

THE STATE
versus
TINASHE MWAZHA

HIGH COURT OF ZIMBABWE
BERE J
MASVINGO CIRCUIT, 4 & 5 June 2015

Assessors : 1. Mr Mushuku
2. Mr Dhauramanzi

Criminal Trial

T. Chikwati, for the State
J. Mupoperi, for the Accused

BERE J: The accused person who was 21 years old at the time this offence was committed is charged with murdering Alfred Murwira by stabbing on the early hours of 9 December 2013 at Mukundi Business Centre, Gutu.

The facts which are largely not in dispute are as follows:

On the evening of 8 December 2013 both the accused, the deceased and other patrons were drinking beer at Mudzamba Bottle Store. They got to the stage where the accused became moderately drunk with the deceased exhibiting signs of heavy drunkenness.

It was at this stage that the accused and the deceased had an altercation emanating from their school days back in 2008. The altercation degenerated into a fight which was stopped by the timely intervention of the accused's uncle, Michael Tsangi who is the owner of the bottle store. Tsangi took the accused inside and ordered him to stay behind the counter to avoid further trouble and declared the misunderstanding was over.

Whilst behind the counter and without anyone noticing the accused went to his uncle's kitchen and took a knife whose details were given as follows: Length of handle – 10,5 cm, Length of blade – 20cm, width of blade on its widest part – 3,5cm. the accused then hid the knife in his jean trousers which he wore underneath his track suit.

The accused sneaked out of the bottle store sometime after mid night and appeared to have left for his home. Just as the deceased and his cousin Innocent Murwira were heading home, they were accosted by the accused person who requested to talk to the deceased in the absence of Murwira. Murwira obliged and walked a few metres behind the two as they appeared to be talking over their earlier misunderstanding during the previous day. It was around this time that when Murwira followed he discovered that the deceased had been stabbed. There is no unanimity on the circumstances surrounding the stabbing of the deceased.

In support of its case the state tendered the following pieces of evidence with the consent of the defence; the accused's confirmed warned and cautioned statement (exh 1), the post mortem report (exh 2), and the knife, which is the murder weapon (exh 3). Apart from this and in line with the provisions of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] the evidence of the following witnesses was accepted in evidence as summarised in the state summary: Michael Tsangi, Notice Mutanga, Nicholas Ganga and Doctor Mhere.

The state led *viva voce* evidence from Innocent Murwira and Stephen Gwandure while the accused was the sole witness for the defence.

THE EVIDENCE

In dealing with the evidence of the two state witnesses we were conscious that the two witnesses were closely related to the deceased and we had to heighten our caution to avoid possible deception.

Innocent Murwira confirmed that at the time the accused and the deceased had an altercation concerning bullying when they were still in school in 2008, both were drunk but of the two, the accused appeared to be moderately drunk whilst the deceased appeared to have been heavily drunk.

It was the witness's testimony that he was not given to beer drinking and that on this day he was taking soft drinks whilst others were partaking liquor. His evidence was that as the deceased was by the bottle store counter, the accused approached him and started poking him in a provocative manner claiming that he used to bully him at school. The altercation started by the accused degenerated into a fist fight and it was only stopped by the intervention of the accused's uncle Michael Tsangi who ordered the accused to stay behind the counter of the bottle store to avoid further trouble.

The witness further stated that well after midnight the accused left the bottle store and after sometime the witness and the deceased also left to go home. He further stated that as they had just left the bottle store, barely 10 or so metres away from the bottle store they were accosted by the accused person who was coming from the opposed direction. The accused said he wanted to talk to the deceased and apologise to him about their earlier misunderstanding in the absence of the witness. The witness then walked behind the two as they walked into darkness.

Innocent further stated that after about 5 minutes or so he decided to follow the two and when he caught up with the two he found the accused sitting on the deceased's belly and assaulting him. Using both hands he pulled the accused by the neck off the deceased. Accused immediately ran back to the business centre. To his utter surprise, the witness discovered that the deceased had been stabbed. He immediately decided to alert others.

Under cross-examination the witness denied that he had been involved in a fight with the accused person as suggested by the later through cross-examination. He stated that he actually heard the accused apologising to the deceased as the accused and the deceased walked away from him at the request of the accused.

We do accept that despite this witness being closely related to the deceased he told the court the truth. We accept his evidence that it was the accused who set the stage for a confrontation with the deceased earlier on which degenerated into a fist fight between the two. The witness's testimony was largely corroborated by the rest of the witnesses including the deceased's uncle Stephen Gwandure who confirmed the accused's aggressive approach to the deceased which triggered the fight earlier on.

