

THE STATE

Versus

PORTIFER CHUNDA

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
GWERU CIRCUIT COURT 25 & 26 JANUARY 2017

Criminal Trial

M. Shumba for the state
Ms N. Maguranyanga for the accused

MATHONSI J: The accused is charged with the murder of his own brother Tairod Chunda who was 35 years old and employed as a manager at Donbrooke Mine, Greendale, Mvuma Road, Gweru where the accused also worked. On 27 September 2015 the accused allegedly struck the deceased twice on the head with a chisel as a result of which the deceased died.

It is alleged that the accused, the deceased and other mine workers were on duty at the mine in the early hours of the morning on that day when the accused was found by the deceased lazing around instead of working. On being ordered to do some work the accused refused. The deceased then grabbed the accused by the collar and a scuffle ensued. It was during that scuffle that the accused took a chisel and struck the deceased twice on the head. He sustained injuries from which he later died on the way to Parirenyatwa Hospital in Harare.

The accused has pleaded not guilty to the charge. He stated in his defence outline that on the fateful day he could not execute his duties because he had diarrhea. As a result he had remained on the surface outside the mine shaft when the other workers went underground to work. While still outside the shaft in the company of Mica Ganya one of the employees, he received information that his co-workers had held a meeting and resolved that they would

exclude him from sharing the proceeds of the mining operations given that he had not provided any work for 2 days.

The accused says that information jolted him into action. He was forced to go down the mine shaft along with Ganya in order to carry out mining duties. Whilst underground he met Gilbert Dube and Stephen Dube while the deceased and Wyson Makwemba were working further down the shaft. It was then that the deceased and Makwemba started shouting at Mica Ganya.

The deceased was already agitated when he met the accused enquiring why he had come down the mine shaft when he was not feeling well. He says he told the deceased that he had done so owing to the resolution of the meeting that had been held in his absence. He refused to go out of the mine shaft when the deceased directed him to leave. It is then that the deceased grabbed him by the collar strangling him and threatening to kill him if he did not vacate the mine shaft.

The accused went on to state in his defence outline that the deceased produced an Okapi knife which he used to cut the accused on the neck. He also tore his t-shirt. The deceased pushed him forcefully resulting in him, the accused, falling in a pool of water. While still on the ground he was struck by the deceased with a log. In retaliation and in self defence the accused says he took an iron bar which was near him which he used to strike the deceased to avert the attack by the deceased.

As a result the deceased fell in a pit which had been recently blasted and started crying and his head was already swollen. He says he tried to assist the deceased who requested water and his tablets. Himself and the other workers carried the deceased out of the shaft. He was later ferried to Gweru Provincial Hospital from where he was referred to Parirenyatwa Hospital in Harare but died in Norton on the way there.

The state produced the accused's confirmed warned and cautioned statement which he gave to the police in answer to the charge of murder on 30 September 2015. The statement was confirmed by a magistrate on 24 December 2015. In that statement the accused stated in part:

"I admit to the charges levelled against me ... I was the last one to get into the shaft. Tairod Chunda asked me why I had entered into the shaft yet I had indicated that I was sick. He ordered me to get out saying he did not want to work with me. He shouted and insisted that I go home since he no longer wanted to work with me. He threatened to assault me and he was restrained by Ganya and Makwemba. He broke free from the grip and held me by the collar, throttling me saying he wanted to kill me. He took a small knife and cut me on the neck. I fell into the water and got up. Tairod took a log intending to strike me with it but missed me. He then said, 'You are not getting out I want to kill you'. I took a chisel and struck him twice on the head with it and he fell down. I suggested to the others that we take him out. He then asked for pills and I gave him. I phoned for a vehicle to ferry him to the hospital where he was treated and transferred to Parirenyatwa Hospital. Tairod Chunda then died in Norton on our way to Harare. I was arrested upon arrival."

The post mortem report was also produced. According to Dr Grayly who examined the body of the deceased, he observed ante-mortem multiple bruises on the thorax and abdomen. He concluded that the cause of death was brain damage, compound skull fracture and head trauma due to assault.

The weapon used to assault the deceased was produced as exhibit. What is referred to as a chisel is not the normal hardware tool that a lay person is familiar with. This is a special tool used for mining purposes. It is common cause that underground miners use a hammer to strike it while chipping away rocks. It weighs 1,472kg, is 51cm long and has a circumference of 7,8cm. Clearly a formidable weapon.

The evidence of Joseph Manenji, Doman Moyo, Samuel Tadzaushe and Dr Manicio Grayly was admitted in terms of s 314 of the Criminal Procedure and Evidence Act (Chapter 9:07) as it appears in the state outline. According to Manenji he was requested in the early hours of 27 September 2015 to ferry the injured deceased from Donbrooke Mine to Gweru General Hospital. Upon arrival at the mine he beheld the deceased lying on the ground. His head was

swollen and he was having difficulties in speaking. He ferried him to hospital in the company of his co-workers.

