

THE STATE

Versus

PRICHARD DUBE

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr Ndlovu and Mr Sobantu
BULAWAYO 7 MARCH 2024

Criminal Trial

K. Shava, for the state
T. Dube, for the accused

KABASA J: The accused appeared before us on a charge of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. He pleaded not guilty.

The state's allegations are that on 12 December 2022 at around 0145 hours the accused and the now deceased were drinking beer at Mahweba Night Club when a misunderstanding ensued resulting in a fist fight. The accused then stabbed the now deceased with a broken beer bottle on the left side of the chest. The now deceased succumbed to the injury upon arrival at Mpilo hospital.

In his defence the accused did not deny stabbing the now deceased with a broken beer bottle. He therefore did not dispute causing the injury which led to the deceased's death. He however explained that the deceased had provoked him and was attacking him and so he acted in self-defence.

To prove its case the state produced the accused's confirmed warned and cautioned statement and the post mortem report detailing the injuries observed on the now deceased's body.

In the very detailed warned and cautioned statement the accused explained that he had a misunderstanding with the now deceased at Kuvukiland Sports bar and he struck the now deceased with a small black label bottle on the face before leaving the Sports bar. He proceeded

to Mahweba Night club and the now deceased followed there and intended to fight him. He ran outside and as he was walking away the now deceased followed him. He was startled. He proceeded to break a quart of a black label bottle and stabbed the now deceased on the left side of the chest.

The post-mortem report compiled by Doctor Jekenya who examined the now deceased's body gave the cause of death as:-

- a) haemorrhagic shock
- b) intrathoracic haemorrhage
- c) chest stabbing
- d) assaults (Covid – 19 PCR positive body)

Among the marks of violence observed by the doctor were:-

- “c) Irregular deep right parietal eminence wound 5.2 x 4.3 cm and is 11 mm down to the skull bone.
- d) There is an oblique clean 20 mm wound just below the left clavicle (collar bone) about 5 cm from midline (suprasternal notch). The wound runs from the clavicle going inwards, downwards and slightly backwards. It travelled for more than 15 cm in the chest cavity causing massive haemorrhage from stabbing then descending the aorta ...”

The doctor explained that the Covid – 19 positive result did not contribute to the death but was an incidental finding. The left subclavian stabbing was the fatal cause of death.

The evidence of seven witnesses was admitted in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07. These witnesses are:-

Lindiwe Mkandla

Weddington Mugabe

Doctor Jekenya

Christine Mathe

Sandisiwe Ncube

Aaron Tendai Chizangwe and

Mbongeni Sibanda

Evidence was led from three witnesses. The first witness was at Kuvukiland Sports bar and later proceeded to Mahweba bar after the first bar had closed. Her evidence was to the effect that the now deceased assaulted her and they fought but were restrained. The now deceased also struck another lady with a brick. She proceeded to Mahweba bar where the now deceased had another altercation with patrons who were playing snooker until he was pushed out by ‘bouncers.’ The now deceased started throwing stones randomly but later stopped and patrons went and stood outside. The deceased was standing at a distance of about 10 metres from everyone else. The accused then came out of the bar and went to where the deceased was. She did not see what was in the accused’s hand but on approaching the deceased he made a swinging gesture at him and subsequently left. The now deceased appeared to be losing balance and subsequently fell.

The witness was adamant that the two that is accused and the now deceased were not involved in an altercation before the stabbing. At that time the deceased was no longer throwing stones.

This witness gave her evidence well. We were satisfied she was merely relating what she knew to have happened and nothing else. Her evidence showed that the now deceased was being a nuisance and appeared to have had a run in with a lot of people.

The second witness’s evidence was more or less the same as the first witness’s. He observed the deceased at Kuvukiland Sports bar and confirmed the assault on the first witness and another lady. The deceased was assaulted by patrons at this place before it closed and people moved to Mahweba bar. He saw the deceased throwing stones but he eventually stopped and stood at a distance on his own. As he was standing there the accused confronted him and this witness described the same swinging movement which the accused made before the now deceased fell to the ground.

