

THE STATE

Versus

EMMANUEL BHUMURE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mrs C. J. Baye & Mr Shumba
GWERU CIRCUIT COURT 28 SEPTEMBER & 1 OCTOBER 2018

Criminal Trial

F Pedzisayi for the state
L. Mapfumo for the accused

MAKONESE J: On 5 September 2017 at about 1830 hours the 28 year old deceased was at Red Tuck Shop which is situated at the 10km peg along Gweru – Harare highway. He was consuming alcohol with his workmates Spencer Masango and Jaffet Marufu. Also present at this drinking spot was the accused, aged 37 years and one Prosper Gariyao. They were imbibing alcoholic beverages. At some point the deceased approached the accused and advised him to stop fighting and arguing with Prosper. The accused was infuriated by this rebuke and his response was that he was not prepared to take the advice. The misunderstanding between the accused and deceased deteriorated. The accused pulled out a knife and stabbed the deceased once on the left side of the chest. The deceased screamed saying he had been stabbed by accused. The deceased collapsed whilst clutching his left side of the chest. He was conveyed by taxi to Gweru General Hospital where he died the following day from the stab wound.

The accused denies the charge of murder. He raised the defence of provocation and self defence. He alleged that the deceased had grabbed his testicles and threatened to assault him. The accused alleged that when he pulled out the knife he did so in self defence as he was being attacked by the deceased who was pummeling him with fists all over his face. The accused made a last ditch attempt to raise the defence of intoxication.

The circumstances surrounding the murder case are set out in the outline of the state case. It shall not be necessary to repeat the entire contents of the state outline. Most of the facts in this

matter are largely common cause are not contested. The defence tendered a defence outline which reads in part as follows:

- “4. The accused will further state that he proceeded to walk outside the Red Tuck shop with the deceased and Jaffet Marufu following behind. When they were outside deceased grabbed the accused by the testicles indicating that he would further assault him.
5. The accused pleaded with the deceased to let him go. When the deceased let go his testicles he started to pounce on the accused with clenched fists and open hands. At that moment the accused pulled out a knife from his pocket and Jaffet Marufu noticed the knife whilst retreating into the Red Tuck Shop. The deceased continued with the assault. That is when the accused stabbed the deceased with the intention of fending off the attack.
6. The accused will further state that when he stabbed the deceased, Jaffet Marufu who had retreated into the tuck shop emerged with Spencer Masango, Milton Mazuva and David Chikongo (alias Diva). Spencer Masango manhandled the accused and started assaulting him and in trying to fend off the attack he pushed Spencer Masango away with both hands. In fear of being further assaulted the accused fled from the scene, threw away his knife and evaded those pursuing him by hiding in a nearby bushy area.
7. The accused will vehemently state that he never at any point intended to cause the demise of the deceased all his actions were a result of being drunk and meant to stop an attack by the deceased and to preserve his own life ...”

The accused’s confirmed warned and cautioned statement was tendered into the record.

The English version is in the following terms:

“I do admit to the allegations of killing Brigadiah Mahachi. I stabbed him with a knife trying to threaten him to stop assaulting me without the intention of killing him. I stabbed him after he had grabbed my testicles and hitting me with clenched fists on the face several times.” (emphasis added)

The pathologist who carried out an examination of the remains of the deceased compiled a post mortem report. The report was filed under post mortem number 846/846/2017. The cause of death is listed as:

- (a) Haemorrhagic shock
- (b) Haemopneumothorax

- (c) Stab wound to the heart
- (d) Assault

On the marks of violence the post mortem reveals that the deceased sustained a stab wound (sutured) left chest located 4cm from left nipple, 13cm medline and 3cm from clavicle. The right ventricle was perforated. On other remarks the following observations were made:

- (a) Sutured surgical wound left anterior axillary line (4cm)
- (b) Direction of wound is front to back, left to right and top to bottom
- (c) The chest drawn site was located 7th intercostals space

The last exhibit introduced into the record was a silver flick knife with the following measurements:-

