

STATE

versus

TRUST MUPOTO

HIGH COURT OF ZIMBABWE

**MUZOFA J**

CHINHOYI 12 September ,5 October,8 November 2022,16 January,1,13 February & 6  
March 2023

Assessors

1. *Mr Chivanda*
2. *Mrs Mawoneke*

### **Criminal Trial**

*TH Maromo* for the State  
*N Dlamini*, for the Accused

**MUZOFA J:** On the 24<sup>th</sup> of October 2020 and at Kenz Bar, Kenzamba the accused in the company of two other accomplices assaulted the deceased one Richard Makazhu with booted feet and clenched fists resulting in the death of the deceased. The two accomplices have since absconded, the accused is before us charged with murder in contravention of s47 (1) of the Criminal Law Codification and Reform Act (Chapter 9:23).

The accused denied the offence. Although he admitted having an altercation with the deceased on the day, he denied ever assaulting the deceased. He indicated that the deceased is the one who assaulted him.

#### The State Case

The State opened its case by producing the accused's confirmed warned cautioned statement. The accused's response to the charge was recorded as follows,

'I have understood the caution or the allegations being levelled against me. I do admit the charge that I assaulted and killed the deceased. On the day I was in a bar and I had a misunderstanding with the deceased because he owes me money. I then came out

from the bar grabbing the deceased. I then proceeded with him along Kenzamba – Obva road. I then assaulted him with clenched fists once on the head and he fell down. I further assaulted him with booted feet once on the face and once on the head. During that time Lovejoy Mavhunga and Peter Makorobodo arrived. Lovejoy Mavhunga started to assault the deceased with fists several times on the head. Peter Makorobodo then assaulted the deceased with empty bottle once on the face. That is all I can say on this case.’

A post mortem report was also produced by consent in terms of s 278 (3) and (11) of the Criminal Procedure and Evidence Act. Dr Martinez who examined the remains of the deceased concluded that death was due to hypovolemic shock, bladder haemorrhage and severe abdominal trauma. Two affidavits by medical officers who certified the deceased dead and the mortuary attendant were produced. The sketch plan was also produced by consent. The evidence of four witnesses William Bakarazi, Doctor Elisha Hove, Lancelot Nyagura and Doctor Martinez was formally admitted into the record of proceedings as summarized on the outline of the State case.

Five witnesses gave oral evidence. Arnold Makazhu ‘Arnold’ was the first witness. The deceased was his brother. He was at the bar in the company of his two brothers the deceased and one Brighton Makazhu. They were drinking beer. The deceased arrived and demanded that they must buy beer for him. He also demanded that the witness pay the money he owed him. An altercation arose between the two. The deceased was refrained by a policeman who was also in the bar who persuaded him to go home. The accused was drunk. He did not go home but remained in the bar. Shortly afterwards the accused demanded his money again. The witness was not comfortable with all this he decided to leave for his home. He did not witness how the deceased was murdered.

Brighton Makazhu ‘Brighton’ was the second state witness. He was in the bar with his two brothers the deceased and Arnold. When the accused had an altercation with Arnold he reported the accused to the police man who was in the bar. He said when Arnold left the bar he also went to another room to play a game of snooker. Later he was advised by one Clever Handiseni that the accused and the deceased left the bar going towards Obva Road. He asked Clever to accompany him to the road where the deceased and the accused went. As they walked along the road, at some point he saw the deceased lying face down. He called his name and there was no response. He returned to the bar where he advised a police officer one

Constable Rwanda. They secured transport to take the deceased to Kenzamba Clinic. He did not see how the deceased met his death.

Clever Handiseni was also at the bar on this day drinking beer with other patrons. He said the accused had an altercation with the deceased. The accused had a torn shirt but he did not know how it was torn. Both the accused and the deceased were drunk. He saw the deceased and the accused shoving each other. The deceased then struck the accused with a clenched fist on the head. They were refrained from fighting. Calm returned and the patrons continued drinking and dancing to the music. The deceased and the accused resumed their altercation. They agreed to fight. They went outside to fight. When they left the bar, the accused held the deceased by the left hand. The witness then went to advise Brighton about the intended fight. They followed the route taken by the deceased and the accused. About 300 to 400 metres from the bar they saw the deceased lying along the road. He was bleeding, eyes wide open and not blinking. They looked for help. The deceased was then taken to Kenzamba clinic. He too, did not witness how the deceased met his death.

