

THE STATE
Versus
LOVEMORE MUPATUTSA

HIGH COURT OF ZIMBABWE
MUZOFA J
CHINHOYI 3,7,16 March,19 May,16 June

Date of written judgment 30 August 2023

Criminal Trial

Assessors, 1. *Mrs Mawoneke*
 2. *Mr Manyangadze*

G. T. Dhamusi, for the State
T. D. Dzvore, for the accused

MUZOFA J [1] The accused was charged with murder together with his accomplice one Mike Mupatutsa who has since absconded. The State applied for a separation of trials and proceeded against the accused before the court. The allegations are that on the 5th of March 2022 at Kyle compound beerhall the accused and his accomplices assaulted the deceased one Carlos Antonio with wooden sticks, stones and a metal pipe leading to the deceased's death. The state tendered the summary of its case which was marked Annexure 'A'.

[2] The accused denied the charge. His defence was that the deceased fought with other patrons at the beerhall. He restrained the people that were fighting. He did not get involved in the brawl. The defence outline was produced and marked annexure 'B'

[3] It is common because that on the 5th of March 2022 the accused was at Kyle compound beerhall. The deceased was one of the patrons drinking beer on this night. It is also common cause that a serious fight broke out between two groups of patrons and the deceased identified with one of the groups. The deceased was assaulted and eventually died as a result of the injuries he sustained.

The State Case

[4] To prove its case the State produced by consent the following,

- i. A post mortem report by Doctor Madzinga who after examining the deceased concluded that death was due to intracranial bleeding (occipital epidural and subdural bleeds) secondary to blunt force trauma.
- ii. The warned and cautioned statement in which the accused's response to the allegations was recorded as follows,

‘I understood the caution, and I deny the allegations being levelled against me. I assaulted the now deceased who was in the company of his friend Cloud Bishopi who ran away after I had been struck with a stone on the forehead. All this happened whilst I was drunk and I had no intention to kill him.’
- iii. The sketch plan drawn from indications made by the accused and the witnesses, a stick measuring 1 metre and 80g in weight, 2 granite stones weighing 1260g and 880g respectively, 2 Okapi knives, a metal pipe measuring 112cm weighing 1340g and an affidavit sworn to by Coster Nhambura.

[5] The evidence by Suwisai Kunaka, Julias Mutepeya, Maxwell George Mudanwa, Coster Nhambura, Dr Mundete and Crispin Madzinga was accepted as summarised in the summary of the state case.

[6] Four witnesses gave oral evidence before the court. Cloud Bishopi was the first witness. The deceased was his neighbour and they lived in the same community with the accused person.

[7] On the fateful day he proceeded to the compound beerhall with the deceased. They played a snooker game while one Mike the accused's brother stood by watching. As they played the deceased asked Mike to move aside to make way for him to freely play the game. A misunderstanding ensued between the two.

[8] Mike then summoned his brother supposedly to assist. Without making any enquiries the accused slapped the deceased. The deceased ran out of the beerhall. The accused, Mike and Simon pursued him.

[9] Bishop followed them and caught up with them near Sebastian Chimpaka's residence where he found the accused sitting on the deceased assaulting him. He tried to intervene but he was threatened and he fled from the scene.

[10] Memory Marufu was asleep in her house. She heard some noise outside. She heard someone calling out for help. She heard Bishop's voice and the accused's voice. The accused was threatening someone. She then peeped through her window and saw them chasing each other.

[11] Eventually she woke her husband Sebastian and the two went out and stood by their veranda. She saw Simon, Mike and the accused assaulting the deceased. Simon picked an iron rod and gave it to someone who assaulted the deceased. They tied the deceased on one leg and dragged him for about 5m. She contacted some people to help and indeed some people came.

[12] Sebastian Chimpaka is Memory's husband. When his wife woke him up they went outside and stood by the veranda. He saw two people one was the accused's young brother. The accused then emerged from a different direction. They were chasing the deceased. When they caught up with him they assaulted him. Simon picked a metal rod. He did not observe what he did with it. They removed his belt and tied his leg and dragged the deceased for some distance. People had gathered. The police arrived and took the accused and his two brothers. He did not know how the altercation started.

[13] Kennias Sibanda was the investigating officer based at Mutorashanga Police. After receiving a report of the assault he proceeded to the scene. At the scene of crime he found the deceased who was injured lying down. The accused and his brother Mike were at the scene together with other people.

