

THE STATE  
versus  
MIKE MAZHAMBE

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 18 & 19 February & 4 March 2016

Assessors: Mr P. Chidyausiku  
Mr T. R. Gweme

### **Criminal Trial**

A. *Masamha*, for the State  
T. *Mutemachani*, for the Accused

ZHOU J: The accused appeared before this court charged with the crime of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations against him are that on 18 March 2014 and at Nyamuzihwa Night Club, Patchway, Kadoma, he unlawfully and with intent to kill, stabbed the now deceased Ngoni Sibanda, once with a knife on the left side of the collar bone, thereby causing injuries from which the deceased died. The allegations are that the incident happened around 0200 hours on the day in question when the accused and the deceased were drinking beer at the night club referred to above. It is alleged that a misunderstanding ensued between the deceased and some other patrons in the course of which the deceased threw an empty beer bottle at those other patrons. The bottle missed the intended targets. The accused person then produced a flick knife and advanced towards the deceased. The latter fled by running out of the night club. The accused pursued him. When the deceased stumbled and fell on his back the accused person stabbed him with the flick knife on the left side of the collar bone. The accused fled from the scene. The deceased was ferried to Kadoma General Hospital where he was pronounced dead upon arrival. In accordance

with the law a plea of not guilty was entered, and the State proceeded to lead evidence from its witnesses.

The evidence of five witnesses for the prosecution was admitted by consent in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Those witnesses are Patrick Chinyama, Clayton Moyo, Joseph Manda, Munyaradzi Mapfumo, and Doctor Mauricio Gonzalez. Three other witnesses testified orally in court. They are Zondai Sithole, Trust Pfuko and Elias Musvosvi. In total the state relied on evidence from eight witnesses.

In his very brief defence outline the accused stated that on the night in question the deceased threw an empty beer bottle at him for no apparent reason. When he inquired from the deceased as to why he was attacking him the deceased insulted him. In a fit of rage and under the influence of alcohol he produced a knife and charged towards the deceased who took to his heels. The deceased ran out of the bar with the accused person in pursuit. The accused person caught up with the deceased and stabbed him once. The accused stated that he never had the intention to kill the deceased person.

The post-mortem report prepared by Dr Mauricio Gonzales shows that the deceased died as a result of a stab wound.

Patrick Chinyama's evidence was that on 18 March 2014 he was drinking beer at Nyamuzihwa Night Club, Patchway, Kadoma when he saw the deceased having a fist fight with two male patrons in the night club. The deceased threw a half empty beer bottle towards the two, but missed them. The accused rose from his seat and at that stage the deceased fled from the night club with the accused person in pursuit. The witness later learnt that the deceased had been stabbed.

Zondai Sithole's evidence was that on the day in question at about 0200 hours he was seated at the verandah of Nyamuzihwa Night Club drinking beer when he saw the accused person running after the deceased wielding a knife. The deceased fell down. The accused stabbed the deceased when he had fallen down. After being stabbed the deceased rose and tried to walk but fell down behind a toilet. The witness looked for transport to convey the deceased to hospital. He was later informed by Sergeant Musvosvi that the deceased had died.

Trust Pfuko, a member of the Neighbourhood Watch Committee who was employed as a security guard at Nyamuzihwa Night Club was one of those who were seated at the verandah

when the deceased emerged from the night club being pursued by the accused person. The two, deceased and accused, were running. He followed them with the intention of restraining them. The deceased fell on his back. The accused person stabbed the deceased once on the left collar bone. After stabbing the deceased the accused person fled from the scene. This witness stated that on that day he had started work at 2000 hours of that evening on which the deceased was stabbed. He had seen the deceased drinking opaque beer. The accused person was playing a game known as snooker. He stated that the deceased was drunk, and was staggering. The witness stated that he never saw the accused person consuming beer.

Clayton Moyo's evidence was that on 18 March 2014 at about 0200 hours he met the accused person. The accused person was wielding a knife when he met him. He proceeded to where the deceased was and observed that he was bleeding profusely. The deceased was ferried to Kadoma General Hospital. The witness learnt of the deceased's death on 19 March 2014.

Joseph Manda who resides at Patchway Shops, Kadoma, is the one who ferried the deceased to Kadoma General Hospital. His evidence was that the deceased was pronounced dead upon arrival at the hospital. Whilst in his custody the deceased did not suffer any injuries.

Elias Musvosvi, an officer in the Zimbabwe Republic Police, is the investigating officer in the case. He was previously stationed at Battlefields in Kadoma, but at the time of giving evidence he was based at Sanyati Police Station. He did not know the accused person other than in connection with the instant matter. He, however, knew the deceased person during his life time as a person who resided in the Patchway area. After receiving the report about the stabbing of the deceased he proceeded to Nyamuzihwa Night Club where he interviewed Zondani Sithole and Trust Pfuko. He recovered clothes which the accused was wearing at the time that he stabbed the deceased. The clothes were behind Masimba Bar. They consisted of a white three-quarter pair of shorts, an orange shirt and a white and black shirt which had been left in a plastic bag on top of a decomposing dead dog. He arrested the accused person at Twinlands Farm following a tip-off. He is the one who recorded the warned and cautioned statement from the accused person. He recovered the knife which had been used to stab the deceased person from the accused person who had wrapped it in a khaki shirt and had hidden it at his friend's house at Twinlands Farm. He also took the accused person for indications which he recorded and produced a sketch plan. The okapi knife, a white three-quarter pair of shorts, an orange and white long-sleeved soccer

jersey, a black and white short-sleeved shirt, a long-sleeved khaki shirt, and a brown wallet were produced as exhibits.

