

THE STATE
versus
JOSEPH CHIFAMBA

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 11 NOVEMBER & 29 NOVEMBER 2024

Criminal Trial-Murder

Assessors: Dr Mushonga

Mr Gwatiringa

R S Mushonga, for the State

P Kanokanga, for the accused

MUNGWARI J: On 11 March 2024, at around 2100 hours in Dengwa village, Chief Mukota in Mudzi, 35-year-old Tafadzwa Chimbangu (hereinafter referred to as "the deceased"), left his residence armed with an unidentified object, en route to the home of 74-year-old Joseph Chifamba (hereinafter referred to as "the accused"). Upon arrival, the deceased forcibly opened the bedroom door and pounced on the accused, who was sleeping on a reed mat.

Startled, the accused attempted to rise but was immediately met with barrage of assaults from the deceased. He angrily accused the accused of having extramarital sexual relations with his aunt. When the deceased momentarily allowed the accused to dress up, the accused seized the fleeting moment and grabbed an axe from the corner of his bedroom. He struck the deceased multiple times on the head until he collapsed.

[1] When he was convinced that he had incapacitated the intruder, the accused went to seek assistance from a neighbour, Patrick Chimbangu. Together, they approached the village head, Langton Chimbangu, and informed him of the incident. The village head also summoned Phillimon Chimbangu, to accompany them back to the accused's residence to inspect the scene.

[2] Using a flashlight in the accused's bedroom, they discovered the deceased, barely alive, lying face down in a pool of blood. He exhibited severe head wounds and was bleeding profusely. The deceased was transported to Kotwa Hospital but tragically succumbed to his injuries two days later on 13 March 2024. A report which ultimately resulted in

the arrest of the accused was made to the police. Subsequent investigations led to the recovery of the murder weapon-an axe-, which was taken as evidence. Meanwhile, a post-mortem examination was conducted by Dr. Robert Guillen. His conclusion was that death was due to brain laceration, subarachnoid haemorrhage, and a skull fracture resulting from the axe assault.

[3] Based on these circumstances, the accused was arraigned before the High Court on a charge of murder as defined in Section 47(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The state alleged that the accused, with intent to kill, or realizing that there was a real risk or possibility that death could occur, but continuing to engage in that conduct despite the risk, struck the deceased on the head with an axe, inflicting mortal injuries.

[4] The accused pleaded not guilty to the charge but admitted to all the factual allegations stated above. They therefore all became common cause. His only point of contention was that, in striking the deceased with an axe, he acted in self-defence. According to the accused, the deceased had attacked him, in his bedroom. He said the deceased had assaulted him with an unknown object. Realizing that he had no means of escaping from this unlawful attack, he seized the nearest weapon available—an axe. The deceased attempted to wrestle the axe from him, but he managed to strike him with it and continued to do so until the deceased collapsed in his sleeping area. Once he realized that he might have seriously injured the deceased, he immediately sought help from neighbours, including the village head, whom he invited to the scene.

State case

[5] The prosecution opened its case by applying to produce the autopsy report compiled by Doctor Robert Guillen a pathologist stationed at Parirenyatwa Hospital. The doctor examined the remains of the deceased on 26 March 2024. Significantly he noted seven surface wounds and injuries on the head, face, the bridge of the nose and on the right shoulder. Further an internal examination on the head, skull and brain revealed:

“hemorrhagic infiltrate in the left frontal, left temporal and bilateral parietal regions, fracture of the left parietal bone; Laceration of the meninges and left parietal lobe; bilateral hemispheric subarachnoid hemorrhage; cerebral hemorrhage and cerebral edema”

In the end Dr Guillen concluded that the cause of death was:

- a. Brain laceration and subarachnoid hemorrhage
- b. Skull vault fracture
- c. Axe assault

With the defence's consent, the post-mortem report was duly admitted into evidence as Exhibit 1. The cause of the deceased's death was uncontested. He died from injuries sustained during the frenzied acts of violence inflicted upon him.

[6] Exhibit 2 is the accused's confirmed, warned, and cautioned statement. In that statement, the accused reiterated the same narrative as outlined in his defence. He stated that:

"I admit to the allegations. What happened is that, the deceased came into my house in the night and banged on my house door in which I was sleeping and I got frightened. The deceased alleged that I wanted to have sexual intercourse with his aunt and he started to assault me with an object which I did not recognize. I got up from where I was sleeping and took an axe which was at the corner of my house and started attacking him which caused him to get injured on the head." (Sic)

[7] Exhibit 3 is the murder weapon. The court observed that the axe features a handmade hardwood handle measuring 66 cm in length, with a compact steel blade measuring 15.5 cm in length and is 5.5 cm wide. The blade has a very sharp edge and weighs approximately 0.52 kg. The axe was submitted without any contestation. Although relatively small, the weapon appears menacing.

[8] Additionally, the testimonies of Langton Chimbanga, Philimon Chimbanga, Farai Kwerangwe, James Barwa (the investigating officer in this case), and Dr. Guillen were formally admitted in accordance with s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] (CPEA), as outlined in the state's summary of evidence. The witnesses' evidence did not present any significant information beyond the established facts. The state also provided *viva voce* evidence from Patrick Chimbangu. The accused, on the other hand, served as the sole witness for the defence.

Patrick Chimbangu (Patrick)

[9] Patrick, a 78-year-old man, is a neighbour and friend of the accused. He has known the accused all his life, because they were both born and raised in the same village. He claimed that he enjoyed cordial relations with the accused and still does. He knew the deceased as his sister's son and was therefore, his nephew.

[10] His testimony was that on the fateful night, at around 2200 hours, the accused visited his residence and asked him to come outside. Once outside, the accused disclosed that he had struck an intruder and did not know the intruder's identity. He showed Patrick the axe he had used in the incident. Together, they proceeded to the village head's residence to report the assault on the intruder. After that, they returned to the accused's

home with two other men. In the accused's bedroom, they found the intruder lying on a blood-soaked reed mat, injured and barely alive. According to Patrick the intruder had sustained five cuts to the head and another on the thigh. Significantly, Patrick realized that the deceased was his nephew, Tafadzwa Chimbangu. Once they identified the intruder, the accused expressed his intention to report the incident to the police.

[11] The witness refused to comment on whether or not the deceased had attacked the accused, stating that he was not present when that happened. Patrick's evidence corroborated that of the other witnesses' formally admitted evidence. Notably, it highlighted that from the very beginning, the accused had told everyone he had notified of the incident that he had not managed to identify the intruder.

Defence case -Joseph Chifamba(Joseph)

[12] The accused, who the court noted is a frail seventy-four-year old man struggled to walk unaided across the courtroom from the dock to the witness stand. Once in the witness stand, he explained the reason for the difficulty, informing the court that he has been experiencing challenges with his declining eyesight for several years now. Recently, he had become unable to recognize even his own children, identifying them solely by their voices. He said by the date of the fateful incident in March 2024, his vision was already failing. He basically adopted his defence outline. The little detail he added was that he is a man of limited means, surviving by weaving winnowing baskets. He described living alone in a sparsely furnished room, which contained nothing but a reed mat and a few blankets for sleeping. In addition to the reed mat, he kept Exhibit 2, an axe, which he used as one of his tools of trade, along with a spear and a knife. Beyond these minimal belongings, he had little else in his room. He explained that there were two additional rooms adjacent to his room. Each of those rooms has its own direct entrance leading outside. Two children with whom he lived with at the homestead occupied each of the rooms.

[13] The accused also stated that he had known the deceased since childhood and enjoyed cordial relations with him and his family. However, four days prior to the incident, he had a fall out with the deceased's aunt over a fictitious sexual incident. The matter was subsequently reported to the village head. Unbeknown to him, the deceased took it upon himself to forcibly resolve the matter, disregarding the involvement of the village head. On the fateful night, the deceased made a nocturnal visit to his home. At around 2100 hours, while lying on his reed mat inside his hut, he heard the sound of his unlocked

door being opened. Startled by the intruder's audacity in entering his dwelling uninvited, he inquired who it was. The intruder dismissively replied that it did not matter who he was or where he came from. With the aid of a small flickering solar light illuminating the room, he discerned that it was a human being approaching him. Suddenly, the intruder launched a vicious attack, raining blows down upon his head and face in rapid succession. As he lay on the ground, he could only ascertain that the assailant was an aggrieved male from his utterances that he was assaulting him because he had allegedly attempted to rape his aunt. He however could not put a name to the voice as he did not recognize it. Joseph stated that the accusations and assaults frightened and angered him. Although he could see that there was an intruder in the house, he was unable to identify who the person was.

[14] The accused further stated that he then heard the intruder angrily instruct him to get up and dress so they could go to his aunt's house. In that moment, he realized there was no way he would reach the aunt's place alive. He feared that the deceased and his relatives would conspire against him and leave him for dead. He reasoned that if he could just get past the deceased, who had momentarily paused the assault and moved aside to stand by the doorway, he might find a way to escape. And so instead of complying with the intruder's instructions, he seized the opportunity to get up and grab his axe which was nearby. He swung it wildly towards the deceased. In response, the deceased attempted to wrestle the axe from him, but the accused said he clung to it fiercely, striking the deceased in the process. Sensing the deceased's strength, he continued to swing the axe desperately and indiscriminately towards the deceased in a bid to subdue him. He clarified that he did not aim for any specific part of the deceased's body but lashed out repeatedly in self-defence, hitting the deceased as a result. He only stopped when the deceased collapsed onto the reed mat. He stated further, that he is uncertain of the number of times he struck the deceased, but that he did so in a frantic attempt to defend his life. He struck him multiple times because it appeared that with each strike the deceased pushed back stronger. He understood that if he did not protect himself, he would perish at the hands of the deceased.

[15] After ensuring that the deceased was immobilized and that he was safe from further harm, the accused decided to report the unwanted intrusion to the village head. He immediately left his home and went to see Patrick who accompanied him to make the report. Everything that followed occurred as alleged by the state.

[16] Under cross-examination, he explained that even though the two children were in their rooms that night, it did not occur to him to call out to them as everything happened so fast and needed quick thinking on his part. He insisted that he felt he was still in danger even when the deceased stepped aside to allow him to get dressed. After persistent cross examining on this aspect he relented a little and said probably the danger had dissipated but regardless of that he realized he would never reach the deceased's aunt's house safely, given the unprovoked and violent attack he had already endured at the hands of the deceased. He clarified that he struck the deceased when he attempted to wrestle the axe from him. However, even after that initial strike, the deceased began pacing around the room with an intensity akin to that of a bull charging at a red flag.

[17] The situation, so the story went, escalated when the deceased banged against the door and swung back into the room, prompting the accused to recognize the deceased's formidable strength. Sensing that the deceased still possessed power, he struck him again until he finally fell to the ground. He said he was alarmed by the fact that the deceased was stronger than him and had the audacity to come to his home at night. Despite the confrontation, he maintained that he could not identify the deceased because of his vision problems. It was only when the village head and other men arrived that he realized the deceased was Tafadzwa, after they confirmed his identity.

Common cause issues

[18] The issues which appear common cause in this trial are that:

- a. The deceased unlawfully entered the deceased's home at night and assaulted him
- b. The accused struck the deceased multiple times using an axe
- c. The deceased's death resulted from the assault

Issues for determination

[19] The issue which lies for resolution in this case is whether in assaulting Tafadzwa Chimbanga and ultimately killing him, the accused acted in self-defence. The state counsel Ms *Mushonga* urged this court to find the accused guilty of murder with constructive intent. She stated that in the very least the accused must have reasonably foreseen death ensuing from his conduct but regardless of the said continued with his actions. Defence counsel Mr *Kanokanga* on the other hand insisted that the accused acted in self-defence. He asked the court to outrightly acquit the accused.

The Law on self-defence

[20] Section 253 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]

provides that the defence of person can be a complete defence where an unlawful attack upon an accused had commenced or was imminent and a host of other requirements are satisfied. In this jurisdiction it is trite that a person is entitled to take reasonable steps to defend himself/herself or any third party against an unlawful attack or harm. It is accepted that in circumstances of imminent danger to life, even killing the assailant may be excusable. The requirements of that defence were prominently explained in the case of *S v Banana* 1994(2) ZLR 271 (S) at 273. They are that:

- a. There must be an unlawful attack
- b. The attack must have commenced or was imminent
- c. That attack must have been directed upon the accused person or upon a third party
- d. The action taken must have been necessary to avert the attack or the accused must believe as such
- e. The means used to avert the attack must have been reasonable in the circumstances

[21] The purpose of the strict requirements is to dissuade self-justice. All the requirements must be satisfied for the defence to succeed. There is very little if any debate around the requirements and the position has become settled in this jurisdiction. An application of the requirements to the case at hand reveals the following:

Unlawful attack which had commenced or was imminent and directed at the accused

[22] There is no gainsaying that a vicious attack on a helpless old man had begun inside his own home and was ongoing. The deceased was enraged, accusing the accused of attempting to rape his aunt. It appeared he had gone for broke. Despite the matter being pending in the village court, the deceased wanted self-justice. He chose not only to confront and attack the accused but to do so in the dead of the night and in the accused's bedroom. He was in no mood for negotiation. Once he forcibly entered the accused's bedroom he immediately launched an attack. He targeted the accused's head. The blows rained down on the accused as he lay helplessly on the reed mat. Faced with the vicious assault from a sturdy thirty-five-year-old, the frail elderly accused was outmatched in strength. This disparity in physical capability explains why the accused chose to strike the deceased when he perceived a momentary pause in the assault. However, even with the first strike, the deceased's strength did not falter. Instead, he countered with

renewed vigour, bashing the door to the accused's house and pacing angrily within the room.

[23] The accused continued to strike the deceased until the latter's strength was finally exhausted, causing him to collapse in his sleeping area. There is no debate therefore that at the time of the incident, the accused was clearly under an unlawful attack from the deceased.

