

THE STATE

versus

TAVONGA MUPINGA

HIGH COURT OF ZIMBABWE

MAWADZE J, MASVINGO, 14, 15, 29 SEPTEMBER; 27, 28 NOVEMBER, 2017  
AND 02 FEBRUARY 2018

### **Criminal Trial**

#### **Assessors**

1. Mr Gweru
2. Mr Mushuku

*B.E. Mathose*, for the state  
*K. Chuma* for the accused

MAWADZE J: At the close of the case for the state we dismissed the accused's application for discharge made in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. We gave our reasons *ex tempore*. The accused had raised the defence of self-defence and our view was that the accused's version of events should be properly ventilated during his defence case to properly ascertain if indeed he could not be convicted of the charge of murder or any other permissible verdict. In short it was necessary for the accused to lay in his evidence the factual basis of the defence of self-defence.

The accused is facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform Act) [*Cap 9:23*] (The Code).

The charge is that on 14 March 2017 at Yellow Farm Range, Masvingo the accused stabbed the now deceased with a knife under the left armpit penetrating the lung resulting in the now deceased's death.

During the night of 13 March 2017 both the accused and the now deceased were at Musakaruka shop with other patrons drinking beer. A misunderstanding then arose between the accused and the now deceased culminating in a fist fight at about 21.00 hrs. The other patron Darlington Gift Mabika restrained them. The now deceased then left the shop ostensibly going home.

It is the state case that the accused followed the now deceased shortly thereafter and stabbed him with a knife below the armpit. It is alleged no one came to the now deceased's help resulting in his death. The now deceased body is said to have been discovered the next morning on 14 March 2017. The accused was linked to the offence by his woollen hat, and knife found at the scene of crime. Accused's t-shirt was also blood stained.

In his defence outline the accused confirmed that he indeed first fought the now deceased that night at the shops although he said the now deceased was the aggressor. He further confirmed that one Given Mabika restrained them. The accused said it is the now deceased who later left the shop first and accused presumed the now deceased had gone to his residence. Accused denied that he followed the now deceased and when he left he, the accused was going to his residence. The accused said it is the now deceased who waylaid the accused and attacked him by throttling him. The accused said he fell down and the now deceased sat on top of him still throttling him. The accused said the now deceased used a sharp object to stab the accused in the face. The accused said he had a knife in his pocket and in order to fend off the attack reached for the knife. The accused said he randomly stabbed the now deceased to force the now deceased to release him. The said he got up and fled and in the process dropped the knife and his woollen hat. The accused said he only learnt of the now deceased's death the next morning. The accused thus raises the defence of self-defence.

In support of its case the state produced the following exhibits.

Exhibit 1 is the post mortem report compiled by Dr. Zimbwa. It shows that the cause of death was the stab wound which penetrated the lung causing excessive loss of blood. The cause of death is not in issue.

Exhibit 2 is accused's confirmed warned and cautioned statement. It is repetition of accused defence's outline.

Exhibit 3 is the knife belonging to the accused. The accused admits that he used it to stab the now deceased.

Exhibit 4 is accused's red, green and yellow woollen hat recovered at the scene of crime which accused said he dropped when he fled from the scene of crime.

Exhibit 5 is the accused's stripped blood stained and dirty t-shirt which t-shirt the accused was wearing on the day in question.

Exhibit 6(1) – (10) are photographs taken when the accused made indications. The accused does not deny that he made indications.

Exhibit 6 are the accompanying notes of the accused indications.

Lastly Exhibit 8 is a statement by state witnesses one Gift Mabika which was produced when his *viva voce* differed from what is said in that statement.

The evidence of Sivhikile Mutetwa and Dr Zimbwa was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. Sivhikile Mutetwa is the one who first discovered the now deceased's body in the morning of 14 March 2017, and noticed that the now deceased had no shirt and had a stab wound under the armpit. As already said Dr Zimbwa is the one who examined the now deceased's body and compiled the post mortem report.

The state led *viva voce* evidence from Jerald Chikwangwami, Ebbiot Shoko, Darlington Gift Mabika, Detective Inspector Zephania Chipanga and Detective Constable Riva. The accused gave evidence and did not call any witnesses.

The question which falls for determination in this case relates to the circumstances under which the now deceased met his demise. The issue is whether the accused acted in self-defence when he stabbed the now deceased with the knife. In order to examine that we have to look at the evidence led by the state to rebut the defence of self-defence.