Munyaradzi Mapfumo's evidence which was admitted in terms of s 314 of the Criminal Procedure and Evidence Act is a member of the Zimbabwe Republic Police as well. He was invited to the scene of the offence by the last witness, and was present when the accused's blood-stained clothes were recovered. He was also present when the knife was recovered, as well as when a warned and cautioned statement was recorded from the accused person. His evidence was that the accused person made his statement freely and voluntarily. He was present, too, when the accused person elected to make indications pursuant to which Sergeant Masvosvi drew a sketch plan. He stated that the accused person made the indications without any undue influence. Dr Mauricio Gonzalez is a legal medicine specialist. On 21 March 2014 he examined the remains of the deceased at the request of the Zimbabwe Republic Police, Kadoma Rural. Following the autopsy he prepared the post-mortem report referred to above which was produced as exh. 1.

The accused gave evidence and called no other witness. He stated that he is a farmer at Twinlands Farm which is about seven kilometres from Nyamuzihwa Night Club. He used to frequent the night club on Fridays and Saturdays when he was free. He did not know the deceased prior to that night. On the night in question he arrived at the night club around 1900 hours and started to play snooker and drink beer. The deceased started to quarrel with some patrons in the night club. He stated that at some point the deceased accused him of being part of the patrons he had a misunderstanding with. The deceased threatened to assault the accused person, whereupon he threw a beer bottle at him. The beer bottle missed the accused. The accused stated that the deceased then got hold of a steel chair and struck him on the head. He fell under the snooker table, rose and threw down the snooker stick which he was holding. He reached for the knife which was in his pocket. When he produced the knife the deceased ran outside the night club. He followed, also running. The deceased fell down. The accused stated that he also fell down but managed to get up ahead of the deceased. He stabbed the deceased once with the knife. He then left the place after stabbing the deceased. In cross-examination the accused person stated that he was not heavily intoxicated. Later on he stated that he suspected that when he stabbed the deceased he was now sober.

From the evidence led by both the State and the accused person, certain facts are not in dispute. These are that on the 18 March 2014 at or about 0200 hours a misunderstanding arose between the accused and the deceased while the two of them were at Nyamuzihwa Night Club, Patchway, Kadoma. During the misunderstanding the accused person produced a knife. The deceased fled from the accused person. The accused person pursued the deceased. The accused caught up with the deceased. He stabbed the deceased using the knife. The deceased died as a result of the injuries.

The circumstances leading to the misunderstanding are in dispute. The state's evidence as given by Patrick Chinyama was that the deceased person only threw an empty bottle which was directed at some other patrons, not at the accused person. The bottle missed the accused person. The accused reacted to that by producing the knife and chasing after the deceased. The accused person stated in his evidence that he was struck by the deceased person using a steel chair. He also mentioned the fact of being struck by a chair in his confirmed warned and cautioned statement. However, in his defence outline he did not mention that he was struck by the deceased person using a chair. Rather, he stated therein that the deceased flung an empty beer bottle at him, and when he inquired as to why he was being attacked he was insulted. He reacted to the insult by producing the knife from his pocket. The accused person did not explain the inconsistency between his evidence in court and in the warned and cautioned statement on the one hand and, on the other hand, his defence outline. In fact, in the warned and cautioned statement there is no mention of an empty beer bottle having been thrown at him. It seems that the accused person was only reminded of the issue of the chair following the production of the warned and cautioned statement and the evidence of Elias Musvosvi. His evidence as to what happened inside the bar should therefore be rejected save to the extent that it is consistent with that of the state witnesses. After all, by accepting without challenge the evidence of Patrick Chinyama, the accused must be taken to have accepted that he reacted to the throwing of an empty bottle and not to an assault using a chair when he produced a knife and pursued the deceased. The issue therefore is whether the throwing of the beer bottle constitutes such a provocation to warrant the reaction by the accused, of producing a knife, chasing the deceased person for more than fifty metres, and stabbing him. An inquiry into the partial defence of provocation involves two stages as envisaged by s 239 of the Criminal Law (Codification and

