

THE STATE
versus
HUMPHREY GARA

IN THE HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
CHINHOYI, 25 October 2023, 1, 6 and 7 November 2023

Assessors: *Mr Manyangadze*
Mr. Kamanga
Mr. T.H.Maromo for the State
Mr. J. Mangeyi for the Accused

Criminal Trial

BACHI MZAWAZI J:

Introduction

A seventeen-year-old teenager died of five gunshot wounds, one in the head, three in the thorax region and one on the thigh at the hands of the accused person on the 9th of May 2020 at house stand number 732 Rudland, Orange Groove Chinhoyi. An arrest was made close to five months later, on the 28th of September 2020 resulting in murder charges in contravention of section 47(1) of the Criminal Law Reform and Codification Act [Chapter 9:23] being preferred on the accused. Interestingly, bail was granted on the following day on initial remand.

Brief Factual Narrative

The facts as borne by the summary of the State case are that on the night in question the deceased who was known to the accused's mother in-law made his way into the homestead uninvited in the middle of the night. Accused who was staying at the same premises with his wife and a newly born baby had retired to bed. The mother-in-law and her 12-year-old grandson were in the lounge watching late night television.

It is alleged that the mother was startled by some noises in the kitchen which she investigated but found nothing amiss. She then later discovered her bedroom door ajar, ransacked and her personal belongings scattered all over the place and immediately suspecting an intruder raised alarm to his daughter and son in law.

The two sprang into action and in the company of the mother-in-law moved from room to room in search of the intruder whom they found hiding in the pantry. Upon accosting the home invader, it is said that the deceased immediately started calling the mother-in-law's name, but the accused quizzed him to say his name which he did not. The accused then shot him at intervals each time he failed to get a response after repeatedly asking for the deceased's name. Even after the second shot the deceased had asked the mother-in-law to please wait a bit. The State outline ends with the accused securing the pantry and making a police report the following morning.

Evidence Produced by Consent and in Support Thereof

The adduced post mortem report, which departed materially from the full detailed version normally compiled by pathologists, outlined the observations made as, lacerations on the forehead, right wrist, upper chest right shoulder and left thigh. The doctor concluded that the cause of death was cardiac arrest as a result of congested blood in the thorax area. In the State papers, there was mention of an explanatory note that was made by the said doctor accompanying the post-mortem report, but was never found nor produced. As a result the State called Doctor Maponga who in his oral evidence admitted that the lacerations were deep penetrating wounds caused by gunshots and the blood that accumulated in the heart causing the cardiac arrest was from those observed wounds.

It is important to note that the post-mortem report had been produced by consent as exhibit 3 in terms of sections 276, 278, 279 and 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] alongside, the sketch plan as exhibit 1, the confirmed warned and cautioned statement as exhibit 2 and the Ballistic Forensic report as exhibit 4. The initial witness line up by the State consisted of eleven people but oral evidence was led from five including the doctor. The summarised evidence of the rest was admitted into evidence as is.

Accused's defence in –chief and factual analysis

The accused person denied the charge and raised a two-pronged defence, of the self and his family members, that is, third parties. Whilst he agrees in essence with most of what was stated in the above State outline, his point of departure is that the shooting took place in a passage not the pantry. Further, that he armed himself with his own licenced pistol after responding from his mother-in law's call but did the house door to door inspection alone not

in the company of his wife and his mother-in law. He also indicated that the deceased never uttered any words even after asking him to do so on several occasions. He then mentioned that the deceased was armed with a garden fork, knife, and a machete. The accused adopted his defence outline and agreed that it be taken into account as evidence over and above of his oral defence in court.

The court did not help but notice material discrepancies in the accused's defence outline, evidence in chief and under cross examination, as well as the statements given to the police, to be analysed at a later stage.

The State Evidence and Analysis

Nothing much came from the State's first three witnesses. They all gave initial statements to the investigating team which they signed when events were still fresh but then departed from those in their testimony in court. Nora Alice Muzondo was not a satisfactory witness, because of her relationship as the mother –in –law her evidence in court was tailored to suit the accused's new defence in court. She then parroted that deceased was shot in the passage yet she said she was faraway and could neither see nor hear what was transpiring between the deceased and the accused. There was a marked departure from her written statement on record stating that all three adults did the manhunt and found deceased in the pantry which exactly tallied with State's summary of the case.

