

THE STATE

Versus

SAMSON ZVOBGO

IN THE HIGH COURT OF ZIMBABWE
NDOU J (with Assessors Messrs Ndlovu and Matemba)
GWERU 29 SEPTEMBER, 29 NOVEMBER, 2 & 29 DECEMBER 2005

Ms D Malunga, for the state
M Jaravaza, for the accused

Criminal Trial

NDOU J: The accused was aged 35 years old at the time of the offence. He is facing a charge of murder. It being alleged that on or about 17 January 2003 and at or near Chapwanya Primary School in Chirumanzu the accused did unlawfully and intentionally kill and murder Never Gumbo, a male adult in his life time there being. The accused denies the charge. Most of the facts are common cause and this will become apparent when the background of the case is highlighted. It is common cause the accused, his wife and the deceased were teachers at Chapwanya Primary School in Chirumanzi at the time of the offence. The accused and the deceased were friends. Notwithstanding this friendship, the deceased and the accused's wife, in an act of betrayal, commenced a love affair. The accused became aware of the relationship. In fact it seems that elders and leadership of the school also became aware. The source of information was anonymous letters addressed

to the accused and an incident where the accused found the deceased and his wife in a compromising situation

HB 136/05

on 27 February 2004 i.e. some eleven (11) months before the offence. The deceased later approached the accused and apologised. He reduced his confession *cum* apology into writing i.e. exhibit 5. The accused forgave the deceased but it does seem that he did not forget. In any event he kept a record of the confession. In September 2004 the accused received an anonymous letter which in essence pointed out that the relationship between his wife and the deceased was continuing unabated. He questioned the two. They both dismissed the letter as having been overtaken by events. They said the letter was referring to the position before and they declared that they ended the affair on 27 February 2004 in circumstances described above. The accused accepted their explanation.

However, on 17 February 2005 another anonymous letter was handed over to the accused. According to the accused he got the Okapi knife from his place of abode prior and not after, he was handed the anonymous letter. This piece of evidence is relevant in determining whether accused planned the murder. Besides the alleged existence of an adulterous relationship between the deceased and accused's wife the letter added a new dimension that the adultery was actually taking place in the accused's house i.e. the deceased would come and sleep at the accused's house in his

absence. The accused went on with his duties after receiving the said letter. He received it when he came back from the tea break. During the lunch hour the accused sent for the deceased. The latter came to the accused's classroom. What transpired inside the

HB 136/05

classroom was not witnessed by anyone as it was just the accused and the deceased. So there is only the testimony of the accused. According to the accused's version, when the deceased came in he gave him the anonymous letter to read. The deceased read it. Accused said he told the deceased that he was going to close the door so that whatever they would discuss, would not reach the ears of third parties. He indeed closed the door. When he turned to face the deceased, without warning, provocation or any justification, the deceased struck the accused with a heavy blow resulting in the accused falling to the floor. At the same time the deceased was uttering words to the following effect "your stupid letters are now getting to my nerves. If your wife is a prostitute keep her firmly secured in your pocket like money. If your wife is a prostitute, she will continue to be a prostitute." He says the heavy blow and the humiliating provocative and mocking words emanating from the deceased drove him mad with anger. The deceased immediately opened the door and bolted and ran towards the school garden with accused in hot pursuit. From this juncture there some eye

witnesses. There is no conclusive evidence on whether the accused was holding the Okapi knife in his hand or whether it was in his pocket. What is beyond dispute is that the accused eventually caught up with the deceased and inflicted the fatal injury.

According to the medical evidence of Dr I Jekeny who conducted the post mortem examination on the deceased the examination revealed:

HB 136/05

Externally:

“There was a 4cm wide wound on the left chest wall just below the end of the left sixth rib near the sternum (chest bone). The wound passes through the chest wall muscles and goes to the apex of the heart making a 3cm wide hole into the heart cavity. This resulted in massive bleeding. Severe force was used”.

Internally

“Lung/pleura: Collapsed left lung with a massive pneumothorax (air in the chest cavity). There was a left massive haemothorax (blood in the chest pleural cavity) of about 900mls and right haemothorax of about 300mls.”

“Cause of Death: Haemorrhagic shock
Heart stabbing
Chest wall stabbing”

There are two issues for determination. First, whether the accused was acting in self defence when he inflicted the above injuries on the person of the deceased. If self defence is not sustained we shall have to consider the defence of provocation.

With these issues in mind we proceed to consider the evidence of the different witnesses in turn and the relevance of such testimony in the resolution of the issues.

