

THE STATE
versus
VITALIS CHIBVONGODZE CHITSA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 29 February 2016; 3 & 4 March 2016

Assessors: (1) Magorokosho
(2) Chidawanyika

Criminal Trial

M. Musarurwa & J Chingwinyiso, for the State
D. Tandiri, for the accused

HUNGWE J: The accused faced a charge of murder in that on 9 April 1999 at Makumbe Bottle Store, Makumbe Business Centre, Buhera, he unlawfully and with intent to kill stabbed Dickson Matimba with an Okapi knife eight times all over the body thereby causing injuries from which the said Matimba died.

He pleaded not guilty.

Briefly the facts upon which this prosecution was brought are as follows. The accused was at a bottle store partaking of intoxicating beverages. So was Dickson Matimba, (hereinafter referred to as the deceased) who was similarly engaged in this age old pass-time. They were drinking separately. Around 17h30 the accused ran out of the resources to fund his pleasurable pursuit and asked for credit facilities to be extended to him so as to continue with his drinking spree. The bar lady, Lydia Svinurai, declined to extend the same but referred him to the manager, one Anna Chitsa, who referred her back to the bar lady. An altercation ensued between the accused and the bar lady over the issue. This time he was now demanding some change. Rightly so, the bar lady refused to acknowledge that she owed him any. In the melee that followed the accused stabbed the bar lady on her right hand wrist, on the neck and on her thigh using an okapi knife. When the deceased attempted to intervene,

the accused shifted his attention towards him. He then struck, stabbed him eight times all over his body including on his face, the right upper arm, the left shoulder the stomach as well as his fingers. In the process the deceased's intestines were exposed. He died shortly afterwards.

In his defence outline the accused pleaded self-defence. He says that when he engaged in an altercation with one Lydia Svinurai he suddenly found himself surrounded by no less than six men one of who is the deceased. He then took out an Okapi knife from the shelf behind the counter and used it to stab Lydia Svinurai three times first before the men set upon him. It was after he had stabled Lydia that the deceased then struck him with a beer bottle on the head. He then stabbed the deceased with the Okapi knife in self-defence.

The truth of what took place however points towards a different direction.

Although Lydia Svinurai survived a murderous attack by the knife-wielding customer-cum-accused on that fateful day, she was able 17 years after the event, to testify as to what she witnessed. She told this court that accused came and bought beer and left. An hour later the accused came and falsely claimed that she owed her ZW\$600 change from which he wanted 4 pints of beer cost ZW\$60-00. She refused to be cheated. A disputed arose. Accused announced to other patrons inside the bottle store, and anyone who cared to listen, that Lydia was refusing with his change as such there will be war. He will stab her with a knife.

He suddenly came behind the counter, produced a knife and began a murderous attack upon her person. She tried to run out of the bottle store but was tripped by the accused who managed to stab her twice before she managed to escape. She ran away to safety after the intervention of other by-standers and patrons including the deceased.

The undisputed evidence of Japeson Farai Mupindu is that after the dispute arose over the false demand of change amounting to ZW\$60 arose, Lydia told him that accused had threatened to stab her. He later saw the accused go behind the counter where Lydia was. He wielded a knife. He saw accused stabbing Lydia. At that stage one Enos Chagonda intervened and Lydia attempted to escape but the accused tripped her. She fell to the floor. He continued to stab her several times all over her body. At that point, he left to call the Police. When he returned he learnt from Anna Chitsa that accused had stabbed the deceased several times causing his death.

Lovemore Chitumba heard the deceased telling accused that he was lying that he had given Lydia ZW\$100, 00. Accused then threatened the deceased that if Lydia did not give

him his change he would see what to do. Lovemore Chitumba then saw the accused stab Lydia. After stabbing Lydia the accused stabbed deceased who died on the spot. The accused was apprehended after he had grabbed Lydia's green cash box and was making his get-away with it.

