

THE STATE
versus
TONDERAI NGULUBE
and
NYASHA MIDZI

HIGH COURT OF ZIMBABWE
MATHONSI J
GWERU 28 MAY 2018 AND 29 MAY 2018

Criminal Trial

M Shumba for the state
N Hlabano for the 1st accused
B Muzenda for the 2nd accused

MATHONSI J: Gift Mukwende (the deceased) was a teenager who had hardly experienced adulthood at 19 years of age when, at a night club known as Can Night Club (the club) Shurugwi, in the early hours of 13 December 2016 he met his gruesome and painful death, the victim of an extremely violent gang attack over a woman which left him with a metal bar-stool embedded in his head through one of its legs. The leg was so viciously thrust into the back of his head by the occipital region before being driven through the head with the use of another bar stool thereby forcing the leg to exit the head through the frontal the right parietal region. It was an attack which gave the young man no chance of survival even as he was ferried to hospital with that stool still stuck in the head.

It is the two accused persons, along with a friend of their called Henry Sibangani, still at large, who are accused of that gruesome act. They are now charged with the murder of the deceased in contravention of section 47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The allegations are that in the early hours of 13 December 2016 at the club located at Donga Business Centre in Shurugwi they unlawfully caused the death of the deceased by striking him all over the body several times with metal bar stools as well as stabbing him once at the back of the head with the leg of one such metal bar stool intending to kill him or realizing

that there was a real risk or possibility that their conduct may cause death but continuing to engage in that conduct notwithstanding.

Both accused persons pleaded not guilty to the charge. In his defence outline the accused one stated that he did not participate in any way in the killing of the deceased. According to him, the deceased and accused one's friend Henry Sibangani (Henry) shared a girlfriend whom we now know as Priscilla Mwarisasa (Priscilla). They had a quarrel and started throwing chairs at each other thereby putting all the patrons inside the club at the risk of injury. At that point he (accused1) approached them in a bid to restrain them from fighting and appeared to succeed as he managed to calm them down. No sooner had the fight stopped than Henry picked up a stool and struck the deceased with it causing his death. He is therefore innocent as he only sought to restore order.

For his part, the accused two stated in his defence outline that on the day in question he was indeed at the club in question in the company of Sekai Mpofu, whom he claims as his girlfriend, Henry and Priscilla. He was staying with Sekai, Henry and Priscilla who was the latter's girlfriend at the two sisters' residence at the time. The four of them had gone to the club where they met the accused one who bought them beer. It was during their drinking session that Sekai informed him that her sister Priscilla was double crossing his friend Henry with the deceased who was also at the club.

At some stage the deceased, Priscilla and Henry left the club and upon their return Henry was having a misunderstanding with the deceased which degenerated into a fight. The accused two stated that he tried to stop the fight and at some point managed to disarm Henry of a bar stool he intended to use to assault the deceased. At no time did he himself get involved in the fight. When the accused one had succeeded in stopping the fight he had gone to toilet only to return and find the fighting having resumed and the deceased and Henry were throwing stools at each other. As the fight turned nasty the accused two says he left the club and did not witness how the deceased was fatally injured.

The accused two went on to say he hooked up with both accused one and Henry outside the club after the fight. He later proceeded home with Henry who then absconded and has never

been accounted for. The accused one also joined him at his home, that is Sekai and Priscilla's home, after the fight from where both of them were arrested that morning.

According to the post mortem report compiled by Dr Roberto Trecu, a forensic pathologist at United Bulawayo Hospitals, who examined the body of the deceased on 15 December 2016 he observed the following marks of violence:

- “1. Irregular and circular laceration (2cm x 3cm) on the left side of the occipital region (brain is outside through laceration).
2. Small laceration (1cm x 1cm) in the occipital region (around laceration number 1)
3. Irregular and circular laceration (3cm x 2cm) on the right parietal region (brain around and outside)
4. Abrasion on the right side of the face, chest and back side.
Tract. Punget object (stool foot) which penetrated through the left occipital region with sortie through right parietal region, produced bones fractures on the skull and severe brain damage.”

The doctor also observed fractures of 6 left ribs among other fractures of the skull and multiple bones fragments and severe brain damage through the fracture caused by the stool leg which went through the head. The doctor concluded that the cause of death was severe cerebral damages, multiple skull bones fractures and severe head trauma due to stab injury.