Doman Moyo is an attested member of the Zimbabwe Republic Police stationed at Gweru Rural Police Station. On 30 September 2015, he recorded a warned and cautioned statement from the accused after cautioning him in accordance with the law. The statement was made freely and voluntarily and was later confirmed by a magistrate. Samuel Tadzaushe is another police officer who witnessed the recording of the statement.

The state also led evidence from 3 mine workers who were present on the day that the deceased was assaulted. These are; Wyson Makwemba, Gilbert Dube and Mica Ganya. These witnesses corroborated each other in material aspects. As if in chorus the 3 of them testified that on 27 September 2015 the deceased, who was their manager, gave orders for all of them to go underground at the mine. While the deceased, Makwemba and Gilbert Dube went down the mine shaft the accused who was the deceased's young brother remained seated at the surface. He did not give any reason for disobeying the order given by the manager and certainly did not mention that he was suffering from diarrhea.

When the manager got underground and discovered that the accused had remained behind at the surface he returned twice to the surface to persuade him to commence work but the accused refused. Ganya who had also remained at the surface operating a generator which was pumping water out, says on the deceased's earlier visit the accused had promised the manager that he would follow him underground later. It was only after Ganya had completed his task at the surface and had joined the other workers underground and was working at the deepest tunnel with the deceased and Makwemba that the accused followed.

Even then, the accused is said to have gotten to the upper tunnel where Gilbert Dube was working and instead of joining others in performing duties, he decided to sit down and do nothing. All 3 witnesses confirmed that at that stage the deceased ordered the accused to leave

the mine shaft since he was unwilling to work but he refused, a fact confirmed by the accused himself. The deceased was agitated resulting in a scuffle erupting between him and the accused.

Although the 3 witnesses are not in unison as to the step by step events which led to the assault of the deceased what comes out clearly from their evidence is that at some point the deceased confronted the accused and held him by the collar. He pressed him against the rough walls of the tunnel and shook him resulting in the accused's t-shirt being torn.

At no time was the deceased armed with any weapon and he had banished the accused from the site but the latter stubbornly held on even as he was not prepared to do any work. The fracas subsided but as the 2 continued exchanging harsh words the deceased again ran towards the accused stating that he wanted to discipline him for disrespecting him as his manager and brother while all the other employees were obeying his orders.

In a flash, Ganya says the whole incident lasted less than 3 minutes, the accused struck the deceased with the chisel, exhibit 5, two times on the head sending him to the ground frothing at the mouth with his eye dilated. According to Gilbert Dube who was standing about 1 ½ metres from the 2 combatants, the deceased was unarmed and had not threatened to harm the accused at that stage, when the accused swung the weapon over his head and struck the deceased on the head twice.

The accused started fleeing but was called back by the other workers so that he could play a part in carrying the injured manager out of the mine shaft. According to Gilbert Dube the accused sustained a cut on the back of his neck at the time that the deceased held him by the collar and pressed him against the rough wall of the tunnel. All the state witnesses denied that the deceased was armed with a knife. He had never carried a knife and the only knife which they had was kept at the fire place where they cooked their meals.

In our view the circumstances of the assault of the deceased come out clearly from the evidence of the state witnesses. Most of what they said was in fact corroborated by the accused

person himself. These are witnesses who had nothing against the accused and had no reason to lie.

When he got the opportunity to testify the accused person maintained what is contained in his defence outline. What became clear from the testimony is that he was a dishonest witness who desperately tried to create a story which was impossible to justify. As they say, no matter how you look at it, water cannot flow up stream without the aid of a pump. So when he claimed that the deceased cut him on the back of the neck with a knife to trigger his actions this was impossible from the manner in which he described the scuffle. One does not cut a person they are scuffling with at the back of the neck, one would expect a frontal attack. The same may be said about his claim that he threw an unknown object at the deceased from where he had fallen in the muddy water.

If that was the case he would not have inflicted the wounds that the deceased sustained. It is for that reason, that, cornered and realising the folly of his explanation, the accused tried to suggest that the deceased may have sustained injuries when he fell. But then there can be no respite in that regard either. This is because we have credible evidence that the deceased fell forward onto some timber, which is consistent with the post mortem report.

According to Dr Grayly's observations the deceased had sustained multiple bruises on the thorax and abdomen which bruises were ante-mortem.

As to why his version of events contained in the warned and cautioned statement was at variance with that given in court the accused also found himself in trouble again. He had to blame it on the police officer who recorded it. Again no basis is established for the police officer to have done that. He does not even suggest that he was assaulted or forced to make the statement. More importantly he had an opportunity to disown the statement at the time it was confirmed by a magistrate. He did not. Clearly therefore the accused person was not being truthful at all.