In assessing the credibility of the witnesses called by the State we were alive to the fact that a long time had since passed after they had witnessed the event to which they testified. We accepted too that there would be a real possibility that memories had faded. We were however satisfied that the witness depositions were as truthful as they could be regard being had to the fact that these events were unfolding rapidly. The situation was therefore fluid. We did not expect, in the confusion that followed to get a blow by blow account of what led to the deceased's death at the hands of the accused. We looked to establish where the probabilities in the case lay. We found that the probabilities in this case lay in the sequence of events as given by the state witnesses. They corroborated each other on the salient features of the case. They all disputed that the accused acted in self-defence.

Besides the viva voce evidence, we considered the findings by the doctor who conducted a post mortem examination on the remains of the deceased soon after he had died. That post mortem is exhibit 6. The Post Mortem Report on the deceased shows that the deceased sustained not less than eight stab wounds delivered with severe force.

We also found that the accused is a pathological liar. He disputed his own statement that he gave in 1999 when the events were still fresh wherein he admitted that he had stabbed the deceased several times because he believed that the deceased wanted to fight him. The basis of his belief, according to his own statement, was that the deceased had come to where he was arguing with Lydia holding a beer bottle. This piece of evidence differs from what he told the court 17 years later. In court he claimed that he had fought with the deceased and was under attack by six people.

The law allows a person to take reasonable steps to defend himself from an unlawful attack, or to take reasonable steps to defend another person against an unlawful attack. In the circumstances, harm, and even sometimes death, may be inflicted on the assailant in order to ward off the attack. In order for this defence to hold there must be an unlawful attack upon the accused or upon a third party where the accused intervenes to protect that third party. The attack must have commenced or be imminent; the action taken must be necessary to avert the attack and the means used to do so must be reasonable.

We had no difficulty in rejecting his version events and therefore his defence of self notwithstanding the fact that there was no eye witness to the actual stabbing of the deceased by the accused. The circumstances are such that no-one else but the accused had quarrelled with the deceased. It therefore follows that it can only be the accused and no-one else who had inflicted the fatal stab wounds on the deceased.

We did so because from the uncontroverted evidence it is clear that the accused behaved like bull in a China shop. He lied about \$100 to Lydia as a pretext to steal her cash box. When deceased challenged him on his claim he turned on him too in order to get his hands on the cash inside the box. It was after killing deceased that he laid his hands on the green cash box. Members of the public apprehended him whilst he still had this cash box yet he has the temerity and audacity to deny this fact.

In the end we were satisfied that the accused never acted in self-defence. He killed the deceased in order to make good his escape with the cash box which was eventually recovered from him before he had evaded apprehension by members of the public. In our view there can only be one verdict:

He is found guilty of murder with actual intent.

SENTENCE

Society cringes at every incident of murder. You have been convicted if this crime. In appropriate instances the legislature provides for the ultimate sentence. Your counsel, Mr Tandiri, has made several important submissions pleading with this court not to pass the death penalty. Amongst his important submission is the argument in respect of the period it has taken the trial to be undertaken. You committed this horrible crime in 1999. You were also convicted of rape for which you serve and were discharged from prison without this matter being called for trial. Clearly whilst you did not push for your trial, which you could have done, you did not intentionally put yourself beyond the reach of the long arm of the law, so to speak. Therefore the delay of 17 years in bringing the matter for trial can be fairly laid at the door of the State as well as yours too. You committed this crime after taking intoxicating beverages. This court has also been advised that you paid ten herd of cattle to the family of the deceased as compensation for their loss.

On the other hand, murder is a serious crime. The deceased had not provoked you in any way. Instead, he was attempting to restrain you from stabbing the complainant in the attempted murder charge for which you have served a three year prison term. It is clear to us that the deceased laid down his life protecting the complainant in the attempted murder charge. It is by dint of fortune that two people did not die at your hands that night as you run amok trying to rob the same bottle store from where you were drinking. You stabbed the deceased with a knife killing him almost instantaneously. Your actions must be condemned in the strongest terms. A sentence that reflects both this court and society's abhorrence of this type of conduct.

You are therefore sentenced as follows:

20 years imprisonment.

Tandiri Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners