

THE STATE

versus

CLEVER CHITATU

HIGH COURT OF ZIMBABWE

MUZOFA J

CHINHOYI, 2, 7, 27 March & 9 May 2023

Date of written judgement 17 May 2023

Assessors

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

Criminal Trial

P.A Gutu, for the State.

I Muchini, for the Accused.

MUZOFA J

[1] The accused person was charged with murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It was alleged that on the 21st of September 2021 and at an open space between Kuwadzana Phase 1 and Kuwadzana Phase 2 Banket, the accused assaulted the deceased one Fredmore Musonza by striking him with an unknown object on the head and clenched fists, intending to kill him or realising that there was a real risk that his conduct might cause his death. The state tendered the Outline of its case which was marked annexure A.

[2] The accused pleaded not guilty to the charge and raised the defence of self-defence. He said the deceased who was in the company of his friend attacked him and he pushed the

deceased who fell and he escaped from the two. The defence outline was tendered and it was marked annexure B.

The State Case

[3] In opening of the State case the prosecuting counsel with the consent of the defence produced the following documentary exhibits: post-mortem report marked exhibit 1; the accused's confirmed warned and cautioned statement marked exhibit 2 and the sketch plan marked exhibit 3.

[4] The evidence of three witnesses was admitted as summarised in the outline of the State case in terms of s 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (CP & E Act). The witnesses' evidence can be summarised as follows:

i. Nyasha Mazarura – She was the deceased's wife. The accused was their neighbour. She said on the 21st of September 2021 the deceased left home around 1500 hours and proceeded to while up time drinking beer at Kuwadzana Township. He did not return home. The following day she was advised by some people to check if she knew the body of a person seen lying at an open space between Kuwadzana Phase 1 and Kuwadzana Phase 2. She proceeded to the said place and identified the deceased as her husband. He had an open wound on his forehead and blood clots on both hands.

ii. Master Mhumha was a police officer who received the report and attended the scene. On arrival at the scene he secured the place. When officers from Criminal Investigations Department arrived he handed over the investigations to them.

iii. Joram Chirume was a mortuary attendant who received the deceased's body on the 23rd of September 2021 at Banket District Hospital. The body was certified dead by doctor Daniel Tiringe and a post mortem report was compiled.

[5] Six witnesses gave oral evidence before the court. Joel Chitsiko 'Joel' was the first witness. On the fateful day he was in the company of the deceased drinking beer at Kuwadzana Township. The accused was his friend .They lived in the same house. They drank beer at Speed Bar. They proceeded to the next drinking place known as DT Voltage Nite Club 'DT'. They did not purchase any beer from DT, they had their beer from Speed Bar. He parted ways with the accused at DT as he went with a lady friend of his. The next time he

saw the accused was the following day in the morning. They were supposed to dig a well together. The accused advised him that he could not dig the well since he hurt his hand when he fought with the deceased. The accused showed him the hand that had a visible laceration on the palm.

[6] Vitalis Urayayi 'Vitalis' was the second witness. He was the deceased's friend. He had a cordial relationship with the accused until the fateful day when he assaulted the deceased to death. He drank beer at Pakrawa Nite Club at Kuwadzana Township. He later followed the deceased at DT. He found the accused assaulting the deceased using clenched fists and open hands outside the club. The deceased rushed into DT for safety. The accused pursued the deceased into the night club and continued to assault him. As the accused assaulted the deceased the beer bottle he held broke and cut his palm. The accused started bleeding from the laceration. They were restrained.

[7] The deceased and the witness then decided to return home. Along the way the accused caught up with them. He called the deceased who turned to check who had called him. The accused held the deceased by the collar and pushed him. The deceased fell. The accused accosted the witness and slapped him once. He fled from the scene. He assumed that the deceased had also fled. The following day he decided to check on his friend, the deceased to inquire why the accused was so hell bent to assault him. To his horror he learnt that his friend had passed on. He proceeded to where his body was and noticed that the deceased was at the place where they were assaulted by the accused.

[8] Livingstone Nyamayedenga was the investigating officer based at Chinhoyi Criminal Investigation Department. He attended the scene of crime. He recorded statements from witnesses and the accused. Both the state witnesses and the accused person made indications which he used to draw a sketch plan that was produced before the court. His cross examination elicited inadmissible hearsay evidence. His evidence was just on what he did after the commission of the offence. He did not perceive how the deceased was assaulted.

[9] Stanley Gomo 'Stanley' was a disc jockey a DT. Inside the night club he occupied an elevated place, slightly higher than where the rest of the patrons were drinking beer and dancing. He could see what was taking place on the dance floor. He noticed that the accused was drinking clear beer in a bottle. He later saw the accused and the deceased fighting using

clenched fists. He did not see anyone using a bottle during the fight. He did not know who the aggressor was and did not know why they fought and how the fight started as he was busy playing music. The two were pushed out of the night club by security officers. He did not know what transpired outside.

