

THE STATE
versus
OBVIOUS CHITARA

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 23 March & 30 May 2023

Criminal Trial

Assessors: Mr *Mhandu*
Mr *Kunaka*

A Mupini, for the State
S Chigumira, for the accused

MUNGWARI J: The mishap which resulted in the deceased's unfortunate death was a turf war. The deceased was unreasonably territorial. The state alleges that on 27 December 2020 at around 2am, the deceased was drinking beer with fellow patrons in George Bottle Store, at Katiyo Business Centre in Uzumba. The accused entered the bottle store and joined other patrons. The deceased who appeared to be thoroughly inebriated and aggressive suddenly confronted the accused. He questioned the accused why he had come to drink beer at Katiyo Business Centre instead of going to Mashambanhaka Business centre which was closer to his homestead. The accused did not respond but rather proceeded to the counter. The deceased was unrelenting. He charged towards the accused and struck him with open hands and fists on the face several times. To his credit, the accused did not retaliate but ran to the other side of the bottle store. Presumably buoyed by the apparent cowardice exhibited by the accused, the deceased pursued the accused and continued to assault him with fists. The accused bled from the nose due to the assault. Cornered, he attempted to fight back but was overpowered by the deceased. When he managed to wriggle out of the deceased's grip, the accused took an empty beer bottle, broke it using the edge of the counter and stabbed the deceased several times on the head and left palm. Other unidentified patrons pleaded with the accused to stop the assault on the deceased and he complied. The deceased bled profusely from the resultant wounds. The accused then left the scene to an unknown location while the deceased made a police report and was referred to Mutawatawa Hospital where he was admitted. His condition

deteriorated and on 2 January 2021 he died. A post-mortem conducted by Doctor Pepukai Muzanhi concluded that the cause of death was due to haemorrhagic shock.

Needless to say, the police arrested the accused and prosecution preferred the charge of murder which the accused faces. In the charge of murder he is alleged to have unlawfully and intentionally caused the death of Believe Kurarama (deceased), or that realising that there was a real risk or possibility of death resulting from his actions but nonetheless persisting he stabbed the deceased several times on the head and left palm with a broken beer bottle, causing mortal injuries in contravention of s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The accused denied the charge and proffered the following in his defence outline. On the day in question, he went to George bottle store. On entering, the deceased immediately accosted him. He demanded that the accused buy him beer. The accused refused and proceeded to the bar counter. He tried to avoid the deceased, but was followed and assaulted by the deceased who by then had been joined by up to four other assailants. The accused sustained severe injuries including the loss of several teeth. In self –defence and out of fear for his life, the accused grabbed a bottle off the bar counter and used it to defend himself. The other patrons in the bar separated the parties. The accused said he immediately left the bar. At the time he left the bar, the deceased was alive and well. Later that day, while back in his home village, the accused was contacted by other villagers who informed him that the deceased and his friends were in the village, looking for him. The deceased was alive but with a bandaged head. The accused maintained that the deceased assaulted him and subsequently provoked him. He merely acted in self-defence. He denied any intent or motive to kill the deceased and claimed that he actually sought to avoid the deceased who was deliberately being a nuisance in pursuing and assaulting him.

The state case

The state opened its case by applying to tender a medical affidavit by Dr Pepukai Mazanhi stationed at Mutawatawa District hospital. The defence consented to the production of the affidavit which was marked as exhibit 1 in the trial. Dr Mazanhi examined the deceased, who was admitted into the hospital on 2 January 2021. He noted that the deceased had no pulse and certified him dead at 4pm the same day.

On 3 January 2021, Dr Mazanhi conducted a post-mortem examination on the deceased's remains. He observed lacerations on the left and right parietal region, as well as unidentifiable marks on the anterior chest wall. Additionally, he noted the presence of matter

coming out of the nose and mouth. Based on his findings Dr Mazanhi concluded that the cause of death was due to haemorrhagic shock. The post mortem report with observations and conclusions was produced with the consent of the accused and marked Exhibit 2 in the record of proceedings.

Noteworthy is the fact that the deceased was admitted to hospital on 2 January 2021 contrary to the State's assertion that he was admitted on the day of the assault, on 27 December 2020. The medical evidence therefore, corroborated the accused's assertion that when he left the scene the deceased was alive and well and was spotted later in the neighbourhood with a bandaged head, and in the company of his friends, still militant and baying for the accused's blood.

