

THE STATE
versus
JUSTIN TENHA

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 18 February & 30 September 2022

Assessors: Mr Gweme
Mr Jemwa

Criminal Trial

D H Chesa and TMukuze for the State
F Gororo and A Murutayi for the accused

MUNGWARI J: Justin Tenha (herein after referred to as “the accused”), appeared before us charged with the crime of Murder in contravention of s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*] (hereinafter referred to as “the Code”). Prosecution alleged that on 9 September 2020 he struck Tendai Kanjanda (hereinafter referred to as “the deceased”) with logs and stones. The attack caused mortal wounds.

In detail, the allegations were that on the night of 9 September 2020 the deceased and his friend Wallace Mwase were drinking beer at some unlicensed premises (shebeen) in an area called New Lines in Mbare. The accused who suspected the deceased of having stolen his scrap wire, got wind of his whereabouts. He followed the deceased to the watering hole. He confronted him about the missing scrap wire. The accused was visibly angry. He attempted to assault the deceased but was restrained from doing so. Sometime later the deceased sent an emissary to apologize to the accused on his behalf. The apology appeared to have been accepted. With that in mind and convinced that he had appeased the accused, the deceased and his friend returned to drinking their beer. After a while they left the shebeen and headed home which was a cabin they occasionally put up in. On arrival they retired to bed.

At around 2300hrs the accused once more sought out the deceased. This time he went to the deceased’s cabin. When he got there he forcibly entered the room and started assaulting the deceased and his friend. The deceased’s friend took to his heels and somehow escaped. He left the accused still assaulting the deceased. The assault spilled outside the cabin and into the yard.

Some passersby saw the deceased being assaulted by the accused on the head with a log and a stone. They heard him begging for forgiveness from the deceased.

The following morning the deceased's lifeless body was discovered at the scene. A police report was subsequently made. The post mortem report concluded that death was due to a 'severe brain oedema, hemorrhagic area in the occipital region and moderate head trauma caused by assault.'

After the assault, the accused fled the scene. He was only arrested on 18 September 2020, some nine days later at a farm in Macheke where he had now secured employment as a farm hand. Upon his arrest he was subsequently charged with the murder of the deceased.

The accused pleaded not guilty to the charge and denied having followed the deceased to his cabin on the mentioned date. Contrary to the state's assertions the accused maintained that although he had earlier in the day gone to the shebeen and met the deceased there, he never attacked him in the manner described. Instead he said he engaged in a fist fight with the deceased at the shebeen. He confessed that the cause of his aggression was his missing scrap wire which he suspected had been stolen by the deceased. The fight had occurred about four hours after he had started drinking the illicit brew sold at the shebeen. Soon after the fight he had gone to his uncle's house to sleep. He did not follow the deceased to his cabin. He denied having fled the scene and said that he left for Macheke because he had been scheduled to go to his uncle's farm on that day in order for him to take up a part time job that he always used to do during the tobacco season. He denied having any knowledge of how the deceased ended up dead.

COMMON CAUSE ISSUES

The issues which are not in dispute in this trial are that:

1. There was a misunderstanding between the accused and the deceased earlier on the day in question. That disagreement was about the accused's scrap wire which deceased was suspected of having stolen.
2. The deceased apologized to the accused and some kind of truce ensued
3. Later in the evening, after the deceased had retired to sleep in his cabin, someone attacked him and his friend
4. The friend fled and left the deceased at the mercy of the assailant.
5. The deceased sustained severe injuries from which he died. His body was discovered the next day

STATE CASE

The state opened its case by applying to tender the accused's confirmed, warned and cautioned statement. The defence consented to the admission of the statement. The statement was recorded from him at CID Homicide in Harare on 19 September 2020. It was confirmed by a magistrate sitting at Harare on 21 September 2020. The statement was accordingly admitted as exhibit no 1. In the statement the accused mentioned the following under caution:

"I do not deny the allegations of killing the now deceased. What happened is that we fought after he took from me my wire and sold it. When I asked him about the wire an argument ensued between us. This resulted in a fight two days after he stole my wire. We did not get a chance to talk to him until the time I left. I later learnt about his death after the fight"

Prosecution thereafter applied to produce the autopsy report compiled by Doctor Laudun Malogon Martinez a pathologist employed at Harare Central Hospital. The doctor had examined the remains of the deceased on 14 September 2020. He noted multiple injuries on it. In particular, he observed five plague abrasions on the frontal region, the right hip, the right thigh, right elbow and forearm and on both legs. He also noted a 3cm wound in the chest area. Lastly he noted a fracture in occipital skull bone, severe brain edema and hemorrhaging in the occipital region. He concluded that the cause of death was as a result of:

- a. severe brain edema
- b. hemorrhagic area in occipital region
- c. moderate head trauma

Again with the consent of the defence the postmortem report was duly admitted into evidence as exhibit no 2. The cause of the deceased's death was therefore uncontentious.

In addition to the above, the evidence of the Rachel Masiya, Samuel Mawadza and Tendai Machiriori was formally admitted in terms of s314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as it appeared in the state's summary of evidence.

The evidence of those witnesses established the following relevant facts:

1. The accused confronted the deceased at a shebeen run by Rachel Masiya at around 7pm on the fateful night demanding to be compensated for the scrap wire allegedly stolen from him by the deceased.
2. Although no fight ensued between the two, the accused was visibly unhappy with the wrong committed against him.
3. The deceased was contrite and went to the extent of sending an emissary to plead for forgiveness from accused.
4. The deceased's body was discovered the following morning lying on the ground in New Lines Mbare.

5. The accused was arrested on 18 September 2020 at Durlstone Farm Macheke where he was employed as a farm laborer and had fled to following the events of the night of 9 September 2020
6. A warned and cautioned statement was recorded from the accused according to the law

ORAL EVIDENCE

The State led *viva voce evidence* from three witnesses namely Walter Wallace Mwase, Bernard Nyerenyere and Dela Matariro. The accused on the other hand was the sole witness for the defence.

ISSUE FOR DETERMINATION

When the state's allegations, the defense's arguments and the common cause issues outlined above are put together it is apparent that the only issue which arises for determination is the identity of the person who attacked the deceased at the cabin. In view of that we proceed to summarise and analyse the witnesses' evidence in so far as it deals with the identity of the deceased's assailant.

Walter Wallace Mwase (Wallace)

He survives as a pushcart operator in Mbare and was a close friend of the deceased. He was present and in the company of the deceased at Rachel's shebeen when the confrontation between the accused and the deceased occurred. He corroborated the evidence of Rachel that no fight took place at the shebeen. He was present and sleeping with the deceased later that night when the accused broke into their cabin and started assaulting them indiscriminately with booted feet, hands and a weapon resembling a knobkerrie. He identified the accused with the aid of a street light that shone into the cabin's opening. In fact he said the accused had identified himself as Jasi, a moniker for the accused's real name Justin. He also identified him through his voice when he repeatedly demanded payment for his scrap wire as he beat up the screaming deceased. Accused was well known to him and they often drank beer together at the shebeen.

The witness informed the court that he and the deceased had consumed opaque beer. They had laced the beer with an illicit brew. That made the beer's alcohol content more concentrated, more potent and consequently more intoxicating. For that reason he was drunk and so were the accused and the deceased. The deceased however appeared the drunk amongst the three of them. He made that conclusion because from the shebeen the deceased had staggered and literally crawled back to the cabin. He struggled to maintain his balance.

