

THE STATE
versus
PASSWELL CHIWAURA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 6 May 2024 and 7 November 2024

Assessors: Mr *Mhandu*
Mr *Shenje*

Criminal Trial

D. H. Chesa, for the State
F. Mabika, for the accused

MUTEVEDZI J: Godwin Takudzwa Kavhuru (the deceased) died a needless death. He was stabbed by the accused Passwell Chiwaura in a drunken brawl resulting from petty jealousy over ladies in whose company they were on a night out at some drinking place called Matomati bar in Hopley suburb in the town of Harare. The allegations by prosecution are that on 20 August 2023 the accused in contravention of s 47(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (the Code), unlawfully and with intent to kill, or realizing that there was a real risk or possibility that his conduct may cause death but continuing to engage in that conduct despite the realisation of the risk or possibility stabbed the deceased with a broken empty bottle on the stomach. The deceased suffered mortal injuries.

[1] The brief background to the charge was that on the fateful night, the deceased was drinking beer with his friends named Joyce Gwese and Patience Mildred at Matomati bar. Although they were outside the bar the place was illuminated by solar powered lights. The deceased pranked and caressed Patience Mildred Gezi's buttocks. Joyce Gwese, who was the deceased's girlfriend then reprimanded the deceased about his behaviour. The accused, who was some distance from the trio overheard the reprimand. He wasn't happy that the deceased had caressed Mildred's buttocks. He approached the deceased. Soon thereafter, a misunderstanding arose between them. Other patrons at the bar intervened in a bid to pacify them. The deceased and his girlfriend Joyce Gwese then left the bar intending to go

home but on their way out, the accused once more confronted the deceased at the doorsteps. A fist fight broke out. We are not told whether or not the accused lost the first round of the fight but he fell to the ground. Whilst there, he allegedly picked a broken beer bottle with which he stabbed the deceased on the stomach. The deceased collapsed and the accused immediately escaped. The deceased's tummy ruptured and the intestines protruded from it. One patron called Takudzwa Masvingo, the deceased's girlfriend Joyce Gwese with the help of other patrons tried to render first aid by putting a cloth around the ruptured stomach. Takudzwa later ferried the deceased to Sally Mugabe Hospital. He was unfortunately pronounced dead on arrival at the institution. Subsequently, a pathologist conducted an autopsy on the deceased's remains. His conclusion was that death was due to haemoptoreum.

[2] The accused denied that he intentionally caused the deceased's death. His defence was that on the day in question, he was sitting alone watching soccer and drinking beer outside Matomati bar. He said although he was inebriated he appreciated what he was doing at all material times. At around 2230 hours, he was approached by a lady, whom he believed to be a sex worker. The woman offered to have sexual intercourse with him for a fee of USD\$5. He said he turned down the invitation. The lady then returned into Matomati bar where she had come from. A while later, the accused said he was then approached by five men from the bar. One of them shouted that he wanted to teach him (accused) a lesson because he had solicited sexual intercourse from his wife. Before he could respond to the threats, the men began to assault him. He fell to the ground. They then took off his jacket, wallet which had USD\$93.00, national identification card and an NMB Bank card. They also took his *Itel* A56 cell phone. They relentlessly assaulted him. He pleaded with to stop assaulting him but they didn't heed his pleas. Instead, they kept on punching and kicking him in the face and all over the body. It was during that he said he then picked an empty bottle of beer. He neither knew nor noticed that it was broken. He threw it into the air without targeting any of his assailants. He was lying on his belly facing downwards. He suddenly heard a loud scream from one of the men who were assaulting him. The gang then suddenly stopped assaulting him. The accused further said he then stood up, screamed for help at the same time running away. The gang pursued him whilst shouting that he was a thief. Their shouts resulted in the accused being apprehended by members of the public. The same members of the public later released him after recognising that he was not a thief but a local person in that community.

[3] After his apprehension, he was taken back to the crime scene where he discovered that one of the gangsters had been injured. He assisted in conveying the injured man to hospital. The deceased was still alive then. The accused person further denied that he had an intention to kill the deceased. There was no bad blood between the two of them because he didn't know the deceased. Rather, he had only acted in self-defence against a group of people who were attacking him.

State case

[4] The state led viva voce evidence from Mildred Patience Gezi and Takudzwa Masvingo. The prosecutor applied that the evidence of Joyce Gwese be expunged from the summary of the prosecution's evidence because the police could not find her. Further the prosecutor applied to have the testimonies of witnesses Rodgers Chabwera, Zorodzai Wagoneka and Luck Deza formally admitted into evidence in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (CPEA). The defence did not object. The evidence of the witnesses which was largely common cause was therefore duly incorporated into the record of proceedings. Below, we restate the critical portions of the evidence of the two witnesses who orally testified in court. Further, the prosecutor also applied to produce the accused's warned and cautioned statement recorded on 25 September 2023 at ZRP Southlea Park by a Sgt Deza, witnessed by a Cst Wagoneka and later confirmed by a magistrate at Mbare Court of 23 November 2023. It became exhibit 2 in the trial.

