

THE STATE
versus
PROMISE SITHOLE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 19 May and 1 June 2016

Assessors: 1. Mr Chivanda
2. Mr Shenje

Criminal Trial

D H Chesa, for the state
J Chikura, for the accused

MAWADZE J: The accused is being charged of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in that on 3 March 2015 at Stanbarn bar Chegutu the accused caused the death of Tichaona Zinondo by striking him with an axe once on the right side of the head realising that there was a real risk or possibility that his conduct may result in Tichaona Zinondo's death.

The facts alleged are that on 3 March 2015 the accused and deceased were playing a game of snooker in Stanbarn bar Chegutu when they had a misunderstanding. It is alleged that the accused then left the bar and armed himself with an axe. The accused is said to have met the deceased at the verandah of the bar where the altercation between them resumed. Accused is alleged to have pulled out an axe and struck the deceased in the right side of his head causing deceased to collapse and bleeding profusely. The deceased died before he was taken to hospital. The cause of the deceased's death is said to be skull fracture which resulted in brain damage arising from the assault.

In his defence outline the accused does nor deny that he struck the deceased with an axe on the head. The accused said what happened that day was that he was heavily intoxicated as he

had been drinking beer from 10 00hrs until about 21 00hrs when this incident happened. The accused said he had an altercation with the deceased at about 21 00hrs over the game of snooker after he had defeated the deceased but the deceased refused to concede defeat insisting that they play another game despite that there were other players who had placed their challenge against accused and wanted to play. The accused said he grudgingly gave in and played another game with the deceased. The deceased was infuriated when other patrons started to cheer the accused and deceased sunk all the balls thus prematurely ending the game. The accused said the next person in line to play the game then pressed his token but deceased again sunk all balls. As a result accused said he confronted the deceased but the deceased reacted by assaulting accused with open hands, clenched fists and booted feet all over the body. The accused said he managed to escape and went home but he realised that he had left his cell phone in the bar which was being charged by the bar lady. The accused said he decided to return to the bar to collect his cell phone. The accused said he feared to be attacked by the deceased again or by other muggers as it was dark hence he armed himself with a small axe and returned to the bar where he collected his cellphone. The accused said as he left the bar the deceased blocked his way by the door but he managed to force his way out of the bar. At that point he said the deceased charged towards him threatening to assault him again. The accused said in trying to prevent the assault he produced his axe and waived it towards the deceased in a bid to scare the deceased. The accused said the deceased nonetheless advanced towards the accused and in so doing he moved into the line of motion of the axe which was being waived and was struck in the process. The accused said he did not intend to strike the deceased at all and had no intention to cause deceased's death. The accused said when he waived the axe his judgment was impaired by the alcohol he had taken.

The post mortem report which was produced as exh 1 was compiled by Dr Mauricio Gonzalez shows that the deceased was injured on the parietal area and had a 6cm wound. The deceased's skull was fractured, that is the parietal bone. The cause of deceased's death is stated as skull fracture resulting in brain damage due to head trauma. The contents of the post mortem report and the findings by the Doctor are not in issue.

Exhibit 2 is accused's confirmed warned and cautioned statement whose contents are basically similar to accused's defence outline on the cause of altercation resulting in the alleged first assault. The only difference is on how the accused said he allegedly struck the now deceased with the axe. In the statement the accused said as he left the bar after collecting the cellphone the

deceased followed him as deceased was ready to assault the accused with clenched fists. As a result accused said he proceeded to strike the now deceased with the axe once in the head causing deceased to stagger and that accused fled the scene. There is no mention that the accused first swerved or waived the axe. The accused said he first fled to Selous where his mother stays and that on the way he threw away the said axe into Mupfure River. Accused said he later went to Venice Mine and subsequently surrendered himself to police at Battlefields after 12 days on 15 March 2015.

The evidence of the following witnesses was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

1. Munyaradzi Mugarira
2. Nyasha Muza
3. Stanford Makomo
4. Simbarashe Dhobha
5. Dr Mauricio Gonzalez

For purposes of clarity and completeness we shall summarise the evidence of the above state witnesses. We have already dealt with the testimony of Dr Mauricio Gonzalez when we dealt with exh 1 the post mortem report. Suffice to say he is a forensic pathologist who examined deceased's body at Harare Central Hospital on 6 March 2015 and compiled Exhibit the post mortem report.

Munyaradzi Mugarira

He was one of the patrons in the bar and witnessed the argument between the accused and the deceased over the game of snooker. He was later alerted when the now deceased had been injured outside the bar after which he went out of the bar and found the now deceased lying down bleeding profusely. He is the one who called an ambulance to ferry the now deceased to hospital. He therefore did not witness how the now deceased was injured.

