

THE STATE
versus
GARIKAI KAMUPIRO

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 30 January & 8 February 2024

Criminal Trial-Murder

Assessors: Mr Gweme
Mr Gwatiringa

A Mupini, for the State
M Hamandishe, for the accused

MUNGWARI J:

[1] Garikai Kamupiro (hereinafter referred to as the accused) was indicted before the High Court facing a charge of murder. The state alleged that on 10 February 2023 at Chidziva Farm Compound, Mvurwi the accused had a fallout with her husband Frank Milanzi (hereinafter the deceased). As a result, she brutally attacked him with logs several times all over the body. It is alleged that she did so with intent to kill or realizing that there was a real risk or possibility that her conduct may cause death but still continued to engage in that conduct despite the risk or possibility. The deceased sustained mortal injuries as a result of the assault.

[2] The accused entered a plea of not guilty and in an attempt to rebut the allegations, she informed the court that she had a troubled relationship with the deceased which from the onset was characterised by frequent fighting. She disclosed that she also sustained serious injuries from those previous altercations with the deceased. The fights and beatings were repeatedly perpetrated. Her injuries include loose and shaking front teeth. She further explained that on the night before the unfortunate incident, both she and the deceased returned home intoxicated after a beer drinking session. An argument ensued and escalated into another physical altercation. After sometime they stopped fighting and went to sleep. In

the early hours of 10 February 2023, the accused woke up feeling extremely angry over the previous night's assault and attempted to discuss the matter with the deceased. That attempt led to another violent confrontation. Neighbours intervened and restrained both parties. Subsequently, the two were left alone but the deceased continued to insult and threaten her with death if she did not leave the homestead. Fuelled by anger, the accused grabbed a gum log and entered the bedroom where the deceased was. Violence soon broke out once more. During the fight the accused attempted to defend herself by striking the deceased on his legs and hands. She then observed that the deceased had sustained injuries and was bleeding from his legs, hands, nose and mouth but it was too late. He passed on a short while later. Essentially the accused pleaded self-defence.

[3] The circumstances leading to the deceased's death were established through the evidence of all six state witnesses namely Abigirl Ndege (Abigirl), Jane Sixpense (Jane), Lazarus Chesango (Lazarus), Receive Aliyoni (Receive) Detective Sergeant Mvura and Dr Martinez. Their unchallenged evidence was accepted by the court in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (The CP&E A) as it appears in the state's outline of its evidence. We summarise that evidence as follows:

[4] The accused, an elderly woman with four children of her own, cohabited with the elderly deceased, who also had children from previous relationships. Despite their cohabitation, the couple did not have any children together. Their initial attraction seemed to stem from their shared love of alcohol, as both were known to be regular heavy drinkers in the village. Whenever they got some part-time work on different farms and received payment, they would often engage in a drinking binge. In the end, the deceased's drinking habit had escalated to consuming illicit brews. Given this background, it is not surprising that their eight-year relationship was marked by frequent fights and arguments. They would engage in physical altercations and verbal disputes regularly, with insults being exchanged during their drinking sessions. The conflicts were often mutual, with both parties involved in the altercations. The tumultuous nature of their relationship became well-known in the neighbourhood, with the community acknowledging and accepting the volatile state of their relationship. At times, neighbours would intervene or leave them to resolve their conflicts on their own, which they often did.

[5] On the tragic day at around 5 am, the couple engaged in their all too familiar heated arguments, shouting loudly at each other. Concerned about the shouting, the deceased's daughter, Abigirl, sought assistance from a neighbour and family friend, Jane, to help mediate

the dispute. Upon arriving at the couple's home, they found the accused standing at the bedroom door, holding a log in her right hand and yelling at the deceased, who had taken refuge inside the room. The accused was challenging the deceased to come out of the closed bedroom and indicating her intention to harm him if he did. Jane inquired about the cause of the conflict, to which the accused indicated that she had tolerated the deceased for too long and she wanted to assault him. When the deceased partially opened the door, the accused struck him with the log. Jane intervened, disarmed her and removed the log. She proceeded to counsel both the deceased and the accused, eventually diffusing the tensions.

[6] The two women left the couple at the homestead believing that the situation had been resolved but it had not. Two hours later at around 7am a man named Receive who also lives in the same compound as the couple passed by their homestead. He witnessed the accused exiting their bedroom with a gum tree log in hand. He saw her place it near their bedroom doorstep. Receive inquired about the situation and the accused explained that she was fed up of being assaulted by the deceased and wanted him to pay for all her suffering. Receive removed the log and discarded it before departing the homestead. The conflict persisted and Lazarus a male adult shopkeeper at Chidziva Farm Compound heard the accused and the deceased shouting loudly from his shop. He enquired and learnt from his customers that the two had been quarrelling since the early hours of the morning. At around 9 am, he temporarily closed his shop and went to bath at the deceased's homestead since they shared the bathroom. He encountered the accused sitting on the bedroom doorstep with a gum tree log in hand. Lazarus approached her and forcibly took the log from her and concealed it in his shop fearing that the couple could seriously harm each other.