Hessel Kondo, the police officer who was first to attend the scene on the night in question's evidence, leaves a lot to be desired and actually questions the integrity of the police. Firstly, in a shooting incident she came alone under no escort. Secondly, as a trained police officer she did not observe the crime scene to see where the alleged shooting took place and any signs of struggle, blood traces or trails. All she could relate to the court is that she saw a corpse holding on to weapons. She failed even to explain how the dead body clung to a machete after being shot so severely and severally. She then attested that she found the deceased's body in a sitting position with the back resting on something but with a satchel strung on the dead body.

Astoundingly, she could see some weapons in a bag at the back of the deceased which included a knife and garden fork. She never said that she opened the bag but surprising she claimed to have seen these additional weapons. Testing her evidence of seeing a knife against

that in the accused's admitted defence outline, annexure C, on record, the accused said a knife was thrown at him necessitating his shooting in defence. In self-contradiction accused after hearing the witness testimony then in his submissions and oral evidence talks of an attempt to throw the knife.

Kondo proved not be a credible witness. In her written evidence she did not say that she responded to a crime scene call only to guard a corpse but to attend scene and record findings. She even mentioned compiling a report afterwards. In court she made an about turn after a leading question from Mr Mangeyi, counsel for defence and she stated that her only mandate was to secure the body. She then reverted to her original story when the court put her written statement to her for further explanation. This witness' evidence only serves to point out that the deceased was found in the pantry already dead and bleeding.

The third witness, also a police officer could not explain why and how a dead body could still hold on to weapons if at all he had brought them in the first place and had intended to use them because that was what this witness was eager to say. He too had magical or supernatural eyes which could see weapons inside a bag pack at the back of a dead body without inspecting the contents. To the court's surprise the second police officer stated that he too had the sole mission to only guard the corpse and nothing else. However, he clearly categorically stated that there was not even a single trace of blood in the passage when he arrived at 7am in the morning and that there was no any form of lighting in the passage.

Both these two police officers' evidence alludes to the fact that they guarded the body which was their ultimate purpose. So, this serves to illustrate that any wounds on the deceased's body were as a result of his encounter with the accused. In other words, they guarded and protected the body from further injury. Both police officers also mentioned photographs being taken by the Central investigating department which took over the case the following morning from the last security guard.

It is the evidence of the investigating officer, Anderson Mutiiwa which stands out. He was assigned to the case five months later and set on a vigorous pursuit of justice resulting in the arrest of the accused who had never been arrested since the death of the deceased. He also made efforts to collate all the evidence including the photographs but they could not be presented to him. He eventually took the accused for initial remand but he was freed the same day through a shorter route of bail by consent in a third schedule offence.

Mutiwa was a very credible witness both in word and demeanour. He is also the one who went for indications with the accused being driven by the and at the convenience of the accused. He reduced the indications to a sketch plan which was signed by the accused and tendered into evidence by consent. Noticeably, the accused admitted to making the indications and signing them but disputes some elements therein. This witness's evidence marked the closure of the State case.

Defence Case

The defence only led evidence from the accused. In his defence outline the accused had stated that a knife was thrown at him prompting him to shift in a defensive gear and shoot, a position he later changed in his oral evidence. He also attested that he could visibly see all the weapons the deceased had but later on changed saying that because of the poor light cast through the window he could only catch a glimpse of the shininess of what looked like a machete. He also stated that the deceased was charging at him after the two shots and warning shots but at the scene of the crime, he stated that after shooting the accused he staggered away. He said he aimed his shots at the window which was opened but logically if an intruder hears gun shots they escape. They do not continue charging.

Re-opening of the case, re-summoning of a witness, sketch plan and *inspection in loco*

In order to deliver a well- informed judgment, after the pleadings had been closed, the court felt the need to recall the last police witness and go for an inspection in loco to clarify sticking issues in exhibit 1, the sketch plan and exercised its powers in terms of s232 of the Criminal procedure and Evidence Act[Chapter 9:07]. Section 232 gives the court the leverage any stage of the trial proceedings to recall and re-examine any person already examined. See *S v Zakeyo* 1963 SR 434(s), *r v Buitendag* 1976(1) RLR and *S v Shezi* 244/93[1994]ZASCA 20 (22 March 1994) .Submissions were made by both the State and defence counsel orally to that effect and Officer Mutiwa was recalled for the purpose of an *inspection in loco* of the crime scene against the sketch plan.

