

THE STATE
versus
ADMIRE CHIURAIRWE
and
PHILIMON MHONDERA

HIGH COURT OF ZIMBABWE
HUNGWE J & ASSESSORS
MUTARE, 28 October 2015, 2 & 4 November 2015

Assessors: 1. Mr Rajah
2. Mr Chipere

Criminal Trial

J Matsikidze, for the State
C Ndlovu, for the accused

HUNGWE J: The two accused cousin brothers face a charge of murder it being alleged that on 14 September 2013 at Kurwaisimba Business Centre Chimanimani, with actual intent or realising the real risk or possibility that death may result assaulted Liberty Mwenje with fists, booted feet, a log, stones and a knife thereby inflicting injuries from which he died.

They both pleaded not guilty.

In their detailed defence outline the two accused state that they were at the Business Centre enjoying intoxicating liquor. The deceased approached them and indicated that he had an unresolved issue with accused one. Previously, the deceased had fought with their other brother, one Charlie. Accused one had been present. Deceased had claimed on that occasion that had lost his mobile phone and some cash. He demanded a return of these.

Accused two suggested to the deceased that since Charlie was around the Business Centre, it was best that the deceased confronts him. The deceased left and they resumed their drinking. Later, the deceased again approached them in the company of Blessing Ziyomo (“Blessing”) and Moses Chivhunga (“Moses”). The deceased’s friends moved ahead as the

deceased engaged them again over the same issue. Accused two suggested that they go to the police station for assistance, a stone's throw away. On the way the deceased's two friends joined him in the dispute. Blessing initiated that it was not necessary to go to the police. Blessing took each of the accused's beer bottles and threw them away.

Blessing then grabbed accused one by the collar and head-butted him causing him to fall to the ground. As he lay on the ground, the deceased and Blessing assaulted accused one with booted feet all over his body. Accused one got up and exchanged fist blows with Blessing. The deceased produced an Okapi knife and stabbed accused one. He again fell down and cried out that he had been stabbed. Accused two picked up a log and struck Blessing. Moses, who had not, up till then, taken part in the fight came close. This action drew the anger of accused two who then struck Moses with the same log. Blessing and his two friends ran away from the scene.

Accused two chased after the deceased. According to accused two, he caught up with deceased and again struck him indiscriminately all over his body using the same log. Deceased escaped and, after a short chase, accused two gave up the chase. Accused two threw away the log and returned to the Business Centre.

In the meantime, after the deceased fled from the scene, accused one picked himself up and walked home. He was arrested by police. He received treatment for the stab wound.

Accused one maintained that he was targeted by deceased because he was present when deceased and Charlie fought. On this day he had not fought with deceased nor had he pursued him when the deceased fled from the scene. He therefore denied all allegations levelled against him by the State.

Accused two, for his part, maintained that he came to his cousin brother's aid as he was under attack. He claimed defence of a third-party from an unlawful attack. He never intended to kill the deceased.

The state case was built around the evidence of Blessing Ziyomo. He was the main state witness. In assessing the credibility of this witness and the probative value of his evidence in court, the court is aware that in any assault case, the complainant as well as the accused, both have an interest to serve, which is to be cast and therefore be seen in better light than that portrayed in the allegations. The court appreciates that there is a real likelihood of this witness Blessing under-playing his role and exaggerating that of the accused is quite real. His evidence is as follows.

As he, the deceased and Moses Chivhunga were leaving the business centre for home, he saw the accused two at a bar at the Business Centre. As they passed the two, accused one called the deceased to where they were. The deceased approached them. He and Moses kept going. They did not pick the discussion that took place between the two accused and the deceased. The deceased later joined them and they continued with their journey home. At some point they realised that the two accused had followed them, caught up with them and overtook them after the police base. Accused two went in front of them whilst accused one made the rear end. They were sandwiched between the two as they made their way home. The two accused began to accuse the deceased of failing to take heed of the standing prohibition against him which prevented him from visiting the Business Centre. In response the deceased indicated that he did not recognise such an unlawful order which had the effect of limiting his freedom of movement. Both accused one and two threatened to accompany the deceased to his residence. Again the deceased rejected the offer to be accompanied home against his will. As the argument raged, the deceased was accused by the belligerents of being hard headed.

