

**THE STATE**

**Versus**

**THEMBA NDLOVU**

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J with Assessors Mr P. M. Damba and Mr S. M. Hadebe

BULAWAYO 3 & 4 NOVEMBER 2016

**Criminal Trial**

*T. Hove* for the state

*B. Ndove* for the accused

**TAKUVA J:** Accused is charged with murder. It being alleged that on the 29<sup>th</sup> day of March 2016 and at Sompisi Bar Mahatshula North, Bulawayo, the accused did wrongfully, unlawfully and intentionally kill and murder Belinda Mguni a female adult in her life time.

He pleaded not guilty to the charge and the state proceeded to introduce the following exhibits into the record.

Exhibit 1 was the summary of the state case wherein the facts are that:

The accused and the deceased were not related. On the 29<sup>th</sup> day of March 2016 the accused was drinking beer at Sompisi Bar where deceased was employed as a bar lady. The accused was drunk and disorderly, which conduct disturbed peace and tranquility in the bar. A number of patrons complained leading to accused's eviction from the bar by one Taurai Rwizi, a security guard at the bar. The accused armed himself with a quarter brick and immediately followed Taurai back into the bar. The accused threw the quarter brick at Taurai who was at that stage at the braai stand at the back of the bar. The accused missed his target and hit the deceased at the back of her head felling her down. The deceased was rushed to Mpilo Hospital on the same night but later died on the 4<sup>th</sup> of April 2016. The accused was arrested at the scene.

The next exhibit was the accused's defence outline in which he outlined his defence as follows:

On the day in question he was at Sompisi Bar drinking beer alone. Later, he claimed that an argument ensued between him and a security guard over some ladies he had affectionately greeted. The security guard then manhandled him and also assaulted him. In retaliation he insulted the guard mentioning his mother's private parts, leading to further assault and he then fled from the guard to where other patrons were. Further, he adopted his warned and cautioned statement as part of his defence. In the statement he said *inter alia* that as he was running away from the guard, a brick was thrown at him which then hit the lady who was coming out of the office going to the toilet.

Exhibit 3 was the accused's confirmed warned and cautioned statement recorded on 31<sup>st</sup> May 2016. The post mortem report by Dr I. Jekonya was produced as exhibit 4. It shows the cause of death as (a) intracranial haemorrhage (b) skull fracture (c) head injury (assault)

The pathologist indicated that severe force was used to cause the noted intracranial haemorrhage. Also the skull fracture measured 6cm x 5.4cm. Exhibit 5 was the quarter brick whose weight is 1.435kg. It is an old brick that came off a demolished structure. It is plastered with sharp edges.

The state's first witness was Taurai Rwizi who was employed at this bar as a security guard. He knew the deceased as his workmate and the accused as a regular patron. On 29 March 2016 at approximately 2120 hours he was on duty when he observed the accused disturbing other patrons. The proprietor of the bar told him to tell the accused to leave the bar. He did so and eventually took the accused outside. When he returned into the bar, he noticed that the accused had followed him into the bar. He suddenly heard people shouting "brick, brick" and when he turned, the brick missed him and struck the deceased on the head. He ran towards the accused and with the assistance of other patrons apprehended the accused who wanted to escape. The witness said he only saw the brick closely after the accused had been apprehended. Under cross examination, he said there were many people in the bar when this incident occurred. Also he said, the accused was handcuffed by the proprietor one Champion Ureke.

The witness categorically denied that he insulted the accused after the latter had greeted some women. He also denied that the accused shouted obscenities at him and that it was he witness who was arrested by patrons for committing this crime. More importantly, the witness denied that he threw the brick and that he is being protected because all the witnesses are not only Shona speaking but are very close to Champion. As regards visibility, he said they could see clearly as there was illumination from light bulbs. Finally, he said the accused was in the company of his friends who are not known to the witness and that exhibit 5 was used as a door stopper to the main entrance and was there on that day.

