HB 39-17
HC (CRB) 6-9-17
XREF HC MZILIKAZI CR 29-06-07

THE STATE
versus
DUKE NDLOVU
and
LIONEL BARKE
and
LWAZILWENKOSI NDLOVU
and
ROCHIE KOLTA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 7 FEBRUARY 2017

Criminal Trial

T Hove for the state
J Mhlanga for the 1st accused
Ms S Munherendi for the 2nd accused
Ms P Mvundla for the 3rd accused
Ms V Chikomo for the 4th accused

MATHONSI J: The accused persons are jointly charged with murder in contravention of s47 (1) of the Criminal Law Code [Chapter 9:23] it being alleged that on 1 June 2007 at No 33 Aloe Crescent Thorngrove Bulawayo they each or one or more of them wrongfully, unlawfully and intentionally killed Raymond Kasawaya, a male adult, who at the time of his death was aged 32.

All the accused persons have pleaded not guilty to the charge but accused 2, 3 and 4 have tendered a limited plea of guilty to the lessor offence of assault. The state has accepted the limited pleas of the three accused persons. Following its acceptance of the limited plea of accused two, three, and four, the state applied for a separation of trials in order to proceed to trial in respect of only accused one and to proceed on agreed facts in respect of the former which application we granted.

According to the statement of agreed facts filed of record, accused two was aged 21, accused three, 18 and accused four aged 28 at the time of the commission of the offence. They

were at a shebeen located at No 33 Aloe Crescent Thorngrove Bulawayo together with the deceased on the night in question and were all drinking alcohol. The owner of the place, Catherine Souza approached accused one, two and three whilst they were sitting and drinking in the verandah complaining that the deceased was refusing to pay for the beer he had consumed.

Accused one, two and three confronted the deceased who was in the kitchen and several patrons also followed them to the kitchen. Soon the confrontation translated into a fist fight which was joined by accused four and other patrons. Accused two slapped the deceased with open hands on the face. Accused three assaulted the deceased with fists while accused four slapped the deceased three times on the face with open hands.

Unbeknown to accused two, three and four, accused one used a knife to stab the deceased once in the abdomen which conduct the three accused persons dissociated themselves from. In fact accused four assisted the deceased accompanying him to his place of residence together with the deceased's girlfriend Ntando Moyo and two others. The deceased later died on as a result of a stab wound on the abdomen, perforation of the bowl and peritonitis, that is an inflammation of the walls of the abdominal cavity.

To the extent that it was unknown to the three accused persons that Duke Ndlovu was armed and that he had, in the melee, used a knife to stab the deceased on the abdomen, and to the extent that the deceased died as a result of that stab wound and nothing else, we are of the view that the concession by the state has been properly made. There is no way the conduct of Duke Ndlovu could be imputed on the three and they cannot be said to be either co-perpetrators, accomplices or accessories in the stabbing.

Accordingly, accused two, three and four are hereby found not guilty of murder but guilty of assault.

<u>Reasons for sentence</u>

In considering an appropriate sentence we have taken into account the following personal circumstances of the three accused persons. At the time of the offence Lionel Barke was aged 21. He is now aged 31 because there has been a delay of 10 years in bringing the accused persons to trial. Since then accused one has managed to father two children, one of whom is 2

years old and another who is 7 months old, although he is not married. He is unemployed and survives on odd jobs.

Accused three was 18 years old at the time but is now the father of an 8 year old girl who is in his custody. He is self-employed as a construction worker. He had to relocate from his home to live in Luveve for a period of 4 years as the locals blamed him for the killing of the deceased.

Accused four was 28 years at the time and is now 38 years old, married with three children. He survives on catering and is now the chairperson of the residence association. While the conduct of accused two and three could be down to immaturity or youthfulness, accused four was a mature person who was expected to have exercised self-restraint and to behave sensibly in the circumstances. To his credit though, he was able to show contrition by assisting the deceased and escorting him to his home after the assault.

We accept that the assault took place at a shebeen when all the accused persons had consumed alcohol which could have blurred their sense of judgment. But the consumption of alcohol should not be used as an excuse for violent behaviour. There was no reason whatsoever for assaulting the deceased the way they did merely because a shebeen queen had said so. We also accept that there has been a 10 year delay in bringing the matter to court thereby subjecting the accused persons to trauma.

The accused persons subjected the deceased to a gang attack which was dangerous indeed. In fact they created a confused situation which enabled someone to use a knife to stab the deceased unnoticed. Young people should desist from frequenting shebeens and taking large amounts of alcohol which numb their senses thereby leaving them vulnerable to the machinations of illegal operators like shebeen queens who would readily incite them to commit offences on their behalf.

