

THE STATE
versus
REMEMBER RANGWANI
and
PASSMORE RANGWANI

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 22 March & 26 July 2023

Assessors: Mr Barwa
Mr Chimonyo

Criminal Trial

M Furidze, for the State
D Chikwangwani, for the 1st and 2nd accused

MUTEVEDZI J: This was a David and Goliath story. The deceased was a towering figure. He terrorised the two accused persons after they accused him of selling fetid meat. He unfortunately came out of the fight he had started and thought he would easily win worse. Remember and Passmore Rangwani are brothers. They are alleged to have killed Jealousy Jiri on 27 February 2022. The allegations specifically state that on that date, each or both of the accused unlawfully and with intent to kill or realising that there was a real risk or possibility that their actions could result in death and regardless of that realisation of risk or possibility persisted with their conduct and assaulted Jealousy Jiri (the deceased) all over his body with a bottle of whiskey, clenched fists and open hands. The deceased died from the assault. The State alleged that the fracas which led to the deceased's death occurred at a shopping centre called Candy Business Centre located in a suburb called Southlea Park in Harare. The deceased had a market spot from which he was vending goat meat on the fateful day. He was approached by the two accused. An altercation ensued as a result of a disagreement over the price and quality of the meat which the deceased was selling. The deceased then slapped the first accused twice with open hands. The second accused retaliated by striking the deceased with a bottle of whiskey which was half-full, on the head. The deceased collapsed after which the second accused fled from the scene. The first accused continued attacking the deceased using clenched fists and open hands. He was subsequently restrained by members of the public who had

gathered at the scene. The second accused was also apprehended later. The body of the deceased was conveyed for a post-mortem examination which concluded that death was due to severe brain oedema, contusive focus in the brain and severe head trauma.

Both accused pleaded not guilty to the charge. Accused 1 said on the day in question he proceeded to the shopping centre in the company of accused 2. At the shops, they were drinking a type of whiskey called gold blend. Later that evening, they approached the deceased with the intention to buy goat meat. They ordered a portion but on inspection, accused 1 said he noted that the meat was rotten. He openly advised the deceased of his observation. The deceased was not amused that the first accused had made the remarks in front of other people who also intended to buy the same meat. He began shouting obscenities at both accused. To their credit, the two accused decided to leave. After a short while, the deceased who must all along have been following them appeared from nowhere and hurled more profanities at the accused persons. He threatened to kill them. He attacked accused 1 who had kept walking in the face of the insults from the deceased. Whilst the assault was on-going, accused 1 said he saw the deceased suddenly falling. He seized the opportunity to free himself and ran away. He said he only later learnt that the deceased had fallen because he had been hit by a bottle by the second accused. He added that he never assaulted the deceased but was actually a victim of the deceased's aggression.

Accused 2 said after realising that his brother was under attack, he threw a half full bottle of gold blend whiskey which he was holding in the direction of the deceased in an attempt to avert further attacks on accused 1. He was a distance away from the deceased but when the bottle connected the deceased fell to the ground. The second accused said he then he ran away from the scene because he feared that he could be attacked by the mob which was gathered there. He went home from where he was later apprehended by the police. He argued that he neither intended to kill the deceased nor did he foresee the possibility of his death. He threw the bottle to defend his brother.

State Case

Prosecution commenced its case by applying to tender the evidence of Blessing Chikoto in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Code). The defence consented to the application and the evidence was duly admitted as it appeared on the State's summary of evidence. It was insignificant because it dealt with the common cause issue that the deceased had a cut on the left side of the occiput. His head was also swollen.

The prosecutor also applied to tender the post mortem report compiled by the pathologist who examined the deceased's remains to ascertain the cause of death. Once more the defence did not object and the report was duly admitted and became exhibit 1 in the trial. Thereafter the State sought the admission into evidence of accused 2's confirmed warned and cautioned statement. The defence did not oppose the application. The statement became exhibit 2. The bottle of whiskey allegedly used in the commission of the murder was equally admitted and marked as exhibit 3.

