

THE STATE
versus
CLEVER MASANGO
and
HERBERT MPOFU
and
ROBERT MTETWA

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 19, 20, 21, 22 & 30 September 2016 and 20 October 2016
And 7, 11, & 14 November 2016

Murder Trial

A. Muzivi, for the State
Ms T. Nyandebvu, for the 1st accused
P.S. Jonera, for the 2nd accused
A.A Makore, for the 3rd accused

PHIRI J: The accused persons were charged with murder as defined in s 47 of Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The allegations were that the accused persons caused the death of Whatever Givemore Mutapauja by stabbing him with a knife and also by assaulting him with clenched fists and booted feet. All accused persons pleaded not guilty to the charge.

THE STATE CASE

The State opened its case by leading evidence of three witnesses by way of formal admissions. This was the evidence of REUBEN MASHONGERA, AUGUSTINE MATSAPA AND DECTOR GONZALEZ

REUBEN MASHONGERA

He stated that he is a duly attested member of the Zimbabwe Republic Police. On 20 June 2015 he was playing a game of snooker at Mudhara Bar Chakari when he was called by another patron who was drinking beer stating that someone has been assaulted outside the bar. He went outside and noticed a group of people standing around the deceased. He went

through the crowd and knelt beside the deceased. He checked for pulse and noticed none, he contacted the police station and police officers attended the scene.

AUGUSTINE MUTSAPA

Stated that he is a duly attested member of the Zimbabwe Republic Police Stationed at Chakari Police Station. On 20 June, 2015 a report of murder was received at the station. Together with other police officers they went to the scene. At the scene he observed the deceased lying on the ground facing upwards and had three stab wounds on the left side of the neck which appeared to be deep.

He instructed Constable Magaisa to guard the scene. Whilst at the station accused persons were brought by one Kevin Jack and some youths. On the same date this witness recorded warned and cautioned statements from the accused persons. All accused persons were in their sober senses and they freely and voluntarily signed their statements.

DOCTOR MAURICIO GONZALEZ

He is a duly registered medical practitioner employed as a legal Medical Specialist Stationed at Parirenyatwa Hospital. On 23 June 2015, at the request of ZRP Chakari, he examined the remains of the deceased and concluded that death was as a result of Hypovolemic Shock, haemothorax, stabbed wound and subdural haematoma (depressed skull fracture). He compiled a post mortem report which was produced in court as exh 1.

GODFREY BANDA

He testified that he observed the three accused fighting with the deceased. He observed the second accused holding the deceased by the neck. He also saw the 1st accused throwing an empty bottle at the direction of the 2nd accused and the deceased. He then saw the 1st accused flip open an okapi knife and menacingly charging towards the deceased. He saw the 1st accused plunging the knife on the chest and near the neck of the deceased. The knife was produced as exh 2.

He subsequently observed the 2nd accused and deceased both fall to the ground.

The 1st and 3rd accused rushed and lifted the 2nd accused person and ran away with him.

KEVIN JACK

Testified that he was employed as a Security Guard at Madhara bar. He was also a member of the Neighbourhood Watch Committee. On 19 June, 2015 the accused persons

came to Madhara bar and they were at the snooker table. They had a misunderstanding with the deceased. The misunderstanding was over a snooker token.

He ordered all of them out of the bar. He observed the accused and the deceased fighting. 2nd accused was assaulting the deceased using his hands and feet. He was assaulting the deceased on his head and face.

The witness also noticed that the 1st accused had a knife. He observed the 1st accused stabbing the deceased near the neck. He observed the 3rd accused assaulting deceased with clenched fists. The witness explained to the court that there was a serious commotion as the parties were fighting each other. He could not manage to stop them. He subsequently observed the 2nd accused and deceased were injured and lying down. The 1st and 3rd accused then assisted the 2nd accused and ran away into the dark leaving the deceased unattended.

Upon taking away the 2nd accused the 1st and 3rd accused persons lied to the witness, that they were taking 2nd accused to hospital.

The witness also testified that Godfrey Banda had called and reported to him as to what was happening outside.

The witness approached the deceased to find out if deceased was still breathing and he thereafter decided to call the police.

THOMAS CHIMUNGWE

Testified that he is a duly attested member of the Zimbabwe Republic Police and was stationed at Chakari as the officer in charge.

On 20 June, 2015 he received a phone call from Constable Mushongera and it was reported that there had been a murder case which occurred at Madhara Bar. He assigned several police officers to attend to the scene. He also attended the scene and observed a group of people gathered around the deceased. The body of the deceased was drenched in blood and facing upwards.