Length of blade 8.5cm

Length of handle 11 cm

Width of blade 2.0cm

Total length of knife 19.5cm

Weight 0.068kg

The State Case

The state led evidence from three witnesses. The first to testify was **PROSPER GARIYAO**. He testified that he resides at 43 Hertfordshire, Gweru. He knows the accused as his neighbour. He knew the deceased during his lifetime as a drinking mate at Red Tuck Shop, Gweru. On 5 September 2017 at around 1800 hours, per tradition, he went to Red Tuck shop and found accused drinking beer with one Diva. He joined them and started drinking with them. They were drinking Castle lager beer. At around 10pm the witness suggested that accused and his drinking mates should go home. The suggestion was met with a sharp response from the

accused who pointed out that he had come to the bar on his own and that no one should tell him when to leave. The parties exchanged harsh words for a while before they reconciled. All seemed to be well. The witness stood up to leave the bar to a fireplace outside. The accused got up and punched the witness without warning. This caused the witness to fall down on some stones. He got up and held the accused's hands. The other patrons sat by the fireplace and continued drinking. The accused dashed outside the bar. A little later the witness saw the deceased standing by a doorway. He was complaining that the accused had stabbed him in the chest. The deceased was clutching his left side of the chest. He was bleeding profusely. The accused immediately fled the scene of the crime and disappeared. A taxi was called and the deceased was taken to Gweru General Hospital for treatment. He died from injuries sustained in the stabbing the following day. We found the evidence of this witness to be compelling, credible and reliable. He conceded that he did not witness the actual stabbing. We are satisfied that the testimony of this witness is an accurate reflection of his recollection of the events on the day in question. His evidence is worthy of belief. His evidence was not contradicted in any material respects under cross examination.

The next state witness to testify was **SPENCER MASANGO**. He resides at Regina Mundi High School, Gweru. He is employed as a farm manager. He knows the accused as a regular patron at Red Tuck shop. He knew the deceased as a workmate at Regina Mundi High School and as a friend. On the fateful day he was drinking beer at Red Tuck Shop with the deceased. The accused and Prosper had a misunderstanding. There was a verbal exchange which continued for some time. Eventually the parties seemed to have reconciled. He continued playing snooker. Around 10pm the witness heard the accused saying he wanted to revenge. The witness advised Prosper not to engage the accused in any physical confrontation. The deceased approached the accused and reprimanded him not to fight or engage in any violence. A few minutes later the deceased screamed and indicated that the accused had stabbed him in the chest. The accused charged at the witness and uttered words to the effect that he could also "*finish him off.*" The accused was brandishing a flick knife. The witness retreated and as he moved backwards he fell. As he was getting up on his feet, the accused stabbed him on the upper part of the right buttock. The witness made some indications and drew the court's attention to a scar he

sustained as a result of the stabbing. The patrons at Red Tuck Shop were enraged. They attempted to apprehend the accused who, however, managed to make good his escape. A taxi was called and the deceased was conveyed to Gweru General Hospital. He died the following day from injuries sustained in the attack.

The witness gave his evidence well. In spite of spirited attempts by *Mr Mapfumo*, counsel for the accused, to challenge the accuracy of his observations, the witness maintained that his recollection of the version of events was correct as he was able to observe the deceased and the accused at the time of the stabbing. The witness denied the accused's assertion that he had been grabbed by his testicles by the deceased. It is our view that the witness' evidence was credible and reliable. We accept his evidence.

The state then led *viva voce* evidence from the last state witness, **JAFFET MARUFU**. He is a piggery supervisor at Regina Mundi High School. He knows the accused as a regular patron at the Red Tuck Shop, Gweru. He knew the deceased as a workmate at Regina Mundi High School. Deceased was his friend. On the day in question he was drinking beer with the accused, deceased and other patrons. The accused had a misunderstanding with Prosper. The deceased approached the accused and told him not to engage in violent tendencies. The altercation stopped briefly but the accused refused to take heed of the witness' advice. The accused and the deceased moved out of the bar. The two held each other as they moved away. As they were moving away, they were grabbing each other by the armpits. They both staggered and fell down. When the deceased got up he was clutching his left side of the chest. He was complaining that accused had stabbed him with a knife. The witness and other patrons tried to apprehend the accused but he fled. Spencer indicated at that stage that he had also been stabbed on the right buttock by the accused. Having failed to apprehend the accused the witness and his colleagues turned their attention to the injured deceased. The witness removed the deceased's shirt and attempted to stop the bleeding. A taxi was called and the deceased was conveyed to Gweru General Hospital. The witness later learnt that deceased had died from the stab wound.

The witness testified that when the accused and deceased fell down he was standing at a distance of 5.5 metres. He denied the suggestion that deceased had at any stage manhandled the accused by his testicles. The witness did not observe the deceased assaulting the accused in any manner. His testimony was that the accused was the aggressor that evening. The deceased was the victim of such aggression. We have no difficulty in accepting the evidence of the witness which we found to be credible and reliable. The witness did not exaggerate his evidence and had no motive to give false testimony against the accused.

