The deceased’s mother-in-law is the accused’s junior wife’s sister. The accused announced to the deceased that he did not want him to enter his courtyard. The deceased nevertheless gained entry against the express wishes of the accused. The deceased approached the accused where he was working and asked him why he did not want him on his premises. He explained his reason as being rooted in the rumour the accused had originated which was doing the rounds in the village. The rumour touched on his two wives and the death of accused’s brother’s late daughter Sarah.

The deceased went away.

The next day the deceased had pitched up alone. He demanded to see the accused who was indoors. Accused came out. The deceased, upon seeing the accused, demanded that the

accused comes out of his courtyard so that they discuss the issue carried over from the previous day. The accused refused to come out of his courtyard. From outside the accused's gate, the deceased embarked on a tirade of verbal threats and expletives for quite some time. Among other threats offered by the deceased were threats of physical assaults, forced relocation and so on. After sometime he went back to his residence.

The following day, 16 December 2016, the day of his demise, the deceased came back to the accused's homestead very early in the morning. As had become his practice, he did not enter the courtyard but greeted the accused from outside the gate. He announced that he had come to discuss the unresolved issue. The accused then indicated that he would only discuss the issue if his younger brother, Paul Guta ("Paul") was present. The deceased indicated that Paul was at his residence so they can both proceed there. The accused declined the invitation to go to Paul's residence and asked the deceased to bring him over if he was there. The deceased left. The accused decided to send his emissary to check if Paul had returned from South Africa. The emissary came back with confirmation that indeed Paul was back.

Shortly afterwards both Paul and the deceased arrived. As usual he invited Paul into his residence and asked the deceased to remain outside the courtyard till he is called in. The deceased complied as Paul went in alone. Paul and the accused conducted their discussion from outside one of the two kitchen huts. The deceased could see them.

After a while, the deceased felt he had had enough, so it would appear. He shouted that he was giving the accused up to the count of three before he entered and dared the accused to do as he pleased. He also had a family to run and had no time to waste over the rumours. He swore that he would settle the matter physically. He then barged into the premises proceeded to where the two brothers were and punched the accused three times before being restrained.

Accused's senior wife, Martha Chimbo, and Paul steered the deceased away from the scene as he resisted. Whilst he was being restrained by this couple, the deceased somehow managed to lend another punch on the accused. The accused got up and warned the deceased that he would injure him if he did not desist.

From there on there are different versions as to what transpired.

The accused's version is that after the deceased and Paul had arrived, he had told the deceased to remain at the gate till he was advised to enter. He intended to discuss these events with his brother Paul before involving the deceased. Before they had concluded their private discussions, the deceased announced an ultimatum in which he threatened to kill the accused.

According to the accused, the deceased held him by the collar and lifted him up before delivering a slap with an open palm. He fell down. When he got up the deceased delivered three fist cuffs to his face but he ducked. These did not find a mark on his person. The fourth blow landed on the wall of the hut. He got up. Paul and Martha Chimbo then tried to restrain the deceased without success as he continually pushed them away. The deceased then kicked and punched him again. When it was clear that the deceased would not leave or be restrained he decided to fetch a knife from the window sill which he had been using to glaze the hut. The accused went to where the deceased was and stabbed him on the upper left side of the chest. The deceased tried to throw a stone towards the accused but failed to do so as the stabbing took effect. He then moved out of the gate where he collapsed and died.

In assessing the credibility of the State witnesses, we took into account that the two eye-witnesses who testified in court were the accused's wives. Although they tried to be as dispassionate in their narration of the events leading to the stabbing as possible, it was clear that their evidence was coloured by their marital ties with the accused.

As an example, Martha Chimbo testified that the accused had uttered words to the effect that he will kill the deceased before he went to fetch the knife. She immediately sought to withdraw the threat to kill and substitute it with the threat to injure the deceased.

