

THE STATE
versus
LUCKCHANCE MUTSAGO

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 30 July 2019, 5 and 20 August 2019 and 25 September 2019

Criminal Trial

ASSESORS: 1. Mr Mudzinge
2. Mrs Mawoneke

M Musarurwa, for the applicant
T. T. Sigauke, for the accused

MWAYERA J: The accused was charged with murder as defined in terms of s 47 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In that on 1 June 2012 at around 20:00hours and at Mazonwe Farm Bottle Store, Burma valley, Mutare, the accused in the company of Frank Chimana who is on a warrant of arrest unlawfully caused the death of Richmond Martins by beating him with booted feet and fists several times all over the body and twisting his head along the neck, intending to kill Richmond Martins or realising that there was a real risk or possibility that their conduct might cause death and continued to engage in that conduct despite the risk or possibility resulting in injuries from which Richmond Martins died. The accused tendered a plea of Not Guilty to the charge.

The accused in his defence outline denied ever assaulting or attacking the deceased in any manner. He pointed out that one Frank Chimana in whose company the accused was is the one who engaged in a scuffle with the deceased. The accused tried to stop the scuffle but Frank Chimana who was visibly angry could not be stopped. Frank Chimana violently pushed deceased and kicked him all over the body. Despite efforts to restrain him, Frank was unstoppable. The accused told the court that he was only implicated because he was in the company of Frank Chimana who fatally assaulted the deceased. He denied having conspired or colluded with Frank Chimana to assault the deceased in any manner.

The bulk of the facts are common cause as deduced from the evidence of state witnesses which was formerly admitted by consent in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The evidence of Precious Muyambo, Peter Mashatini, Bornwise Jairos, Tendai Young Gotsi, Ringisa Mlilwana, Ephias Mukwe and Doctor Kasongo was admitted. It was apparent from Doctor Kasongo's evidence that the deceased died as a result of traumatic shock secondary to assault. It was also common cause that the accused and Frank Chimana were at the shopping centre at Mazonwe Bottle Store where the deceased was. That the deceased was subjected to assault is also not in dispute. However the contentious issue is whether or not the accused together with Frank Chimana acting with common purpose assaulted the deceased thereby causing the traumatic shock which occasioned death of the deceased. The state adduced oral evidence from two witnesses namely Fiona Mukombiwa and Zebediah Mubango.

Fiona Mukombiwa stated that she observed a scuffle ensue between the deceased and Frank Chimana. The accused while inside the bottle store tried to restrain. The parties pushed each other outside. Whilst outside the witness followed and observed Frank Chimana and accused stomping the deceased in the stomach with booted feet. She further stated that she observed the accused and colleague kick the deceased on the ribcage. Further the witness narrated that Frank Chimana twisted the deceased's neck. She tried to stop the two assailants but to no avail as they were unstoppable and even wanted to assault her. According to Fiona Mukombiwa the accused only stopped when her brother and mother whom she summoned for help came. At that stage the deceased had been hurt. He vomited blood and beer. He staggered to the veranda of the bottle store from where Zebediah Mubango, was called upon to move him into the campus. After about 2 hours the deceased passed on. According to the witness the assault did not take much time and she was the only one who witnessed as most people had gone and the few patrons left were in the bottle store. The witness told the court that the fracas occurred in the dark within a short space of time. The visibility and time has a bearing on the witness's testimony when viewed with the totality of evidence inclusive of the accused's version. If the neck was twisted and broken then such injuries could have been noted and observed by the doctor who compiled the post mortem report exh 1 tendered by consent.

In the post mortem report the doctor excluded head injuries and specified that the body was intact which in layman's terms implies that nothing was broken or that there was no fracture. The doctor in fact observed bruises on the back. Given it was dark and that the witness

herself was trying to restrain that could have interfered with accurate observation of what transpired. The witness' evidence was to the effect that a bystander could not distinguish who the aggressor was, she told the court that when the brawl started the accused intervened to stop the fracas between deceased and Frank Chimana. There appears to have been no reason why when they were outside the accused then turned to be the main perpetrator of the assault as the witness sought to portray. That it was dark and the accused was new in the area and that the initial fracas was between the deceased and Frank Chimana cast doubt on the involvement of the accused. The witness could have mistaken the restraining for assault or mistake the assault by Frank to be by the accused.

It was apparent the fracas occurred at the witness's bottle store and that she feared being associated with the subsequent death of the deceased as evidenced by her ordering the security guard Zebediah Mubango to move the deceased away from the veranda. That there just had to be somebody to shoulder the blame is the impression created by the witness when she testified. The reliability of the observations was an issue given this happened in the dark and possibility of mistaken identity of who was doing what is not farfetched. This is moreso, when one considers the details of assault the witness said she observed which appeared exaggerated when juxtaposed with the post mortem report and injuries observed by Dr Kasongo. It is possible the witness had poor or exaggerated observation or faulty recollection and reconstruction of evidence. The witness was clearly not reliable as she appeared to have been affected by the fact that deceased passed on at her mother's bottle store which the witness was manning. It cannot be taken away from the witness that there was a quarrel between the deceased and Frank Chimana. Also it is common cause accused was with Frank Chimana and that the accused initially sought to restrain. There is however an unexplained gap of how the accused became the assailant together with Frank Chimana. It appeared to be a case of saying accused is here at court, and was there at the scene with Frank and thus he assaulted the deceased. We did not view the witness as a credible and candid witness in her narration of what transpired.