In our view, this witness gave evidence in a calm, composed and straight forward manner. He narrated a very simple and short version of events leading to the death of the deceased. Although the accused labeled him as the murderer, he never exaggerated this evidence in order to strengthen the case against the accused. For example, while he could have easily said he saw the accused picking up the brick, his testimony was that he did not see this happen. Further although he could have embellished his evidence by telling the court that he saw the accused throwing the brick, he actually said he did not see this happen, all he saw was a brick flying past his head when he turned in reaction to the alarm raised by Tatenda Musenga (Tatenda).

Finally as will be shown later, this witness' evidence is corroborated by that of other state witnesses. The arrest of the accused was a spontaneous act by patrons who had been incensed by what the accused had done. For these reasons we find Taurai to be a credible witness whose evidence we embrace *in toto*.

The next state witness was Tedious Gwenhure (Tedious) who knew the deceased as a bar lady at Sompisi bar. He knows the accused as a patron at this bar. The witness knows the bar owner as a fellow businessman. He owns a shop at the same business complex in Mahatshula North. On the night in question, the witness was playing pool with Tatenda when he saw the accused being taken out of the bar by Taurai. Shortly thereafter he saw the accused returning holding a brick and he heard Tatenda shouting "stone stone". He realised that the brick had

been used to strike the deceased who fell down. The accused was immediately apprehended by patrons although he did not participate in the arrest as the accused had no chance of escaping. He did not see the owner of the bar handcuffing the accused. When asked how accused was disturbing other patrons he said he did not know how.

Under cross-examination, he denied having been coached by Champion Ureke (the owner of the bar) on what to say in court. He denied accused's version that the brick was thrown by Taurai saying, "accused is lying, he came with the brick. It was not possible for the guard to get the weapon in the bar." He denied that patrons were threatened with dogs by the owner. When the police arrived, he was still at the scene although they did not speak to him. The witness told the court that Tatenda was not his friend but just a "drinking mate". Also, he said he did not see how the brick left accused's hand. When it was put to him that he conspired with the owner of the bar to falsely incriminate the accused because he does not belong to their tribe, the witness said that is not true at all as at one time he had ferried the accused in his car to watch soccer at Bourbarfields stadium. He said the accused is a Highlanders supporter while the witness supports Dynamos.

Tedious is a businessman in his own right. His demeanour in the witness stand was good. He answered questions with ease. It was clear that he did not exhibit any hostility towards the accused and he did not depart from his version. Quite clearly there was no exaggeration in the witness' testimony. For example when asked how the accused was disturbing other patrons, he said he did not know. If he had been coached by the owner, he would have made sure that his evidence dovetailed with the owner's evidence on this point – namely that the accused was shouting obscenities at patrons, stepping on them and taking their beer etc.

In our view, this witness gave a credible account of what he actually observed whilst in Sompisi bar. We find him to be a truthful witness whose testimony is also supported by other state witnesses. We therefore accept his evidence.

Tatenda Musenga (Tatenda) was the next state witness. He knows the accused as a resident in Mahatshula North. He knew the deceased during her lifetime as a bar lady at Sompisi

bar. On the 29<sup>th</sup> day of March 2016, he was playing a game of pool with Tedious when he saw Taurai taking the accused out of the bar. Shortly thereafter he saw the accused returning holding a brick. Accused ran into the bar and he shouted “stone, stone”. At that time, the accused threw the stone towards Taurai who was walking. Taurai turned his head and the stone missed him and hit the deceased at the back of her head. The deceased fell down and accused was immediately apprehended by “people”. He denied that Champion Ureke ordered patrons out of the bar. When it was put to him that he was influenced by the owner of the bar to lie he said “I cannot be influenced”.

As regards how he ended up as a state witness, he said he voluntarily went to the police station after he gathered information that the police wanted those who had witnessed the incident to report to the police station. The witness categorically denied that he connived with Gwenhure to incriminate the accused. He had a clear view of the whole area and this is why he was able to see that the accused was behind the security guard (Taurayi).