In our view it is highly probable, given the fact that he had been punched several times by the deceased that the accused uttered the threat to kill. We come to that conclusion because the accused had long expressed his dislike of the deceased as he held him responsible for the nasty rumour doing the rounds against him and his wives in the village. This is, in our view, the reason why he had imposed a ban on the deceased from setting his foot onto his courtyard. Again the ban was in spite of the fact that the deceased had shown a willingness to have the matter resolved by a discussion between him and the accused.

The threats allegedly uttered by the deceased in our view were an exaggeration by the wives meant to paint the deceased as having been the aggressor through and through. When asked why the deceased who had all along been compliant with the prohibition orders given to him by the accused, the accused could not give any reason for the sudden change of attitude by the deceased. In all probability the deceased's patience with the accused ran thin after he had complied with the accused's demand for Paul's presence before he could discuss the subject at hand with him. He must have, in all probability, been miffed by accused's continued rebuttal of all his efforts at discussing the issue. It is important to note that the deceased had not been armed throughout all the visits.

We do not find that he would have decided on using the stone when they say the deceased did. We come to that finding in light of the fact that the evidence of Paul Guta admitted by the defence in terms of s 314 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] does not advert to the deceased picking a stone. On the contrary, his evidence is that the accused came and stab the deceased who they had managed to restrain.

On this issue we are fortified in our finding by the discrepancies in the evidence tendered by the two wives. The first witness, Martha Chimbo, who is the senior wife gave a curious version. She told the court that before the deceased was stabbed he had picked a stone. After he was stabbed he picked yet another stone. Thus, according to this witness the deceased picked two stones but did not throw either of them. Her evidence got more interesting under cross-examination. She told the court that after the deceased overpowered her and Paul he picked up a stone. This stone was inside the courtyard. He was then stabbed before he threw it.

From the second witness, Sarah Chapinduka, the junior wife, the court is informed that the stone, exhibit 7, together with another stone of same size, is used to keep the gate from swinging open. The weight of exhibit 7 2,6kg gives credence to this explanation as to where the exhibit 7 and its other counter-part are normally kept.

This court knows from the evidence of both ladies that the deceased did not bring the stone when he entered against the wishes of the accused. The court finds as fact that he used his hands to assault the accused upon entering the accused's premises. He had no stone on his person.

Contrasted with the junior wife's evidence, the issue of the stone becomes more convoluted. Sarah Chapinduka says she saw the deceased holding a stone soon after he had been stabbed. She did not see when or from where he picked it. From the sketch plan it is agreed that the deceased was stabbed at point C some 7,9mts to the south-west of the tree inside the yard. According to the junior wife, after he had been stabbed she saw the deceased attempt to throw a stone but failed to do so as he was losing his strength. She did not see whether the deceased picked up the stone or from where he picked it. But she recognises it as one of the two stones used to support their gate.

In our view it is unlikely that the deceased could have been near where these two stones are kept at the gate when he was stabbed. The admitted evidence of Paul Guta, in our view, discounts the possibility of the deceased having picked up the stone since by the time

he was stabbed the deceased had been subdued. If the deceased had attempted to pick a stone, Paul Guta would have noticed it and prevented him from doing so as he had subdued him.

We are unable to find that the deceased at any point picked up a stone exhibit 7 or attempted to throw it at accused either before he was stabbed or after he was stabbed. We find that the accused stabbed the deceased as Paul Guta and Martha Chimbo were steering him out towards the gate at point C. The question becomes whether, when he stabbed the deceased, the accused acted in self-defence.

In order to succeed on the defence of self-defence, the accused must meet the requirements set out in s 253 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The requirements for the defence of self-defence to be a complete defence to a charge of murder are that when he did or omitted to do anything which is an essential element of the crime:

- (a) the unlawful attack had commenced or was imminent; or he believed on reasonable grounds, that the unlawful attack had commenced or was imminent;
and
- (b) his conduct was necessary to avert the unlawful attack and he could not otherwise escape from or avert the attack; or he believed on reasonable grounds that his conduct was necessary to avert the unlawful attack and that he could not otherwise escape from or avert the attack;
and
- (c) the means used to avert the unlawful attack were reasonable in all the circumstances; and
- (d) any harm caused by his conduct was caused to the attacker and not to an innocent third party; and was not grossly disproportionate to that liable to be caused by the unlawful attack.

