

THE STATE

versus

GODKNOWS MAKOTORE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 6,7 & 24TH March, 2017

Assessors

1. Mr J. Mushuku
2. Mr E.J. Gweru

Criminal Trial

S. Busvumani for the State
E. Shoko, for the accused

MAWADZE J: In the absence of background facts of this case the circumstances of this case were rather bizzare or weird. It was only during the course of the trial that it became sensible as to why the event of this day occurred in the manner which unfolded.

The accused is facing two counts. Count 1 relates to murder as defined in s 47(1) of the Criminal Law (Codification and Reform Act) [*Cap 9:23*] and count 2 relates to assaulted as defined in s 89(1)(a) of the same Act, [*Cap 9:23*].

In count 1 which relates to murder the charge is that on 10 May 2015 at Machele Village, Chief Nhema, Zaka the accused unlawfully assaulted Mbambo Machele with an

unknown object several times intending to kill him or realising that there was a real risk or possibility that his conduct may cause death and continued to engage in that conduct despite the risk or possibility.

In count 2 which relates to assault the charge is that on the same date and place as in count 1 the accused unlawfully assaulted Margreth Machele with an unknown object on the back and right arm.

The accused who resides in Chiwami Village, Chief Nhema, Zaka was known to both the now deceased and the complainant. The now deceased who was about 73 years old was the husband of the 64 year old complainant.

It is not in dispute that on 10 May 2015 at about 19.00 hrs the accused met both the now deceased and the complainant. What is in issue is what happened with they met. The State alleges that accused attacked both the now deceased and the complainant with an unknown object when he suddenly appeared from behind. It is the State case that the accused firstly attacked the now deceased with the unknown object on both his legs and all over the body causing him to fall down. The complainant is said to have tried to flee from the scene calling for help but was allegedly attacked three times on her back and once on her right arm by the accused with the same unknown object. It is the State case that Apolonia Machel and Zezekai Ganyata answered to the complainant's distress call by rushing to the scene of crime where they found the now deceased lying down groaning in pain as he bled from both legs. It is common cause the now deceased was ferried to his nearby homestead in a wheel barrow where he passed on the same night before he could be taken to hospital. The complainant was taken to hospital. The cause of the now deceased's death is said to be haemorrhage shock and multiple limb fractures.

The accused denies assaulting the complainant in any manner and instead alleged she was mistakenly assaulted by her husband the now deceased. The accused further alleges that he only assaulted the now deceased three times on the legs with the now deceased's walking stick which was an iron rod when he acted in self-defence. The accused disputed inflicting the fatal injuries.

In his defence outline the accused's version of events is that when he met both the now deceased and the complainant on the day in question at about 19.00 hrs he properly greeted them but they both initially failed to recognise the accused as they were both heavily

intoxicated. The accused said he had to identify himself after which all hell broke loose. The accused said both the now deceased and the complainant alleged that the accused was coming from their homestead and went on to block the accused's way. The accused said it is the complainant who first held the accused's jacket raising the issue of a case accused had previously reported to both the police and Chief Nhema when complainant had allegedly assaulted the accused causing him to lose three front teeth and leaving other teeth being loose. The accused said as he was being held the now deceased hit him with a walking stick. The accused said when the now deceased tried to deliver a second blow, the accused ducked and the now deceased mistakenly hit his wife the complainant with the walking stick on her right arm. The accused said realising the now deceased was hell bent on attacking him with the walking stick, the accused held the walking stick and he wrestled with the now deceased over the walking stick, as they both fell to the ground. Meanwhile the accused said the complainant came to the aid of her husband the now deceased by picking stones which she threw at the accused. The accused said he managed to overcome the now deceased and dispossessed him off the walking stick. In a bid to fend off further attack accused said he assaulted the now deceased three times slightly above the knees. The accused said he was however hit on the knee with one of the stones thrown by the complainant causing the accused to fall down and losing grip of the now deceased's walking stick. At that point accused said he sensed danger and managed to flee despite limping from the injuries inflicted with a stone by the complainant. The accused said he decided to hide in the nearby bush and both the complainant and the now deceased failed to locate him. As he was hiding the accused said both the now deceased and the complainant turned against each other as the now deceased accused his wife the complainant for causing all this altercation because complainant had previously assaulted the accused causing accused to lose his teeth. Accused said he went home leaving the two quarrelling and does not know what further transpired between them. The accused said he acted in self-defence and had been provoked by both the now deceased and his wife the complainant.