In addition to the above, the evidence of all five state witnesses namely Melody Dzviti, John Nyakabangwe, Nhete Kurarama, Enock Katiyo and Prince Tineyi Mutumbami was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], (CP &EA) as it appeared in the state outline. The evidence of these witnesses also corroborated the accused's defence outline and made the following facts common cause:

1. On 27 December 2020 at around 2am Melody Dzviti a bar tender at George bottle store witnessed the deceased accosting the accused. John Nyakabangwe a patron at the bar also observed the altercation. The witnesses saw the deceased charging towards the accused and assaulting the accused repeatedly on the face, causing the accused to bleed from the nose. Despite the attack, the accused did not retaliate and actually attempted to evade the deceased's advances. However after sometime, the accused was frustrated and fought back but was overpowered by the deceased. The accused then broke an empty beer bottle and charged towards the deceased, who retreated and sat down. The accused stabbed the deceased multiple times with the broken beer bottle on the head and the left palm. Other patrons eventually restrained the accused. John Nyakabangwe saw the deceased leaving the bar, crying for help. He also saw the accused leave the scene holding the empty broken beer bottle that he had used to stab the deceased.
2. After learning of the deceased's death on 2 January 2021, Nhete Kurarama reported it to ZRP Mutawatawa.
3. Enock Katiyo and Prince Tineyi Mutumbami both duly attested members of the Zimbabwe Republic Police conducted an investigation into the murder charge against the accused. Following the investigation, Prince Mutumbami arrested the accused.

Defence case.

The accused provided a detailed testimony in his defence. He explained to the court that on 27 December 2020 he entered George bottle store with the intention of purchasing cold beer. There was no cold beer at the place where he had previously been drinking from. The deceased, who was intoxicated, confronted him and demanded to know why he was at George bottle store. The accused tried to ignore the deceased and approached the bar lady to make a purchase. Suddenly, the deceased attacked him from behind, and a series of assaults followed. The accused attempted to escape and sought refuge behind the pool table, but the deceased caught up with him and caused him to fall to the ground. The deceased continued to assault him until other patrons intervened and pulled the deceased off him. The accused tried to leave the store, but the deceased pursued him relentlessly, attacking him with fists and open hands. The accused realized that the door to the store had been closed. A substantial number of people in the store tried to restrain the deceased but failed.

Eventually, the deceased overpowered the people who were trying to restrain him in order to drag him outside. He remained inside and continued to assault the accused inside the bottle store. In the midst of the assaults the accused tearfully asked the deceased why he wanted to kill him. The deceased did not respond. Instead, the deceased hit him on the head with an unknown object, causing severe injuries, including the loss of four teeth. The accused started bleeding from the mouth and nose. He feared for his life. He was certain that if the deceased continued, he would either inflict life threatening damage or kill him altogether.

Without putting much thought into the consequences of his actions and in the heat of the moment the accused picked an empty beer bottle which was on the bar counter. It was the only weapon within his reach. His intention was to scare the deceased so that he could give way to him and allow him to flee the scene through the doorway. The accused broke the bottle on the edge of the counter and started to walk towards the door hoping that this would deter the deceased. However the deceased purposefully charged towards him clearly intent on continuing with the assaults. The deceased threw a fist towards him and the accused used the broken bottle in his hand to ward off the attack. The blow with the bottle landed on the palm and head of the deceased but the deceased was undeterred. The accused then stabbed him on the face with the bottle. The deceased only stopped fighting back when he realized that he was injured. The accused then took to his heels and fled the scene. He claimed that he never intended to kill the deceased.

During cross examination, the accused denied being drunk and stated that he had specifically gone to George bottle store to buy cold beer. He had always known the deceased as a naturally violent person but still enjoyed cordial relations with him. Asked why he did not exit the shop the accused explained that there was only one exit in the bottle store which the deceased had closed. The bartenders exit was closed to the public with a burglar barred screen door. This was compounded by the fact that the deceased continuously assaulted him, making it difficult for him to shield himself or dodge him. The other patrons had tried but could not restrain the deceased. He confirmed that the deceased prevented him from exiting the shop as he trailed him and blocked him at every turn. When it was put to the accused by state counsel that his actions of stabbing the deceased with a broken bottle were grossly disproportionate against the unarmed attack by the deceased the accused said he had no idea how else he could ward off the attack from the deceased in the circumstances, as a number of men had even failed to restrain him. The accused said he was surprised to hear of the deceased's death eight days later and even went into denial. While he agreed that he may have caused the deceased's death he denied doing so intentionally.

Issues for determination

The issue which lies for resolution in this case is whether in causing the death of the deceased the accused acted in self-defence and thus lacked the requisite intention to sustain a charge of murder. We now turn to analyse the evidence.

