

THE STATE
and
FARAI CHIWEZA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 14 February, 3 May & 22 November 2022

Assessors
Mr Barwa
Mr Shenje

Criminal Trial

Ms S Mutamangira, for the State
F Munyamani, for the accused

MUTEVEDZI J: The accused initially appeared before this court jointly charged with Osman Tsoka. They were both facing a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Osman Tsoka was however acquitted at the close of the state case after the prosecution withdrew charges against him at that stage. The allegations against the accused were that on 11 August 2015 at Stoneridge, Waterfalls in Harare, he caused the death of Tonderai Mazvani by striking him with clenched fists and booted feet all over his body. Tonderai Mazvani (herein after the deceased) later died from the injuries.

The accused denied those allegations. He explained that he and the deceased were friends. On the day in question, the two of them were drinking beer with their friends. The deceased provoked him by insulting him. A misunderstanding arose between the two of them. It degenerated into a fist fight. The fight was however stopped by Osman Tsoka (Osman) before anything serious had occurred. Osman cautioned both of them that it was not worthy fighting over petty disagreements. They all decided to leave the bar and go home as they resided in the same neighbourhood. When they got to their neighbourhood they parted ways as each proceeded to his homestead. The accused said he believed that the misunderstanding was over but to his horror, the deceased followed him to his house to continue with the fight. The deceased was belligerent and much as the accused tried to avoid a further brawl it did not

help. The deceased, armed with an empty beer bottle, demanded that the fight must continue without intervention from third parties. He threw punches at accused who then retaliated and the deceased fell. The accused contended that he never used any weapon. All he did was defend himself against the deceased's attacks. He used his bare hands in the process.

The State's Case

Before opening its case, the State sought the amendment of its summary of evidence to exclude the evidence of Esnath Chimuti who the prosecutor indicated had died before the trial commenced. The defence did not object to the application and the evidence of that witness was duly expunged from the state's summary of evidence.

Prosecution opened its case by applying to tender the post-mortem report compiled by Dr Gonzalez, the pathologist who examined the remains of the deceased person. With the consent of the defence, the report was admitted and became Exhibit 1 in the trial. Further the State also applied for the formal admission of the evidence of the witnesses indicated below in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The defence again consented to the application and the evidence of Machaka Tariro John and Sikarungu Yofasi was formally admitted. That left the state to lead *viva voce* evidence from two witnesses namely Eneresi Juma and Soneni Mazvani. Below we deal with the material aspects of the witnesses' evidence.

Eneresi Juma (Eneresi)

She used to be a neighbour to the accused person in Stoneridge. On the day in question she had gone for some activity at the National Sports Stadium in Harare. She left the stadium between 2100 and 2200 hours. When she arrived home and was indoors, she heard noise outside. She went out to inspect and saw the deceased lying on the ground. The accused, Osman and Osman's younger brother were present. The accused was kicking the deceased who was lying down, with booted feet. This happened behind the accused's house. The witness said she rushed to wake up accused's wife who took a while to respond. She later came to the scene and restrained the accused. Thereafter, the deceased was ferried to hospital. Probed as to how many times the accused kicked the deceased, the witness said she could not remember. What she could remember was that the accused kicked the deceased on the groin area around his manhood. She did not talk to the deceased but only managed to remove his shoes. He shook his head three times and never said anything. The back of his head was swollen. The deceased's wife also later arrived. She took away the log which the accused was holding. She admitted however that the accused did not use the log to assault the

deceased as he was restrained by the deceased's wife before he could do that. Thereafter, accused was escorted by his wife into their house. The deceased's wife looked for transport to rush him to hospital.

Soneni Mazvani (Soneni)