That Innocent was an honest witness, further finds corroboration from the accused's confirmed warned and cautioned statement which speaks to his non-involvement in the subsequent fracas that took the deceased's life. If innocent had taken part in fighting the accused as testified by the accused, the accused would certainly not have failed to mention that as the cause of his stabbing of the deceased on the fateful day in his confirmed statement.

The evidence of Stephen Gwandure was largely corroborative of the evidence of Innocent. The witness also spoke to the nature of the deceased's injury which does assist the court in its appreciation of the possible force that must have been used by the accused person.

The trust of the accused person's case was centred on the defence of self-defence as informed by section 253 of the code. The accused said he used the knife to stab the deceased because he was under a severe attack from both the deceased and Innocent.

We have already accepted the non-involvement of Innocent and accepted that the accused was the aggressor on the day in question. Self-defence, as a defence cannot be raised where there is no evidence of an unlawful attack on the accused.

During submissions, the defence made an honest and a well-considered concession that the defence of self-defence was not available to the accused person. We agree. We comment the accused's counsel for properly reading the evidence adduced in this case.

The accused's counsel further urged this court to accept that the accused engaged in a conduct which he subjectively foresaw would result in the deceased's death.

We do not share the defence's sentiments for the following reasons. Our view is that the accused formulated his intention to kill the deceased from the moment he stole the murder weapon from his uncle's kitchen and hid it in his jean trousers. If there was any doubt, this doubt is completely removed by the accused's cunning removal of Innocent from the deceased in order to effectively carry out his objective without hindrance.

The evidence of the witness and accepted by this court is that the accused deliberately isolated his victim by pretending to be apologetic in order to completely take his victim by surprise because he knew he now had the added advantage of the knife. The accused lured the deceased to a dark place to ensure his mission or objective would be realised as planned.

As a court, we had the unenviable privilege of seeing the murder weapon whose details have already been given. We have also seen the post mortem report. The cut in the left side of the stomach was so deep that it ended rupturing the spleen.

Our view is that the nature of the murder weapon and the force used could not possibly have been meant to leave the victim alive.

The accused thoroughly prepared for the stabbing of the deceased and he prepared the ground work to ensure that his objective would not be defeated.

Under such circumstances the verdict can only be one of murder with actual intent.

Verdict - Guilty of murder with actual intention

EXTENUATION AND AGGRAVATING CIRCUMSTANCES

As a court we accept as properly observed by both counsel that extenuation does exist in this case and it flows from the following circumstances; it is accepted that at the time of

the commission of this offence the accused was only 21 years old. Even as we sit in this court the accused still enjoys to be regarded as a youthful offender.

Secondly, it is accepted that the accused person had partaken of liquor for a considerable length of time, from the time he arrived at the bottle store up to the time he stabbed the deceased to death on 9 December 2013.

Section 48 of the Constitution in my view recognises the imposition of death penalty where murder is committed in aggravating circumstances. Precedent has attempted to define aggravating circumstances (see *S v Isaac Mlambo*¹)

In short, and as correctly observed by the state counsel aggravating circumstances speak to situations where murder is committed in the furtherance of the commission of other offences like rape, robbery and other kindred offences. We accept that that scenario does not arise in this case and that because of this we have to consider other sentences other than the imposition of capital punishment.

SENTENCE

We will consider the following factors as a guide in our attempt to arrive at what we consider to be an appropriate sentence.

In mitigation we accept that the accused is a youthful offender. His youthfulness and immaturity is demonstrated by the manner in which he thought of dealing with his situation with the deceased.

The accused had taken a considerable amount of beer on the date of the offence. Intoxication which is divorced from dutch courage has always been regarded as mitigatory.

From the submissions by his counsel, the accused appeared to have been deprived of proper counselling from his parents at a tender age and this must have affected his proper socialisation.

The accused has been kept at remand prison whilst awaiting the conclusion of this case for eight months.

It was noticeable during this trial that the accused person is remorseful of his conduct and the sentence that we will impose will show an appreciation of this among other factors.

¹ HH 351-15

It is commendable that the accused's relatives have attempted to make peace with the deceased's relatives by paying some amount and beasts as compensation and also footing the bill on the deceased's memorial.

In aggravation we are guided by the need to mete out sentences that recognise the value of human life and that once lost it cannot be recovered. Human life must not be lost so cheaply.

We are concerned with the premeditation that characterised this murder. The planning was thorough and the execution was flawless.

The accused lured his victim to a secluded place and gave him a cosmetic apology in order to give him a false sense of security.

The accused is a young person who requires to be kept out of the main stream society for a reasonably long time in an effort to assist him in rehabilitation.

The accused sentenced to undergo - 25 years imprisonment.

National Prosecuting Authority, State Counsel
Saratoga Makause Legal Practitioners, Accused's Counsel