

THE STATE
versus
RESPECT SITHOLE
and
SHAMISO MUNETSI

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 26 June 2018, 10, 13, 16, 17 and 18 July 2018,
30 August 2018 and 19 September 2018

Criminal Trial

ASSESORS: 1. Mr Mudzingo
2. Mr Raja

Mrs *J Matsikidze*, for the State
Ms *P Maganga*, for the 1st accused
Mr *I Mandikate*, for the 2nd accused

MWAYERA J: Both accused pleaded not guilty to a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The state alleges that on 29 December 2017 and at Jambaya Store, Chief Muusha the accused persons did each or one or more of them unlawfully and with intent to kill or realising the real risk or possibility that their conduct may cause death and continuing to engage in that conduct despite the risk or possibility struck Moses Gwenzi with a log and machete all over the body thereby inflicting injuries from which the said Moses Gwenzi died.

Both accused raised the defence of self-defence. Accused one's defence was to the effect that he was defending his wife, accused 2 who was under attack from the deceased. Further that it was one Nomatter Sithole who struck the deceased's legs with a machete.

The second accused also relied on self-defence, stating that she was defending herself from the deceased who had attacked her and that one Nomatter Sithole is the one who struck the deceased with a machete on the legs.

The summary of the state case was to the effect that on 29 December 2017 the deceased approached the accused's homestead while armed with a machete. The deceased

then attacked the first accused's mother one Arania Sithole with a Machete injuring her in the process and went away. After midnight the two accused together with one Nomatter Sithole who at the time of hearing was said to be at large caught up with the deceased at Jambaya Store. The trio struck the deceased several times with a machete and sticks and force marched him to his home till he fell down and the trio abandoned him. The deceased's body was only found on 30 December 2017 when it was in an advanced state of decomposition. The doctor who examined the remains, Dr Makumbe concluded that the cause of death was exsanguination (which in simple terms is loss or draining of blood from the body leaving it with insufficient blood to sustain life.)

Evidence of 4 state witnesses was formally admitted by consent in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It was clear from the evidence that the accused persons, one Nomatter Sithole and the deceased had physical combat. Further it was apparent the deceased's body was recovered in a state of decomposition with multiple injuries.

The state further adduced oral evidence from two witnesses namely Arania Sithole and Tinashe Sithole. Arania Sithole the mother, and mother in law of accused 1 and 2 respectively recounted events of the night in question. The witness made it clear that the deceased was her son in law married to her daughter one Juliet Sithole. The deceased's wife was at the relevant time at the witness's home as she had deserted the deceased's home over misunderstandings. The witness's evidence was that her family and the deceased did not enjoy good relations as the accused was disrespectful and violent towards her. On 3 occasions the deceased had attacked and harassed the witness and on the third occasion the deceased actually burnt down the witness's kitchen hut. On the night in question the deceased approached armed with a machete and he went to the kitchen where he indiscriminately struck the inmates including children who were sleeping. According to the witness when her family cried for help she went out to investigate. Upon exiting the bedroom she met the deceased who then struck her with a machete on the shoulder, forehead and leg. The witness told the court that she sustained injuries which occasioned her hospitalisation for about 9 days.

The witness told the court that she later learnt that after the two accused and Nomatter Sithole proceeded to the witness's parents' home to notify about the attack and injuries on her, on the way they met with the deceased. She had no personal knowledge of what transpired after she had fainted but later learnt the deceased had passed on. She appeared

emotional as evidenced by shading tears while testifying and she explained the emotions to be over being perplexed by the deceased her son in law's violent and disrespectful conduct towards her which culminated in the tragic end. Generally the evidence was that the accused was aggressive on the night in question as he struck her and other people at her homestead using a machete.

The other witness who gave oral evidence Tinashe Sithole testified that the two accused and one Nomatter Sithole approached the witness's homestead and delivered news that the witness's sister, the last state witness Arania Sithole had been struck and injured with a machete by the deceased. The witness together with his mother proceeded with the accused to go and see their hurt mother. Whilst on the way at Jambaya Store they came across the deceased who had been struck with a machete all over the body. The witness told the court that the first accused told him that he had struck the deceased with a machete. The witness later changed his version and pointed out that it was confusion but that Nomatter is the one who struck the deceased. Despite these short comings in the witness's testimony it was apparent that he came across the deceased when the latter was badly injured. The accused and Nomatter Sithole tried to force march the deceased to his father's homestead but the latter who was badly injured could not walk so the accused left him unattended in the open. The witness told the court that upon his return from seeing his sister the accused's mother he did not see the deceased at the position where he had initially been left.