She is the deceased person's widow. They had been married for approximately 5 years at the time he met his death. The accused is her neighbour in Stoneridge. On 15 August 2015 around 2300 hours she was woken up from a slumber by noise outside her house. She heard the voices of her neighbours. She went out to inspect and found the deceased kneeling on the ground being assaulted by the accused and Osman's younger brother. She restrained accused from further assaulting the deceased. He complied but uttered the words that he wanted to finish off the deceased. The accused had a log in his hands which he intended to assault the deceased with. He however didn't use it. The deceased was now lying on the ground. There were several women standing close by. One of those women was Esnath Chimuti. She then tried to raise the deceased from the ground but noticed that the back of his head was swollen and that he had blood coming out of his mouth. After realizing that he was badly injured, she proceeded to look for transport to take the deceased to hospital. She got help from one Mugwisi who agreed to ferry the deceased to hospital. They went to Chitungwiza Hospital via the police. The deceased was taken for a scan from which the doctor ascertained that he had internal hemorrhage in the head. He advised that the deceased be taken to Parirenyatwa for further management. They took him there but he wasn't treated. They could not afford the medication they had been asked to buy. She was left with no option but to call the accused and Osman to advise them that the deceased was badly injured and she needed money for his treatment. The accused said he had been equally injured and could not help. The deceased died around 1100 hours the following day. Crucially she added that the relationship between the accused and the deceased was cordial. They came from the same rural areas and the accused used to come to their house a lot. She was completely taken aback by the turn of events and the assault. That the relationship was good was the reason why she called both the accused and Osman to come and assist the deceased. She said she did not see any injuries on the accused but noticed that he was staggering and suspected that he could have been drunk.

After the testimony of this witness the state closed its case.

The accused's case

As already pointed out, the accused was initially jointly charged with Osman Tsoka who was acquitted of the charges at the close of the state case. When he opened his defence case, the accused indicated that he intended to call his former co-accused as a defence witness. That suggestion caused a little ruction between the state and the defence which fortunately was quickly doused as the state climbed down from its position that it was not permitted for accused to call his former co-accused to testify on his behalf. The law allows it.

The accused opened his case by personally giving evidence. His testimony was largely the same as his defence outline. The only new aspects he added were the details of the earlier fight at the bar between him and the deceased. He indicated that the deceased accused him of disrespect and that he did not like being called a young man. He threatened to show the accused that indeed he was not a young man. He suddenly charged and hit the accused with a fist. The accused was taken by surprise. The deceased hit him for the second and third times. It was then that the accused retaliated. A fight ensued. Osman then intervened and stopped the fight. The issue appeared resolved and they all agreed to go home. When they got to their neighbourhood they went past Osman and the deceased's houses first. They bade each other goodnight and agreed to meet the following day. The accused and Wayne proceeded to their houses. When they reached the accused's house, they charted briefly. It was then that Wayne noticed that the deceased had followed them. The deceased was holding an empty beer bottle and looked menacing. Wayne restrained him, took the empty bottle and threw it away. The deceased charged at the accused and hit him with a clenched fist. The accused retaliated by hitting the deceased with booted feet. One of the accused's shoes came off. Wayne again intervened and restrained the accused. Another neighbour called Mike also came and assisted with restraining the protagonists. They took accused into his house. At the door, accused said he saw Eneresi Juma, Osman Tsoka and his wife. Osman was confused why the new argument had occurred when everyone had amicably parted ways and agreed that they would meet the following day. In the house, accused said he noticed that one of his shoes was missing. He decided to return to the scene of the fight to search for it. The search took a while. Whilst there he then heard the voice of Soneni Mazvani, deceased's wife challenging him as to why he was assaulting her husband. The accused tried to explain that it was the deceased who had been attacking him since the time they were at the bar. He turned and went in to the house. He added that he was not aware that the deceased had been critically injured let alone mortally wounded. He slept thinking that they would have a fuller discussion of the matter the next day.

On the following morning, Osman told the accused that the deceased had been taken to hospital in Mugwisi's car. The accused then asked Mugwisi about the deceased's injuries. Mugwisi had not seen anything serious except that the deceased's head was swollen at the back. The accused said he intimated to Mugwisi that the deceased must have fallen on his back at the time that he (accused) had hit him with booted feet and hit his head on some hard surface. He said he wanted to go and see the deceased at the hospital but Mugwisi cautioned against that hinting it could potentially cause problems. He spend that whole day at home because he was going to work at night. Towards the evening he heard the news that the deceased had died. It devastated him. He resolved to go and report the matter to the police but before he could do so, police officers from Waterfalls arrived and arrested him. He repeated that he did not attack the deceased with any weapon. He also repeated that the deceased was belligerent and extremely violent. His behavior was unprecedented in their friendship.

