HB 243/18
HC (CRB) 91/18

THE STATE

Versus

TATENDA MAGODHI

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mrs C. Baye and Mr Shumba
GWERU CIRCUIT COURT 3 & 4 OCTOBER 2018

Criminal Trial

M. Shumba for the state
K. Manika for the accused

MAKONESE J: This case once again exposes the violent nature of our society. The weapon used in the murder and the age of the warring parties is a worrisome development.

The accused who was aged 19 years at the time of the offence is facing a charge of murder. It is alleged that on the 2nd of July 2017 and at Bhunu Bar, Makushaa at Shurugwi, the accused unlawfully caused the death of the deceased Matron Isheunesu Makotore by stabbing him in the abdomen with a homemade knife. The accused denies the charge and raises the defence of self defence.

The facts surrounding the commission of the offence are largely common cause. The accused admits stabbing the deceased as alleged, but contends that his life was in monument danger and that he was compelled to avert the attack by stabbing the deceased.

The brief facts as outlined in the defence outline of the case (exhibit 1) are that the accused resides at 52A Sebanga Park, Shurugwi. He is an artisanal miner. The deceased who was aged 24 years at the time he met his demise hailed from Chief Nhema area in Shurugwi. On the 2nd of July 2017 at around 2100 hours the accused and the deceased were at Makusha Business Centre, Shurugwi. There were other patrons at the bar. The accused and deceased were discussing about the whereabouts of a Nokia cellphone belonging to the deceased. The deceased was involved in a love relationship with a lady known as Hazel. During the period

their love relationship blossomed, the deceased had given Hazel the phone to use. At some stage the relationship broke down. Hazel was then later married to the accused. The deceased attempted to retrieve his phone from Hazel without success. On the fateful day the deceased once again took accused to task about the cellphone. The accused appeared reluctant to surrender the phone to the deceased. A misunderstanding then ensued between the two. The accused suddenly drew a homemade knife and stabbed the deceased with it once on the left side of the abdomen exposing the intestines. The deceased crouched after the stabbing and the accused fled the scene. Clive Tinago pursued the accused but gave up chase when he realised that the accused had disappeared into a dark and unlit area. Transport was sought and the deceased was ferried to Shurugwi hospital. He was later transferred to Gweru Provincial Hospital where he later died from injuries sustained in the attack.

The state tendered into the record a post mortem report compiled by Dr S. Pesanai at United Bulawayo Hospitals, after conducting an examination of the remains of the deceased. The report is filed under post mortem report number 631/630/2017. The pathologist concluded that the cause of death was:

(a) Bronchoaspiration
(b) Haemorrhagic shock
(c) Penetrating abdominal wound
(d) Assault

The accused's confirmed warned and cautioned statement was also tendered into the record. The statement was recorded at ZRP Shurugwi five days after the stabbing on the 7th July 2017. The English translation of the warned and cautioned statement is in the following terms:

> *I do not admit to the charge that I stabbed Isheunesu Makotore with a knife. I saw my girlfriend with a cellphone after I asked her, she told me that it was Isheunesu's cellphone. I then took the cellphone and kept it. I met Isheunesu at Bhunu Bar and he confronted me demanding to know about his cellphone. I promised that I will give him the following day. Isheunesu then started assaulting me with his fist on the mouth and throttled me. . I then produced a knife and stabbed him once on the abdomen."*

The homemade knife was tendered as an exhibit. It is an unusually long and dangerous knife. The total length of the knife is 41cm. Its handle is 18cm long. The length of the blade is 23cm. It weighs 0.31kg. The photograph of this knife was produced as the last exhibit and forms part of the record.

The state case

The state led oral evidence from one single witness CLIVE TINAGO. He testified that he is a resident of Makusha Township, Shurugwi. He was known to the deceased during his lifetime. He was his cousin. He knew the accused as a local resident of Shurugwi. On the day in question he went to Bhunu Bar around 2100 hours. Whilst there, he saw accused and the deceased standing at the verandah at Bhunu Bar. The two were discussing the issue of a cellphone. The accused seemed to be professing ignorance about the phone. The witness entered the bar looking for Blessed Benson. After a little while he exited the bar and saw the deceased crouching and holding the left side of his stomach. The accused was standing close by holding a homemade knife (exhibit 5). When the accused saw the witness he ran away. The witness chased him but failed to apprehend the accused. He was afraid to proceed with the chase because of the darkness. The witness returned to the injured deceased. He observed that the deceased's abdomen had been ripped open and the intestines were exposed. The witness then took the deceased to hospital with the assistance of other patrons. He made a report to the police. He led the police to the scene of the crime. The witness subsequently learnt of the deceased's death.

This witness gave his evidence in a clear and convincing manner. His evidence reads well. He struck as an honest witness who sought to tell the truth. He did not prevaricate. He did not exaggerate his evidence. We found him to be credible and reliable witness. We accept his evidence as an accurate reflection of his recollection of the events of the night in question.