[14] He arrested the accused and Mike. The deceased's body was swollen and covered in blood. He recorded a statement from the accused. The statement and the exhibits already listed were produced through him.

[15] The State then closed its case.

The Defence Case

[16] The accused adopted his defence outline and opted to buttress it by oral evidence.

[17] He explained that he learnt that his brother was involved in a fight. He restrained the two groups that were fighting in the beerhall. When Sebastian arrived the fight had ceased. Sebastian did not see anything. He denied ever assaulting the deceased. However, he could not explain how the deceased was assaulted and who assaulted him.

[18] Under cross examination the accused indicated that Sebastian had a grudge with his parents that could have motivated him to falsely implicate him.

Legal and Factual Analysis

[19] The following issues were not in dispute, that there was a dispute between Mike Mupatutsa and the deceased, that Mike was the accused person's brother, that the deceased was assaulted following this dispute and that the accused, one Simon Muli and Mike were involved. The only issue for determination is the nature of the accused's involvement in the assault. It could be that he restrained the parties or he also assaulted the deceased.

[20] The issue depends on the credibility of the witnesses. The first witness Cloud was the deceased's friend and they were playing a game of snooker together. We have no doubt that this witness would invariably try to downplay what he and the deceased did and exaggerate what the accused and his accomplices do. This is a factor inherent in human nature.

[21] Although he said the altercation started in the Bar, it is apparent that there was a fight between two groups. On one side the witness and the deceased and on the other, Simon, Mike and the accused.

[22] We accept the said position because he said he followed the deceased when he was chased to some place near Sebastian's residence. He escaped to a nearby bush since he was threatened and watched the assault on the deceased from a garden. This evidence was not supported by Memory who said she saw Cloud at the scene as the accused and his accomplices chased the deceased. The probabilities are that Cloud was fighting in deceased's corner until they were over powered it is only then that he fled to the garden. There is no way that he could have simply followed the deceased to just watch the deceased being assaulted, he did not even call for help.

[23] The exaggeration per se does not discredit his evidence on the participation of the accused person. In his defence outline the accused said he intervened to stop the fight. He also said the deceased actually hit him with a stone during the altercation. He was a peacemaker.

[24] Three witnesses gave a description of what transpired near Sebastian's homestead. We were not told how far this homestead was from the Bar where the altercation

commenced. What we accept is that the altercation started in the Bar and the warring groups went outside. This explains why the accused said he was hit with a stone outside.

[25] The three State witnesses corroborated each other on salient issues about the assault. They indicated that it was dark but they could see what was taking place. The accused's legal practitioner insisted that there is no way the witnesses could have clearly seen what happened since it was dark. Their evidence must be dismissed in its totality.

[26] Unfortunately it is difficult to be persuaded as such, the witnesses' evidence was credible. They were clear that they could not see all the details. If they were malicious, they could have simply implicated the accused through and through. We believe them when they said Simon used a metal rod, the accused used a stick and they dragged the deceased using his belt.

[27] The court is required to assess the evidence in its totality. In making such an assessment the court has to consider the accused's explanation juxtaposed with the state evidence. The court must consider if the explanation is reasonable in the circumstances.

[28] The accused's version of what transpired can be gleaned from his warned and cautioned statement, his defence outline and evidence before the court. Where his version of events from these varies in material respect then the court can draw some adverse inferences.

[29] In his warned and cautioned statement the accused admitted assaulting the deceased. This means he was involved in the fight. He even said he was struck on the forehead.

[30] The contents of the statement was not challenged at all.

[31] In his defence outline he downplayed his role and indicated that he restrained the fighting parties. The deceased hit him with a stone on the forehead. Under cross examination although he tried to insist that he did not assault the deceased, he eventually relented and indicated that what he told the police was the truth of what transpired. It therefore means that the accused did assault the deceased and did not simply restrain those that were fighting.

[32] After considering the evidence from both the state witnesses and the accused we come to the following, that there was a dispute between the two groups. The accused although he was not initially involved, he joined to protect his brother Mike. Memory and Sebastian witnessed the accused assaulting the deceased together with Simon and Mike. By

intervening the accused associated himself under the doctrine of common purpose with Mike and Simon's cause.

