

THE STATE
versus
TAFARA SHAVA

HIGH COURT OF ZIMBABWE
MOYO J
GWERU 17 AND 18 MAY 2016

Criminal trial

Shumba for the state
Mahamba for the accused

MOYO J: The accused person faces a charge of murder as defined in section 47 (1) of the Criminal Law Codification and Reform Act [Chapter 9:23]. It being alleged that on 12 September 2015, he stabbed the deceased Albert Sibanda with an okapi knife. Deceased subsequently died as a result. It is common cause that the accused person stabbed the deceased with an okapi knife on the day in question.

The state case is that deceased and Reveal Sibanda were walking home after collecting money from an ecocash agent. They met the accused who was in the company of another person. Accused then queried deceased's manner of dressing. Deceased responded by saying that it was his style and that it was none of the accused person's business. The accused then said deceased acted like he owned the world. He then drew an okapi knife from his trousers and chased after deceased and his brother, caught up with deceased and stabbed him once on the left side of the back. Deceased had fallen down at the time that accused stabbed him. It is also the state case that the accused person was never assaulted by anyone and that he did not suffer any injuries.

The accused person's versions, because there is more than one of them, are that firstly in the defence outline the accused says is that deceased was in the company of four men when accused and friend met them and he was visibly drunk. Accused greeted deceased and his friends and respectfully told deceased to dress properly, deceased did not heed the advice but

instead started to insult accused telling him to mind his own business. Thereafter accused and deceased exchanged harsh words. He was kicked by one of the persons in deceased's company whilst another held his hand, he staggered to the ground and the rest of the group joined to assault him all over the body. He fought back to defend himself he was hit with a beer bottle on the head and was also kicked in the mouth with what he believed to be a safety shoe. He lost three teeth. He was overpowered and then fell down whilst lying down one of the deceased's friends pulled out a knife and attempted to stab him. Accused rose from the ground and kicked the hand of the person who was holding the knife and the knife fell down, accused then rushed to pick the knife.

He said that one had the knife his attackers then retreated. The accused who was still furious then pursued the deceased.

The second version as contained in his evidence in chief is that his friend and him met four young men dressed in a deplorable manner with their trousers pulled down showing their underwear. He commented on the manner of dressing and his friend laughed about this. He then rebuked them as to their manner of dressing. It was at that stage that him and the young men started shouting at each other. He then told them to desist from showing off. He then proceeded until he got to his place of residence. When he arrived at his house, there were some two young men who followed behind, they had beer bottles. They then questioned him about what he had been doing insulting their colleagues. They then started assaulting him and the four persons he had an altercation with before also came and all six swarmed him. They apparently stoned him and as he chased deceased they were still pelting stones at him.

Now there are significant issues on the two versions. In the defence outline the accused person met deceased and company only once and was not followed to his home by two of them with the four joining later.

In the second version accused was now at home and yet in the first version as per the defence outline accused met the quartet resulting in the altercation and the fight whilst on the way to Mandava Shops. Again, in the defence outline, when he got possession of the knife the deceased and his companions retreated but he followed deceased as he was furious and was in severe pain. Yet in this court he told us that he followed deceased and wanted to tear his shirt

with the knife in order to scare him and because the others were still following him and pelting him with stones.

Asked to describe how he managed to set himself free, kick the knife from the hand of one of his attackers, get up and pick it, as they had pinned him to the ground and two of them held his hands from the back, others kicking him other, pelting stones at him, the accused person failed to do so and ended up just saying he just managed to do so.

Again he lost three teeth, had a deep cut in the head, but none of the state witnesses observed all that. The court can only draw the conclusion that the accused person's version of events crumbled on its own as almost always a concocted story falls apart as it is difficult to lie and maintain a fabricated version. We thus find that the accused's version is hogwash and this court cannot rely on it. We can only throw it out in its entirety.

We are thus left with the version of the state witnesses, which we believe is the only true version of what transpired on that day. Reveal Sibanda told the court how accused rebuked deceased for his manner of wearing the trousers lowered down beneath his underwear. He told of how deceased answered back and how accused then said deceased thought that he owned the world and then started chasing them resulting in accused stabbing the deceased when deceased had fallen down.

There is nothing irrational here as to render the version unbelievable in our view. The third state witness, the police officer confirmed that accused was violent at the police station and that he was drunk. It is our finding that the accused person did behave in the manner as alleged by the state witnesses. Whilst Reveal Sibanda is a brother to the deceased and could have reason to lie to suit his side of the coin, he was never shown to be such during cross-examination. In fact his evidence on the injuries on the accused was corroborated by the police officer and the neighbourhood watch member who this court's views as independent witnesses. There would not have been any reason for them to fail to observe the injuries on the accused person if they were there.

It is for these reasons that we believe the evidence of the state witness and reject the accused person's version.

The post mortem report, Exhibit 4 gives the cause of death as hypovolemic shock, left lungs damage, severe pneumothorax, stabbing injury. The wound penetrated deep into the

thoracic cavity and through the left lung. From the nature of the wound clearly excessive force was used.

Again, as we rejected accused's version in its totality we find that the okapi knife, Exhibit 5, in fact belonged to the accused person and not deceased and his brother. It was suggested by the defence counsel that this court should find that there is a gap in the state case as the first state witness did not see what then transpired between accused and deceased as he ran away.

We reject this theory for two reasons. Firstly the first witness saw the altercation between accused and deceased and as they ran away from accused, when he was about few metres away he heard deceased scream that you have killed me. He said this whole event took about three minutes. So one can not hold that more happened between deceased and the accused during the first witness's absence as in the *Zvobgo* case that was cited.

Secondly, while in the *Zvobgo* case it is not known what happened in the room leading to the court giving the accused person the benefit of the doubt, in this case, the first witness saw the altercation between accused and deceased and it would be absurd to find that perhaps something else (i.e) another form of altercation) could have occurred as they fled with the first witness running in front and deceased running behind. The accused person himself even confirms that when he stabbed the deceased, deceased was fleeing so there is no other gap that can be said to exist in the state case.

It is for these reasons that we find that the accused person did act wrongfully and unlawfully on the day in question.

We then move on to determine what the accused person is guilty of. We look at murder with actual intent, wherein the accused must have desired death, death must have been his aim or object. Again in another leg of actual intention the accused might not have desired death but he ought to have foreseen that death was certain from his action. With constructive intent, the accused person must have the requisite legal intention to kill, that is, he must have foreseen that there is a reasonable possibility that death would ensue from his actions. Although the accused carried a lethal weapon on the day in question, we are unable from the facts to infer that he actually desired death or that he foresaw that there death was certain from his actions but he nonetheless continued to act in a reckless manner. Refer to Feltoe *A Guide to Criminal Law in Zimbabwe* 2005 Edition at page 96.

It is for these reasons that we will find the accused person guilty of murder with constructive intent.

National Prosecuting Authority, state's legal practitioners
Mahamba Law Firm, accused's legal practitioners