Taking into account all the relevant facts, the three accused persons are sentenced as follows:

Each accused person shall pay a fine of $400-00 or in default of payment 6 months imprisonment. In addition each accused person is sentenced to 6 months imprisonment which is wholly suspended for 3 years on condition they do not during that period commit any offence

involving violence for which upon conviction they are sentenced to imprisonment without the option of a fine.

Accused two is given up to close of business on 21 February 2017 to pay the fine of $400-00 imposed.

In respect of accused one, he was originally jointly charged with three other people of murder in contravention of s47 (1) of the Criminal Law Code [Chapter 9:23] it being alleged that on 1 June 2007 at 33 Aloe Crescent, Thorngrove, Bulawayo they unlawfully and intentionally killed Raymond Kasawaya, a male adult who was aged 32 at the time.

Following the state's acceptance of the limited plea of the other accused persons, namely Lionel Barke, Lwazilwenkosi Ndlovu and Rochie Kolta the state applied for a separation of trials in order to try the present accused person separately. We granted the application and as such the accused one was subjected to a full trial on his own. He pleaded not guilty to the charge of murder and stated in his defence outline that he was 29 years at the material time and not 39 as alleged by the state. He knew the deceased as they resided in the same neighbourhood and there was no bad blood between them. On the fateful night he was at the shebeen drinking beer with his friends Lewis Granger, David Adams and Lionel. In fact he had been drinking alcohol of varying types ranging from clear beer, to whiskey and all the way to opaque beer nonstop for a couple of days.

As they were drinking the shebeen operator came out of the house to advise them that the deceased was refusing to pay for beer he had consumed. He says himself and other patrons decided to get inside the house to investigate only for him to discover that the person who had been refusing to pay was someone that he knew. When he advised the deceased to settle his bill, the deceased informed him that he did not have money. He suggested to the deceased that he should surrender his tennis shoes as a pledge for the settlement of the bill the following day.

The deceased did not take kindly to that advice and insulted the accused before assaulting him several times with open hands on the head. During the ensuing scuffle and propelled by drunkenness the accused one says he picked up a kitchen knife from the sink which he used to stab the deceased in the stomach. He did not intend to kill the deceased but it is drunkenness which made him lose control of his mental faculties and to act in the manner that he did.

If the deceased had received proper medical care, he would have survived the attack. The accused then urged the court to find him not guilty of murder but guilty of the lessor charge of assault.

The accused's warned and cautioned statement given to the police in response to the charge of murder on 4 June 2007 which was confirmed by a magistrate at Bulawayo on 23 January 2008 was produced by the state as an exhibit. In that statement he stated the following:

> "I do admit the charge of stabbing the now deceased. I was drinking beer at that house which is a shebeen. I was in the company of my friends Lewis Granger, David Adams and Lionel when the shebeen operator told us that the now deceased was refusing to pay for the beer which he had drank. We entered the kitchen and approached the deceased in the company of Lewis. Other drinkers followed in and then we told the accused to pay for the beer. He refused to pay and a quarrel between us and the now deceased ensued. The quarrel resulted in some pushing and shoving. I then picked up a knife from the sink which I used to stab the now deceased once on the stomach. After stabbing him I threw the knife back into the sink and told Mr Souza the husband of the shebeen operator to open the door for me. I went out and left other people still in the kitchen assaulting the deceased. I was later joined by my friends Lewis, David and Lionel and we went to David's place where we drank beer till late."

Of course while the accused and his friends were continuing with their beer drinking until late the deceased was writhing in agony and battling for his life while nursing the mortal wound inflicted by none other than the accused one himself. He later died at Mpilo Hospital on 3 June 2007 where he had been admitted the following day on 2 June 2007 as his condition deteriorated.

The post mortem report compiled by Dr I Jekenya, a medical doctor based at Mpilo Hospital was produced in terms of s278 (2) (a) of the Criminal Procedure and Evidence Act [Chapter 9:07]. That section provides:

> "In any criminal proceedings in which it is relevant to prove any fact ascertained by a medical practitioner in any examination carried out by him which is proper to the duties of a medical practitioner, a document purporting to be an affidavit relating to any such examination or treatment and purporting to have been made by a person who in that affidavit states that he is or was a medical practitioner and in the performance of his duties in that capacity he carried out such examination and ascertained such fact in such examination or administered such treatment, and, in either case, arrived at such opinion, if any, stated therein shall, on its mere production in those proceedings by any person, but subject to subsections (11) and (12), be *prima facie* proof of the facts and of any opinion so stated."