Analysis of evidence

The accused appeared to us to have been an extremely tolerant man. He was under siege and was subjected to extreme provocation from the time he set foot inside the bar. Evidence before us is that when the accused entered the bar, the deceased was seated in some part of the bar. The deceased stood up when he saw the accused and that signalled the beginning of the provocation. The accused was verbally quizzed by the deceased on the reason for his presence at the bar. He was assaulted. He tried to brush it aside but the deceased's brazenness and belligerence was unmitigated. All the state witnesses alluded to this fact. It was undisputed that the accused suffered extreme provocation. He does not however seek to rely on that defence because he managed to withstand the provocation.

The accused was clear that in assaulting the deceased with a broken beer bottle he acted in self-defence. The only door accessible to the public and through which the accused could have attempted to escape had been closed by the deceased. Some men had tried to pull the deceased out of the bar and failed. They left him inside and he continued to viciously assault

the accused. The accused was literally trapped inside the bar with nowhere to hide. Those who were inside with him did nothing to help. He was assaulted and lost four teeth, was injured behind the ear and on the head.

On one hand, Melody Dzviti and John Nyakabangwe saw the accused charging towards the deceased with a broken beer bottle in hand. They also saw the deceased retreating and sitting in the place he had been in before he started assaulting the accused. Their evidence is uncontroverted. It was formally admitted in terms of s 314 of the CP&EA. On the other hand is the accused's evidence that the deceased never retreated nor sat down. He continued hounding him even after he broke the bottle. We find the accused untruthful in his assertion that the deceased continued to charge towards him when in actual fact it was him who charged towards the deceased and he retreated and sat down. He assaulted the deceased when he was sitting down. What is not in doubt however, is that despite that the deceased sat down and at that moment refrained from assaulting the accused, the danger had not yet dissipated. The hiatus in the assault in our view was inconsequential. The accused was still trapped inside the shop. The deceased who though seated had sprung up previously and had assaulted the deceased relentlessly. That same person was still in the shop. If anything the deceased must have been angrier at the accused's temerity to challenge him.

The accused's evidence is that even after he had assaulted him the deceased still wanted to attack. The accused did not feel safe and was sure that the deceased was still intent on pursuing him. His fear is supported by what transpired afterwards. When the deceased left the scene he mobilized his friends. Even in the pain of an injured head he had the courage to pursue the accused to his village to accost him. We can safely conclude that the friends were hired assailants meant to reinforce the deceased's charge. Either way their presence in the accused's village was unsettling to him. We outline all this to illustrate that the danger which one may think had passed had not.

Lastly evidence was also led by the State to show how the accused stopped assaulting the deceased. He was restrained and immediately took heed and stopped. His actions of stopping immediately have a bearing on his intentions.

Self defence

Section 253 of the Criminal Law Codification and Reform Act [*Chapter 9.23*] states that self-defence can be a complete defence if an unlawful attack on the accused had commenced or was imminent. It is trite that a person is entitled to take reasonable steps to defend themselves, third parties or their property against an unlawful attack. In circumstances

of imminent danger to life, the killing of an assailant may be excusable. The requirements of that defence were preeminently explained in the case of *S v Banana 1994(2) ZLR 271 (S) at 273*. They are that:

- a. There must be an unlawful attack
- b. the attack must have commenced or was imminent
- c. that attack must be directed upon an accused person or upon a third party
- d. the action taken must be necessary to avert the attack or the accused must believe as such
- e. The means used to avert the attack must be reasonable.

The strict requirements in place serve to discourage acts of self-justice. In order for the defence to be successful, all of these requirements must be met. There is little if any debate surrounding these requirements, and the position has become settled in this jurisdiction. When the requirements are applied to this case it becomes clear that the first three requirements have been fully satisfied as will be demonstrated hereunder:

1. unlawful attack which had commenced, or was imminent and directed at the accused

It is undeniable that the accused was subjected to a vicious and prolonged attack .From the moment he entered the bottle store at 2 am he was harassed and assaulted by the deceased. He did not even get a chance to sit down. The deceased made sure not to afford him that opportunity. The accused was on his feet from that minute until he left the store, all the while running scared of the deceased's continuing attack. Despite the efforts of other patrons to intervene, the deceased continued to attack the accused. He lost four teeth and sustained injuries to his head and ear. It is significant that the attack took place in front of other people who failed to restrain the deceased. The cornered accused was convinced that the deceased was not going to let him out of the bar alive. With no help forthcoming, the accused was forced to defend himself using the only weapon he could find. Given the circumstances, it is apparent that there was an unlawful attack that had commenced and there was imminent threat of death which was directed at the deceased.

We therefore have no apprehension that the accused satisfied the first three requirements for the defence of self-defence.

