

THE STATE
versus
ALEXANDER DZOMONDA

HIGH COURT OF ZIMBABWE
CHATUKUTA J with MR CHIDYAUSIKU and MR VERA, Assessors
Harare, 30, 31 January 2006 & ***** October 2006

Mr *Katiyo*, for the State
Ms *Ngwenya*, for the accused

CHATUKUTA J: The accused was charged with the crime of murder, it being alleged that he wrongfully and unlawfully killed one Josphat Mutseta. He pleaded not guilty to the charge. It is common cause that the accused and the deceased were brothers. The two had a long standing dispute over cattle they inheritance from their father. The State alleged that the accused had sold the deceased's share of the inheritance resulting in the deceased seeking redress in the civil court. On 25 November 2004, the accused approached the deceased who was working in his garden and attacked him. He struck the deceased with an axe on the back of the head and threw the deceased into a deep well.

In his defence, accused stated that there was indeed an altercation over the cattle they inherited from their father. He stated that the deceased attacked him first and he retaliated in self defence. He struck the deceased with the handle of an axe and the deceased fell into the well.

The evidence of all the eight witnesses listed in the State's Summary, except for the evidence of Simba Kamunda and Doctor Mapiye, was admitted by the accused in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The evidence of Chabvakairi Zambu was that was watering his garden, some fifty

metres from the deceased's garden. Deceased was also working in his garden. He heard a thud and splashing sound coming from the deceased's garden. He observed the accused running away from the garden wielding an axe. He went to the deceased's garden and observed deceased's hat and jacket on the ground. The water in the well was unstable. The witness chased the accused and apprehended him with one Bignock Mahwara. Bignock Mahwara's evidence was that on the fateful day, the accused passed him in the garden where he was working. The accused indicated to him that he was going to deceased's garden. After a short while he saw accused running out of deceased's garden wielding an axe. He gave chase and apprehended the accused. Lawrence Kambeu's evidence was that the accused arrived at his homestead wielding an axe with Bignock Mahwara in hot pursuit. Bignock advised him that the accused had killed the deceased. The witness recovered from the accused an axe and caused the accused arrest on the same day. The other witnesses were police details who attended the scene of the murder and retrieved the deceased from the well.

The State produced accused's warned and cautioned statement by consent. The statement was confirmed on 2 December 2004, one week after the accused's arrest. In the statement, the accused admitted that he struck the deceased with the intention to kill him because the deceased had taken all the inheritance. He stated that he had lodged a complaint with the village head and the matter was supposed to be heard on 26 November 2004 (the day following the murder). The deceased invited him to his garden to discuss the matter. When he went to deceased's garden, he was carrying his axe. When he arrived at the garden he immediately struck the deceased with the back of the handle and the deceased fell into the well. He then left the garden.

The State called its first witness, Dr George Mapiya. Dr Mapiya testified that on 25 November 2004 he compiled a post-mortem report on the deceased. The post-mortem report was produced with the consent of the accused. The doctor stated that the deceased had a laceration fracture on the right side of the head. Below the fracture there was subdural haematoma (collection of blood on the brain). The cause of death was head injury as a result of severe shock caused by a blunt instrument. The State produced, by consent, an axe with a blade measuring 26.5cm in length and 67cms in width weighing 1.5kgs. The Doctor testified that the axe is consider as a blunt object except for the tip of the blade. He testified that the injury sustained by the deceased would have been as a result of the lower part of the axe since the injury was a linear laceration. The Doctor also testified that he opened deceased's abdomen and checked the lungs to see if the deceased had swallowed any water since deceased was drenched with water when he was brought in for post-mortem. He found no water in either the lungs or the abdomen and concluded that the deceased had not died of drowning. The Doctor testified that the deceased had bruises which were consistent with the deceased having been pulled on a rough service. There was no meaningful cross examination of the witness.