In that hopeless drunken stupor, so the witness narrated, the deceased was defenceless. He could only plead with the accused to desist from assaulting him. Unfortunately the pleas fell

on deaf ears. At some point during the assault, the witness said he managed to slip out of the cabin as the accused continued to bludgeon the deceased. He made good his escape only to discover the following morning that the deceased had died

Nothing significant came out of the cross examination except an insistence by the witness that he was drunk but only moderately so. He insisted that he had consumed approximately four opaque beers mixed with the illicit brew as already stated. He poured half a bottle of the illicit brew into each container of opaque beer. The sizes of the containers as well as the combined alcohol content were not made known to the court. We were unable to properly assess the potency of the mixture. We therefore accepted that in the absence of any evidence to the contrary the witness was indeed moderately drunk. On the other hand, the witness said, whilst the accused was drunk his movements were steady, his thoughts appeared coordinated and his speech was coherent. That made the witness to believe that the accused knew and understood what he was doing. In our view, the coherence with which this witness narrated the events persuaded us to accept that although he had been drinking alcohol, he fully appreciated what was happening. The fact that he remembered to escape from danger buttresses our conclusion. He saw and could comprehend that there was danger. He ran for dear life. In addition he was refreshingly candid with the court. He did not seek to fill in the gaps where he had no knowledge of the issues. Slow in manner of speech he plodded on with his testimony. We noted that in spite of this handicap he had an amazing knack of recollection. No amount of cross examination could shake him. The significance of his evidence was not lost to the court. There was no question that his evidence was truthful. The only issue which needs to be interrogated is whether the witness properly identified the accused as the assailant.

In a long line of authorities, courts have always been cautioned against readily swallowing a witness's evidence of identification hook, line and sinker. A witness in that regard need not only be honest. His evidence must be completely reliable. In *S v Mtetwa* 1972 (3) SA 766 at 768A-C HOLMES JA stated that:

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, built, gait and dress; the result of identification parades, if any, and of course, the evidence by or on behalf of the accused. This list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighted one against the other, in the light of the totality of the evidence, and the probabilities."

Wallace's evidence falls into the same category that the court in Mtetwa was referring to. We should therefore be sure that he properly identified the accused. The only blemish we find on the witness is that by his own admission, he had consumed alcohol. Generally alcohol tends to impair a person's judgment. Our observation as already stated is however that the witness as shown by his actions, was moderately drunk and could tell left from right. He was therefore not in a state where he could failed to recognise the accused. We are fortified in making this finding by the following additional factors.

(a) Witness and accused were known to each other prior to this incident

The evidence before us is that the accused on one hand and the witness and the deceased on the other were acquaintances of sorts. They had on many occasions drank beer together at the shebeen. There was therefore no question of mistaking someone else for the accused by the witness.

(b) The accused and the witness had met earlier on in the day at the shebeen. The witness had had occasion to observe the accused. They had spoken together. The witness knew the accused's voice.

(c) When the accused arrived at the deceased's cabin, he had not bothered to hide his identity. He openly declared that he was Jasi. He shouted and ranted as he demanded his scrap wire or payment for it. The witness said he recognised that voice. He knew that indeed it was Justin, the accused person in this matter.

(d) The cabin was illuminated by a street light whose beam shone into the cabin. That light made visibility very good. It in turn enabled the witness to recognise the accused.

(e) The assault took place in a cabin. By its nature, it is a small structure. It follows therefore that the accused was very close to the witness when the assault on the deceased took place. He could observe the accused's features at very close range.

With this in mind, the witness's identification is what the law recognises as very accurate. In fact with the cumulative effect of all the factors stated above, it exceeds identification and becomes recognition. Wallace did not identify the accused. He recognised him. We are thoroughly satisfied with this particular witness's identification of the accused. It is completely reliable.

Once that is accepted, the evidence placed the accused firmly at the deceased's cabin well after 11pm. It confirmed that the accused had come in a combative mood. He was still angry about his missing scrap wire. If Wallace's evidence was reliable then the corroboration of it by Bernard Nyerenyere is damning.

