THE STATE
versus
PRIMROSE GUVHEYA

HIGH COURT OF ZIMBABWE
CHAREWA & MUZOFA JJ
HARARE, 20 June 2018

Criminal Review

CHAREWA J: The accused was charged and convicted of culpable homicide in contravention of s 49 (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code). She was sentenced to 4 years imprisonment, wholly suspended for 5 years on condition that she did not, during this period, commit any offence involving assault for which she is convicted and sentenced to prison without the option of a fine.

The circumstances of the offence are that the accused and her female friend were, on 17 June 2017, in a night club dancing to music and minding their own business. The deceased propositioned the accused and was rebuffed. According to the State outline this proposition comprised of deceased hugging and caressing the accused, touching her buttocks and inviting her to have sexual intercourse. Having been rebuffed the first time, the deceased importuned the accused a second time and was once more turned down. The deceased was undaunted. He persisted with his sexual advances a third time where upon the accused pushed him off her with both hands. The deceased stumbled backwards and hit his head against a concrete pillar, fell to the ground and hit the back of his head against the floor. He lost consciousness, and was revived by the night club owner. The following day the deceased fell ill and complained of a headache. His brother took him to hospital where he was admitted for 4 days. He eventually died on 23 June 2017. A post mortem report concluded that he died of severe cerebral oedema, subdural haematoma, and skull bone fracture and head trauma consistent with head injuries.

The accused is 18 years old, a first offender with a 4 year old child and who pleaded guilty. It seems to me that the trial officer dealt with this matter in a very cursory manner, in circumstances where an 18 year old first offender could not have possibly understood the elements of the offence or that she had a plausible defence.

Paragraphs 5 and 6 of the State Outline are quite clear: the deceased made a nuisance of himself, subjecting the accused to persistent groping which was unwelcome. It was only on the third attempt that the accused had no option but to try and push the deceased off her whereupon he stumbled and hit his head on a pillar and fell to the floor with the back of his head.

It cannot be said that the accused was negligent in doing so. In fact, the record does not show that the accused used force which was not commensurate with the attack on her bodily integrity. Clearly, the defence of self-defence was open to her and the trial officer failed to draw this to her attention. Section 253 of the Code sets out the requirements for self-defence 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
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> (*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
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> (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.
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> (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."

Clearly, the accused only pushed the deceased away on the third unwanted sexual advance thus satisfying the requirements of sub-section 1(a). And after rebuffing the deceased's unwanted advances twice, pushing him away with her bare hands could not be said to have been an unnecessary conduct as defined in sub-paragraph (b) or that she used unreasonable means in terms of sub-paragraph (c). Nor could the fact that deceased eventually succumbed to the injuries he sustained be held to be disproportionate as envisioned in sub-paragraph (d). It could not have been foreseeable that pushing a man away, with a girl's bare hands, could lead to fatal consequences.

Our jurisprudence has already decided that subsection 2 requires that each case must be dealt with according to its own circumstances, and that judicial officers must not adopt an armchair approach.[1] In particular a trial officer is enjoined to take a robust approach rather than try to measure the precise bounds of legitimate self-defence with intellectual callipers.[2] It is thus trite that one must assess the reasonableness of a person's behaviour when he is acting in self-defence, not in the rarefied atmosphere of the Court, but one must look, even though objectively, at the situation as it existed at the time in relation to the particular person one is considering.[3]

The circumstances of the case cried out for the magistrate to assist the accused who was an unrepresented young person. While not suggesting that the magistrate ought to have advised the accused of the defences open to her, case law has already placed an obligation on judicial officers, in circumstances where an accused person is not defended, to ensure that the accused's case is fairly put before the court and that the prosecution does not take any unfair advantage.[4] GILLESPIE J observed that:

> "Where it is necessary to invoke …..(s271(2)(b)(i)), then the essential elements of the offence must be explained in such a way as is calculated to inform the accused, if unrepresented, of the nature of the charge in sufficient clarity and detail as will suggest to him, in his knowledge of the matter, whether he has a defence to offer……it must not be overlooked that where a person on trial has not had the benefit of legal advice, the only possible source of independent assistance towards an understanding of the nature of his predicament will be the bench. The mere fact that the person wishes to plead guilty is no reason to be cursory in the explanation of the essential elements. On the contrary, it is precisely because an admission of guilt is tendered that it is necessary to ensure that the accused has applied his mind to the true import of the charge and is properly aware that anything he might wish to say in his behalf could constitute a defence."[5]

In particular, the Supreme Court has laid down three questions which a trial officer must ask himself in dealing with undefended accused,[6] thus:

1. Where the accused has pleaded guilty, would it be appropriate nonetheless to enter a plea of not guilty in terms of the provisions of s 255A of the Criminal Procedure and Evidence Act?

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[1] See *S v Banana* 1994(2) ZLR 271 (SC) @ 274 D-F.
[2] See *S v Ntuli* 1975 (1) SA 429 (A)
[3] Per Fieldsand CJ in *S v Phiri* SC-190-82.
[4] Per Beadle CJ in R v Muchena 1966 RLR 731 (A) @ 736 H.
[5] See S v Machokoto 1996 (2) ZLR 190 (H) @ 200G-201B
[6] *S v Dube & Anor* 1988 (2) ZLR 385 per Dumbutshena CJ @ 392H – 393F

2. Where the accused is unrepresented, would it be fair and appropriate to advise him of the complexities of the matter and enquire whether he has considered obtaining legal representation?
3. If satisfied that the accused should have legal representation but cannot afford it, should the court certify that he should have legal representation in terms of the provisions of s 3 of the Legal Assistance and Representation Act [*Chapter 66*] as amended by s 2 of Act 21 of 1974.

In the light of the above, the accused, an 18 year old first offender, is unlikely to have appreciated the proceedings, and pleaded guilty without being aware that she had a possible full defence.

In the circumstances the conviction is not safe and should be quashed and expunged from her record.

Consequently it is ordered that the conviction be and is hereby quashed.

MUZOFA J agrees…….