The two began to assault the deceased. Accused two delivered the first blow on deceased using an empty beer bottle which had been in his possession all along. When Blessing questioned the reason for the travel ban they had unlawfully imposed on the deceased, he was struck with an empty beer bottle by accused one. Blessing fell to the ground. Accused one continued with his assault by kicking the now fallen Blessing. At some point during the scuffle, Blessing managed to grab accused one's leg and pulled him down. Accused one fell down and they both rolled on the ground as each attempted to get up whilst keeping the protagonist on the ground. They rolled and scuffled on the ground. Blessing then managed at some point to get up. He straightaway went to help the deceased who was fighting accused two. With the help rendered by Blessing, the two managed to break free and made good their escape.

Blessing, in his evidence, described an instance during which he saw Moses hold accused two's hand by which he wielded a broken bottle with shards. He was unable to say whether or not it was used to attack the deceased. Their assailants were hot on their heels as they ran. They decided to take different direction as a tactic to evade the marauding assailants. The deceased took off on a route away from the major road. As he ran Blessing, told the court that accused one caught up with him again. He struck him with a bottle for the second time. He staggered but kept on running till he made good his escape. He hid away

from his pursuers in the fields far off the view from the road. As he hid, he heard Moses calling upon them to join him. He came out of hiding and joined Moses but they could not, despite diligent search, find the deceased. It was getting dark. They abandoned the search for the deceased and alerted his family on the events which they had experienced leading to the deceased's disappearance.

The next day, a search team was mounted. The deceased was eventually found. He was however, unconscious and unable to speak. His whole body was badly swollen. He had wounds all over. He was ferried to hospital. Some four days after the attack Blessing was able to speak with deceased from his Rusitu Hospital bed. According to Blessing, deceased described to him how both accused had assaulted him with large stones and a knife. He was present when police recovered a log and a knife. Both items were blood stained.

He disputed that accused two suggested that they go to the police base over the mobile phone and cash issue. He denied that either of their assailants had shouted that he had been stabbed. Under cross-examination Blessing could not discount the possibility that the mobile phone and cash issue could have been raised when the two accused called the deceased aside. He was however adamant that the two accused had initiated the assault upon them and therefore were the aggressors in the whole episode. He denied any knowledge of a discussion between the deceased and the two accused prior to their going home.

He told the court that in the brief discussion the two accused held with deceased, he did not notice any animosity as deceased came back and joined them without any reference to such a possibility. He flatly rejected the suggestion that he had rubbished the idea to involve the police in the crime as it was never raised. According to him the matter was over the ban imposed on the deceased. Blessing denied that he initiated the attack by head-butting the accused one and throwing away their beer bottles. He also denied the claim by the two accused that the deceased had stabbed accused one with a knife. He denied that the deceased had a knife on the day.

Blessing was unable to say that the scar on accused one was a result of a stabbing with a knife. He disputed the claim that accused two had struck him with a log. He maintained that he had fought with accused one only and fled after he had overpowered accused one. He did not witness accused two strike Moses with the log nor did he see the subsequent assault on the deceased by accused two after he had fled from the scene. He could not speak to the assault on deceased by accused two after the two had fled in different directions. He maintained that deceased had wounds all over his body.

Whilst we accept that there is need to approach Blessing's evidence with caution, we are satisfied that his evidence read better than that of the two accused put together. His version was the more credible one over that given by the two accused persons. The probabilities in this matter favour the version given by Blessing over that given by the two accused. We say so for the following reasons.

In our estimation, the two accused had imposed a travel ban over deceased because he had accused their brother of theft of his phone and cash. If the deceased came to Kurwaisimba Business Centre, the ban implied that he was challenging their hegemony in the area. This challenge to their authority was to be vigorously resisted. In our view this must be the only reasonable explanation regarding why the two accused had called only the deceased to where they were, as opposed to the rest of those in the deceased's company.

Secondly, Blessing knew about the allegations which the deceased had allegedly made against Charlie, their brother. If they kept deceased's company as he openly defied their ban, in the two accused's warped thinking, they were game as well. They were not concerned about Moses who, apparently, was a stranger in the area. This explains the reasons why he was spared the vicious assault at the accused's hands. Seen in this light, therefore, it is the two accused who were geared for a fight, rather than the deceased and his two colleagues.