The state closed its case without leading further oral testimony. The evidence of the under listed witnesses as it appears in the outline of the state outline was admitted into the record

by way of formal admissions in terms of section 314 of the Criminal procedure and Evidence Act (Chapter 9:07), namely:

(a) Paul Manamike
(b) Kenneth Samson
(c) Engelbert Makore
(d) Japhet Tsamai
(e) Sergeant Ndou
(f) Constable Mazondo
(g) Dr S. Pesanai

Defence case

The accused, **TATENDA MAGODHI** elected to give evidence under oath. The accused largely adhered to his defence outline. In essence his defence was that he acted in self defence. Accused testified that on the day in question he was at Bhunu Bar watching soccer on a television set with other patrons. He was approached by **CLIVE TINAGO** who asked him to accompany him outside the bar. Once outside the bar and whilst standing on the verandah he saw the deceased standing outside on the verandah. Clive informed him that the deceased wanted to speak to him. The deceased enquired about his cellphone which he had given to Hazel when the two were still in love and before accused had married Hazel. The deceased indicated that he did not have the phone on his person. Accused states that this infuriated the deceased who upon being incited by Clive punched the accused on the mouth. The accused fell to the ground and as he was trying to get up deceased grabbed his left arm and twisted it. At the same time the deceased was throttling the accused whilst holding the accused from behind. The accused was overpowered by the deceased and could not escape from the deceased's chocking hold. The accused was having difficulty in breathing. The accused noticed that Clive was hurriedly advancing towards him with a machete in his hand. The accused states that it is at that stage that hi pulled a knife which was strapped to his waist and stabbed the deceased in the abdomen. The accused demonstrated how his hand delivered the blow by moving his right arm

from his left side. He proceeded to demonstrate that he had moved his right arm across his body and managed to stab the deceased on his left side of the abdomen. From the accused's demonstration, and considering that the stabbing occurred whilst the parties were in a standing position, it is difficult to conceive how the accused delivered the fatal blow from that position. This court found the accused's description of the manner of the stabbing as being improbable. The court had not lost sight of the fact that accused indicated that the deceased was behind him when he delivered the blow. The deceased was throttling him with one hand, whilst the other hand was twisting accused's left arm. Inspite of this improbable story, the question that remains unanswered is where and how the accused obtained the strength to stab the deceased when he could hardly breathe. This court finds the accused's explanation of how the stabbing occurred to be an impossibility and therefore false. The murder weapon itself is large, to the extent that it was virtually impossible to draw the knife and move it across accused's body towards and around his back to stab the left side of deceased's abdomen in the manner suggested. What the accused told the court is not true. Any lie by an accused person should be taken as corroboration of the evidence by the state. This view finds support in the case of *S* v *Mhlanga* 1987 (1) ZLR 70. The learned Judge of Appeal held at page 77B-C as follows:

> "To be capable of amounting to corroboration the lied told out of court must be deliberate. Secondly it must relate to a material issue. Thirdly the motive to lie must be a realization of guilt and a fear of the truth. … Fourthly the statement must be clearly shown to be a lie by evidence other than that of an accomplice who is to be corroborates, that is to say by admission or by evidence from an independent witness."

The accused gave two conflicting versions as to why he stabbed the deceased. In his warned and cautioned statement which was recorded five days after the commission of the offence he stated that the reason he stabbed the deceased was the deceased had assaulted him and throttled him. The statement was confirmed by a magistrate on the 9th of August 2017. The accused confirmed that the statement was given freely and voluntarily without any undue influence. In his defence outline, however the accused seems to give a different version. His reason for the stabbing was that the state witness Clive was advancing towards him with a machete in his hand and he feared that Clive would strike him with the machete. He stabbed the

accused to free himself. The accused maintained his line of defence contained in the defence outline.

Clive testified that he was not armed. He indicated that it was not possible to move with a machete at that place at a bar. Besides, when the accused exited the bar he found the deceased crouching holding his left side of the abdomen. The accused was standing close by with the knife in his hand. He fled as soon as he realised that Clive was present. The stabbing occurred in the absence of Clive who confirmed that e did not witness the stabbing. It is this court's view that the accused lied about why he stabbed the deceased.

The accused was not a credible witness. He was not an open and forthright witness. At first he said he was employed as a security guard at a mine and that is the reason he gave for keeping a knife. He then shifted his position under cross examination and he admitted that he is a gold panner. Indeed upon his arrest he was arrested while panning for gold. The accused was evasive about why he stabbed the deceased. His demeanor in the witness stand was poor. He is not a credible witness. His attempt to demonstrate how he stabbed the deceased exposed the fact that his evidence and version could not be reasonably possible.

We accept and make a finding that accused stabbed the accused following an argument and confrontation with deceased over a Nokia cellphone. We do not find the accused's version convincing and reject it.