2. The action taken and the means used to avert the attack were necessary and reasonable

In casu the accused attempted to leave the bar several times. He was trapped and continually assaulted by the deceased who was excessively drunk and aggressive. Despite the efforts of several men he could not be restrained. The accused had tried to avoid the deceased but he persisted in his attacks. With teeth falling out of his mouth and an injured head, the accused attempted to scare the deceased away and find an opportunity to escape. The only weapon available to him was an empty bottle which he broke in the hope that the deceased would be deterred. Admittedly it became a lethal weapon. Despite being seated the deceased still managed to throw a punch. He was undeterred. The door to the shop was still closed. The accused was somehow the stranger in the bottle store. He was far from his own turf as it were. He was not sure who was or who was not on the deceased's side. Unless if he immobilised the deceased, the chances that he would return to continue his aggression towards the accused were very high. It was for those reasons that the accused used the broken bottle to attack his assailant on the palm and other parts of his body that the deceased did not manage to shield including the head and chest.

Given the barbaric and relentless nature of the attack, it would be an armchair and unreasonable approach to expect that the accused should have had the presence of mind to carefully consider which weapon was appropriate to defend himself with. It would be unfair to have expected him to make a calculated decision in the heat of the moment. The caution against the armchair approach requires the court, in assessing whether the action taken and the means used to avert the attack were necessary and reasonable, to place itself in the shoes of the accused and consider all the circumstances. In providing defences to crimes, the law does not expect the courts to sit back and analyse issues from an abstract perspective. Instead the court is expected to contextualise the predicament of an accused who alleges he was under siege. The accused had no opportunity to rationalise on the selection of weapons. He simply latched on to the first weapon he saw to immobilize the deceased and create an avenue for escape. It is clear that the accused did not intend to kill the deceased but rather to defend himself and escape further harm. In the heat of the moment, he also had no opportunity to select a specific part of the deceased's body to aim at. Failure to seize the opportunity to grab the bottle would have resulted in more vicious assaults and potentially the death of the accused. He had already lost four teeth. It is preposterous to imagine that he should have waited for more harm before defending himself.

In its closing submissions, the state correctly conceded that the accused did not commit murder. It however argued that the accused was negligent in his actions as he used excessive and unreasonable means to defend himself against the attack. The State referenced the case of *Chamunorwa Munyaradzi Mandizha v The State* SC 200/91. What the prosecutor omitted to mention is that the same case emphasized the importance of assessing the reasonableness of a person's behaviour in self-defence based on the circumstances at the time and in relation to the character of the deceased. GUBBAY CJ in the referenced case, stated that regard should be had to the character and nature of the deceased as this is a factor of importance in attempting to determine what went on in the mind of the accused when he was attacked. He quoted with approval the approach that was adopted by the court in the case of *Phiri v The State* SC 190/82 wherein FIELDSEND CJ said the following:

“It is trite that one must assess the reasonableness of a person's behaviour when he is acting in self-defence, not in the rather rarefied atmosphere in the court, but one must look, even though objectively, at the situation as it existed at the time and in relation to the particular person one is considering”

The uncontroverted evidence is that the deceased was a naturally aggressive man who had previously been involved in many altercations with other men in the neighbourhood. Despite this the accused had maintained a cordial relationship with him. When the accused saw the drunk deceased acting aggressively, he knew he was in for a hard time. He tried to avoid retaliation but eventually had to defend himself to avoid being killed. For the State's assertion to stand the prosecutor needed to prove that while the accused had no other means at his disposal he was nonetheless reckless with the use of the broken bottle. Evidence before us shows that the deceased though unarmed was unrestrainable. He was on the war path easily shrugging off attempts to restrain him. It cannot be discounted that the other patrons may have been equally afraid of him given his violent disposition.

In the circumstances prevailing, it was unrealistic to expect the accused to have continued to dodge the deceased's blows. Faced with a potentially fatal assault, the accused had neither the chance nor the opportunity to rationalise the degree of force or the number of blows necessary to avert the danger to his life. The action taken to avert the attack was therefore necessary and the means used were equally reasonable.

From the above analysis, it is clear that the accused satisfied all the requirements to sustain the defence of self-defence. He could not be expected to have done anything else. He did not have the necessary intention to sustain a charge of murder.

Disposition

From the evidence before us the defence of self-defence is available to the accused. While courts do not condone violence or self -help remedies, there are circumstances where a pugnacious person corners and assaults someone to the point where self-defence becomes necessary. In this case all the necessary requirements for a self-defence claim have been met and consequently we find that the accused had the right to defend himself. As such we are not convinced that the State managed to prove that the accused had the requisite intention to sustain a charge of murder. The question of negligently causing the death of the deceased cannot arise in the circumstances and a conviction on the competent verdict of culpable homicide cannot also be sustained. The accused is accordingly found not guilty and is acquitted of the charge of murder.

National Prosecuting Authority, state's legal practitioners
Whatman and Stewart, accused's legal practitioners