Nyasha Muza

He was residing with the accused in Chegutu and he said on the night in question the accused arrived home at about 2000hrs as he was doing his school homework and that he opened the door for the accused. He said the accused simply collected a small axe which was in the

house and immediately left the house. It is common cause that this is the axe accused later used to fatally strike the now deceased.

Sgt Stanford Makomo

He is the investigating officer in this case. His evidence is that he ferried the now deceased's body to Harare Central Hospital for an autopsy by Dr. Mauricio Gonzalez. He said after accused had been arrested and on 20 March 2015 he recorded accused's warned and cautioned statement which he caused to be confirmed at the magistrates court. Thereafter he said he took accused for indications at the scene of crime where accused made indications from which he drew a sketch plan which was however not produced by the state. He said accused then led him to Mupfure River in a bid to recover the axe used in the attack of the now deceased and that the police sub *aqua* unit failed to find the axe in the river.

Simbarashe Dhobha

He is a fellow police detail who assisted Sgt Stanford Makomo during investigations and his testimony is similar to that of Sgt Stanford Makomo.

We now turn to *viva voce* evidence led by the state.

James Bangamuseve (James)

James resides at No P47 Pfumojena Township in Chegutu and on 3 March 2015 he was one of the patrons in Stanbarn bar when accused and the now deceased had an altercation over the snooker game. He said he had just arrived in the bar towards 2100hrs and was sober when he witnessed the accused and the now deceased being restrained as they were about to fight after which the accused left the bar. James said after about 25 minutes he then heard Clement Mutazu calling out for help from outside the bar and he rushed out where he saw the now deceased lying on the ground bleeding profusely some 10m from the verandah of the bar.

James said that he had seen accused returning to the bar and collecting his cell phone but he had not seen how the now deceased had left the bar. He said he observed that the now deceased had been injured on the right side of the skull.

Under cross-examination James said both accused the now deceased were drunk. He denied that when accused and the now deceased quarreled while inside the bar they exchanged

any blows. Instead he said the two just exchanged harsh words. He denied that the accused was assaulted by the now deceased inside the bar.

In our assessment James gave his evidence very well. He was able to answer all questions put to him in cross examination. We have no doubt that he was sober as he had a clear recollection of events of that day especially what transpired inside the bar. It is clear from his evidence that he did not witness how the now deceased was injured. We have no reason at all not to accept his evidence.

Clement Mutazu (Clement)

Clement resides at No 26300 Kaguvi Phase 3 in Chegutu and is one of the patrons who was at the bar on 3 March 2015 when the now deceased was fatally injured. In fact he is an eye witness to how the now deceased was injured.

Clement told the court that he had just arrived at Stanbarn bar when this incident occurred around 2100hrs. He had not witnessed the first quarrel between accused and the now deceased inside the bar as he had not arrived at the bar at that time. He said he then bought some beer and started to drink after which he went out of the bar to relieve himself. By then he said he was sober.

Clement said as he was outside the bar he saw accused and the now deceased standing quarrelling but he was not privy as to the cause of the misunderstanding between the two. He said he proceeded to relieve himself and that as he came back he realised that the quarrel between accused and the now deceased had escalated as both were now animated, more angry and raising their voices. Clement said the accused and the now deceased were standing facing each other and that they were hardly a meter apart. In view of the heated argument between the two he stopped to see what was going on as he was about 10 m away. He said this was near the verandah of the bar and that the place was well lit by the lights on the verandah of the bar.

Clement said he heard the now deceased saying he would assault the accused and in response accused said that would not happen. He said the now deceased repeated the threat to assault the accused. At that point he said accused said he had enough and accused immediately withdrew a small axe from his undergarments and struck the now deceased on the side of the head causing the deceased to fall down. Clement said he then shouted for help from the patrons inside the bar as the accused fled from the scene.

Clement graphically explained how the accused struck the now deceased. He said both accused and the now deceased were equally aggressive and drunk as they stood facing each other engaged in a heated argument. He however said accused and the now deceased did not exchange any blows but that accused in a flush swiftly pulled out a small axe hidden from underneath his clothes and struck the now deceased. He said the attack with the small axe was sudden and deceased was caught unaware. Clement said accused used a lot of force as accused was very angry and judging by how accused swerved the small axe while delivering the blow which caused the now deceased to fall down severely injured.