Analysis of the evidence

This court is acutely aware that it is dealing with single witness evidence. Clive Tinago is the only witness who gave oral evidence under oath. In dealing with single witness testimony in *State* v *Isaac Masare Bosha & Ors* HB-115-15, this court had this to say at page 5 of the cyclostyled judgment:

> "The law on this aspect is settled in our jurisdiction. In terms of section 269 of the Criminal Procedure and Evidence Act, it shall be lawful for the court to convict on the evidence of a single witness. The relevant section provides as follows:

> "269. It shall be lawful for the court by which any person prosecuted for any offence is tried to convict the person of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any competent and credible witness …""

In the case of *S* v *Nathoo Supermarket* 1987 (2) ZLR 136 (SC) GUBBAY (JA) had this to say at page 133:

> "It is of course permissible in terms of section 253 of the Criminal Procedure & Evidence Act (Chapter 59) for a court to convict a person on the single credible witness. The recognized test is witness his evidence is found to be satisfactory in every material respect."

In this matter, we conclude that the evidence of Clive Tinago is satisfactory in all material respects. He was indeed a credible witness. He testified about what he observed. He was ready to concede that he did not perceive the actual stabbing. The witness candidly confirmed that there was an argument about a cellphone. He was not a party to the argument between deceased and accused. This explains why he proceeded inside the bar and left the two on the verandah. When he emerged from the bar, Deceased was holding his left side of the abdomen. He was in pain. The accused fled the scene. Clive indicated that he pursued the accused. This was a natural reaction. The accused was fleeing after committing a heinous offence. As soon as Clive realised that he could not locate the accused person in a dark and unlit place he retreated and turned his attention to the deceased who needed assistance. It is this court's finding that Clive Tinago was a competent and credible witness as envisaged by section 269 of the Criminal Procedure and Evidence Act.

Defence of self defence

The defence of self defence is now codified under section 253 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). The section provides as follows:

> "(1) Subject to this part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if:

(a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent and,
(b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or her or she believed on good grounds that his conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape or avert the attack; and
(c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances; …"

The provisions of section 253 (1) (a) to (d) of the Code must all be satisfied before the defence of self defence can succeed. This is because the word "and" is used to link the subsections to each other. The word "and" is conjunctive. All the requirements under section 253 must be satisfied. The court is satisfied that it is possible on the facts place before the court that there was an unlawful attack that had commenced or was imminent against the accused. The state clearly failed to rebut the assertion by the accused that he was under some form of attack. It is this court's view, however that the evidence clearly shows that the means used to avert the attack was disproportionate to the attack and was not reasonable. The means used in all the circumstances was not reasonable. The question that has to be asked is, was it necessary for the accused to pull out a large and dangerous knife and thrust it into the abdomen of the deceased in order to avert the attack? The evidence shows that the accused exceeded the bounds of self defence. The accused pierced the deceased's abdomen thereby exposing the intestines. He used considerable force to cause that injury. His reaction was unreasonable and the defence of self defence is not available to him.

See the case of *State* v *Ronald Runyova* HH-104-10, where UCHENA (J) (as he then was),had occasion to consider the requirement of the defence of self defence.

Verdict

Mr Shumba appearing for the state conceded that there was insufficient evidence to sustain a verdict of murder with actual intention. He argued that the evidence led supported a verdict of murder with constructive intent. The medical evidence indicates that the deceased sustained a penetrating abdominal wound. He had a sutured wound on the midline abdomen (30cm) and sutured left abdomen. The injuries suggest that while accused may not have desired to bring about the death of the victim, he reasonably foresaw death as a real and substantial possibility. See *S* v *Mungwanda* SC-19-02.

Defence Counsel conceded that on the facts placed in the record, the accused foresaw the possibility of death. *Mr Manika* appearing for the accused person conceded that a verdict of murder with constructive intent was appropriate. We agree.

In the circumstances and accordingly, accused is found guilty of murder with constructive intent.

Sentence

In assessing an appropriate sentence the court takes into account all the mitigating circumstances of the case that have been articulated by accused's defence counsel. Accused is a young first offender who finds himself convicted of a very serious offence. The court takes into consideration the fact that accused has spent more than a year in custody pending his trial. The sentence the court shall impose should not have the effect of completely breaking the accused. There must be a chance for rehabilitation. The court agrees with counsel for the state that young offenders of accused's age, particularly those engaged in mining activities have developed a violent culture. They move around with lethal weapons such as machetes, knives, axes and they stand ready to use such weapons on the slightest provocation. These courts will treat young first offenders with leniency, but however there is need to impose sentences that do not trivialize the offence of murder whether with actual or constructive intent. Where a young offender displays violent conduct and commits murder in circumstances showing that he was prepared to face off and confront persons older than himself, then depending on the circumstances, his youthfulness should provide, less mitigation that the ordinary youth who because of immaturity acts

irrationally. In this matter the accused was armed with a lethal weapon. He appeared to be infuriated by the demand by deceased to release a mobile phone. He inflicted a wound that left deceased's abdomen ripped open wit intestines exposed. H has shown no remorse or regret for his conduct. This, in my view is aggravatory.

The only appropriate sentence that would send a clear message that these courts, will not condone violence especially the use of machetes, knives and other such weapons is a lengthy custodial sentence. The court is aware that in sentencing the accused the court must primarily consider the accused's peculiar circumstances, the offence, and the interest of justice. It is this court's view that the following sentence will meet the ends of justice.

"Accused is sentenced to 20 years imprisonment."

National Prosecuting Authority, state's legal practitioners
Jumo, Mashoko, accused's legal practitioners