

THE STATE

VS

JULIUS DABETI

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 1, 2, & 15 NOVEMBER 2018.

ASSESSORS:

1. Mr Dauramanzi
2. Mr Mutomba

Criminal Trial

Ms M. Mutumhe for the State

J. Maweni for the Accused

MAWADZE J: The accused who is facing a charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] offered a limited plea to the lesser charge of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. The state declined to accept the limited plea.

The charge is that on 15 May, 2017 at Down Town bar, Mashingaidze business centre, Zaka, Masvingo the accused unlawfully and with the intent to kill stabbed Peter Chinyaka once on the right leg and once on the collar bone causing his death.

Both the accused and the now deceased were well known to each other. It is common cause that on 15 May, 2017 the accused and the 30-year-old now deceased were among beer patrons enjoying themselves drinking beer, dancing to music and watching TV in Downtown

bar at Mashingaidze business centre in Zaka, Masvingo. The state case is that when the accused entered the bar he pulled out an okapi knife and went on to challenge other beer patrons in the bar waving the knife. It is alleged the now deceased felt offended and took up the challenge. The now deceased is said to have proceeded to kick the accused who fell down.

It is the state case that as the accused lay down he stabbed the now deceased on the right leg above the ankle after which he stood up and fled from the bar still armed with the knife. The now deceased is said to have chased after the accused out of the bar. The state alleges the accused then stabbed the now deceased with the okapi knife on the collar bone outside the bar after which he fled from the scene. The now deceased is said to have returned to the bar bleeding where he collapsed and died.

In his defence outline the accused said he started to drink beer at the business centre at 1600 hrs on that fateful day. The accused said he partook a cocktail of opaque beer called “scuds” which he mixed with a lethal brew called “chimusoja” with a very high alcohol content and also black label. The accused said when he was in Downtown bar the now deceased pestered him asking for beer but the accused replied that he no longer had any money to buy the beer for the now deceased. The accused said around 2100 hrs the now deceased assaulted him causing him to fall down. The accused said he stabbed the now deceased on the leg and fled from the bar. The accused said he later realised that he too had been injured on his leg but he has no recollection of how he got injured or at what stage. The accused said he was shocked to be arrested in relation to the now deceased’s death. The accused puts into issue all the evidence incriminating him.

It was indeed an arduous task to try and appreciate the accused’s defence throughout this trial. Was the accused denying stabbing the now deceased at all? If so why then was he offering a limited plea of the charge of culpable homicide. Is the accused alleging he only stabbed the now deceased on the leg and not on the collar bone? Again the accused seems to say that he was so intoxicated to such an extent that he has no recollection of how the now deceased was fatally injured. This would probably entail that allegation that the intention to kill was vitiated due to the high degree of intoxication. These are the issues we grappled with in this case.

The evidence of the accused can be summarised as follows;

The accused said from about 1600 hrs he spent \$14.00 drinking the opaque beer, the lethal brew called “chimusoja” and black label when this incident happened. He said when he went into Downtown bar he found the now deceased drinking beer with one Francis

Magweregwede. The accused said when the now deceased asked him to buy beer for the now deceased he told him that he no longer had money but the now deceased would not accept that. The accused said as a result the now deceased attacked him. He explained how the attack took place.

The accused said the now deceased followed him and slapped him in the face. The accused said he was carrying a knife which he had intended to use to skin a beast for the beef committee that day but the said beast was however not slaughtered. The accused said he pulled out the knife from his pocket. He said the now deceased kicked him on the head causing him to fall. The accused said he was kicked as he lay down trying to get up. He said when he managed to get up he fled from the bar. From that stage he said he has no recollection of what transpired. Besides this altercation the accused said he had no previous issues with the now deceased.

Under cross examination the accused's evidence became muddled up further. The accused denied waiving the said knife at all in the bar. He however admitted stabbing the now deceased on the leg. The accused insisted he had no recollection of what transpired as he was excessively drunk. He even disowned his confirmed warned and cautioned statement in which he admitted to have stabbed the now deceased twice, once on the leg and once on the shoulder. He now seemed to allege that these words were put in his mouth by the police.

In support of its case the state led evidence from Passmore Mhaka, Peter Mubaiwa, Raymond Mamvura and Dr Zimbwa whose evidence was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*].

The state led *viva voce* evidence from Jonisias Chiringa the proprietor of Downtown bar, Francis Magweregwede the now deceased's drinking mate and the Investigating Officer Sgt. Mbonisi Kaweni.

A total of 3 Exhibits were produced by consent being Exhibit 1 the post mortem report; Exhibit 2 accused's confirmed warned and cautioned statement, Exhibit 3(a) the okapi knife and Exhibit 3(b) being the certificate of weight relating to the okapi knife.

