

THE STATE
versus
BLESSING GORE
and
SHADRECK GORE
and
ELLIOT CLEMENCE GADZIKWA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 20, 22-24 October 2014, & 1 April 2015

Criminal Trial

H.M Muringani, for the State
L Ziro, for first accused
N Hlabano, for second accused
A Muzvaba, for third accused

MUREMBA J: The accused are charged with the murder of Gift Tembo as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The following is common cause about the facts of the case. Accused 1 is the village head of Gore village, Chief Svosve, Marondera. Accused 2 is a nephew of accused one in that he is a son of accused one's brother. He also resides in Gore village. Accused 3 also resides in Gore village. On 13 June 2013 the deceased was drinking beer at Nhowe Business Centre in Nhowe Bottle Store. He was in the company of his young brother Nicholas Tembo and one Witness Gudo. Seated on the other side in the same bottle store, drinking beer on their own, were the accused persons, Shingirayi Gumanya (first accused' wife) and one Nomatter Mugandiwa.

As they were drinking beer, the deceased gave Nicholas Tembo some money to buy some chips called jiggies from the counter. When Nicholas Tembo bought the jiggies Shingirayi Gumanya asked for a packet. Nicholas Tembo threw the packet to Shingirayi Gumanya and unfortunately the packet fell on the ground. Accused 3 picked up the packet of chips, opened it and started eating the chips. This did not go down well with the deceased

who asked accused 3 why he was eating the chips when he was not the one who had asked for the chips. The two argued over the issue and a fight ensued between the two. This prompted some of their colleagues to join in the fight. Those who were fighting ended up going outside the bottle store and continued with the fight.

When the fight outside ended, the parties went home in their separate groups. It is common cause that the accused's group was ahead of the deceased's group. Apparently the two groups were going in the same direction. Nicholas Tembo walked faster and caught up with the accused's group. He accused the accused persons of having injured his brother, the deceased. He struck the first accused on the forehead with a bottle of coke that he was holding and fled into the night. There is a dispute as to what then happened there after. However, what is common cause is that after Nicholas Tembo had fled the deceased was assaulted at or near that place that night. He was taken to hospital that night and was pronounced dead on arrival at around 3 am.

It is also common cause that the accused persons and their colleagues and the deceased and his colleagues were motherlessly drunk. The deceased and his colleagues had consumed 2-3 crates of opaque beer. The accused persons and their colleagues had consumed about 5-6 crates of opaque beer. They had all started drinking beer around 4-5pm and the first misunderstanding over the chips happened around 7 or 8pm. The last fight as they were going home happened towards 11pm.

According to the post mortem report what caused the death of the deceased were the following injuries. Severe head injury, brain contusion and haemorrhage due to assault. During the post mortem examination the doctor observed the following injuries: bruises on the face, laceration under the left eye, bruises on the chest, and bruises on both lower limbs. On the head there were bruises. There was haemorrhage under the scalp. There was haemorrhage on the brain and contusion on the left side of the brain. There was also brain oedema.

While the State alleges that it is the three accused who caused the death of the deceased by assaulting him the three accused persons denied it and gave various defences.

Accused 1's defence outline was as follows.

He fought with the deceased in self-defence. He was not the cause of the deceased's death. He incorporated the contents of his confirmed warned and cautioned statement. He said that when the misunderstanding arose in the bottle store over the chips the deceased

struck accused three with a fist. Accused one said that he bought a replacement packet of chips and gave it to the deceased in order to quell the situation. The issue subsided.

At around 11pm the deceased and Nicolas Tembo carried accused three outside the bottle store. Accused three screamed for help. Accused one intervened asking them why they were taking accused three outside. The deceased kicked accused one in the ribs while Nicholas Tembo was grabbing accused one by the neck. A fight then ensued between all the accused persons on one side and the deceased and Nicholas Tembo on the other side.

