

THE STATE
versus
RICHARD CHIBWE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE 27 & 28 February 2017 and 7 & 20 March 2017 and 31 May 2017 & 1 June 2017

Criminal Trial

ASSESSORS : 1. Mr Gonzo
2. Mr Barwa

Mr Kasema, for the state
Mr R Maposa, for the accused person

TSANGA J: The accused was charged with murder in that on the 19th of May 2016, he unlawfully and with intent to kill, or realising that there was a real possibility that death might result, had murdered Batanai Zumbika at Fox night club, Glen View 3 Shopping Centre, Harare. He is said to have stabbed him with a knife on the chest resulting in injuries which caused his death.

The accused pleaded not guilty to murder. The essence of his defence outline was that he had arrived at the night club in question at around 2.00 am in a heavily inebriated state. He had found the deceased together with Robert Shambamuto quarrelling with one Liberty over a missing plastic bag with some groceries, which was said to belong to Liberty. He had tried to restrain them and the deceased had grabbed him forcefully and told him not to interfere. During the brawl which ensued the deceased had grabbed him in a choke and he had had to resort to using the Okapi knife to free himself. He could not scream or shout for help as he was being suffocated. His heavily intoxicated state had further coloured his judgment. He had not even noticed where he had stabbed the deceased as his mind had been on freeing himself. He stated that it was also not reasonably foreseeable that death might result from his actions as his mind was engrossed in fighting for his life.

The accused's warned and cautioned statement was admitted in evidence as exh 1. It essentially captured the story of the dispute over the plastic bag and that he had produced a knife during the fight which ensued.

It was also not in dispute that the deceased died as a result of the injuries sustained. The post-mortem report which was admitted as evidence as exhibit No 2 in terms of s314 of the Criminal Procedure and Evidence Act showed that the 30 year old died of haemopericardium, heart damage and the stab wound inflicted to his chest. The state, with the consent of the defence, dispensed with the need to produce the knife in question as it was not in dispute that it belonged to the accused and had been used by him.

Also admitted in evidence was the evidence of Talent Mashave a duly attested member of the ZRP at Glenview police station. He had attended the scene of the crime on the night in question and had discovered the body of the deceased lying in an open space between Munyeza building and Shah building. He was also the one who had been given the okapi knife after it was found by one Clara Chinyerere at her market stall. He had also recorded the deceased's warned and cautioned statement the following day on the 20th of May 2016. He had also drawn the sketch plan from indication made by the accused.

The State led evidence from 4 witnesses. Charles Kalumbi a security guard at the night club where the deceased died. He had witnessed the deceased and the accused pushing each other. He had not known the cause of the altercation. The pushing had lasted less than five minutes. He had approached them and at that point the accused was walking away whilst the deceased was grasping his chest stating that the accused had stabbed him. The accused had run out of the night club and together with a patron they had chased him and had caught up with him at a certain house where he was hiding under a lemon tree. He had been brought back to the night club. The incident had happened in the small hours of the morning at around 3 am. He was cross examined on whether he could deny that the deceased had actually gripped the accused's wind pipe necessitating the need for the accused to free himself. He maintained that the accused was not at any time grasped by the throat. He also said that the accused was not heavily drunk though he did state that both the accused and the deceased had consumed alcohol. Materially from this witness's evidence the stabbing had already taken place by the time he approached them as a security guard. He had not seen the circumstances of the actual stabbing but had observed the accused and the deceased had been pushing each other.

Ronald Shambamuto who was at the night club with the deceased whom he knew very well, also gave evidence. He also knew the accused as a patron at that bar. His evidence was that the accused and the deceased had started pushing each other over the said plastic bag with groceries. He had witnessed the pushing which he said had been at the behest of the accused. Both he and the deceased had been accused of taking the plastic bag. It was supposed to have fertiliser and other perishables but he had only seen it the following day after the unfortunate event. He said their drinking had been moderate. He had left the accused and deceased pushing each other over the issue when he had gone outside to light his cigarette. He had not restrained them as he had not expected that the altercation would get out of hand and never anticipated that anyone would be stabbed. As he was on his way up the stairs to the night club he had met accused going down the stairs. He had then learnt of the stabbing. He told the court that he could not speak to the stabbing or to the alleged throttling as it had occurred when he had gone out of the night club.