As per Exhibit 3(b) the okapi knife weights 0.055 kg. its length is 24 cm and the blade is 11 cm. Indeed, an okapi knife is a lethal weapon if used to attack another person especially in relation to the vulnerable part of the human anatomy.

The cause of the now deceased's death is not in dispute. As per Exhibit 1 the post mortem report the Doctor noted the following injuries;

- “1. Deep stab wound in right supravicular fossa, reaches apex of right lung, lung is puncture (air expels on chest compression), \pm 4cm wide, smooth straight edges.
2. Deep laceration right tibia area \pm 7 cm (to bone level)”

The cause of death is stated as haemorrhagic shock arising from stab wounds. The narrow question we have to answer therefore is whether the accused inflicted the fatal injuries.

We first deal with the evidence admitted in terms of Criminal Procedure and Evidence Act [*Cap 9:07*].

Dr Zimbwa

Dr Zimbwa carried out the post mortem of the now deceased and authored Exhibit 1.

Raymond Mamvura

He is a police officer based at Zaka police station and was the one who attended the scene. He found the now deceased already dead lying on the floor with stab wounds on right ankle and right collar bone. He is the detail who arrested the accused and observed that the accused had a wound on his right leg. He then recovered the okapi knife Exhibit 3(a) after which he witnessed the recording of accused's confirmed warned and cautioned statement.

Peter Mubaiwa

Peter Mubaiwa is a local teacher at Mashingaidze Primary School near the business centre where this incident happened and was known to both the accused the now deceased. He was telephoned at night on 15 May 2017 and asked to rush to Downtown bar in order to ferry the now deceased to hospital in his vehicle. As he was about to leave for the business centre the accused passed by limping and he offered to also take him to hospital but the accused refused. He drove to Downtown bar and found the now deceased already dead.

Passmore Mhaka

He was one of the beer patrons inside Downtown bar. He said at around 2130 hrs he saw the accused holding an Okapi knife. Exhibit 3(a) shouting that he would kill anyone who dared to provoke the accused. Moments later he saw both the accused and the now deceased in a scuffle and the accused fell down but still holding the knife. He said the now deceased tried to kick the accused's hand holding the knife but missed and he saw the accused getting up and running out of the bar with the now deceased chasing after him. He said within seconds the now deceased returned to the bar with his T/shirt soaked in blood. He saw that the now deceased had a deep cut on the right collar bone. He then observed the deceased seating near the counter where he collapsed and died.

We now turn to *viva voce* evidence;

Jonisias Chiringa (Chiringa)

Chiringa is the proprietor of Downtown bar and both accused and the now deceased were local beer patrons who frequented his bar.

He said on 15 May 2017 he arrived at the bar at 20.00 hours where he started to sell beer. He saw both the accused and the now deceased in his bar.

Chiringa said the now deceased approached him requesting for a song by Allen Chimbetu called "Dear Rosy". The now deceased was in a very jovial mood saying he wanted to dance and enjoy that song. He said as the now deceased was dancing to the song Chiringa went to the toilet out of the bar. Upon his return the song had finished playing. The now deceased was standing by the counter looking sad. Chiringa said he asked the now deceased if he could repeat that song or play other songs. The now deceased then said he was worried as accused was waving a knife threatening the now deceased saying he did not care about the now deceased's big stature because accused was capable of killing the now deceased like a chicken.

Chiringa said the now deceased reacted by kicking the accused who fell down still holding the knife. He said the now deceased tried to step on the accused's hand holding the knife but the accused moved the hand. As a result, he said the now deceased proceeded to kick the accused. The accused then stood up fleeing. At that point Chiringa said the now deceased held his thigh as he had been stabbed but still ran after the accused who went out of the bar. He said seconds later the now deceased returned to the bar injured on the collar bone with blood flowing down up to now deceased's shoes. He said that the now deceased said the accused had stabbed him and that he was dying. Chiringa said the now deceased's last words were that the accused's family would be haunted by an avenging spirit.

Chiringa said the now deceased failed to stand and sat down breathing heavily. Realising the gravity of the situation Chiringa ran out of the bar to find transport to ferry the now deceased to hospital. A local teacher one Mubaiwa answered his call saying he had seen the accused limping. Chiringa said upon his return to the bar he found the now deceased dead.

Chiringa said the now deceased was not drunk. Instead he said the accused was moderately drunk as he was not staggering and was able to fend off the now deceased's blows as the now deceased kicked him about three times. Further he said the accused was able to flee running from the now deceased. Chiringa said the now deceased was heavily built and was regarded as a giant whereas the accused was of a small stature. Chiringa said he was very much

familiar with both the now deceased and accused's state of sobriety or degree of intoxication as his regular patrons.