The investigating officer Assistant Inspector Fungayi Levi gave evidence outlining how he conducted the investigations. He recorded a warned and statement from the accused person. The statement was made freely and voluntarily and it was duly confirmed. He also drew a sketch plan. Sergeant Mufanechiya was part of the investigation team. His evidence on the arrest and investigations corroborated Ass/Insp Levi's evidence. The last state witness was the Magistrate who confirmed the accused's warned and cautioned statement. The Magistrate outlined how the accused's statement was confirmed. The defence counsel did not even cross examine the witness.

The state then closed its case

#### The defence case

The accused gave evidence. He did not call any other witness. He adopted his defence outline. He had few additions that he was assaulted by Mufanechiya to admit to the charge. He also said he left the bar with Brighton, Arnold and the deceased.

#### Factual and legal analysis

This matter turns on circumstantial evidence. Both the State and the defence's legal representatives were in agreement that there is no direct evidence in this case. The court must

make a finding on the liability of the accused based on circumstantial evidence and the accused's statement.

The accused attempted to wriggle out of his confirmed warned and cautioned statement by alleging that he was assaulted by Sergeant Mufanechiya. The statement was confirmed before a Magistrate. There was no allegation that it was improperly confirmed. The Magistrate gave evidence and her evidence was not controverted. It is therefore admissible in court in terms of s256 (2) of the CP& EA subject to the accused showing on a balance of probabilities that he did not make the statement feely and voluntarily. See *Dube v S SC 62/14*. The accused did not show that the statement was vitiated by any undue influence. In his evidence he said when the statement was recorded at prisons he was not assaulted. He was poked in the eyes by Sergeant Mufanechiya on their way to the police station after his arrest. The officer who recorded the statement neither threatened nor assaulted him. He did not even allege that the poking by Sergeant Mufanechiya influenced him the give the statement. The accused failed to show that he did not make the statement freely and voluntarily.

The fact that a person has been murdered can be proved by circumstantial evidence even in the absence of direct evidence. Two cardinal rules must be satisfied before a court can draw an inference against the accused. These were set out in the celebrated case of *R v Blom 1939 AD 188* as follows:

1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct.

The rules have been embraced in our jurisdiction. The proper approach is to analyse the evidence and draw the inference from the evidence as a whole. The inference must not be drawn from individual pieces of evidence. See *S v Masawi & Another 1996 (2) ZRL 472 (SC)*. In *R v de Villiers, 1944AD 493, 508*, the court said, the test is not whether each proved fact excludes all other inferences, but whether the facts considered as a whole, did so.

The accused had and the deceased had an altercation in Kenz Bar. We accept Clever's evidence that the accused left the bar together with the deceased. The two had agreed to settle their differences by fighting. When they left the accused held the deceased. We accept that the deceased was to some extent the aggressor on this day. However, when they left the bar the accused was in control of the deceased, he intended to deal with him in whatever way he deemed fit.

We do not accept the accused's version of events that he left the bar fleeing from the deceased, Brighton and Arnold. This is because the uncontroverted evidence before the court was that Arnold left the bar well before the second altercation. His evidence was not disputed by the accused. It was also corroborated by Brighton. Secondly Brighton was actually advised by Clever that the accused had left with the deceased to fight somewhere. This was the reason he followed them together with Clever. If these witnesses intended to maliciously incriminate the accused, it was easy for them to have said they saw the accused assaulting the deceased. They were candid with the court that they found the deceased already lying helplessly by the road. We therefore accept that the accused was the last person with the deceased. Their companionship was to settle some scores through a fight. There's only one irresistible inference from these facts that the accused assaulted the deceased leading to his death. In *Mutsure v The State* SC62/21 the Supreme Court upheld a conviction based on circumstantial evidence where the appellant was the last person seen with the deceased and the deceased had shouted that the appellant had set her on fire. There was no direct evidence, but the court found the circumstantial evidence adequate.