Subsection (11) of s278 requires three days' notice to be given to the other side by any party desiring to produce a medical affidavit. Subsection (12) gives the court the discretion either *mero motu* or at the instance of a party to the proceedings to cause the doctor who made the affidavit in question to give oral evidence in the proceedings in relation to any statement contained in the affidavit or to cause written interrogatories to be submitted to that doctor for reply.

Mr *Mhlanga* who appeared for the accused did not complain of short notice in breach of subsection (11). Therefore that provision does not arise in this matter. Upon production of the post mortem report in terms of s278 (2) (a) Mr *Mhlanga* only stated that he required the doctor to be called to come and explain certain issues contained in the post mortem report which he did not explain. I have cited s278 (2) (a) verbatim above to make the point that the post mortem report which is in the form of an affidavit is, on its mere production, *prima facie* proof of the findings of the doctor. The court has to rely on it to that extent.

While this court has a discretion to cause the doctor to be called, it can only exercise that discretion in favour of calling the witness where it is satisfied that there is need for the doctor to explain certain facts in the affidavit. Where what the defence would like explained is not disclosed but stored in the mind of the defence, and where the request for the doctor to be called is only made belatedly during the trial, the court cannot exercise its discretion in favour of the defence.

In any event, it should be appreciated that the nature of the accused's defence is to call into question the treatment that the deceased received after the stabbing. In his view if the deceased had received proper treatment during his lifetime, he would not have died. In other words, he died due to poor medical care, ante-mortem and not post-mortem. The medical evidence which the state produced relates to the examination, observations and conclusions of the doctor post mortem. It contains the observations of what caused his death and not the treatment that the deceased received before he died. In our view, the statement of the doctor is not relevant to the accused person's defence.

According to Dr I Jekenya the only mark of violence that he observed in the deceased was a 2cm stab wound in the left lower side of the abdomen. He also observed a 1cm stab wound of the sigmoid colon. He also remarked:

> "Severe force was used. Peritonitis is generalized infection of the abdominal cavity and surface of the abdominal organs. This was caused by stabbing and also leakage of the faecal matter from the stabbed sigmoid colon."

He concluded that the cause of death was peritonitis, bowel perforation and stabbed abdomen. Be that as it may, and happily indeed, the state decided to call Dr Jekenya. His evidence confirms the view that we have already expressed that he only investigated the cause of death in the post mortem report. Although he had access to medical records showing that the deceased was receiving treatment before he died, if anyone wanted to impugn the medical care that the deceased received they have to question the doctors who treated the deceased and not himself.

Significantly, whether or not the deceased was taken to hospital immediately after the stabbing nothing changes because peritonitis is caused by bacteria and treated with antibiotics. It so happens at times that the organisms may resist treatment leading to death regardless of the timing.

The state also called three other witnesses namely Benjamin Shurto, Ntando Moyo and Esten Jeff Millin. While it is appreciated that it has been almost 10 years since the events that the witnesses testified about occurred and as such the lapse of such a lengthy period of time has tended to negatively impact on their recollection of the events it is difficult to rule out collusion on the part of Benjamin Shurto and Esten Jeff Millin. Both confirmed that they know the accused very well as they grew up with him. It is apparent from the evidence that they are drinking buddies and as such highly possible that their inability to recall the events and apparent departure from the original statements given to the police was by design.

Whatever the case, both of them confirmed that the deceased had an argument with the shebeen operator in the kitchen. Thereafter he was subjected to a gang attack by several people during which attack he sustained injuries and was bleeding. Both Shurto and Millin say they

witnessed the commotion from the comfort of the lounge at the shebeen and their vision was affected by the crowd of assailants who surrounded the deceased as they beat him up.

Millin added that the accused person had been present at the scene. He last saw him by the veranda but he did not see when and how he left the shebeen. He added that he is the one who had intervened trying to stop the crowd from assaulting the deceased but did not do a good job of it.

What is significant though is that the state evidence places the accused at the scene where the deceased was being assaulted during which assault he was stabbed in the abdomen as a result of which he subsequently died. Ntando Moyo added that during the argument that ensued between the deceased and the shebeen operator the latter had vowed that the deceased would not be allowed to leave the place without paying. She had also made it clear that she was not the type to be messed around with as she exited the house to gather her storm troopers to assault the deceased. After a short while, Ntando Moyo says, the shebeen operator unleashed them upon the deceased.

