

THE STATE

Versus

GIRTFIBION NTUTHUKO MOYO

And

MDUDUZI MOYO

IN THE HIGH COURT OF ZIMBABWE

BERE J with Assessors Mr E.R.M. Nyoni & Mr J. Sobantu
BULAWAYO 18 & 31 OCTOBER & 2 NOVEMBER 2016

Criminal Trial

T. Hove for the state

T. Matshakayile for 1st accused

S. Nyathi & T. Muganyi for 2nd accused

BERE J: The two accused persons, namely Girtfibion Ntuthuko Moyo (accused 1) and Mduduzi Moyo (accused 2) stand charged with the offence of the murder of one Lovemore Sibanda in the early hours of 20 December 2015 and at or near Masisa Bottle Store, Nxele Business Centre, Plumtree.

The allegations against the two accused persons are that the two together with the deceased had been drinking beer from 19 December 2015 right up to the early hours of 20 December 2015. It was in the early morning of 20 December 2015 that the two accused persons are alleged to have ganged up and severely assaulted the deceased who died on the spot. The post mortem report that was produced by consent and as exhibit 4 speaks to severe multiple injuries and marks of violence and concludes that the cause of death was asphyxia, bronchoaspiration and fractured mandible caused by assault.

The two accused persons pleaded not guilty. In their defence outlines the two allege that at the relevant time the deceased met his fate, he was involved in a scuffle with the two after the deceased had ambushed them on their way home about 100 metres away from the Nxele Business Centre.

Accused 2 alleged that when they were ambushed by the deceased, the latter chased them and that in the process he hit the deceased with a black label beer bottle and felled him down and immediately ran away leaving the deceased down and with accused 1 at the scene of the murder.

Accused 1 in his defence outline said that after the deceased had been floored by the accused 1 with a beer bottle, the deceased dropped a hammer which the accused picked up and used to hit the deceased twice on the face and once on the ribs before he too fled the scene. Both accused in their defence outlines and subsequent evidence in chief projected the deceased as having been the aggressive party on the occasion the two assaulted him.

The first witness to give evidence Sikhanyisiwe Ndiweni the deceased's wife had virtually nothing to assist the court in as far as the death of her husband was concerned as she only got to the scene of the murder after she had been notified of the death of her husband.

Nyasha Mudadi, the second state witness gave the court some indication of the events of the day linked to the death of the deceased. The witness confirmed the deceased, the accused persons and other patrons had been drinking and dancing to disco music that was at the business centre on the 19th of December 2015 and that the merry-making spilled over to the early hours of the 20th of December 2015. The witness had been drinking with the deceased for the better part of the day and during that time this witness had the misfortune of picking up a quarrel with accused 2 after the latter had spilt his beer. In this witness's testimony, the accused 2 was generally portrayed as an aggressive person and appeared to him to be a person of violent disposition as evidenced by his moving around with a catapult. To put this witness on full alert, the witness told the court that he was warned by one patron to be wary of the shenanigans of this particular accused after he had quarreled with him leading to him slapping the accused 2. We have no doubt in our mind that having been so warned he had a good reason to keep his eyes on the movement of accused 2 for his own safety. The witness observed that accused 2 was wearing a Kaiser Chiefs jersey.

The witness testified to the effect that when the deceased parted with them advising he was now leaving for his homestead, he saw him being confronted and conversing with both accused persons and 2 or so other people whom he could not identify.

Of significance from this witness was that although he could not tell the nature of the discussion between the accused and the deceased who were about 20 metres away from him, he noted that there appeared to be an altercation amongst those people. He last vividly observed accused 1 and 2 taking turns to push the deceased away in the general direction of where the deceased was eventually found dead.

The witness was quite clear that when the two accused were pushing the deceased away from the business centre the deceased who had one hand holding a bottle of Black Label beer, one packet of jiggies and one container of opaque beer, had to use his free hand to try and ward off the pushes he was subjected to by the two accused persons. The witness last saw the deceased and the accused and these other unidentified people disappearing into the darkness not far away from the spot of murder.

We did not labour as a court to follow the sequence of events as given by the second state witness. We closely followed the narration of events as given by this witness and we are satisfied that the witness gave both a believable and credible story. We were particularly impressed by this witness's open disclosure to the court that both the accused and the deceased were evidently drunk on the day in question. We were also impressed by the witness's honest disclosure that given the distance that separated him from the deceased and the accused persons the last time he saw deceased alive, he was not able to tell the exchanges that were going on between the deceased and the accused persons.

Given the strong warning that this witness had been given after he had slapped the 2nd accused by some bystander concerning the disposition to violence given to accused 2, we are more than satisfied that the witness had a good reason to keep his eye on the movements of the accused persons because it was in his interest. Because of this we believe that the witness was being candid with the court when he said he actually saw the time the accused persons left the

business centre in the company of the deceased. We also accept that the witness must be believed when he said according to his observations at the time the deceased and the accused left the business centre, all was not well as amongst them as evidenced by the constant shoving of the deceased as the three headed to their respective homes, and disappeared into darkness.