At the crime scene, it was observed that the sketch plan did not capture all the rooms as was on the ground and may have missed one or two things. This is understandable taken in the contest that these are not expert surveyor drawings called for standard precision. As the

name denotes, they are sketches. Merriam Webster dictionary defines a sketch plan as a preliminary plan that is less detailed than a working drawing. It is also defined as a rough, informal drawing that is used to convey basic ideas and concepts of a bigger picture. It can also be called a rough drawing representing the chief features of an object or scene and often made as a preliminary study. The Oxford dictionary defines a sketch plan as a simple picture that is drawn quickly and does not have many details. The court was satisfied that the sketch plan depicted the key areas as pointed to the officer by the accused. This was not disputed or challenged at the crime scene during the inspection in loco. The defence kept hammering the investigating officer on the issue of two passages. The sketch plan on record has only one passage which matched what was on the ground. As such that was a non- issue.

A wall emerged between the lounge and the passage, whereas on the drawings the lounge overlooked the passage. The crime was committed three years prior to the trial. This is when the sketch plan was drawn. There were a lot of visible renovations and changes that had been done to the property when the inspection in loco arrived at the scene three years later. That a wall was then extended cannot be ruled out.

What is of significance is that, the accused person did point at the allegedly exact places where both himself and the deceased were and their actions during and after the shooting.

An Exposition of the Law

On analysis, it is permissible at law to kill in self- defence, property and that of others. It is a full defence if it passes cumulatively the standard or tests set by the law in order to prevent wanton and unjustified killings under the pretext of self -defence. Section 253, of the Criminal Law Codification and Reform Act [Chapter 9:23] recognizes the right to self -defences and outlines its limitations or qualifications as a full defence.

The person raising the defence must firstly, establish that there was an unlawful attack, which had commenced or imminent. Secondly, that his actions or conduct was necessary to avert the attack. Thirdly, that there was no escape route or other defensive mechanism other than confronting the attacker. Fourthly, the means used in averting the unlawful attack was reasonable in all the circumstances. Fifth, the defensive attack was only

aimed at the attacker and not third parties. Lastly, that any harm or injury caused by the conduct was not grossly disproportionate to that liable to be caused by the unlawful attack.

In the assessment of the above essential requirements in the defence of self- defence, the law in s253(2) enjoins the judicial officer to employ an objective test. That is a reasonable man concept of placing oneself in the shoes and environment of the offender at the time. What is to be taken into account is the general disposition of the perpetrator, mental stability, sobriety, stress, prior knowledge of victim amongst several other factors. See, *Ncube v The State, SC10/14 Sibanda v The State SC39 /14*.

These requirements have been amply spelt out in several case authorities amongst them *Zibusiso Ndhlovu the State SC 57/14, Ncube & Moyo v The State SC58/14, Mapande v The State SC82/14, Sv Chimangaidzo Ndou HMA15/18*.

Section 254, notably recognises that where the accused person may have used excessive force not in commensuration with the perceived attack thereby falling short of satisfying all elements cumulatively as dictated by s253(2), he is entitled to a culpable homicide verdict if there is evidence of an unlawful attack.

In the circumstances of this case the accused's defence is that of self-defence and that of his family. We have the accused's word, the witness evidence and the documentary exhibits tendered by consent as direct evidence to be weighed against the indirect evidence that presented it- self at the scene of the crime.

Circumstantial evidence from which an inference of guilt may be drawn is permissible in our jurisdiction. Courts are allowed to draw inferences from a totality of evidence and proved facts exclusively pointing to the guilty of the accused. *Muyanga v the state hh 79/13. S v Shonhiwa 1987 1 ZLR, S v Marange and Ors 1991ZLR 244 S*. In *Muyanga v the State* above it was noted that the court is asked to infer from a combination of established facts the guilt of the accused.

Issues

In *casu*, in interrogation of the defence proffered by the accused we assess both the direct and indirect evidence to see whether to begin with there was an unlawful attack and if there was, whether or not the accused exceeded the boundaries of self-defence? Put differently, whether or not the means used by the accused to avert the attack was reasonably proportionate to the unlawful attack?

Assessment of Facts, Evidence and the Law against the Underpinnings of the Law

We are told that the intruder, slid into the house through a bedroom window. In this bedroom, there was evidence of searching through the pulled-out drawers and scattered clothing items. If we stop or pause here at this stage, we see or can draw a reasonable inference of the trails of a petty thief who was looking for something to steal. Had the intention been to harm anyone the intruder would have gone straight to attack those who were awake in the lounge watching television.