After the fight the accused persons bought some beer and left for home. On the way home Nicholas Tembo followed them shouting threatening words and insults. When he caught up with them, all the people who were in the accused's company ran away except for accused one and two who were drunk. Nicholas Tembo was holding two unopened bottles of coke. He threw both bottles at accused one. One missed him and the other hit him on the forehead. Nicholas then ran away. The deceased immediately arrived looking for Nicholas Tembo. An argument ensued between them i.e. accused one and two against the deceased. The deceased struck accused one with a clenched fist. Accused one and two retaliated. They assaulted him with clenched fists and kicks and left him there.

In his confirmed warned and cautioned statement which he incorporated as part of his defence outline he admits assaulting the deceased and killing him. He said that he assaulted the deceased when the deceased fought him as he tried to rescue accused three. He admits assaulting the deceased in the face with booted feet and fists. He also said that accused two assaulted the deceased in the face and head after Nicholas Tembo had struck accused one with a bottle. He said all the three of them (accused persons) left the deceased lying motionless as they went to their homes.

Accused 2's defence outline was as follows

They went to the bottle store at around 6pm. When the misunderstanding arose over the chips, the deceased pushed accused three. Accused three pushed him back and the deceased hit against the wall with his head. The two then fought. Nicholas Tembo joined in the fight on the deceased's side and they assaulted accused three heavily and dragged him outside. Accused three called for help from accused one who rushed to stop the fight. The deceased and Nicholas Tembo began to assault accused one with fists and booted feet. In the process the deceased fell and hit the ground. All the accused persons collected their beer and headed home.

When Nicholas Tembo followed them and struck accused one with a bottle he attempted to strike him again with the second bottle. Accused one held the bottle and the two wrestled for the bottle. Nicholas Tembo tried to flee from the scene but was held by Kennedy Mundanda. Accused one regained consciousness and together with accused two they started to fight Nicholas Tembo. The deceased arrived at the scene and started to fight accused one. Nicholas Tembo fled from the scene when accused two turned to assist accused one in fighting the deceased. They fought the deceased until he fell down. They stopped the fight and left the deceased there.

Accused 3's defence outline was as follows

He denied ever assaulting the deceased. He said that he only pushed the deceased away when the deceased started pushing him towards the counter. Nicholas Tembo joined in in manhandling accused three on the deceased's side. Accused one came to accused three's rescue. Accused three took the opportunity to escape and went behind the counter. Accused one and the deceased and Nicholas Tembo remained pushing and shoving one another. The bottle store owner moved the trio outside the bottle store. Accused three remained in the bottle store.

Outside, accused one fought with the deceased and Nicholas Tembo. Accused two joined in on accused one's side. Accused three only went outside when the bottle store owner ordered everyone out. He saw the deceased lying down being attended to by Nicholas Tembo. Accused three proceeded home together with the other accused persons and those that they had been drinking beer with.

As they were walking home Nicholas Tembo came running and struck accused one with a bottle and ran away. Accused one and two followed him and in so doing they met the deceased and started to assault him with booted feet. Accused three said that he could not intervene because the attack got fierce and aggressive.

Issues to be resolved

What is apparent is that there were three scenes of assault; firstly, in the bottle store; secondly, outside the bottle store and thirdly, on the way home. It is important to establish the role that was played by each accused person at each of the three scenes. It is also important to

establish at what stage the fatal blow was inflicted. In resolving these issues I will juxtapose the evidence of the State and the evidence of the accused persons.

I, however, need to mention that there is some evidence of the State which was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The evidence is in respect of the following witnesses: Ebby Razerera, Archibold Ruzive, Rose Mukandishaya, Peter Chigavazira, Paul Pausiri and Doctor W. Chaka. Ebby Razerera is the bottle store owner where the misunderstanding started. Archibold Ruzive is the police officer who received the assault report and attended the scene. He is the one who took the deceased to Marondera General Hospital. Rose Mukandishaya is a nurse at Marondera General Hospital. She said that when the deceased was brought she observed that he had a swollen face, a cut on the upper lip and was unconscious. Peter Chigavazira is a police officer stationed at Marondera Rural Police Station. He recorded warned and cautioned statements from the accused persons and took them for indications. He is the one who took the body of the deceased to Parirenyatwa Hospital for a post mortem examination. Paul Pausiri is a police officer who accompanied Peter Chigavazira for indications. Doctor W. Chaka is the medical doctor who certified the body of the deceased dead at Parirenyatwa Hospital. All these witnesses except for Ebby Razerera the owner of the bottle store did not witness the assaults.