The defence adduced evidence from the two accused who each testified in their respective cases. The first accused mentioned that he rushed to assist the second accused who was under attack from the deceased whom they met at Jambaya Store still armed with a machete. The account on what actually transpired when the accused came across the deceased was not very clear. According to the first accused, when they came across the deceased at Jambaya Store the latter was aggressive and he pursued accused 2 whom he tripped to the ground following which she screamed prompting accused 1 and Nomatter Sithole to come to rescue her. The second accused's version was also to the effect that accused 1 and Nomatter stepped in to assist and rescue her from the deceased. It was apparent from the two accused's testimonies that at the time that the deceased was struck by Nomatter Sithole accused 1 was pinning deceased's head down while accused 2 was pinning the deceased down on the torso. It was also clear from the two accused that they subdued and overpowered the accused when they left the scene proceeding to their maternal grandparents. Upon their return the deceased who was mortally injured was still at the scene. The first accused tried to force march him to

his father's home but had to abandon the futile exercise since the deceased could no longer walk as he was badly injured. I must mention that the two accused's evidence on material aspects tallied, the minor differences on whose idea it was to go to the maternal grandparents was immaterial as it did not cloud evidence on how the deceased ended up being fatally wounded. Both the accused persons during cross examination made it clear that the two of them with Nomatter Sithole assaulted the deceased in unison to overpower him. At the close of evidence it was clear that the deceased was the aggressor on the night in question. It is not in dispute that the deceased was armed with a machete. It is also not in dispute the deceased had earlier struck the accused's mother Arania Sithole, injured and left her unconscious. Further, it is common cause when the two accused and Nomatter Sithole met with deceased they wrestled with him. It is also not in contention that the deceased was overpowered and the machete fell into control of the accused persons. According to the two accused, Nomatter Sithole struck the legs using the machete while the two held the deceased down. Given the totality of evidence the court has to decide on whether or not the accused persons teamed up with an intention to kill the deceased and killed the deceased. In deciding on whether the accused had the requisite intention the court of necessity has to consider the evidence and circumstances of this matter holistically.

The accused persons raised the defence of self-defence and defence of one another. It is important at this stage to look at the requirements of the defence as provided for in the law. Section 253 of the Criminal Procedure and evidence act [*Chapter 9:07*] is instructive. It provides for the defence of self-defence as a complete defence as long as the requirements therein are met. The requirements can safely be summed as ably stated in *S v Mudenda* HB 66/15:

“The accused must show that there was an imminent attack. He must establish that the action taken to defend himself was reasonable.” See also *S v Tafirei Runesu* HMA 37/17.

The requirements as discerned from s 253 of the Criminal Law Code are as follows:

1. There was an unlawful attack.
2. The attack must be upon an accused or third party where the accused intervened to protect that third party.
3. The attack must have commenced or be imminent.
4. The action taken must be necessary to avert the attack.
5. The means used to avert the attack must be reasonable.

Going by the sequence of events on the night in question, it can safely be concluded that the accused persons set out to go and advise their maternal relatives about the bad condition in which their mother was. The accused, from the evidence adduced were not armed and this gives veracity to their assertion that they did not set out on a mission to follow the deceased. In any event, it was agreed the direction where they met deceased was opposite the direction of the deceased's home. This further gives credence to the fact that the meeting was by chance. Given the deceased was aggressive, violent and armed the accused on realising him charging at them had to defend themselves. The deceased had earlier injured the accused's mother and the second accused. That the second accused accompanied her husband to go and report cannot be taken as a factor to show that she had not earlier been attacked as suggested by the state but it only goes to the nature and extend of injury occasioned on her. She was not immobilised and that would not taint the accused and state witness' evidence that the second accused and a child were also earlier attacked by the deceased on the night in question. The deceased was armed with a dangerous weapon and thus the accused resorted to teaming up for purposes of wading off the attack. Once accepted that the accused were acting in self-defence the next question is whether or not that self-defence was within the realms of the requirements of the defence. That the deceased who was armed with a machete was drunk is not in dispute. In the first accused's confirmed warned and cautioned statement tendered as exh 1 by consent he stated that the accused produced a machete intending to strike accused 2 but the accused persons overpowered him. This position was confirmed by both accused persons during cross examination when they gave vivid description of how they unarmed and immobilised the deceased. Given the 2 accused and Nomatter had overpowered the drunk deceased the question that begs of an answer is: "was it necessary to hack the accused several times with a machete with the 2 accused pinning him down?" It is our considered view that after disarming and immobilising the deceased the further attacks on an unarmed drunk man who was on the ground was not necessary and the means used were unreasonable. For the defence of self-defence to be sustained as availed in s 253 of the criminal law code all the requirements have to be met as evidenced by the conjunctive and not adjunctive nature of the requirements. Once some of the requirements are not met then the defence of self-defence as a complete defence cannot be sustained.

In this case the two accused and Nomatter Sithole, who going by their association and conduct were acting with common purpose and in concert and thus qualify as co-perpetrators overpowered the accused. The trio were not under attack when they delivered the fatal blows.