Like the first witness his evidence was straight to the point. He did not seek to exaggerate or to minimise what the now deceased did on this night.

He too was a credible witness whose evidence can be safely relied on. The stabbing of the deceased occurred when the deceased was unarmed and had stopped throwing stones. He was standing some distance away on his own.

The last witness's evidence also corroborated the first two witnesses' evidence as regards what happened at Mahweba bar. This witness was not at Kuvukiland bar and so he did not seek to speak about the events that happened there.

He saw the deceased being pushed out of Mahweba bar. Accused followed the deceased and stabbed him but he did not see what the accused used.

Granted all the witnesses had been drinking beer but they all said they were not drunk as to fail to appreciate what was going on. Their account of what happened is testimony to the fact that they were aware of what was happening.

We did not lose sight of the accused's explanation. He said he was defending himself. Section 253 of the Criminal Law Code sets out the requirements for the defence of self. Where such requirements are fully met self-defence amounts to a complete defence.

These requirements are:-

1. The accused must be under an unlawful attack.
2. Such attack must have commenced or was imminent.
3. The accused's conduct must be necessary to avert the attack after exploring all avenues of escape.
4. The means used to avert the attack must be reasonable in all the circumstances.

It was the accused's story that after Kuvukiland where he struck the now deceased with a bottle he proceeded to Mahweba. At Mahweba he decided to go home as he felt unsafe. That is when a brick thrown by the now deceased missed him. "It hit the upper part of the door frame and people scurried for cover in the night club and he tried to hide by the shade outside the bar and the brick hit him on the left hand thumb."

We must say we were puzzled as to how that same brick that had missed him, hit the upper part of the door would bounce back and hit him on the left hand thumb. None of the witnesses witnessed that and yet they were at that same place and witnessed the brick throwing.

The accused went on to say he was startled when he saw the deceased close to him carrying bricks and he then broke a bottle and merely waved it at him to scare him away but the deceased kept advancing and that is when he was stabbed.

This account gives the impression that the stabbing was accidental and not intentional. It was as if the deceased got in contact with the broken bottle and not that the accused stabbed him.

If that was so would the stab wound have travelled for more than 15 cm into the chest cavity causing massive haemorrhage?

We are alive to the fact that the accused need not convince the court as to the truthfulness of his story. Whatever explanation he gives, no matter how improbable it may be, the court cannot dismiss it unless it has been shown to be not only improbable but beyond doubt false (*R v Difford* 1937 AD 370, *S v Kurauone* HH 961-15)

The accused's story must however not be looked at in isolation. The court must look at the totality of the evidence.

Unlike the state witnesses, accused was not honest. He was at pains to show that he did not make a deliberate move to stab but was only waving the bottle. One wonders why he deemed it necessary to break that bottle first.

He was not the only one present at this bar when the deceased was throwing stones. It cannot be said he was the one under attack. Even if he was, the stabbing occurred when the stone throwing had stopped and the deceased was standing alone unarmed.

The accused could have easily walked away just like every other patron who was there but he chose to confront the deceased. He approached him and stabbed him causing him to fall. He thereafter walked away.

We got the distinct impression that the accused was irritated by the deceased's behaviour but surely his behaviour must have irritated the other patrons equally. Was the accused's action necessary? We would say it was not. His action was meant to teach the deceased a lesson and not dictated by a desire to fend off an attack. There was no attack on his person.

The very first requirement therefore was not met. Without an unlawful attack there can be no self-defence for what would one be defending themselves from?

The defence of person is therefore not available to him.

He also said he had been provoked. Section 238 of the Criminal Law Code provides that:-

“If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realisation referred to in section forty – seven, the person shall be guilty of culpable homicide, if, as a result of the provocation –

- (a) he or she does not have the intention or realisation referred to in section forty – seven or
- (b) he or she has the intention or realisation referred to in section forty-seven but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control.”

The law recognises that one can be so provoked that they lose self-control and lash out in the heat of the moment. In this case the accused left Kuvukiland after hitting the deceased with a bottle because the deceased was being a nuisance. At Mahweba the deceased was not being a nuisance to the accused in particular but to other patrons and that is why the bouncers threw him out. The question is why the accused felt so infuriated to the point of confronting the now deceased who was then standing alone at a distance from everyone else, break a bottle and proceed to stab him?