The State led *viva voce* evidence from only 3 witnesses namely, Nomatter Mugandiwa, Nicholas Tembo and Witness Gudo.

The first incident in the bottle store and the second incident outside the bottle store

Nicholas Tembo said that when the misunderstanding happened in the bottle store all the three accused persons ended up fighting against him and the deceased. He said that it was accused three and the deceased who started by pushing one another. He said when he tried to restrain them accused one joined in as he asked him if he regarded himself as a bouncer. The two of them held each other and started to wrestle. Accused two then joined in and the 5 of them fought. They pushed each other and went outside the bottle store where they continued to fight. He said that the deceased was hit by accused one on the nose and he started bleeding. Accused three kicked the deceased with booted feet and he fell down. As he was lying down the three accused persons kicked him with booted feet indiscriminately. Nicholas Tembo realised that the fight was now fierce and ran away leaving the deceased at the mercy of the accused persons.

Nomatter Mugandiwa said that as accused three and the deceased were pushing each other in the bottle store the deceased hit against the metal bars at the counter with his shoulders and the back of his head. Nicholas Tembo went to assist the deceased. The two then held accused three with the intention to take him out of the bottle store. Accused three shouted to accused one for help saying that the deceased and Nicholas Tembo were going to kill him outside. Accused one went and grabbed accused three by the belt thereby preventing the deceased from taking accused three outside. This prompted the deceased and Nicholas Tembo to hold accused one and take him outside. Nomatter Mugandiwa said that he did not see the fight that happened outside because he remained inside the bottle store and it was dark and drizzling outside. He said that he only left the bottle store when it was closed. He said that is when he saw the deceased lying outside, but he was afraid to get closer. The problem that we had with Nomatter Mugandiwa's evidence was that he sounded biased towards the accused persons. To begin with, on that night he was drinking beer in the accused persons' camp. Of all the people who testified including the accused persons, he is the only one who said that on that night it was drizzling. During cross examination by the accused persons' legal practitioners he said that the deceased was lying outside due to drunkenness. Honestly, if that was the cause he would not have been afraid to get closer to the deceased. The totality of Nomatter Mugandiwa's evidence exhibited some clear bias towards the accused persons. He said that accused two was never involved in the fight at all.

Witness Gudo was a friend of the deceased and was drinking beer on the deceased's side. He said that when the deceased and accused three pushed each other in the bottle store the deceased fell down before Nicholas Tembo intervened to stop the fight. He said that when the deceased fell he was not injured. Witness Gudo said that when the fight stopped he left for Nemukuyu shop to collect his bag that he had left there. He came back after about 20 minutes to find the deceased lying outside the bottle store against a pillar bleeding from the head and in pain. The deceased said that he had been injured. Witness Gudo did not witness the fight that happened outside the bottle store or how the deceased was injured. So Witness Gudo did not witness accused one and two's involvement in the fight that happened inside and outside the bottle store.

On the other hand accused one in his defence outline and warned and cautioned statement said that all the three accused persons were involved in the fight that happened at the bottle store. Just like what Nicholas Tembo said it was the three accused persons versus the deceased and Nicholas Tembo. It was only during the defence case that accused one

sought to depart from his defence outline and statement to the police. He was now saying that it is the deceased and Nicholas Tembo who fought him and carried him outside the bottle store when he came to accused three's rescue. He said that when they were outside the two started to assault him as he was lying down. In a bid to protect himself he kicked his legs in the air and in the process the deceased and Nicholas Tembo were hit. This puts his credibility in doubt. It was however clear that this departure was in light of the fact that accused one had now realised that his co-accused were distancing themselves from the fight.

