

THE STATE
versus
TENDAI BROWN
and
SHEPHERD MUTEMAMOMBE
and
NHAMO MUTEMAMOMBE

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 25, 26, 27, 28 February 2013 & 6 March 2015

ASSESSORS: 1. Mr Chakuvinga
2. Mrs Shava

Criminal Trial

M Manhamo, for the state
N Munetsi, for 1st accused
S Zvavanoda, for 2nd accused
R Zinhema, for 3rd accused

MUSAKWA J: The accused persons pleaded not guilty to contravening s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9: 23*]. It is alleged that on 24 October 2010 and at Riverview Farm, Bindura the accused unlawfully and with intent to kill or realising that there was a real risk or possibility that their conduct might cause death, caused the death of Costa Domingo by striking him with an empty bottle and a piece of wood on the head and stabbing him in the chest with an iron rod and assaulting him all over the body with clenched fists thereby inflicting injuries from which Costa Domingo died on the same day.

The charge is inelegantly drawn. The state is enjoined to allege what it can prove. It should not be difficult because the prosecutor prepares the indictment from the evidence in the docket. The deliberate inclusion of damning allegations and alleging all conceivable manner of assaults as if there are witnesses to prove that should be avoided.

The second and third accused and the deceased were neighbours. On the fateful day the deceased went to the accused's residence where an altercation ensued. The state sought to prove that the first accused then assaulted the deceased all over the body with clenched fists and also struck him with an empty bottle on the head. The second accused joined in and assaulted the deceased with clenched fists. The deceased escaped and was waylaid by the third accused who stabbed him with an iron rod in the chest and also struck him with the same rod. The deceased then died instantly.

The first accused's defence is to the effect that he arrived at the residence of the co-accused around 5 p.m. when he finished work. Thereafter the deceased also arrived and hurled obscenities at the other accused. The deceased was drunk. The first accused tried to lead him away but he was struck with a fist and he fell down. As he tried to get up he was stabbed on the back.

The second and third accused and neighbours intervened and the deceased was led away. The first accused subsequently left for his residence. He was later arrested in the early hours of the following morning.

The second accused's defence is to the effect that he intervened to quell the scuffle between his brother, the third accused and the deceased. This was after he realised that the third accused's right toes were bleeding profusely. He noted that the iron bar had pierced the third accused's right foot. He never assaulted the deceased. The deceased was heavily drunk.

On the other hand the third accused claimed that he wrestled with the deceased. He was injured on the right leg. As they wrestled two people who included the deceased's son came to his rescue. That is when he escaped. He was pursued and he sought refuge at some grounds until the following morning. He went back home and found no one. As he went to look for his family he was then arrested. That is when he learnt of the deceased's death.

Doctor Lawrence Hlatshwayo who conducted the autopsy on the deceased's remains was the first to testify. He obtained a degree in medicine and surgery (MbChB) from the University of Zimbabwe in 2006. He has worked at Bindura Provincial Hospital as a general practitioner.

He noted a depressed skull in the occipital region and a wound on the left side of the chest. The occiput is the back part of the head. The chest wound was ill-defined.

The autopsy was externally conducted. A depressed skull means a fracture where the skull enters brain tissue. There was blood around the wound. That means there was damage

to brain tissue or damage to the blood vessels. A blunt or heavy object probably caused the injury. The iron rod produced as an exhibit could have inflicted the wound.

The doctor was a bit shoddy in the conduct of his duties. This was exposed by the defence during cross-examination. For example, he mixed up the deceased's weight and length. More importantly, he did not detail his findings in the post-mortem report apart from simply stating his conclusion. However, he was redeemed by the fact that he had kept notes with which he refreshed his memory. The danger was that if he was unavailable the case would have gone unclarified. He genuinely acknowledged his mistake and impressed as one who could recall the case. This was particularly so when he pointed out that it was a remarkable case on account of the injury.

Kudzanai Kamulani a neighbour of the third accused testified that she was at home washing some plates outside when a girl passed by crying. She went to the back of the house and saw the first and third accused standing without shirts. The girl who had just passed had come from the direction where the accused were. This was not far from her residence. She got closer and asked the accused why they were fighting. There was no response. The second accused was seated on the veranda.

She saw the deceased lying on the ground. She went and reported to an officer called Chimupini.

Thembiwe Maphosa the investigating officer testified that when she went to the scene during the course of the morning the deceased had already been taken to hospital. They managed to locate the first and the third accused. The second accused had fled. The first and third accused were identified by Chimupini. They were in the compound at a place where people were imbibing beer. The second accused was later arrested in Madziva. The first and second accused's warned and cautioned statements were confirmed at court.

