

THE STATE
versus
AARON TOM

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 14, 15 & 24 June & 27 & 29 September 2021

ASSESSORS: (1) Mr Mabandhla
(2) Mr Mhandu

Criminal Trial

B Murevanhema, for the State
W Madzimbamuto, for the accused

MUNANGATI-MANONGWA J: A brawl at a bar on 10 July 2019 at around 23:30 at Chembada Business Centre in Mhangura resulted in the death of one Lloyd Jonasi after he was stabbed with a knife twice on the chest. The accused faces the charge of murder as defined in s 47 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]. It is alleged against the accused that he unlawfully assaulted Lloyd Jonasi the now deceased by stabbing him with a knife twice on the chest resulting in the death of Lloyd Jonasi.

The accused pleaded not guilty to the charge and accordingly the court entered a plea of not guilty. The allegations are that on the fateful day whilst at the aforementioned business centre, the accused had an altercation with one Calvin Boroma who tried to avoid the accused person by moving to a different shop. The accused followed the said Calvin Boroma to the shop he had moved to. One Bright Katandara rebuked the accused for bothering Calvin Boroma. The accused turned against Bright Katandara and pulled him from the shop counter he was sitting at and he fell to the floor. The deceased tried to refrain the accused from assaulting Bright Katandara and during the process the accused stabbed the deceased twice on the chest with a sharp object. The deceased approached Calvin Boroma informing him, that he had been stabbed on the chest by the accused person. The deceased was rushed to the nearest hospital where he died whilst being attended to by Doctor Goshomi Joseph.

The state led evidence from two witnesses namely Bright Katandara and Calvin Boroma. The evidence of three further witnesses Meserengi Edzai the shopkeeper of the shop at which the fatal assault occurred, Collen Bowani who witnessed how the fight started and Costa Nhambara the mortuary attendant was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The postmortem report by Doctor Joseph Goshomi was produced by consent and appears in the record as Exhibit 1. The cause of death is described as;

- 1(a) Cardiac tamponade secondary to hemopericardium
- 1(b) Penetrating incision wound into the right ventricle (heart)

In summary the evidence of Bright Katandara is this; He knew both the accused and the deceased and he has known them for several years. This witness stated that he was with Calvin Boroma when the accused accosted them. In order to avoid a confrontation the two moved to the next shop where the accused followed the pair and became confrontational. This witness challenged the accused on why he was after Calvin Boroma and the accused attacked him by pulling him from the counter where he was seated. The witness retaliated by running outside of the shop, grabbing a brick and attacking the accused. He ran outside. He indicated that accused continued the fight with deceased and Calvin Boroma. He indicated that when the deceased was stabbed he was not in the shop as he had gone outside.

Calvin Boroma's evidence is that the accused confronted him seeking to pick a fight with him. He moved away to another shop and the accused continued to be provocative. When Bright Katandara stood up for him he was attacked by the accused and a fight ensued. He states that at that juncture the deceased joined in the fight to rescue Bright Katandara. He denied joining the fight and stated that the fighting was going on the left side of the shop about 3 metres from where he was. As he was closing his beer bottle, the deceased came to him running and told him that he had been stabbed by the accused and he was bleeding profusely. The witness tried to render first aid to the deceased. He further arranged for a motor vehicle to take the deceased to hospital passing through the police station. The witness narrated how the accused had sat on the driver's seat of the motor vehicle that had to take the deceased to hospital and refused to leave the seat. The witness stated that the accused asked him what he was going to say to the police and at the hospital. The witness stated that the accused only left after the intervention of his sister and wife.

Whilst the court notes that the admitted evidence of certain state witnesses and the oral evidence of Bright Katandara state that Calvin Boroma was part of the fight, the said Calvin denies taking part in the fight. Such an inconsistency does not make all his evidence unacceptable. The court accepts his evidence in part particularly the narration on how deceased approached him after he was stabbed. This is because the evidence of the shopkeeper Muserengi Edzai also corroborates Calvin Boroma's evidence that the deceased approached him soon after he was stabbed. The witness was not shaken under cross examination and maintained his story line that he did not see the deceased being stabbed but it is the deceased who advised him that the accused had stabbed him.