The fact that the accused pointed out that Nomatter struck the deceased with a machete while they were holding the deceased down to immobilise and facilitate the hacking places them at the scene and the liability of one squarely falls on the other. Sections 195, 196 and 196A of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] are instructive. The principal perpetrator and co-perpetrator are clearly defined therein. Once it is established the co-perpetrators assisted the principal perpetrator as occurred in this case were Nomatter Sithole struck with the machete while accused 1 and 2 were holding down the upper body of the deceased to facilitate the striking, then liability of the principal perpetrator squarely falls on the co-perpetrators.

It is apparent that the accused together with Nomatter reacted to wade off an attack, they however, in so doing exceeded the limits of self-defence. The accused ought to be convicted of culpable homicide as provided for in s 254 of the Criminal Law Code. The defence of self-defence cannot be sustained as force used was unreasonable and disproportionate to the attack. It is a partial defence to the charge giving rise to culpable homicide as clearly from the circumstances the accused persons did one, or both or more of them realised that death may result from their conduct and negligently failed to guard against such.

In any event after observing that the deceased had been seriously injured the accused persons who had occasioned the harm by exceeding the limits of the defence of self-defence left the deceased unattended and that gives rise to liability by omission. A badly injured bleeding man who was not able to walk was abandoned and he bled to death.

The accused persons acting with common purpose with one Nomatter Sithole negligently caused the death of the deceased and are thus guilty of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

In reaching at an appropriate sentence we have considered all mitigatory and aggravatory circumstances advanced by the respective counsels. We have also considered the probation officer's report and recommendations therein.

It is important to point out that we requested for a probation officer's report given the second accused's age of 17 years thus a juvenile. Although the second accused was customarily married to first accused the age estimation confirmed she was 17 at the time of trial which places her at 16 at the time of commission of the offence. The first accused was 18 at the time of commission of the offence and 19 at the time of completion of trial. Counsel

for the first accused Ms *Maganga* pointed out in mitigation that the court should consider the youthfulness of the first accused. Indeed, the first accused is an immature adult whose moral blameworthiness when one considers the circumstances leading to the commission of the offence is not high. The deceased was aggressive and violent on the night in question and he showed no respect at all for his in-laws as he hacked the first accused's mother who was the deceased's in-law. Again on the second encounter with the two accused and one Nomatter Sithole, the accused was still armed with a machete. The deceased was more to blame for the violence that ensued leading to this unfortunate loss of life

Mr *Mandikate* for second accused submitted that the accused is a juvenile first offender. She has the disadvantage of having grown up as an orphan since both her parents passed on when she was at a tender age. She seems to have found solace in early marriage to the first accused as a way of having family. The childhood pressure of joining in the fracas is understandable given the relationship between her and the first accused. The immaturity and lack of appreciation of the gravity of the offence is visible going by the manner she testified. Both accused although they pleaded not guilty to murder were sincere on their involvement in the physical attack on the now deceased. Both accused are first offenders who stand convicted of negligently causing the death of another. The trauma that attaches and the stigma of having caused the death of another will live with the two accused for the rest of their life. In mitigation we have also considered that both accused have been in custody for about 9 months awaiting the finalisation of the matter. The period of incarceration is not an easy period *moreso* with the tension brought about by the suspense of not knowing the outcome of such a grave charge.

In aggravation as correctly pointed out by the state counsel Mrs *Matsikidze* is the fact that precious human life was lost as a result of the negligence of the accused. The accused teamed up with one Nomatter and assaulted the deceased severely injuring the latter. The accused on realising the severity of injuries caused on the deceased who had been immobilised left the deceased unattended which culminated in the deceased's bleeding to death. The offence is deserving of custodial sentence. It is our considered view that although the second accused is a juvenile there is no justification in differential treatment between herself and the first accused her husband. Both accused's involvement in the commission of the offence speaks volumes of their partnership in crime. The circumstances of the matter and the fact that the second accused is married to first accused militates against the suggestion of placing the second accused at a training institution. She has lived as a married person for

more than 2 years and for her to be lumped up with juveniles at the training institution would be detrimental to the other juveniles who are regarded as children in need of care. The recommendations by the probation officer that the second accused be sentenced like an adult is sound as it appears to have been carefully thought. Given the age difference of the two accused, their relationship as husband and wife and the manner in which the offence was committed, this is a case where differential treatment for sentence would not only be unjust but uncalled for.

Having considered the circumstances of the offence, the mitigatory and aggravatory factors the offence is deserving of a custodial term. In seeking to balance the offence to the offender and tempering justice with mercy while at the same time considering the societal interests, a wholly suspended prison term will be appropriate.

Each accused is sentenced to 3 years imprisonment the whole of which is suspended for 3 years on conditions accused does not within that period commit any offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, State's legal practitioners
Matsika Legal Practitioners, 1st accused's legal practitioners
Mugadza Chinzamba & Partners, 2nd accused's legal practitioners