Mildred Patience Gezi

[5] She said the accused person is her ex-boyfriend. She was at Matomati bar on the fateful night. There had been a tournament for a game called pool earlier in the day. Her team had won the tournament and they were in celebratory mood. She said she did not recall much of what took place because she was drunk. She went into the next bar after the celebrations but when she returned to Matomati she saw the accused person who was in the company of his friend. They were on a bench on a raised platform whilst the deceased was on the ground. They were arguing with each other. She said she enquired from the deceased what was going on. The deceased asked her to wait because he wanted to teach the accused a lesson. The witnesses said she then advised the deceased that the young man who was in the accused's company was Kuda Mandebvu's younger brother. It was then that the deceased calmed down. He shook hands with the young man signalling an end to the hostilities. They held hands and went outside. The witness said she also left and went to

the next bar where she saw Kuda Mandebvu. She advised him that his younger brother had gotten into trouble. She requested him to go with her to check on the deceased. The accused had gone back into the bar. She tried to approach him, but he signalled to her to stop. He accused her of having caused the problem which had resulted in the altercation. In the bar, Mildred said she met Joyce Gwese who was the deceased's girlfriend. The deceased went past her as he followed Joyce. She later heard commotion from a fight. It was the deceased and Joyce who were fighting.

[6] When Mildred went outside she said she heard that the deceased was being accused of having caressed her buttocks. It troubled her because she had not been fondled by anyone. She was told that it had happened during the celebrations. She said everyone was happy and she wasn't sure whether it was true or it was false. About ten minutes went by. She then heard the deceased and the accused quarrelling. The deceased was asking the accused why he had been conversing with his wife. They fought. Mildred said she left and sat amongst the crowd. Shortly after she saw the deceased coming to where she was seated. He collapsed close to the slab. Joyce tried to resuscitate him but he couldn't wake up. Takudzwa then realised that the deceased had been injured. The accused was already fleeing. Takudzwa pursued the accused. Mildred and others followed and met Takudzwa who had apprehended the accused on his way back to the scene. The accused was then assaulted by many people to the extent that he was stripped naked.

[7] Mildred's testimony continued when she stated that at that time when accused was being assaulted a certain boy arrived and asked the crowd why they were concentrating on someone who was alive yet the deceased's intestines were protruding from his stomach. No one had earlier realised that the deceased was that gravely injured. When she noticed that nit was true, the witness said she left the scene. When quizzed who had been involved in the fight Mildred said it was only the accused and the deceased. The accused was alleging that the deceased was in love with Joyce. She said the people who had assaulted the accused had only done so after he had attacked and injured the deceased. She was adamant that it was only the accused and the deceased who were involved in the fight.

Takudzwa Masvinge

[8] He was at the same bar on the fateful evening. The deceased and the accused had a misunderstanding. The deceased took the accused aside. Takudzwa said he followed them and drew closer. He heard the deceased asking the accused why he was speaking to his wife. The deceased then took the accused and they went outside the bar. The witness said

he remained inside. A while later he heard commotion outside. He went to check. A lot of people also followed outside. The deceased and the accused were fighting. In the midst of the fight it appeared like the accused had been overpowered. He seemed like he was fleeing from the place. The deceased followed him as he fled. A while later the deceased returned. He had apparently failed to apprehend the accused. The witness said he was seated close to a structure near the bar. Other patrons were also seated there. The deceased stood on his own. It was getting darker. After some time, the commotion began again. The witness said he noted that the accused had returned and the fight with the deceased had resumed. They both fell in an embrace. The deceased was under whilst the accused was straddling over him. The fight didn't last long because other patrons intervened and restrained the accused. They tried to remove him from the deceased.

[9] Takudzwa said he while he was still seated on the structure the deceased started back-peddling. His hand was clutching on to the side of his stomach. He was trying to walk to where the witness and others were seated. He appeared like someone in serious pain. At that point Takudzwa said he stood up intending to talk to the accused. He told him that he had injured the deceased. The accused suddenly bolted in the same direction he had earlier on taken when he had first fled from the deceased. The witness said he gave chase. The accused then sought refuge in some house in the neighbourhood with Takudzwa still in pursuit. Many other people had also followed in order to help him apprehend the accused. At the time that the witness was trying to open the door to the house where the accused had hidden, someone arrived to advise him that he had to go back to the scene because the deceased was badly injured and his intestines were protruding from the stomach. He abandoned the chase and ran back to assist the deceased.

[10] With that evidence the prosecution closed its case.

Defence Case

[11] In the defence case, the accused elected to give evidence. His testimony was identical to his defence outline. We need not therefore repeat it.

Common cause issues

- The accused and the deceased fought over a woman
- The accused stabbed the deceased with a broken beer bottle
- The accused doesn't deny that the deceased died as a result of his actions

Issue for determination

As said already, the accused does not deny assaulting the deceased. His defence is that the assault was necessary to defend himself from an unlawful attack by the deceased and the gang which was assisting him. Put differently, the accused pleaded of person. The question therefore is whether or not his actions satisfy the requirements for the defence.