Oral Testimonies

Brian Murwira

He was an eye witness to the murder. He said that on the day in question he saw the deceased violently pursuing the first accused. He chased him until the accused tried to seek refuge at a place where there was a crowd which was gambling. The deceased caught him and a fight ensued. During that fight, accused 2 approached the protagonists. He got into the crowd and hit the deceased with a whiskey bottle on the head. The deceased fell. Accused 1 continued assaulting the deceased with clenched fists and open hands whilst accused 2 fled from the scene. The witness said he was barely four metres away from where the fight was taking place. The deceased collapsed in a way which showed that he had been badly injured. Accused 1 then ran away. The entire fracas took about four minutes. When the first accused escaped, the witness said he advised some of the people who were gathered to try to apprehend him. He further said he observed the deceased hitting the first accused about three times with claps. Accused 2 then later joined in the fight. He remained in attendance at the scene until the arrival of the police. He said in his opinion, the deceased had died when he collapsed because he didn't scream or do anything. Some women vendors who were around had made futile attempts to resuscitate him. When the police arrived, he showed them where accused 2 resided. Under cross examination he repeated that it was the deceased who had chased after the first accused who sought refuge amongst a crowd which was gathered for gambling. He was asked to clarify the disparity between his statements to the police where he said accused 1 had thrown the bottle of whiskey yet in his evidence in court he alleged that he was holding the bottle when he struck him with it. The witness's explanation was that there could have been a misunderstanding when his statement was recorded but accused 1 was holding the bottle when he struck the deceased with it. He did not throw it. Asked to comment on the issue that the indications drawn by the investigating officer showed that the first accused was about three metres from where accused 2 and the deceased were fighting when he threw the bottle the witness said the first accused

had bulldozed his way past the crowd and attacked the deceased. He conceded that when accused 1 fled from the scene, he was possibly afraid that the mob could turn against him. He also admitted that the deceased had a bigger built than each of the accused.

Hamutendi Duri

He did not witness the fight between accused and the deceased. He did not see accused 1 attacking the deceased. He had only heard commotion about fifteen to twenty minutes earlier. He closed his shop when he heard that someone had been killed. He then proceeded to the scene where he gathered that accused 1 had fled but was hiding in a nearby maize field. He followed him up with a group of men. They apprehended him and brought him back to the scene. They left him under guard as he and a few others proceeded to file a report with the police. During cross examination the witness said he did not think that accused 1 knew that the deceased had passed on at the time that they apprehended him.

Portia Mandichera Dzanwa

After the murder had been reported, she proceeded to the scene where she formally arrested accused 1 who had been apprehended by members of the public. At the scene she recovered the whiskey bottle which had allegedly been used to assault the deceased. It was lying about one to two metres from where the dead body was. It was unbroken and still had some contents. She guarded the body until the next morning.

Timothy Muzeza

He was the investigating officer. He insisted in court that contrary to what Brian Murwira had said in court, when he recorded his statement Brian had actually said the second accused threw the bottle at the deceased. He also confirmed that the deceased had pursued the first accused with the intention of assaulting him. He caught up with him and assaulted him. Accused 2 retaliated and a fight ensued.

After the investigating officer's evidence, the prosecutor closed her case.

Defence Case

Remember Rangwani

He advised the court that he was largely relying on his defence outline as his evidence in chief. He said he approached the deceased to buy the meat as narrated earlier. He gave the deceased \$10. He wanted meat worth \$4. When he was given the meat, he wasn't satisfied with the portion because it looked small and appeared rotten. He demanded a refund of his money. He was refunded and put his money in his pocket. The deceased started scolding him. He threatened to beat him and kill him for accusing him of selling rotten meat in front of his

customers. The accused and his brother continued walking away. The deceased followed them. He caught up with accused 1 and assaulted him. The first accused said he ran into a crowd to seek protection. The deceased pursued him. The first accused fell to the ground but the deceased was unrelenting as he continued the assault. Some people tried to restrain him without success. At the time the first accused was down he said he saw the deceased fall to the ground. He seized the opportunity to run away. He later decided to return to the scene to check on his younger brother accused 2. He wasn't sure if he had managed to escape the deceased's wrath. It was then that he said he was apprehended by some people who accused him of having caused the deceased's death. They made him sit next to the corpse and demanded that he perform the miracle of resurrecting it. The police later arrived and arrested him. He was taken to the police station where they demanded to know where accused 2 had fled to. Accused 1 denied that he even fought with the deceased. Instead he said he was severely assaulted by him. He added that the deceased was way heavier and taller than him. He did not and could not have stood a chance against him. When asked to comment on the accusation that the second accused had struck the deceased with a whiskey bottle, the first accused's comment was that they had a bottle of whiskey from which they both had been drinking earlier. Under cross examination, it came out that the fight took place around 2000 hours. He denied the allegations that the deceased slapped him. Rather he said he was heavily assaulted. He did not see how the deceased was hit because he (the deceased) was bending over and assaulting him at the time he fell. He said he sustained a swollen face and lumps on the head. He was alerted to his statement to the police in which he stated that he had fought with the deceased after he had slapped him with open hands. The first accused indicated that he had told the police his version of events in the same way he had told the court. The police officers had however said they would take the version given by the witnesses. He agreed that when the deceased fell, he fled. He did so because he feared that if deceased got up he was going to assault him even more. One of the people in the crowd had actually advised him to run for his life.