The accused gave almost a similar version of events in his confirmed warned and cautioned statement Exhibit 2. The only notable difference being that he said he was hit by the now deceased with an iron rod and not a walking stick (although the now deceased was using that iron rod as a walking stick).

The evidence of Joyce Chidzungu, Dr Zimbwa, Dr Muchinguri and Colen Muchinganwa was accepted in terms of s 314 of the Criminal Procedure and Evidence Act, [Cap 9:07]. In brief that it is as follows;

Dr Godfrey Zimbwa examined the now deceased's body and compiled a post mortem report Exhibit 1.

Dr L. Muchinguri examined the complainant and compiled a medical report Exhibit 3.

Joyce Chidzungu is the police detail who attended the scene of crime on 11 May 2015 and caused the now deceased's body to be ferried to Masvingo Provincial Hospital mortuary.

Colen Muchinganwa is the investigating officer who also arrested the accused and recorded accused's warned and caution statement Exhibit 2.

A total of 4 Exhibits was produced by the State in support of its case. They include the following;

Exhibit 1 is the post mortem report compiled by Dr Zimbwa who examined the now deceased's body on 12 May 2015. Dr Zimbwa made the following pertinent observations and findings;

- (i) the now deceased had a compound fracture of the right tibia and fibula just below the knee with an associated laceration which was about 8 cm long
- (ii) another compound fracture on the left tibia and fibula just above the ankle joint
- (iii) that the cause of death was haemorrhage shock arising from multiple limb fractures

Exhibit 2 is the accused's confirmed warned and cautioned statement which we have already alluded to.

Exhibit 3 is a medical report in respect of the complainant in count 2 compiled by Dr P. Muchinguri on 26 May 2015. The doctor noted that the complainant had a laceration on the right upper limb and suffered from backache. The doctor said the injuries on the complainant were caused by both sharp and blunt trauma and that several blows were delivered with moderate force inflicting serious injuries although permanent disability was unlikely.

Exhibit 4 is the iron rod which weighs 0,240 kg and is 95 cm long. One of its end is very sharp and the other end is round shaped. Apparently this is the weapon the State alleges accused used to attack both the now deceased and the complainant. The accused alleges it is this iron rod the now deceased used as a walking stick and was used to attack the accused and that the now deceased also hit the complainant in error before the accused wrestled it from the now deceased and assaulted the now deceased three times on the legs.

Both the contents of the post mortem report Exhibit 1 and the medical report Exhibit 2 are not being contested. This means that the cause of the now deceased's death is not in issue and neither are the injuries sustained by the complainant in count 2.

There are broadly two issues which this court has to resolve. The first one is the identity of the assailant who inflicted the fatal injuries on the now deceased and the serious injuries on the complainant in count 2. The second issue is whether the accused acted in self-defence. Intertwined to these issues is the question of which of the versions given by the State and the defence is most probable or true in the circumstances. To resolve these two issues, we revert to *viva voce* evidence placed before us.

Margreth Machele

As already said Margreth Machele (Margreth) is the 65 year old wife of the now deceased. She knew the accused as an employee of her nephew one Chebanga Sithole.

Margreth told this court that on 10 May 2015 she went with the now deceased to Mureyi Village where they intended to sell their beast and on their return went via her husband's elder brother's homestead where there was a beer drink which they unfortunately found finished. She said the now deceased only got 3 cups of the traditional brew and she settled for the less intoxicating residue (called muchaiwa in Shona) hence they were both not drunk when they left for their home at about sunset. She explained how they were attacked. Margreth said when they were near their homestead as it was now getting dark her husband the now deceased was attacked first and initially they did not see the assailant. She said the now deceased was hit with a second blow and he fell down facing upwards as the attacked continued. The now deceased then shouted that he had identified his assailant as one "Godie an employee of Chebanga." Margreth said at that point she turned and also identified the accused who was/is well known to her. She said upon realising that the now deceased's life was in danger due to the vicious unprovoked attack she ran away calling out for her daughter

in law Apollonia's help. Margreth said she did not manage to get far as the accused turned on to her and delivered 3 blows on her back and the 4th blow was on her right upper arm as she was stabbed with a sharp instrument, which to her was like an iron rod. By then she said she had clearly identified the accused and that accused did not utter any words. She said Apollonia answered to her distress call and came with a light as accused was throwing stones at them.