If we proceeded in analysing the chronology of the events of that fateful day, there is only one passage from the kitchen leading to the bedrooms. Going by the State Outline Norah heard some noises in the kitchen. When she checked there was no one. But we are not told of any checks to the pantry next to the kitchen. Norah used the same passage to go to her bedroom where she witnessed the vandalism. Obviously, no one was in the passage. Norah's bedroom, the entry point, is only about two metres away from the accused's then bedroom which faces directly at the whole passage. In that context, Norah moved from the bedroom called the in laws whilst standing in the same passage where at that time no one was present. The only exit to the house is the kitchen door as the others are secured. It shows that the deceased was already in hiding when there was commotion in this small passage. It then defies logic that he would then show up only to confront accused in the narrow passage. This leans more to the version initially given to the police when the events were fresh before the panel beating to underplay the accused's actions of the day, that the accused was shot where he was found hiding, in the pantry.

We do not subscribe to the notion that the summary of the state case is a creation of the police. The police are not endowed with superpowers to narrate events of unfamiliar setups and persons. They gather that information from complainants and witnesses. We see

no reason for the police to manufacture or cook up facts. In this case ninety per cent of what was said to the police when the events were made spontaneously and contemporaneously was not disputed. Changes were then made as to the exact spot of shooting and on the weapons aspect.

Further, examination on the weapon aspect leans more to the fact that the deceased may not have been armed at all. A reasonable inference can be drawn from the evidence of the witness and the position of the deceased's body that the weapons if any may have been planted or they never existed. An analysis of the accused's own testimony reveals that he does not have one statement as regards the alleged arms and how he visualised them. He said he came face to face with deceased in the passage who then threw a knife which missed him and he fired. His second statement is that he did not see the arms because of poor lighting but the shining of what he concluded was a machete. At the scene of the crime when asked by the assessor to point where he stood with respect to the deceased, he pointed a distance of less than three metres. He said he stood opposite the bathroom door which happened to be open and his first reaction upon seeing the deceased was to fire two shots out of the bathroom window which also happened to be open at midnight. His most damning explanation is that after shooting at the window he immediately shot twice at the deceased who the staggered into the pantry. (My emphasis.) These inconsistencies make the accused a poor witness and his evidence improbable.

In dissecting the above, and the two police officer's evidence that a knife was found in a satchel wrapped at the back of the deceased, it is clear that the accused lied about the knife being thrown at him prompting the shooting in self-defence. Further, the accused did not mention any weapons when he shot the accused resulting in his staggering away. The staggering meant the deceased was already injured from the two admitted shots. This also meant he had turned his back on the shooter and was escaping with his dear life to the pantry. It shows that if there was an initial threat, it was no longer in existence.

It is startling then to believe or even comprehend the two other witnesses' evidence that the deceased's cold hands and body were seen holding on to a machete. Logically, once one is wounded to the extent of walking away, he lets go of the weapon at the spot he was hit or where he finally rests. In our view, the whole weapon and armed evidence is cooked up. If there were any weapons on the dead body the inescapable reasonable inference to be drawn is

that they were planted as already analysed on the evidence of the two police officers who failed to take note nor see the actual point of the shooting and the trail of blood.

More so, if taken in combination with how the whole case was handled and investigated. Firstly, crucial photographic evidence of the crime scene was never made part of the docket let alone the record. Secondly, the police's apparent reluctance to charge and effect an arrest of the accused for five months. Thirdly, the readiness of the State to give accused bail and not allowing him to spend a single day in detention although permissible at law is suspicious. Fourthly, it is beyond logic that the law enforcement department sends one officer to a shooting incident in a station of police officers not to investigate first scene attendance but to guard a corpse.

A reasonable inference that can be drawn is that there could not have been any spoor of blood anywhere as the deceased was shot as per the statements given to the police by Norah and all the summarised witnesses' statements. The only logical conclusion that can be deduced from the evidence and surrounding facts is that the deceased could not have been in possession of any arms.

As already stated above, for the evidence of the accused to be believed by the court it should also pass the credibility test and be probable. This accused person's defence is neither probable nor credible. As it is clear, from the angle analysed above, there is no evidence of an unlawful attack, which had commenced or imminent. Although the dead do not tell any tales, the circumstantial evidence is their voice in circumstances such as these.

However, at law we are also mindful and alive to the fact that unlawful entrance in a residential place poses a threat to the entire inhabitants and at times the people are traumatised to the extent of fearing for their lives. This in itself can it be qualified to be an unlawful attack.

Section 252 of the Criminal law Code [Chapter 9:23] defines, an unlawful attack as any unlawful conduct which endangers a person's life bodily integrity or freedom. *See, S v Elizabeth Thumbulani HB113/16*. If we are to believe that the mere presence of the intruder plus or minus any weapons was a conduct that endangered the accused 's and his family's life then we may be persuaded to conclude that there was an unlawful attack because once the person is in the house and cornered you would not know their next move. However, this is

where s253 qualifications come in, so as to deter unlicensed or sanctioned termination of human life at the press of the trigger under the pretext of defence from an unlawful attack.