Asked by the court to clarify his state of sobriety, the accused said together with his younger brother they had downed half the whiskey bottle. It was a 750 ml bottle. He admitted that he was starting to get drunk but was well in control of his faculties. He also stated that academically, he only went as far as form two. He thereafter closed his case.

Passmore Rangwani

He also adopted his defence outline as part of his evidence in chief. He is barely twenty years old. He conceded that he struck the deceased with the whiskey bottle but said he did so in an attempt to defend his elder brother who was under attack by the deceased. He threw the bottle at the deceased from about three metres away. The deceased was bending over the first accused and assaulting him. The second accused said he did not see which part of the deceased's body he struck but he had aimed the bottle at his backside. He said although he had taken alcohol, he wasn't drunk. He scoffed at the suggestion that he did not throw the bottle but rather hit the deceased whilst holding the bottle in his hand. The accused then closed his case.

Common cause issues

1. The accused persons and the deceased had a misunderstanding over the purchase of meat which the deceased was vending.
2. The altercation resulted in the deceased chasing after accused 1.
3. Accused 1 attempted to seek protection by running into a crowd but the deceased caught up with him and assaulted him. Accused 1 fought back in a bid to protect himself.
4. Accused 2 hit the deceased with a bottle which he threw from a distance of about three metres.
5. The deceased fell and subsequently died from the injuries sustained from the assault with the bottle.
6. The deceased was clearly the aggressor in all this.

The issues for determination

Our view is that the situations for accused 1 and 2 are entirely different. We conclude so because accused 1 did not do anything which led to the deceased's death. The chronology of events exonerates him. He attempted to buy meat from the deceased. He was not happy with both the pricing and quality of the meat because he believed it had putrefied. He demanded a refund of the money he had paid. He was refunded and started walking away but the deceased was not amused. He followed him, threatened to beat him up and kill him. The accused did not at that stage retaliate. He continued walking away. The deceased could not unfortunately be stopped from dying that night. He went after the first accused even when he sought the protection of a crowd that was gambling at the shopping centre. He assaulted the first accused not by simply clapping him as the prosecutor wanted us to believe but with some measure of brutality. The first accused could only try to fight back to protect himself. The evidence we have does not allege that he did anything more than that. His attempts to fend off the attack by

the deceased did not cause any injury to the deceased. As such there was no causal connection between the first accused's conduct and the deceased's injuries and subsequent death. As already said, the deceased was the aggressor towards the first accused such that if he had not died, it is very likely that he would have been charged with the assault of the first accused. That accused 1 had alleged that the deceased was selling rotten meat did not in any way give him the licence to viciously attack him like he did.

Against the above background, the only way that accused 1 can be connected to the murder of the deceased is if the court finds the second accused liable for it and determines that he acted in common purpose with accused 1. It appears clear to us once more that it is far-fetched to link the accused via that principle. The two accused persons at the time they approached the deceased to purchase meat for their supper, did not have any criminal design in mind. They were simply going home after a beer drink. Neither of them foresaw the grim and sudden turn of events which followed. They both tried to escape the anger of the deceased. In their bid to do so, they ran each in his own direction. They lost each other in the process. The deceased focused his anger on first accused presumably because he is the one who had uttered the words that the deceased's meat was rotten. When he was under attack, the first accused could not have foreseen the possibility that his younger brother would appear from somewhere and use the whiskey bottle to strike the deceased who would die from the injuries sustained.

Section 196A of the Criminal Law (Codification and Reform) Act deals with the liability of co-perpetrators. That principle embodied and legislated the common law concept of common purpose. It provides as follows:

“196A Liability of co-perpetrators

(1) If two or more persons are accused of committing a crime in association with each other and the State adduces evidence to show that each of them had the requisite *mens rea* to commit the crime, whether by virtue of having the intention to commit it or the knowledge that it would be committed, or the realisation of a real risk or possibility that a crime of the kind in question would be committed, then they may be convicted as co-perpetrators, in which event the conduct of the actual perpetrator (even if none of them is identified as the actual perpetrator) shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.”

What is clear is that the prosecution must not only elect to charge the accused persons with the commission of a crime in association with each other but that it must also lead evidence which shows that each of the accused persons had the necessary mental element to commit the offence. Put differently prosecution must show that independently of one another each of the

accused either intended to commit the offence, or knew that the offence would be committed or realised that there was a real risk or possibility that a murder would be committed. As already said, in this case, accused 1 did not even intend to assault the deceased let alone to kill him. He did not discuss the assault of the deceased with the second accused. He could not have realised the risk or possibility that accused 2 could fatally assault the deceased. There is simply no evidence to prove that accused 1 had the requisite *mens rea* to commit the murder. That requirement is the first step in proving common purpose or the liability of co-perpetrators. Our view is that accused 2's actions were completely independent of accused 1.