We have had the benefit of eye-witnesses' account of how the deceased was fatally attacked from two extremely good witnesses in the form of Sekai Mpofu and Enock Chimbetete both of whom have not been shown to have any motive to falsify their evidence. Their combined effort reveals the following facts: On the night in question the club was packed with patrons who were imbibing while seated on either the bar stools located by the bar side or some benches which were placed around the bar hall. Among the patrons were Sekai, Priscilla, the deceased, Henry and accused one and two, who were drinking alcohol while in the company of others.

There was an underlying problem between the deceased and Henry as, to their unpleasant knowledge, Priscilla who is now deceased was dating both of them. They had then become sworn enemies and rivals. The state witnesses talk of the deceased having confided in both Sekai and Chimbetete that Henry was giving him some problems over Priscilla. On the other hand, when Henry saw the deceased returning into the club, after having gone out to answer the phone, followed by Priscilla he immediately picked out a quarrel with him accusing him of

having snatched his woman. In no time a fist-fight erupted between the two rivals. With the deceased taking an early lead and being on the ascendancy the two accused persons stepped in to save Henry.

When the accused two initially tried to join the fight, other patrons prevented him suggesting he should allow the two fighters to slug it out between the two of them. When the accused one tried to restrain them the deceased connected him straight in the eye with a fist giving him a blue eye. Incensed, he is said to have gone outside to break a beer bottle intending to use it as a stabbing weapon against the deceased as he was heard complaining why the deceased had struck him. Meanwhile the accused two had armed himself with a bar stool which he used to strike the deceased on the back.

By then all three of them are said to have been armed with bar stools which they used to attack the deceased indiscriminately forcing him to fall to the floor and inflicting the injuries observed by the doctor. The accused one and two were a tag team when, the moment the deceased was on the floor, the accused one held the bar stool by the legs on the seat side and aimed one foot of the leg to the back of the deceased's head in the occipital region and stabbed him. The force used must have been extremely severe because although the stool's leg is protected by a rubber it still penetrated the head.

Sekai said it had not penetrated deep but accused two brought his own bar stool and struck the stool which had been stuck into the head by the accused one to cause it to go further into the head. In fact the stool's leg went right through the head as a result, exiting at the front on the right parietal region as observed by the pathologist. Leaving the stool stuck by its leg in the deceased's head the three assailants fled the scene. It is Sekai who had the presence of mind to rush and file a report with the police who quickly attended the scene and evacuated the deceased to hospital with the stool still stuck in his head. It was only removed at the hospital except that the deceased had died.

The two accused persons were later arrested that morning after Sekai had lured them to her home on the pretext of cooking for them only for her to rush to bring the police to arrest them. I must add that a bar stool similar to the one that was used to stab the deceased was

produced by the state as exhibit 7. Sekai explained that the exact one used had to be cut at the hospital in the process of removing it from the deceased's head.

I have no hesitation in stating that the state witnesses presented their evidence perfectly with very good demeanor. They were at pains in expressing themselves and assisting the court appreciate how the deceased was killed. At great risk to her own safety Sekai orchestrated the arrest of the accused persons, first running to the police station to bring the police to the scene and then setting an ambush for them as they appeared hell bent to escape justice. Unfortunately Henry managed to make good his escape and has not been accounted for. It is against that background that Sekai's little lie that she had not been sitting with the accused persons pales to insignificance. It cannot detract from main thrust of her presentation.

Against what is obviously credible evidence from eye-witnesses the two accused persons set about trying to defend themselves. The accused one who was very loud and with poor demeanor suggested that his only involvement was trying to stop the fight between Henry and the deceased. He stated that the deceased was only assaulted and eventually stabbed by Henry. He also tried to exculpate the accused two by suggesting that the latter had not even been present when the deceased was stabbed. Although he himself witnessed the gruesome stabbing which was perpetrated by Henry, he promptly left the club unable to bear the terrifying sight of how it was executed. In fact he says he ran and stood by the verandah which acted as a recognizance spot for himself, the accused two and Henry. He says he called out to the latter as he came out of the club running. When he indicated to Henry that he had injured the deceased, Henry told him he was also injured and wanted to proceed to hospital as he sought after his girlfriend Priscilla. According to the accused one, Henry who had just brutally stabbed the deceased with the leg of a bar stool discussed the event with both accused one and two before walking away with the accused two.