Margreth said when they got to the now deceased they realised he had been severely injured as he lay lifeless bleeding from broken legs. She said her son in law one Titus Bhasitera then arrived at the scene and ferried the now deceased in a wheel barrow to their homestead. Her husband passed on that night from the fatal injuries before he could be taken to hospital. It was herself who was taken to hospital where she spent 4 days and was discharged in order to attend the burial of her husband the now deceased.

According to Margreth her right hand is still in pain and we noted that besides the healed scar arising from the stab wound her right hand is swollen and has blisters.

Margreth also explained what she believes could be the possible cause why the accused attacked her and her husband the now deceased. She said sometime in the past, probably in 2014 she had brewed beer at her homestead and accused and other patrons attended. She said the accused later stole some of the beer but was detected and the stolen beer confiscated. This led to an altercation between the accused and other local boys or men who were present resulting in a fist fight which degenerated to the use of stones and bricks as the protagonists were drunk. She said during this brutal fight accused lost some teeth. Margreth said she was surprised when the accused sought to implicate her to the police in that fight and alleging that she had assaulted accused causing him to lose his teeth. She said the police however investigated the matter and realised that due to her gender, old age and frailty she could not have fought the accused, let alone causing him to lose his teeth. The police released her. In fact, she said accused was injured by other men when they fought at her homestead.

Under cross examination Margreth said the attack perpetrated on her and the now deceased on the day in question was unprovoked and that the accused never uttered a word to them throughout the attack. She dismissed as totally untrue accused's version of events. She denied quarrelling with the accused that night. When it was put to her that she and her

husband were the aggressors who first attacked the accused, she genuinely looked surprised by that question retorting how old she and her late husband were could even contemplate attacking a young and fit man of accused's stature. She totally denied attacking the accused in the past or causing his loss of teeth. She dismissed as untrue that both herself and the now deceased were drunk.

Margreth could only guess why the accused attacked her and the now deceased as he never explained himself. She completely dismissed as totally false that she was injured by her late husband and ascribed her injuries to the accused. She denied that accused acted in self-defence as no one attacked him.

In our assessment Margreth gave her evidence very well. She is an old frail and unsophisticated woman. We noted in her demeanour that she was evidently and genuinely surprised by the question put to her by defence counsel which relate to accused's defence and version of events. She exhibited a clear recollection of her harrowing experience of that night. In our view she was able not only to explain the possible motive as to why she and the now deceased were attacked but also events which happened at her homestead involving the accused. We assess her as a well-meaning and truthful witness.

The evidence of both Apollonia Machele and Titus Bhasitera is not helpful in identifying who attacked the now deceased and Margreth. Further their evidence was largely unchallenged. We shall simply summarise it for completeness of the proceedings.

Apollonia Machele

Apollonia Machele (Apollonia) is a daughter in law of Margreth and is now 65 years old. She did not know the accused and did not see or identify him on the day in question.

Apollonia said on the night in question she was in her kitchen hut at around 19.00 hrs when she heard her mother in law Margreth crying calling out for help saying she, Margreth and the now deceased were being killed by one "Goddie". This prompted to rush to the scene with a torch and met Margreth who was running away. She observed that Margreth had been stabbed on her right hand above the elbow. She accompanied Margreth to the place where the now deceased was and they were joined by one Zezepai. Apollonia said they found the now deceased lying down, soaked in blood from the knee level. At that stage one Titus arrived and he ferried the now deceased in a wheelbarrow. She did not see who had attacked the now

deceased and the complainant as the assailant had vanished. Apollonia noted that Margreth was not drunk.

Titus Bhasitere

Titus Bhasitere (Titus) is Margreth's son in law and stays in a different village from Margreth. He is known to the accused.

