

THE STATE
versus
JOSEPHAT HANZU MUKWENA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 28, 29 & 30 October 2013

Criminal Trial

Ms J Matsikidze, for the State
F Matinhure, for the accused

HUNGWE J: The accused faced a charge of murder it being alleged that on 13 December 2003 at Gaza bottle store, Marange, he unlawfully and with intent to kill stabbed Morgan Muchafa Tarugarira with a broken bottle in the chest thereby inflicting certain injuries from which the said Morgan Muchafa Tarugarira died. These charges arose following a scuffle that occurred 10 years ago at a business centre in Marange. Two eye witnesses testified.

It is important to, from the outset acknowledge the attendant and obvious difficulties which stood in both the witness and the accused's way resulting from a delayed prosecution of the matter. These events occurred 10 years ago. Human memory fades with time. Details of events become blurred and the power of recollection diminishes with time. Due allowance therefore ought to be made in assessing the credibility of both the State and the defence.

For the State Brenda Muchacha gave evidence first. Her evidence was as follows.

It was a Saturday morning. She was not on her normal duty as a bottle store keeper. She intended to fetch water so she went to collect a bucket. The accused and one Matya Marange, who were well known patrons of the bottle store enterprise, asked to make a purchase of opaque beer. She obliged. She noticed that they had a bottler of Old Chateau brandy, a popular intoxicating beverage. She gave them a metal mug cup to use as they sat down on her shop veranda and begin to enjoy their intoxicating beverages.

The deceased Morgan Tarugarira Muchafa (“Morgan Muchafa”) (“Muchafa”) came by and asked these two if he could share their liquor. They gave conditions with which he did not agree. She noticed the deceased kick the mug cup of beer causing its contents to spill. The deceased took to his heels clearly to escape the situation he had provoked. Matya Marange (“Marange”) chased Morgan Muchafa, the deceased. The accused helped him.

After successfully evading the two for a short distance, Marange struck the deceased with a thorny or prickly tree branch stick. The deceased fell to the ground. The two caught up with the fallen deceased. The accused and Marange then commenced a mortal assault upon the deceased. At the same time, they pulled him towards the shop veranda. At the veranda, they each pulled him in the opposite direction as the deceased tried to break free. In the process the deceased fell down. This act caused the bottle of brandy, which the accused all along deftly held in one hand, to break up. They lost its contents in the process. Before the bottle broke, the two had been using its contents to increase the potency of their opaque beer. Therefore the loss of their concentrate must have angered the pair even further, so the witness believed.

The witness Brenda Muchacha described what thereafter followed thus.

The accused, who held the broken bottle by its top, suddenly used it to stab and jab the deceased who lay on his back. The stab jabs were directed at deceased’s chest, arm and upper part of the body including the face. Alarmed by this turn of events, the witness shouted at them to stop as deceased was now bleeding profusely. They stopped. By then, the deceased lay in a pool of blood. The accused and his friend Marange, left. She organised for the deceased to be ferried to the nearest health facility. She later learnt of the death of the deceased.

According to this witness, the accused and his friend appeared drunk. She could not say the same about deceased as she knew him to be mentally challenged prior to his death. He could have been drunk as well, the witness said. She described the assault as vicious and frightening. She personally was frightened by the sight of it all. This incident took place around 9 am. She disputed any suggestion that the deceased had fought back.

The witness maintained this version under cross-examination. She impressed us as a truthful witness with no reason to wilfully mislead the court. She was forthright with her answers during cross-examination. Subject to what I said at the onset of this judgment, we accepted her version of events as representing a reasonably correct version of how the deceased met his death at the hands of the accused and his late accomplice.

Douglas Mugondi substantially corroborated Brenda's evidence. His power of recollection was similarly affected. He explained his lack of detail by telling the court that he was further away from the scene than Brenda was. He corrected his version that there was a fight by suggesting that in fact he was referring to an assault of the deceased by the accused and his accomplice.

He explained that it appeared as if the accused sat next to deceased who was lying on his back at the time when the stabbing occurred. He also described the event as frightening to behold. He could not get closer than 20 meters. He however observed that deceased bled profusely.

The accused gave a version diametrically opposed to the state witness case.

He told the court that when deceased came to where the two were drinking, the deceased he spilled Marange's beer after an argument. He tried to persuade deceased to buy and replace the beer that he had spilled. Even as they chased him, the accused's sole purpose was to calm down the deceased as well as the other party present. He denied that he had at any time laid his hand on the deceased in an assault. He had in fact defended himself from an unlawful attack by the deceased. He explained that he did not realise that the bottle had broken when he used it to parry away blows aimed at him by the deceased. In fact, according to the accused, the deceased had punched him in the face for suggesting that he replaces the beer he that he had spilled. Whilst accepting that he had used the broken bottle to parry away deceased's blows, he did not realise that he had injured the deceased.

But his version is made less credible by what he says he did soon after he had stabbed the deceased whom he left lying on the ground. He told the court that he had gone away to fetch a set of catapults which he used to propel a projectile towards the deceased. The reason for doing so was that he was angry with the deceased who had assaulted him for no reason.

This behaviour gave away the accused's version that the injury to the deceased was inflicted accidentally. It cannot be believed. If the injury to the deceased was accidental, as he would like the court to believe, one would have expected him to react differently upon realising how badly injured the deceased was. Rather than walk away, pull out some catapults which he used to propel stones towards the deceased, one would have expected him to try and help deceased.

For this reason, we did not believe the accused's version of how deceased met his death.