In his defence outline, the accused denied stabbing the deceased with a knife or a sharp object. He stated that the deceased was part of a gang that attacked him. He states therein that Calvin Boroma was the one with a knife during the altercation and he suspects that the said Calvin Boroma might have mistakenly stabbed the now deceased with a knife whilst in a bid to stab the accused. He stated that he had no motive to stab the deceased as the deceased had spent a day at his residence and he had even bought the accused beer. The accused stated that he was surprised when he got arrested as he sought to lodge a report for assault. He professed ignorance on how the death of the deceased occurred.

In giving oral evidence the accused indicated that as he went into a shop, Calvin Boroma confronted him on a gossip issue. Before he could answer the said Calvin attacked him and Bright Katandara joined in by kicking him. The said Bright later attacked him using a brick as the deceased held him. He stated that he was then rescued by one Better Mukundanyoka. As he left the scene for his home he noticed Calvin holding something. He only heard that someone had been stabbed when he was long at his home. He then sought to get transport by getting into the vehicle that sought to take the deceased to the hospital. He admitted not leaving the seat until his wife and sister interfered. The accused stated that the deceased could have been stabbed by the people he had an altercation with in the afternoon.

The accused's demeanor left a lot to be desired and he prevaricated on his story. The court observed that he did not take the proceedings seriously and performed poorly during cross examination and avoided questions in certain instances. For instance during cross-examination this ensued:

“State: The deceased joined the fight because you were fighting with Calvin?

Accused : I cannot agree or deny

State: Why did the deceased join the fight?

Accused : I am not sure.

State: Do you then dispute that he was fighting you whilst on the side of Calvin?

Accused : He was assisting Calvin.”

Equally he could not provide a reasonable answer when asked how the deceased could have approached Calvin Boroma for assistance if the said Calvin Boroma had stabbed him.

Submissions

The state seeks that the court passes a guilty verdict against the accused. The state has to prove its case beyond reasonable doubt. In the absence of any witnesses to the stabbing of the deceased the state seeks to rely on circumstantial evidence. Mr *Murevanhema* for the state submitted that the accused had approached Calvin Boroma and given a statement pertaining to his stabbing in a spontaneous manner. He was bleeding profusely at the time he uttered the words that the accused had stabbed him with a knife. That the deceased approached Calvin Boroma was witnessed by one Edzai Muserengi. Although she did not hear the name of the accused being mentioned, she heard the deceased stating that he had been stabbed during the fight. Mr *Murevanhema* submitted that the deceased uttered the words without having time to reflect hence he had no motive to falsely implicate the accused person.

It was further submitted on behalf of the state that the state witnesses were unshaken during cross examination and were credible as opposed to the accused who departed from his defence outline. The court must thus draw an adverse inference. The accused had implicated Calvin Boroma as the assailant but departed from the statement implying that the deceased could have been stabbed by the people he had an altercation with during the day. The state counsel referred to the failure by the accused to challenge the evidence of Calvin Boroma in cross examination moving that such failure should be read as an admission to the led evidence. Further reference was made to the behavior of the accused person when he sat in the vehicle meant to ferry the deceased to the police station and the hospital. The state referred to the failure of the accused to call witnesses especially his wife and sister as fatal to his defence. The state urged the court to find the accused guilty of murder in terms s 47(1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The accused's counsel agreed with the state counsel that in the absence of a witness who particularly saw the deceased being stabbed circumstantial evidence is the determinant factor on the guilt or innocence of the accused. The defence argued that *in casu* circumstantial evidence had not been established. It was submitted that the court could not draw the inference of guilt as this was not consistent with the proved facts. Mr *Madzimbamuto* for the accused submitted that the reliance of the state on the evidence of Calvin Boroma who alleged that he had been told by the deceased that the accused had stabbed him was misplaced. He argued that the statement was not corroborated although there were a number of people in the bar who assisted in rendering first aid to the deceased. Further, he submitted that Bright Katandara who also assisted the deceased and was in the car that ferried the deceased to hospital had not heard the deceased implicating the accused. Counsel argued that it is open to doubt how the deceased failed to advise those who were in the vehicle and those who rendered first aid if at all the accused had stabbed him.