The next issue is how the accused assaulted the deceased. This is provided in the accused's warned and cautioned statement. The accused said he assaulted the deceased with a clenched fist once on the mouth and he fell down. While he lay down, he kicked him once with a booted foot on the face and once on the head. Lovejoy and Peter joined to assault the deceased. These persons were supposed to be the accused's co accused. Lovejoy was arrested but later absconded. Peter was not located at all. The joining of these two does not absolve the accused person.

It was submitted for the accused that the facts of the matter do not allow for one inference to be drawn since there is a possibility that the other two could have administered the fatal blow. The submission was not borne out of any legal basis. If it is accepted that the three of them joined in common purpose to assault the deceased then the doctrine of common

purpose attaches liability. Burchell & Milton in Principles of Criminal Law 5<sup>th</sup> Ed at page 477 opine that

‘Where two or more people agree to commit a crime or actively associate in a joint unlawful, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their “common purpose” to commit the crime.’

The common purpose may arise from a prior agreement to commit the offence. However even if a prior agreement does not exist or is not proved liability will arise from an active association and participation in a common criminal design with the requisite blameworthy state of mind. Going by the accused’s evidence the three of them assaulted a lying helplessly on the road. He was not even retaliating. Death was reasonably foreseeable but they persisted in their conduct. The conduct of one is attributable to all of them. Death was reasonably foreseeable.

As correctly submitted by both counsel in their closing submissions the accused lacked the actual intention to cause the death of the deceased but realised the potential risk associated with his conduct but persisted. The accused’s intention can be inferred from a number of factors such as the weapon used, the number of blows, the part of body the blows are directed at as enunciated in *Sv Mtisi* HMT 28/21 referred by the State. In this case the accused together with his accomplices kicked deceased with booted feet on the head and all over the body. The head is a vulnerable part of the body and any force exerted on it poses a high risk to life. The post mortem report recorded a violent attack on the body of the deceased. The cause of death included bladder haemorrhage and severe abdominal trauma. These injuries were consistent with the assaults described by the accused.

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

#### Sentence

In assessing sentence, the court considered the submissions made by both counsel for the State and the defence. The accused is a fairly young first offender aged 25 years. He committed the offence when he was about 23 years. He has family responsibilities. He was drunk. He has been in custody for almost two years. Pre-trial incarceration is highly mitigatory.

Section 50(6) of the Constitution requires that an accused be tried within a reasonable time. One year 10 months cannot be said to be a reasonable time. The court was urged to pass a sentence in the region of 10 to 12 years by the defence counsel.

The State conceded that the lengthy pre-trial incarceration must be considered in mitigation. However, it submitted that murder is a serious offence and stiff sentences must be passed. The accused was the engineer of the altercation he kept on asking for his money. The issue could have been dealt with while sober. In any event life was lost and can never be replaced due to a minor issue. A sentence of 13 years was proposed.

In coming up with a proper sentence the court should consider the triad, the person, the offence and the interest of the public. The court must also reflect on the form of the sentence to impose. It could be rehabilitative, retributory or restorative. Deterrence generally cuts across these forms of sentences. In murder cases almost invariably, the sentence must have a measure of retribution. Murder is a serious offence. A non-custodial sentence is inconceivable.

The accused decided to seek vengeance against the deceased outside the bar. He literally dragged him out of the bar. His behaviour was very patronising. Violence has no place in a civilised society. Disputes must, as far as possible be resolved amicably. The appropriate sentence would have been in the region of 15 years but for the pre-trial incarceration the sentence would be reduced.

The accused is sentenced as follows.

12 years imprisonment.

*Legal Aid Directorate, Accused Legal Practitioners.*

*National Prosecuting Authority, Respondents Legal Practitioners.*