Although accused one says he initially remained behind at the veranda with his workmate, he also later followed Henry and accused two to the women's home where the accused two admitted him and his workmate to a bedroom for them to sleep. Henry had escaped by then. He was awakened by the police who arrested them. So indeed the two accused persons

and Henry associated with each other even after the fatal attack on the deceased by one of them even by their own version.

The accused one was very evasive under cross examination. He could not even confirm what appeared to be harmless facts like the assault with a fist which he endured at the hands of the deceased. He could not explain if indeed he witnessed the beating of the deceased as he claimed, how the deceased would have sustained all the serious injuries he had as observed by the pathologist including the six broken ribs. In the end he was content with saying he did not know how the deceased got injured. Neither could he explain what could have motivated the state witnesses to falsely incriminate him and his co-accused. Indeed even the explanation he gave of how the deceased was hit and got injured, even suggesting he had been injured by a fall on a table, did not make sense. We therefore reject his evidence as false.

The accused two also gave evidence. He subjected the court to a long rendition of how he had spent the day and the night in question. How he had tried to stop the fight between the deceased and Henry, a person he admitted to be his friend. How he had witnessed the first blow from Henry which was directed to the back and forced the deceased to fall. How, the moment that happened, he had conveniently sneaked out of the club in order not to see the actual stabbing of the deceased by Henry and how he had thereafter met his colleagues by the verandah and discussed what had just happened. They had thereafter proceeded home, that is, the homestead of Sekai and Priscilla. He claimed to have been in love with Sekai from 29 November 2016 long before Sekai even came to visit that locality. The rest of what the accused two said was irrelevant.

In my view the evidentiary value of what the accused two said is completely non-existent. This is a witness who insisted, even after being shown evidence of him having given a warned and cautioned statement to the police on 13 December 2016 the very day of the incident, that it had actually occurred three days earlier on 10 December 2016. He also insisted that he had commenced having an affair with Sekai on 29 November 2016 well before Sekai came to Chachacha. A person who could not give any meaningful explanation as to why, if indeed Sekai, who was then 20 years old, would describe the gory details of how he had hammered a missile into the deceased's head the way she did, if she was a live in girlfriend of his. He is a witness

who was adamant that the accused one was not consuming alcohol on the night in question and had stopped drinking a long time before that day, even though the accused one himself had testified that he had been drinking and *Mr Hlabano* for accused one had also alluded to that fact.

This is a witness who cannot be relied upon at all. We therefore reject his evidence in *toto*.

What we have here is a situation where the two accused persons have simply presented a bare denial of the allegations against eye-witness accounts which place them not only squarely at the scene of crime but portrays them as being actively involved in the brutal attack on the deceased. The latter was subjected to a ruthless and vicious gang attack by three assailants who were armed with bar stools.

In terms of section 196 A of the Criminal Law Code:

- “(1) If two or more persons are accused of committing a crime in association with each other and the state adduces evidence to show that each of them had the requisite *mens rea* to commit the crime, whether by virtue of having the intention to commit it or the knowledge that it would be committed, or the realization of a real risk or possibility that a crime of the kind in question would be committed, then they may be convicted as co-perpetrators, in which event the conduct of the actual perpetrator (even if none of them is identified as the actual perpetrator) shall be deemed also to be to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.
- (2) The following shall be indicative (but not, in themselves, necessarily decisive) factors tending to prove that two or more persons accused of committing a crime in association with each other together had the requisite *mens rea* to commit the crime, namely if they –
- (a) were present at or in the immediate vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that crime; or
 - (b) were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged; or
 - (c) engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime for which they are charged.”

In my view the proved facts in this matter satisfy the provisions of section 196 A (2) (a) in that the two accused persons along with Henry were present in the immediate vicinity of the scene of the crime in circumstances which implicate them directly in the commission of the crime. They both participated in assaulting the deceased with metal bar stools inflicting fatal

injuries including six broken ribs. The two of them assisted each other in driving the leg of a stool into the head of the deceased with fatal consequences. The accused one drew first blood when he thrust the stool leg into the back of the head while the accused two drilled it in and through the head. They are therefore equally to blame for the murder of the deceased. The two of them together with Henry associated with each other even after the event as they tried to evade justice. Their liability as co-perpetrators is therefore complete.