The defence counsel further queried the state's stance that the accused was the aggressor on the day in question hence circumstances point to him as the perpetrator of the offence. He contended that given that the fight involved other players, it was open to doubt that the accused is the one who committed the offence. Further a contention was made that no meaningful inference could be drawn from the alleged conduct of the accused of occupying the driver's seat and refusing to disembark. He submitted that in fact, the aforementioned conduct exonerates the accused because if the accused had perpetrated the crime he should have run away rather than avail himself at the car. He further submitted that since no evidence was led to the effect that the deceased who was in the car implicated the accused when accused arrived at the car, the inference ought to fail. Given the foregoing, Mr *Madzimbamuto* submitted that the circumstantial evidence that the state seeks to rely on fails in many respects hence, the inference that the accused committed the offence cannot be drawn from the evidence led.

The defence counsel further submitted that the evidence of the state witnesses could not be relied on since Calvin Boroma and Bright Katandara gave conflicting evidence pertaining to the fight that resulted in the death of the deceased. Counsel contended that as the evidence pertained to the same event there was conflicting evidence on material aspects which therefore leaves the court in a difficult position as to which version to accept. The credibility of Calvin Boroma was challenged particularly as to why if he was 3 metres away, from the fighting scene he failed to see

how the deceased was stabbed, and how the accused left the scene. He thus urged the court to disregard the evidence of Calvin Boroma as not credible.

Analysis

It is common cause that none of the witnesses saw the accused being stabbed. What is not in issue is that there was a fight. It is also clear from the evidence that the accused was the aggressor as he had confronted Calvin Boroma who had sought to avoid the fight and moved to another shop. The accused followed Calvin Boroma to the next shop. Accused does not deny that there was a confrontation at the first shop and that he then went to the shop that Calvin Boroma had moved to although he said he wanted to buy. That the accused was aggressive is supported by the evidence of Bright Katandara, Muserengi Edzai and Calvin Boroma. Bright Katandara was part of the fight after the accused pulled him from the counter he was seated at after he challenged the accused as to why he was after Calvin Boroma. Evidence also shows that the deceased joined in the fight to support Bright Katandara. Collen Bowani, Museringa Edzai and Bright Katandara all state this either in oral or admitted evidence that Calvin Boroma was involved in the fight with accused where deceased and Bright were participants. The pertinent and decisive question is “did the accused stab the deceased resulting in the deceased’s death?”

The state seeks a conviction of the accused in terms of s 47(1)(b). The law is clear that where there is no actual intention to commit murder, legal intention can be inferred from the circumstances of the case. It, however, remains that the state must prove its case beyond reasonable doubt irrespective of whether the evidence is direct first hand evidence or circumstantial evidence. In *casu* no one saw the accused person stabbing the deceased. Thus the state seeks to rely on circumstantial evidence. The evidence which the state seeks to rely on brings in the issue of the application of the evidential rules relating to *res gestae* and circumstantial evidence.

What witnesses can attest to is that the accused was one of the persons involved in a fight in which the deceased was a participant. It is not disputed that when accused pulled Bright Katandara down, the said Bright ran outside brought a brick and attacked accused with it. He then ran outside whilst the fight went on. He did not witness the stabbing. His evidence is thus not material except to the extent that accused was aggressive on the day.

Two state witnesses Calvin Boroma and Edzai Muserengi attest to the deceased approaching Calvin Boroma when injured, and informing him that he had been stabbed. Calvin

Boroma witnessed the deceased bleeding profusely and he used his clothing to cover the wound. He was the first and only person to be approached. He alone rendered first aid to the deceased after asking the shopkeeper Edzai Muserengi for space. This evidence was not challenged. The court accepts the evidence of the two witnesses as credible. Calvin Boroma particularly states that the deceased singled out the accused as the assailant, whilst Edzai Muserengi's evidence simply refers to the deceased stating that he had been stabbed. Calvin Boroma was being addressed by the deceased whilst Edzai Muserengi heard the deceased telling Calvin that he had been injured. The state thus relies on the fact that the deceased uttered words to the witnesses to the effect that he had been stabbed by the accused. No doubt the reference of the witnesses to what the deceased said would be hearsay evidence. However there are instances where this kind of evidence would be admissible. It has been held that:

“Hearsay evidence of a statement made to a witness by the victim of an attack describing how he had received his injuries was admissible in evidence, as part of *res gestae*, at the trial of the attacker if the statement was made in conditions which were sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoction or distortion. In order for the victim's statement to be sufficiently spontaneous to be admissible it had to be so closely associated with the event which excited the statement that the victim's mind was still dominated by the event. ...” See *R v Andrews* [1987] 1 All ER 513 extensively quoted in *S v Mutsure* SC 62/21.