BERNARD NYERENYERE (BERNARD)

He is a motor mechanic and was a neighbour of the deceased. His gated house is located 15 metres from the deceased's cabin. On the night in question he was awakened by the noise of a scuffle inside the cabin. He went to investigate and about 7 metres away from the cabin he heard the following dialogue between the accused and the deceased:

Deceased: "Jasi you will injure me. Forgive me please"

Accused: "I don't want to injure you. I want to kill you"

Deceased: "Allow me to go and collect your money from my sister's place of residence"

Bernard knew both the deceased and the accused very well. He related very well with the accused. They had at some point lent each other tools in their trade. He would have no reason to fabricate evidence against him. The essence of his testimony was that the accused vowed to kill the deceased. Not even the deceased's desperate pleas for mercy could restrain him. Bernard said he intervened and after the scuffle had subsided he had retreated to his house. It however turned out that the hiatus was short lived as moments later he heard the accused clobbering the deceased again. Indeed, the following morning the witness discovered the lifeless body of the deceased lying outside his house.

Given this evidence, there is no basis for accused denying being at the deceased's cabin on the fateful night. There is no way he can deny having assaulted the deceased that night. Bernard was more acquainted to the accused than the deceased. If anything, he would have easily contrived to give testimony more favourable to the accused than the deceased. In our view he chose to tell the truth.

DELA MATARIRO (DELLA)

This 19 year old girl, who was only 17 at the material time was a crucial eye witness. She resided at the house where the deceased had his cabin. She witnessed how and why the feud between the accused and the deceased started. She also witnessed the fatal assault on the deceased by the accused. Three days before the incident, she had seen the accused bringing his scrap wire to her house. The accused also frequented her house. The accused had dumped the wire by the door and left. The deceased had returned later and collected it. It was her who had then whispered to the accused about her suspicions on the deceased. She witnessed the accused assaulting the deceased demanding the scrap wire. Under intense pressure and physical threats from the accused the deceased had stayed away from home for two nights. He confided in her that he was evading the accused. Della further told the court that the deceased returned and put up at home on the third night which turned out to be his biggest mistake. That night, she was

sleeping when the accused arrived and accosted the deceased. She peeped through the pane - less window frame of her room. In horror she saw the accused straddling over the deceased who lay on the ground outside the cabin pleading for forgiveness in vain. With a switch in hand, the accused emphatically told the deceased he was not interested in his pleas for forgiveness but he only wanted his money. He continued to beat the defenceless man with a broken switch. Not content, the accused picked up a stone and took aim at the deceased lying on the ground. Unable to stomach it anymore the girl left her vantage position and cried herself to sleep but not before hearing the exchanges coming from the scene. These included the cries by the deceased entreating Wallace to help him get back to the cabin. It was in vain. She also heard the accused inquire if indeed the deceased was dead. He needed not inquire because the following morning Della also found the lifeless body outside.

As already said Della's evidence was crucial. She saw the accused assaulting the deceased outside the house where his body was found lifeless the following morning. She heard the accused's threats that he wanted to kill the deceased unless he got his money. The evidence placed accused at the crime scene at around midnight. It meant the accused could not therefore have been at his uncle's place of residence like he alleged in his defence outline. She struck us as a truthful witness in spite of the shyness she exhibited when she was giving her testimony. She managed to make out a coherent narrative to the court. No amount of cross examining her could make her waiver. If anything the cross examination elicited affirmations and clarifications from her which served to solidify the state's evidence. Her evidence corroborated that of Wallace and Bernard to the extent that accused was at the scene of crime at the relevant time and date and that he assaulted the deceased.

THE DEFENCE CASE (JUSTIN TENHA)

To a large extent the accused maintained the story he alluded to in his defence outline with some few additions. In his evidence in chief he told the court that on 8 September 2020 he left his scrap wire with Della at no 1New Lines Mbare for safekeeping. When he returned Della told him that the deceased had taken his scrap wire. Because he wanted to know what happened to his scrap wire he looked everywhere for the deceased. A day later and in the evening he then met him at the bar. He confessed to having earlier consumed a litre of illicit brew. Three hours after drinking the brew he then fought with the deceased at the shebeen. He said the deceased actually retaliated. Even though people saw them fight no one restrained them. He however could not make up his mind on whether he was drunk or not at the time when he fought with the deceased. After he realized that nothing would materialise from the

fight he left the shebeen boarded a commuter omnibus for his place of residence in Epworth. He arrived home at around midnight and went to sleep. He left the deceased and his friends drinking beer. The following morning he left for Macheke where he normally visits and works as a tobacco curer. He did not run away as his friends and sisters were aware of where he had gone.