During indications she saw a shattered bottle. The third accused indicated an iron rod that was in the toilet. The rod was protruding from the toilet pit. The second accused indicated two hoe handles. During cross-examination she stated that there was blood on the rod.

The summary of evidence in respect of Tambudzai Muropa was admitted. The state produced the confirmed warned and cautioned statements recorded from the first and second accused persons. There was no objection from the defence although the accused sought to claim during the course of their respective cases that they did not freely and voluntarily give the statements.

The first accused testified in his defence. He confirmed that the co-accused are nephews. He used to reside with them.

On the day in question he went to work. Having not eaten he went to Riverview Farm where he met the third accused. Upon arrival he saw the deceased who was making an issue about his daughter who had been impregnated.

Although the first accused said he did not see the deceased holding anything, in another breath he said the deceased was armed with a knife. As the deceased shouted he charged at the other accused. The third accused asked the first accused to restrain the deceased. When the first accused got hold of the deceased the latter asked if he had been hired. The deceased then struck him on the right cheek and he fell down. When he got up he was struck with a knife on the back. The first accused showed the court a visible scar on the back.

The first accused escaped as the deceased was being restrained. He informed the other accused that he had been stabbed. The deceased appeared as if he was drunk.

The first accused went to the third accused's residence. He was given a T-shirt by the third accused as he had used his to wipe away some blood. There was a young girl of about 10-12 years. Thereafter he proceeded home as he was no longer feeling well. Around 2 a.m. he was taken by a member of the neighbourhood watch who informed him about the deceased's death.

The first accused stated that he made indications relating to the place where he was stabbed, where they were standing and where he restrained the deceased. He denied ever using a bottle against the deceased. He also denied contributing to the deceased's death.

He was not cross-examined by counsels for co-accused. State counsel quizzed him on whether he arrived at the scene before or after the deceased's arrival. This is because in his defence outline he stated that he was present prior to the deceased's arrival. He maintained that when he was stabbed by the deceased, the co-accused took no action. It was put to him that the testimony of Kudzanayi Kamulani that she saw him and the third accused with no shirts was not challenged. His reply was that he did not know. It was also put to him that Kudzanayi Kamulani testified that she questioned both the first and third accused and they did not respond. Again he replied that he would not know. Asked about what happened to the deceased after the first accused was stabbed, he replied that he was restrained and escorted to his residence. However, he could not recall who escorted the deceased. Although he admitted

that when the deceased first arrived he was not injured, he could not explain how the deceased eventually sustained the fatal injuries.

The second accused testified that he resides at Riverview Farm. On the fateful day the deceased came and sought to fight the third accused. He restrained him the deceased shouted at the third accused. That is when the first accused arrived looking for food. The first accused tried to restrain the deceased. The deceased then punched the first accused. The second accused remained standing. The deceased stabbed the first accused on the back and then charged at the third accused. A fight broke out between the deceased and the third accused. The second accused called for assistance from a neighbour. The deceased was taken to his residence whilst the second accused went to a bar within the compound. He was not present when the deceased returned and fought with the third accused.

The second accused further explained that in Madziva he had visited his in-laws as he wanted to thatch their building. He denied using a stick or bottle against the deceased. Concerning the recording of the warned and cautioned statement he claimed to have been assaulted by Police officers over five days in their bid to extract a confession.

During cross-examination the second accused admitted partaking some liquor but he was not drunk. There were two incidences with the deceased. It was on the second incident that the deceased brought an iron rod. The first accused arrived after the deceased. On being further questioned about the rod he replied that he had been stabbed once in the belly with it. The deceased persisted and the third accused struck him in the chest with the rod. At that stage the deceased's children arrived. The second accused then ran away limping. He sought refuge at some residence whilst the deceased's children searched for him. He later went to a football pitch. Towards dawn he limped home where he saw no one. He then made follow-ups on his family until he reached a place called Gatawa. The person to whom he related his ordeal then tipped a member of the neighbourhood watch and he was arrested.