Under cross-examination, it was put to him that he was influenced by Champion Ureke because both of them are Shonas and his answer was, “I do not talk to Champion”. He also denied that Champion threatened to set his dogs upon the patrons. He said there is no bad blood between him and the accused.

In our view, this witness’ evidence is not difficult to follow due to its clarity. The witness saw the accused holding the brick and he immediately alerted other patrons because he realised that the accused was about to throw it into the bar. That someone shouted the warning is even admitted by the accused. This witness had no reason to falsely incriminate the accused. The suggestion that he was coached does not make sense when one considers the fact that Champion Ureke did not even witness the attack. There is no indication in this witness’ testimony that his evidence was rehearsed at all. The witness did not contradict himself and his demeanour was good. For these reasons we accept his evidence wherever it conflicts with that of the accused.

The next state witness was Champion Ureke (Champion). He is the owner of Sompisi bar and he knows the accused as a patron at his bar while he knew the deceased as his “accountant” who had worked for only two months before she died. On the 29<sup>th</sup> March 2016, he noticed that the accused “was causing unrest to the other patrons”. He cautioned him but he continued forcing him to instruct Taurai to evict the accused from the bar which he did. This was after accused had used vulgar language and threatened to assault patrons. The witness suddenly heard someone shouting “stone, stone” and when he turned, he noticed that there was commotion at the braai stand. He moved closer and saw deceased lying down seriously injured. He enquired and some patron said “Themba had thrown a stone”. He applied first aid to the deceased and later handcuffed the accused and locked him in the shower room as patrons wanted to mete out mob justice on him. He called an ambulance and reported the case to the police. The deceased was ferried to hospital where she died on the 2<sup>nd</sup> of April 2016.

The witness saw the brick lying besides the deceased. He witnessed its recovery by the police. When asked to comment on accused’s defence that it was his security guard Taurai who threw the stone the witness said he “did not know”. He denied influencing the witnesses and said there “were many patrons who had volunteered to testify”. He also denied having a hand in selecting witnesses and that the patrons actually apprehended Taurai and not the accused. He said he never influenced or connived with the police or the patrons to falsely incriminate the accused. The witness admitted owning dogs saying almost everyone in Mahatshula knows that he is a dog trainer. However, on the day in question his dogs had not yet been brought to the shop as this is done after the bar is closed. As regards accused’s state of sobriety that night he said “he was drunk but he appreciated what he was doing”. The witness noticed that accused’s behaviour was “awkward”. At one time he said “Today I want to kill one Shona and run away to Botswana”. When asked by accused’s legal practitioner whether he would be happy to have his employee implicated in a murder case, the witness replied “yes - especially when we are talking of murder”.

In our view, Champion was a truthful witness whose evidence is not even directly relevant to the assault which he did not witness. Where he had no direct knowledge of the facts,

he honestly indicated so. According to him, the patrons were so angry about what the accused had done that they threatened to assault him. He then decided to lock the accused in the shower room. Surely, if the deceased had been murdered by Taurai the patrons would not have vented their anger on the accused so soon after the event. The question is why would all the patrons suddenly pledge allegiance to Champion well knowing that the actual perpetrator of the murder was Taurai? If the answer is that they were afraid of the dogs, then surely they would have simply walked to the police station to narrate the correct position. I say so because the evidence that is uncontroverted is that the deceased was “liked” by the majority of patrons who were deeply pained by her murder. Consequently they could not have allowed Champion to distort facts in order to protect his selfish business interests. Even accepting that he had some interest in what had happened, he certainly had no capacity to influence the patrons to lie. We find therefore, for these reasons that Champion was a truthful and credible witness whose evidence we accept wherever it conflicts with that of the accused.

