

THE STATE
versus
BERNARD MAKUCHETE
and
RICHARD MAKUCHETE
and
RABSON MAKUCHETE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 26 & 27 October 2016; 7 & 23 November 2016

Criminal trial

Assessors: Messrs Mushuku & Dhauramnzi

Mr *T. Chikwati*, for the State
Mr *T. Gondo*, for the second accused

MAFUSIRE J: Accused 2, Richard Makuchete [*“the accused”*], aged 25 years at the time, was one of three brothers arrested for the murder of their cousin, Zvinowanda Zvinowanda [*“Deceased”*]. The murder happened in rural Masvingo under Chief Chikwanda. By the time of trial only the accused was available.

The allegations were that on 10 May 2014, following a beer drink, the accused and his two brothers, or one or other of them, unlawfully caused the death of Deceased by striking him with knobkerries and a slasher all over the body, intending to kill him or, despite realising the real risk or possibility that their conduct might cause death, continued with it.

The accused pleaded not guilty.

The State called six witnesses. Four gave *viva voce* evidence. The other two, who included the doctor who conducted the post mortem examination on Deceased, had their evidence admitted by consent.

The first and, obviously, the star witness for the State was Edward Zvinowanda [*“Edward”*]. He was Deceased’s brother. On the day in question he and Deceased were drinking traditional beer at a certain homestead. The accused and his two brothers were also

drinking there, but not together with Edward and Deceased. At some stage, Bernard Makuchete [**“Bernard”**], aged 21 years, the youngest of the three brothers, stood up from their drinking place, approached Edward and Deceased and provoked a fight. He accused Edward of having assaulted him previously. In court Edward said that that incident had happened way back in 1989 when both he and Bernard were still youngsters.

We note in passing that from 1989 to 2014 it was twenty-five years. So, if Bernard was twenty-one years old at the time of the offence, then in 1989 he had not yet been born. However, Edward was not categorical that the incident had happened in 1989. It was purely an estimate that he gave when pressed by Counsel.

Back to the fight. Bernard slapped Edward twice. The two started fighting. The accused and the third brother, Rabson Makuchete [**“Rabson”**], aged 23, joined on Bernard’s side. Deceased, who at 44 years old was the oldest of the lot, intervened and quelled the fight. Bernard turned on him. He accused Deceased of having destroyed his first marriage by snatching his first wife. He also accused Deceased as the author of the continuous misfortunes in his life. In court it transpired from the testimonies of Edward, Deceased’s wife, Tecla Matema [**“Tecla”**], and even the accused himself, that the incident relating to Deceased allegedly having had an affair with Bernard’s wife had been almost a decade old. Edward said it was 2007. Again we note that then Bernard would have been only about fourteen years old. But again Edward was just estimating.

The brawl eventually died. But the accused and his brothers continued to scold Edward and Deceased. The accused in particular, said omniously that it was not the end of the matter. Edward and Deceased decided to leave. The time was around 15:00 hours. The accused and his brothers followed them. At Deceased’s homestead the three milled around the edge of the fields shouting. Deceased invited them inside the house. He wanted them to discuss and resolve the issue amicably, seeing that they were all members of the same family. These two sets of brothers were first cousins. Their respective fathers had themselves been brothers.

The three accused persons refused to enter Deceased’s house. Later on they left for their own homes. Deceased, Edward and their wives had supper together with another cousin, Munyori Zvinowanda [**“Munyori”**], who had called on them. Munyori was the other State witness whose evidence was admitted by consent.

After supper Deceased and Edward walked Munyori to his own home. The time was now around 19:00 hours. There was plenty of moonlight. The three used a footpath that passed through the accused’s homestead. On their way back, the accused and his brothers confronted

Deceased and Edward. The three were all armed with wooden knobkerries. Each of those knobkerries comprised a 10 to 12 cm long head and a shaft about 90 cm to a metre long. In addition, the accused was armed with a metre long metal slasher with a rubberised handle. The slasher was angled at the tip.