Concerning the warned and cautioned statement he stated that Police officers put words into his mouth to the effect that he killed the deceased. On why he fought with the deceased he stated that this was because the deceased was violent and drunk. On the use of the iron rod he stated that he did so when he was escaping. When the deceased approached him running the second accused hit him in the chest with the rod and he staggered. He could not explain why Tambudzai Muropa's testimony was admitted. He also stated that Police caused him to retrieve the rod from the toilet although he is not the one who had discarded it. This is despite his claim that he had told Police officers that he had dropped the rod within

the homestead. It is pertinent to note that the investigating officer testified that it was the third accused who indicated the rod. This was also confirmed by the third accused during his testimony.

In his defence the third accused testified that the first accused is an uncle. The deceased was a neighbour.

When they were about to have supper the deceased arrived and started to shout obscenities. He threatened that he was going to kill someone. He did not see the deceased holding anything. The first accused arrived whilst the deceased persisted with the insults. When the first accused asked why the deceased was behaving in that manner the third accused remarked that he always behaved like that when he was drunk. That is when the deceased charged at him. Suddenly the first accused was knocked down. He realised that the deceased had a knife with which he stabbed the first accused who ran away. The deceased charged at the third accused before he was restrained by other people and escorted to his home.

After a while the first and second accused returned. The deceased also returned without a shirt. The deceased rushed at the accused with a rod. When the accused got up he was struck with the rod on the foot and got injured. They wrestled for the rod and the accused was struck with a fist. He managed to remove the rod from his foot and retreated. As the deceased tried to grab him he stabbed him in the chest. That is when the deceased's children arrived.

The third accused fled as one of the deceased's sons, Domingo destroyed a rack. The third accused first went to Fourpence's residence. As the search for him continued he went to a football pitch. Towards dawn he returned home but there was no one.

During cross-examination he stated that the deceased's children attended the scene in order to rescue him. When the third accused left the scene the deceased was stooping. This is because he had prodded him. The third accused had no idea why Tambudzai Muropa's evidence was admitted. He denied that the deceased died on the same day. He also stated that he subsequently met the second accused at prison. Thus he stated that the second accused lied that he had told him about the deceased's death on the following morning. Whilst he admitted retrieving the rod he stated that it was at the instance of Police Officers. When he recovered the rod the second accused was not present. He could not explain why Kudzanayi Kamulani's evidence was not challenged.

He further explained that he had known the deceased for twenty three years. Concerning what led to the confrontation he stated that a woman from a friend's family had been impregnated by the deceased's son. The matter had been reported to Police. The deceased thought the accused and others were exerting pressure on his family.

The state sought a verdict for murder in terms of s 47 (1) (b) of the Code. Mr *Manhamo* submitted that there was no direct evidence save the observation of Tambudzai Muropa regarding the first accused's assault of the deceased. In seeking to rely on circumstantial evidence he referred to *R v Edwards* 1949 SR 30, *S v Nyamayaro and Another* 1987 (2) ZLR 225 and *R v Blom* 1939 AD 188. Mr *Manhamo* further submitted that there was connivance amongst the accused persons regarding their defences. Even though the second accused admitted striking the deceased on the head, Mr *Manhamo* submitted that all accused must be liable for the second accused's conduct as they associated unlawfully. In respect of the iron rod Mr *Manhamo* submitted that both the second and third accused admitted that the deceased was unarmed. Therefore it must be concluded that the iron rod emanated from their residence.

Mr *Munetsi* for the first accused submitted that there must be facts from which an inference may be drawn. The deceased died at the second and third accused's home. It is unreasonable that the second and third accused persons could have waylaid the deceased at their home. He also attacked the investigating officer for being selective in the manner in which she gathered the evidence.

Mr *Zvavanoda* also submitted that the state case was full of inconsistencies. The first and third accused were merely seen standing whilst the deceased was lying down. He was critical of the hoe handles that are attributable to the second accused's indications. Having noted the provisions of s 256 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] he conceded that he could not challenge the production of the extra curial statement. On circumstantial evidence, citing *S v Masawi* 1996 (2) ZLR 472 he submitted that there must be only one reasonable inference to be drawn from the set of facts. Lastly, he was critical of the testimony of doctor Hlatshwayo and the manner in which he conducted the autopsy.

Mr *Zinhema* submitted that the third accused was defending himself from attack. He discounted common purpose. The chest wound inflicted by the third accused was not the cause of death. He did not make meaningful submissions regarding the third accused's extra curial statement. He simply submitted that the third accused did not abide by that statement.

The post mortem report which was based on an external examination concluded that the cause of death was severe head trauma secondary to assault. However, as observed earlier, the post-mortem report was complemented by the viva voce evidence of its author. In his confirmed warned and cautioned statement the first accused replied to the allegations as follows-

“I do not admit to the allegations of killing Costa Domingo but we fought and when I saw him producing a knife which struck me on the back, I then ran away.”