Osman Tsoka

His evidence corroborated the accused's evidence in every material respect. What he added is that during the fight at the bar, the deceased sustained injuries on the side of his head as he wrestled with the accused. He also added that before he parted ways with the accused and Wayne he reprimanded both the accused and the deceased that what they had earlier done was wrong because they were all neighbours and friends. He asked the deceased to get into his house as accused and Wayne went to their residences. The deceased took his bag which the witness was holding and proceeded. After about 10-20 minutes he heard noise from outside. He heard accused shouting from his house. The witness said what immediately came to his mind was that the accused must have been fighting with his wife. He went to the scene where he saw accused being restrained by his wife. He asked accused what was going on and he repeated to him that the deceased had followed him to his house and attacked him. He saw a vehicle that was leaving the scene with deceased. He did not think the deceased was injured but actually believed that he was proceeding to report the matter to the police. The next morning he went to the deceased's place intending to find out what had transpired the previous night. The maid advised him that the deceased had not returned home. He proceeded to work. Later that day he heard that the deceased had been hospitalised. The next thing was he got a call from the police asking him to attend at the charge office because the deceased he had died. He also insisted that the accused and the deceased were very close friends. Crucially, he described the earlier fight between the deceased and the accused at the

bar. In his view, the deceased provoked that fight but came out of it the worse. He was injured on the right side of the head because he bled. The deceased was thoroughly inebriated. On their way home, he looked better. The drunkenness had somewhat subsided.

After the evidence of that witness, the defence closed its case.

There are a number of issues which appear common cause in this trial. In summary they can be stated as:

1. The deceased and the accused had a close relationship. They came from the same rural areas
2. Before the fight in the compound, the two had engaged in a fist fight at the bar from which the deceased came out injured on the right side of the head. The deceased had provoked that fight.
3. The two fought for the second time in the compound
4. Both the accused and the deceased were intoxicated by alcohol on the fateful night
5. The deceased died of the injuries stated by the pathologist who examined him. How he sustained the injuries is however contentious.

The issue for determination

With those common cause issues, it appears the only issue for determination in this case is whether or not the accused intended to kill the deceased. He accepts assaulting the deceased both at the bar and the compound. His defence is simply that on both occasions, when he engaged in the fight with the deceased he was defending himself from the deceased's aggression.

Self Defence

The defence of self-defence is provided for under s 252 of the Criminal Law Code. It is officially called the defence of person because it encompasses various other aspects beyond the accused simply defending himself. Its requirements are stated in s 253 as follows:

“253 Requirements for defence of person to be complete defence

(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 he or she, believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack, and

(c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances; and

- (d) any harm or injury caused by his or her conduct—
(i) was caused to the attacker and not to any innocent third party; and
(ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.
(2) In determining whether or not the requirements specified in subsection (1) have been satisfied in any case, a court shall take due account of the circumstances in which the accused found himself or herself, including any knowledge or capability he or she may have had and any stress or fear that may have been operating on his or her mind.”

From the above provision, it is apparent that a number of requirements must be met for the defence to succeed. They can be enumerated as:

1. there must have been an unlawful attack on accused's person
2. the attack must have commenced or was imminent
3. the action taken must have been necessary to avert the attack and that he could not escape or avert the attack
4. the means used to avert the attack must have been reasonable in the circumstances
5. the harm caused was on the attacker and not on innocent third parties and
6. that harm was not grossly disproportionate to that which could have been caused by the unlawful attack

These requirements have become trite. They have been stated and explained in various authorities. See the cases of *S v Sweswe* HB 184/18; *S v Nyawo* HB 245/20 and *S v Justin Watanhauka* HH 342/13 among others.

Application of the law to the facts

a. Unlawful attack which had commence or was imminent

In this case, the evidence before us is that at the bar, the deceased attacked the accused without provocation. He hit the accused twice with fists before the accused retaliated after a third fist had struck him. A fight ensued. Osman Tsoka had intervened and stopped the unnecessary fight. There was a cessation of hostilities with the accused genuinely believing the fight was over. When they got to the compound, they parted ways as each went to their residences. The deceased however surreptitiously followed the accused and accosted him just before he went into his house. He was armed with an empty beer bottle. Wayne Tsoka disarmed him. He again attacked the accused. With the full knowledge of the earlier attack and ensuing fight, the accused could not be expected to have taken the attack by the deceased for granted. All the witnesses who gave evidence for prosecution did not and could not have spoken about these events because they did not witness them. As such the only testimony we have about what transpired is the accused's uncontroverted version of events. He was unlawfully attacked by the deceased. Needless to say, the same evidence established

requirement 2 in that the deceased had already commenced the attack on the accused person. The accused had already been hit by a clenched fist by the time he retaliated.

