

THE STATE
versus
TINASHE MUUMBE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 12, 13 January, 2 & 17 February 2023

Assessors: 1. Mr Gweru
2. Mr Mutomba

Mr T. Mbavarira, for the state
Mr K. Mabvuure, for the accused

Criminal Trial

MAWADZE J: The critical issue in this matter which falls for determination is whether the defence of person or self-defence as provided for under section 253 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] [the Criminal Code] is available to the accused.

In answering this critical question the court shall consider firstly whether factually as per the evidence the accused can rely on the defence of person. Secondly if the answer is in the positive then the court shall then assess as to whether the requirements for this defence as provided for in section 253 of the Criminal Law Code are satisfied.

The 44-year-old accused is facing the charge of murder as defined in section 47 (i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The charge is that on 9 June 2021 at Pedzisai Village, Chief Nhema, Zaka Masvingo the accused unlawfully and intentionally caused the death of the 23-year-old Abiot Chikwanda by assaulting him with a hoe handle several times all over the body.

The Background Facts

The accused is the step father of the now deceased. He is customarily married to the now deceased's mother. The accused had one child with the now deceased's mother, the now 16-year-old X, a boy. When the accused married the now deceased's mother, she had 5 children of her own from her previous relations with different men. These 5 children included the now deceased who was the only male child. The accused had looked after these 5 step children from their childhood at his homestead. In fact the 4 female step children had their own children and were not married. Apparently, this is the genesis of the turbulent family dynamics which prevailed at the accused's home. At the material time one of the accused's step daughter Comedy who had 2 children of her own was critically ill and was being nursed at the accused's homestead. The ill step daughter due to her illness was sleeping in the kitchen hut with her mother Jeniffer Vavarirai the accused's wife who was nursing her. The accused as a result was sleeping alone in his bedroom. The now deceased together with X and their grandmother Enia Mabika used a shed as their bedroom. This was a thatched structure, half built on the sides with pole and dagga. The scene of crime was in this shed.

The alleged facts

It is alleged that on 9 June 2021 when everyone had retired to bed the accused left his bedroom and proceeded to the shed when the now deceased, X and their grandmother were sleeping. The accused is said to have been armed with a hoe (hoe and its handle). The State alleges that the accused proceeded to brutally assault the now deceased who was sleeping several times all over the body causing him to cry out for help. This apparently woke up the accused's wife who is the now deceased's mother who was also fast asleep in the kitchen hut who attended to the distress call. However, it is said when the now deceased's mother tried to intervene the accused threatened her with physical harm causing her, X and the grandmother to flee from the homestead thus leaving the now deceased at the mercy of the accused as they sought help from fellow villagers. It is said upon their return the following morning the now deceased was already dead. The cause of the now deceased's death is said to be head injury arising from assault.

The accused's defence

The accused both in his defence outline and his evidence stated that he acted in self-defence when he fatally assaulted the now deceased on the night in question.

In his defence outline and also in his rumbling evidence in chief the accused said the following happened;

The accused said his relations with the now deceased soured in 2021 because the now deceased had become a truant step child who disrespected him. He said the now deceased would among other things invariably allege that the accused was neglecting the now deceased's critically ill sister Comedy and was hell bent to cause Comedy's two children to be taken to their respective fathers. The accused said this pained him as he looked after the now deceased and his other step children as his own flesh and blood from their childhood, moreso as their relatives and fathers were unwilling to have them or take care of them. The accused said he equally did all he could do to look after the now deceased's critically ill sister Comedy which efforts the now deceased trashed.

In relation to the night in question on 9 June 2021 the accused said the day was a normal one as he engaged in his chores, returned home and later retired to his bedroom. As a responsible husband and stepfather the accused said he later woke up to make a routine check on the sick step daughter Comedy who was sleeping with accused's wife. The accused seems to allege his wife and the sick step daughter were also sleeping in the shed and not the kitchen hut, a fact he later on not persued. Upon entering the shed the accused said he found the now deceased awake and smoking. The accused said he asked the now deceased how the sick step daughter Comedy was feeling that night. To his utter surprise and unexpectedly the accused said the now deceased attacked him with booted feet. Sensing danger the accused said he picked a chair, threw it at the now deceased hitting him. Instead of retreating he said the now deceased became even more violent and picked an axe. In order to defend himself the accused said he in turn picked a hoe and struck the now deceased first. The accused said due to this commotion the people in the shed fled from the homestead. The accused said thereafter he and the now deceased made peace and both agreed that the accused would take the now deceased to the local clinic upon day break as he was apparently injured. Unfortunately, the accused said the now deceased passed on that night and that the accused telephonically advised the police. The accused said he was later arrested while at a relative's homestead where he had gone to advise them of this tragedy and in persuance of funeral arrangements of the now deceased. To that extent therefore the accused denies any criminal liability on the basis of defence of a person or self-defence.