He inquired whether these were any witnesses who witnessed the death of the deceased and only two came forward. These were Godfrey Banda and Kevin Jack who was a member of the neighbourhood watch and was also working as a security guard at the nightclub.

He inquired as regards the whereabouts of the accused and was advised that they had collected their colleague who at the time was conscious and disappeared.

He conducted for a search for the knife that had allegedly been used to stab the deceased. The knife was recovered with the assistance of a cattle buyer named Simbarashe Matashu. The knife matched the description that had been described to him by an anonymous caller. The knife was blood stained. This was then tendered to court as an exhibit. The knife matched the description of the murder weapon.

DEFENCE CASE

CLEVER MASANGO: 1st accused

Led evidence in his defence and he incorporated what was submitted in his defence outline which was admitted into evidence and marked as Annexure “B”.

In his defence outline he raised an *alibi* defence and stated that at the time when the deceased was murdered he had already left Madhara bar and was at home.

He went on to further state, in his defence outline, that on 19 June, 2015 he went to Madhara bar for a drink and was later joined by the 2nd and 3rd accused. He alleged that around 11 pm 2nd and 3rd accused started arguing with the deceased when they were ordered out by the security guard.

He later followed outside. The argument turned into a fist fight and he was not part of the fight. He was standing aside holding a black label bottle in his hand. He left the scene of the fight around 12pm whilst the fight was going on. He was awoken by mobs of people and the police handcuffed him, with accusations that he had killed the deceased.

He averred that he was not part of the fight and he never saw the murder weapon nor held it. He went home before the deceased was killed.

Under cross examination the witness was questioned about Godfrey Banda’s testimony that he was seen throwing a beer bottle in the direction of the 2nd accused and the deceased. He was also questioned on the evidence that he flipped open an Okapi knife and advanced towards the 2nd accused and the deceased and that he stabbed the deceased. He denied this.

The witness was further questioned that Godfrey Banda had seen him aggressively advancing towards the deceased or stabbing the deceased. It was also put to him that the reason for his intervention was that deceased had overpowered the 2nd accused. His answer was, “As a person who was drunk there was nothing I could have managed to do....”

The witness was further questioned whether he was handling a black label beer bottle and his answer was “No”

The witness was referred to para 6 of the defence outline in which he stated that he was standing aside holding a black label beer bottle in his hand. He retorted that “... as a person who knows nothing it is mere saying...”

It was further put to the witness that he left the bar at 2 a.m. and his answer was that “I cannot dispute it.”

It was further put to him that that placed him placed him at the scene of crime and his answer was “There is nothing that I know.”

It was further directly put to the witness that it was him who stabbed the deceased with an Okapi and his answer was;

“As a person who was drunk there is nothing that I know.”

The witness was further questioned on the inconsistencies in his defence outline and evidence in chief and also with peculiar reference to para 7 of his defence outline and his answer was “there is nothing I can say because there is nothing that I know.”

The witness testified that he started drinking alcohol, that is, opaque beer and “skippers” from 8:00am to about 12 midnight and that he was drinking with 2nd and 3rd accused.

HERBERT MPOFU: 2nd accused

Also led evidence in his defence and incorporated his defence outline which was marked as Annexure “B”.

In his defence outline accused stated that he attended Madhara bar and was drinking beer and playing a game of snooker. An altercation arose between the accused persons who were playing a game of snooker and the now deceased which caused the security guard to push the accused persons, the deceased and other revellers out of bar.

The accused stated that he remembers exchanging words with the now deceased who was drunk and agitated whilst standing outside the bar. The deceased picked an object which he used to strike second accused on his head which rendered the witness unconscious. He had no knowledge as to who stabbed or assaulted the deceased.

In his evidence in chief he stated that accused persons had a misunderstanding with the now deceased as a result of the “snooker token” 2nd accused had bought. He claimed that the deceased indicated that the game 2nd accused was playing was the deceased’s game.

There was a misunderstanding and Kelvin Jack (the security guard) and 3rd accused came indicating that the two should stop the misunderstanding.

The witness testified that the security guard held the now deceased and took the deceased and the witness (2nd accused) outside the bar. The deceased pushed him and the retaliated by also pushing the deceased.

Deceased then took a stone and struck the 2nd accused with a stone on the head. He became unconscious and gained consciousness when he was at home.