In relation to accused 2, the situation is slightly different as earlier indicated. He admits assaulting the deceased. His argument is that he did so in defence of his elder brother who was under attack. In other words accused 2 relied on the defence of person. Sections 252 and 253 of the Criminal Law Code establish and regulate s 253 that defence is couched 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, 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.

An accused is therefore permitted by law to kill in defence of another person. Previously this defence was called private defence or self-defence and defence of property. It encompassed the defence of a third party but the rider was that the person seeking to rely on the defence had to show that he/she had an obligation to defend the third party. Under statute, it appears that requirement is no longer necessary. As long as the person shows that he/she was defending another and then satisfies all the requirements, the defence will succeed. Below, we deal with the requirements and juxtapose them against the second accused's actions.

a. Attack commenced or imminent

The first accused was already under attack. He had fallen down and the deceased had cornered him. There was no question about the establishment of this requirement.

b. Conduct necessary avert attack from which it was not possible to escape

This requirement entails that a person under attack has an obligation to attempt to escape from the attack if it is possible. When dealing with the requirement courts are obviously discouraged from taking an armchair approach by which they would place onerous and at times unachievable expectations on an accused that he/she should have escaped the attack. In this case we have already said that accused 1 whom accused 2 was defending had already fallen. He was pinned to the ground by the deceased who was more heavily built than him. He could not escape. In fact when he got the slightest opportunity to do so, he escaped. But that opportunity only presented itself because the second accused had attacked the deceased. Once again it is evident that the second accused's conduct was necessary to avert the attack on his brother.

c. Means used was reasonable in the circumstances

The requirement appears self-explanatory. The determination whether the means used were reasonable must be made after examining the obtaining circumstances. For instance, the use of a gun may be unsuitable in some instance but may be the only reasonable means in another. In this case, the second accused used a bottle of whiskey which was half full. The attack on the first accused was unexpected. It happened at night around 2000 hours. The deceased had suddenly started chasing the accused persons and threatening to kill them. We have evidence that the brawl took about four or so minutes. There was commotion as the first accused went into the crowd to seek protection. He did not get any. It will be taking an armchair approach if we were to demand that accused 2 must have considered each weapon which came to his mind and determined its suitability. He had been holding the whiskey bottle all along. It must have naturally come to him as the only weapon available. The second accused said he aimed at the deceased's back as he was bending over assaulting the first accused. There could be very little argument if any about that. The injuries which the deceased sustained support that version. He was hit on the occiput. The bottle was not broken. It was a desperate attempt by accused 2 to rescue his brother. Our conclusion is that there was nothing outrageous about the means that he used given the prevailing circumstances.

d. Harm caused on attacker and not third party and was not grossly disproportionate

This is another requirement which has the potential to cause problems. It is because usually where there is death, it must be shown that the death was not disproportionate to the danger which the person being defended was in. Yet that would amount to attempting to measure the two harms with intellectual callipers. An accused acting in the heat of the attack would not be able to sit and consider what harm would result particularly where he or she does not use a weapon which may be considered blatantly lethal such as where a firearm is used. Where such is in this case, an accused used a bottle which he believed would not kill the deceased but would simply enable him to let go his grip on the person being defended, the fact that a person ended up dying should not cloud a court's mind in making the assessment on the proportion of the harm caused to that which the person being attacked was under. In any case, the deceased had, whilst chasing the first accused, expressly pronounced his intention to kill him. The second accused can therefore not be blamed if he thought that the deceased was bent on killing his elder brother. Once again we are satisfied that the second accused did not intend to cause more harm than that which his brother was likely to face. Needless to say, the attack was directed at the deceased and no third party suffered any injury as a result. We have considered the stressful conditions which the second accused found himself in. He genuinely thought that the deceased was going to inflict serious if not fatal harm on accused 1. He had shown that determination by pursuing both of them as they ran away from him. He chased the first accused even when he sought the protection of other members of the public. We are told that some people had tried to restrain the deceased without success.

From the above, we are convinced that the second accused satisfied all the requirements to enable him to fully rely on the defence of defence of person. The aggression which the deceased exhibited cannot be excused by the unfortunate situation that he accidentally died in the fracas. The courts have emphasised that it is not always that where a person dies pursuant to a fight, the survivor must be charged with murder.

Against the above background, the State's evidence falls short of the requirement of proving the accused persons' guilt beyond reasonable doubt. In the circumstances, we have no choice but to acquit both of them. It is therefore directed that both accused be and are hereby found not guilty and are acquitted of the charge of murder they were facing.

*National Prosecuting Authority, State's legal practitioners
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