Millin confirms that the accused was seated by the veranda with the group that was mobilized by the operator to deal with the deceased for daring to refuse to pay for his beer. There can be no doubt therefore that he is one of those that responded to the call to deal with the deceased. It is a fact that none of the witnesses witnessed the stabbing of the deceased given the commotion and the stampede by a group of people to join the assault of the deceased which made it impossible for anyone to see the actions of the stabber. The state case to that extent hinges on circumstantial evidence.

The law governing the use of circumstantial evidence is settled in this jurisdiction. The guiding principle is that circumstantial evidence depends upon facts which are proved by direct evidence from which the court is required to draw inferences. It is often said that means, motive and opportunity are examples of circumstantial evidence. Where it is shown that the accused had the means, a motive and the opportunity the court will be persuaded that the accused is guilty. It therefore raises a *prima facie* case against the accused for him to answer.

It is crucial though to point out that where the conviction of the accused is dependent upon circumstantial evidence, the inference sought to be drawn must be consistent with the

proved facts and the facts should be such that they exclude every reasonable inference from them except that which is sought to be drawn. See *S* v *Edwards* 1949 SR 30; *S* v *Vhera* 2003 (1) ZLR 668 (H) 679 C – G; *S* v *Gwebu* HB 124/16.

To the extent that it has been shown that the accused was among the group of people that was summoned by the shebeen operator to deal with the deceased for refusing to pay for beer, he had the motive and opportunity to stab the deceased. Therefore a *prima facie* case has been established for him to answer.

That then brings us to the accused person's defence. We have stated that in his defence outline he admits having stabbed the deceased using a kitchen knife which was in the sink. He attributes his conduct to two things; firstly provocation by the deceased who insulted and assaulted him and secondly, drunkenness. There is also the accused's warned and cautioned statement which he made three days after the incident when the events of that night were still fresh in is mind.

In that statement the accused makes it clear that it was himself and Lewis that got to the deceased first before other drinkers joined in. He says when there was pushing and shoving after the deceased refused to pay, he picked a knife and stabbed him before asking Mr Souza to let him out. This explains why all the other witnesses, including his co-accused who joined in the beating did not witness the stabbing. He had already stabbed the deceased and left the fracas when the other people joined in and started beating the deceased. The beating witnessed by the witnesses came after the deceased had already been stabbed as explained by the accused in his evidence.

The accused's warned and cautioned statement is also significant for another reason. In that statement the accused makes no mention whatsoever of the deceased insulting him or even assaulting him. He also makes no mention of being propelled by drunkenness to stab the deceased. Therefore the alleged insults and assault by the deceased are a most recent fabrication informed by a desperate desire to justify the senseless and inexcusable stabbing of a person who was not only unarmed but hopelessly outnumbered and cornered by a superior force in the kitchen that was locked.

The nature of the accused's defence is three fold namely provocation, intoxication and poor medical care breaking the casual link. In respect of provocation, I have already said that it appears to be an afterthought because if indeed the deceased had insulted and slapped him, the accused would have been quick to mention that fact when he was called upon to make a statement to the police on 4 June 2007. He did not.

In any event, it is the policy of our law to encourage people to use self-restraint and to deter people from causing harm to others when they are provoked. If the law were to allow any type of provocation to justify violent action there would be anarchy. For that reason Zimbabwean law applies a twofold approach to provocation. The first stage is to apply the normal subjective test to decide whether there was intention to kill. If there was intention the court should proceed to the second stage which was lucidly formulated in *S* v *Nangani* 1982 (1) ZLR 150 (S) as: Was the provocation such as would reasonably be regarded as sufficient ground for loss of self-control that made the accused act against the deceased the way he did? If the answer to that question is in the affirmative then the accused must be found guilty of culpable homicide. See G. Feltoe, A Guide to the *Criminal Law in Zimbabwe*, LRF at pp29-30.

In our view, a person who uses a kitchen knife to inflict a 2cm wound into the abdomen of a human being should intend to kill that person. There can really be no reasonable argument against that finding. It therefore requires us to proceed to the second stage of the inquiry. It cannot reasonably be said that the refusal or failure of the deceased to pay for his beer could have provoked the accused and caused him to lose self-control. He had no pecuniary interest in the transaction and could not have been angry on behalf of the shebeen operator.

That then leaves the alleged assault and insult by the deceased. In considering that, we are mindful of the fact that the alleged assault and insult are mentioned for the first time in the defence outline when the accused had an earlier opportunity to relate to them but did not. Even then, he had an opportunity in his defence outline to give the particulars of the insult but did not electing to leave it vague. When he testified at the trial, it was after probing questions by the court that he alleged that the deceased had used vulgar language and insulted him by his mother's private parts. Even then, he does not say that it was the assault or the insult that caused

him to pick up the knife. He says he did so initially to scare the deceased and force him to pay but because of drunkenness he found himself stabbing him.