Glorify Chagonda who used to work as a cashier at the night club also gave evidence. He was on duty at the night club on the night in question. The accused had come to ask him for a plastic bag and he had told him that he had not seen it. He had gone outside. Thereafter he recalled seeing the accused going down the stairs and the deceased as well who opened his shirt and said he had been stabbed by the accused. He had taken handcuffs and gone after the accused and had alter handcuffed him after he was caught He had not witnessed the actual stabbing.

Clara Chinyerere who found the knife also gave evidence. She had found the knife when she had gone to sweep at the stall where she sells her wares. It was a blood stained knife. She had shown it to her husband and subsequently given it to the police who were in fact looking for the knife. As stated there was no dispute about the knife.

The accused then gave his evidence. He told the court that he had arrived at the night club at around 2.am that day and had met Ronald Mashambamuto as well as the deceased and Liberty who were at that time having an argument. Liberty had said he had given his plastic bag with contents to the deceased and Ronald for safe keeping, who were now refusing to give it back. He had told them to give the said Liberty his plastic bag as he was ready to go home. Ronald Shambamuto had told him that he was intervening in a matter which had nothing to do with him and had struck him. The deceased had then pushed him and he had pushed him back. It was then that the deceased had pushed him against a pillar and started

throttling him. He had tried to remove his grip but had failed as he was drunk. He said that he had already consumed 19 -20 pints of beer that night by the time he had arrived at that particular night club. He had bought another pint at the night club. He told the court that he had tried to raise his hands for assistance to indicate he was being choked. At that time, Liberty then at the counter with his back towards them. He was losing breath and could not cry out. He had managed to produce the knife and had stabbed the deceased. When the deceased loosened his grip he had walked out of the night club. There had been about 20 people in the bar at the time. He had been apprehended by Ronald Shambamuto and Charles Kalumbi. He told court that he had not been the one to push the accused and said maintained that he had used the knife because he was being throttled. He described the deceased as taller and as bigger than he was. He said he had been struck by Ronald Shambabamuto and it was at that time that the deceased had come and pushed him. In cross examination he conceded that his intervention in the dispute about the plastic bag had been simply because Liberty had told him about it.

At the time that the pushing was taking place Liberty himself had already moved away from the altercation and was at the counter. He had not thought of telling security about the plastic bag but had instead intervened on Liberty's behalf. He explained that he had bought the okapi knife that day as he had intended to use it at home. He had put it in his pocket. He had opened it with his two hands although he had had to force himself to retrieve the knife. He said he had not run away in the initial instance for fear of being attacked. He conceded in cross examination that things may not have deteriorated to the extent that they did had he not asked about the plastic bag but denied that any blame was apportionable to him as in his view it was the deceased and Ronald Shambamuto who had failed to control themselves.

The said Liberty who was supposed to give evidence on behalf of the accused was not willing to give evidence and accused's counsel dispensed with him on the likelihood of him being a hostile witness.

From the evidence of the witnesses we made the following factual findings.

- a) The deceased and the accused were involved in a scuffle in which they pushed each other over a plastic bag which the accused was demanding from the deceased but which did not belong to the accused but to one Liberty.
- b) The deceased was not armed.

- c) None of the witnesses actually saw whether or not the accused was held in a choke at the time that he resorted to stabbing the deceased. The accused's evidence that he was being choked was therefore not controverted by any real evidence.
- d) The accused used both hands to retrieve his knife from his pocket and to open it
- e) The accused stabbed the deceased with a knife resulting in injuries which caused his death.

In its closing submissions, the State zeroed in on s253 (1) (b) of the Criminal Code which articulates when self-defence may be a complete defence and the particular the requirements for defence of the person. The State argued that there had been enough room from the events as described, for the accused to have resorted to using his hands rather than a weapon to stave off the deceased. Moreover, the weapon had been directed at a vital part of the body where there is soft tissue. It was further submitted that even if the accused had no intention to stab the deceased, his conduct had been reckless. In this regard the focus was on s 253 (c) of the Criminal Code which articulates that the means used must have been reasonable in all circumstances. It was argued that the response of the accused in using a knife had been excessive and that he could have punched the deceased in the face or groin and that this would have been a reasonable defence under the circumstances. It was further argued that had he stabbed in the thigh then that would have been evasive action if he was indeed under threat. The State further argued that the accused could not rely on provocation as his reaction to the accused in the use of the knife had nothing to do with the alleged slap from Ronald Shambamuto but rather the allegation of throttling. The State therefore argued that the accused had caused the deceased's death within the framework of constructive intent to murder in that realising the risk of death from his perceived conduct he had nonetheless continued despite that risk. It relied on the case of *S v Mugwanda* 2002 (1) 574 (S) for this assertion. Its conclusion was that the accused should be found guilty of murder in terms of s 47 (1) (b) of the Criminal Code.