The witness testified that the 1st accused was outside the bar and 3rd accused remained inside the bar and was watching a game of snooker.

He denied assaulting deceased and also disputed holding the deceased by the neck. He also denied that he gathered any weapons in order to assault the deceased.

He, under cross examination, testified that he did not know whether 1st accused was “armed” and could not dispute the fact that 1st accused had a knife and a catapult. He admitted that 1st accused was drunk.

On being asked that he assisted in the “battle” and in the acceleration of the deceased’s death the witness replied

“I cannot dispute to that as a person whom I shoved with each other...”

The accused was further asked “... were it not for your actions deceased would not have met his death?” and his answer was:

“... that I cannot know ... it is because of that person who stabbed hm.”

It was further pointed to the witness under cross-examination that the witness associated himself with the conduct of his co-accused on that caused the death of the deceased? His answer was, “I do not know.”

ROBERT MTETWA

The 3rd accused also testified and he incorporated his defence outline and his warned and cautioned statement as part of his evidence. These were marked as Annexures “D1 and D2” respectively.

In his warned and cautioned statement accused stated the following;

“I do not admit to the allegations being leveled against me. I deny the allegations because I was called from the bar to see my relative Herbert who had been injured. He was unconscious and could not speak. We gave him First Aid and he gained consciousness and we carried him to his place of residence with his sisters and a man called Vembeu. When I arrived home and was about to sleep, some people arrived and asked me to take them to Hebert’s residence. These people were in the company of Clever who was implicated to have stabbed WHATEVER GIVEMORE MUPATAPANJA with a knife. I had earlier on seen Clever at the bar wearing a white shirt and a grey trousers.”

The witness denied under cross-examination,, that Kelvin Jack saw him and the 1st accused assaulting the deceased.

It is the court’s considered view that from the evidence led it is common cause that;

1. The three accused persons were at Madhara bar and drinking beer and playing snooker.
2. A misunderstanding arose between the accused persons and the deceased and this was occasioned by an argument over a snooker token and snooker game.
3. The court accepts the evidence of Kelvin Jack who testified that he saw three persons (The accused) fighting with the now deceased.

He ordered them to leave the bar since they were pushing and shoving each other.

As they were moving out of the bar he followed them and found them fighting.

4. The court also accepts the evidence of Godfrey Banda who testified that he saw three persons fighting with the deceased.

He saw the 2nd accused holding the now deceased by the neck

He also saw the 1st accused throwing a bottle in the direction of the 2nd accused and the deceased.

He also saw the 1st accused flipping an Okapi knife and advancing towards the deceased and saw the 1st accused stabbing the deceased.

5. There is corroboration in respect of the State witness as regards most of the material evidence adduced. Their credibility cannot be questioned.
6. On the other hand the accused persons led evidence which sought to distance themselves from the scene of the crime and also from the part that each of them played which resulted in the deceased meeting his fate.

7. All accused persons were friends and drinking together and playing snooker. The 3rd accused, in his warned and cautioned statement admits that Herbert (2nd accused) was his relative.
8. The accused persons clearly gave conflicting evidence which, as the prosecution submitted, was tainted with lies as they sought to protect each other.
9. It is common cause that the deceased was stabbed and sustained injuries as described by Dr Gonzalez who concluded that the cause of death was “hypovolemic shock, haemothorax – stab wound. ..” all due to assault.
10. It is the finding of this court that all accused persons had a clear common motive in attacking the deceased, and, they all participated in the common objective of attacking the deceased.
11. They were all present at the scene and each one of them were aware of what the other was doing and associated themselves in attacking the deceased.
12. The accused persons all participated in an activity after foreseeing that there was a real risk and possibility that their actions would result in the death of the deceased.

The 1st accused led evidence portraying a picture that he was “dead” or motherless” drunk to the extent that he did not know what he was doing. However he sneaked away from the scene of the crime and went home and changed his clothes.

The 2nd and 3rd accused admitted having partaken of alcohol but they were not so drunk as not to appreciate what they were doing. There was some concerted effort made to ferry the 2nd accused, not to the hospital but to his residence. Clearly they were aware as to what they were doing.

This establishes a constructive intent to the commission of the crime.

Murder is the unlawful and intentional killing of another person. In order to prove the guilt of an accused on a charge of murder the state must establish the fact that the perpetrator committed the act that led to the death of the deceased with necessary intention to kill.