b. The action taken necessary to avert the attack and that accused could not escape or avert the attack

As already said, the accused was under attack by the deceased. He had secretly followed him. Although disarmed of the weapon he had been holding the accused was well aware of the aggression that the deceased had been exhibiting all night. He had been physically restrained, had been spoken to and had been dissuaded from the unnecessary fights. The accused had left to go to his residence. Nothing appeared to have worked as the accused appeared relentless in his quest to attack the accused. The court will be taking an armchair approach if it were to hold that there were other means that the accused could have employed to avert the attack by the deceased. In any event, the accused accepts and witnesses testified that both he and the deceased were drunk. He was at my residence. A man cannot run away from his home to evade an attack. Trying to escape under such circumstances would have put him in more danger. The attack was at night and came as a surprise. There was no room for the accused to sit back and analyse which plan would work better than the other. In the heat of the moment the accused cannot be faulted for hitting the deceased back in self-defence.

c. The means used to avert the attack must have been reasonable in the circumstances

The accused said he retaliated by hitting the deceased with open hands. When the deceased fell to the ground he hit him with booted feet. The evidence of the use of a weapon by the accused is discounted. None of the witnesses saw him use the log as alleged. Both Soneni Mazvani and Eneresi Juma admitted that the accused did not assault the deceased with the log he is alleged to have been holding. In reality therefore, the accused assaulted the deceased with open hands and booted feet. By any measurement it cannot be said that the means he used to avert the attack were disproportionate to the attack itself. The means were reasonable. It would have been different had he used a weapon on an unarmed assailant.

d. Harm caused on the attacker and not on innocent third parties and harm not grossly disproportionate to that which could have been caused by the unlawful attack

There is no argument that the assault was on the deceased and not on any innocent third party. What needs determination is simply whether the harm inflicted on the deceased was

disproportionate to that which could have been caused by the unlawful attack. It is not easy to measure the level of harm that was likely to have been caused by the unlawful attack perpetrated by the deceased. Initially he was armed with an empty beer bottle. He dared the accused to a fight where no third party would restrain them. He is therefore someone who was prepared to go all the way and presumably show the accused that he was not a “young man” as earlier threatened. The deceased was drunk. Nobody knows where he was going to stop. By kicking him when he was already down, it may be argued that the accused ought to have stopped once the assailant was on the ground and he had opportunity to escape. It should be restated that the idea of measuring these requirements with nice intellectual callipers cannot work and must be avoided. Rather a common sense approach must be adopted. We have already said the deceased was relentless in his bid to attack the accused. There is no evidence that the assault on the deceased by the accused directly caused the death. The injuries which were noted by the pathologist were bruises on the frontal area, and a swollen face on the left side. Osman Tsoka indicated that after the fight at the bar, the deceased suffered injuries on the side of the head. The findings by the pathologist are consistent with those injuries. There is a real possibility therefore that the fatal injuries did not occur during the second fight at the compound but at the bar where it is even clearer than during the second fight that the accused was defending himself. It would thus be inimical to the rationale behind the defence of person were this court to hold that the retaliatory punches and kicks the accused inflicted on the deceased were disproportionate to the injury which was likely to be caused on him by the deceased’s attack.

In the end and on the backdrop of the above findings, we have no apprehension to hold that the accused ticks all the boxes in satisfying the requirements of the defence of person. He is entitled to succeed. Where these requirements are all satisfied, s 254 of the Criminal Procedure & Evidence Act which decrees that where the means used to avert the attack are not reasonable in the circumstances but all other requirements of defence of person are met does not apply. We found as a fact that the means were reasonable in this case.

Disposition

In the final analysis, what this means is that the State failed to prove its case beyond reasonable doubt. Accordingly the accused is entitled to his acquittal. **He is therefore found not guilty and is acquitted of the charge of murder.**

National Prosecuting Authority, State's legal practitioners
T Pfigu Attorneys, accused's legal practitioners