THE STATE

Versus

WILLIAM SIWELA

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr J Sobantu and Mr M Ndlovu
BULAWAYO 2 FEBRUARY 2023

Criminal Trial

K M Nyoni, for the state
Ms D Ncube, for the accused

KABASA J: The accused is charged with murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. He pleaded not guilty.

The state alleges that on 6th July 2014 at around 0545 hours the now deceased "Tarisai" met the accused along an unnamed road in Spitzkop Gwanda and asked him about his memory card and cell phone. Earlier on the accused had taken Tarisai's cell phone for repairs but failed to repair it. He however damaged the touch pad and gave the cell phone back minus the memory card. Upon being asked about the cell phone the accused invited Tarisai to his home promising to replace the damaged phone and the memory card. The accused proceeded to enter his house leaving Tarisai outside.

On his return he stabbed Tarisai once on the left side of the chest. Tarisai succumbed to the injury.

In his defence the accused did not deny stabbing Tarisai and causing the injury from which Tarisai succumbed to. He however said he had been provoked and was also drunk.

To prove its case the state produced the post mortem report, the murder weapon and led evidence from 2 witnesses. The evidence of 3 witnesses was admitted into evidence in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07.

From the evidence led the following is common cause:-

1. The accused and Tarisai were friends and Tarisai had on some unknown date given his cell phone to the accused so he could repair it.

2. The accused damaged the cell phone and returned it without the memory card.

3. On 6 July 2014 the two met and Tarisai asked for his memory card and also inquired about the damaged cell phone.

4. The accused invited Tarisai to accompany him to his (accused's) home. The two walked together. On arrival the accused asked Tarisai to wait outside whilst he went into the house where he took a phone and a knife.

5. On getting back to where he had left Tarisai he handed over the phone to Tarisai and proceeded to retrieve the knife which he had hid in his back pocket. He stabbed Tarisai once on the left side of the chest.

6. Tarisai was ferried to hospital where he later succumbed to his injuries.

7. A post mortem report compiled by Doctor Pesanai gave the cause of death as:-

- haemorrhagic shock
- Bilateral haemothorax
- Perforated heart

The issue is whether the accused intended to kill Tarisai or realised that there was a real risk or possibility that his conduct may cause death but continued nonetheless despite the risk or possibility.

The 2 witnesses who testified gave their evidence very well. They were credible witnesses and there really was no issue raised as regards their account of the events of that fateful day.

The accused's sister who was the first witness had last seen the accused the day before as he did not come back home until that morning. She was in the house when the accused came in and took the phone and the kitchen knife. She asked him what he wanted the knife for but he did not respond. He went out and shortly thereafter she heard someone saying "William has

stabbed someone." She later saw that it was Tarisai who had been stabbed and was lying on the ground.

This witness could not say whether the accused was drunk or not as she did not pay attention to that.

The second witness was talking to Tarisai when accused emerged from his house which was barely 5 m away from where Tarisai and the witness were. This witness saw the accused handing over a phone to Tarisai and shortly thereafter retrieved a knife from his back pocket with which he stabbed Tarisai.

As regards accused's state of sobriety the witness said he did not look drunk. The accused fled soon after the stabbing.

The accused testified in his defence and said he thought Tarisai was about to assault him and that is why he stabbed him. Tarisai had been slapping him with open hands all the way from where they had met to the accused's home.

From the entirety of the evidence can it be said the accused acted in self-defence and he was so drunk as to fail to appreciate what he was doing?

After his arrest the accused gave a warned and cautioned statement and said:-

> "I do admit to the charges levelled against me. I met Tarisai Ncube at a certain house in Spitzkop and he demanded that I go with him to our house so that he will take my phone since I damaged his phone whilst repairing it. Whilst on the way he slapped me once on the cheek. When I got home, I went into the house and took a phone and a knife which I hid in my back pocket. I did as if I wanted to give him the phone and produced the knife from my back pocket and stabbed him once on the chest. He grabbed the hand which was holding the knife and I dropped it. He fell to the ground. I ran to hide in a nearby bush. I do not know what got into me."

This statement was recorded at 1630 hours on 6th July 2014, just hours after the fatal stabbing. The accused was therefore expected to state what had happened with some degree of accuracy as the events were still very fresh in his mind. He however only said Tarisai slapped him once on the cheek.

Why then did he seek to portray a picture of a sustained assault on the date of his trial? Is this not indicative of a person who was bent on misleading the court and trying to justify his actions? We think it is.

The accused also gave a vivid account of what he would have us believe happened on 6th July 2014 and yet later sought to suggest that he was heavily intoxicated and could not recall where he aimed his blow.

We got the distinct impression that the accused was not being honest and was denying for the sake of it. How could he recall everything else with great detail and only became too drunk when it came to recalling where he stabbed Tarisai? It does not make sense.

Section 253 of the Criminal Law Code sets out the requirements for the defence of self. These requirements are:-

1. The accused must be under an unlawful attack.
2. Such attack must have commenced or was imminent.
3. The accused's conduct must be necessary to avert the attack after exploring all avenues of escape.
4. The means used to avert the attack must be reasonable in all the circumstances.
5. The harm or injury caused to the attacker is not grossly disproportionate to that liable to be caused by the unlawful attack.