The state applied to have the evidence of the under listed witnesses as it appears in the outline of the state case by way of formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07), namely:

- (a) Milton Maziwa
- (b) Bruno Tendai Tigere
- (c) Kadumbo Nicodimus
- (d) Mundeia Kelvin Kaunda
- (e) Arnold Zvokureva
- (f) Dr S. Pesanai

Defence Case

The accused, **EMMANUEL BHUMURE**, gave evidence under oath. He called one defence witness in support of his case. Accused resided at 43 Hertfordshire, Gweru at the time of the commission of this offence. He was not formally employed. He survived on part time jobs, including cutting firewood for sale. He arrived at Red Tuck Shop at around 8pm. He found Prosper, Spencer, deceased and Jaffet Marufu at the bar. He started drinking beer. He was partaking of opaque beer (known as *super*). That day his total count of the beer he consumed was 6 to 8 bottles of 1 litre super brew. The accused stated that he was not very drunk and was in control of his mental faculties. He testified that an argument ensued between himself and Prosper after the latter told the witness that it was time to go home. The accused indicated that what irked him is that he had just arrived at the bar and Spencer was suggesting that he should

leave the place. The misunderstanding raged on for some time but the parties reconciled and apologised to each other. The accused averred that Spencer had struck him on the face. The accused retaliated by pushing Spencer away. The other patrons quickly intervened and the dispute appeared to be resolved. A few minutes later, the deceased confronted the accused and stated that accused was “provocative”, “was talkative” and “could not fight”. The accused stated that this angered him. The deceased charged towards him and struck him with clenched fists all over the body. The accused got inside the bar and started crying. The deceased returned inside the bar and confronted the accused. The deceased and Jaffet Marufu walked outside the bar. The accused’s version is that once they got outside the bar he asked the deceased to explain whether he considered him not be man enough. It is at that stage that accused says the deceased grabbed his testicles. The accused narrated that he felt weak but remained standing. The deceased let go of the accused’s testicles. Accused then asked the deceased whether he desired to bring suffering upon his wife and family. The accused explained that what the deceased had done would prompt him to retaliate, he would be arrested and sent to prison. The accused testified that the deceased began to strike him with clenched fists. In a fit of rage and in a bid to defend himself, accused pulled out a flick knife from his pocket and stabbed the deceased. He indicated that he did not direct the knife at any particular part of the body. He conceded that the blow was aimed at the upper part of the body. The accused conceded that the injuries reflected in the post mortem report confirm that the force used to inflict the injury was excessive. The accused admitted that he was reckless in the manner he delivered the fatal stab wound. The accused denied that he had the requisite intention to kill the deceased.

The accused largely adhered to his defence outline and version as contained in the confirmed warned and cautioned statement. It is common cause that the deceased was stabbed by the accused and that he died from injuries sustained in the attack.

The accused called one witness **MUNYARADZI BENJAMIN MUDEMBE**. The evidence of this witness was for the most part a rumbling account of what had transpired but corroborated the state witnesses. The defence closed its case.

Analysis of the evidence

Whether the accused was provoked

The accused testified that the accused told him that he was talkative and provocative and that he could not fight. The accused avers that those words deeply offended him. The defence of provocation is now codified under section 239 of the Criminal Law Codification and Reform Act (Chapter 9:23). The section provides as follows:

“239. **When provocation a partial defence to murder**

- (1) If after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realization referred to in section forty-seven, the person shall be guilty of culpable homicide if as a result of the provocation –
- (a) he or she does not have the intention or realization referred to in section forty-seven or
 - (b) he or she has the realization referred to in section forty-seven but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self control ...”
(Emphasis added)

The circumstances of this case clearly show that the alleged provocation does not really exist. The question is, would a reasonable man in the shoes of the accused be provoked by the words “*you are provocative*”, or “*you are talkative*” and “*you cannot fight*”? Would a reasonable man lose his self control completely as a result of such utterances? It is our view that the provocation must be so severe, to such an extent that any reasonable person would be offended by the words uttered and would as a result lose self control. If anything, the accused was the aggressor on the night in question. Throughout that evening he displayed violent

tendencies against, not only the deceased but other patrons. See *State vs Herold Moyo* HB-19-17. The defence of provocation is clearly not available to the accused in this matter.

Whether the accused acted in self defence

In terms of our criminal law, the defence of self defence is available to an accused person under certain limited circumstances. Essentially the accused is required to demonstrate that at the time he attacked his victim he took reasonable steps to defend himself against an unlawful attack. The means used by the accused to defend himself against such attack must not be disproportionate to the initial attack. In his book, *A Guide to Criminal law of Zimbabwe*, G. Feltoe sets out the requirements of self defence at page 45 as follows:

“The requirements for this defence are:

- (a) an unlawful attack
- (b) upon X
- (c) the attack must have commenced or be imminent
- (d) the action must be necessary to avert the attack
- (e) the means to avert the attack must be reasonable.”