In their closing submissions both counsel ably referred us to case authority in the law on self-defence as well as on provocation. In our view, the defence of self-defence fails for the following reasons. When the accused stabbed the deceased he had been subdued by Paul Guta and Martha Chimbo who were leading him away from accused towards the gate. The accused followed them and surprised both Paul Guta and Martha by stabbing the deceased.

The accused's action was not carried out in self-defence as by then such an act was not necessary because by then the deceased was being led away. He could have let them take him through the gate. That way he could have averted the death of the deceased.

In any event the facts show that the deceased had at no time picked up exhibit 7. Therefore, even assuming in accused's favour that the two were locked in mortal combat, as he would like the court to believe, his resort to the lethal weapon, the knife, was grossly disproportionate to the harm posed by the deceased who resorted to clenched fists and booted feet only. It is our finding that the accused acted more out of anger than self-defence.

As for defence of provocation, it is trite that provocation is not a defence to a crime. (s 238 of the Criminal Law Code).

However, it may constitute only a partial defence if the requirements set out in s 239 (1) of the Criminal Law Code are met. Basically in order for the provocation to succeed as a partial defence, such provocation must have been so intense as to have induced in the accused a complete loss of self-control in circumstances where such provocation would have been sufficient to make a reasonable person in the accused's position and circumstances lose his self-control.

The facts do show that the accused did not at any time lose self-control. For example, he asked the deceased to remain outside the gate, when the accused barged in by force, he asked him to sit down; when he was punched by the deceased three times, he warned the deceased to leave or else he would kill or injure him. He then went to fetch his knife from the kitchen hut and stab the deceased. In our view these are careful actions of a sober person who was angered by being attacked by the deceased when he least expected it. He acted out of revenge and anger not provocation. The knife was not on his person. He had to walk a short distance to fetch it. The deceased was being led away. During that time the accused had sufficient time to reflect on his next step. He decided to stab the deceased in the chest.

We are unable to find that this was an act triggered by provocation. As his wife said the accused resolved that he would kill the deceased with the knife if the deceased remained on his premises. He went for the knife; took it and stabbed the deceased on the left upper part of the chest without warning. He must have realised that by stabbing him close to the chest there was a real risk or probability of death occurring but despite the realization persisted in his conduct.

In our view, he cannot escape conviction for murder. He is guilty of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

REASONS FOR SENTENCE

In assessing sentence I take into account what your learned counsel submitted in mitigation of sentence. I take into account especially the fact that at some stage the deceased was indeed the aggressor. He had slapped you in the face for no apparent reason. I also take into account the fact that you may have been angered by the manner in which the deceased handled the dispute between you and him. More importantly, I consider the fact that your family and that of the deceased are negotiating compensation for the loss of a bread-winner as mitigatory. That is as it should be in terms of Shona customary practice. It restores the good relations between the surviving members of the family and prevents the resurgent of avenging spirits and everything associated with this scourge. I have also given consideration to the personal circumstances set out by your learned counsel.

On the other hand however, I have to give due weight to the aggravating features in this case which were emphasised by State counsel. Murder is a serious crime which, in appropriate cases calls for the death penalty. The reason for this view of the crime are obvious. Death is an irreversible state of non-existence. Once one dies, nothing can bring that life back. As such it creates a permanent loss of life, not just for the deceased, but in the family and ultimately the society at large. In your case, the facts show that when you killed the deceased, he was being led away by your relatives. As such you had no reason to stab him besides just your desire to punish him for having slapped you earlier on. In my view, this increases your moral blameworthiness. Your actions led to an unnecessary loss of life for which the deceased's family and society is all the poorer.

Society expects the courts to pass sentences which reflect its abhorrence to this type of crime. Had it not been for the fact that no finding of aggravation in relation to the act of killing was made by the court, this court would have had to consider the ultimate penalty.

In the circumstances, I consider that the following sentence is appropriate:

20 years imprisonment.