If indeed the deceased had assaulted the accused as alleged, it would have been the first thing to come to his mind when he gave a statement to the police.

In our view, even assuming that the deceased had directed such words to the accused he could not be said to have lost self-control. We conclude therefore that provocation is a defence which is not available to the accused in this matter.

Regarding voluntary intoxicating G Feltoe, I bid at p22 observes that in specific intent crimes like murder, where it is established that the accused person voluntarily consumed alcohol to the extent of losing self-control or inhibitions, that defence will only reduce murder to culpable homicide. The court must therefore explore carefully the actual effect upon the accused of the consumption of liquor.

In our view, upon being invited by Souza to come to her rescue, the accused was the first to arrive. He says that he even made the reasonable suggestion that the deceased should surrender his takkies as security for the debt. He then used severe force, as observed by the doctor, to inflict a stab wound. After that he had the presence of mind to request Mr Souza to open the door and let him leave. After he left he says he continued drinking with his friends until late.

In our view this is not conduct consistent with a person who was motherless with alcohol as not to formulate an intention. Although he had consumed alcohol, it did not remove his ability to discern what he was doing. Even after the stabbing he had a clear mind and was able to abscond. He had the presence of mind to go drinking until late with his friends. Therefore alcohol does not come into it and cannot help the accused in this matter.

Finally, the accused has suggested that it is lack of proper medical care which led to the demise of the deceased. The law on that subject is succinctly stated by G Feltoe, I bid, at p103 where he says:

> "Where a person murderously attacks another and inflicts injuries that require medical treatment, the courts are very reluctant to find that subsequent medical negligence or failure by the victim to follow medical advice constitutes a break in the causal chain. This is especially so where the wounds originally were serious. However, if the initial

> injury was trival and there is grave medical negligence or stupid failure to follow medical advice on the part of the victim, then the chain of causation may be broken. See *S* v *Mubila* 1956 (1) SA 31 (S); *S* v *Rahman*; S-178-82, *S* v *Runokonda* S -27-85."

The injury which the accused inflicted was serious. He used severe force to perforate the deceased's colon releasing faecal matter in the abdomen and 1,5 litres of blood. In addition, as expected, the accused has not pointed to any shred of evidence suggesting medical negligence or that the deceased did not follow any advice in that regard. That the deceased did not go to hospital until the following morning cannot, even remotely, equate to medical negligence or failure to follow advice. It is within human experience that a victim would not know of the seriousness of his condition until he feels irresistible pain. Only then can he go to hospital. In any event, this is a person who did not even realize he had been stabbed, at least from Ntando Moyo's evidence. We therefore reject that defence as well.

When the accused stabbed the deceased the way he did he realized that there was a real risk or possibility of death ensuing. He however continued with his conduct notwithstanding that risk or possibility.

Accordingly the accused is hereby found guilty of murder with constructive intent.

Reasons for sentence

In assessing sentence we take into account the following mitigating circumstances; The accused is a first offender. He was 29 years old at the time of the commission of the offence. He is now 39 years old. He had consumed large amounts of alcohol and became susceptible to being influenced by the shebeen operator to perform her hatchet job. We accept that he has a large extent been honest with the court thereby assisting in the attainment of justice.

There has been an inordinate delay in bringing the accused to trial, a period of 10 years which the state has not bothered to explain. This has meant that the matter has remained hanging over the accused's head for all this time which is a measure of punishment as it is traumatic on its own. This court will always knock off a certain portion of the sentence where the state has delayed in bringing accused persons to trial in order to encourage the state to expeditiously

prosecute matters. Therefore we will chop off 2 years from the sentence we had settled for in consideration of the delay.

However, this was a violent and senseless killing of a person who posed no threat whatsoever to the accused. We have here a situation where the accused consumed alcohol to excess and was then used by a dubious shebeen operator to prey on a defenceless patron. As a result, a life was needlessly lost at the hand of someone who showed no contrition whatsoever. After he had stabbed the deceased mercilessly he surreptiously left the place. Instead of rendering assistance he was only concerned about saving his own skin.

He exhibited coldness of unbelievable proportions when he went partying with his friends late into the night after inflicting what turned out to be a mortal wound on the deceased. This court has a duty to impose sentences that underscore the importance of human life and to send an accurate message to society that the use of violence in order to solve problems will not be tolerated.

Accordingly the accused is hereby sentenced to 15 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Masiye-Moyo and Associates, accused's legal practitioners