We find that the correct version is that is that given by the first state witness. We find that the accused and his late friend, Marange, were angered by the spilling of their liquor by the deceased. They wanted to punish him for this by assaulting him using both hands and sticks. We find that the bottle held was not used before it broke because it had the beloved contents and held dearly secured by the accused himself. When both the accused and the deceased fell down, the bottle accidentally broke. They blamed him for the second loss of their intoxicating liquor for the second time. We find that this angered the accused who all along had safely carried it about. Upon realising that their potent liquid was lost, the accused held the deceased responsible for their loss. He turned the remaining piece of the bottle into a weapon and stabbed the deceased as he lay on his back.

However that is not the end of the matter. In order to discharge the onus upon it, the state must prove each and every element constituting the crime charged. Murder consists in the unlawful and intentional killing of another human being. Intent may be actual or constructive. In our view, the accused and his erstwhile accomplice harboured no intention to kill, actual or constructive. They had been enjoying their liquor undisturbed until the deceased arrived. The deceased was set to partake of their liquor with or without their permission. When the permission was denied he took the liberty to deprive them of the enjoyment by kicking it away. This provoked the two into assaulting the deceased. In our view, besides intoxication to which the first witness testified, the accused was prematurely and unduly provoked. A combination of the two emotions prevented him from formulating an intent to kill.

The medical report indicates that the accused stabbed deceased on the left cheek, four times on the right arm and once under the left armpit. The doctor also found multiple deep cuts on deceased's body. There was blood all over the body. The deceased died of haemorrhagic shock secondary to massive bleeding.

The facts show that there was no premeditation on the part of the accused and his friend. The attack on the deceased was precipitated by the deceased spilling the beer which the two were drinking. The accused admit causing the death of the deceased. He denies intention to kill, whether directly or indirectly.

In order to establish that the accused was guilty of murder, rather than culpable homicide, the state had to prove that he either intended to kill Morgan Muchafa, or he intended to cause him bodily harm which he knew was likely to cause death. In this regard the cornerstone of the state case was the nature and extent of the injuries suffered by

Muchafa, and the degree of force required to inflict them. The more severe the injuries caused by the accused, and the more the force required to inflict them, the stronger the inference that he intended to kill the deceased or cause him serious injury. The court must be satisfied that the accused, when he attacked the victim, intended his death or subjectively foresaw the possibility of death or serious injury resulting from his conduct but proceeded regardless of whether death resulted. In other words foresight of possibility of death must be subjectively be found to have existed in the mind of the accused, not just serious injury only. See *R v Horn* 1958 (3) SA 457 (AD). If the accused in fact foresaw the possibility of the consequences in question (and was reckless as to whether or not they did result), he intended them in the legal sense. On the other hand, if he did not actually foresee, but as a reasonable man he should have foreseen, the possibility of the consequences occurring, he will at most have been negligent.

In a case of this nature, it is the accused's state of mind when he struck the blows which injured the deceased which is vital to the decision. In order to arrive at a proper finding as to the accused's state of mind, it is important to determine what facts can be relied on as indicating that state of mind. It is only against those facts that it is possible to say whether the accused had the requisite *mens rea* for the offence charged. The determination of this issue is made the more difficult by the fact that we do not feel we can accept the accused's evidence of the events which led to the assault upon the deceased by him. But the fact that the appellant has given false evidence of these events is by no means conclusive against him, because the onus is on the prosecution to refute the defence of lack of intent to kill.

In *R v Shevill* 1964 RLR 292 at p 293 Macdonald AJA, as he then was, said:

“It is not in the broad interest of the administration of justice that courts should invent explanations and excuses for accused persons which are unsupported by evidence. Such conduct might tend to encourage accused persons to withhold their version of the facts in the hope that a more favourable explanation might occur to the court.

Once, however, the magistrate found that the appellant's version was untrue it became necessary for him to ascertain as best he could on the evidence available the truth of what happened. The fact that the appellant had given a false account did not justify the court in accepting of the two possible explanations the less favourable (to the appellant) and less probable explanation.”

The facts show that the accused and his friend were drunk. Possibly the deceased was drunk as well. Further, the facts show that the provocation offered to the accused by the spilling of his beer may have directly clouded his personal judgment to the extent that he lost

self control. In the heat of that moment we do not think that the accused subjectively foresaw the possibility of death occurring from stabbing the deceased with a broken bottle as he had not intentionally broken the bottle with a mind to use it on the deceased.

It is true he knew or ought to have known that it was now broken and he ought to have realised that it constituted a lethal weapon. But if the element of intoxication is taken into the equation, in our view it will be difficult to say that the accused subjectively foresaw death occurring from this fracas.

The test is not whether a reasonable person in accused's position should or could have foreseen death occurring but whether the accused himself foresaw the possibility of death resulting from his conduct. We are on these facts unable to say that the accused subjectively foresaw the risk of death occurring as a result of his conduct.

In the circumstances we are unable to find that the accused had the necessary intent, actual or constructive, to kill the deceased.

However we find that by embarking in a deadly assault where he and his colleague used sticks and later bottles to assault the deceased the accused were negligent as in those circumstances a reasonable man would have taken steps to avoid the consequence which resulted. That failure to take those steps which a reasonable person could have taken, constitutes negligence.

The accused therefore must be found guilty of culpable homicide and not guilty of murder.

*National Prosecuting Authority, the State's legal practitioners
Gonese & Ndhlovu, accused's legal practitioners*