[7] Driven by a need to ensure the well-being of the couple, Abigail decided to visit their house for the second time that same day. At around 2pm she arrived and found the deceased lying on the bed on top of the blankets facing upwards with the accused seated beside him. The deceased was bleeding from his nose and mouth and his legs and hands appeared swollen. Despite the struggle to speak he managed to convey to Abigail that the accused was a murderer and should leave the house. The accused responded by confessing that she had assaulted the deceased on the legs and arms with a stick. Abigail went to fetch Jane and they returned together to find the deceased unconscious and unresponsive. A report was filed at ZRP Mvurwi leading to the arrest of the accused.

[8] On 28 February 2023 Doctor Malagai Martinez a pathologist stationed at Parirenyatwa hospital examined the remains of the deceased and established the cause of

death as “brain damage, severe brain oedema and severe head trauma due to assault.” The post-mortem report was tendered as Exhibit 1 with the consent of the defence. In it the doctor noted multiple abrasions on the right lateral of occipital, left shoulder thorax, right cheek and both legs. On the head the pathologist noted haemorrhagic infiltrate on the right occipital and temporal.

[9] The police recovered a gum tree log at the scene and another from Lazaraus which he had hid in the shop. Upon her arrest a warned and cautioned statement was recorded from the accused. The statement was subsequently confirmed by a magistrate sitting at Bindura Magistrates court. It was produced without any contestation from the defence counsel and marked Exhibit 2 in the trial. In it the accused said the following:

“I Garikai Kamuparo do admit the charge being alleged against me. Frank Milanzi insulted me so much that I assaulted him on both his hands and legs using a log which then caused his death”

[10] The two gum tree logs allegedly used to assault the deceased were also tendered with the consent of the defence as Exhibit 3. The court observed that the longer log had a circumference of 20 cm, weighed about 1.8 kgs and was 1.4 meters long. The shorter and thinner log weighed 0,25 kg and was 59 cm long. Because of their sheer size and their being marked by protrusions, both logs appeared menacing and dangerous.

Defence case

[11] The sixty-six-year-old accused testified in her own defence. She was the sole witness. She has a small wiry body frame and an extremely combative attitude. We occasionally witnessed flashes of her anger as she gave her narrative. While she said adopted her defence outline as part of her evidence in chief, in that evidence she gave a version materially different from the one provided in the defence outline. She stated that she and the deceased retired to bed after a drunken brawl the previous night. The following morning when the effects of the previous day’s beer binge were wearing off, she woke up. Still angry from the previous night’s fight, she confronted the deceased. The confrontation degenerated into another physical fight. She agreed that indeed Abigirl and Jane came early in the morning and saw her wielding a log with the deceased behind the door in the bedroom. She also admitted having seen Lazarus and stated that he took a log from her. According to the accused it was a tense situation and she was extremely angry at the deceased. The deceased had tried to strangle her but she had managed to free herself. She had stormed out of the bedroom and went to look for a log. She had returned into the room and found the deceased

lying on the bed facing upwards. She struck him on the hands and the legs. She stated that when she left the bedroom she was under attack and that she was angered and provoked by the deceased's insults. She was clear that she caused the death of the deceased and that she used the small log to assault him.

Issue for determination

[12] The issue which lies for resolution in this case is whether in causing the death of Frank Milanzi the accused had acted in self-defence and thus lacked the requisite intention to sustain a charge of murder. The state counsel Ms *Mupini* urged this court to find the accused guilty of murder with constructive intent. She stated that at the very least the accused must have reasonably foreseen death ensuing from her conduct but regardless of that realisation she continued with her actions. Defence counsel Mr *Hamandishe* on the other hand insisted that the accused acted in self-defence and also belatedly raised the defence of provocation which should not detain this court as it was only raised during closing submissions. He asked the court to convict the deceased of culpable homicide stating that she had acted negligently.

The law on self defence

[13] In this jurisdiction it is trite that a person is entitled to take reasonable steps to defend herself, any third party or her property against an unlawful attack or harm. It is accepted that in circumstances of imminent danger to life, even killing the assailant may be excusable. The requirements of that defence were outlined in the case of *S v Banana 1994(2) ZLR 271 (S) at 273*. They are that: There must be an unlawful attack and the attack must be directed at the accused or a third party, where the accused intervenes to protect a third party. The attack must have commenced or be imminent and the action taken must be necessary to avert the attack. Lastly the means used to avert the attack must be reasonable.