The second State witness was Simbai Kumunda. She testified that she was related to both the accused and the deceased. It was her evidence that she was neighbours with the deceased whilst the accused stayed some distance away from her homestead. On the fateful day, the accused passed her at the well in the morning stating that he was going to collect parts of a plough. He later returned, this time carrying an axe. As they were having tea, the deceased also arrived asking for his windlass from the witness as he wanted to go to his garden. The accused then invited the deceased to his home to discuss some issue. The deceased asked the accused to raise the

issue there and then but accused refused. Deceased left for his garden and the accused followed. The witness also went to her garden. Her garden was, according to the indications which were produced by consent, about 74 metres away from the deceased's garden. Whilst in her garden, she then heard a funny sound being made by the windlass in deceased's garden. She stood up and saw the accused picking up his axe and running out of the deceased's garden. She ran to the deceased's garden with one Zambu. She found deceased's hat on the ground but could not see the deceased. The water in the well was unsettled and assumed that the deceased had been thrown into the well. The witness remained steadfast under cross examination and her evidence remained unchallenged. She did not exaggerate anything and I found her evidence to be credible.

The accused testified in his defence. He stated that he was seventy three years old. The deceased was his brother. He testified that his brother wrote him a letter to discuss some issues without disclosing the issues. When he left home on the fateful day he went out to look for his cattle and decided to visit the deceased. He arrived at Simbai's home (the 2nd State witnesses) and the deceased also arrived. They went together to the garden. They had some discussing but they could not reach an agreement. The deceased wanted to punch him and he took the axe and struck the deceased with the back of the axe. The deceased fell down and rolled into the well head first. He waited for a while worried that his brother. The water in well was still stirring and when it stopped moving he concluded that his brother was dead and then he ran away from the scene. He stated that he went to Kambeyo's homestead and advised him of what had happened. The accused was subsequently arrested. During cross examination, accused confirmed that there was a long longstanding dispute over inheritance of some cattle. He stated that he hit the

deceased with the back of the handle of the axe as he had removed the blade. At the time when he struck the deceased, the deceased was tying a piece of wire around the windlass. Although the deceased was not attacking him at that stage, he had earlier threatened to do so. He therefore attacked the deceased in anticipation of an attack on his person. Accused testified that he aimed for the neck but ended up striking the deceased on the head. The deceased was not armed. He denied ever throwing the deceased into the well.

The following issues are not in dispute:

- (a) There was a longstanding dispute between the deceased and the accused over some cattle they inherited from their father;
- (b) On the fateful day, the deceased and the accused were in the deceased's garden;
- (c) The accused struck the deceased on the back of the head with an axe;
- (d) The deceased died as a result of the assault;
- (e) The deceased ended up in the well in his garden.

The State asked the court to return a verdict of guilty with actual intent. It is clear from the nature of injury sustained by the deceased and the part of the of the body the accused aimed the blow at that he had the intention to kill the deceased. As stated in *Robert Mugwanda v The State SC 19/02*, the *mens rea* of the accused has to be inferred from the circumstances of the case where a single wound inflicted to a vital part of the body results in death. The deceased sustained deep laceration on the back of the skull. The skull is a vulnerable part of the body. Even if it were to be accepted that the accused had aimed for the neck, this is equally vulnerable. The force of the blow was sufficient to cause a fracture of the skull. It can therefore be inferred that the accused used considerable force. The accused admitted that

when the deceased fell into the well, he waited for some time to see if the water had settled and only left after it had settled. It appears the waiting period was to ensure himself that deceased was indeed dead because the accused did not attempt to help the deceased out of the well or call out for help to retrieve the deceased. Simbai Kumunda, Bignock Mahwara and Chabvakairi Zambu, were near the deceased's garden. Surely the deceased would have called on these people to help. This gives rise to the inevitable inference that the appellant intended to kill, in the sense of directing his will towards the bringing about of the death of the deceased.