Under cross-examination Clement said he did not see accused and the now deceased inside the bar at time he arrived at the bar. When it was suggested to him that he may not have properly perceived the incident in which the now deceased was injured because he was possibly drunk Clement said he was sober as he had been drinking beer for less than an hour when the incident occurred. He disputed the accused's version of events suggested to him stating that neither accused nor the now deceased charged towards the other before the now deceased was struck with the small axe. He dismissed as untrue that accused waived the small axe before he struck the now deceased but maintained that accused just swiftly pulled out the small axe and struck the now deceased. Clement vehemently disputed that the accused acted in self defence as the now deceased had not charged towards him, but that they were standing about one metre apart facing each other and simply exchanging harsh words. He said all that accused said before the attack was that he had had enough and pulled out the small axe without warning the now deceased that he had an axe.

In our view Clement gave his evidence in a clear and straight forward manner. He is an eye witness to how now deceased was fatally injured by the accused. His account of how the accused attacked the now deceased is very clear and detailed. We are therefore left in no doubt that when Clement perceived this assault he was sober. His evidence remained largely unchallenged in cross-examination. No motive was suggested to him as to why he would falsify his evidence. We equally find none. In our assessment he was an unbiased witness who clearly stated that both accused and the now deceased were drunk and aggressive. We therefore accept his evidence.

The Accused's Evidence

The accused adopted his defence outline as his evidence and incorporated his confirmed and cautioned statement as part of his evidence.

The accused however made additions to his evidence.

It was accused's evidence that Clement was a biased witness as he is a workmate and colleague of the now deceased. In fact the accused said Clement had been in the company of the deceased from the time the altercation between accused and deceased started in the bar and accused was allegedly assaulted by the deceased. He said this also explains why Clement was also outside the bar when the now deceased was injured as he was there to help a colleague. We are surprised and baffled by this piece of evidence from the accused. This is so because all this was not put to Clement in cross-examination. Further it is not part of accused's defence outline and accused did not mention it in his confirmed warned and cautioned statement. The only inescapable conclusion we can make is that this is simply an afterthought on the part of the accused in a bid to discredit Clement's evidence.

The accused in his evidence said he waived the axe twice or thrice warning the now deceased that he was armed and that the now deceased was not deterred. We however note that this is not the version accused gave in his confirmed warned and cautioned statement.

Under cross-examination accused admitted that he was in control of his mental faculties and fully appreciated what he was doing despite the fact that he was drunk. We are inclined to agree with the accused because as can be discerned from both accused's confirmed warned and cautioned statement and defence outline accused had a fair recollection of events of that day. Accused was able to go home and collect an axe which he hid under his clothes. After attacking the deceased accused managed to flee from the scene and immediately disposed of the axe which was never found. The accused insisted that he was assaulted by the now deceased inside the bar during the first altercation. We are unable to agree with the accused in this regard. James whom we assess as a credible witness with no motive to lie did not witness the assault of the accused inside the bar. Our finding therefore is that accused was not assaulted at all during the first altercation when he left the bar going home.

While it is clear that both accused and the now deceased were drunk and that they were both aggressive in their argument we are unable to appreciate the accused's defence. It would seem accused is saying he struck the now deceased in error as the now deceased blindly walked

into the line of the axe in motion as accused waived it to scare him away. In the same breath accused seems to say he acted in self defence by striking the now deceased as he was about to be attacked with clenched fists for the second time. The accused also blames his degree of intoxication for inadvertently striking the now deceased. Our finding is that accused is simply being untruthful hence these various explanations. We do not believe that accused struck the now deceased in error at all. It is clear that after the initial confrontation inside the bar the accused went home to collect the small axe which he hid under his clothes. The accused was clearly poised for a fight. Equally so the accused did not act in self defence as is defined in s 253 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The evidence of Clement is very clear that accused did not act in self defence. Needless to mention that voluntary intoxication as defined in s 221 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is not a defence to a charge of murder. It is our finding that in attacking the now deceased, the accused used a lethal weapon which is an axe and directed the blow at a delicate part of the deceased's body which is the head. It is clear that the accused used a lot of force as he fractured the now deceased's skull causing brain damage. From the totality of the evidence before us we have no doubt that the accused realised that there was a real risk or possibility that his conduct of attacking the now deceased in that manner may result in deceased's death.

Accordingly the accused is found guilty of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates to murder with constructive intent.

Verdict: Guilty of contravening s 47 (1) (b) of the (Codification and Reform) Act [*Chapter 9:23*]
: murder with constructive intent.

National Prosecuting Authority, state's legal practitioner
Hove & Associates pro deo, accused's legal practitioners