Accused two denied any involvement whatsoever, but as already stated above he was implicated by Nicholas Tembo and accused one.

Accused three only admitted to the pushing that happened inside the bottle store. He denied being involved outside the bottle store but again accused one and Nicholas Tembo implicated him.

Our conclusion is that all the three accused were involved in the fight that happened at the bottle store.

Another finding that we make is that the fight that happened at the bottle store did not result in the deceased sustaining life threatening injuries. The evidence about what happened in the bottle store shows that although the deceased fell, he was not injured because he quickly rose and continued with the altercation. Witnesses were divided on whether or not he hit against a metal bar, but the bottom line is that he was not injured or if he was, the injury was not bad otherwise he would not have been able to get up and continue with the fight.

Evidence also shows that outside the bottle store the deceased bled. Nicholas Tembo said when he escaped he left the deceased bleeding from the nose. Witness Gudo said when he returned from Nemukuyu shop he found him bleeding from the head. He said that although the deceased complained of having been injured and in pain he was able to get up with his assistance. They walked home together as he held him by his hands. He said that they were both staggering due to drunkenness, but for the deceased the contributory factor to his staggering were the injuries that he had sustained. Witness Gudo said that since it was at night he could not see the injuries that the deceased had sustained. In light of this it is difficult for us to say with certainty that at that stage the deceased had sustained life threatening injuries.

The last incident on the way home

The deceased's home was said to be 2km away from the Growth Point and the incident is said to have happened about 50m away from Nhowe Bottle Store. As the people were going home the accused's group was ahead while the deceased and his friend Witness Gudo were following behind. Nicholas Tembo who had run away from the bottle store when the fight had become intense was walking alone. He told the court that upon his return to the bottle store to check on his brother whom he had left being assaulted he found the bottle store deserted. Everyone had left, but he lit a match stick and saw a lot of blood at the place he had left his brother being assaulted. He said that he realised that his brother had been seriously injured. He said that this is what prompted him to follow the accused persons shouting and insulting them. When he caught up with them he then struck accused one with a bottle of coke that he was holding and ran away into the darkness. The evidence on record shows that this is when all hell broke loose.

The evidence shows that of the three accused persons it is accused one and two who went berserk and returned for the deceased who was following behind with Witness Gudo and severely assaulted him leaving him motionless. From then onwards the deceased neither spoke nor stood up again until he died in the early hours of the next morning.

The evidence of the State witnesses which implicates the first and second accused and exonerated accused three is as follows. Nomatter Mugandiwa who was walking in accused persons' company said that when accused one was struck with the bottle on the forehead he (Nomatter Mugandiwa) lit a torch. Accused one was bleeding profusely. The extent of the injury could not be seen because of the severe bleeding. Nomatter Mugandiwa said that when this happened they could hear the voices of the deceased and Witness Gudo as they were following behind. Accused two went back to them saying that the deceased had caused his uncle (accused one) to be injured. Nomatter Mugandiwa said that he had tried to persuade accused one to go to hospital, but he had realised that accused one was not interested. So Nomatter Mugandiwa started to walk going home alone leaving behind the rest of the group. As he was walking going home he then heard Witness Gudo saying, 'Gentlemen you are now killing a person.' Nomatter Mugandiwa said he continued walking going home. He did not stop.

Nicholas Tembo did not witness this assault because after he struck accused one he ran away.

Witness Gudo said that as he was walking with the deceased they could hear the voices of the accused persons who were walking ahead of them. Witness Gudo said that he then heard the accused persons saying, "Naye, naye" meaning, "with him, with him". The phone lights were switched on at the place where the accused persons were. Witness Gudo heard accused one saying that he had been injured. So, "Naye, naye" was in reference to Nicholas Tembo. Witness Gudo said that when he heard this he left the deceased in order to see what was taking place ahead. The deceased immediately lay down. At that very time accused one and two arrived. Witness Gudo had not gone far from the deceased. The two accused persons went straight for the deceased and started stamping on him as he lay on the ground. They were saying that his young brother had injured accused one. They were angry and drunk. They stamped on his head severely with booted feet for about 3-4 minutes as Witness Gudo stood about 2 metres away. They stopped when the deceased was now motionless. The deceased who could talk and walk with assistance before, could no longer talk and walk. Witness Gudo said that accused one was wearing brown Simberland shoes. He said it is a shoe which is like a Weinbrenner type of shoe. He could not recall the type of shoe accused two was wearing. Accused three was wearing gumboots, but he did not stamp the deceased.