I now turn to consider their particular intention in doing what they did. It is trite that the prosecution, in a case where it is required to prove the intentional commission of the crime, can prove either actual or constructive intention. The test to be applied in ascertaining intention is a subjective one which involves consideration of the personal state of mind of the accused at the time of the commission of the crime. The accused persons' personality must therefore be considered together with any other relevant factors such as intoxication which may have influenced the accused person's ability to form the requisite intention at the relevant time.

Mr Shumba for the state has urged of us the return of a verdict of murder with actual intent because of the manner in which the crime was perpetrated. *Mr Hlabano* for the accused one submitted that considering the fact that the accused persons were intoxicated on the night in question the appropriate verdict is murder with constructive intent. This is because intoxication affected their state of mind at the time.

Actual intention is the most blameworthy state of mind at criminal law. This is because the accused deliberately causes the criminal consequence. He or she desires it, sets about to achieve it and it is his or her aim and objective. See G Feltoe, *A Guide to the Criminal Law in Zimbabwe*, LRF at 10.

In the present case, the deceased as I said was subjected to a vicious gang attack by three assailants. When they ganged up against him the evidence we have accepted is that their main objective was to hit him on the legs in order to force him to the floor. When they finally succeeded in forcing him down, the accused one held a metal stool by the legs and severely drove the leg into the back of the head. So severe was the force used that the metal leg which was covered with a rubber still managed to penetrate the head and was stuck in it. The evidence we have accepted is that at that stage the accused two brought another stool which he used to

hammer the missile further into and right through the head such that it exited through the forehead.

It is that state of mind, the state of forcing metal already stuck in the head, itself a vulnerable part of the body, which illustrates that the accused persons had the actual intention to bring about the death of the deceased. Intoxication does not come into it at all especially as, by their own admission, the two accused persons were not intoxicated as not to appreciate what they did.

Accordingly each accused person is hereby found guilty of murder with actual intent.

Reasons for sentence

The personal circumstances of the accused one are that he is 28 years old. He is married with two children the oldest of which is 3 years while the youngest if only 10 months old. He is the sole bread winner for his family. He has been in remand prison awaiting trial for 18 months.

The personal circumstances of accused two are that he is now 25 years old. He is not married. He also has been in custody for 18 months, that is since his arrest on the day of the offence.

Both accused persons are first offenders. We recognize that both accused persons had consumed alcohol on the day in question which may have played havoc with their sense of right and wrong. It is also significant that what ignited the fight was a woman, the accused persons' colleague having been smitten by bouts of jealousy when he observed that the deceased was relating with his girlfriend. There is therefore no evidence of premeditation. That is about all that can be said in favour of the two accused persons.

In aggravation it is apparent that the deceased was not only subjected to a gang attack by an extremely violent trio who singled him out for assault for no other reason than that he also had a relationship with a cheap girl whose turpitude was unworthy of the kind of attention she was receiving from the two suitors. The precision with which the assailants went about the business of taking the life of the young man would shame even the most ardent of assassins. Working as a team they virtually executed the deceased in the full view of quite a large crowd before

escaping from the scene only for the two accused persons here present to retire for bed as if nothing had happened.

Even by their own admission the accused persons accept that the manner and style of the attack on the deceased was unprecedented. This is a person who had fought three people with his bare hands and did not pose the type of danger on them, being completely out numbered, as to attract the kind of attack he received. Clearly therefore it is an attack on a human being which is not only an affront to all the known tenets of human civilization but displays evilness of the highest order. It is unimaginable that a human being could be subjected to such savagery by another being.

As it is now a young life was needlessly lost in the most violent manner. There is therefore a need for his court to impose a penalty against the perpetrators which underscores society's revulsion at that kind of conduct. We cannot continue to lose human capital at the alter of drunken debauchery by gangs of drunks coming out of gold panning pits who have lost all hopes of life, to whom human life has become meaningless.

This is an offence which calls for a very stiff penalty. The accused persons have been convicted as co-perpetrators. In terms of section 196 B of the Code in sentencing a principal or two or more co-perpetrators for murder a court shall not impose a death sentence except where the murder is committed in aggravating circumstances as provided for in section 47 (2) and (3). None of the aggravating circumstances set out there in exist in this case. Therefore the accused persons cannot be sentenced to capital punishment.

In the result each accused person is hereby sentenced to 25 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Hlabano Law Chambers, accused's legal practitioners
Hore and Partners 2nd defence's legal practitioners