With no prior ado the accused struck Edward on the top of his head with the knobkerrie with so much force that it immediately snapped. The accused turned to the slasher. He struck Edward between the eyes. Edward fell down. The accused turned to Deceased, He struck him twice with the slasher. His two brothers joined in. Together they randomly struck Deceased with their knobkerries and the slasher all over the body. Deceased fell down. They continued to assault him until he went limp. They had been at him for about 10 minutes. Meanwhile, Edward lay bleeding some six to eight metres away. But he said he could observe everything.

Tecla and Vimbai Sithole, Edward's wife [*"Vimbai"*], had crawled out of their hiding place in the maize field and had silently encroached closer to the scene. Bernard noticed them. He chased after them but failed to catch up with them. He came back and ordered Edward to carry Deceased home. Deceased was lying face down, lifeless. Edward was himself in no state to lift Deceased on account of the assault on his own person. He staggered to Deceased's homestead and found both Tecla and Vimbai waiting. Upon telling them that Deceased had died, Tecla started wailing. The noise attracted other villagers. They congregated at Deceased's homestead. Eventually Edward was ferried to hospital where he was admitted for two days. A report was made to the police. They came immediately. But all the accused persons had fled. However, they were all apprehended four days later at their uncle's homestead in another chieftdom.

Edward said all the three accused persons were subsequently tried in the magistrate's court for the attempted murder of himself. He said he gave similar evidence. But he did not know the exact outcome of that case, save to say that the accused was sent back to custody and his two brothers released.

The next State witness was Tecla. The material portions of her testimony were that she witnessed the assault of both Edward and Deceased from start to finish. Together with Vimbai they had crawled to the edge of the maize field near the accused's homestead. They had been attracted by the noise of the struggle. Amid a mixture of thuds, shouts and swears the accused's voice was the sharpest and most dominant. The accused was making constant reference to the Deceased having taken Bernard's first wife. He was saying Deceased was going to pay for it that day.

Tecla said when she married Deceased, the issue of his having taken Bernard's first wife had been talk of the village. She had no first-hand knowledge of it. She had heard that the wife in question had been questioned about it by a village court but that she had completely denied any affair with Deceased.

Tecla's testimony corroborated that of Edward virtually in all material respects. She stressed that at no stage did Deceased try to retaliate or defend himself, a detail that Edward had also mentioned. From their evidence, it seems when the first blow caught him, Deceased's one hand was still inside his trousers' pocket. He must have died like that because when the body was examined the following morning, the hand was still inside the pocket.

The only slight difference between Edward's testimony and that of Tecla was on who, of the three accused persons after they were done assaulting Deceased, had chased after Tecla and Vimbai. Edward said it was Bernard who had chased them both. But Tecla said it was the accused that chased after her, with Bernard chasing after Vimbai. However, this difference is of no significance.

As said before, the summary of Munyori's evidence was admitted without objection. He had been at the beer drink on the day of the fight. He witnessed the first brawl from start to finish. His evidence on it corroborated that of Edward in all material respects. It was also the same with his evidence on the issue of their having had supper at Deceased's home and the walk to his own home. The extra detail in Munyori's testimony that was not, and naturally, could not have been in those by Edward and Tecla, was that after Edward and Deceased had accompanied him to his own homestead, he had received a phone call from yet another of their cousins, Ishmael Zvinowanda [*"Ishmael"*], at around 23:00 hours. Ishmael informed him of the attack on Edward and Deceased. Munyori had rushed to the scene. He had found Deceased lying on the side of a footpath near the accused's homestead. Munyori inspected the body. He observed several deep scalp wounds. Part of the head was covered with blood. The blood was coming from the mouth and nostrils. He also observed three knobkerries and a slasher beside Deceased's body. One of the knobkerries was broken. The police arrived at the scene around 03:00 hours the following day.

The next two State witnesses were police officers, Sergeants Rashweth Mutaki [*"Rashweth"*] and Last Zimbandi [*"Last"*]. Rashweth was the investigating officer. Last, the last State witness to give *viva voce* evidence, was part of the team of police details that arrested the three accused persons.

Material portions of the evidence of the police witnesses was that after the accused persons had been arrested and had been brought back to the scene of the crime, Rashweth asked each of them to pick the respective weapons that they had used to assault Deceased. The accused picked the broken knobkerrie and the slasher. Bernard and Rabson each picked a knobkerrie.