D/Insp Zephania Chipanga (D/Insp Chipanga)

The evidence of D/Insp Chipanga is peripheral to the issue to be resolved. He confirmed that the accused made indications as per Exhibit 6 and 7. It was during those indications that he recovered the knife Exhibit 3(a). The only other aspect of his evidence is that Gift Mabika gave a statement to the police and signed it which is in affidavit form. We shall later comment on this.

The investigating officer in this case is D/Cst Riva Riva (D/Cst Riva). Again his evidence does not speak to the issue to be resolved by the court.

D/Cst Riva examined the now deceased's body at the scene of crime and said the now deceased had no shirt. It was never resolved during the trial how the now deceased ended up without his shirt. At the scene of crime, he recovered accused's woollen hat Exhibit 4. Upon searching the now deceased's body, he found that the now deceased had \$3.20, personal identity card and FBC bank card. At the accused's house D/Cst Riva recovered the accused's blood stained t-shirt Exhibit 5. Lastly he confirmed that indeed the accused had lacerations on his face. The accused alleges there were inflicted on him by the now deceased at the scene of the crime. Most importantly D/Cst Riva said he was unable to rebut the accused's defence of self- defence during his investigations.

Jerald Chikwangwami, Ebbiot Shoko and Darlington Gift Mabika did not witness how the now deceased was stabbed. Their evidence centred more on the brawl or fight between the accused and the now deceased at the shop before both the now deceased and accused left the shop. Again their evidence is not material to what is in dispute or to be resolved by the court. We shall only deal with that evidence for completeness of the matter and other peripheral issues.

Jerald Chikwangwami (Jerald)

Jerald was known to both accused and he now deceased. His evidence is that the accused survived as a poacher. He disputed that the accused makes cooking sticks.

According to Jerald the dispute between the accused and the now deceased was about a song being played in the shop as they all were drinking beer. According to him the accused was the aggressor and that initially the now deceased did not hit back when the accused

assaulted him. Jerald said after the brawl accused and the now deceased engaged in a fight for the second time at the shop and that no one intervened. The two just stopped on their own. After a while he said the now deceased smashed a beer bottle to attract the attention of all patrons and proceeded to apologise for what had happened after which he left the shop going home. Jerald said the accused was the next person to leave the shop some 5 to 10 minutes later. Later Jerald said he heard a person crying out but no one went to check who it was or what was going on.

Jerald said when Ebbiot Shoko left the shop Ebbiot returned reporting that he had seen the now deceased bleeding profusely. Jerald rushed to the scene and found deceased lying on the ground bleeding. He noticed the now deceased had lost a lot of blood. Jerald said he left without offering any help to the now deceased and only learnt of the now deceased's death the next day.

Under cross examination Jerald disowned some parts of his statement to the police. These relate to the number of fights between the accused and the now deceased that night, whether he saw the body of the now deceased the following day. All what Jerald confirmed is that both accused and the now deceased were drunk and that they fought each other at the shop. Jerald was also drunk as he did not see the need to help the injured now deceased that night despite realising that the now deceased had lost a lot of blood that night. Be that as it may he did not see how the now deceased was stabbed.

#### Ebbiot Shoko (Ebbiot)

Ebbiot also witnessed the fight at the shop between the accused and the now deceased. He however did not know the cause of the fight. He too said initially the now deceased did not fight back, but that the two exchanged blows during the second brawl. Ebbiot confirmed that it is now deceased who left the shop first. As per Ebbiot's estimation the accused later left the shop some 20 minutes after the now deceased's departure. Contrary to Jerald's evidence Ebbiot said when Ebbiot left the shop and discovered the now deceased lying injured he was in the company of Jerald. He said the now deceased was bleeding and unable to talk. He too offered no help and his reason was that he was scared. Ebbiot said he was excessively drunk just like the accused and the now deceased.

Under cross examination Ebbiot conceded that there were indeed disparities between his evidence and the statement he allegedly made to the police. Some of the aspects he disputed is that he saw the now deceased's body the next morning insisting he did not visit the scene the next day. Again Ebbiot did not see how the deceased was injured.

#### Darlington Gift Mabika (Gift)

Gift just like the other witnesses said the now deceased did not retaliate when the initial brawl occurred. He also corroborated other witnesses that when accused and the now deceased fought for the second time no one intervened. They stopped on their own. He too said the now deceased was the first to leave the shop and the accused later followed. Gift only learnt of the now deceased's death the following morning when he attended the scene of crime and saw the now deceased's lifeless body.