Next the state called the attending detail, one Mabutho Kim who is a Constable in the Zimbabwe Republic Police based at Queenspark Police Station. After receiving a report, he visited the scene where he found an ambulance crew attending to the deceased. He was shown the accused by Champion. Accused had been cuffed and locked in a room. He recorded a statement from Champion on what had transpired and took the accused to the station together with exhibit 5. He confirmed that when he got to the bar it was still open although there were few people. The witness told the court that he informed those patrons in the bar to come to the police station if they had witnessed the assault and some indeed took his advice and came to the station. He denied that he deliberately chose particular witnesses.

In our view this witness’ evidence is almost common cause. The defence did not seriously challenge his evidence. He certainly had no reason to falsify his evidence which we embrace.

The state then applied to have the evidence of Evans Kagwere and Dr Jekonya admitted in terms of section 314 of the Criminal Procedure and Evidence Act Chapter 9:23. There was no objection and the evidence was so admitted. The state then closed its case.

The defence opened its case by calling the accused as a witness. He told the court that on the 29<sup>th</sup> of March 2016 at approximately 9 pm he was drinking beer at Sompisi Bar when 2 ladies arrived. He greeted them by saying “you are beautiful”. Taurai then stood up and pounced on him accusing him of talking to his (Taurai’s) wives. Despite an apology Taurai continued assaulting him. The accused then insulted Taurai referring to his parents and ran towards the crowd expecting to be defended. He then realised that people had grabbed Taurai accusing him of having struck the wrong person. Taurai’s employer asked who had been fighting with Taurai and the patrons said it was the accused. Champion, then directed patrons who were holding Taurai to release him but they refused until he threatened to release the dogs. He walked towards the door where dogs are kept and the patrons ran away. Champion locked the door and handcuffed the accused. He said he was very drunk on the day in question. Asked why he did not have any witnesses, the accused said “I do not have any witnesses because Champion threatened to release the dogs and my witnesses ran away. I was alone”. He admitted that he is a regular patron in this bar.

Under cross-examination, the accused said for the 1<sup>st</sup> time that there was a patron called Priscilla Moyo who was there. When asked why he had not mentioned this to his legal practitioner, the accused said, “Champion said he was going to influence and pay them”. The accused admitted that they were many people in the “hall” drinking beer.

In our view the accused was not a truthful witness at all. While the gravamen of his defence is that all state witnesses, the police included were scheming against him, the totality of the evidence shows that it is the accused who is the schemer. We say so for the following reasons. The accused has not given a consistent version of how the fight started, in that whereas in the warned and cautioned statement he gave the impression that when he greeted those ladies

he was just outside the bar, during his evidence in chief he said he was inside the bar together with Taurai.

Also, the accused does not explain why he remained in the bar when other patrons fled. According to him at this time Taurai was being held by the patrons and he was a free man. Why not run away? The answer is not difficult to find. It is that the accused had already been apprehended otherwise he would have run away with those who ran if any.

Further, accused's failure to mention the injuries and that Priscilla Moyo was his witness to the police makes his version incredible. The defence outline is silent on that. Accused only mentioned this crucial piece of evidence under cross-examination. We find this to be an after-thought. Also accused failed dismally to explain why he was locked in the shower room by Champion. Champion said the reason was that the patrons were very angry and wanted to assault the accused.

The accused tried to play the tribal card but this in our view is untrue as pointed out by the witnesses that they simply were in court to tell the truth of what they saw.

For these reasons, we find the accused to be an incredible witness who strenuously attempted to trick this court. The accused is a cunning person whose evidence we disbelieve.

### **Issues**

1. Who threw the brick that fatally struck the deceased?
2. Did that person act with the requisite mens rea/

The 1<sup>st</sup> issue is a factual one to be decided by findings of credibility and probabilities. The second is a question of law.

