

THE STATE
versus
INNOCENT BOB

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
CHINHOYI, 16 November 2023 to 26 January 2024.

Assessors: *Mr. Manyangadze*
Mr. Kamanga

Criminal Trial

T. H. Maromo, for the State
M. Burukai, for the Accused

BACHI MZAWAZI J: Innocent Bob had a fist fight with the deceased Isaac Tsingano in a night club on the night of the 9th of June 2022. Issac Tsingano later died on the 11th of July 2022 at Sally Mugabe Central Hospital. The cause of death as per the autopsy report, admitted into evidence as exhibit 2, was tripartite. It was stated as brain damage, brain abscess and head trauma. As a result, accused was arrested and charged with the murder of the deceased in terms of s47 (1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

The brief non-contentious narrative of facts is that, the deceased and his colleagues Panashe Sabore and Gerald Shumba and another were drinking beer at a bar. The accused arrived in the company of Tafadzwa Bhuka. Panashe Sabore is the first State witness and a close relative of the deceased, whilst the other two were mere friends. It is not in dispute that Tafadzwa Bhuka complained about the malfunctioning snooker token he had purchased from Joel Josh Mayuni, the bar tender at the behest of the accused. A trading of insults then ensued between the two culminating into a fist fight.

At some stage both the deceased and the accused ceased to be spectators of the show and got involved in the fight. The intensity of the initial exchange of blows then translocated to the newcomers who then engaged in a fierce battle with the deceased having an upper hand. It is alleged that both opponents ended on the floor with the deceased on top of the accused pummeling him with blows. This is the moment where the accused is said to have reached out for a full beer bottle and struck the deceased once, sideways on the forehead with the flat butt of the same as demonstrated by the first witness in court.

What is in dispute firstly, are the roles of the accused and the deceased when they meddled in the fight between the barman and Tafadzwa. Secondly, whether there was the use of the alleged weapon in the physical confrontation between the deceased and the accused? Lastly what caused the injuries that ended up killing the deceased?

The divergent views as to the questions posed above emerge from the testimony of the State witnesses making up the State case and the accused's own version of the events, his defence. Initially the State had lined up twelve witnesses but only three gave oral evidence. The evidence of the rest was admitted as summarized by consent. In addition, the sketch plan, confirmed warned and cautioned statement, autopsy report and other attendant, exhibits were also produced without challenge. Most of the State witnesses including, Panashe Sabore, the first witness and Gerald Shumba all say that, the deceased intervened to stop the fracas between Bhuka and the barman only to be stopped by accused. They stated that accused wanted to enjoy the spectacle by seeing the two in a brawl.

Notably, accused 's then friend Bhuka who started the whole saga also stated that accused joined in the fight to deter the deceased from pacifying the situation. An irrefutable assertion was then made that at the

time Bhuka's statement was recorded, close to four weeks after the incident he had defected to the deceased's camp as he had taken over accused's wife with whom he is currently staying with. As such his evidence will cautiously be approached.

On the other side, one of the State's own witnesses, the man who was the key player in the first fight Joel Josh Mayuni's written evidence tendered uncontested, is more corroborative of the accused's defence than the State case. He testified that it was the deceased who was both the aggressor and the provoker who had stopped the accused from stopping the initial fight between himself and Tafadzwa Bhuka not the other way round. This witness clearly states the role of the accused as that of an intervener and peacemaker not that of an aggressor as opposed to the averments by Sabore, Gerald Shumba and Bhuka.

Joel Josh Mayuni, in sentence number 8, of his statement as paraphrased by the summary of the State outline states as follows;

"The deceased then confronted the accused person and an altercation between them then commenced as well. He later saw the accused and the deceased both lying on the ground grabbing each other."

The import of that brief statement is that not only was he fighting Bhuka but a parallel fight took place between the deceased and the accused. On the issue of the bottle, both Bhuka and Mayuni, again, never mentioned the use of any weapon let alone a bottle. Bhuka did confirm that accused had purchased some bottled liquor but he never witnessed the bottle being used as a weapon.

