

THE STATE

And

STARBOY MASAVE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
GWERU 4 AND 6 FEBRUARY 2013

Mr S. Pedzisayi for the state

Mrs L. Mavhondo for the accused

Criminal Trial

MAKONESE J: The accused is facing a charge of murder. He was 20 years old at the time of the commission of the offence. The allegation against the accused is that on the 16th day of November 2005 and at village Sabwela, Chief Simuchembo in the District of Gokwe North, the accused did unlawfully and with intent to kill stab Markson Mafuwa a male adult aged 20 years at the time he met his death.

The accused person tendered a plea of Not Guilty on the murder charge and tendered a limited plea of guilty to culpable homicide.

The State did not accept the limited plea and accordingly we proceeded with a trial. The State commenced proceedings by tendering into evidence, a Summary of the State Case marked Exhibit one. The State sought and obtained formal admissions in terms of section 314 of the Criminal procedure and Evidence Act [Chapter 9:07], and the evidence of the following witnesses as reflected in the summary of the State case was accordingly admitted: Thanda Sabwela, George Mufuwa, Ellison Sabwela, Temson Siamtenge, Kembule Gondwe, Justice Tsoka and Constable Matavire.

The summary of the defence case was then tendered into evidence as Exhibit two. I will repeat the accused's defence outline which is as follows:

- “1. *The accused will say that he is aged twenty eight years, married with two minor children. At the time he committed the offence in 2005 he was 20 years old.*”

- (2) *The accused will say that on 16th November 2005 he was at his homestead thatching the roof of his hut when later in the day around 3pm he decided to go for a beer drink where deceased and his brothers were selling beer under a tree. Accused arrived and joined deceased's brothers Sikini and George and started drinking with them.*
- (3) *After sometime it was Accused's turn to buy beer and he gave deceased ten thousand Zimbabwean dollars (old currency) for a beer mug going for four thousand dollars. The deceased told him that he no change of six thousand dollars. He told the deceased to come back later to collect his change.*
- (4) *The Accused left and joined deceased's brothers and continued drinking beer with them. After sometime he went back to the deceased to ask for his change whereupon deceased replied rudely that he had already given him his change. Accused was shocked but initially he thought the deceased was joking. Later he realized that deceased was really bent on not giving him money. He got angry and told the deceased that he wanted his change whereupon the deceased continued to insist that he had given him.*
- (5) *The Accused told the deceased that he could verify the issue about change with his brothers George Mafuwa and Sikini who were at the drum when he bought the beer. The deceased then violently pushed the Accused who nearly fell. The deceased struck Accused with a big stirring stick on the arm. Accused retaliated punching the deceased on the face.*
- (6) *The deceased's brothers Sikini and Bernard also joined and started assaulting Accused.*
- (7) *Accused then moved a distance from the deceased and his brothers and he felt something piercing his arm. He remembered that he had a knife in his pocket which he was using when he was thatching the roof. He saw Bernard and the deceased coming for him with Bernard holding the stick and he thought that was going to be the end of him. He went for the deceased who was a short distance from him and stabbed him in the abdomen whereupon he fell down.*
- (8) *He walked away towards his house afraid that if he remained there deceased's brothers would kill him. He proceeded to Zhomba Police where he handed himself to the Police.*
- (9) *The Accused will say he later paid six beasts to the deceased's family as compensation to appease his spirit.*
- (10) *The Accused will not plead guilty to murder as he had no intention to kill the deceased. He merely acted in self defence after extreme provocation from deceased and his brothers. He will also say the alcohol he consumed in excess caused him to act on the spur of a moment."*

The next Exhibit 3 was produced with the consent of both State and defence counsel. This is the accused's confirmed warned and cautioned statement dated 21st day March 2010. It is not entirely clear why the statement was recorded almost 3 months after the

murder. The contents of the accused's warned and cautioned statement are these:

"I have understood the caution and I do admit to the allegations levelled against me. I assaulted Markson Mufuwa with a knife which resulted in his death after Markson Mufuwa started assaulting me when I had asked him my (sic) change of money which I had given him after buying beer from him. That is all. I wish to say in connection with the case."

Exhibit 4 is the knife. It weighs 0.098kg, length is 23cm. The length of blade is 13.5cm. It's width at the widest point is 3cm. The knife is sharpened on both ends and it appears to be a home made knife.

The State then produced an Affidavit sworn to by one Wilfred Binha dated 11th August 2011. This affidavit was marked Exhibit 5. The affidavit reads as follows:

- "1. I am a duly attested member in the Zimbabwe Republic Police currently situated at Mzilikazi Police station and attached at Mpilo Central Hospital Post. My duties include charge office manning, post mortem identification, investigation and issuing out post mortem reports.
- (2) I do not know the accused in connection with this case.
- (3) I did not know the now deceased Mackson Mafuwa during his lifetime.
- (4) On the 11th day of August 2011 during the tour of my duty, I was approached by constable Mutazu of Nembudzia Police Station inquiring whether there was post mortem report in respect of Mackson Mafuwa.
- (5) With his assistance, I went through all the records for the period 01 June 2004 to 29 April 2010 but could not find the post mortem report. There is even no such a name in the post mortem registers.
- (6) I would like to mention that records in the Mpilo post mortem registers do not show that the post mortem was ever done in respect of the deceased.
- (7) I make the above statement solemnly and conscientiously believing the same to be true
(signed)"

The State led viva voce evidence from two witnesses. The first to testify was Bernard Siamtenge. The evidence of the witness which was not substantially controverted by the defence is that on the day in question around 1200 hours, the accused was drinking traditional brew (popularly known as seven days), at Siabwela village with other villagers and the deceased was the cashier selling the beer. A misunderstanding arose between the accused and the deceased after the accused demanded his change of Z\$6000-00, which both defence and State Counsel agreed to be the equivalent of US\$6-00. The accused had bought a mug of beer for