Exhibits and their probative value

A total of 4 exhibits were produced by consent.

Exhibit 1 is the post-mortem report dated 14 June 2021. The doctor who compiled the post mortem report observed the following injuries on the now deceased's remains;

- “1. *facial bruising with right frontal bone fracture.*
2. *fracture left parietal bone with overlying haematoma*
3. *fracture right tibia and fibula*
4. *multiple body bruising”*

The cause of death is said to be head injury arising from assault.

The accused did not put into issue the now deceased's cause of death.

It is clear that the now deceased who was hitherto in fairly good health was brutally and fatally assaulted. The assault was indiscriminate as it was all over the body. Clearly severe force was used as bones were fractured. The now deceased's head, a vulnerable part of his anatomy was not spared which led to his demise. The accused admits inflicting all these injuries *albeit* in self-defence.

Exhibit 3 is the hoe handle which accused admitted to have used to assault the now deceased. As per Exhibit 4 the certificate of weight the hoe wooden handle is 1,1420kg and 7 cm long. It is made of very hard wood and is capable of inflicting serious injuries if severe force is used.

Lastly Exhibit 2 is the accused is confirmed warned and cautioned statement. It is a regurgitation of the accused's evidence except that it differs with the accused's evidence in three material aspects which are as follows;

- (i) in his evidence the accused said the now deceased first attacked him with booted feet but in the statement, he said he was first slapped with an open hand.
- (ii) Critically in this statement the accused omits to mention that the now deceased at any stage picked up an axe which issue he only raised in his evidence.
- (iii) in that statement the impression the accused gives is that he was apparently bitter about the responsibility thrust upon him of looking after his step children. However, in his evidence the accused said he fully accepted this responsibility without any rancour.

Indeed throughout the trial the accused failed to explain away these anomalies and or contradictions which negatively impacted on his credibility.

The Evidence

The evidence of both Dr Godfrey Zimbwa and a police officer Assistant Inspector Albert Gonye was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07].

Dr Zimbwa carried out an examination on the now deceased's remains and authored the post-mortem report Exhibit 1 already alluded to.

Assistant Inspector Gonye was tasked to investigate the allegation raised by the accused that there was bad blood between the accused and the now deceased prior to this incident as a result of the now deceased's truant conduct. In fact the accused had portrayed himself as a perennial victim of domestic violence at the hands of the now deceased whom he said would assault the accused. As a result, Assistant Inspector Gonye had to interview accused's wife Jennifer Vavarirai the now deceased's mother and a local member of the police constabulary Pfanyangurai Rupfidza who both dismissed the accused's account as false. The accused had also alleged that he had made the relevant reports of domestic violence perpetrated against him at ZRP Zaka by the accused. Again, a check with ZRP Zaka proved this to be false. This therefore meant that the accused had told a material lie in his story that he was a victim of domestic violence at the now deceased's hands.

The State led *viva voce* evidence from the accused's wife who is also the now deceased's mother Jennifer Vavarirai, the accused's son X and the investigating officer inspector Partson Khumbuya. The accused gave evidence and did not call any witnesses. We in turn deal with that evidence.

Assistant Inspector Partson Khumbuya (Ass Insp Khumbuya)

The evidence of Assistant Inspector Partson Khumbuya is basically formal evidence and remained uncontroverted.

He attended the scene of crime later in the day, on 10 June 2021 and found the now deceased's body lifeless on his bedding inside a shed. He examined the body and observed the following injuries;

- i) cut on forehead

- ii) bruises on side of face
- iii) bruises all over the body
- iv) fractured leg

These injuries are consistent with the post mortem report and were inflicted by the accused.

He said on arrival at accused's homestead the accused was nowhere to be found. The accused was only arrested 6 days later on 16 June 2021 in a different village by members of the neighbourhood watch committee who had gathered that the accused was a fugitive staying in a mountain. One then wonders as to why the accused who had acted in self defence would desert his home and live in a mountain instead of simply going to the police to explain himself.

After his arrest Assistant Inspector Khumbuya took accused for indications at the scene of crime. Crucially it is the accused who showed him Exhibit 3 the hoe handle the accused used to assault the now deceased.

Assistant Inspector Khumbuya said when he questioned accused why he had assaulted the now deceased all accused said is that he, the accused, had simply lost the plot as he could not cope with the burden of looking after a sick step daughter. This is contrary to accused's version of events now in court.