In contrast, on the second aspect, the State witnesses attested that during the heat of the fight, accused picked a bottle and struck the deceased on the forehead with the flat butt of the bottle. The two witnesses who testified in court differ as to where the bottle had been positioned before the fight. One said it was on top of the counter and the other that of the snooker table.

On a skeptical examination of the aspect of the beer bottle, what is interesting is that all the people who were present said that it was full. In addition, that there was a real pulling and shoving of the two opponents during their fight in the arena where the snooker table was situate. This wrestling match ended with the deceased dominantly sitting on the accused's chest assaulting him. We are told that is the time when the accused grabbed the empty bottle and used it to strike the deceased. Snooker table or counter they are both higher grounds to a person lying down.

Surprisingly, the witnesses said the bottle was on a counter of some sort, if one is to picture the accused lying down then pulling a bottle on a counter, it does not add up. If he was in a sitting position or standing maybe it would make some sense. The State witnesses failed to demonstrate how a man who has been floored and is being beaten then reached a counter or the snooker table to grab a bottle without shifting to a standing or sitting position. Further, if the bottle was on the snooker table it was bound to fall and break. It defies logic that a beer bottle remains full and intact in the midst of a beer boxing match.

In addition, the first witness admitted under cross examination that both himself and the deceased were drunk. He may have failed to visualize clearly the events of that day when he said a full beer bottle was used sideways with the flat butt striking the deceased. Logically, this does not make sense. A person under the heat of blows does not chose to strike with the flat part of a bottle and sideways. This is not synonymous with beer hall tussles involving the use of beer bottles. Normally, it is struck randomly, in a striking up and down position in order to ward off the blows not sideways with the flat part.

This in turn casts doubt on the accused picking and using the bottle at all as alleged. Evidently, that doubt lies in favour of the accused as

regards the use of the bottle and dispels the notion that the deceased was struck with a beer bottle.

Accused person in his defence stated that after he had seen the bartender assaulting his then friend Bhuka he intervened by shutting the security gate demarcating the beer counter from the bar floor. He insisted and maintained without variation that the deceased then attacked him. He was head butted and felled by the blow and was assaulted by the deceased. He said it was not vice versa that the deceased was the mediator. On that note, the deceased's testimony tallies with that of Joel who the court finds credible and had nothing to hide.

Further, the accused said he never used his own bottle of beer that he had purchased that night because of the commotion. It had to be brought to his homestead the following morning. This averment was not rebutted by the state witnesses. Another peculiar feature, is that the accused said he sustained injuries as a result of the head butt and the following morning he had a swollen face.

If one interrogates, Joel Josh's statement referred to earlier, in particular the second statement from the last. He said the accused returned to the bar after about 15 minutes. His face was swollen and he had blood on his face. On the following day Mayuni met the deceased who showed him a scar on the forehead which he claimed had been caused by the accused with a beer bottle.

On thorough examination, the said witness did not see visible injuries on the deceased apart from what was pointed to him by the deceased himself. If this is juxtaposed to Sabore's concession under cross examination, it reveals a small insignificant scar. Panashe Sabore said "it was a small cut".

What is startling is that the witnesses admitted that they joined forces and, on the morrow, or morning of the following day they accosted the accused at his homestead. The reason of his visit is also at variance with that of the accused. Accused states that they had come to seek peace and forgiveness as he was the one who had been injured and with a swollen face. Gerald Shumba does not deny that they had gone to pacify the two since they lived in the same proximity. Not even a single one of the witnesses would openly and strongly state the injuries of the deceased on the night of the fight and the following morning.