**The Law**

Sections 57 of the Criminal law Codification and Reform Act Chapter 9:23 deals with deflected blow in homicide cases. It states:

“If any person –

- (a) does or omits to do anything in relation to another person which, if it caused that other person’s death, would constitute murder; ... and
- (b) by the conduct referred to in paragraph (a), causes the death of someone other than his or her intended victim; he or she shall be guilty of the following crimes –
  - (i) ... and
  - (ii) in respect of the person whose death he or she has actually caused –
    - (A) Murder or infanticide as the case may be, if he or she realised that his or her conduct involved a real risk or possibility of causing the death of someone other than his intended victim; or
    - (B) Culpable homicide, if the requisites of that crime are satisfied.”

Section 15 of the Code is relevant as regards the test of the realization of real risk or possibility and its two components. It states;

“15 (1) where realization of a real risk or possibility is an element of any crime, the test is subjective and consists of the following two components –

- (a) a component of awareness, that is, whether or not the person whose conduct is in issue realised that there was a risk or possibility, other than a remote risk or possibility, that –
    - (i) his or her conduct might give rise to the relevant consequences; or
    - (ii) the relevant fact or circumstance existed when he or she engaged in the conduct;
 and
  - (b) a component of recklessness, that is whether, despite realising the risk or possibility referred to in paragraph (a) the person whose conduct is in issue continued to engage in that conduct.
- (2) ...  
 (3) ...  
 (4) ...”

**Findings of fact**

- (1) The accused, the deceased and all state witnesses except the pathologist and police officers were at Sompisi Bar when the deceased was struck with a brick.
- (2) The accused was unruly and had to be evicted from the bar by Taurai.
- (3) The accused was incensed by this and he returned to the bar carrying a ¼ brick i.e. exhibit 5
- (4) Accused's intention was to assault Taurai with the ¼ brick
- (5) The accused threw the brick with excessive force towards Taurai.
- (6) The accused missed Taurai and the brick struck the deceased on the head and she collapsed.
- (7) The accused was apprehended at the scene by Taurai with the help of other patrons.
- (8) Subsequently the accused was taken by the police and charged with murder.
- (9) The deceased sustained fatal injuries and she died on the 2<sup>nd</sup> of April 2016 from those injuries.

#### **Application of the law to the proved facts**

- (1) The accused threw a brick in a crowded bar. He was fully aware of this fact. Therefore he realised that there was a risk or possibility that his conduct might cause death to one of the patrons.
- (2) Despite this realization the accused continued to throw the brick. In so doing the accused acted recklessly.
- (3) There is no reasonable possibility that the accused's defence might be true as it has been sufficiently rebutted by positive evidence from state witnesses.

In the circumstances, we find that the state proved its case beyond reasonable doubt. We therefore find that the accused acted with the requisite intent and is guilty of murder with constructive intent.

**Reasons for sentence**

In assessing sentence we take into account that the accused was forty (40) years old at the time he committed the offence. The offence occurred in a bar where accused was drinking beer. At the time of the offence, accused had taken large amounts of alcohol and was therefore intoxicated. We have also taken into account that the accused grew up as an orphan after both his parents died when he was 4 years old. He lacked proper parental guidance while growing up. The accused left school after grade 7 and never got formally employed. At the time of the offence, he was a “tout” at Egodini where he was exposed to a lot of violence. Finally, we took into account that the accused is a 1<sup>st</sup> offender who has been found guilty of murder with constructive and not actual intent.

Having said that we noted that a precious life was needlessly lost when accused introduced a brick into the bar. The accused who was a nuisance in this bar defied the security guard’s order to leave the bar. We also noted with a sense of revulsion that murders committed at drinking places are now prevalent. There is need to remind those who consume alcoholic brews and commit brutal murders that stiff penalties await them. The deceased was a blameless victim caught in cross-fire. The accused showed no remorse at what he had done. The courts have a duty to uphold the sanctity of human life

Accordingly, accused is sentenced to 25 years imprisonment.

*The National Prosecuting Authority, state’s legal practitioners*  
*Ndove, Museta & Partners, accused’s legal practitioners*