STATE
versus
JAMES CHISHAKWE

IN THE HIGH COURT OF ZIMBABWE
HUNGWE J.
MUTARE, 23, 25 & 30 October 2017 & 1 November 2017

Criminal Trial

Assessors: 1. Rajah
2. Chagonda

Mrs J. Matsikidze, for the State
Mrs M. Mandingwa, for the accused

HUNGWE J: The accused faces a charge of murder it being alleged that on the 17th of November 2016, at Ross Common Estate, Chimanimani, he, with actual intent or realizing the real risk or possibility of death, struck Bigboy Matsangaise with an iron bar on the head, face and body thereby inflicting injuries from which the said Bigboy Matsangaise died. He pleaded not guilty to the charge.

It is not clear what his defence, from his defence outline, was meant to be. However, a careful analysis of the defence outline indicates that the accused raised the defence of intoxication. but it amounts to one of intoxication. I mention this because in Exh 2, the defence outline, the following appears.

> "The accused and the deceased drank from 1500 hours to late into the night which the accused is not too clear as to the actual time. The accused will state that he does not even remember how he followed the deceased or how he assaulted the deceased or how he slept into the deceased's quarters. He was only woken up to be informed that he had seriously injured the deceased. He hazily remembers that during the drinking spree there was an altercation between him and the deceased over a woman with whom both were dating.
> The accused will further state that he was so drunk that he did not even attempt to hide the weapon used to inflict the injury. Furthermore, in the drunken stupor he went into the deceased's quarters

> thinking that he was going into his own quarters to rest. As a result of the intoxication the accused will state that he lacked the requisite *mens rea* to satisfy the requirements for murder."

From this defence outline it does not appear to me that the accused was raising any factual dispute regarding the basis of the allegations giving rise to the charge of murder. However, we must deal with the matter as presented by the defence.

We find that the following facts are not in dispute. The accused and the deceased are uncle and nephew, with the deceased being the accused's uncle. They were both employed at Roscommon Estates. The accused was the deceased's assistant. On the fateful day, they had both gone drinkin. They had argued over a woman's affections. The accused felt that the deceased had snatched away his woman. When the altercation subsided it would appear the deceased left the beer drink first to go home. From the facts, it is common cause that they both shared the same living quarters. The accused later followed home. Upon arrival, he had called for the deceased to come out of the quarters. He must have been armed by then, because as soon as the deceased emerged from their living quarters, he struck him with an iron bar in the face, around the head and all over the body. The injuries sustained in that assault are captured in the post mortem report. Those injuries are concentrated around the head and the face. Despite having been so severely injured, the deceased apparently walked away, but he collapsed and died some six days afterwards in Mutare.

The accused's defence is that he was so drunk that he does not remember what happened. However, in our assessment, this defence is false as demonstrated by the following facts.

(a) The first person to find the deceased, who was then in distress, Willard Mwasvipa testified that when he found the injured deceased, he approached the accused at their living quarters. He observed upon arrival that their quarters was door was locked from inside. He called out for the accused. There was no response. Eventually, the accused came out. When the accused emerged from their room, the witness noticed that the accused had blood stains all over his clothes.

(b) When he asked the accused what had happened to the deceased, the accused explained to the witness that he had assaulted the deceased who had done a stupid thing. Clearly, the accused knew what had taken place.

(c) When the accused was invited to make a statement to the Police soon afterwards, he explained that he had used an iron bar to assault the deceased in the face. He gave the reason for such an assault. He explained to Police that, the deceased had snatched his girlfriend from him.

(d) His statement, which is Exhibit 3 given on 20 December2016 was given a month after the event. In it, he spells out what is clearly consistent with the injuries found in the Post Mortem examination.

(e) In Court he gave the clear impression that he was unaware as to what might have happened to the deceased, even suggesting that Mwasvipa himself may have had a hand in the crime.

(f) In his defence outline, he admitted that he had caused the death of the deceased, but claimed that he was so intoxicated that he could not have formulated an intention to kill.

The accused was clearly a hopelessly unreliable witness for his case. Even his defence counsel, *Mrs Mandingwa* had a torrid time leading him in-chief. It was clear that the accused was prevaricating from one version to another. Consequently, Mrs Mandingwa submitted in closing that because of the gaps in the evidence, an appropriate charge and verdict ought to have been culpable homicide.

In order for us to determine whether the State has proved a charge of murder beyond a reasonable doubt, the Court is enjoined to assess the evidence placed before it and decide that issue bearing in mind that in criminal proceedings the onus always lies on the State to prove its case beyond a reasonable doubt. The facts show that the accused and he deceased went out together for a drink. The same facts also show that they quarreled over the affections of a woman who the accused claimed was his. The deceased left the beer drink earlier than the accused and went home to their living quarters. The accused later followed and called the deceased out of the living quarters. He unleashed a most vicious and brutal attack using an iron bar around the head and the face. The result was a mobile skull fracture on the supra orbital area and a raptured left eyeball and several lacerations and other head injuries.