Granted the court must not adopt an armchair approach but what had so incensed the accused at the time he stabbed the now deceased? His story is that he was defending himself at the time of the stabbing and we have already said he was not under attack.

If therefore his explanation for the stabbing is that he was startled and believed he was in danger, which story has been shown to be false, he cannot be heard to jump onto provocation because he did not react after losing control from being provoked. The evidence we have already accepted as credible does not speak to such provocation. He too does not say he stabbed the now deceased because he had lost self-control due to provocation. His story in our view was shown to be not only improbable but beyond doubt false. It is not difficult for one who is being honest to just state why they behaved in the manner they did and not jump from one

explanation to another. As at the time of the stabbing the accused was the aggressor who, out of all the other patrons, saw it fit to confront the deceased and fatally stab him.

The accused used a broken bottle to stab the now deceased in the chest with such force that the stab wound travelled more than 15 cm into the chest cavity. The chest houses delicate organs and to use a sharp object with severe force in stabbing a human being in the chest can only show an intention to kill, whether legal or actual is neither here nor there given MAKARAU JA's remarks in *S v Mapfoche* S 84-21. The distinction is insignificant, murder is murder, whether it is as per section 47 (1) (a) or (b).

In *S v Mugarapanyama* HH 211-23 MUREMBA J had this to say on the defence of provocation:-

“Case authority shows that this second stage of the defence of provocation only succeeds in a limited range of situations. Where the provocation has been very severe see Prof G Feltoe *Commentary on the Criminal Law (Codification and Reform) Act* Chapter 9:23. Prof G Feltoe says this can happen in cases where the accused discovers his or her spouse in the act of adultery and kills the spouse or lover. It can also happen in a case where the accused discovers a man raping his daughter or sodomising his son. Prof G Feltoe refers to the case of *S v Nangani* 1982 (1) ZLR 150 (S) where a man killed his wife in circumstances which led him to believe that she had engaged in sexual intercourse with another man. In *S v Ncube* S 14-87 a woman stabbed to death a woman who had been committing adultery with her husband when she found her kissing her husband.”

The loss of self-control in these cases justified the reduction of murder to culpable homicide. In this case the evidence does not show a man who was so provoked as to lose self-control. This was a man who was just angry and wanted to teach the deceased a lesson. He did not act out of a loss of self-control.

He may have been drinking but he knew what he was doing and a narration of what he seeks to portray as the events of this day shows that he was not so drunk as to fail to appreciate what he was doing. The deliberate smashing of the quart of beer and the viciousness with which he stabbed the now deceased in the chest betrays a man who wanted to inflict maximum damage.

The defence of provocation is not available to him.

With that said, the use of a broken bottle to plunge into another human's chest travelling more than 15 cm into the chest cavity can only give rise to the inescapable conclusion that the

accused must have realised the real risk or possibility that his conduct may cause death but continued nonetheless.

We are therefore satisfied the state has proved its case beyond a reasonable doubt and accordingly find the accused guilty as charged.

Sentence

In assessing sentence we considered the following:-

The accused is a first offender, married with a 5 year old child. He was 33 at the time the offence was committed.

His family is likely to suffer as a result of his incarceration.

He expressed regret and showed he was remorseful throughout the trial.

He has been in pre-trial incarceration since 13/12/22.

The deceased was a nuisance on this night. The murder was not pre-meditated.

Aggravating is fact that a weapon was used to viciously stab deceased in the chest.

A life was needlessly lost. Courts have time without number exhorted society to respect the sanctity of life. The taking of another's life should be frowned upon by all right thinking people.

The presumptive penalty per SI 146/23 is 15 years. This is not cast in stone and for good reason the court can depart from it.

Given the mitigatory factors highlighted above, a sentence of 12 years will meet the justice of the case.

Accused is accordingly sentenced to

12 years imprisonment

National Prosecuting Authority, state's legal practitioners
Ncube and Partners, accused's legal practitioners