Z\$4000-00 which is now the equivalent of US\$4-00. It is not disputed that the accused was refusing to give accused any money, arguing that he had already given accused his change. There is no dispute that all the patrons including deceased and the accused were intoxicated. Their levels of intoxication ranged from moderate to extreme but there can be no exactitude on the degree of intoxication of either the deceased or the accused or even the patrons and the witness himself. The facts presented before the court are that drinking had commenced from around 11am in the morning. The witness confirmed that the misunderstanding between the deceased and the accused degenerated into a fist fight. The deceased landed several blows on the accused's face with the deceased fighting back. There is no dispute that the accused overpowered the deceased. The point of departure however, is that Bernard Siamtengwe says that accused landed a blow on the deceased's lower jaw (mandible) which sent him crushing to the ground and leaving him unconscious. The witness says he tried to collect water to pour it upon the body of the deceased and when he returned he observed the accused who had now walked to a distance of about 12 metres away producing a knife (Exhibit 4) and plunging the knife into the deceased's rib case with fatal consequences and accused then fled from the scene.

We find the evidence of this witness to be fair and credible. There were no indications of any exaggeration in any respects and there were no material contradictions even under cross-examination.

The evidence of Sikini Mapiwa was substantially similar to that of the first witness in all material aspects. In spite of criticism by the defence counsel that the evidence of this witness was somehow suspect, his evidence is consistent with matters that are essentially common cause. The fact that he saw the accused stabbing the deceased is not denied even by the accused himself. The facts that the wound inflicted upon the person resulted in the death of the deceased is also common cause. We generally found the evidence of Sikini to corroborate the fact that accused inflicted one stab wound upon the right side of the deceased's chest. He also observed the deceased withdrawing the knife from the deceased's chest before fleeing the crime scene.

The defence called the accused to give evidence. His evidence supports the version of events as narrated by State witness in material respects. We find that there can be no dispute that there was a misunderstanding that led to a fight. The accused says that he was under attack from deceased, Sikini and Bernard. He says that he was being attacked by a stirring stick. He says that he only remembered that he had a knife when he felt something in his back pocket. He says the reason he used the knife was to enable him to escape. He says that he stabbed the deceased in the rib cage whilst the deceased was standing. He admitted that he had to pull out the knife from deceased's body. He said he walked away from the scene. He denied that he fled the scene of crime.

Our finding from the evidence led is that the accused must have felled the deceased to the ground by landing a fist to his lower jaw (the mandible). He then proceeded to strike the deceased in the chest cavity with a high degree of force with Exhibit 4. The single stab wound resulted in the death of the deceased. In spite of the absence of the Post mortem Report we are satisfied the stab wound led to his death. The evidence presented in court showed that the deceased died of his way to hospital. Exhibit 4, the knife which was tendered in court is a sharp double edged knife. The length of its blade is 13.5cm. It is self evidence that if the blade was plunged into the rib cage it would most certainly cause death. As alluded to by the State Counsel, the court can still return a verdict of guilty to murder in the absence of a Post Mortem Report.

See case of *S v Shoniwa* 1987 (1) ZLR 215. In this case the court upheld a conviction on a murder charge in spite of the fact that no body had been found.

In *casu*, there is sufficient evidence to show that deceased was stabbed by the accused and that he later died as a result of that single stab wound. The Post Mortem Report would no doubt have assisted in laying out the nature of injuries and spelling out the cause of death. The evidence of the State witnesses and accepted by the accused person is that he caused the death of the deceased.

The issue that remains for determination is whether the accused had an actual or constructive intention to kill.

It is trite that the issue of intention is subjective. The law is well spelt out at page 110 of Prof Feltoe's, Guide to Criminal Law in Zimbabwe, that is;

(a) Actual Intention

Where accused desired death and death is his aim and object,

(b) death is not the aim and object but accused continues to engage in an activity which he realises will almost certainly lead to death.

See also the case of *S v Mugwanda SC 19/02*.

This court finds that the accused person assaulted the deceased who fell to the ground rendering him unconscious. Accused walked away for a distance of about 12 metres. At that stage he was under no imminent threat from the deceased because deceased was on the ground unconscious. Accused had ample time to observe this and he confirmed in his own words that he had overpowered the deceased. Accused then returned to where the deceased was lying prostrate with his face upwards and his chest exposed and thrust the knife into the rib cage. His intention and desire at that stage was clearly to finish off the deceased. He intended to achieve the death of the deceased and he succeeded.

The defence of self defence is not available to the accused person if one has regard to the provisions of section 253(1) of the Criminal Law Codification and Reform Act [Chapter 9:23]. It provides as follows:

- "1. Subject to that Part, the fact that a person accused of a crime of murder was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if:
- (a) when he or she did or omitted to do the thing, he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent, and
 - (b) he or she believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack and;
 - (c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances and; --- etc."

On the facts of this case the circumstances clearly show that the victim had been rendered unconscious. There was no imminent danger. The accused could have easily escaped without using the knife. Death could have been avoided.

The state of drunkenness of the accused was not such that he could not appreciate the consequences of his conduct. By his own admission, accused remembered most of the events in their logical sequence. He was not hopelessly drunk and knew exactly what he was doing at the critical time.

We are accordingly satisfied that on the evidence led the State has proved beyond reasonable doubt that the accused had the requisite *mens rea* to cause death. Accused is found guilty of murder with actual intent.

Extenuation

We found that there existed extenuating circumstances.

Sentence: 20 years imprisonment with labour

*Criminal Division, Attorney General's Office, State's legal practitioners
Mvura-Mavhondo and partners, accused's legal practitioners*