If there was need to confirm or corroborate that what Nyasha Mudadi had observed subsequently degenerated into a nasty incident then the evidence of Noleen Moyo filled up that vacuum. Noleen Moyo is a close relative of both the deceased and the accused persons. The accused persons are uncles to her husband and the deceased was her sister's son in law.

Noleen's evidence was that on the day in question she had spent the better part of the day running her kitchen at Nxele Business Centre and that in the early hours of 20 December 2015 she left the business centre to retire her children to bed. She testified that on her way back to the business centre, when she was barely 20 metres away from the business centre, her attention was drawn by a distress cry and she cautiously moved closer to investigate. She said she discovered that the person crying was on an open space and on getting closer she heard the person crying saying "Lovetone why are you assaulting me, why are you killing me." Out of panic the witness rushed to the business centre where she alerted one Imaha Khuphe about the distress cry she had heard and what appeared to have been the white object that she had seen sandwiched by four unidentified individuals.

Noleen's evidence was confirmed by Imaha Khuphe who eventually discovered that the white object referred to by Noleen was in fact the remains of the deceased.

Under cross-examination Noleen reiterated the evidence around the distress cry she heard and she remained steadfast that she was not able to identify the four people who she saw around the white object that turned out to be the deceased's remains. As a court, we were particularly impressed by the fact that what this witness told the court was corroborated by Imaha Khuphe who equally gave his brief evidence very well. Noleen Moyo was a convincing witness and the stock of her credibility was built around her unwillingness or insistence that she was unable to identify the people she saw surrounding the deceased. If this woman was malicious as against

the accused persons, as her cross-examination tended to suggest she could have easily said that she identified the accused persons as some of the people who were around the deceased. She did not say that and that in our assessment of her evidence speaks to her undoubted credibility. From her testimony, it was clear that she was at a vantage or strategic point when she heard and observed what she said she saw on the morning of 20 December 2015. Consequently, her evidence must be believed in its entirety.

If there was need to find corroboration of this witness's testimony, then that corroboration came from a very unlikely source – both accused persons' confirmed warned and cautioned statements. It will be noted that from their statements, both accused persons admitted to have assaulted the deceased. So if Noleen heard a distress cry from the deceased which identified one of the assailants as one of the accused persons, that evidence's truthfulness is beyond reproach. I will deal with the accused persons' statements in greater detail later in this judgment.

As already stated Imaha Khuphe's testimony generally served to confirm the credibility of the story told by Noleen and to reaffirm that generally many people had spent the day partaking liquor and dancing to disco music.

Simbarashe Zinhumwe, an Assistant Inspector in the Zimbabwe Republic Police's evidence further served to confirm the evidence of Noleen. His evidence also covered the preliminary investigations which he carried out leading to the recovery of the hammer weighing 700 grams which he said accused 1 admitted to have used in assaulting the deceased after he had been floored with a beer bottle by the second accused person. The nature of the investigations given by this officer had absolutely no challenges given the cooperation exhibited by the two accused persons in the subsequent recording and confirmation of their warned and cautioned statements.

The officer said accused one led the investigating team to Nathaniel Moyo's homestead to show them where he had put the murder weapon, the hammer. The officer's unchallenged evidence was that the hammer was recovered from the top of a thatched bedroom hut. It was

also the officer's unchallenged testimony that when the hammer was recovered it was blood-stained.

It was of significance that when the officer saw the deceased at the scene of crime, he noted that the deceased had sustained a cut on the right side of the cheek, deep cut on the chin, the mouth and face both of which were full of blood, swollen neck and face and bruises on the rib cages. In our view, if these injuries are looked at in conjunction with the detailed analysis as shown on exhibit 4, the post mortem report, one cannot avoid concluding that the deceased must have been butchered and left with death as a certainty. The kind of assault to which the deceased was subjected to was clearly calculated to end his life or that those who engaged in his assault were reckless as to the consequences of their conduct.

Under cross-examination the officer speculated on the aggressive conduct of the deceased whom he never saw during the day preceding his death. Obviously if the court were to choose between the speculative evidence of this witness and that of the people who actually saw the deceased during the day the court would rather go with the evidence of the people who actually saw and interacted with the deceased on that day. It is true that at some stage the deceased picked up a quarrel with Owen and that this prompted the deceased's wife to take away from the deceased the axe which he had and secured it with Noleen. Despite this, in our view it would not be fair to import this conduct of the deceased's dealings with Owen to his interaction with the accused persons because those who saw the deceased at the material time like Mudadi testified that there was evidence that the deceased was under serious threat from the accused persons when he was last seen alive and that prior to that he had been in a jovial and sociable mood.