It is evident herein that the statement by the deceased was made immediately after he was stabbed as he walked towards one Calvin Boroma who witnessed the seriously bleeding deceased walking towards him and fall into his arms. The court finds that the statement was made soon after the stabbing and was spontaneous and contemporaneous with the event. The deceased had no time to concoct or adapt his version, nor deliberate on his statement. The deceased had just realized that he had been stabbed and he made the statement as he approached the nearest person Calvin Boroma. The statement qualifies to be admitted in evidence. The court believes the evidence of Calvin Boroma that the deceased stated that he had been stabbed by the accused. The accused's allegation that the deceased could have been stabbed by Calvin Boroma cannot be sustained as the deceased could not have approached his assailant for assistance. Further the evidence that the deceased approached Calvin Boroma when injured was not challenged by the defence. Neither was the evidence that it was Calvin Boroma who rendered first aid immediately upon seeing the deceased injured and arranged to ferry the injured to hospital. Rather the accused's explanation was that he heard that someone had been stabbed when he was already at his home thus, the defence

could therefore not challenge the evidence that deceased approached Calvin Boroma given the accused's line of defence. The submission by the defence counsel Mr *Madzimbamuto* that several persons rendered first aid to the deceased and yet he did not tell them that he had been stabbed by accused is not supported by any evidence. The evidence led is clearly to the effect that only Calvin Boroma rendered first aid to the deceased.

A court must exercise great care and caution before convicting an accused on circumstantial evidence. In that regard the cardinal rules are that where conviction of the accused person is based on circumstantial evidence:

1. The inference to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them save one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct. Refer to *S v Blom* 1939 AD 288, *S v Maranga & Ors* 1991(1) ZLR 244(SC)

In amplifying these requirements, TSANGA J in *S v Nyamundoma* HH 808-18 conversely put the requirement as follows:

“What the state must satisfy the court is “not that each separate item of evidence is inconsistent with the innocence of the accused but only that the evidence taken as a whole is beyond a reasonable doubt inconsistent with such innocence”. The courts in other words, consider the cumulative effect of items of circumstantial evidence. Before conviction on circumstantial evidence it is necessary to exclude every reasonable hypothesis not consistent with guilt.”

In other words, the court is enjoined and obliged to consciously carry out an evaluation process in its mind taking into full consideration all the proven facts and ensure that no other reasonable inference can be drawn therefrom apart from the one that the court comes up with. A thorough exclusion process ensues, and once any other inference which points towards the innocence of the accused by way of a reasonable hypothesis can possibly be drawn a guilty verdict is not sustainable.

The state witnesses gave evidence that the accused was the aggressor on the fateful day leading to a fight which then involved, Calvin Boroma, Bright Katandara and the deceased. The deceased had joined supporting accused's adversary Bright Katandara, he was not on accused's

side. There is no explanation on how the accused left the scene. Accused testified that he heard that someone had been stabbed, when he was already at his house. He did not come to assist but rather sought to delay the vehicle carrying the injured deceased to hospital. Apart from the words uttered by the deceased implicating the accused, the accused's behavior in the vehicle which sought to carry the deceased to hospital points towards his guilt. Evidence was led that he was reluctant to leave the vehicle questioning the occupants about what they were to tell the police and the hospital authorities upon arriving at the hospital. It is not in dispute that it took his wife and his sister to persuade him to leave the vehicle. The accused did not deny delaying the vehicle. His explanation was that he also wanted to be ferried by the car and he had asked the occupants what they were to tell the police if they left him behind. This corroborates the version of Calvin Boroma that accused questioned him on what they were to tell the police. When the police later came looking for him at his home he could not be located and his wife had no idea where he had gone to. This evidence was not challenged in cross-examination. The accused's explanation that he had gone to report an assault on him could not have been true as the police arrived in the early hours of the morning and none of his family members knew his whereabouts.