The court accepts submissions made by the State that in this case all accused persons deliberately lied and tried to deceive the court. This is a factor which this court also takes into account in drawing adverse inferences of accused person’s guilt. See *S v Gijima* 1986 (1) ZLR 33 (S).

The court also accepts the submission made on behalf of the State that the court has a right to reject those parts of the accused person's evidence which may be favourable to them whilst accepting the parts which are not. See *S v Munemo* 1986 (2) ZLR 71 (S).

All accused persons were present at the scene of the crime. They also were aware as regards what each of them was doing and each of them associated themselves in assaulting the deceased. They accordingly acted in common and fore saw that there was a real risk that their actions would result in the death of the deceased.

Accordingly this court accepts that the three elements to the constructive intent were present, namely;

- (a) Subjective foresight
- (b) Real possibility of death and
- (c) Recklessness.

See the cited case of *S v Ndlovu* SC91/94 and *S v Gumbi* 1994 (2) ZLR 323 (S) at 327.

This court also accepts the submission made on behalf of the State that the issue of voluntary intoxication (in terms of s 221 of the Criminal Law, Codification and Reform Act, *Chapter 1:23*) is not a defence to the crime. The court also accepts the submission that accused persons in this case, are still guilty of Voluntary Intoxication leading to unlawful conduct as defined in s 222 of the code and are still liable to the same punishment as the original crime.

Clearly the state has proved the guilt of the accused persons beyond reasonable doubt and accordingly accused persons are hereby found guilty convicted of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

SENTENCE

In sentencing the accused, the court takes into consideration what has been stated for and on behalf of each accused persons.

It was submitted, on behalf of the first accused that accused lost his mother at an early age and attended school up to grade seven. At the time of the commission of the offence he was 21 years of age. He is married and has one child.

It was submitted that the second accused is 24 years of age. He attained education up to grade seven and is a first offender.

It was also submitted that third accused is aged 23 years and is married and has two children aged 1 and 1½ years respectively. His wife is unemployed.

The court accepts the fact that all accused persons are youthful offenders. See the factors outlined in the case of *S v Masamba Chininga* SC 79/2002.

The court also accepts the fact that the accused persons were found guilty of murder with constructive intent. This in itself is a mitigating factor.

The court also takes into consideration the fact that accused persons, and the deceased, had partaken of some alcohol which led to the needless argument over a ‘snooker token.’

The combined effects of youthfulness and possible intoxication serves to reduce ‘the moral, albeit, not the legal blame worthiness of the accused in the commission of the murder.’ See the case of *Okay Ndlovu v The State* SC 91/94 at p 4 of the cyclostyled judgment and the remarks of CHIDYAUSIKU CJ in the case of *Masamba Chininga v State (Supra)* at p 7 to 8 of the cyclostyled judgment.

However this court also takes into account the aggravating factors adduced, for and on behalf of the State, that it is the duty of this court to protect the sanctity of life.

This court agrees with the submission that the loss of self-control by accused’s persons in this case was not reasonable. The court accepts that the broad social policy must be to show restraint despite provocation.

Regrettably it has almost become a norm that petty disputes, particularly at beer drinks are resulting in needless deaths or loss of lives in this country. Such conduct must be declared deplorable and this court needs to reiterate and send a clear message that consumption of alcohol should not be used as an excuse to commit heinous offences such as the present one.

In the case of the first accused evidence was led that he was not a first offender. He has a previous conviction of assault.

A deterrent sentence is therefore called for and this court is indebted to counsel for the State and the guidance of the cited cases which show the sentencing trend of cases of murder with constructive intent. See for instance cases of *S v Ndhlovu (supra)* and *S v Chigumba* SC 19 of 2 000.

This court also takes judicial notice of factors outlined in the General Laws Amendment Act No. 3 of 2016 in s 47 (6) of the Criminal Law (Codification and Reform)

Act [*Chapter 9:23*] which outlines the circumstances under which this court should take into account as aggravating circumstances.

In terms of s 47 (2) (d) the court must take into account the fact that “the victim was murdered in a public place....”

Accordingly, in the circumstances the accused are sentenced as follows:

- (1) The first accused is sentenced to 20 years imprisonment with labour.
- (2) The second and third accused are each sentenced to imprisonment with labour of 15 years each.

National Prosecuting Authority, State’s Counsel
Sibanda and Partners, 1st accused’s legal practitioners
Wintertons, 2nd accused’s legal practitioners
Chinawa Law Chambers, 3rd accused’s legal practitioners