The accused submitted that he acted in self defence. In order to succeed in his defence, the accused must satisfy the court that:-

- (a) the attack on his person was unlawful;
- (b) the attack must have commenced or imminent;
- (c) the action taken must have been necessary to avert the attack; and
- (d) the means used to avert the attack must have been reasonable.

The accused was not able to state how he had been attacked by the deceased. He stated that the deceased intended to punch him but did not do so. The deceased threatened to assault him later after completing his work and it is this threat of assault that led him to protect himself. He submitted that because of his age he could not have warded off the assault by the 42 year old deceased and therefore he acted in pre-emptive self defence. G. Felto in *A Guide to the Criminal Law of Zimbabwe* 3rd ed. At p43, describes pre-emptive self defence as, and I quote:-

“Where an attack is about to be launched upon another, they may be justified in taking reasonable pre-emptive measures to prevent the attack.”

It is the accused's own evidence that after the deceased threatened him with assault when he had completed his work, the deceased proceeded to work on his windlass. When he attacked the deceased, the deceased was putting a piece of wire around his windlass with his back to the deceased. He then proceeded to strike the deceased on the neck but the axe landed on the back of the head. Accused's evidence confirm that there was no unlawful attack on his person and that there was no imminent attack since the deceased was wiring his windlass when he was struck in the back. His explanation for striking the deceased as he did was that he wanted to ensure that the deceased would not be able to attack him. It can safely be concluded, as submitted by the State that the only way he would prevent the deceased from attacking him was to kill him. The accused failed to explain, why he aimed for the neck instead of any other part of the body which is less vulnerable. Accused also failed to satisfactorily explain where he got the time to remove the blade of the axe and strike the deceased with the handle only and then replace the blade.

Self defence was not raised in the accused's warned and cautioned statement. The warned and cautioned statement is again supportive of the State's submissions that the accused did not act in self defence. The accused admitted the striking the deceased with the intention of killing him. He stated in the warned and cautioned statement:

I do admit the charge of killing the deceased with the intention of killing him I killed the deceased because he was troubling me since the year 1990 until the day I killed him. The deceased took all the property of our late father. He was now coming to me alleging that I stole his cattle. On the day I killed the deceased, I had gone to the village - head in a bid to have our dispute resolved. That is when the deceased arrived and I told him that our case was set

for the following day. The deceased then indicated to me that we had to talk about the issue at his garden. He then went to his garden. I then followed him carrying my axe. I arrived at the garden. I found this deceased near his well in the garden, without wasting time I struck the deceased with the back part of the axe on the back of the head. He then fell into the well. I went out of the garden and left. That is all.

The accused made an attempt, when he was being cross examined, to challenge the confirmed warned and cautioned that its contents were not accurate. However, the confirmed warned and cautioned statement was produced by consent. Under cross examination he agreed that he made a statement to the police. He submitted that he narrated to the police what had happened without repeating the narration. He further submitted that he did not know what the police wrote. He however, admitted that he was taken to Bindura Magistrates Court for the confirmation of the warned and cautioned statement. He did not challenge the statement during the confirmation proceedings. The statement was again read to him during the trial. He submitted that the police did not record the statement accurately. Apart from these submissions accused did not raise any irregularities. The fact that the warned and cautioned statement was confirmed before a magistrate shifts the onus to the accused to prove that the warned and cautioned statement was not made by him, and was not made freely and voluntarily. The accused did not discharge that onus. The warned and cautioned statement was accordingly accepted in evidence. The warned and cautioned statement confirms the State's submissions that:

- (a) the accused intended to kill the deceased;
- (b) the accused used the blade when he struck the deceased since the accused stated that he immediately struck the

deceased upon entering the garden and therefore would not have had time to remove the blade from the handle;

- (c) he aimed for the back of the head and not the neck; and
- (d) the deceased never threatened him.

We accordingly find the accused guilty of murder with actual intent.