

THE STATE

vs

THOMPSON MACHINGURA

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 26th, 27th September and 11 October 2019

ASSESSORS: 1. Mr J.G. Nish
 2. Mr E.J. Gweru

CRIMINAL TRIAL

T. Chikwati for the state

0. Mafa for the accused.

MAWADZE J: The then 30 year old accused is facing the charge of killing his then 38 year old sibling as defined in s 47 (1) of the Criminal Law (codification and Reform) Act [*Cap 9:23*] by assaulting him all over the body at Gwati village, Chief Zimuto, Masvingo on 2 February 2019.

At the material time only the accused and the now deceased stayed at their parent's homestead in Gwati village, Chief Zimuto, Masvingo.

It is not in dispute that sometime between 2017 or 2018 the now deceased was afflicted with some mental illness and had to be hospitalised for two weeks at Ngomahuru Psychiatric hospital in Masvingo and that he fully recovered.

On 2 February 2019 the accused collected some maize from the Social Welfare Department as drought relief and took it home. It has not been disputed that the now deceased sold one of the maize bags without accused's consent. Accused alleges the now deceased even wanted to sell the remaining bag and that this led to the altercation between the two.

The state alleges that the now deceased assaulted the accused with a yoke pin (chikeyi) and that accused dispossessed the now deceased of the yoke pin. It is alleged the now deceased picked a hoe but was again dispossessed by the accused.

The state case is that the accused proceeded to assault the now deceased with the hoe causing injuries on right hand, right leg and the head resulting in the now deceased's death. The accused is said to have dragged the now deceased's lifeless body from their main house and left it in a disused kitchen hut at the homestead. The next morning on 3 February 2019 the accused advised their cousin sister Gladys Mavise that he had assaulted the now deceased the previous night. Gladys Mavise then found the now deceased's body in the disused kitchen hut and alerted her father Nelson Mavise. Meanwhile the accused proceeded to the police and handed himself over. The police attended the scene and recovered the hoe.

The accused's basic defence is that he acted in self-defence as he was being indiscriminately attacked by the now deceased. In our view this is the narrow issue this court has to resolve as most of the facts are not in dispute.

The evidence of the village head of Gwati village, Solomon Zimuto, an attending police detail Pasca Musengezi and Dr. Godfrey Zimbwa who examined the remains of the now deceased and compiled a post mortem report was all admitted in terms of s314 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. In a summary it is as follows.

a) Solomon Zimuto

The accused woke him up in the early hours of 3 February 2019 at around 0100 hrs and disclosed that he, the accused, had assaulted the now deceased after the now deceased had sold maize meant for their food. He said the accused advised him that since the now deceased was injured the accused was now proceeding to hand himself over to the police. Later at dawn around 0500 hrs, Solomon Zimuto proceeded to the now deceased and accused's homestead to check on the now deceased. He found the now deceased's body in a kitchen hut with injuries on right leg, right hand and back of the head. He also observed a trail of blood from the main house to the disused kitchen where the now deceased's body was.

Our only brief comment is that accused did not tell Solomon Zimuto that he had fought the now deceased or acted in self-defence as the accused now alleges. Further,

the accused, did not also reveal that the now deceased had been fatally injured or was dead.

b) Pasca Musengezi

He is one of the police details who accompanied the investigating officer Rtd Sgt Augustine Magadzi to the crime scene. He observed blood in accused's main house and the blood spoor or trail led to the disused kitchen hut where the now deceased's body was. Our brief comment is that accused admits that he indeed assaulted the now deceased whilst in the main house and later on dragged him to the disused kitchen hut.

c) Dr Godfrey Zimbwa

Dr Zimbwa carried out the examination of the now deceased's remains and authored the Post Mortem report exhibit 1 on 4 February 2019. He observed the following:

- i) extensive body bruises
- ii) multiple skull fracture
- iii) fracture of the left tibia and fibula
- iv) fracture of the right humerus.
- v) massive abdominal inflation or distention

Dr Zimbwa concluded that the cause of the death was haemorrhagic shock, arising from the head injury and the multiple fractures.

The cause of the now deceased's death is not an issue. The accused admits inflicting the fatal injuries. It is clear from the nature of the injuries that the assault was indiscriminate and severe force was used. A potential lethal weapon, a hoe, Exhibit 3 was used. Its weight is 660g (after being broken) and the broken hoe handle was 14cm. Indeed the blows by the accused landed on the deceased's head, a vulnerable part of the body, causing not only hand and leg fractures but multiple skull fractures. This is indicative that several blows were delivered.

The State led *viva voce* evidence from 3 witnesses Gladys Mavise a cousin to both accused and the now deceased, her father Nelson Mavise who is an elder brother to both accused and the

now deceased's late father and the investigating officer Rtd Sgt Augustine Magadza. None of all these 3 witnesses was an eye witness to the assault of the now deceased by the accused. Their testimony therefore is very peripheral and of no probative value to the issue at hand. We simply refer to it for the sake of completeness of the facts.

1. Rtd Sgt Augustine Magadza.

In our view nothing turns on his evidence other than that he is the investigating officer and attended the scene. He observed the injuries on the now deceased and the blood spoor from the main house to the disused kitchen where the now deceased's body was found. He also recovered the hoe Exhibit 3 on accused's indications.

2. Nelson Mavise

Nelson Mavise confirmed that accused and the now deceased had normal sibling misunderstandings and that at one point the now deceased suffered from mental illness but was successfully treated. He denied that the now deceased was a person of violent disposition as alleged by the accused. His daughter Gladys Mavise called him on 3 February 2019 and led him to the disused kitchen hut where the now deceased's body was and he noted injuries on the now deceased's head.

