

THE STATE

**versus**

GABRIEL ZHAKATA

HIGH COURT OF ZIMBABWE

MUZOFA J,

CHINHOYI, 11, 12 & 26 October 2022

Assessors:     1. Mrs Mawoneke  
                  2. Mr Manyangadze

### **Criminal Trial**

*T.H. Maromo*, for the State

*N.W Dlamini* , for the accused

**MUZOFA J** On the 25<sup>th</sup> of June 2021, the accused assaulted the deceased, one Wonderful Mhlahlwa with a log several times all over the body resulting in the death of the deceased. The accused was subsequently arrested and charged with murder in contravention of s47 (1) of the Criminal Law Codification and Reform Act (Chapter 9:23).

The brief facts are that on the 24<sup>th</sup> of June a day before the fateful day, the accused together with the deceased and other beer drinkers were revelling at a drinking place. Late in the night the accused was dancing to some music with a certain lady. The deceased and his friends were not amused. They claimed the lady was theirs. The deceased and the friends dragged the accused to a nearby bush and assaulted him. They left him unconscious. The following morning, the accused met the deceased. The accused then assaulted the deceased resulting in the death of the deceased. What is in dispute is why the accused assaulted the deceased and how he did so.

The accused denied the offence and raised the defence of self-defence.

The State case.

At the onset of the state produced evidence by consent. The post mortem report was produced in terms of s314 of the Criminal Procedure and Evidence Act. Dr Mukwapuno who compiled the post mortem report observed that the deceased's body had a depressed skull fracture – frontal region, deep laceration occipital region, 4<sup>th</sup> & 5<sup>th</sup> rib fractures and subdural haematoma. He concluded that death was due to severe head injury.

Affidavits by persons who handled the deceased's body were also produced by consent of the defence. The log that was used to assault the deceased was produced in court. Its length was 125cm with an average width of 3cm. It had short spikes. A certificate of weight for the log and a sketch plan was also admitted into evidence by consent.

The evidence of eight witnesses as summarised in the summary of the State case was formerly admitted.

Two witnesses gave oral evidence in court. Their evidence was that the accused was at a beerhall drinking beer together with other revellers. Later in the night he was dancing to some music with a young girl. As they danced he was touching the girl's bums. The deceased reprimanded the accused to stop what he was doing. The girl was about 15 years old. The accused did not take the reprimand kindly. However they continued to dance.

The following day, the witnesses saw the accused assaulting the deceased with the log that was produced in court. When the witnesses approached the scene, the accused dropped the log and ran away. Both state witnesses did not know what triggered the assault. They took the deceased to a nearby clinic. The deceased later succumbed to the injuries.

Their cross examination did not elicit much in favour of the accused. They could neither confirm nor dispute the accused's defence that he acted in self-defence. This is because they did not know how the assault started.

We accept their evidence in its totality. The accused on his part did not deny assaulting the deceased.

The defence case

As already stated the accused raised the defence of self-defence. He said after the deceased and his friends chastised him about the girl they claimed to be theirs, they dragged

him to some bush where they heavily assaulted him. He was left unconscious. When he regained consciousness he realised that he had a pair of trousers only, he had lost his shirt and personal belongings. He then proceeded to his home which must have been nearby.

In the morning, he retraced his steps in the hope that he could salvage some of his items. True to his impulse, at some point near the kraal where he was assaulted he picked his torn shirt, his hat and torch. At the tuckshop he found his shoes. Incidentally the deceased and one of his gang members only referred to as Robert were at the tuck shop.

Robert called out, 'that person is back' and he advanced towards the accused. He said he believed that Robert was about to attack him. He picked a stone and threw it at Robert who ran away. The deceased also rose and charged towards him. Fearing another brutal assault, he picked the nearest log and assaulted the deceased on the head and body about three to four times until the deceased fell down. He stopped assaulting the deceased when some people arrived at the scene.