The law

[12] The requirements for the defence of person are provided in the Code under 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

[Paragraph as substituted by sec 31 of Act 9/2006]

(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 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

[Paragraph as substituted by sec 31 of Act 9/2006]

(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”

[13] As is apparent, the first requirement is that for the defence to succeed, the accused must have been under an unlawful attack which had commenced or which was imminent or one which on reasonable grounds, he believed was about to occur. This court has previously stated that its understanding of that requirement is that it encompasses two tests. The first test is a subjective one where an accused believed that the attack had started or was about to start. The second rung is measured on an objective basis because the accused must have

believed, on reasonable grounds that the attack was imminent. In this case, the accused alleges that he was actually under attack by a gang of five men.

[14] From the evidence on record, the allegation by the accused is fanciful at best and preposterous at worst. None of the witnesses who testified in this case saw any altercation let alone a fight between the accused and anyone else other than the deceased. None of them saw the accused being assaulted by anyone else other than the deceased before the stabbing took place. The assault on the accused by the mob took place after he had stabbed the deceased, fled from the scene and was apprehended hiding in some house in which he had sought refuge. The unlawful attack on him by the crowd if there was any therefore occurred after the fact and cannot be used to build the defence of person he seeks to rely on.

[15] Given the above, the measurement we are prepared to use in this case only relates to the accused's fight with the deceased. If at all the accused was defending himself, he was defending himself from the unlawful attack by the deceased person. We still find it difficult to accept the accused's defence for a number of reasons. First there were two episodes of the fight between the two of them. The first one occurred soon after the deceased and his girlfriend had decided to leave the beerhall and go home. The accused is said to have accosted the deceased. Mildred said a fight then broke out between the two. Under cross examination she appeared to admit that it was the deceased who first attacked the accused. Takudzwa made similar insinuations. The accused lost the first fight. He fled from the scene. The deceased pursued him but returned after he failed to catch him. The accused acted in the manner which the law under s 253 envisages. A person who is under an unlawful attack must run away or escape to avert the attack if he can do so. If he does not in circumstances where the possibility of escaping without attacking the aggressor was there, the law will hold him liable for an attack that injures or kills his attacker. In this case the accused did not only run away but did so successfully.

[16] The evidence of the witnesses is that some time after he had escaped, the accused surreptitiously returned to the scene. The witnesses did not see how. What they simply noticed was that the fight between the accused and the deceased had resumed once more. The deceased was on the receiving end this time. Patrons at the bar intervened to restrain the accused. They however must have been a shade too late because by that time the accused had already stabbed the deceased in the stomach. In that melee, the deceased staggered up and back peddled to where the witnesses Takudzwa and Mildred were sitting.

He collapsed. Both of them said they did not immediately notice that he was mortally wounded. It is from those actions that we find the accused's story very hard to believe. A man who is attacked and runs away from his attacker but returns soon thereafter to engage in a fight with the same person cannot cry self-defence. He had no reason to return to the scene unless if he wanted to avenge the earlier fight loss he had suffered at the hands of the deceased. The attack on himself by the deceased had long ceased. The second fight was therefore a completely new transaction which the accused initiated. He had become the aggressor.

[17] Our conclusion therefore is that the accused was not under an unlawful attack by the deceased or by anybody. His protestations fail to meet the threshold required by s 253(1)(a).

[18] Even if we were to accord the accused the benefit of doubt, which we don't, his actions would still be unjustifiable for one more reason. We have already discarded his fertile imagination of an attack by a gang of five men. The evidence is irrefutable that the fight was between the two of them only. Now, imagining that he was under attack by the deceased, the accused doesn't mention in his narration of the assault that the deceased was armed with anything. He must have been using his bare hands. We are also told that the accused had the upper hand in the second fight. It was thus needless for him to use the lethal weapon of a broken beer bottle to avert the attack on him by the deceased. Clearly, the means that he used were not commensurate to the attack that he was under. We would still reject his defence on this second basis but like we have already pointed out, the defence fell at the first hurdle when it became clear that the accused was not under attack. Instead it was him who was attacking the deceased.

[19] Once we reached the above conclusion, the question of whether or not the accused intended to kill the deceased is a foregone one. He did. A person who uses an object as sharp as a shard to stab a vulnerable part of another's body like a belly must and indeed foresees the risk or possibility that his conduct may lead to death. That the broken bottle split the stomach to the extent of the deceased's intestines coming out is a clear sign of the force that must have been used in the assault. That on its own further supports our finding that the accused cannot deny having intended to kill the deceased. It is for the same reason that this aspect of the accused's defence remained tepid. It was not seriously argued. We dismiss it like we dismissed the accused's argument of self-defence.

[20] In the circumstances, we are convinced that the state managed to prove beyond reasonable doubt as required by law, that the accused is guilty of the murder of the deceased. **Accordingly, the accused is found guilty of murder as charged.**

MUTEVEDZI J:

National Prosecuting Authority, the state's legal practitioners
Mupindu Legal Practitioners, accused's legal practitioners