The accused proffered three defences for his actions, namely provocation, self-defence and intoxication. As regards provocation, a slap was said to be enough to provoke somebody. Relying on the case of *S v Nangani* 1982 (1) ZLR 150 (SC) it was argued that a provoked man loses self-control and the violence had happened on impulse. As regards self-defence, it was maintained that the now deceased had grabbed the accused by the throat. He had also been pushed against a pillar and others would not have noticed all this as the

incident took place in a dark spot of the room. Moreover, accused had said he had raised his hands in the air for rescue but no one had come. He had been in that precarious position for two minutes. It was further argued that the accused had been in a state of drunkenness which had diminished his sense of judgment. Because he was provoked and drunk he had thus acted on the spur of the moment. It was submitted that what accused had done on that day considering that he was heavily intoxicated and had also been provoked by the deceased was in line with what a reasonable person would have done. It was further highlighted that the silly argument over a plastic bag was in itself an indicator that accused was no longer in control of his faculties.

Accused's counsel further submitted that to argue that the accused could have simply punched the deceased in the face was taking an armchair approach to the events that occurred. Moreover the fact that the deceased had also only been stabbed once even though the stabbing had been fatal in itself showed that all the accused wanted to do was to avert the attack. He had stabbed the deceased in a vulnerable part because he had wanted to save his own life. In the final analysis her argument was that the deceased person should be found guilty of assault as opposed to murder with constructive intent.

The legal position

Self-protection forms the basis for a legally acceptable form of self-defence. At the heart of self-defence at common law is an objectively assessed reasonable response to any given threat, real or sincerely, though mistakenly, perceived to exist. The reasonableness of the response is ascertained by looking at whether 'necessary force' was used, and, secondly whether that force was 'proportionate force'. Two key elements feature on the issue of "necessity". Firstly, whether there was need for any defensive force at all, and, secondly the choice of defensive force used.¹

As regards the need for defensive action key to such analysis is whether there was need for immediacy in the response that was taken and whether there was an opportunity for retreating. On the nature of defensive force used the expectation with self-defence is that the minimum amount of force necessary to ward off the aggressor must be used by the

¹ See James Slater, *Making Sense of Self Defence* 5 Nottingham L.J. 140 1996 at p141-145

aggressor.² In other words, deadly force is not justified where less harmful means can be utilised.

Proportionate force means that the force used must not be unreasonable or disproportionate to the harm that is being defended. Where an act is deemed both necessary and proportionate, then no liability rests on the accused. A justified act of self-defence would result in an acquittal for self-defence to be justified the focus is therefore on the act itself as opposed to the actor.³ Our Criminal Law (Codification and Reform) Act [Chapter 9:23] captures these elements self-defence in s253 (1) and (2) of the Code.

In *S v Mabvumbe* HH 39-16 and *S v Muchairi* HB 12-15 these elements of self-defence are summarised as:

- a) an unlawful attack;
- b) upon accused or upon a third party where accused intervenes to protect that third party;
- c) the attack must have commenced or be imminent;
- d) the action taken must be necessary to avert the attack;
- e) the means used to avert the attack must be reasonable.

Factual and legal analysis

On whether there was a need for defensive force at all, since our finding was that none of the witnesses could testify with certainty that the accused had not been held in a choke, the accused's version that he was being throttled must be accepted. Ronald Shambamuto who had witnessed the pushing had gone outside to light his cigarette when he had left the deceased and the accused pushing each other. If the accused was being throttled then there would have been a need to extricate himself. The opportunity to retreat had already been missed as he should have done so when he was pushed in the initial instance by the deceased as he claimed.

Accepting that he needed to extricate himself from the choke, the next issue for consideration then shifts to the defensive force used under the circumstances. In this case he resorted to a knife which from our findings on the facts from accused's own response in cross examination, he was able to pull out from his pocket using both hands in spite of the throttle.

² Slater above at p144

³ Slater above at p 145

Stabbing the accused in the chest cannot be said to exemplify the use of minimum force. If proportionate force means it must not be unreasonable or disproportionate to the harm being defended then clearly by resorting to stabbing in the chest, the accused acted disproportionately to the harm he was facing. Section 253 (c) of the Criminal Code is explicit that the means used to avert an unlawful attack must be reasonable and should not be grossly disproportionate to that liable to be caused by the unlawful attack.