The next relevant aspect of the evidence of the police witnesses was on the recording and confirmation of the warned and cautioned statements. Rashweth had led the way. Last had witnessed the process. The State went into some detail on how the statements had been recorded because the accused seemed to be challenging some aspects of his statement.

From the police witnesses' evidence, the three accused persons' warned and cautioned statements had been recorded at the police station at Muchakata, some two days after their arrest. Two sets of statements had been recorded from each of the accused persons. One set related to the charge of attempted murder in relation to Edward. The other set related to the charge of murder in relation to Deceased. The accused had properly been warned and cautioned. He had opted to write down his statement in Shona. It had been translated to English. It had been read back to him. He had agreed with it. He had then signed it freely and voluntarily without any pressure having been brought to bear upon him, or any promises having been made to him. Some six days later, i.e. on 16 May 2014, the accused's statement had been confirmed by a magistrate at Masvingo Magistrate's Court.

It transpired from the police witnesses that Bernard and Rabson had challenged their warned and cautioned statements in relation to the charge of attempted murder. As a result those statements had not been confirmed. The confirmation process had been carried out at the same time in respect of all three.

It also transpired that all the three accused persons had been charged with attempted murder in the magistrate's court. But none of the police witnesses was quite sure what the final outcome of the case had been. In the present trial, none of the weapons used in the commission of the offence was produced as exhibits. The police witnesses said they had been the same weapons produced in the attempted murder trial. Apparently after the conclusion of the attempted murder trial it was not realised that the same weapons would be relevant exhibits for the current trial. They had been destroyed on the orders of the court.

The last State witness, but whose evidence had been admitted without objection, was Dr T. Nyasha, a medical practitioner. From his post mortem examination of the body of Deceased

he concluded that the cause of death had been head injury. The post mortem report recorded deep cuts on the forehead and bruises on the chest.

That was the State's case.

The accused gave evidence. He would admit only such evidence as was not directly incriminatory, and deny everything else. He claimed all the State witnesses had lied against him in order to secure a conviction simply because he was the only one that was in the dock.

The accused was largely incoherent. He admitted the evidence of the first brawl at the beer drink. But he denied that Bernard had provoked it. Instead, he said it was Edward who had stood up from his drinking place to go and slap Bernard. Bernard had retaliated. Edward had been overpowered. He had then produced an Okapi knife intending to stab Bernard. Deceased had intervened and stopped the fight. The accused denied he and Rabson had joined the fight on Bernard's side, or at all. The accused said Deceased and Edward were chased away from the beer drink by some village heads who had been around.

Next, the accused admitted the fight with knobkerries at the edge of his homestead between him and his brothers on the one side, and Deceased and Edward on the other. But he completely denied having ever assaulting Deceased or in any way having engaged him in any violent physical contact.

The accused's version of events, as far as we could make out from the rumbling incoherence, was materially different from that of the State witnesses. He maintained that in the evening fight, Deceased was assaulted by Bernard and Rabson. For him, the only person he ever fought with was Edward. Edward had been the aggressor. He had come banging at his door demanding that he should come out or else he would burn down the house. The accused was lying inside with his wife. Edward was armed with a knobkerrie. At first the accused ignored Edward's violent knocks. Later he observed that Edward, who was using his cell phone light, had moved away to Rabson's compound. The accused then came out of the hut and ran to Bernard's place. His reason for going to Bernard's place was to inform him that the people that he and Rabson had fought with earlier on in the day had come bothering him at his house. Bernard had to come and deal with them himself.

The next lucid detail in accused's testimony was on the actual fight. He said he and Bernard came back together. They ran into Deceased and Edward. Edward slapped him on the face. They started fighting using knobkerries. At that time Deceased, Bernard and Rabson also arrived. They also started fighting using knobkerries, Deceased on one side, and Bernard and

Rabson together on the other. At some stage Edward stabbed the accused at the back with an Okapi knife, inflicting a 2 cm deep wound.

It was not altogether clear from the accused's testimony how his fight with Edward eventually ended. He did mention a slasher. But he denied it had been his weapon or that he had ever used it. Instead, he claimed it was Ishmael who had arrived at the scene holding a slasher. But under cross-examination he said it was Bernard's slasher and that it was Bernard who had used it on Deceased. Accused said he became more certain that indeed it was Bernard's slasher when he saw it on the day of indications because Bernard always had one like that.