Turning to the facts of this case, the accused was not under any attack. Tarisai was talking to the second witness when the accused came back from his house and he stabbed Tarisai immediately after handing over to him a cell phone. Why would Tarisai want to assault him when all he (Tarisai) wanted was the cell phone which the accused had handed over to him.

If he was fearful of an attack by Tarisai as he sought to portray when he gave evidence, why did he not stay inside the house since he had managed to persuade Tarisai to remain outside? Why go back to a person he was scared would attack him? Is that the behaviour of someone who was fearful and was desirous to avert an attack? Certainly not.

On the contrary he armed himself with a knife and hid it in his back pocket. Thereafter he sprung a surprise attack on Tarisai and inflicted a stab wound which cost Tarisai's life. He would have stabbed Tarisai for a second time had the second witness not intervened.

There was no self-defence to talk about and no provocation either. The accused's story was shown to be beyond doubt false (*R* v *Difford* 1937 AD 370). His version that he made as if he was handing over the phone to Tarisai shows that Tarisai was not expecting to be attacked and also had no reason to attack the accused.

Granted the court is not supposed to take an arm-chair approach when looking at the defence of self. In *State* v *Farai Kapenga and Anor* HH 14-2018 HUNGWE J (as he then was) had this to say:-

> "The question whether an accused can successfully claim the defence of private defence is determined by examining objectively the nature of the attack and defence to determine whether they conform to the principles of law that are set out above. This means that each requirement of the attack and defence must be judged from an external perspective rather than in terms of the accused's perceptions and his assessment of the position at the time he resorted to private defence. In applying this test the court must be careful to avoid the role of arm chair critic …….. weighing the matter in the secluded security of the court room. Instead the court must adopt a robust attitude, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence. See *State* v *Ntuli* 1975 (1) SA 429 (A) at 436 D."

By going into the house leaving Tarisai outside and plunging the kitchen knife into Tarisai's chest without saying anything and taking Tarisai by surprise, the accused was on the offensive not defensive.

The defence of private defence is therefore not available to him. Even if we were to accept that he was provoked such is not a defence. The evidence does not show that he was provoked and so provoked that he completely lost self-control and so could not have appreciated his actions or been able to form the requisite intention to kill. All Tarisai had asked for was his cell phone and memory card. What was provocative about that legitimate request to cause the accused to lose self-control? We would say there was nothing remotely provocative about Tarisai's request.

As regards the assertion that he (accused) was drunk, surely his sister would have noticed that but she did not. This is her brother and she did not have to take particular note of him to notice that he was drunk if indeed he was as intoxicated as he wanted the court to believe.

The second witness did not observe the intoxication either. Again if the accused was intoxicated this witness would have had no problem noticing that. The accused might have taken some alcohol but he was not drunk. Even if he was, voluntary intoxication which did not have the effect of rendering him incapable of appreciating his actions is not a defence which is available to him.

The accused used a knife, 70 grams in weight, 30,5 cm long with a blade which measured 18,5 cm and handle which measured 12 cm and plunged it with severe force which caused a 1,3 cm wound perforating the 3rd left rib, went through the left chest damaging the 3rd rib and into the left lower lobe of the lung right through the left heart perforating it.

The chest houses delicate organs and plunging a knife into someone's chest almost always results in a fatality, as happened to Tarisai. What possible intention could accused have had except to cause a fatal injury? Even if it can be argued that he did not set out to kill, he must have realised the risk or possibility when he engaged in that conduct but did not desist.

In light of MAKARAU JA's (as she then was) remarks in *Mapfoche* v *The State* SC 84-21 whether the killing was in terms of section 47 (1) (a) or 47 (1) (b) is of no moment. Killing or causing the death of another person with either of the two intentions is murder as defined by section 47 of the Criminal Law Code.

We will just say this much, that the accused in arming himself with the kitchen knife and using it to stab the now deceased in the chest must have realised the real risk or possibility that his conduct may cause death but continued to engage in that conduct despite the risk or possibility.

We are therefore satisfied the state has proved its case beyond a reasonable doubt and accordingly find the accused guilty as charged.

Sentence

In assessing sentence I considered the following:-

You are a first offender. In 2014 you were 22. You were therefore youthful. Youthfulness is a strong mitigatory factor. It has taken almost 9 years to finalise the matter.

Your anxiety over this period cannot be understated. You killed your friend, you are likely to have the memory of this haunting you for the rest of your life.

Society will also label you a murderer and that is a heavy burden to carry for anyone.

Aggravating is the fact that a life was unnecessarily lost. The courts have time without number implored people to respect the sanctity of life.

Life is a gift, not to be robbed of one at the hands of another, especially one they regarded as a friend.

Your conduct must have caused pain of an excruciating nature to the deceased's loved ones. Death is painful but a death which occurs in such tragic and violent circumstances is even more painful, especially given the particular circumstances of this case.

You appeared to want to minimise your moral blameworthiness instead of showing contrition and regret for causing the death of your friend.

That said however the submission by defence counsel imploring the court to reduce an otherwise appropriate sentence in light of the delay in the finalisation of this case is sound and persuasive. Justice delayed is justice denied.

A sentence of 18 years would have been appropriate but for the delay of about 9 years.

A reduction of that in recognition of this delay will not be amiss.

You are accordingly sentenced to:

15 years imprisonment

National Prosecuting Authority, state's legal practitioners
Job Sibanda and Associates, accused's legal practitioners