Having noted and assuming that there was an unlawful attack in the context of s252 we are inclined to interrogate whether the accused person's conduct was necessary to avert an attack and proportionate to the attack. Taking accused's last explanation of how the events evolved on *inspection in loco* at the actual scene of the crime, that he fired two warning shots out of the window and that he was facing the deceased. Further, that when he fired two bullets directed at the deceased, the deceased staggered away. What shows that the accused was in full control of his mental capacities is that from his version, he made a conscious decision to fire the first two shots as warning shots outside a bathroom window when in full view of the intruder. This means that he was capable of taking one other cautionary step of targeting the lower part of the human torso which we believe he did as the victim managed to stagger away. However, five wounds were found on the body representing five shots. It is not clear as to where those alleged first two direct shots landed on the deceased's body. Common sense and logic says that once there is evidence that the shooter has struck his opponent who has retreated, he thus poses neither threat nor danger.

The shooter the accused should have stopped with the two shots but there is evidence of three more wounds described by the doctor in court as akin to gunshot wounds. We say this because we believe that those licensed to use, keep and own firearm licences are also trained and or assessed for their fitness to be in possession of such lethal weapons. The Firearms Act [Chapter 10:07] regulates and controls the use and possession of firearms in Zimbabwe against the backdrop of international and regional instruments to which it is signatory or part to. These are the SADC Firearms Protocol 5, Bamako Declaration, UN Firearms Protocols, to mention but a few. Against this background, apart from firing warning shots the firearm holder must also be in possession of skills of how to shoot to incapacitate or disarm and not to kill. If this is not explicit in the requirements for one to obtain a licence or permit to possess a firearm then there is lacuna in the law that needs further exploration and exploitation outside the scope of this judgment. See, "The Law of The Gun", An audit of firearms control legislation in the SADC' by Peter Cross, Rick de Caris , Etienne Hennop and Angus Urquhart.

In casu the common cause facts are that the deceased died from the wounds sustained in the accused's residence where he had trespassed into. It is irrebuttable that the accused through his admissions and evidence is the only one who inflicted wounds on the deceased on the day in question. It is also a proved fact that after the accused's encounter with the deceased the police secured the body preventing it from any further harm. It is undisputed that the only weapon accused used to inflict the wounds is a 38 "Special Rossi Revolver, pistol which he owned and was licenced to use. Exhibit 1, 2, and 4 are pieces of direct evidence which support the above facts.

Exhibit 3, the post-mortem report reveals five wounds later explained in court as deep wounds synonymous with gun shots. Exhibit 4 supports the firing of 5 spent cartridges and 2 spent bullets. In our view five spent cartridges tally with the five wounds found in the deceased's body. Three of those wounds were fatal and either of them if shot first would have paralysed the victim from any movement. The shot on the forehead, right upper shoulder and right upper chest were lethal. The right upper chest is the home of the lungs heart and veins connecting all the major organs in a human body. To think or imagine a person moving from the point of shooting to ten or so metres further is impossible.

The reasonable inference is that if the accused's last version of events is to be believed, he said after two shots the deceased staggered. If deceased staggered away then those two shots were not the fatal once. The 'body' of evidence in this case the deceased's body was bullet ridden with five wounds. Therefore, the last three shots were shot when he had already been immobilised and in the final resting place inarguably the pantry.

As such the only reasonable inference at the exclusion of all other inferences that can be drawn, is that the means used to avert the attack if any was unreasonable even in the circumstances of a reasonable man. One gunshot does sufficient harm and incapacitates a single teenager let alone five. Three shots on point blank after the two crippling shots were not proportionate to the danger posed by the mere intrusion of a single person

We do not agree with Mr Maromo for the State that the accused is entitled to an acquittal. He shot a single grief-stricken young person he could see. It is different from shooting at random on several intruders in the dark. Had the police done their job properly and presented all the evidence this was a clear-cut case of murder with constructive intent. The murder weapon itself was not produced in evidence.

In conclusion, even though the State has failed to prove murder with actual and or constructive intention, the proved facts, the direct evidence and all the circumstantial evidence which is incapable of explanation by any hypothesis other than the guilty of the accused and inconsistent with his innocence is sufficient to prove negligent and reckless killing of the deceased by the accused beyond a reasonable doubt.

Accordingly, the accused is found guilty not guilty of murder with actual or constructive intention but guilty of culpable homicide.

Mangayi Law Chambers for the Accused

National Prosecuting Authority for the State