[33] The doctrine of common purpose as codified under s196A of the Criminal Code provides,

'Liability of co-perpetrators

(1) If two or more persons are accused of committing a crime in association with each other and the State adduces evidence to show that each of them had the requisite *mens rea* to commit the crime, whether by virtue of having the intention to commit it or the knowledge that it would be committed, or the realisation of a real risk or possibility that a crime of the kind in question would be committed, then they may be convicted as co-perpetrators, in which event the conduct of the actual perpetrator (even if none of them is identified as the actual perpetrator) shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator'.

[34] In terms of subsection 2 of s196 A common purpose can be inferred if the accused's conduct in relation to the offence. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea; so, in respect of the killing of the deceased, he must have intended him to be killed, or he must have foreseen the possibility of him being killed and performed his own act of association with recklessness as to whether or not death was to ensue. See Whiting, 1968 SALJ at p39.

[35] The law ascribes liability where two more persons agree with a common purpose to commit an offence. In such cases the conduct of one is imputed to all. In *casu*, the accused did not agree with Simon and Mike to commit the offence at the inception but he later joined and identified with their intention to assault the deceased. He therefore actively associated himself with the commission of the offence. See *S v Madzokere & 7 Others HH523/16* .The accused was not only at the scene of crime but he actively participated in assaulting the

deceased. Memory heard the accused asking the deceased if he knew why he was being assaulted. We have no doubt that the accused fully associated himself with Simon and Mike's conduct later and assaulted the deceased.

[36] Memory and Sebastian graphically described how the deceased was assaulted. They initially used sticks, then Simon picked a metal rod and assaulted the deceased. They were not yet done with the defenceless deceased, they removed his belt and tied one of his legs and dragged him for some distance. It is now acceptable that intention can be inferred from the accused's conduct, the brutality of the assault, the nature of the weapon and the parts of the body targeted.

[37] When the accused assaulted the deceased, he acted with a common intention to seriously injure the deceased and he must have foreseen the possibility of him being killed and performed his own act of association with recklessness as to whether or not death was to ensue. The fact that the witnesses saw different degrees of assaults on the deceased some more serious than others and that the assaults were committed at different stages is irrelevant when one applies the doctrine of common purpose. In the circumstances, we are satisfied that the accused actively associated himself with the execution of the common purpose.

[38] As properly submitted by the State, in his warned and cautioned statement the accused raised the defence of voluntary intoxication. This is not a defence in cases of intention. It can be treated as mitigation. It cannot reduce a charge of murder to culpable homicide or result in an acquittal. However, the fact of intoxication which was not disputed means the accused was incapable of formulating an actual intention to kill the deceased.

[39] The State proved its case that the accused was both the factual and legal cause of the death of the deceased.

The accused is found guilty of murder with constructive intention in contravention of s47 (1) (b) of the Criminal Code.

Sentence

[40] In assessing the appropriate sentence the court considered that the accused is a first offender age 26 years and is a family man with responsibilities. He has been in custody for 6 months and has religiously attended court as opposed to his co accused persons who

absconded. He committed the offence while drunk. The law does not differentiate between excessively drunk or moderately drunk. Voluntary intoxication at whatever level is just mitigatory.

[41] In aggravation the court will take note that the accused committed a serious offence. He was indeed the eldest of these two groups that fought on the day, he must have prevailed to restrain the parties. The attack was senseless and brutal, to imagine that they had the audacity to tie the deceased on one leg and dragged him like a piece of wood is inhuman to say the least. The injuries that the deceased sustained testify to the callousness.

[42] The court was urged to temper justice with mercy. It was said mercy is a hallmark of civilised democracy and a sentence of 5 years was proposed by the accused's legal practitioner. We were referred to the case of *S v Shariwa* HB 37/03 on the approach to sentencing. This was a futile exercise, in that case the accused was convicted of stock theft, theft of one chicken. Surely to import sentiments from that case in a case of murder would be amiss. In sentencing an accused person, a court must always be guided first by the offence and the circumstances surrounding its commission. There can be no comparison between murder and stock theft of one chicken.

[43] In murder cases the sentence leans more to retribution than rehabilitative, thus a custodial sentence is always imposed except in special circumstances.

[44] This was an attack on the deceased by a group of three people. They used weapons and dragged him. In *S v Muzive* HB 215/15 the court sentenced the accused to 18 years where a group of people attacked the accused. The court in that case found weighty mitigatory factors which is not the case in casu. The only mitigatory factor is the intoxication.

Accordingly, the accused is sentenced as follows,

15 years imprisonment.

National Prosecuting Authority, the State's legal practitioners.

Mutsvairo and Associates, accused's pro deo legal practitioners.