Zebediah Mubango the second witness to give oral evidence stated he was at the scene of crime and that he witnessed the assault. On being probed for detail he just stated that accused assaulted the deceased. On another breath he stated that he was behind the building and was only called after the fight. He helped the deceased from the veranda and guarded him till he passed on and further guarded the corpse till the police came. As correctly observed by the state, the witness lacked confidence. To us the witness could not confidently give detail of what

transpired because he was behind the building. He just had to give a statement as a security guard and he just had to testify since the altercation occurred at his employer's place. He unlike Fiona told the court that the accused used clenched fists to assault deceased. Upon realising the contradictions in his testimony with that of Fiona, the witness told the court he was behind the bottle store having his dinner. The witness did not know anything about how the assault was perpetrated. His evidence was not of assistance in elucidating how Frank and accused, if he did assaulted the deceased causing fatal injuries. Unlike Fiona the witness said deceased was standing when he was punched yet Fiona said the deceased was kicked while lying on the ground. The version of Zebediah Mubango was a reconstruction based on hearsay since he did not observe the assault as such we cannot rely on his version or testimony.

The accused in turn was the only witness in the defence case. The accused's testimony was consistent. In his warned and cautioned statement that was tendered as exh 2 by consent the accused denied assaulting the deceased but restraining his friend Frank Chimana who was involved in an altercation with deceased. Firstly inside the bottle store and secondly outside when the deceased had fallen to the ground and Frank Chimana kicked him. The accused maintained his version in his defence outline and testimony in court. He insisted that Fiona Mukombiwa was mistaken that he was the aggressor when in actual fact he was trying to restrain Frank Chimana. He, just like the state witness Fiona told the court that the assault was over a short space of time and that when the fracas ended no one took to his heels to flee from the scene. The accused stated that he did not foresee that death would occur. He actually upon walking towards home remembered he had given the state witness Fiona his chicken portions for safe keeping so he went back to the bar to collect the chicken. The accused's version that all he did was seek to restrain his friend Frank was maintained by the accused throughout the trial. It was apparent from the accused's version that Frank Chimana blamed accused for the fatal assault of the deceased while accused blamed Frank. In the absence of Frank's testimony and further in the absence of corroborative evidence of the single witness who was not credible and reliable given the circumstances of the matter and alleged observations in the dark the court is left to speculate.

The accused is facing a murder charge which consists of unlawful and intentional killing of another. The state has a duty to prove its case beyond reasonable doubt whereas the accused has no duty or obligation to prove his innocence. The question really is given the totality of evidence adduced before the court has the state proved beyond reasonable doubt that

the accused acting in concert and with common purpose with Frank Chimana assaulted the now deceased with an intention to kill him or realising that there was a real risk that death may occur. The insufficiency of evidence is worsened by the separation of accused person for trial. The mere presence at the scene without evidence of knowledge or participation in the commission of the offence is not enough to hold an accused liable for the commission of the offence. The doctrine of common purpose demands more than mere presence for liability as an accomplice or co-perpetrator to attach.

In this case there is scanty evidence to prove accused committed the alleged offence. It is apparent the only witness who observed the incident throughout observed the incident in dark. The evidence cannot be precluded from the dangers of poor observation, faulty recollection or reconstruction after the event. There is therefore a danger of false incrimination given the possibility of mistaken observation as clearly the witness stated that the altercation was initially between the deceased and Frank Chimana while accused was restraining. It is not clear what prompted the accused to change rolls to being an attacker. See *Last Mupfumbu v the state* HH 64-15. The court therein rehashed:

“There is obviously a risk which attaches to convicting the accused on the basis of uncorroborated testimony of a single witness. There is a scarcity of evidence in the case and the testimony of the witness is the sole proof of the accused’s guilt. In this situation the danger arises of poor observation, faulty recollection, and reconstruction of evidence after the event, bias and any other risk that the circumstances of the case suggest.”

This clearly means one has to be cautious and eliminate the possibility of false incrimination given the scarce evidence. In this case the only eye witness’ evidence lacked certainty and clarity as the observations were in the dark and within a short space of time less than 5 minutes according to the witness. The reliability of the observation remained haze. See *S v Mthetwa* 1972 (2) SA 766.

The accused on the other hand has no onus to prove his innocence. Section 18 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is instructive on the burden of proof. It states:

“Subject to subsection (2), no person shall be held to be guilty of a crime in terms of this Code or any other enactment unless each essential element of the crime is proved beyond a reasonable doubt” (underlining my emphasis)

See *S v Nyirenda* 2003 (2) ZLR 70, *S v Makonyonga* 1996 (2) ZLR 231 and *S v Kuiper* 2009 (1) ZLR 370.

Once accused's defence is reasonably possibly true then he ought to be granted the benefit of doubt. In this case the accused was consistent he was a stranger in the area. He met a colleague and went for social time at the bottle store. When his friend Frank Chimana was involved in an altercation with the deceased he intervened to restrain. When the two pushed each other outside he followed still making effort to restrain. We find no reason not to believe the accused's explanation as being reasonably true. There appears to be no reason why the accused would assault the deceased whom he was not known to and had no reason to assault. It appears probable that accused was implicated because he was in the company of Frank Chimana who started the fracas with the deceased.

Having accepted the accused's explanation as being reasonably possibly true, the court ought to grant the accused the benefit of doubt.

Accordingly the accused is found not guilty and acquitted.

*National prosecuting Authority, state's legal practitioners
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