[10] Luckson Nayuma was just a hopeless witness. Its either he decided not to give a full account of what he witnessed or he did not witness anything at all. In his evidence in chief he said he drank beer with the accused in DT. He heard that there were people fighting outside. When he went to check there was no one. He did not see the accused and the deceased fighting. The defence counsel referred him to his statement, he denied it and even said he did not sign the statement. In a nutshell his evidence was irrelevant there was no need for the State to call him.

[11] Doctor Tiringe was the last state witness. His testimony was to explain the medical terms used in the post mortem report. It was relevant to the extent that the evidence of how the deceased was assaulted must in a way relate to the injuries sustained by the deceased which eventually led to his death. According to the post mortem report death was due to subdural haematoma secondary to blunt trauma of the head. In simple language he said death was due to an accumulation of blood in the area surrounding the brain. The brain was under pressure. Ordinarily such injuries result from a blunt instrument. He was asked if falling on the ground can lead to such injuries. He confirmed that, but explained that could only happen after some force has been applied on the person like a push. The usual normal fall would not result in such injuries.

The state then closed its case

The Defence case

[12] In his defence the accused opted to give evidence. No other witness was called in support of his case. In his evidence in chief he said he was in DT Nite Club when he realised that his friend Joel had left unceremoniously he decided to find out. When he was by the entrance to exit he met someone who pushed him inside and assaulted him with a bottle. He was injured on his palm. He later realised that this person was the deceased. He slapped him and he fell. They where restrained. The deceased was taken out of the night club by some

patrons. The patrons later advised him that they had dealt with the deceased. After some time he left proceeding to his residence.

[13] Along the way at an open space he saw two people ahead of him. When they saw him they walked fast towards him. He confirmed that it was the deceased and Vitalis. The deceased tried to hit him with a fist, he ducked and slapped the deceased. He saw Vitalis approaching, he hit the deceased with a clenched fist. When Vitalis realised that his friend, the deceased had fallen he ran away. The accused also fled from the scene. He returned to the shops where he told some people what transpired. He later learnt of the deceased's death. Shaken by the news, he ran away to Banket Grain Marketing Board but later returned. Under cross examination he said he had taken one too many since he had been drinking from morning.

The defence then closed its case.

Factual and legal analysis

[14] In order for the State to prove its case, it must establish the accused's guilt beyond a reasonable doubt. This means that even the defences raised by the accused must be shown not to be applicable. In this case of murder there must be the *actus reus* accompanied by the requisite *mens rea*. It is settled that for a court to convict an accused of murder it must be satisfied that either the accused had the actual intention to cause the death of the deceased or that he reasonably foresaw that as a result of his conduct death was substantially certain and persisted with the conduct none the-less. See *S v Mugwanda* SC 19/202, *S v Milos Moyo* HB 85/2010 and *S v Chaitezvi and Ors* HH 63/10.

[15] From the evidence placed before us, some factors are common cause. It is common cause that both the accused and the deceased were drinking beer on this day. It is also common cause that that they knew each other and they were neighbours. They had an altercation in DT Voltage and were restrained. It is not in dispute that the accused assaulted the deceased leading to his death. What falls for determination is whether the accused assaulted the deceased in self-defence. In addition, the court has to consider intoxication and provocation which the defence counsel referred to in his closing submissions.

[16] Despite all the witnesses that the state called this matter turns on the evidence of a single witness, Vitalis. It is Vitalis' word against the accused's word. This is because after the

accused and the deceased fought at DT, the deceased did not sustain any visible injuries. The injuries were seen after the assault by the accused at this open space. A court can convict an accused on the single evidence of any competent and credible witness in terms of s269 of the CPEA. The court is required to make a judicious assessment of the witness' credibility. This is a factual finding that must be based on the facts placed before the court.

[17] Assessment of a witness' credibility has its own challenges to any court. The temptation is to dwell on the demeanour of the witness and how he or she responded to questions under cross examination. Infact assessment of credibility demands more than the court's observation of a witness' demeanour.

[18] Vitalis' evidence must be considered in its totality from the time he was in DT with the deceased. In assessing his credibility we are alive to the fact that both the accused and Vitalis would tend to exaggerate what the other did and minimise their role. In this case Vitalis would have a reason to minimise the role played by the deceased. For instance we do not accept that the deceased was assaulted both outside and inside DT as stated by Vitalis. Stanley who was in the night club saw the accused and the deceased fighting inside DT and they were taken outside the club. This version corroborates the accused's version of what transpired. Vitalis' version that the deceased was assaulted and he did not retaliate is highly improbable. We say so because the accused's version that the deceased was the aggressor was not controverted by any credible evidence. The probabilities are that the accused and the deceased fought.

[19] In his warned and cautioned statement the accused said at the night club the deceased was the aggressor. When he eventually met the deceased and Vitalis at the open space the deceased struck him with a clenched fist on the chest once he then assaulted the deceased with an open hand and punched him on the left side of his head. The deceased then fell down. The deceased cried out that he had been hurt. Vitalis then tried to attack the accused. The accused slapped Vitalis who immediately fled. The accused's version in his evidence in chief is slightly different. He said the deceased tried to hit him with a clenched fist and he ducked. He hit the deceased who then fell down. When Vitalis saw that his friend had fallen he fled. It seems the accused's evidence in chief confirmed Vitalis' evidence that Vitalis did not attack the accused.