Gift also disowned part of the contents of his statement to the police. These relate to how he allegedly restrained the now deceased and the accused during the fight. In fact, Gift was categorical that the statement alluded to him was not his and that his signature was forged.

#### The accused

The accused in his evidence maintained what he said in his defence outline. The accused insisted that he makes cooking sticks and is not a poacher. The accused said at the shops when he fought the now deceased he did not opt to use the knife as his life was not in danger at all.

The accused maintained that the accused waylaid him as he was going home and could not have anticipated this sudden attack. It is accused's evidence that he was drunk and could not have outpaced the now deceased. The accused insisted that he only resorted to the use of the knife after the now deceased had throttled him and was sitting on him. He said the now deceased was bigger in stature and attacked him expectedly at night. The accused said when he used the knife he did not pick any part of the body but was preoccupied with the inflicting pain and to free himself from the now deceased who was throttling him and stabbing him with a sharp object in the face.

According to the accused he only left the shop some 20 – 30 minutes after the accused had left and disputed that he followed the now deceased. The accused said he was apprehended the next morning as he went back to the scene to check for both his knife and hat which he

dropped as he fled from the scene the previous night. The accused was steadfast that he could not have followed the now deceased who had earlier on left the shop as he did not know the route the now deceased had used.

### Analysis of evidence

The state case is clearly plagued with insurmountable problems. To start with all the civil witnesses disowned the statements alluded to them. They disowned the signatures on those statements especially Gift who commented on the signature. This was indeed worrying to the court. Why would these simple rural people who had no discernible interest in how this matter would be resolved disown the statements they allegedly made? No possible motive was given or suggested. We are inclined to believe that the manner this matter was investigated leave a lot to be desired. Beyond this we are unable to comment further.

The other issue is that there was no eye witness to how the now deceased was injured. All the witnesses who testified are not relevant on this point. The state case does not even turn on circumstantial evidence. To be fair to the state all they hinge their case on is mere speculation. No wonder the investigating officer D/Cst Riva conceded that he could not disprove the accused's version of events especially that he acted in self-defence.

In casu the accused admits fatally stabbing the now deceased with the knife. He proffers the defence of self-defence as is provided for in s 253(1) of the Code [*Cap 9:23*]. The defence of self-defence in our law is a complete defence.

In the case of *S v Collet Baira Manzonza* HMA 02/16 at pages 11 – 14 of the cyclostyled judgment I discussed at the length the requirements for the defence of self-defence.

The state in our view has not been able to meaningfully disprove the accused's version of events. To start with if the now deceased left the shop the earlier why would the accused who would followed later caught up with him. Is it not clear after how long the accused left the shop after the now deceased's departure. It is 5 to 10 minutes as one witness said or 20 minutes as the other said. The other point is that it has not been ascertained how the accused was able to ascertain the exact route the now deceased had used. It has not been shown why accused's version that it is the now deceased who waylaid the accused is false. There is therefore no evidence to support the contention that it is the accused who followed and attacked the now

deceased. That would be mere speculation. Why is it not possible that it is the now deceased who waylaid the accused?

The proper approach which is objective is to accept the accused's version and answer the question whether the accused exceeded the bounds of legitimate self-defence. The fact that a life was lost is therefore besides the point as our law accepts that is permissible for one to cause death upon an unlawful attacker.

If the now deceased waylaid the accused, it means he was the aggressor and more prepared to attack the accused. The accused was indeed drunk and attacked unexpectedly. Indeed, the accused was injured in the face and overpowered by the now deceased who had a bigger stature. The accused was throttled as the now deceased sat on him. He had been clearly overpowered. The two had previously fought at the shop. All this should be assessed in the context of the provisions of s 253(2) of the Criminal Law (Codification and Reform Act) [*Cap 9:23*] (The Code). The accused explained that he used the knife as a last resort and it was one blow which he inflicted to cause the now deceased to release him. As the accused maintained he did not aim any particular part of the body. It is therefore fortuitous that he aimed below the armpit. After delivering one blow and securing his freedom he fled. The accused's conduct thereafter is irrelevant. He was drunk.

It is our view that the state has failed to negative the plea of self-defence. The doubt should have resolved in favour of the accused.

Accordingly, the accused should be found not guilty of the charge.

VERDICT: Not guilt and acquitted.

*National Prosecuting Authority*, counsel for the state

*Chuma, Gurajena and Partners*, counsel for the accused