

THE STATE
versus
JAMES NYEVERA

HIGH COURT OF ZIMBABWE
MATHONSI J
GWERU 31 MAY 2018 AND 1 JUNE 2018

Criminal Trial

M Shumba for the applicant

T Chivasa for the accused

MATHONSI J: The accused was only 20 years old at the time the events forming the basis of this criminal case unfolded at Muponda Business Centre in Shurugwi District. On the night of 24 October 2016, the Gwatipedza family comprising of the elderly Alice Mateo and her children who included Shalom Gwatipedza who is now deceased, Nancy, Salem and Emmanuel had proceeded to that shopping centre accompanying Nancy to board transport that would take her to her own home in Gutsaruzhinji village. Emmanuel was also proceeding to his own workplace at Nash mine. Apparently there had been a family gathering which had brought the family together.

The state alleges that after seeing off Nancy who had to be accompanied by Salem as it was dark, the trio of Emmanuel, the deceased and their mother had gathered by Mukandi shop when the deceased, who was 24 years old, was attacked with a spear by the accused who stabbed him at the back inflicting an injury from which he later died on 19 November 2016. As a result the accused is now charged with murder as defined in section 47 (1) of the Criminal Law Code [Chapter 9:23].

The accused protested his innocence and pleaded not guilty to the charge denying completely having possessed a spear on that day in question or on any other day for that matter and denied having stabbed the deceased at all. Quite to the contrary the accused maintained that

although he had been at Muponda business centre on the night in question, he was in fact a victim. In his defence outline he stated that he had entered Mukandi store when the deceased and his two brothers Salem and Emmanuel, who were in the company of two other men unknown to him, picked up a quarrel with him which was ignited by the deceased's demanding that he bought him beer.

When he refused to do so, the deceased suddenly pulled out a machete and struck him on the head as a result of which he fell down bleeding profusely. The accused's brothers soon joined the attack with Salem stabbing him two times on the left leg. They indiscriminately beat him up as he wrestled with them in a bid to flee. When the gang was done with him it fled leaving him helpless. He later picked himself up and walked home with some difficulty only to be met by his father Steven Nyevera and Solomon Gore who escorted him to Donga Police station and later to hospital where he received treatment. He only got to know of the allegations against him after the death of the deceased on 9 November 2016 and questioned why no report was made by the deceased or his brothers until after he died.

The accused's confirmed warned and cautioned statement recorded from him at CID Shurugwi on 11 November 2016 and confirmed by a magistrate at Shurugwi Court on 25 November 2016 was admitted on its production by the state. In that statement the accused stated under caution:

"I do not admit that I killed Shalom Gwatipedza. On the 24th day of October 2016 at 1900 hours I left home going to buy mealie-meal and sugar at Mponda shops. I went to Mukandi Shop and bought 10kg mealie-meal and 2kg sugar. In the same shop I found Shalom Gwatipedza, Salem Gwatipedza, and two male adults whom I did not know. Shalom Gwatipedza requested me to buy him beer and I refused. Shalom Gwatipedza struck me once on the head with a machete. Salem Gwatipedza stabbed me on the left leg with a knife and I fell down. When I woke up I noticed that there was no one at the shops. I proceeded home where I met my father Stephen Nyevera and Solomon Gore who took me to Donga Police Post where I made a report of assault against Salem Gwatipedza and Shalem Gwatipedza."

According to S Pesanai, a pathologist at United Bulawayo Hospitals who performed the post mortem on the body of the deceased, the stab wound sustained by the deceased on his right back was 4cm. It was located 8cm from the iliac crest and 8cm from midline just below the last

rib. Apparently the stabbing perforated the intestines thereby causing severe peritonitis full of blood. The wound also became septic. He concluded that the cause of death was;

- “1. Septicaemia
2. Severe peritonitis
3. Stab wound.”

A total of five witnesses, who may roughly be grouped into two categories, testified on behalf of the state. The first group of two is that consisting of Alice Mateo, the mother of the deceased and Emmanuel Gwatipedza, the elder brother of the deceased. This is the group belonging to the deceased’s family who obviously have an interest in the matter having lost their loved one. There is also the stand alone witness Nyaradzo Makovere who happens to be a girlfriend of Solomon Gore, the shopkeeper at Mukandi Store. She may be said to be a completely independent witness who had no interest whatsoever in the matter. If anything she may be said to gravitate towards the third category if indeed she had a relationship with Solomon.