Unfortunately, there was no eye witness to this assault. Despite the fact that in the defence outline, it is stated that the accused did not hide the murder weapon, that weapon was not produced

in Court. Although the accused described the weapon to Police and maintained that that the Police took possession of it, the iron bar was not produced in court. It would appear that it is the police who might have misplaced this Exhibit.

The Doctor described the injuries as severe and that a lot of force would have been used or required in order to crack the human skull and inflict the nature of the injuries that she described in the post mortem report. There is no doubt in our mind that the assault on the deceased was both brutal, vicious and unrelenting. Even in the absence of the weapon used, it is clear that, whatever description the iron bar fitted, it was used with fatal effects.

The accused's defence is one of intoxication. By s 221 of the Criminal Law Codification and Reform Act, [*Chapter 9:23*] where a person is charged with a crime requiring proof of intention, knowledge or realization of a real risk or possibility, was voluntary or involuntary intoxicated when he or she committed the crime, but the effect of such intoxication was not such that he lacked he requisite intention or knowledge or realization, such intoxication shall not be a defence to the crime.

In our view, although the accused had consumed intoxicating liquor, he was not so drunk as to have failed to appreciate his actions or the consequences of such actions. To illustrate this, when he picked up a quarrel with the deceased at Konaguru they did not fight at that stage. According to him he dozed off. His nephew, the deceased left the scene. He got up and went home. One would have reasonably expected that the nap that he took and the walk home would have reduced his level of intoxication. This explains why he neither got lost on his way home, nor stumbled and fell onto the ground along the way, as a result of such intoxication (as one would expect of someone who was motherless drunk).

When he got home, he armed himself with a lethal weapon in form of an iron bar and called out his nephew to come out. In our view, whilst his nephew believed that the quarrel over the woman was over, for the accused it was not yet over. We find that in his jealous rage, the accused decided to end the issue once and for all, by inflicting the worst possible injuries on his nephew for what he had done or for a perceived misconduct.

In such a frame of mind, clearly the accused realized the real risk involved in striking several blows to the face and head using an iron bar, but despite that realization, he persisted with that conduct. Although he may not have intended the death of his nephew as a direct consequence

of his conduct, but if the death was to occur it was a risk that he clearly was prepared to take when he pummeled the dead nephew who had just awakened from slumber. In our view, the gaps in the evidence are not such that there is any doubt as to what the accused's intention ultimately was. The gaps exist in the proposed defence in that there was no independent evidence of the extent of his drunkenness. The is no evidence as to the actual quantities consumed by both the accused or the deceased, or what effect generally, the consumption of those quantities would be on an average person. There was no suggestion that the accused had been involuntarily intoxicated when he attacked the deceased. As I said, voluntary intoxication is governed by the requirements set out in s 221 of the Act.

The accused voluntarily took certain amounts of liquor, the defence of intoxication cannot be founded on the evidence of his say so, his amnesia and so on, more would have been required for this Court to rely on that as a full defence on a charge of murder. (s 220)

In the result, we reject the claim that the gaps in the State's case were such that, in light of the claim of intoxication, a proper verdict ought to have been one of Culpable Homicide. We find that the State has proved that the accused committed the crime charged beyond a reasonable doubt and he is consequently found guilty of murder as defined in s 47 (1) (b) of the Criminal Law Codification and Reform Act.

S E N T E N C E

In assessing sentence I take into account what your Counsel has submitted on your behalf in mitigation. And it is the best that anyone could have said on your behalf in the circumstances. The few factors that I find mitigatory include the fact that you are a first offender and that you are aged 24 years. More importantly, your family has paid in part the compensation demanded by the deceased's family for the loss of their breadwinner.

But as I said, there is nothing more one could have said in your favour because this crime lacks rhyme or reason for it. From the evidence that was led in Court, it would appear that your nephew had looked after you and you were his assistant at your work-place and you stayed together. He was a much older person than yourself. You owed him some respect, although he was your nephew.

But on the contrary you, for no apparent reason, decided to batter him to his death. It was a most brutal and painful death for the deceased. And as the prosecutor said, no amount of compensation will ever replace him both to his family and to the Community at large. Throughout this trial you have not displayed the contrition that you ought to have, since you do not deny killing your nephew.

Society abhors such conduct as it would lead to unnecessary loss of life, especially the sort of brutality that you displayed in this case. We learn from the Doctor that there was a mobile skull fracture which means that the bones were literally loose or loosened from the impact of the blows that you perpetrated on the deceased. He had not died immediately, but some days later. What it means is that, before his death, he had suffered or endured pain and suffering all because of your conduct.

Intoxication can never justify such conduct and to our mind, it cannot be taken as mitigatory, actually it must aggravate the circumstances of this case.

In light of the above, you are sentenced to **20 years imprisonment.**

National Prosecuting Authority, legal practitioners for the State
Mhungu & Associates, legal practitioners for the accused