There is a reason why the accused has been inconsistent about the alleged attack by the deceased. In that regard we note that when the events of the night should have been still fresh in his mind, the accused stated in his warned and cautioned statement made on 30 September 2015 that during the altercation the deceased had used “a small knife” to cut him on the neck. He now claims in his defence outline that the deceased used an Okapi knife to “slit” him on the neck and then struck him with a log. In his evidence in court he gave a description which does not match that of an Okapi knife.

It is significant that in his earlier statement he claimed that the deceased took aim at him with a log but missed. He now claims that the deceased was standing over him assaulting him with a log which he threw an object. He also changed that version to say the deceased was fleeing when he hit him. These glaring contradictions point to only one thing that the accused has tried to exaggerate the threat that was posed by the deceased in order to justify what was clearly unreasonable reaction on his part. He was certainly not in any danger which would have called for the use of such a vicious instrument on his brother directed at the head. We can only speculate that perhaps he was motivated to act as he did by what he claims was a decision to exclude him from a share of the mining profits because he had not worked for it. Which may also explain why he steadfastly refused to vacate the work place when it was clear he was not prepared to work.

We therefore reject the version of the accused person which clearly is informed by a desire to exculpate himself and is therefore self-serving. 3 witnesses who have no reason whatsoever to incriminate the accused have given a plausible version of what transpired in the early hours of 27 September 2015. We embrace that version as truthful. The essence of the accused’s case is that of self-defence. While in our law a person is entitled to take reasonable steps to defend himself against an unlawful attack and harm or even death may be inflicted on the assailant in order to ward off the attack, for self defence to save an accused person the following requirements must be satisfied;

1. there must be an unlawful attack;

2. the attack must be directed at the accused or a third party, where the accused intervenes to protect a third party;
3. the attack must have commenced or be imminent;
4. the action taken must be necessary to avert the attack; and
5. the means used to avert the attack must be reasonable.

Even where the accused acts in self-defence he must not exceed the bounds of self defence, if he does he may either have a partial defence or no defence at all depending on the circumstances of the case. As stated by the learned author G. Feltoe in his little book, *A Guide to the Criminal Law of Zimbabwe*, 3rd edition, LRF, at pp 43-44;

“Where X exceeds the bounds of reasonable self-defence and kills the assailant, he may nonetheless still be found guilty of culpable homicide unless the excess was immoderate. The approach here is that the account should be taken of the fact that X was under attack, although, in the circumstances, he over-reacted. He should thus be entitled to a partial defence on a charge of murder. This partial defence will not, however, apply where X response was entirely excessive in the light of the type of threat he was under.”

See *S v Ncube & Ors* HB-303-16.

In our view this defence is not available to the accused person in that by his own admission he struck the deceased when he had turned to flee. The requirements to make up the defence have not been met in this case. The evidence which we have accepted is to the effect that the attack had not even commenced. It was while his brother was arguing with him that the accused pulled out the weapon and struck him twice on the head.

In light of the fact that the deceased was not carrying any weapon at that time, the use of that formidable iron rod was totally uncalled for even if indeed the deceased had wanted to assault him. This is because at worst he would have hit the accused with his bare hands. Therefore the accused’s action of using an iron rod directed to the head was not necessary at all to avert whatever attack, whether imagined or real. Clearly the means used, exhibit 5, could not possibly be reasonable.

A person who uses the kind of weapon that was used by the accused to strike a human being on the head, under whatever circumstances, must be taken to have foreseen the possibility of death resulting from such conduct. We are talking about a human being not underground boulders against which the chisel was designed.

Accordingly the accused is hereby found guilty of murder with constructive intent.

Reasons for sentence

In assessing sentence we have taken into account the mitigating factors alluded to by counsel. The accused is a first offender. He is a family man with a number of children to look after including the deceased's children. He took care of the funeral and medical expenses after the incident. It is a fact that the accused has lost a brother at his own hand. This is a stigma that will remain with him of the remainder of his life.

We are mindful of the fact that the accused has been in custody for a period of 1 year 4 months.

Against that though is the fact that the accused exhibited stubbornness of gigantic proportions on the day in question. The deceased was not only his elder brother 7 years his senior, he was also in a position of authority having been his manager. He was entitled to give the accused orders which orders the accused contemptuously disobeyed openly and in the presence of other employees thereby undermining the deceased.

When the situation got out of hand the accused did not relent. He was still determined to persist with his defiance to the extent of fatally assaulting his elder brother again in the full view of his subordinates. The accused took his laziness to unbelievable proportions. As a result a precious life was needlessly lost. It is the duty of this court to uphold the sanctity of human life.

Those that work at the mines and now suddenly think that human life is worthless must be reminded that these courts will not tolerate animal behaviour. The courts will continue to

impose lengthy terms of imprisonment against them until they respect human life and stop the violence that seems to define life at the mine shafts.

Accordingly the accused is sentenced to 14 years imprisonment.

*The Prosecutor General's Office, state's legal practitioners
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