Reform) Act. See Professor Feltoe's *Commentary on the Criminal Law (Codification and Reform) Act*, 2004. The first stage is to decide whether the accused person had intention to kill. Having regard to the weapon used, an okapi knife with an 11cm long blade, the choice of where to stab, and the amount of force used, this court finds that clearly there was an intention to kill. The second stage of the inquiry is therefore relevant, namely, whether the accused lost his self-control and killed intentionally in circumstances where even the reasonable person faced with that degree of provocation, would have lost self-control. Clearly in *casu* there was no such provocation as would propel a reasonable person to react in the manner that the accused did. The unchallenged evidence of Patrick Chinyama was that the bottle was not even directed at the accused. Even if it was to be assumed in his favour that the accused person believed that the empty bottle was directed at him the throwing of such an object cannot reasonably trigger the kind of reaction which came from the accused. Further, when he ran for a distance of more than fifty metres the accused person had all the time to reflect upon his action and tame his *over*-sensitivity. The stabbing of the deceased who had fled from the accused person for a distance in excess of fifty metres cannot therefore be justified by reference to the throwing of an empty bottle. For that reason, the court rejects the suggestion that the accused person was provoked when he attacked the deceased person. The court heard that there were about sixty patrons at the night club on the night in question. It is difficult to understand why in those circumstances only the accused person reacted to an empty bottle in the manner he did, particularly given that the bottle did not even hit him. The accused person states that when he pursued the deceased his intention was to apprehend him and take him to the police. Yet at the same time he states that the deceased person was heavily built in relation to him. He does not explain how he then hoped to apprehend him if he was afraid of being overpowered. He also does not explain why he was wielding a knife from the time he was inside the night club up to the time that he caught up with the deceased person if his intention was merely to apprehend the deceased and take him to the police station. He also does not explain why, after he had stabbed and thereby immobilized the deceased, he decided to leave the place instead of attempting to apprehend him in order to take him to the police. Clearly, the accused person's explanation for his conduct does not make sense.

There is the question of the degree of intoxication of the accused person at the time that he stabbed the deceased. On his own evidence, he was only moderately intoxicated. He stated

that he would need to take up to 15 or 16 beers in order to get drunk, and that on that day he had not taken anything near that number. There are other features of his conduct which suggest that he was not quite intoxicated to the extent of failing to lose control or appreciation of the events. He had a vivid recollection of the events of the night in question, including very minute details of how he was missed by a beer bottle, how he produced the knife, and how he stabbed the deceased. He was also able to run for a distance of more than fifty metres pursuing the deceased person. The stab wound shows that severe force was used to inflict it. The accused person admitted that fact when it was put to him in cross-examination. The strength with which the knife was stuck into the body of the deceased person does not suggest that the person holding it was not in full control of his limbs. He even admitted that he realized the danger involved in the manner in which he stabbed the deceased person but nonetheless proceeded to do it.

The evidence led proved beyond a reasonable doubt that the accused person intentionally caused the death of the deceased. The only remaining issue is whether such intention was actual or constructive. In the case of *S v Mugwanda* 2002 (1) ZLR 574(S) at 581D-F the court said the following about the distinction between actual and constructive intent:

“On the basis of the above authorities, it follows that for a trial court to retain a verdict of murder with actual intent it must be satisfied beyond reasonable doubt that:

- (a) Either the accused desired to bring about the death of his victim and succeeded in completing his purpose; or
- (b) While pursuing another objective foresees the death of his victim as a substantially certain result of that activity and proceeds regardless.

On the other hand, a verdict of murder with constructive intent requires the foreseeability to be possible (as opposed to being substantially certain, making this a question of degree more than anything else).”

In the case of *S v Mugwanda* (*supra*) the appellant and the deceased were involved in a quarrel over a small sum of money. The appellant called out to his two sons that the deceased and his companion should be beaten up. The appellant had with him an axe and a knife. In the fight that ensued, the appellant used the knife to stab the deceased once in the chest below the right breast. The deceased ran away but was later found dead from the wound. The trial court found the appellant guilty of murder with actual intent and sentenced him to death. His two sons were convicted of murder with constructive intent. On appeal, the Supreme Court held that it could not be said that the only reasonable inference to be drawn from the facts was that the

appellant foresaw the deceased's death as a substantially certain consequence of his action. The facts did, however, establish beyond reasonable doubt that the appellant foresaw the possibility of the deceased's death as a consequence of the assault and persisted with the assault notwithstanding that realization. Resultantly, the appellant's conviction of murder with actual intent was altered to one of murder with constructive intent. See also *S v Malinga* 1963 (1) SA 692(A) at p 694G-H; and *S v Nkombani & Anor* 1963 (4) SA 877(A) at pp 883A-C, both cases are cited in *S v Mugwanda (supra)* at 580C-G.

Mr *Masamha* for the State moved the court to find that there was constructive intent. This case is a borderline situation when one considers that the accused person chased the deceased person for more than fifty metres while wielding a knife. The blade of the knife is 11 centimetres long. He deliberately chose to stab the deceased person on the left collar bone and not on some other part of the body such as the hand or the leg. He applied severe force when he stabbed the deceased. The witnesses who testified showed that the deceased was not even fighting back when he was stabbed. Notwithstanding the foregoing, the court takes note of the fact that the accused and the deceased were not known to each other and that the commotion which led to the stabbing of the deceased by the accused person followed a misunderstanding. He, however, proceeded to stab the deceased even after realizing that that there was a real risk that death would result. On that account, the court is prepared to come to the conclusion that the accused person's intention was constructive.

In the result, the accused person is found guilty of murder as defined in section 47(1) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

*Chinganga & Company*, accused's legal practitioners  
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