3. Gladys Mavise

Gladys Mavise (Gladys) is an elder cousin of both accused and the now deceased and she stayed about 100m from accused and now deceased's homestead. Gladys confirmed that prior to this day the accused and the now deceased had once fought over a dispute of food and she counselled them. Contrary to the accused's assertions she said it is the accused and not the now deceased who was of violent disposition. She confirmed that the now deceased was once afflicted with mental illness and admitted to Ngomahuru Psychiatric Hospital, Masvingo, but was successfully treated.

As regards the events of this day Gladys said on 2 February 2019 at around 1900 hours it is the accused who came to her. The accused was moderately drunk and advised her that the now deceased had sold the maize accused had collected as drought relief. She said accused said

he was going to deal with the now deceased or to sort him out (kumugadzirisa in shona). Gladys said being aware of the accused's inclination to violent behaviour she implored the accused to shelve the matter until the next morning. The accused then left and she never saw him again that night. Later that night the now deceased is the one who came and collected some food from Gladys. The now deceased was sober. This is contrary to accused's assertions that the now deceased was drunk.

Gladys said at around 2100 hours she heard both accused and the now deceased quarrelling in high pitched voices but she got scared to check on them as it was late at night. She said it is the accused who came to her the next morning saying he was going to the police. Upon inquiring why the accused said he had broken the now deceased's leg. She asked accused to take her to the now deceased but before they got to the disused kitchen hut the accused disappeared. Inside the kitchen hut she saw the naked lifeless body of the now deceased lying on his back. She also observed a blood spoor from main house to the kitchen hut. Realising the gravity of the situation she called her father Nelson Mavise.

Under cross examination Gladys admitted that on 4 November 2018 the accused had assaulted Gladys's father Nelson Mavise accusing him of practising witchcraft and that accused had been arrested. She denied that the now deceased was of a violent disposition but had burnt their grandmother's hut when he was mentally ill. Gladys insisted that accused had said he would sort out the now deceased that night for selling the maize and that the accused was moderately drunk. She denied that accused made any other report other than that he had broken the now deceased's leg.

In our assessment of Gladys is a mature woman who was very balanced in her testimony. We did not find any possible motive for her to lie on any issue but was fair and objective. Further, most of the factual issues she testified on are not in dispute. We therefore find no objective basis not to accept her evidence.

In order to resolve the issue as to whether accused acted in self-defence and be absolved of any criminal liability we shall focus more on accused's own evidence as it unfolds from his

confirmed warned and cautioned statement exhibit 2, the defence outline Annexure B and *viva voce* evidence. Thereafter we shall evaluate whether the accused`s testimony is not only credible but whether it meets the legal requirements as self-defence.

In terms of s 253 (1) of the Criminal Law (Codification and Reform Act) [Cap 9:23] the defence of self-defence is a complete defence. The requirements outlined is s 253 (1) (a) to (d) of the Criminal Law (Codification and Reform) Act [Cap 9:23] are conjunctive. *In the case of the State V Collet Baira Manzonza HMA 02/16 at pp 11-12* of the cycostyled judgement I dealt at length with the requirements of self-defence and how they should be applied.

I now turn to accused`s evidence

In his defence outline the accused lied that he went to advise Gladys Mavise that the now deceased had become violent. This was disputed by Gladys Mavise. The impression accused gave in his defence outline is that when he delivered the fatal blows it was in darkness and in self-defence. What the accused concedes is that after disarming the now deceased he proceeded to attack him.

In his warned and cautioned statement Exhibit 2 accused said after he kicked the now deceased on the chest the now deceased fell down. The accused said he disarmed the now deceased of the hoe. The reason the accused gave for attacking the now deceased was that he was angry or I quote "*I struck him as a result of anger*"

Under cross examination the accused conceded that by the time he assaulted the now deceased the now deceased did not retaliate. Accused further conceded that his life was no longer in danger. Most importantly accused conceded that he acted in anger rather than in self-defence. In our view that concession by the accused puts to bed his assertion that he acted in self-defence. It was futile for the accused to try to disown incriminating parts or contradictory parts of his confirmed warned and cautioned statement.

Our finding is that whereas the accused may have been under unlawful attack his conduct of savagely attacking the now deceased was not necessary to avert the unlawful attack. The accused could simply have fled from the scene. Further the means he used to avert the unlawful

attack cannot be said to be reasonable in all circumstances. Lastly the injuries he inflicted on the now deceased were grossly disproportionate to the unlawful attack he faced. In fact the accused had virtually no injuries. It is therefore clear that on the facts proved the defence of self-defence is not available to the accused. The accused is simply raising that defence in a dishonest manner. He was angered by deceased`s conduct of selling the maize and decided to “sort him out” to quote his own words. While the accused may not have intended to kill the now deceased, the manner in which he assaulted him indiscriminately leads to the finding that the accused realised that his conduct may cause death but nonetheless continued to assault the now deceased in that manner despite the risk or possibility.

In the result we find the accused guilty of murder with constructive intent as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform Act) [*Cap 9:23*]

VERDICT. Guilty of C/S 47 (1) (b) of the Criminal Law (Codification and Reform Act
[*Cap 9:23*]:- Murder with constructive intent.

*National Prosecuting Authority Counsel for the state
Mutendi, Mudisi and Shumba, pro deo counsel for the accused.*