Under cross examination he said he hit the deceased once on the head and he fell down. The accused conceded that the other blows were really inspired by anger more than self-defence. The deceased had haunted him for some time and this was the inevitable end either it was the accused dying at the hands of the deceased or the other way round. On that basis he prayed for an acquittal.

#### Analysis of the evidence and application of the law

The only issue for determination in this case is whether the accused acted in self-defence.

We have no doubt that the accused assaulted the deceased in the manner described by the state witnesses. We do not accept though the state's averment that the accused found the deceased lying by the fireplace. It is common cause that the altercation took place near a fireplace. One of the state witnesses said the accused used a burning log to assault the deceased. He also observed some burn wounds on deceased's belly. However the log that was produced in court did not have signs that it was in a fire. We expected to see some black charcoal on it, there was nothing. The same witness said the deceased sustained burn wounds around the stomach. That evidence was not supported by the post mortem report. No burn injuries were observed by the doctor. That part of the witness' evidence cannot be accepted.

The only evidence on how this assault leading to the deceased's demise came to be was from the accused. We were careful to warn ourselves that the accused is the only witness who knows what transpired and there is a likelihood that he may exaggerate on what the deceased did while reducing his blameworthiness.

The accused said deceased and his gang members had bullied him. Although he was unwilling to state the real reason, he kept on saying it was about a girl that he danced with. The most probable version is that the accused must have had an affair with this girl who the deceased and his gang members also had an affair with. This could have been a love triangle. The court must record its disquiet about the situation. This girl was only 15 years old yet she was already carousing in bottle stores with men who were much older than her. At her age she is supposed to be at school. We wondered what the future of this girl child would be like.

We accept that battle lines were already drawn between the accused and the deceased's gang members. We also accept that the accused was at the receiving end every time they met although at times they would drink beer together.

We accept that on the night of the 24<sup>th</sup> of June there was an altercation between the accused and the deceased's gang members. There was no evidence to controvert the accused's version that the deceased and his gang members dragged him out of the bottle store to a bush where they assaulted him. Similarly there was no evidence to controvert that Robert and later the deceased approached the accused menacingly and he believed that an attack was imminent.

In its closing submissions the state reasoned that, when the accused returned to the tuckshop he wanted to revenge and not to look for his items. The submission was not supported by evidence. Infact on a proper analysis, the submission does not resonate with the circumstances. It cannot be possible that, the accused being aware that the deceased had gang members who had previously attacked him, could go out on a revenge mission alone and unarmed for that matter.

Self-defence is a complete defence where the facts show that the accused was under an attack or the attack was imminent, his /her conduct was necessary to avert the attack, the means he/she used were reasonable in the circumstances and that the harm or injury was directed to the attacker or that it was grossly disproportionate to that which could result from

the unlawful attack. See s253 (1) (a-d) of the Criminal Code. In considering the applicability of the said factors, the court must not take an armchair approach. The court must put itself in the accused's shoes.

The test is subjective in the first part and objective in the second part. Without being a mind reader, the court must endeavour to understand what was going on in the accused's mind that prompted his actions. This is provided for in ss2 of s253 of the Act.

In terms of s254 the defence is a partial defence where the factors in s253 (1) are satisfied except that the means he used were not reasonable in the circumstances. So where a reasonable man would have acted in self-defence but would not have used the means used by the accused, then the accused is entitled to a partial defence.

In this case, the deceased and his gang members had assaulted the accused the previous night and left him unconscious. When he met them the following day coupled with Robert's comment no one can fault him for believing that these two were about to attack him. He therefore took some pre-emptive action to defend himself. He was entitled to do so.

The next consideration is whether the conduct was necessary to avert the attack. Under cross examination, it was suggested to the accused that had he been that fearful of the deceased he must have run away. He was therefore not afraid. He deliberately attacked the deceased. A person under attack has no duty to run away. In discussing this issue the learned author Jonathan Burchell<sup>1</sup> opines that there is no absolute duty to retreat.