The choice of defensive force was a knife because accused says he could not scream as a result of the position he was being held. Yet he still managed to bring out his knife with his hand and to apply it to the deceased's chest. If he could use his hands at that stage to draw out and use a knife then surely stabbing in the chest as his choice of force was not proportionate in the circumstances. He could just as well have used his hands to free himself from the deceased's grip. There was no justification for stabbing in the chest in the sense that this action can be deemed acceptable or permissible under the circumstances. His action in stabbing the deceased on his chest with a knife was clearly not proportionate given that he could have used the same force he used to disentangle himself from the deceased's hold. It was this mistake in reaction on the part of the accused to the situation which he faced which was excessive. Moreover there was also no reason why he had brought his knife to a public space such as a bar. The carrying of a dangerous knife in a public place is problematic in itself to the rule of law as there is often no controlling of its usage particularly in the case of person whose inhibitions may be loosened by imbibing too much alcohol. Clearly being equipped with a knife made accused feel powerful his defence weapon was that knife because of the sense of power over an opponent that it gave him. There is clear indication in his behaviour of stabbing in the chest of simply not caring and of wanting to inflict maximum damage. He was certainly aware that there was a real risk of injury and yet continued to inflict harm on a vulnerable part of the body well knowing that the weapon that he was wielding was a very dangerous one. This is clearly not a case of assault.

The accused also argued that he was drunk and that he was provoked. As regards provocation our Criminal Code offers a partial defence where provocation is indeed found to be applicable. It can reduce murder to culpable homicide.

In casu the provocation in the initial instance that led to the pushing was not such as to make a reasonable person lose their self-control. It was not even the accused's plastic bag that they were pushing each other over and therefore it was not like he was chasing a personal

belonging. In other words, he had no need to intervene and no need to be provoked. Being pushed was self-induced provocation by asking for property which did not belong to him and starting a fight with people whom he accused of taking that property without any proof whatsoever. In fact his attitude was indicative of that of a neighbourhood bully.

In any event according to the accused's own evidence it was Richard Shambamuto who had slapped him and the deceased had simply pushed him and yet his attention had not been turned to Richard. By the time the altercation degenerated to the point of stabbing, Richard had long since moved from the scene. The defence of provocation cannot stand.

Accused also says he was drunk and that his faculties were impaired as a result. His intoxication was voluntary. Voluntary intoxication in terms of s 221 of the Criminal Code is merely treated as mitigatory where the effect of intoxication was not such that he or she lacked the requisite intention, knowledge or realization in committing the offence. *S v Muchemesi* HH 287-15. The evidence clearly shows that he knew what he was doing. He was able to unsheathe his knife and to walk away and hide soon after stabbing the deceased. He walked very fast from the scene because he knew he had injured the deceased.

Verdict

Taking into account our finding that it may indeed have been necessary for him to extricate himself from being throttled as that was unlawful conduct, but however bearing in mind our finding that the force used was not proportionate and that the accused acted mistakenly in resorting to excessive force, in the result the accused is found guilty of culpable homicide.

In mitigation accused, is a first offender. He is 33 years old and a family man with one minor child aged four years old. He is also a sole breadwinner. He was said to be contrite and had assisted the family of the deceased with funeral expenses. He had also pleaded guilty thereby saving the court's time. His counsel sought a sentence of five years with three years suspended. The state sought a sentence of 7 years with two years suspended drawing on the case of *S v Mugwanda* cited herein previously on the basis that the case likewise involved a stabbing.

A sentence of seven years with two and half years suspended would seem to be appropriate in this case given that there was a high degree of negligence in resorting to a knife. Furthermore, the accused has not spent any significant time in incarceration other than

three weeks at the time of his arrest before he was granted bail. I am, however, cognisant of the fact that he is a first offender and also that he did indeed cooperated with the court in admitting to stabbing the accused albeit under circumstances he outlined in his defence. These mitigatory factors are taken into account in reducing his effective period of incarceration.

In the result the accused is sentenced as follows:

Seven (7) years imprisonment of which 2 ½ years is suspended for five years on condition accused is not within that period convicted of an offence of which violence is an element and for which he is sentenced to imprisonment without the option of a fine.

Effective sentence: 4 ½ years imprisonment.

*Criminal Division, National Prosecuting Authority Office, State's Legal Practitioners
Maposa, Ndomene and Maramba Legal Practitioners, for the accused*