Francis Magweregwe (Francis).

Francis was drinking beer with the now deceased when this incident happened. He said the accused was moderately drunk as he could properly dance to music, walk properly and later on fled from the now deceased without staggering.

Francis said when accused and the now deceased conversed, Francis was seated on a bench some 5m away watching television. He said suddenly the accused fled from the now deceased as the accused had a knife. Francis said he tried to intervene but other patrons told him that the accused had a knife. He said he saw the accused lying down but could not tell what caused him to fall. He said the accused then stabbed the now deceased on the leg after which the accused stood up and fled out of the bar. The now deceased chased after him.

Francis said he tried to follow the two but met the now deceased by the door of the bar. The now deceased had been severely injured with his T/shirt soaked in blood. He said the now deceased had an upper chest injury. According to Francis the now deceased said he was dying and that his avenging spirit would forever haunt the accused's family. Thereafter, the now deceased collapsed and died and he saw a deep wound on right leg and on chest. Francis said the report the now deceased made was that he had been stabbed by the accused at the veranda of Downtown bar, he was dying and that his avenging spirit would haunt the accused's family.

Sergeant Mbonisi Kaweni (Sgt Kaweni)

In our view nothing turns on the evidence of Sergeant Kaweni the investigating officer as his testimony is more of formal evidence. He is the one who recorded the accused's confirmed warned and cautioned statement and caused the accused and witnesses to make indications. He confirmed the accused had an injury on his thigh possibly caused by a knife and that accused could have injured himself as he allegedly waived the knife in the bar more so as the now deceased did not have a knife and never dispossessed the accused of the knife. He said the accused himself could not say how he was injured.

The evidence of the state witnesses was largely uncontested at all.

In order to answer the question as to how the now deceased was fatally injured or precisely as to who fatally injured the now deceased one can simply say *reps ipsa loquitor*. (the facts speak for themselves).

The accused's own confirmed warned and cautioned statement answers this question. This is what the accused said;

".....I stabbed Peter Chinyaka with an Okapi knife once on his leg and once on his shoulder after he slapped me with open hands on my face kicking me several times on the stomach and throttling me as he was taking me outside the bar. He was assaulting me because I had denied him beer (sic) I was drinking. When I stabbed him, I then fled and after I had run for an estimated distance of 300m I discovered that I was bleeding on my left thigh. I do not know what injured me."

It is clearly foolhardy for the accused to now try to allege that he did not stab the now deceased fatally on the collar bone. Despite the obvious half-truth and lies in his statement that he was throttled accused is clear in that statement that he is the one who stabbed the now deceased in the chest. This version find favour with the evidence of the state witnesses to the effect that as soon as the now deceased ran after the accused out of the bar, the now deceased returned within seconds injured after which he immediately collapsed and died. The only inference one can make is that he had been fatally stabbed by the accused who had bolted out of the bar wielding the okapi knife.

The evidence of both Chiringa and Francis to a great extent relate to a dying declaration. The now deceased stated that he had been fatally stabbed by the accused and that he was dying. His only solace was that his avenging spirit would haunt the accused's family. In terms of s 254 of the Criminal Procedure and Evidence Act, [Cap 9:07] a dying declaration made by any deceased upon the apprehension of death shall be admissible. The learned author John Reid Rowland in Criminal Procedure in Zimbabwe 1997 Edition discusses what constitutes a dying declaration at page 18 - 21 – 22.

The learned author states that the requirements for the admissibility of a dying declaration are as follows;

- (a) the person who made the statement must be dead at the time of the trial. Indeed, the now deceased is no more.
- (b) the trial must be for the murder or culpable homicide of the dead person. This is the charge accused is facing, the charge of murder
- (c) the statement must relate to the cause of the death of the declarant's death. *In casu* the now deceased was clear he had ben fatally stabbed and was dying

- (d) at the time the statement is made the declarant must have been dangerously ill and have been without hope of recovery. In our case the now deceased was virtually on his death bed. He stated that he was dying hence reference to his avenging spirit. He had no hope of survival. Indeed, he immediately collapsed and died
- (e) the declarant must have been a competent witness. The now deceased was indeed a competent witness
- (f) it matters not that the statement was made orally. The now deceased told both Chiringa and Francis that accused had stabbed him and that as a result he was dying. That evidence is indeed admissible.