We do not believe that a person must escape at all times, in some circumstances to escape could actually put the accused at more risk. A person is entitled to defend himself when an attack is imminent, this is an individual's inherent right<sup>2</sup>. In this case the two had approached the accused again and an assault was imminent. To accept that the accused must have run away would be indeed taking an armchair approach which is discouraged.

In this case even if the accused could have run away, the deceased and his gang members had been on his case for some time. The accused described a scenario on 24 June when the deceased and his gang assaulted him. We believe that is why the accused interpreted this murder as inevitable, it could have been the accused dead or the deceased

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<sup>1</sup> Jonathan Burchell, Principles of Criminal Law, 5<sup>th</sup> Ed @p127

<sup>2</sup> Ibid @121

dead. We come to the finding that the accused was entitled to take some action to avert the attack.

The next issue for consideration is the means used. Even if an accused is entitled to defend himself the gravity of the attack, the manner, and the extent of the defence against the attack must be more or less be proportional<sup>3</sup>. Thus the means used in defence must be proportionate to that used in the attack. If this were not considered the means used in defence may degenerate into vengeance which is not sanctioned at law.

The accused said the deceased was unarmed but he used a log. The log weighed 1,40kgs, 3cm in width and 125cm in length. It cannot be said to be a huge log. However, it is the way that it was used that made it a lethal weapon. Secondly, the accused hit the deceased once and he fell down. From then on the threat had ceased. There was nothing to defend himself from nor to be afraid of. He could have left the scene of the crime. Robert, the other aggressor had fled the scene. Thirdly and most important the accused under cross examination boastfully said the other blows were really out of vengeance because these people had troubled him for some time. He indeed continued to bash the deceased while he lay down helplessly. The accused stopped his onslaught when the state witnesses arrived at the scene of crime. The means used were not proportionate to the imminent attack.

Case authorities in our jurisdiction are clear that the four requirements must be satisfied. In the event that the means used by the accused are disproportionate to the attack then self-defence is inapplicable<sup>4</sup>.

The post mortem report graphically portrays the extent of the brutality that was obviously underpinned by anger and revenge. The deceased sustained a depressed skull fracture- frontal region, deep laceration occipital region, fractures on 4<sup>th</sup> and 5<sup>th</sup> ribs and subdural haematoma. The accused was really out to exert vengeance against the deceased, it was no longer self-defence.

We find that as the accused continued to brutally assault the deceased he could not have formed an actual intention to commit the offence of murder. It is not in dispute that these people were carousing the better part of the night and were still drunk in the morning.

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<sup>3</sup> R v Grigor (2012) ZASCA 95

<sup>4</sup> S v Chitate HH267/21

The accused must have realised that there is a real risk or possibility that his or her conduct may cause death, and continued to engage in that conduct despite the risk or possibility.

From the foregoing the accused is found guilty of murder with constructive intention.

### Sentence

In assessing sentence we considered both counsel's addresses in mitigation and aggravation. In mitigation we considered that the accused is a first offender with family responsibilities. The offence was committed after some prolonged provocation by the deceased and friends. The accused was still under the influence of intoxication. The offence was not premeditated. He picked a log that was just nearby and used it, he did not have the luxury to choose a weapon to use. His pre-trial incarceration period cannot be said to be long, he has been in custody for 5 months.

In aggravation we considered that the accused committed a serious offence. Once a life is taken it cannot be replaced. As such life must be guarded jealously. Although the accused was bullied by the deceased, on this day he acted out of anger than self-defence. This offence could have been avoided had the accused managed his anger. The accused is being punished for his failure to manage his anger. In this life, members of the community must learn to co-exist with those that provoke them. They will always be there. The accused could have simply reported the case of assault to the Police.

The following sentence would meet the justice of the case.

10 years imprisonment.

*National Prosecuting Authority*, the State's legal practitioners.

*Legal Aid Directorate*, accused's pro- deo legal practitioners.