In their evidence after the closure of the state case, both accused persons sought to project the deceased as having been aggressive to them with them having been forced to act in what they sought to justify as putative self defence. The combined position taken by the two accused persons is betrayed by none other than themselves in their warned and cautioned statements.

Accused 1, when properly warned and cautioned in his confirmed statement gave his reason for "killing" the deceased as punishment for him for the quarrelling which the deceased

had had with the accused's uncle, accused 2. There are no traces of self-defence that are revealed in accused 1's confirmed and warned and cautioned statement. Surely if the accused person was under threat from the deceased this would have been the first thing that he would have highlighted in his recorded and confirmed statement.

Accused 2 makes an abortive attempt to lay the foundation of some kind of self-defence in his statement when he said he hit the deceased once with a bottle and ran away after the deceased had ran after him. The accused 2's position is effectively put in serious doubt by the accepted evidence of both Mudadi and Noleen.

The evidence of Mudadi does not support the theory of the deceased having ambushed or let alone having chased after the accused person. If anything the two accused persons were last seen shepherding the deceased to a secluded place where incidentally his remains were later recovered.

Noleen's evidence puts an icing to the false theory of the deceased's alleged aggressive conduct. If the evidence of accused 2 is that he merely struck the deceased with an empty beer bottle and fled from the scene, surely Noleen would not have seen four people sandwiching the deceased with the deceased pleading with this same person, accused 2 not to assault and kill him. We now know that at the decisive moment of his life the deceased was heard making a distress cry, pleading with accused 2 (Lovetone) not to assault and kill him.

It is common cause the deceased was a heavily built man. In any event the excessive injuries as summarised in exhibit 4 do not give room to the defence of self-defence. The injuries outlined there suggests excessive force was used to punish the deceased and that the assailants must have foreseen the real risk of causing death to the deceased but were reckless as to whether or not death would result¹.

1. See *A Guide to the Criminal law of Zimbabwe* (Second Edition, published by Legal Resource Foundation) by G. Feltoe p 110

In our assessment of the evidence that has been tabled before us in this case, it would be a reckless exaggeration to say that the accused persons were so drunk to the extent of not appreciating what they were doing on the day of the assault of the deceased.

This would be so because when given the opportunity to defend themselves in court, both gave a fairly detailed narration of the events of the day leading to the deceased's demise. The accused 1 was so conscious that after using the hammer he needed to hide it obviously in a desperate attempt to hide evidence. Accused 2, despite his determined effort to create the impression that he did not know where he struck the deceased with an empty beer bottle sold himself out in his evidence in chief by clearly stating that he hit the deceased on the head and that the impact was so strong that it fell the deceased. This is the behaviour of drunken people who were in full control of their faculties.

Accepted, no one actually saw the accused persons assaulting the deceased, but through their confirmed, warned and cautioned statements, the accused took and placed the court at the scene of crime at the critical moment.

The evidence of Mudadi and Noleen does not allow the court to accept religiously the versions as contained in the confirmed statements because of what I have already stated.

It is very clear in this case that the ratio outlined in *R v Blom*² is well satisfied by the evidence in this case. There is overwhelming evidence pointing to the inevitable guilt of the two accused persons.

In the light of the provisions of section 197³ as amended by section 24 of Act No. 3 of General Laws Amendment⁴ it is clear that when the two accused persons assaulted the deceased, both were acting in common purpose. As a result each accused is found guilty of the offence of murdering the deceased with constructive intent.

1. 1939 AD 188
2. Criminal Law (Codification and Reform) Act Chapter 9:23
3. 2016

Sentence

We accept that this offence was not committed in aggravating circumstances. In considering sentence we accept that both accused persons are first offenders. They have spent 10 months in custody awaiting the conclusion of this case.

The offence occurred at a time when all the parties had spent considerable time consuming alcohol and that all the parties were drunk as confirmed by Mudadi. It is commendable that the accused persons cooperated with the police and made the police investigations quite simple. Police had no difficulties in having to spend time trying to locate the accused persons as they both surrendered themselves to the law enforcement agents.

In aggravation, we are concerned that having been following the proceedings of this court, there is not the slightest indication on the part of the accused that they regret or are remorseful of their criminal conduct.

Accused 1, though young appeared in fact to have been the more aggressive one of the two accused persons.

The manner in which the accused persons used the hammer to butcher the deceased until he died makes this a callous murder.

While accepting that the accused persons were drunk we wish the message to go far and clear that voluntary intoxication must never be regarded as a shield to cover such horrendous acts of violence like the one we dealt with in this case. Our society must learn that violence should never be resorted to in an effort to resolve disputes.

Once again, life was needlessly lost in this case and we continue to call upon the citizenry to learn to respect the sanctity of life.

Sentence - Each accused is sentenced to 22 years imprisonment.

The National Prosecuting Authority, state's legal practitioners

Lazarus & Sarif, accused 1's legal practitioners

Dube-Banda, Nzarayapenga & Partners, accused 2's legal practitioners