Finally there is the third category of Solomon Gore and Learnmore Mhlawendaba. The former is a neighbour of the accused and an acquaintance of his father who took the trouble to inform Steven Nyevera of the beating of the accused during the fight at the shops and even went to look for the accused with Steven before taking him to hospital. The latter is a nephew of the accused who also doubled up as a drinking mate of his. He accompanied the accused to the shops earlier in the day, witnessed the accused unearthing the murder weapon where he had hidden it at a bush a short distance from the shops and indeed carried the weapon for the accused for quite sometime as the two of them consumed alcohol before surrendering it to Solomon Gore.

This last group obviously comes from the accused’s side of the equation. If evidence were to be measured on the basis of allegiance one would expect them to testify in favour of the accused person. They did not, which on its own goes a long way towards their credibility.

Alice Mateo and Emmanuel Gwatipedza were with the deceased at Mukandi Store and were sitting on a bench by the veranda when the deceased entered the shop to buy cigarettes. As if in chorus they speak of having seen the accused passing them in a flash concealing a glittering weapon behind his back as he rushed into the shop following after the deceased. No sooner had

he gone in than the deceased screamed for help calling Emmanuel's name exclaiming that he was being killed. When in unison they rushed into the shop they found the deceased and the accused grappling for a spear which had just been used to stab the deceased on the right side of the back. The deceased was bleeding from that wound as he held the sharp end of the spear, exhibit 5, while the accused held the same weapon by the handle side while trying to force it further into the deceased's body.

Emmanuel came to the deceased's rescue as the old woman stood by. He grabbed the centre of the spear and the three of them wrestled for the weapon all the way out of Mukandi shop. Whilst outside the deceased pulled out a machete which he used to strike the accused on the head. He was disarmed after which Alice shouted at her sons to run away as the accused was calling names of his colleagues presumably for them to come to his assistance. Unfortunately the deceased had been badly injured and even though the three caught up with each other on the way, the deceased was unable to walk. A motor vehicle was secured which took him to Chivi Hospital where he was admitted. He was later transferred to Gweru Hospital but his condition deteriorated further. He was then transferred to United Bulawayo Hospitals where he died on 9 November 2016.

Alice Mateo explained that they did not report the matter to the police and at Chivi Hospital she lied that the deceased had fallen onto the blade of a plough in order to obtain treatment quickly without involving the police. This is because they knew that for him to get treatment it was necessary to obtain a letter from the police to the effect that the stabbing had been reported. The deceased had feared arrest if they had involved the police because he himself had also inflicted injuries on the accused with a machete. It is for that reason that he had preferred to be treated in Chivi and not their local clinic where they knew the accused had also received treatment. In fact they had passed the accused and others by the road hiking for lifts to take them to the police post. According to Alice the deceased wanted to first get treatment before returning home to face the music.

There are three aspects of the deceased's family's evidence which are a source of disquiet to us. Firstly it is the issue of the deceased exerting revenge after being stabbed and then the whole family leaving the accused behind injured. Secondly it is their election to seek treatment

far away in Chivi and not the local clinic where Alice gave a false story of how the injury had been sustained. Thirdly it is their inability to file a police report after the deceased was stabbed while keeping what later became the murder weapon until after the death of the deceased. Questions begin to linger as to how and indeed why the evidence of such a group which would readily mislead the hospital authorities while not reporting a potential murder should find favour with the court.

Yet it is that weakness in the outlook of the deceased's family which is also its strength. We have a situation where both Alice and Emmanuel readily accepted that the deceased used a machete of all weapons to exert revenge against the accused after being stabbed. Where Emmanuel readily admits having captured the murder weapon and kept in under a car until after the death and admitting not having bothered to report the murder until it was fortuitously discovered by the police when they sought a burial order. We also have Alice readily admitting having taken the deceased for treatment at Chivi Hospital where they did not disclose the correct source of the injuries as they feared the arrest of the deceased. Far from pointing to dishonesty it actually shows truthfulness on their part which can be relied upon by the court.