Witness Gudo said that when accused one and two left the scene he lit a match stick and observed that the deceased was bleeding from the eye and blood was flowing down the cheek, but he could not clearly see how bad the deceased was injured. He said that he then held the deceased by the armpits and dragged him to a disused butchery close by. He left him there and went to look for help. He came back with people to assist around 11pm and the deceased was ferried to hospital.

So of the three State witnesses the only witness who witnessed the assault is Witness Gudo. His evidence was corroborated by the evidence of the accused persons themselves. In his defence outline accused one said that on the way home Nicholas Tembo followed them shouting threatening words and insults. Accused one said that when Nicholas Tembo caught up with them all the people who were in their company ran away except for himself and accused two who were drunk. He said that Nicholas Tembo was holding two unopened bottles of coke. He threw the bottles at accused one. One missed him and the other one hit him on the forehead. Nicholas Tembo then ran away. The deceased immediately arrived looking for Nicholas Tembo. An argument ensued between them i.e. accused one and two

against the deceased. The deceased struck accused one with a clenched fist. Accused one and two retaliated. They assaulted him with clenched fists and kicks and left him there.

In his confirmed warned and cautioned statement he said that accused two assaulted the deceased in the face and head after Nicholas Tembo had struck him with a bottle. He said all the three of them (accused persons) left the deceased lying motionless as they went to their homes.

So in the warned and cautioned statement accused one only implicates accused two. It is a slight departure from what he said in his defence outline wherein he admits that it was the two of them, himself and accused two who assaulted the deceased on the way home. However, what is pertinent is that just like Witness Gudo the State witness, accused one does not implicate accused three as having been involved.

What is interesting though is that during the defence case accused one changed his story totally. He said that on the way home he never assaulted or fought with the deceased as he had been seriously injured. He said that the only person who fought with the deceased was one Kennedy Mundanda who was in their (accused persons') company. When he was being cross examined by the Public Prosecutor he said that he gave his warned and cautioned statement out of fear because the police had said that they would assault him if he denied anything. He said that he had had the statement confirmed in court because the police had told him not to deny anything. He also said that during confirmation proceedings he had been ill and therefore did not appreciate the proceedings. He said that the court was not even cleared and the statement was not even read to him.

So during the defence case accused one was now trying to paint a picture that none of the accused persons participated in the last assault but that it was Kennedy Mundanda alone who assaulted the deceased.

In his defence outline accused two said that when Nicholas followed them and struck accused one with a bottle he attempted to strike him again with the second bottle. Accused one held the bottle and the two wrestled for the bottle. Nicholas Tembo tried to flee from the scene but was held by Kennedy Mundanda. Accused one regained consciousness and together with accused two they started to fight Nicholas Tembo. The deceased arrived at the scene and started to fight accused one. Nicholas Tembo fled from the scene when accused two turned to assist accused one in fighting the deceased. They fought the deceased until he fell down. They stopped the fight and left the deceased there.

In his confirmed warned and cautioned statement he admits assaulting and killing the deceased after Nicholas Tembo had struck accused one with a bottle on the forehead. Accused two said that he was hurt that his uncle had been injured. He said that as a result he together with accused one and three they assaulted the deceased with clenched fists and hands all over his body. They left him motionless.