Ethel Zvobgo: She is the accused's wife. Their marriage is around seventeen (17) years old and is blessed with two children. With some measure of diving and ducking she eventually testified to the existence of an immoral adulterous relationship between her and the deceased. It is important not to lose sight of the fact that irrespective of her immoral conduct in this matter she is not the person on trial. The focus should always remain on the accused although the effect or impact of the

136/05

adulterous relationship on the violent conduct of the accused should be amplified where it is relevant. She confirmed the incident of 27 February 2004 and its ultimate resolution. She confirmed the two anonymous letters addressed to the accused and how the matters were dealt with after each receipt by the accused. Although she tried to underplay her voluntariness in the adultery, we hold the view that she was a willing participant. She naturally appeared very unsettled testifying about her adulterous relationship with the deceased. This is understandable bearing in mind that she was baring her moral misdemeanours in court, in the presence of her husband and in-laws and strangers in the public gallery. Most of what she said however, is not material to the resolution of the issues in this murder trial. Her wayward

conduct seems common cause to us. She did not witness the fatal assault. She, however, described the accused as non-violent person of sober habits who spends most of the time with their children. She also described the accused and the deceased as having been best friends who treated each other as brothers. She also confirmed that some sexual acts between her and the deceased took place in her matrimonial home i.e at the school and that they started since 2003. She confirmed that the accused was going to sell maize cobs that afternoon and he took the Okapi knife from their house to cut the maize cobs. Under examination she also confirmed that the sexual acts with the deceased continued well after the letter of apology written on 27 February 2004 and in fact the last such acts took place just two (2) days before the date of the offence.

HB 136/05

Tatenda Muroiwa: He was a grade 7 pupil in the accused's class at the time of the offence. He said that around 1300 hours on the day of the offence, he was sent by the accused to call the deceased. He did so and the deceased obliged. This evidence is common cause.

Paul Tauya Mavedzenge: He was the headmaster at Chapwanya Primary School at the time of the offence. On the fateful day the accused approached him around 1300 hours in his office. The accused was breathing heavily and looked worried. The accused told him that he had a misunderstanding with the deceased and showed him the

anonymous letter exhibit 3. The accused informed him that the deceased ran away in the direction of the school garden. He also gave him further details of the above mentioned relationship between the deceased and his wife. The accused informed him that he had fought the deceased. He also confirmed that the accused was non-violent and was not quarrelsome. He also confirmed that the accused was going to sell maize cobs that afternoon at the school garden. He said they usually use a hoe but did confirm that the accused used the knife in certain instances. He conceded that often he (i.e. the witness) is not present when the accused sells the maize. He later received a report and attended the scene and found the deceased having sustained the fatal injuries. We are satisfied that this is a fair and credible witness.

Pasca Manika: He was in the deceased's grade 7 class. He said on the day in question Tatenda Muroiwa came and called the deceased. The deceased left the classroom. The next he heard was his name being

HB 136/05

called from outside. He got out and outside he saw the accused throwing a stone at the deceased. The deceased was not holding anything. The deceased was going towards a wooden gate. He was about ten(10) metres when he observed all this. He said he did not see the accused and the deceased fight. He said he did not see the accused chasing the deceased. The latter piece of evidence impacts on the reliability of this witness' testimony. He is the only

witness who said he saw the accused throwing stones at the deceased and yet he also did not witness the accused chasing after the deceased an issue that is common cause. We find that his evidence is unreliable in material respects.

Elias Chimvemve: He is a 13 year old grade 5 pupil at the school. He stated that on the day in question he saw the accused chasing the deceased towards the garden. He did not see the two fighting. He did not see either of them throwing stones. He said he saw the accused holding something when he was chasing the deceased. He did not see what it was but it looked like a stick or ruler. He said he was seated about fifteen (15) metres away when he saw the accused in pursuit of the deceased. We are satisfied that this young witness is truthful. We are aware of the need to approach evidence with caution but in the end we are satisfied that he gave his evidence very well.

Robert Manyawu: He is another pupil at the school. He said that on the day in question he was inside a classroom peeping outside through a window. It was towards 1300 hours. He later went outside and went behind the class 5A block. He observed the accused and the deceased

HB 136/05

going round the tree. He then saw the deceased drop to the ground. He went outside the school yard to where the deceased had fallen down. When he was about fifteen(15) metres away he saw the deceased stand up and fall down again. The accused left

going towards the school when the deceased started staggering. He did not see the accused assault the deceased. When they were walking around the tree the deceased was in front and the accused was following. The deceased appeared to be trying to run away from the pursuing accused. He was adamant that his view of the two was not obstructed. He was walking towards them when he observed all this. He conceded that he did not see the two chasing each other from the school to the garden. He only saw them outside the school yard around the tree. He said he does not know whether the accused was assaulted before he saw him following the deceased around the tree. He only saw the deceased staggering but did not see what had happened prior that. We are of the view that this young witness testified well. We are impressed by his evidence. He was not shaken under cross-examination. He did not seek to exaggerate his evidence.