In our view that is why despite their numerical superiority, the trio was soundly vanquished. They were taken completely by surprise when the attack targeted at the impudent and hard-headed trespasser was launched. Blessing was merely caught in the cross-fire.

Tichaona Murenje gave a graphic background to this case. His evidence closely corroborates that of Blessing. This, in our view, indicating that the version which Blessing gave to court is the same version he had given to the deceased's brother the very same day regarding this incident. For example, both Tichaona and Blessing say the initial attack occurred soon after the police base. This is also confirmed by Constable Mudzekenyedzi.

The knife did not belong to deceased, according to his brother Tichaona. In our view as the two accused were geared for a fight, in all probability, it is them who had a knife rather than the deceased.

We therefore prefer the evidence given by Blessing where the two accused's evidence differs with that of the state witnesses.

The post mortem report corroborated the evidence regarding the condition and the injuries sustained by the deceased. It speaks to a grossly swollen head; multiple bruises;

(generalised) haematoma on the back and upper limbs. The post mortem records the cause of death as poly trauma/ head injury and blunt abdominal trauma. These injuries are in our view consistent with repeated application of force (blunt trauma) to the body using the log which was produced in court as exhibit 4.

It will be clear from the above that we reject the accused's claim that accused one played no role in the assault and subsequent death of the deceased. He did. The evidence clearly implicates him in this vile deed. Accused one in our view, seeks to hide behind his scar which is an injury he sustained as he assaulted deceased and his friends. Even assuming that it was deceased who inflicted that injury on accused one in some way, it is fool-hardy to expect, even in defeat, that a victim of violence cannot score some notable blows. As pointed out above, this was a brutal assault on the deceased and his friends. They were bound to act in self-defence. In the process, Blessing and company could have also assaulted and injured their assailants in retaliation. That, in our view, does not in any way detract from the fact that it is the two accused who set upon a course of a vicious assault against the deceased and his colleagues.

The two accused acted in common purpose. In terms of s 196 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], they are equally guilty as accomplices to this crime.

We are however, unable to hold that they had pre-planned the attack on the deceased but having encountered him they devised a plan in which they intended to isolate him and deal with him for disregarding the ban which emanated from an assault on their brother Charlie. They failed to isolate him, so they set upon the deceased together with his friends. The detail of how they inflicted such unsightly injuries on the deceased is best well-known by the two accused. The only reasonable inference is that, as deceased told Blessing four days later at Rusitu Clinic, the accused used logs, stones and a knife.

In launching such an attack, the accused must have realised the real risk or possibility that death may result from their assault on the deceased. Put differently, the accused must have foreseen the possibility that serious injury or death may result from his conduct but proceeded notwithstanding this foresight. In doing so the accused at law would be regarded as having the necessary intent for the crime charged. Such is the broad approach to constructive intent. In regard to the nature the constructive intent, law as to constructive intent was settled by *R v Huebsch* 1953 (2) SA 561 (AD) as confirmed in *R v du Randt* 1954 (1) SA 313 (AD). In *R v Poteredzayi* 1959 (2) SA 125 (FC) BRIGGS FJ put the matter thus:

“It is sufficient if there is ‘an appreciation that there is some risk to life involved in the action contemplated, coupled with recklessness as to whether or not the risk is fulfilled in death.’ It is also settled law that the test whether a person has this constructive intent to kill is a subjective one. As to recklessness, it must be stressed that general recklessness is not enough. There must be ‘recklessness as to whether or not the risk is fulfilled in death’

See also *S v Muchita & Others* 1984 (1) ZLR 1 (HC); *R v Mabheba* 1968 (2) SA 28 (R; AD).

That they did not see whether the deceased died or lived can be inferred from their subsequent action of leaving the deceased for dead. Had they cared enough to alert his relatives where to find him, he may have lived.

They are in our view guilty of murder with constructive intent as defined in s 47 (1) (b) of Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

National Prosecuting Authority, legal practitioner for the State
Gonese & Ndhlovu, legal practitioners for the accused