The action taken and the means used to avert the attack must be necessary and reasonable

[24] The actions taken by the accused were clearly necessary to avert further attacks that he believed would continue coming his way. The deceased, consumed by rage and ranting about the alleged sexual assault on his aunt, presented a serious threat. The accused's fear for his safety was exacerbated by the deceased's presence at the door, effectively blocking any means of escape. Contrary to the state's assertion that the brief pause in the assaults indicated that the accused was no longer in danger, this actually signified a continued and looming threat. It is therefore undoubted that the first requirement for the defence of self-defence was more than satisfied.

[25] We also note that the deceased was mourning more than the bereaved. He had nothing to do with the matter before the village head's court. He was not the one who had allegedly been abused. He foolishly took it upon himself to avenge the accused's perceived transgressions against his aunt. The worst part of it is that he attempted to take his revenge in the accused's house. Besides assaulting the accused, the deceased had also barricaded him inside because he stood at the doorway. The accused could not leave his homestead and literally became a prisoner in his own home. He was literally a captive in his own home. As if the captivity was not enough he was forced to get dressed and follow the deceased to some place in the village. When he got the opportunity to defend himself, the axe, spear and knife were the only weapons available in the room. Admittedly all are lethal weapons. As such neither could be said to have been a worse choice than the other. In any case, given the barbaric attack which he had already been subjected to it would be preposterous for anyone to have expected the frail old man, in the frenzy of the attack on him, to properly weigh his options and carefully assess which weapon was commensurate to the attack so that his defence of self-defence could succeed in court if he ended up being charged with murder.

[26] Sight must not be lost that in providing these defences to crimes, the law does not expect the courts to take an armchair approach. Instead the courts are expected to be

robust and to put themselves in the shoes of an accused person who alleges that he was under attack. The law equally urges a court assessing the defence of person to take into account all the circumstances which an accused found himself/herself in. Those circumstances must include any knowledge or capability he/she may have had and any stress or fear that may have been operating in his/her mind. We have already stressed that in this instance, the accused was under siege by a vastly younger and far stronger man. It was in a dark room. His vision was failing him. We cannot even start to imagine the fear that must have gripped him as a result. All those factors surely played out in his mind and limited his ability to think of any other options out of that dire situation. He then reacted instinctively, seizing the first weapon at hand. He testified that he had access to various other weapons, such as a spear and a knife. His intent was to immobilize the deceased and create an avenue for escape without being pursued. In the heat of the moment, he had no opportunity to consider alternatives such as calling out to the children for help. He did not have the chance to choose a specific part of the deceased's body to target. He defended himself against an intruder who had unlawfully entered his room at night and struck him randomly on the head while he was lying on his mat. That belligerent attitude demonstrates that the intruder was emboldened. The possibility of being armed with some unknown object could not be discounted.

[27] In our view, the above represents a literal swim or sink, kill or be killed situation. From the facts at hand, any argument that the deceased did not want to kill the deceased cannot be properly made. A man who is so brazen as to enter and attack another who is asleep in his habitat is capable of doing anything. Unfortunately, he ended up on the losing side. The deceased was found lying in a pool of blood in the deceased's bedroom. That on its own vindicates the accused's contention that all he sought to do was defend himself. The argument by prosecution that when there was a hiatus in the assault on the accused, he ought to have ran out of the house is unpalatable. The law does not expect a man to run away from his own homestead. The accused could not run away from his own house into the darkness. Doing so, would have obviously posed more danger to him. In any case, the accused was bent on force-marching the deceased to some unknown place in the midst of the night. The accused was therefore right to suspect that he either would not reach that destination or return from it alive. It is very likely that if he had not seized one of the available weapons—the axe, spear, or knife—it was him who would have died that night.

[28] In the end we conclude that, the actions taken by the accused to avert the attack were not only necessary but the means employed were equally reasonable. The last requirement relating to the attack being targeted at the accused is obviously met without the accused raising a sweat because there is no allegation that any third party was injured. From the above analysis, it is therefore evident that the accused met all the criteria to sustain a defence of self-defence. He is fully entitled to rely on the defence.

[29] Although no one deserves to die, and the courts do not advocate for violence and self-help remedies in situations where a bold intruder, such as the deceased, assaults a vulnerable, partially blind elderly man in his own bedroom, forcing him into a state of near captivity at night, an accused cannot be convicted simply because another human being has died. We therefore remain unconvinced that the State has proven that the accused possessed the requisite intention to support a murder charge because the accused had the right to protect himself. Given that context, the court is not satisfied that the prosecution has met its burden of proving the accused's guilt beyond a reasonable doubt, as mandated by law. **Accordingly, the accused is found not guilty and is acquitted of the charge of murder.**

MUNGWARI J:.....

*National Prosecuting Authority, State's legal practitioners
Kanokanga & Partners, accused's legal practitioners*