[20] Since the deceased and the accused lived in the same neighbourhood we do not believe that any one of them waylaid the other. Each of them was just proceeding home and their meeting was fortuitous. This is confirmed by the fact that the accused had to confirm who he was dealing with by calling out the deceased by his child's name. We wondered why the accused would have wanted to confirm the identity of the persons walking on the road unless if he had some ulterior motives. We do not lose sight of the fact that the accused told the court that the deceased was the aggressor at DT. Taking into consideration the chain of events we believe the accused was the one who would be inclined to assault the deceased more than the deceased would. At the night club the deceased had assaulted the accused for no reason, the accused was cut on the hand by a beer bottle. When he met the deceased there is a high likelihood that he would want to retaliate. We therefore do not accept that the accused was attacked by the deceased and Vitalis. It is the accused who attacked the deceased. The accused therefore did not act in self-defence.

[21] In its closing submissions the State did not allude to the defence raised by the accused. It confined itself to the defence of intoxication only. According to the State the accused was intoxicated such that he was unable to formulate any intention. Obviously this was a laid back approach to the defence. The State did not properly address the law on this aspect. It is trite that in terms s221 of the Criminal Code intoxication is not a defence to crimes committed with requisite state of mind. Murder is one such crime which requires a specific intention. Intoxication is not a defence. It can only be considered in mitigation.

[22] In *Sv Sithole* HB 126/18 the court noted that, even if hypothetically voluntary intoxication can be a defence s222 of the Criminal code 'requires that a person charged with a crime requiring proof of intention, knowledge or the realization of a real risk or possibility as is the case with murder defined in section 47 (1) of the Code, who is proved to have been voluntarily intoxicated and the effect was such that the person lacked the requisite intention, knowledge or realization, be found guilty of voluntary intoxication leading to unlawful conduct instead of the crime originally charged. However when it comes to punishment, it is the same as if he or she had been found guilty of the crime originally charged'. Those sentiments are applicable in this case. Intoxication is of no moment in this case, it did not interfere with the accused's intention.

[23] Provocation was belatedly raised in the closing submissions by counsel for the accused. However the submission was not properly taken to its logical conclusion. We have already made a finding that the accused was not provoked or even attacked when he met the deceased and Vitalis by the open space. He could have been provoked in DT by the deceased. If this is the provocation that the defence relied on, it would not be applicable all the same. The accused was provoked by the deceased and they fought. They were restrained and each continued to mind their business. They later met after sometime. There was some cooling off period that it cannot be expected that the accused can argue that he was still labouring under the influence of the provocation. For provocation to succeed as a complete defence the accused must react immediately to the provocation and the provocation must be such that it caused the accused to lose self-control. Otherwise it can only be considered in mitigation. Provocation cannot save the accused in this matter.

[24] Both the State and the defence agreed in their closing submissions that the accused must be found guilty of culpable homicide. Although the defence believed the accused acted in self-defence, surprisingly it did not seek the acquittal of the accused. The State and the defence submitted that the accused was negligent by failing to assist the deceased who was calling out for help. By leaving the deceased out in the night the accused was negligent.

[25] We also come to the same conclusion that the accused lacked the requisite intention to cause the death of the deceased for different reasons from the State and the defence. The circumstances of the case show that the accused administered only one blow to the deceased. Unfortunately there was no information on the force exerted. The cause of death is said to be subdural haematoma secondary to blunt trauma. It is common cause that the accused fell. Dr Tiringe said the injuries were consistent with a fall when some force is applied on the person. So when the accused hit the deceased with a clenched fist that was enough force to lead to the fall. The deceased must have sustained the injury on impact with the ground. The circumstances are such the accused could not have had the actual intention to cause the death. Equally the accused may not have subjectively have foreseen that death may occur. The accused lacked both the actual and legal intention to cause death.

[26] The accused was negligent in his conduct. Accordingly, the accused is found not guilty of murder. He is found guilty of culpable homicide in contravention of s49 of the Criminal Code.

Sentence

[27] In coming up with the appropriate sentence the court considered both the mitigation and aggravation as submitted by both counsel.

[28] The accused is a youthful first offender aged 22 years old. At this age, he was still impressionable and his decisions still tainted with some immaturity. The deceased was the aggressor when they met at DT bar. No weapon was used. Although no amount of consolation can bring back life but it is highly mitigatory where the accused or any relative of his assists the deceased's family during the funeral or make some payments to the deceased's family. We were advised that the accused's family assisted during the funeral of the deceased. It shows contrition. That is all in mitigation.

[29] In aggravation the court will take into account that a life was lost. One appreciates the importance of one life when a person close to them dies. One life is too many to be lost especially under such circumstances where it could have been avoided. Once lost, life cannot be replaced. Despite that in this case the accused is being punished for being negligent in circumstances where a reasonable person could have avoided the demise of the deceased. The following sentence is appropriate in the circumstances.

5 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition the accused does not within that period commit an offence involving violence on the person of another for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

Kachere Legal Practitioners, the accused's *pro deo* legal practitioners

National Prosecuting Authority, the State's legal practitioners.