[14] Even where the accused acts in self-defence she may not have the defence available in instances where she exceeds the bounds of moderation. If she does, she 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 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 kill 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 overreacted. He should thus be entitled to a partial defence on a charge 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 also the case of *S v Ncube & Ors* HB-303-16

The Law and the facts

[15] What stood out from accused's testimony was that she was a dishonest witness. She wove a web in the form of a narrative which ultimately trapped her. Under cross examination she abandoned her earlier assertion of having acted in self-defence and clearly stated that she was not under any attack. The deceased had not followed her outside. If anything, the deceased was lying on the bed when she entered the bedroom. She had simply felt provoked by his insults whose details were not disclosed in court. The insults had angered her. This version finds credence in her very own confirmed warned and cautioned statement in which she said she assaulted him because of insults and not that she acted in self-defence.

[16] Probed on why she proceeded to strike the deceased on the head and other parts of the body with a log when he was lying on the bed the accused sought to wriggle out of trouble by alleging that she did not aim at the head. She tried to minimise the assaults insisting that she only aimed for the hands and legs. Cornered she then conceded that she may have assaulted him on the head as she was filled with fury during her frenzied attack on him. According to the accused she was extremely angry at the deceased for hurling profanities at her.

[17] Those contradictions, half-truths and at times blatant lies in the accused's evidence can only point to one thing. She attempted to exaggerate the threat posed by the deceased to justify her attack on him. In the court's assessment, she was not in any danger which would have warranted the use of a weapon such as a log directed at a vulnerable part of the human body such as the head. It is not unreasonable to conclude that she blamed him for the degeneration of their relationship. In any case she confirmed this to the state witnesses. She told them she had had enough of the fights and assaults and she wanted to assault him as a way to make him pay for all her suffering and frustrations. The court therefore has no choice but to reject the accused's defence as false. Her defence was apparently motivated by a desire to exculpate herself and is self-serving.

[18] With this version of events and concessions by herself it is evident that the accused averted any danger that may have come her way at the time that she left the room. The witnesses who attended at the scene all arrived to find her in an aggressive and combative mood. She was the one who was hunting down the deceased who had scurried away in fear and was hiding in the bedroom. She is the one who was baying for his blood. Abigail and

Jane saw her shouting at the deceased to come out while wielding the log. They also saw her assault him with the log when he opened the door. Abigail and Jane tried to calm and pacify her as well as the deceased. It didn't help as the accused continued until Receive also arrived to see her challenging the deceased with a log in hand. Receive disarmed her. Determine she retrieved the log from where Receive had discarded it and fatally struck the deceased. Abigail arrived at around 2pm to find the deceased in the final stages of his life. What this means is that from 5am to 2pm the deceased was harassed and assaulted by the sharp-tongued angry woman he lived with. For a protracted period of nine hours, he was hunted down and assaulted by the accused with a log. The injuries that the deceased sustained were massive and multiple in number. They are injuries typical of a frenzied and hectic attack. They are not injuries consistent with any self-defence by an unarmed deceased. The accused resisted efforts to pacify her. She was intent on striking the deceased. Her defence that she was defending herself is unsustainable.

[19] The accepted position is that she is the one who initially left the bedroom picked a log from outside and attacked the deceased who was lying on the bed. There was no attack that which was imminent on her. Even if she could be given the benefit of doubt that there was, the fact remains that at the time that she attacked the deceased he was in a weak position and did not pose any danger to her. If he had been on his feet, it might have been a different story. Therefore, the force and the means used to attack the deceased were unreasonable in the circumstances. The blows to the head cannot by any stretch of imagination be said to have been made to avert any form of danger to her person. Because the very first requirement was not met, it becomes unnecessary for the court to discuss all the other requirements to sustain the defence of self-defence. A person who uses the kind of weapon that was used by the accused to strike another human on the head, under whatever circumstances, must be taken to have foreseen the possibility of death resulting from such conduct.

[20] From an analysis of all the evidence the court finds it as a fact that the accused knowingly caused the death of Frank Milanzi. She had many options available to her which she could have utilized to extricate herself out of the situation. She was neither provoked nor did she act negligently. She was intentional in her conduct and in the very least ought to have realised a real risk or possibility that her conduct might cause the death of the deceased. Regardless of that risk or possibility she persisted in her conduct.

[21] MAKARAU JA (as she then was) in the case of *Tafadzwa Watson Mapfoche v The State* SC 84/21 laid to rest the issue of whether or not the trial court in a murder trial should specify whether it was murder with actual or constructive intent when she said:

“Thus, under the section, it is not necessary as the position was under common law, to find the accused guilty of murder with either actual intent or constructive intent. Put differently, it is not necessary under The Code to specify that the accused has been convicted under 47(1)(a) or (b). Killing or causing the death of another person with either of the two intentions is murder as defined by the section.”

Disposition

In the circumstances therefore, we are convinced that the accused’s defence of self-defence is not sustainable. We are convinced that the state managed to prove the accused’s guilt beyond reasonable doubt. Accordingly, the accused is hereby found guilty of murder.

National Prosecuting Authority, the State’s legal practitioners
Sibanda and partners, accused’s legal practitioners