Titus' evidence is that in the night in question he had gone to Margreth's village and when he was near Margreth homestead he heard Margreth calling out that she, Margreth, and the now deceased were being killed. He also heard the now deceased crying out hence he rushed to the scene where he met Margreth, Apollonia and one Zezepai (a female). He observed that the now deceased was lying down with blood on both his legs. Titus closely checked the injuries the now deceased had and observed two wounds above the right knee and ankle. The now deceased's left leg had an injury above the knee. In relation to Margreth he observed that she had been injured on her right arm.

According to Titus the now deceased could not walk hence he ferried him in a wheel barrow and due to the severity of the injuries on the now deceased he started to look for a motor vehicle to ferry him to hospital. He however said the now deceased passed on before being taken to hospital and only Margreth was taken to hospital that night Titus did not see the person who had assaulted the now deceased and Margreth but the now deceased advised him it was the accused.

Titus pointed out that Margreth was sober and that the now deceased was not using any walking stick. Infact he said he and the police only recovered the iron rod Exhibit 4 near the scene of crime the following day.

The accused's evidence

The accused adopted the version in his defence outline and confirmed warned and cautioned statement as his evidence.

In his evidence the accused maintained that Margreth assaulted him at her homestead in 2014 causing him to lose some teeth.

The accused gave his version of the events of 2014 leading to the accused's injury at Margreth's homestead. The accused said on the day he was injured and lost some teeth he

was at a beer drink at Margreth's homestead. He said Margreth just started to assault people at her homestead and accused tried to restrain her. Instead he said Margreth turned on to the accused and hit him with a pestle causing accused to lose 3 teeth. In fact, accused said his crime then was to try and restrain Margreth's son one Clever and that this did not go well with the Margreth.

The accused said after he had been injured by Margreth, her husband, the now deceased offered to compensate the accused with a beast but the accused declined the offer and instead reported the matter to ZRP Zaka. The accused said he also turned down US\$16.00 offered by Margreth's emissary. Unfortunately, all this was not put to Margreth to solicit her comment.

The accused said after he spurned the offers from Margreth and her husband, Margreth's relatives started to threaten the accused which forced accused to leave employment at Margreth's relative. The accused said he was not able to present a solid case to the police against Margreth as he failed to raise US\$70 for him to be treated and obtain a medical report. Accused said he also failed to attend court and his case against Margreth was therefore dismissed.

The accused said in his quest for justice he reported the same matter to Chief Nhema and that Margreth was ordered to pay compensation of 4 beasts or an equivalent of US\$450 per beast. The accused said Margreth defied the order by Chief Nhema and the Chief was unable to cause her to comply with that order for compensation. Again all this was not put to Margreth in cross examination.

As regards the events of the day in question the accused stuck to the version he gave in his defence outline and no useful purpose would be served by repeating it. Suffice to say that the accused insisted that the now deceased and Margreth were very drunk and were the aggressors. The accused denied assaulting Margreth at all and then when he assaulted the now deceased with a walking stick three times he was acting in self-defence. The accused said he believes the now deceased was injured by Margreth because after his arrest the scene of crime shown to him by the police was about 1 km from where he had had an altercation with both Margreth and the now deceased. The accused said it was unfortunate that police arrested him on these allegations before he himself had filed his report. The accused said

despite being injured that night by Margreth he was not treated because a police report was required.

Under cross examination the accused conceded that Margreth was released by police for allegedly causing accused's loss of teeth due to lack of evidence. The accused also agreed that he was bitter when Margreth could not be held accountable for what she allegedly did. In fact, that accused said he indeed approached the Chief because he wanted compensation and also to be given money for treatment arising from his alleged loss of teeth. The accused insisted he had issues with Margreth and not her husband the now deceased hence he had no cause to fatally attack the now deceased.

Analysis of the evidence

We are not persuaded by the accused's version of events both in relation to the background facts of this matter and what transpired on the day in question.

In our view it is highly improbable that a frail old woman like Margreth would have injured the accused at her homestead causing him to lose 3 teeth. If that had been possible we find no reason why the police and the courts would fail to punish Margreth for her transgressions. There should have been a number of witnesses who should have witnessed such an attack on the accused. On the facts before us Margreth's version of what happened at her homestead during the beer drink is more probable.

We are unable to appreciate the accused's defence in this case. The background facts which the accused – painstakingly outlined to use only help to shed light as to what motivated the accused to attack the now deceased and Margreth.