The requirements of self defence have been codified under our law. In terms of section 253 of the Criminal Law (Codification and Reform) Act, it is provided that:

“253. Requirements for defence of person to be a complete defence

- (1) Subject to this part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence if –
 - (a) When he did or omitted to do the thing, the unlawful attack had commenced or was imminent, and
 - (b) His or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she, believed on reasonable grounds that his or her conduct was necessary to

avert the attack and that he or she could not otherwise escape from or avert the attack ...” (emphasis added)

An analysis of the evidence presented in court illustrates that the accused was not under an unlawful attack. All the state witnesses indicated that the deceased was the peacemaker. Deceased was targeted by the accused because he was trying to calm down the tensions between accused and one Prosper. There is irrefutable evidence that Spencer was also stabbed by the accused on the buttock during the same night. It was the accused who wielded a knife on the day in question. Accused could have simply walked away from the scene if he had been angered. He was not compelled to use the knife to defend himself. He was not under any form of attack.

The accused’s own defence witness Munyaradzi Benjamin Mudembe asserted that the accused was a person full of himself. In the words of this witness, “the accused was a person who knew it all”. Accused’s own witness did not witness the provocation described by the accused. This witness did not support the accused’s version that at the time he stabbed the accused he was acting in self defence. The accused crucially conceded that he could have avoided the attack by simply leaving the scene. The accused made an attempt to shift his defence by alleging that his conduct might have been clouded by the consumption of liquor. The defence was clearly an afterthought and was not supported by the evidence. The court rejects the defence of intoxication.

The court is satisfied that both defences of provocation and self defence are not available to the accused person. The accused deliberately chose to use a lethal weapon against the deceased who was unarmed. The accused had, prior to the stabbing ominously warned the deceased that he would do something that would cause his family to suffer should he get arrested. The accused clearly harboured some bitterness against the deceased. He waited for an opportune moment to launch his attack. He stabbed the deceased once in the chest and fled the scene.

Verdict

The appropriate verdict in this matter has been agreed by both defence and state counsel to be murder with constructive intent. In *S v Mugwanda* SC-19-02, the Supreme Court set out the requirements of actual and legal intention. An accused will be convicted of murder with legal intention when he does not mean to bring about the death of the victim but foresees that whilst engaged in some activity, death is a possibility and he proceeds regardless of the consequences. The requirements for a verdict of murder with constructive intent are:

- (a) subjective foresight
- (b) as to possibility not probability
- (c) recklessness

See also *S v Mudzana* SC-76-04.

By his own admission accused testified that he did not direct his blow at any particular part of deceased's upper body. Accused's conduct was utterly reckless. This was a random and indiscriminate attack upon a defenceless victim.

In the result, and for the foregoing reasons, the accused is found guilty of murder with constructive intent.

Sentence

The court shall take into account all the mitigating circumstances of the case as articulated by the accused's defence counsel. The court takes into account that the accused is a first offender with the usual family responsibilities. The accused is married with 4 children. As a result of this offence the accused's wife has already left the accused's matrimonial home to live with her parents. Accused's marriage has evidently been broken up as a direct consequence of this offence. The accused is HIV positive. He has instructed his defence counsel to tender his apologies to this court and to the victim's family for his conduct. He has spent one year in custody pending trial. The court notes however, that drinking places are being turned into war

zones. Citizens are entitled to enjoy their leisure time at bars and such other their places in the comfort of the fact that they will not be attacked or harassed by violent patrons. The accused's use of a lethal flick knife in stabbing the deceased makes his moral blameworthiness very high. The accused's conduct on the night in question was extremely irrational. He picked up several fights with patrons at the bar before he stabbed the deceased. The stabbing itself was random, reckless and indiscriminate. The accused fled the scene of the crime. He raised false defences in a bid to avoid the consequences of his conduct. His claim that deceased grabbed him by his testicles prior to the attack, given as the reason for the attack was refuted by all the witnesses including accused's own witness. The courts have a duty to protect the sanctity of human life. The right to life is protected under section 48(1) of the Constitution of Zimbabwe Amendment (No 20) 2013. This court must pass a sentence that is fair to the accused and just in all the circumstances, that meets the ends of justice. The sentence should not be retributive. A lengthy custodial sentence is however appropriate.

Accordingly, and in the result;

“Accused is sentenced to 15 years imprisonment.”

National Prosecuting Authority, state's legal practitioners
Marufu, Misi Law Chambers, accused's legal practitioners