In any event that family's evidence is corroborated in important respects by other independent witnesses. Which brings me to the second category, the evidence of Nyaradzo Makovere. This witness struck us as brilliant. She had confidence, clarity and good demeanour. Where she did not witness anything she quickly said so. The thrust of her evidence is that the deceased entered her store when she was alone and he left his relatives outside by the veranda. He tendered to her a dollar ordering cigarettes. Before she moved to the shelf to collect them the accused entered the shop apparently hiding something behind his back. She never got to know what that was.

The moment she turned round to collect the cigarettes from the shelf she heard the deceased screaming. When she turned to check she observed the accused and the deceased grappling for the item which was in the accused's possession. Emmanuel soon joined in and the three struggled for possession of the weapon until they got out of the shop enabling her to close the shop. The witness stated that she had not sold anything to the accused the whole of that day and certainly not sell mealie-meal to him as they did not even stock it. She was in fact seeing

the accused for the first time that day when he stabbed the deceased. She was not selling alcohol at the shop at the time. We have no reason to disbelieve Nyaradzo's evidence. We accept it. The importance of the evidence of Solomon Gore and Learnmore Mhlawendaba is to posit the spear, exhibit 5, right in the hands of the accused as his weapon. I have already said that Learnmore was present when the accused unearthed it in the bush where he had hidden it. Solomon confirmed that the two of them had it in their possession before he temporarily took it from them given that it was a dangerous weapon. Both of them confirmed that the accused demanded it that night and took it away at a time when he was angry and drunk. He told Solomon that he wanted his weapon because "all was not well." Learnmore helpfully added that this occurred after the accused had spotted the deceased enter Mabhiza bar. He was later seen using it to stab the deceased.

We are aware of the contradiction which exists in the evidence of the state namely the insistence by Learnmore that he had been present when the accused stabbed the deceased at Mukandi shop and that there were actually five people in the store when that happened. This contradicts what the other three witnesses said that only three people were present before Emmanuel and Alice rushed in. To that extent we find Learnmore's evidence suspicious indeed especially as he claims to have seen two male persons and Alice rushing to the store after the deceased was stabbed. Considering that this is a person who says he was drunk and that he did not even come to the rescue of his colleague, the accused, when he had been assaulted, we prefer the clear-evidence of Nyaradzo in that respect.

In any event, that contradiction does not harm the state case given that whether Learnmore was present or not, we have it on good authority that the accused stabbed the deceased with exhibit 5.

When the accused took to the witness stand it was to refute all the allegations leveled against him by the state witnesses. That evidence we have already analysed above. In fact the essence of the accused's defence is a complete denial of what is alleged against him. Instead he accused the deceased and his brothers of singling him out for an unprovoked attack as he got into Mukandi Store and thereafter subjecting him to a beating with a machete and stabbing on the leg causing him injuries which required medical treatment.

The accused, who I must say must rank as one of the worst witnesses to ever grace a witness stand in a criminal trial, did not say much. Other than abiding by his defence outline he presented defence counsel with serious difficulties in leading evidence from him. He was timid, could not speak up and was generally unhelpful to the court. He repeatedly stated that he could not comprehend even questions put to him by his own counsel to motivate the presentation of his own case. He fared even worse under cross examination where most of the questions put to him went unanswered either because he simply remained quiet or said he could not answer the questions.

For what it is worth, accused's case is that he walked into Mukandi shop having tested no alcohol at all that day at about 1900 hours. It would be recalled that according to Learnmore's uncontested evidence he had been buying super opaque beer like everything depended on it for most of the day. According to Solomon he was extremely drunk and seething with anger when he demanded his weapon from Solomon at Mabhiza bar saying all was not well. His state forced the elder man to capitulate and surrender the spear.

According to him, for no apparent reason other than that he had refused to buy him beer, the deceased attacked him with a machete there and then inside Mukandi shop sending him sprawling on the floor bleeding. Although he was badly injured and had done absolutely nothing wrong the deceased called his brother Salem, a person we know was not present at all at the scene, to stab him. Salem obliged by stabbing him in the leg. At no time did he retaliate and he did not stab the deceased at all. That story, coming as it does against eye-witness account of how the deceased was stabbed by the accused, is not only improbable but demonstrably false.