The next relevant bit in the accused's testimony related to the recording and confirmation of the warned and cautioned statements. He denied that he had written down his own statement or that he had signed it. He swore he never went to school and so he could neither read nor write. He maintained that the police had got Bernard to write down his [the accused's] statement and to sign it for him.

The accused denied that the police had recorded two statements from him and maintained that only one had been recorded. That one statement related to the attempted murder charge, not murder.

At confirmation, the accused maintained he did inform the magistrate that the police had assaulted him and that they had got Bernard to write his statement and to sign it for him. However, the accused claimed the magistrate had just kept quiet about it. The accused mumbled incoherently why the statements ascribed to Bernard and Rabson would not be confirmed when they had challenged them but only to have the magistrate confirm his alone.

Asked why he had not sought medical treatment given that he had been seriously wounded from the knobkerrie attacks and the knife stabbing by Edward, the accused at first said he been waiting for a letter of instruction from the village constabulary, one Tembwe, to whom they had made a report of the fight. However, upon being given the report, Tembwe had allegedly advised them to wait for sunrise given that Deceased was of a violent disposition. But later on the accused said he had opted for traditional medicine for his wounds because he could not afford clinic or hospital fees.

That basically was the accused's case. It was a pack of lies. We had little difficulty dismissing it. It did not add up. It was contradictory in many respects. A few examples will suffice:

- That at the beer drink it was Edward, not Bernard, who had provoked the fight was corroborated by Munyori. Munyori's summary of evidence was admitted by consent. So the accused, rather than the State witnesses, was lying on that score. At any rate, the accused could ascribe no reason or suggest why Edward would just stand up unprovoked and go and attack Bernard. That would be irrational. At least Bernard deemed himself to have an unresolved grudge against Edward.
- Admittedly, given Bernard's age at the time, the dates ascribed by Edward to the incident of the old fight, 1989, and the incident of the alleged affair between Deceased and Bernard's first wife, 2007, did not add up. However, this has little significance. The State witnesses were merely trying to emphasise lengthy periods of time that had elapsed.
- The accused's denial of the assault on the person of Deceased was in direct contrast, not only to his warned and cautioned statement that was recorded only some six days after the event, but also to his defence outline that was drafted by his Counsel only some six days before trial. In the warned and cautioned statement, the accused admitted striking Deceased with a knobkerrie more than once and to Deceased falling to the ground. In his defence outline, the accused expressly admitted attacking Deceased, albeit with a knobkerrie, and albeit "... *never severely* ..."
- Still on the assault on Deceased, the accused's denial of having used a slasher contradicted his warned and cautioned statement. In that statement, he admitted to being armed with a knobkerrie "... *and an iron rod / bar...*" At any rate, there was no significant challenge to the evidence of Edward and Tecla, who were direct eye-witnesses, that the accused had been armed with a knobkerrie and a slasher; that he had smashed Edward with the knobkerrie which had then snapped, and that he had then used the slasher on Deceased. Furthermore, there was no serious challenge to the evidence of the police witnesses who testified that at indications, each of the three accused persons had been asked to stand by the weapons that each of them had used during the fight and that the accused had picked the broken knobkerrie and the slasher.

- Still on the issue of weapons, if Deceased and Edward had each been armed with a knobkerrie, then there should have been five of them on the day after the fight or on the day of indications. But there were only three, one of them broken. Every relevant witness on that point said they were only three. The accused did not deny or challenge that. He did not say anyone might have concealed the others.
- From the evidence, Deceased did not fight back. There is a salient detail that seems to confirm that he did not fight back. It was that he died with one hand inside his trousers' pocket. That could not have been a fighting posture, or even a defensive one. The first blow on him must have been a surprise attack. It must have knocked him out instantly, otherwise he would naturally have had to try and deflect it. So the accused must have been lying when he said in his warned and cautioned statement that Deceased had been attacking him, or when he implied or insinuated in his testimony that Deceased had attacked Bernard and Rabson.
- The accused's version of how his warned and cautioned statement was recorded and confirmed would probably make sense in kindergarten. If believed, it would mean Rashweth, as the investigation officer conspired to fix him. Last, as the witness, and the magistrate who confirmed the statement would also have conspired against him. Finally, the court that tried him of attempted murder, and all the court officials involved in that trial, including the prosecutor, would also all have conspired to use a statement that clearly referred to a charge of murder. This is incredible and therefore not believable.