In his defence outline he indicated that the deceased might have been stabbed by one Calvin Boroma who was in possession of a knife. In his evidence he indicated that the deceased may have been stabbed by other persons he had an altercation with during the day. The court draws an adverse inference from the accused's departure from his defence outline. The court believes the evidence of Calvin Boroma that the deceased informed him that he had been stabbed by the accused person. Accused person himself confirmed that there was no bad blood between him and the deceased and the two had spent part of the day together at accused's house and deceased had even bought beer for him. The deceased thus had no reason to falsely implicate the accused as the person who stabbed him. Whilst Calvin Boroma denied taking part in the fight when the other witnesses say he was part of the fight does not render all his evidence incredible. The court accepts his evidence which pertains to the material time when the deceased approached him to tell him that he had been stabbed. This was corroborated and it was not challenged. That the accused failed to call a single witness especially Better Mukundanyoka whom he claims rescued him from further attacks leaves the state case intact as crucial evidence was not rebutted.

Considering the proven facts and the cumulative effect of the evidence at hand, the court finds that the only reasonable inference to be drawn is that the accused was responsible for the demise of the deceased by stabbing him with a sharp object. Accordingly the accused is found guilty of murder as defined in s 47(1)(b) of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

Sentence

Sentencing consists of a balancing act as the court is enjoined to consider the nature of the offence the accused committed, the personal circumstances of the accused and the interests of the society. It remains that whilst the accused has the opportunity to inform the court of his circumstances, and the nature of the offence is clear, the societal interests are never fully articulated. That a breach of criminal law is a wrong against the state is to some extent not entirely correct as there is a victim, a real person who in actual fact suffers from the commission of the offence. Victims of attempted murder, rape and murder being examples on point. In the case of murder the death of the deceased may bring untold suffering to his family. Whilst the accused as in this instance, was able to advise this court of the possible suffering by his seven (7) children if he were to be incarcerated, the state is unable to relate how the deceased's own children are robbed of a bread winner. This is why it is necessary for our legal system to adopt the practice of having witness impact statements. Whilst sentencing is not about seeking retribution, there can be no adequate balance unless if the impact of loss of a breadwinner is referred to. Witness impact statements enable a court to adequately weigh the mitigatory and aggravating factors and reach an appropriate sentence.

Often the state counsel proceed to address court on aggravation without even interviewing the affected family members and often what they submit to court is their perception of the case. There certainly is need to introduce a paradigm shift from the conceptualization of crime as a violation against the state alone and not individuals against whom the crimes would have been committed.

In *casu* not much was presented in mitigation except that the accused is a first offender and a breadwinner to seven (7) children and that he was to some extent intoxicated. The level of intoxication could not be established except that the court was informed that the accused was

drinking beer from mid-morning up to late afternoon. Upon the court asking the accused to enlighten it on the issue not much was gotten from the enquiry.

This court agrees with the defence that there was no premeditation and the state counsel is correct in indicating that the murder was not committed in aggravating circumstances. However death could have been avoided in the circumstances had the accused not pursued Calvin Boroma from the first shop to the next shop where the stabbing occurred. Further the accused was aggressive on the day in question as he had also attacked Bright Katandara which shows that he was looking for trouble. Accused stabbed the deceased twice with a sharp object with one stab thrust ripping through the right ventricle of the heart as borne by the postmortem report. The deceased suffered a violent death. Imbibers should learn to control their drinking as voluntary intoxication should never be given undue weight when it comes to sentencing. The courts will not hesitate to pass deterrent sentences should crimes be committed after drinking sprees.

The court however takes cognizance of the fact that the attack against the deceased was not premeditated. It occurred during a fight involving several parties and there is a possibility that the accused was being overcome as the deceased had joined the fight to assist Bright Katandara. In spite of this, the moral blameworthiness of the accused is high. Carrying of lethal weapons has its consequences especially where mindless use thereof results in fatal consequences. Taking all the factors into consideration this court finds the following sentence to be appropriate in this case:

Accused is sentenced to 15 years imprisonment of which 3 years imprisonment are suspended for 5 years on condition the accused does not commit within that period any offence involving the use of violence upon the person of another for which the accused is sentenced to a term of imprisonment without the option of a fine.

Kajokoto & Company, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners0+