THE STATE
versus
WILLARD GWETE

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 25 & 29 February2016 and 1 & 3 March 2016

Assessors: 1. Mr Magorokosho
2. Mr Chidawanyika

Criminal Trial

M Musarurwa, for the State
A Mutungura, for the defence

HUNGWE J: The accused faces a charge of murder it being alleged that on 4 July 2015 at Gwete Bottle Store, Chiramba, Chief Saunyama, Nyanga the accused unlawfully and with intent to kill, stabbed Takemore Gwete, his blood brother, with an okapi knife in the abdomen thereby causing injuries from which the said Takemore Gwete died.

In his defence outline prepared on his instructions by counsel the accused admitted that he had stabbed the late Takemore but did so in self – defence. He alleged that as he was leaving the said bottle store there was an altercation between him and his brother who had commenced an assault upon him. He then produced a knife intending to scare him away. He had "unknowingly" stabbed him to death. In court the accused's changed from this version of events to another. He introduced an unnamed third party with who he had an altercation over certain allegations about his unnamed nephew who was conducting an illicit affair with this unnamed man's wife. The man started to assault him over that issue. He fled from the scene and took refuge at Gwete Bottle Store where he had joined his brother the now deceased in partaking of intoxicating beverages as the night wore in. At some point which he did not recall, he says that

the deceased then suggested that they should leave for their residence. He agreed with the suggestion and left together with the deceased. On their way, he claims that they met up with that other unnamed assailant who had raised the issue of an illicit affair between that unnamed man's wife and their nephew. The unnamed man attacked him again using clenched fists. Twice, he was felled to the ground and twice he rose up again. Upon gaining his composure he decided to take flight. As he did so he produced a knife with which he feigned an attack so as to clear his path to freedom from the vicious attack by this unnamed man. In that process, he felt himself stab someone. However, this act appeared to have cleared his path. He continued on his way home. Before he had got anywhere, he was called back and advised that he had stabbed his brother, the deceased. The accused claimed that he had not realized, due to intoxication, the gravity of the situation till some two days later.

His evidence is contradicted in every material respect by that of Givemore Simango. This witness told the court that he was alerted by Kundai Gwete about the fact that Takemore had been injured. When he got into the bottle store he noticed the now deceased lying on the floor bleeding profusely. He was dying. He got information about the accused's encounter with the deceased who lay injured. At that time, according to the witness, the accused stood by the window outside threatening to stab anyone who dared to apprehend him. When he went outside the accused retreated from him and faded away into the dark distance. Lloyd Saunyama, Givemore Simango and other patrons chased and apprehended the accused. He was still wielding the murder weapon in his hand. The group subdued him, took away the offensive weapon, an Okapi knife, and placed it inside the accused's pocket. Police were summoned to the scene. The accused was visibly intoxicated. When the police arrived at the scene, the witness asked if it was true that his brother had died. According to this witness, when this was confirmed, he appeared quite remorseful over what he had done. This version is confirmed by the other witnesses, Lloyd Saunyama and Givemore Simango, whose evidence was admitted into the record in terms of section 314 of the Criminal Procedure and Evidence Act, [*Chapter 9:23*].

Counsel for the accused, Mr *Mutungara,* acknowledged that his client was a poor witness for the defence. Indeed he had difficulties leading the accused during his evidence-in-chief.

Accused was hopelessly untruthful in his evidence. He changed his version of events to such his prevailing whim.

The law provides that a person is entitled to take reasonable steps to defend himself against an unlawful attack or to take reasonable steps to defend another against an unlawful attack. Harm, and even sometimes death, may be inflicted on the assailant in order to ward off the attack. The requirements for this defence are that there must have been an unlawful attack upon the person of the accused or a third party where the accused intervenes to protect that third party; the attack must have commenced or imminent; the action taken must be necessary to avert the attack and the means used to avert the attack must be reasonable. (See: s 253 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].)

Therefore in order to raise this defence successfully, the onus lay upon the accused to show on a balance of probability that he had, in killing the deceased, acted in self-defence. The court is aware that in its assessment of the evidence adduced by the accused, it must not adopt an armchair approach. The danger with such an approach is that it underplays the factual situation in which the accused found himself and the lack of the opportunity to weigh the niceties of taking this or that action in order to avoid a deadly situation without endangering his own life. The court must critically analyze the evidence adduce by the State as well as that adduced by the accused and decide whether on the facts found proved, there is a reasonable probability of the accused's defence of self-defence being true.