There were several other contradictions and inconsistencies in the defence case. In the final analysis the accused's version of events is rejected in favour of that of the State.

The court is satisfied that the State has proved its case beyond any reasonable doubt. We find that the accused actually did intend to kill Deceased. Therefore, the accused is hereby found guilty of murder with actual intent.

In mitigation, Defence Counsel said accused was married with three minor children. The wife was said to be unemployed and disabled. As such, the accused was the sole breadwinner.

Counsel also submitted that it should be taken into account that the accused, at 23 at the time of the commission of the crime, was still fairly young. He had consumed large quantities

of alcohol on the fateful day and should therefore be taken to have been drunk. As such, and coupled with youthfulness, his sense of judgment could be said to have been become impaired.

It was also urged on us to take into account that the accused was already serving a seven year prison term in respect of the conviction of attempted murder.

In aggravation, State Counsel argued that the murder was premeditated in that the accused had for a long time harboured a grudge against Deceased whom he and his brothers held responsible for having taken away Bernard's first wife and for the misfortunes that allegedly continuously befell Bernard. Our attention was drawn to the General Laws Amendment Act, No. 2 of 2016, which amended s 47 of the Criminal Law [Codification and Reform] Act, *Cap 9:23* [*“the Criminal Law Code”*]. The amendment lists circumstances that a court, in sentencing a person convicted of murder, may, without any limitation on any other factors, regard as aggravating. The Constitution, in s 48[2], says that a law may permit the imposition of the death penalty on certain persons convicted of murder which was committed in aggravating circumstances.

State's Counsel's point was that in accordance with paragraph [a] of the new sub-section [3] of s 47 of the Criminal Law Code, if a murder was premeditated, this, in the absence of mitigating circumstances, may amount to an aggravating circumstance, thereby leaving the court at large to consider the penalty of death or life imprisonment.

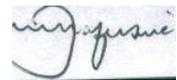
In our assessment, we have considered that at no stage did the accused show or exhibit any signs of contrition for the death of such a close relative. In fact, the English word “cousin” kind of puts distance in the relationship. In traditional African culture, the accused and Deceased were brothers by blood. But immediately after savaging Edward and Deceased, the accused was still not yet done. He noticed Deceased's wife and chased after her. God knows what would have happened had he caught her. After the murder, the accused and his brothers did not own up. They ran away. Ever since, he has tried to disown responsibility.

However, we have not accepted that the murder of Deceased was committed in aggravating circumstances. This is in spite of the fact that before killing Deceased, the accused had started with Edward whom he had left for dead. But this was one single criminal episode or enterprise. We believe this was an alcohol induced lack of self-control that might have been compounded by youthfulness. For, example it was irrational that cousins would fight over an incident that was more than a decade old. Nonetheless, life was needlessly lost. Justice demands that an appropriate punishment that suits both the offence and the offender be imposed.

Defence Counsel appreciated that a lengthy prison sentence was called for. He suggested fifteen years would be appropriate but that these should be made to run concurrently with the seven years imprisonment that the accused was already serving for the conviction of attempted murder.

In *S v Mudenda*¹ where the accused, driven by extreme jealous, killed the deceased by striking him twice on the head with a sharp axe, was sentenced to 30 years imprisonment. In this case we have felt that a similar period would not be out of place. However, instead of ordering that any period of imprisonment that we may finally impose should run concurrently with the sentence in the previous conviction, which would be irregular for a number of reasons, we have, instead, taken the previous sentence as an aspect of mitigation. Therefore, the accused is hereby sentenced to 25 [twenty-five] years imprisonment.

23 November 2016

A handwritten signature in blue ink, appearing to read 'J. J. J.', is written over a horizontal line.

National Prosecuting Authority, legal practitioners for the State;
Chihambakwe, Makonese & Ncube, legal practitioners for the second accused, *Pro Deo*

¹ HB 66-15