When asked by his counsel on whether he knew any reason why the three state witness would say they saw him assaulting the deceased his response, in his own words was “they may have seen me but there is a variance concerning the time they saw me”

The accused’s response amounted to a concession that the witnesses may have in fact seen him. His only worry was the variance concerning the time they saw him. This was surprising because his initial insistence had been that he had not even been at the crime scene. We viewed his volte-face as an acknowledgment that the evidence of the witnesses had cornered him. His denials were bare. Despite that brief climb down the accused was quickly back to his defensive best. During cross examination he again latched on to his story that he had only fought with the deceased at the shebeen. They had thereafter, parted ways. But that inconsistency told a story which crucified him. It only exposed as untruthful.

He confirmed that indeed the disappearance of his scrap wire valued at 80usd angered him to the extent that someone had to pay for the loss. He confirmed that he was prepared for the loss to come at any cost. He also confirmed that for three days he pursued the deceased in an attempt to make good his losses. He failed to explain why he did not report the theft of his property to the police but instead took the law into his own hands. He could only explain that it was during the Covid19 pandemic lockdown period where movements were restricted. On the other hand he conceded to having been able to go ahead with his day to day business, including hounding down deceased. We got the impression that he did not report because he felt he had a score to settle with the deceased.

Further on in cross examination the accused stated that the scrap metal was essential for use in Macheke but then failed to explain why he would then just decide to leave after 3 days of hunting down the deceased before he could recover it. The urgency in deciding to go to Macheke remained unexplained.

The story about his fight with the deceased at the shebeen again turned out to be another wild goose chase he was sending the court on. It clearly never happened. He could not give the details of the fight when called upon to do so. When cornered to do so, he tripped himself again and went back on his earlier statement that the deceased had fought back. He then changed and

stated that the deceased had only ducked his blows but had never hit back. As if that was not enough, he made another somersault and alleged there had been no fight but that he had assaulted the deceased.

We illustrate all this simply to show that we could not make head or tail of the accused's evidence. It was riddled with half-truths and utter lies. A person who lies about one aspect of his evidence cannot expect the court to believe another part. He was at pains to explain simple issues. His prevarication and lies only served to strengthen the allegations against him by prosecution. His evidence was clearly palpably false particularly when it is juxtaposed against his admitted confirmed, warned and cautioned statement. .

ANALYSIS

In his closing submissions, counsel for the accused dedicated a full six pages to restating the law on voluntary intoxication. Presumably, the intention was to persuade the court to consider the accused's level of inebriation on the day in question so as to raise the partial defence of voluntary intoxication. The baffling aspect of this contention is that it was never raised in accused's defence outline nor his testimony. He specifically stated in his defence evidence that the altercation occurred four hours after he had drunk the illicit brew an indication that a long time had lapsed and he had sobered up. After the incident he managed to board a commuter omnibus and made his way home. Furthermore in his own evidence he could not even make up his mind on whether he was drunk or not. When asked in his evidence in chief whether there was a possibility that at the time when he fought with the deceased he was drunk he only alluded to there being a possibility. A defence raised at the 11th hour is an indication of a desperate man's whims especially when it is not supported by any evidence. It is an afterthought in as well as it may be viewed as a concession to the accused's attendance at the crime scene on the fateful night. The law requires that where an accused proffers a defence, he must adduce sufficient evidence to raise it. There must be sufficient ground for it which will compel prosecution to disprove it beyond reasonable doubt that it existed.