While the accused admitted assaulting the now deceased with the iron rod, all the accused does is to play down the severity and consequences of that assault. Instead the accused want us to believe that some other unknown person or Margreth later fatally attacked the now deceased after the accused had left. This is improbable for a number of reasons.

Why would some unknown person emerge from the blue to attack the now deceased soon after accused's departure? Why would Margreth who had allegedly teamed up with her late husband suddenly fatally attack the now deceased? Would a frail and old couple like Margreth and the now deceased engaged in a serious fight with a reasonably young and fit person like the accused in the manner accused want this court to believe? This is even made

worse by the accused's assertion that both Margreth and the now deceased were excessively drunk.

The accused's version goes against the grain of evidence given by Apollonia and Titus, who both heard Margreth crying out and calling for help. It is illogical for Margreth to have called for help in that manner if she and the now deceased were the aggressors and were not under any meaningful attack. The fact that Titus and Apollonia were clear on Margreth's sobriety put accused's argument to rest that the two may have acted in the manner they did because they were heavily intoxicated. Further all the witnesses denied that the now deceased was using any walking stick or the iron rod Exhibit 4.

The accused's conduct betrays the truthfulness of his version. After such an alleged unprovoked attack by Margreth and the now deceased, the accused vanishes from the scene. He did not look for any help despite alleging he had been injured. He did not go to report to the police. Instead police had to arrest him.

Our finding is that it is the accused who inflicted the fatal injuries on the now deceased in count 1 and also seriously injured the complainant in count 2. The manner in which the accused attacked the now deceased, the weapon he used and the injuries he inflicted leads to the inescapable conclusion that he did realise that there was a real risk or possibility that his conduct may cause the now deceased's death but nonetheless continued to engage in that conduct.

The defence of self-defence raised by the accused is clearly a ruse and there is absolutely no iota of truth that accused acted in self-defence. Instead accused simply pulverised this old couple as they happily walked home.

Accordingly, we have entered the following verdicts.

Verdict

Count 1 – Guilty of contravening s 47(1)(b) of the Criminal Law (Codification and Reform) Act, [Cap 9:23] :- Murder with constructive intent.

Count 2 – Guilty of contravening s 89(1)(a) of the Criminal Law (Codification and Reform) Act, [Cap 9:23] :- Assault.

Sentence

There is virtually very little one can say in the accused's favour in this case especially in relation to mitigatory factors surrounding the commission of the offence.

It is in accused's favour that he is a first offender. We hope the accused would find time to introspect and desist from further crime.

The accused is a family man with 3 children to support. He is not employed with neither savings nor assets.

The accused has suffered from a pre-trial incarceration period of 2 years. This should be reflected in the sentence we shall impose by possibly ordering the sentence in count 2 to run concurrently with the sentence in count 1.

We are persuaded to guess that the accused probably acted in the manner he did because he felt aggrieved about the events which took place in 2014 when he allegedly lost three teeth. Be that as it may such conduct was not only unreasonable but misguided.

Murder is a very serious offence. The sanctity of human life cannot be over emphasised and the courts have a cardinal duty to protect human life. It is saddening that cases of murder are very prevalent in Masvingo. Many young people needlessly resort to violence with fatal consequences.

The now deceased and his wife are a very old couple who posed no threat whatsoever to the accused. At his age the now deceased should have at least suffered a natural death rather than the painful and brutal death he was subjected to moreso for no cause at all. At his age one would expect the accused to respect and protect the elderly members of our society. A life was needlessly lost. The complainant in count 2 did not only lose a husband but she may well be permanently injured on her right hand from what we observed. At her advanced age she may not fully recover.

What aggravates the accused's moral blameworthiness is that he is not contrite at all. This is surprising considering how he savagely and brutally attacked the now deceased.

In the result, the accused is sentence as follows;

Count 1 :- 15 years imprisonment

Count 2:- 1 year imprisonment

Further, it is ordered that the 1 year imprisonment in count 2 shall run concurrently with the 15 years imprisonment in count 1.

Total effective: 15 years imprisonment.

National Prosecuting Authority, counsel for the State

Mangwana & Partners, pro deo counsel for the accused