The accused chose to render an explanation as to what he perceives to be the cause of death. He suggested two probabilities of how the deceased was fatally injured. The first one is opportunistic in that he lunched on to the lie given by Alice to Chivi hospital that the deceased had accidentally fallen onto the blade of a plough and hurt himself. The accused suggested that is how the deceased got injured. It is shamelessly opportunistic especially as it is obvious that the deceased got injured at Mukandi store where there was no plough. Therefore the first explanation is not worthy of further consideration.

The second one is that the deceased may have been struck by “friendly fire” as it were, a blow delivered by one of his own brothers as they beat up the accused. In our view that is stretching imagination to elasticity limit because it gives the impression that there was a free-for-all at that moment which resulted in a stabbing blow straying onto the deceased’s back side. We know of course that there was not such free for all. Even the accused himself says he was struck only once on the head and stabbed twice on the leg. Therefore the possibility of a stray blow is completely non-existence. In addition, as submitted by *Mr Shumba*, the accused himself admitted that his assailants had surrounded him and were concentrating on attacking him even when he was on the floor. There was therefore no chance of the deceased being stabbed on the back even in the maginary melee.

What all this means is that the accused person has failed to discredit the evidence of the state. He has also failed to give a reasonable explanation from which we may entertain a doubt that he committed the offence. This is moreso when all the evidence of the state witnesses point to him having stabbed the deceased as alleged. That evidence is corroborated by the post mortem report produced by the state in terms of section 278 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07]. That section provides that in any criminal proceedings in which it is relevant to prove any fact ascertained by a doctor, any opinion of that doctor relating to that fact, a document purporting to be an affidavit stating that the doctor ascertained such fact and arrived at the opinion, shall, on its mere production in those proceedings, be *prima facie* proof of the facts and opinion stated.

I make reference to that because doctor S. Pesanai observed a stab wound on the back of the deceased which I have already referred to above, consistent with the evidence of the state witnesses on how the deceased was stabbed and bled. Clearly therefore the state has proved beyond a reasonable doubt that it is the accused who stabbed the deceased. The accused’s argument that he was also beaten up appears to come after he had perpetrated the offence. The deceased only exerted revenge. That aspect is only relevant when considering sentence.

Accordingly the accused is hereby found guilty of murder with constructive intent.

Reasons for sentence

The accused is a youthful first offender, he having been 20 years old at the time of the commission of the offence. His conduct may therefore be attributable to immaturity. It is relevant that the accused also suffered dangerous injuries when he was struck with a machete on the head. Although he suffered pain we do not lose sight of the fact that it may have been his “just deserts” for stabbing the deceased unprovoked. It is significant that the accused has been in custody for more than 1 ½ years while awaiting trial. This court will always discount the pre-trial incarceration period from the assessed sentence in recognition of accused person’s constitutional right to a speedy trial within a reasonable time.

It is extremely disappointing that very young people in this country suddenly have no fear whatsoever for death. Apart from consuming large amounts of alcohol on a daily basis day and night they regard indulging in bouts of violent behaviour and taking human life as their favourite pastime. It is pathetic and calls for urgent intervention by authorities before this country is engulfed in violent conflagration. These courts have done everything humanly possible to call these youths to order but the more that is done the more young people are brought to court for the same violent conduct if not worse.

Just the thought that a boy like the accused in this matter would fathom acquiring such a grotesque weapon and harbouring it in the bush while awaiting an opportune time to use it to exert revenge on another youthful person for whatever reason is frightening indeed. This is a person who meticulously prepared for the day and executed his mission only to also receive a thorough hiding for his troubles from his victim. He still does not accept that there was anything wrong with his conduct to such an extent that he would have wanted the law to focus only on his own injuries and pretend that no life was lost.

This court has a duty to uphold the sanctity of human life. A precious young life having been lost because of the accused’s warlike behaviour we have to impose a sentence that will echo society’s disapproval and register the message that violence will only beget lengthy terms of imprisonment until it sinks in the minds of these youths that it should be done away with. Had it not been of the accused’s youthfulness, the consequences would have been worse.

In the result, the accused is hereby sentenced to 14 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Chivasa and Associates, accused's legal practitioners