DISPOSITION

In the final analysis, we have no apprehension to hold that:

- i. The accused did not fight with the deceased at the shebeen. Rachel, the shebeen queen was clear that she only saw accused demanding his money and nothing else.
- ii. The accused prevailed upon the deceased in his cabin. He assaulted him severely. The assault was witnessed by three witnesses, Wallace, Della and Bernard who were

independent of each other. The three all knew the accused prior to the assault. Their recognition of him cannot by any standard be faulted.

- iii. His conduct, the words he uttered during assault and the fact that he was brutal and even used a stone to attack the deceased leave us without a doubt as to his intention.

It is against that background that we are convinced that prosecution managed to prove the accused's guilt beyond reasonable doubt. He is accordingly found guilty of murder as charged.

Reasons for sentence

In passing sentence, the court remains alive to the requirement that punishment must be considered within the triad of the offender, the offence and societal interests. The court therefore considered all the mitigating and aggravating factors as submitted by counsels.

In mitigation the court considered that the accused is a middle aged first offender who is a family man with the usual attendant family responsibilities. He has a wife and 4 minor children and is the sole bread winner in his family set up.

It is indeed very difficult to find anything mitigating in the accused's favor especially when one looks at factors surrounding the commission of this offence. Counsel for the State urged the court to make a finding that the accused committed the offence in aggravating circumstances and urged the court impose the ultimate sentence of death or in the absence of the said a lengthy imprisonment term of 33years. We were therefore called upon to decide whether the murder was committed in aggravating circumstances.

Circumstances in aggravation are clearly outlined in s 47(2) and (3) of the Criminal Law Codification and Reform Act [*Chapter 9:23*]

The evidence on record shows that the accused was angry with the deceased for stealing his scrap wire. He had hounded him in a bid to recover either his scrap wire or the monetary value. His only demand at every turn was for the return of his scrap wire which was then followed by death threats. Clearly his anger got the better of him. We have also taken into account that on the night in question the accused had consumed large quantities of alcohol which may have impaired his reasoning capacity. This is mitigating and defeats the suggestion that the offence was premeditated. We are therefore not in agreement with counsel for the state that this was a murder committed in aggravating circumstances.

In aggravation however, a life was lost under extremely tragic circumstances in which the deceased was subjected to a surprise attack. The accused person directed his anger and indeed his blows at the most vulnerable part of the body the head, giving the deceased no chance to survive. The autopsy indicated that the body of the deceased had multiple injuries

on it as well a fracture in occipital skull bone, severe brain edema and hemorrhaging in the occipital region. Deceased had wept and wailed in pain as the accused clobbered him with different types of weapons ranging from a switch to stones. There is little doubt if any that the deceased died a painful death at the hands of the accused. To further compound issues, there was no reason why the accused assaulted the deceased in the manner that he did. If indeed he believed that deceased had stolen from him the law required him to report the offence to the police rather than to take the law into his own hands.

It is the duty of this court to remind members of society that the sanctity of human life must be upheld at all times. That can only be done by imposing sentences that reflect society's revulsion at such kind of conduct.

After committing the offence he fled the scene leaving the lifeless body of the deceased lying sprawled outside his cabin and in full view of passers-by. There can be no doubt therefore that his moral blameworthiness is high.

Throughout the trial the accused showed no remorse for his actions as he even raised spurious defences. His demeanor suggested a good measure of impunity on his part. In offences such as murder, the court has very little room to consider the plight of the victim and the collateral suffering caused to the victim's family. It therefore assisted the court a great deal that the counsel for the state placed before the court evidence from the deceased's sister Nelia Kanjanda. Through this evidence, the court managed to have an insight of the effect of the accused's actions upon the deceased's family. What is clear from the evidence led is that the accused did not reach out and apologize to the deceased's family neither did he contribute anything. He clearly did not think it worthwhile. It would have assisted him in mitigation if he had. As such the sentence which the court will pass must strive to pacify the victim's family that justice finally caught up with the perpetrator. The court has no doubt that a lengthy custodial sentence is called for in the instance.

Accordingly accused is sentenced to **20 years imprisonment.**