The evidence adduced during trial show that the accused was making a nuisance of himself as a result of his intake of intoxicating beverages. He would ask for and demand beer from patrons of the family bottle store. When restrained he would not heed such appeals to ethical behavior. The deceased took the accused out of the bar in order to remove the source of embarrassment for the other family members. When they went outside, the accused from the evidence, then stabbed the deceased. There is no evidence that the deceased was aggressive when they proceeded to leave the bottle store. The accused does not say that he had been attacked by his victim prior to the fatal stabbing. His evidence is that someone else attacked him over an issue regarding his nephew's philandering habits. He does not say that the deceased attacked him or was about to do so just prior to the fatal stabbing. In any event his masterful recollection of the events of that night tend to indicate that he was fully aware of what took place. Indeed when the police arrived at the scene he was surprised that his victim was dead, not that it was his brother. His surprise came from the fact of the death of the deceased, not the identity of his victim. He

did not deny that he carried a knife that night. He threatened the other patrons with it before he ran away from the scene before he was subsequently apprehended. In our view, these factors demonstrate that the accused realized that his use of the weapon upon the deceased carried with it the real risk or possibility of death but persisted in that conduct.

Mr *Mutungura* urged the court to find that as the State did not have an independent witness to how the stabbing took place, the circumstantial evidence could only establish culpable homicide, not murder.

We are not certain that in his submission Mr *Mutungura* took into account the following admitted facts.

a) The accused carried around a potently dangerous weapon before he embarked on a voluntary spree of beer drinking and merry making.

b) Around 8pm the accused was harassing patrons at Gwete Bottle Store demanding free beer.

c) His brother, the deceased, remonstrated with him and urged him to desist from his clearly embarrassing behavior towards their patrons.

d) The deceased pleaded with him that they should go home and apparently he acquiesced to the advice from the elder brother and peacefully walked out with him.

e) Shortly after, the deceased walked back and expressly announced that accused had stabbed him. He collapsed from excessive bleeding.

From the above, the inescapable conclusion is that the accused had lied about an altercation with his brother. He also had lied about being assaulted by an unnamed or unidentified man. His description of how the stabbing occurred is so patently improbable that we dismissed it as false. In the end we find that the accused was unable to establish the requirements set out under section 253 of the Criminal Code for the defence of self defence to be a complete defence to a charge of murder.

The facts show that he was angered, probably due to his drunken state, by the polite advice from his brother that he should desist from harassing the patrons for free beer. In our view when he walked out with his brother, he decided to end the small problem posed by a level headed brother by stabbing him. He took the decision to stab him well-knowing the

consequences of such an act, or, put differently, realizing the real possibility that death may occur from stabbing the deceased in the stomach.

He clearly realized, despite being drunk, that there was a real risk or probability that by stabbing his brother in the abdomen death would result, but notwithstanding such realization, persisted with that conduct.

In our view his conduct soon after, where he was threatening anyone who dared to apprehend him with a knife confirms that he was well aware that he had fatally stabbed his cousin. He was in full control of his faculties despite the fact that he was drunk. In the end we did not find favor with his defence. We rejected the submission made on his behalf by counsel.

Instead we are satisfied that the accused is guilty of murder as defined in s 47 (1) (b) of the Criminal Code.

SENTENCE

In assessing sentence this court does not lose sight of the mitigating and aggravating circumstances. As for the mitigatory factors, the court does not lose sight of your youthfulness which was exacerbated by having one beer too many. Your drunken state played a major role in this sad story. You expressed remorse upon realizing, at the scene, that you have killed the deceased. The fact that you killed your cousin will forever haunt you for the rest of your life. Being a first offender this type of crime will unavoidably leave an indelible mark on your conscience. Your remorsefulness therefore must be regarded as genuine.

However you have been convicted of a serious offence for which the legislature, in its wisdom, has provided for capital punishment. The reasons for this are clear. Murder is a serious an offence for which the ultimate punishment may be imposed. Murder reduces the sanctity of human life. For this reason, the public expects the court to pass appropriately tough sentences that reflect the gravity of the crime. It is by so doing hoped that those of a like-mind would be deterred by the sentenced assessed with retribution in mind. The court is all too aware of the fact that once a life is lost, it can never be replaced. Therefore the purpose of sentencing a murder convict needs to be attuned to this reality. In your case I am of the strong view that because you expressed regret upon the realization of the grave consequence of your conduct, that you have learned a bitter lesson that violence can only lead to worst consequences.

In light of the above factors I am of the view that the following sentence will meet the justice of this case.

14 years imprisonment

Mutungura & Partners, accused's legal practitioners
National Prosecuting Authority, State's Counsel legal practitioners