

THE STATE
versus
MUNYARADZI CHAKWESHA

HIGH COURT OF ZIMBABWE
BERE J
MASVINGO CIRCUIT 11, 12, 20 & 21 February 2014

Assessors: 1. Mr Gweru
2. Mr Mutomba

Criminal Trial

E. Chavarika, for the State
F. Baloyi, for the accused

BERE J: The accused is facing a charge of murder as informed by s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The allegations against the accused person are as a result of the tragic events that occurred at Chavangira Bottle Store, Mutumba Business Centre in Zaka District on the afternoon of 24 February 2010.

The facts which are largely common cause are that on the fateful day the deceased, his assailants, the accused and other villagers had been to Zaka police station over some misunderstanding that had occurred amongst them in their village. It looks like the Zaka police had been able to counsel the parties and urged them to go back to their village and live in harmony.

On their way from the police station the deceased and his assailants ended up at Chavangira Bottle Store, the scene of this crime. A serious misunderstanding occurred between the deceased and Nomore Chakwasha. The result was an exchange of blows between the deceased and Nomore. One Francis Chakwasha was later to join in the vicious assault which claimed the deceased's life. The evidence suggests the assault turned out to be so vicious that it even threatened the on lookers who had gathered to witness the day's ordeal. Both Francis and Nomore became uncontrollable to the extent that some onlookers had to scurry for cover. A log measuring 1,69 metres in length and weighing 5,305 kgs was used to

assault deceased by Nomore. The final and possibly the decisive blows were delivered by both Nomore and Francis taking turns to drop a concrete slab weighing 8,159 kgs on the deceased's head and it rendered him flat and motionless. These murder weapons were tendered in this court as exh 3 and 4 respectively. Exhibit II was the post-mortem report which gave the cause of death as head injury.

This trial was concerned with the role played by the accused person given the State's allegations that he had actively participated in assaulting the deceased by joining in when Nomore and Francis took part in the vicious assault of the deceased.

The accused denied the charge and maintained in both his confirmed warned and cautioned statement and defence outline that he had merely joined in to restrain Francis and Nomore in the assault of the deceased. The enquiry in this case was narrowed to deal with this aspect alone.

The State case was premised on the *viva voce* evidence of Nyasha Makeme, Martin Mudisi and Albert Chavangira who was called as replacement for Davison Mutyiri who could not be located. The other evidence of Sgt Chinyerere, Constable Makwara and Doctor G. Zimbwa was accepted as summarised in the State Summary in terms of s 314 of the Criminal Procedure and Evidence Act. The accused was the sole witness for the defence.

THE EVIDENCE

Both the State and the defence were in agreement that the circumstances leading to the death of the accused pointed to a verdict of guilty of murder with actual intent against the perpetrators of the assault. We agree.

THE ROLE PLAYED BY THE ACCUSED PERSON

The role played by the accused person became the central issue in these proceedings.

Nyasha Makeme, the first State witness gave us a fairly detailed account of how the deceased was severely assaulted by Nomore and Francis both inside and outside the bottle store. He testified that at one stage Francis fumbled his trousers' belt intending to pull out a kitchen knife which he wanted to use against the deceased but the deceased was only saved by the timely intervention of one Martin Mudisi who forced the knife to drop on the floor before it could be used.

In the commotion that followed the witness said he saw Martin being hit hard by a standard cement brick which floored Martin and rendered him unconscious for some time before he regained his consciousness.

The last form of assault he witnessed was when Francis used cement bricks and concrete slab to slam the deceased's head. It was important that this witness shed light on the specific role played by the accused. The witness, whilst agreeing to having seen the accused at the spot of the assault was adamant that he did not see him taking part in assaulting the deceased in the manner alleged by the State or in any manner. The best his evidence revealed was that at the critical moment of the assault the accused was there at the scene of crime. The witness maintained his position in both his evidence in chief and in cross-examination.

We found this witness to have been at a vantage point when the commotion was taking place and our assessment of his evidence is that it was a fair account of what transpired. His evidence, just like the evidence of the other witnesses projected a very mobile scene which was pregnant with fear and great anxiety generated by the viciousness of the assault on the deceased by Nomore and Francis.

It was significant that this witness testified to the effect that at one stage Martin Mudisi was also assaulted and rendered unconscious by Francis.

The witness saw the accused arrive at the scene and enquiring as to what was happening and that this was around the time the deceased fell to the ground for the last time. He was not able precisely tell the court what accused the deceased to fall. When specifically asked as to whether he had seen the accused kick the deceased at any given time his answer was a firm negative.

Martin Mudisi was the second State witness to give evidence in court. He was closely related to both the deceased and the accused.

The witness gave an account that almost tallied with the evidence of Nyasha. The only point of departure with his evidence was his averment that the accused had also taken part in assaulting the deceased by kicking him from behind and forcing him to fall down before Nomore smashed the deceased's head with a concrete slab, exh 4.

This critical piece of evidence did not find support from the other two witnesses who gave evidence, viz, Nyasha and Albert Chavangira.

Albert Chavangira's account of what happened squarely lays the blame of the demise of the deceased on Nomore and Francis, two suspects who appear to be fugitives from justice.

Albert confirmed Nyasha's evidence that upon his arrival the accused said something but he could not comprehend what he actually said. Compare this with Martin's evidence that when the accused arrived at the scene he said nothing but went straight to attack the deceased.

Albert's evidence appears to have been given from a vantage point as well as he was in his shop having ordered the deceased and his assailants to go and fight outside his bottle store.

The witness testified that Martin fled from the scene of the assault the moment the accused appeared at the scene. If Albert's evidence is accepted, as it should be, then it is likely that Martin may not have been quite candid with the court.

Add to this, the revelation that at one stage Martin himself was attacked and rendered unconscious (a fact measuredly denied by Martin himself), it becomes risky to accept Martin's evidence.

The accused's explanation as to why he hurriedly arrived at the scene was that he wanted to physically restrain Francis and Nomore from assaulting the deceased. He stated that upon arrival he appreciated the risk of trying to physically restrain the two and opted for persuasion as he felt the two assailants were vicious in their attack and in an uncompromising mood.

It is not possible for the court to dismiss the evidence of the accused person.

As a court, we were quite curious to know why the accused braved to be at the scene where others were fleeing from, and why he appeared to have enjoyed the company of the two assailants during and after the assault.

The accused explained that his motive was to restrain the two assailants by persuasion and to try and take them away from the scene to enable others to render any assistance to the deceased in their absence. He said he thought he would go away and later come back with the deceased's wife but all his good intentions were disrupted by his immediate arrest after the fatal assault of the deceased.

Our unanimous view is that the accused's explanation which finds expression in his confirmed warned and cautioned statement is reasonably and possibly true. The accused has sufficiently cast doubt on his alleged involvement in the murder of the deceased. He is entitled to a verdict.

Verdict - Not Guilty and Acquitted.