Jennifer Vavarirai (Jennifer)

Jennifer is the accused's wife and the now deceased's mother. The material part of her evidence is that on the night in question she was woken up by the thudding sound outside their kitchen hut where she was sleeping. She then heard accused shouting that the now deceased would die. She reacted by rushing out to check what was amiss. She met X and the grandmother fleeing from the shed. She then inquired from the accused what was wrong. Instead accused advanced towards her threatening to also harm her. Due to fear she too fled from the homestead. The accused had a lit torch tied on his forehead and was hitting the now deceased with what looked like a log. She did not know what had angered the accused.

Jennifer did not witness how the assault of the now deceased started. She did not see the helpless now deceased fighting back. She was not aware of any abuse previously visited on accused by the now deceased. She said on that night both accused and the now deceased were sober. Her evidence was not materially challenged.

X (Jervas)

The crucial witness in this matter is the 16-year-old X accused's son who was sleeping in the shed with the now deceased. He is the eye witness.

Jervas said before all of them retired to bed at their respective places the accused had refused to take part in the normal family prayers saying he was too tired and that accused retreated to his bedroom leaving other family members to pray for the sick sister in the kitchen hut.

Later in the night Jervas said he woke up from the shed where he was sleeping with the now deceased and their grandmother to go and relieve himself. By then the now deceased was fast asleep. Before he could fall asleep he saw accused coming from his bed room with a lit torch tied on his forehead. The following events then unfolded;

- i) the accused approached the shed quietly wielding what looked like a plank or pestle. Inside the shed there was a fire and accused's torch also illuminated the place.
- ii) the accused approached the now deceased's bedding as the now deceased was fast asleep. The accused delivered 3 blows on the now deceased's legs with the weapon accused had. Jervas and the grandmother woke up and fear and rushed out of the shed. Simultaneously Jervas mother Jennifer also came out of the kitchen hut.
- iii) the now deceased could not even rise from his bedding as he was being attacked by the accused. Jervas said all the now deceased could do was to cry out asking the accused what was wrong. Instead Jervas said the accused retorted saying *"you will die here"* and that the now deceased was bestowing himself with authority he did not have.
- iv) the assault continued on the defenceless and hapless now deceased who never got a chance to rise up his bedding. Jervas and others fled from the homestead fearful of being harmed by the rampaging accused.

- v) upon their return the next morning Jervas found the now deceased's lifeless body still on the bedding where had been as the accused assaulted him.

Jervas gave his evidence clearly and very well. He is accused's son. He had no cause in our view to lie against accused. He remained unshaken in cross examination and told the accused in his face that the accused's version of events was clearly false. He was clear that the now deceased was fast asleep when he was first attacked. He maintained that the now deceased never got a chance to rise up from his bedding let alone to fight back. The next morning, he found the now deceased's lifeless body still on same spot the now deceased was when first attacked and the accused had vanished.

We therefore find no basis not to accept Jervas's evidence.

The Accused

The accused's version of events can not possibly be true. The accused admits fatally assaulting the now deceased. The injuries accused inflicted on the now deceased as per Exhibit 1 are not even consistent with his version of events. Critically the accused himself suffered no injuries. The accused's conduct of fleeing from his home and living in a mountain for 6 days is clearly inconsistent with a person acting in self-defence.

Disposition

The defence relied upon by the accused is provided for under section 253 of the Criminal Law Code. We find no need to repeat it. The legal requirements to be met are clearly outlined in the cases of *State v Banana* 1994 (2) ZLR 271 and *State v Collet Baira Manzonza* HMA 02/16. For that defence to absolve accused of any criminal liability the accused should satisfy all the 4 requirements listed in section 253 of the Criminal Law Code [*Chapter 9:23*].

In *casu* the accused's case fails on the first hurdle. As a fact the accused was not under any unlawful attack or any attack. Instead, it is the accused who simply visited the now deceased with gratuitous violence as clearly explained by Jervas.

The intention of the accused can be inferred from a number of factors. The proximate attack was unprovoked. The now deceased was fast asleep when attacked in the middle of the night. The accused was the aggressor who in fact left his bedroom and visited the now deceased in the shed. The accused used a lethal weapon, a hoe handle. Severe force was used. The blows were several and indiscriminate. The bones were fractured on the legs and the face. Clearly the

accused subjectively foresaw the possibility of his act causing death but nonetheless continued with his conduct despite such risk or possibility.

We dismiss the accused's defence of self defence as not available to the accused. Factually the accused was not under any attack. This defence can not be available to the accused.

It is our finding that the accused acted with constructive intent.

In the result we have entered the following verdict;

VERDICT: Guilty of contravening section 47 (i) (b) of the Criminal Law (Codification and Reform Act) [Chapter 9:23]: - murder with constructive Intent

National Prosecuting Authority, counsel for the state
Chihambakwe Law Chambers, pro deo counsel for the accused