On the other hand the second accused’s confirmed warned and cautioned statement reads as follows-

“I admit the allegations against me. I struck Costa Domingo with a piece of wood on the head and I then slapped him and punched him on his back. He then escaped from being assaulted and ran heading (*sic*) his home. I then saw him going to Robert Chimwanza’s homestead; my colleagues, Nhamo Mutemamombe and Tendai Brown and I waylaid him at the grass thatched bathroom. I then struck him once more with a piece of wood, by then he had already been stabbed with an iron rod by Nhamo; he fell and died there.”

The admitted evidence of Tambudzai Muropa is to the effect that the deceased was her neighbour. On the fateful day at about 1800 hours she saw the first accused approaching his gate whilst shouting. The deceased stood by the gate. A while later the first accused punched the deceased with fists. The other accused watched from a distance. The witness went to alert Domingo, the deceased’s son. Later on the same day she learnt of the deceased’s death.

In light of the admitted evidence of Tambudzai Muropa and the viva voce evidence of Kudzanayi Kamulani, all accused persons were squarely placed at the scene of crime. The first accused person was seen assaulting the deceased. Tambudzai Muropa then went to alert the deceased’s son. That explains why the deceased’s sons descended on the scene. On the other hand Kudzanayi Kamulani saw the first and third accused standing shirtless. The deceased was lying on the ground. A girl had passed by crying coming from the same direction where the accused and the deceased were.

The second accused’s confirmed statement amounts to a confession. This is despite that he was only seated at the veranda when seen by Kudzanayi Kamulani. By then the assault must have been complete. The production of the statement by state counsel was not challenged.

Concerning the admissibility of confirmed statements s 256 (2) of the Criminal Procedure and Evidence Act states that-

“A confession or statement confirmed in terms of subsection (3) of section *one hundred and thirteen* shall be received in evidence before any court upon its mere production by the prosecutor without further proof: Provided that the confession or statement shall not be used as evidence against the accused if he proves that the statement was not made by him or was not made freely and voluntarily without his having been unduly influenced thereto, and if, after the accused has presented his defence to the indictment, summons or charge, the prosecutor considers it necessary to adduce further evidence in relation to the making of such confession or statement, he may re-open his case for that purpose.”

In light of Mr *Zinhema*'s concession regarding the second accused's statement, nothing much can be said other than that the statement constitutes overwhelming evidence against him. In addition, he was seen by Kudzanai Kamulani whilst seated on the veranda whilst the first and the third accused stood shirtless. That means he had not run away as he stated in his defence. He obviously absconded later as he was eventually located in Madziva. In light of his confirmed statement, he was not merely visiting his in-laws as he claimed.

With the first and third accused persons being seen shirtless in the vicinity of the prostrate deceased what other inference can be drawn from such stark facts other than that they were the cause of such a scenario. This must be viewed in light of their refusing to answer Kudzanai Kamulani when she queried what was happening. This must also be viewed in light of the young girl who had passed by crying and drawing the attention of Kudzanai Kamulani.

As was stated by Watermeyer JA in *R v Blom supra* at 202-203:

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

The defences advanced by all the accused persons appear to be contrived. Having realised the enormity of the situation the second accused absconded. Upon his arrest the second accused indicated some hoe handles. On the other hand the third accused indicated an iron rod. In light of the injuries sustained by the deceased, these exhibits incriminate the

accused persons. This is notwithstanding the absence of a forensic examination of the exhibits. This is especially so in respect of the iron rod which the second and third accused referred to in their testimonies.

The three accused persons are co-perpetrators within the meaning of s 196 of the Code. They must have associated with each other unlawfully prior to the deceased being found lying motionless in their vicinity. This must be considered in the light of the first accused being seen assaulting the deceased. Then the first and third accused were seen standing without shirts whilst the deceased lay down. On the other hand the second accused confessed to waylaying and attacking the deceased. The second accused's act is deemed to be the act of the other co-accused.

We have no evidence that the three accused set out to kill the deceased. The deceased may have been belligerent. This must have been exacerbated by his drunkenness. However, to attack him in the manner they did, the accused must have realised that there was a real risk or possibility that their conduct might cause death but continued to engage in such conduct despite the risk or possibility.

Accordingly all accused are found guilty of murder in terms of s 47 (1) (b) of the Code.

Prosecutor General's Office, legal practitioners for the state
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