George Runesu: He is an ex-pupil at the school. On the day in question he saw the accused running after the deceased. He was herding cattle in the vicinity at the time. His vision of the two was interrupted when he went to assist some grade 1 children who had sighted a snake. When he re-focused on the accused he realised that the deceased had been injured. He saw the deceased go round a shrub and rolling and eventually lay on his stomach. He said he did not witness the deceased pick stones and

throw them at the accused. He conceded that his attention was diverted at the crucial moment by the grade 1 children. He did not see what caused the deceased to fall down. When the deceased fell, the accused walked back to the classrooms. We are equally satisfied that he is a credible witness.

Samson Zvobgo: He confirmed his defence outline. He gave a detailed account of his wife's infidelity. As already alluded to, it is the accused who is in the dock and the wife's infidelity has limited relevance on the question of provocation. We should be careful not to try her for her infidelity in this criminal court. On the assault he said the deceased was very angry. He obviously had the upper hand during the pursuit. From his testimony it is evident that during the pursuit the accused was not under an unlawful attack. This is a key requirement of self defence. If during the pursuit the deceased believed that his life was under threat he would have been entitled to fend off the attack by the accused. The accused during the chase wanted to perpetrate an unlawful attack on the deceased. He chased the deceased from the classroom to the gum trees. The deceased, even in the accused's own version, would have been entitled to defend himself with the stones or in the manner described by the accused - *Phiri v S* SC-190-82 and *Moyo v S* SC-45-84. What happened here, if the accused is believed, is that he had an upper hand during the chase. At some stage, the deceased turned the tables around and picked stones and threw at him.

When this occurred, the accused was still chasing deceased. It is this action by the deceased that averted the pursuit. Self defence does not

HB 136/05

apply in such a situation - *Sibanda v S* SC-7-87. The bottom line is that the evidence does not show that the attack on the accused was unlawful. It appears that it is rendered lawful by the fact that, *prima facie*, from the facts, the deceased would have been entitled to defend himself from the accused's initial attack. The accused cannot claim that the attack by the deceased is unlawful on account of the latter having successfully tilted the scales in his favour. Why was the accused chasing the deceased from the Classroom, through the fence and into the gum trees in the garden? Whatever happened in the classroom surely the accused cannot claim to be defending himself. We, however, do not believe the version given by the accused leading to the fatal assault. In our view the accused chased the deceased up to the gum trees where he finally stabbed him as described by Robert Magawu. Although the later witness did not see the actual stabbing he saw the accused following the deceased at that crucial moment. The accused had the upper hand as late as at that stage before the deceased staggered. In other words from a legal point of view or the factual situation self defence does not apply here. You do not defend yourself from a person you are deliberately chasing. The accused was very angry and took the law into his own hands. He gave an

incoherent version of the manner in which he stabbed the deceased. The accused's defence of self defence cannot stand. This leaves us to consider the question of provocation. We do not know what transpired in the classroom apart from what the accused said. The accused's explanation cannot be rejected out of hand. No onus rests on the accused to convince the court of

HB 136/05

the truth of any explanation he gives. The court does not have to believe his story, still less has it to believe it in its details, it is sufficient if the court thinks that there is a reasonable possibility that it may be substantially true - *S v Kuiper* 2000(1) ZLR 113(S) at 118B-D; *R v Difford* 1937 AD 370 at 373; *R v M* 1946 AD 1023 at 1027 and *Chindunga v S* SC 21-02. *In casu*, the accused's explanation that he was insulted and assaulted by the deceased in the classroom may be substantially true. It has not been shown that it is false beyond any reasonable doubt. Having accepted the accused's version of what transpired in the classroom then the accused was provoked by the deceased. If one adds the persistent sad history of the adulterous relationship between the accused's wife and the deceased, the provocation is of very serious nature. The accused must have snapped and lost self control. This explains why he acted out of character and chased the deceased for a long distance before he finally stabbed him. The question of provocation as a complete defence does not arise in this case bearing in mind the fatal attack took place a distance from the classroom where the

accused was provoked. We, however, hold the view that this is an exceptional case where the provocation has the effect of excusing or reducing an intentional killing, at least to the point of reducing murder to culpable homicide – *Tenganyika v R* 1958 R 7 N 228 (FSC); *R v Bureke* 1960(1) SA 49 (FSC); *S v Nangani* 1982(1) ZLR 150 SC and *Ncube v S* SC-14-87. Accordingly the accused is found not guilty of murder but guilty of culpable homicide.

HB 136/05

After mitigation, the accused was sentenced to 8 years imprisonment, with 4 years suspended for 5 years on condition of good behaviour.

Criminal Division, Attorney-General's Office, state's legal practitioners
Dzimba, Jaravaza & Associates, accused's legal practitioners