What is apparent is that in both the defence out line and the confirmed warned and cautioned statement accused two implicates himself as having been involved in the last assault. The difference is that in the defence outline he says that they fought with the deceased whereas in the warned and cautioned statement he says that they assaulted him after his young brother had injured accused one. The other difference is that in the state outline he exonerates accused three from having participated whereas in the warned and cautioned statement he implicates him saying that he was also involved in the last assault.

However, just like accused one, during the defence case accused two also departed materially from his defence outline and warned and cautioned statement. He said the people who fought were accused one and Kennedy Mundanda on one side versus Nicholas Tembo on the other. He said that when Nicholas Tembo managed to escape that is when he saw the deceased lying down about a metre away from where the fight had been happening. He said that he then asked what had happened to him. It is Kennedy Mundanda who responded saying that the deceased had been fighting with accused one. It is clear that accused two was now trying to exonerate himself at the same time implicating accused one alone.

Accused two also said that the police had threatened him to make the warned and confirmed statement. He said that he had had the statement confirmed in court out of ignorance and immaturity. He said that he only went to school up to form one.

Accused three is the only accused person who stuck to one story. It is the story that he gave in his defence outline, confirmed warned and cautioned statement and during the defence case. He said that on the way home the deceased was assaulted by only two people, accused one and accused two. He said that they assaulted him for about 3 minutes. He said that they were kicking him with booted feet in the head. He said that no one could intervene because the attack on the deceased was fierce and aggressive. They were retaliating for what Nicholas Tembo had done on accused one. He disputed that Kennedy Mundanda assaulted the deceased.

The attempts to deny the confirmed warned and cautioned statements by accused one and two during the defence case were futile. Their explanations that they were threatened by

the police to make the statements lack weight. The police officers who recorded their statements are the same police officers who recorded accused three's statement on the same day. If the police had threatened them to give self-incriminating statements we do not see why they did not threaten accused three to do the same. Again, we do not see why they had these statements confirmed by the magistrate if they had not given them freely and voluntarily. During the State case no attempt whatsoever was made to challenge the confirmation proceedings. In fact accused one even adopted his confirmed warned and cautioned statement as part of his defence outline. It is our conclusion that the statements were freely given and this explains why the two accused persons had them confirmed in court.

Conclusion

It is common cause that the deceased died as a result of head injuries. Those injuries are consistent with the assault that was perpetrated on the deceased by accused one and two on the way home. They kicked and stamped on his head with severe force. The two are therefore responsible for the deceased's death. It is not in dispute that they were extremely drunk. Under the circumstances they could not have had the intention to kill the deceased. In their drunken stupor they were reacting to an assault that had been perpetrated on accused one by Nicholas Tembo. In other words they felt that they had been provoked. They found it necessary to attack the deceased because the misunderstanding which gave rise to everything that happened that night had been initiated by the deceased in the bottle store. The defence of self-defence that accused one tried to raise is not sustainable. When they attacked the deceased at the last place of assault the deceased was not attacking them at all. He was lying on the ground helpless. So accused one and accused two were not defending themselves from anyone. Even Nicholas Tembo who had struck accused one with a bottle had already fled from the scene. Evidence also shows that it is the last assault which resulted in the deceased's death. After the assault he could not talk, rise and walk.

In the result, we hold the view that the two accused persons lacked the requisite *mens rea* to commit the crime of murder. We thus acquit accused them of murder, but find them guilty of culpable homicide. They were negligent in the manner they assaulted the deceased which negligence resulted in the deceased's death.

Accused three did not participate in the last assault, but he was involved in the assault that happened at the bottle store. In his own words he admitted pushing the deceased in the

bottle store, but this did not result in the deceased sustaining serious injuries if at all he was injured. For the assault that happened outside the bottle store accused three was implicated by Nicholas Tembo and by accused one. We thus find him not guilty and acquitted of murder, but guilty of assault as defined in s 89 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

National Prosecuting Authority, for the state
W.O.M Simango & Associates, 1st accused's legal practitioners
Makonese, Chambati & Mataka Attorneys, 2nd accused's legal practitioners
C. Mutsahuni Chikore & Partners, 3rd accused's legal practitioners