Lastly, in terms of s 221(i) of the Criminal Law Codification and Reform Act [*Cap 9:23*] the accused dismally failed to show that his degree of intoxication vitiated the requisite *mens rea* to commit the offence of murder. From the evidence before us it is untruthful that the accused did not appreciate what he was doing or the events of that day, never mind the falsehoods in his confirmed warned and cautioned statement. To illustrate this point accused had a clear recollection of the following as per his own evidence;

- (i) the time he arrived at the business centre at 1600 hrs
- (ii) the type of beer he consumed, “scuds”, “chimusoja”, and black label
- (iii) the exact amount of money he spent on the beer - \$14 and the change he remained with which is \$1.00
- (iv) the exact manner he was attacked by the now deceased, that he was slapped in the face, kicked in the head and how he fell down and kicked in the stomach
- (v) that he stabbed the now deceased on the leg how he got up and ran out of the bar
- (vi) that he met a local teacher Peter Mubaiwa who offered to take him to hospital and that he refused
- (vii) that he realised he was bleeding from his leg after running for about 300 m

The only time the accused pleads amnesia relates to how the now deceased was stabbed on the collar bone! No reasonable court can believe such evidence. Both Chiringa and Francis explained why they believed the accused was moderately drunk. Indeed, this explains how he managed to outpace the now deceased who was virtually sober. For those reasons we dismiss accused’s evidence that he was hopelessly drunk to such an extent that *mens rea* would be vitiated.

Our finding is that it is the accused who stabbed the now deceased with the okapi knife on the collar bone. The degree of force used was severe in that the knife damaged the lung. The intention was to cause death nothing else. The now deceased died immediately.

In the result the accused is found guilty of contravening s 47(1)(a) of the Criminal Law (Codification and Reform) Act, [Cap 9:23] which relates to murder with actual intent.

VERDICT

Guilty of contravening section 47(1)(a) of the Criminal Law (Codification and Reform) Act, [Cap 9:23] – murder with actual intent.

SENTENCE

It is really disheartening that serious offences like murder are being committed by fairly young persons who are the future of the country. The mind boggles why such young people want to spend the bigger part of their lives within the four walls of prison. This is another matter where a life was needlessly lost.

We shall endeavour to balance the mitigatory and aggravating factors of this case.

The accused is fairly young at 26 years of age and is still single although he has a 3-year-old child. As a single parent this child looks at the accused for support and guidance. However, accused will now have to outsource the upbringing of this child to other people.

We have noted that the accused is of no means as he is unemployed without any savings nor assets. The two cattle and \$500 paid to the now deceased's family as compensation was most probably sourced from other family members. We nonetheless acknowledge such a valuable gesture although it means nothing compared to the loss of precious life.

The accused deserve some measure of leniency as this is his first brush with the law. It is unfortunate that he started on the deep end and is likely to drown. Since his arrest the accused has been in custody and he has suffered from pre-trial incarceration of about one and half years. We appreciate the agony and anxiety the accused went through awaiting the finalisation of this case. The accused shall forever live with the stigma that his has human blood on his hands. This is further worsened by the threats of an avenging spirit made by the now deceased before he breathed his last. In our African culture the fear of an avenging spirit is indeed a reality which would not only torment the accused but also his close family members.

There are indeed mitigatory factors surrounding the commission of this offence.

It is a fact that the accused was intoxicated and this may explain his foolish behaviour of provoking other beer patrons for no apparent reason. We really wonder why accused found it prudent to take a knife to the bar, let alone to waive such a knife threatening other merry makers.

The now deceased cannot be said to be an angel either. Had the now deceased controlled his temper and acted with restraint this tragedy might have been avoided. Indeed, the now deceased was an aggressor. It is the now deceased who first assaulted the accused. This was despite the fact that the accused was armed with a knife and drunk. Even after the accused fell down the now deceased kicked him several times forcing the accused to stab the now deceased on the leg. The now deceased was unperturbed at all. Even after the now deceased had been injured on the leg and the accused had fled out of the bar the now deceased nonetheless chased after him. This was despite the fact that the accused was still armed with a knife. Indeed, the now deceased was to some extent unnecessarily aggressive and reckless in how he handled himself. It was foolhardy for him to pursue accused who had not only injured him but was armed with a knife.

This court has said time without number that cases of murder are increasingly prevalent in Masvingo province. The rate of which young persons resort to use of dangerous weapons like knives or axes at the slightest opportunity is a serious cause of concern. This calls for deterrent and exemplary sentences.

The sanctity of human life cannot be overemphasised. As already said there was no real dispute between the accused and the now deceased. Places like bars are there for entertainment and merry making not slaughter houses. We are amazed that the accused was not remorseful at all and was unwilling to shed light on how the now deceased was fatally stabbed. The accused's conduct deserve censure.

In the result, the accused is sentenced as follows;

“16 years imprisonment”