We are told that the accused reported the matter and was given a medical affidavit but no evidence to that effect was produced. Reasons proffered were challenges of communication since accused is in custody. A single witness was called by the defence. He stated that he was in the bar at the time of the altercation. His evidence corroborated that of the accused in all material respects. What stands out in his evidence is that the deceased and his colleagues went drinking the morning after the occurrence and coming from the accused house. The court was mindful that the defence witness set in court during the last quarter of the accused's testimony. It therefore applied the cautionary rule but did not dismiss his evidence. He was found to be non-partisan and credible.

We are not told of what transpired from the 9th of June 2022 up to the 3rd of July 2022 when the deceased and his team went to then file a police report against the accused on the current allegations. It is not clear whether from the State's side he went about his business as usual. Whether he went to work or interacted with friends and family or that he was bed ridden, all that was not clarified by the State's witnesses.

The first witness said the deceased had a head ache the following morning after the fight. He also stated that it was because of these incessant persistent headaches that then led to the trio to approach the

police. The court is not told why the deceased did not seek medical attention earlier if his headache had been caused by the assault or fight with the accused. Is it that he did not have money? We would like to agree with the accused that ordinarily the hospital accepts victims of fights and other unexplainable injuries after the production of a police report or medical affidavit. Clearly, after the report to the police the deceased was admitted into the hospital and died a few days later.

The State case is hinged on the doctrine of causation. This principle has metamorphosed over the years with diverse views from jurists academics and authors as illustrated in the cases prior to and after the case of *S v Tembani* 2007(1) SACR 355(SCA). See *S, Mokgethi* 1990(1) SA 32(A). *S v Masilela and Another* 1968(2) SA558(A). See, Jonathan Burchell, *Principles of Criminal Law*, 5th edition Chapter 6 from page 65.CR, Snyman Strafleg, *Criminal law Casebook*, 5th edition, page 41.

In simple terms causation is conduct, omission or action that give rise to the end result. In other words, a link or nexus between actions of an individual and the harm perpetrated on the recipient of those actions. In some instances an unbroken chain, in others the chain of events may break but culpability can still be traced to the one who set the ball in motion.

Hunt, *South African Criminal Law and Procedure vol II at page 93*, defines causation, as a causal connection between the initial act or omission of the accused and the ultimate death of the victim. The test for causation is in two parts, factual and legal causation. One is a question of fact and the other a question of law respectively.

Factual causation is the set of facts that leads to the conclusion that the accused caused the injuries or harm on the victim. This is what some authors refer to as the *conditio sine qua non*. If it is a fight like in the

present case, then it has to be established that the accused caused the injury that led to the death of the deceased. See *R v Loubser 1953(2) SAPH 190, S v Daniels, 1983 (3) SA 275*.

The legal causation is defined by Snyman(supra) as an, '[A]n act is a legal cause of a situation if, according to human experience, in the normal course of events, the case has the tendency to bring about that type of situation.' It is also known as the 'but for' test. "But for" the action or inaction of accused would the injury have occurred. See *S v Mbambo 1965(2) SA 843(A) S v Gono & Anor HMA 14/12* and *S v Tembani* above.

When considering legal causation, the principle of *novus actus interveniens*, has to be also considered. Jonathan Burchel in *Principles of Criminal Law* above defines the term as, 'The *novus actus or nova causa interveniens* concept is often described in terms of an 'abnormal' intervening actor event which will serve to break the chain of causation. The normality or abnormality is judged according to the standards of general human experience. See, the *Loubser* case above where a rural dweller delayed in seeking medical attention even after being advised to do so. Given his general background, beliefs and lack of sophistication the person who had inflicted the initial injuries was convicted of his actions being the cause of the death.

In *S v Tembani* (Supra) The learned Judge pronounced that;

"it is now well established that a two-stage process is employed in our law to determine whether a preceding act gives rise to criminal responsibility for a subsequent condition. The first involves ascertaining the facts, the second imputing legal liability. First it must be established whether the perpetrator as a matter of fact caused the victim's death. The inquiry here is whether, without the act, the victim would have died (that is whether the act is the *conditio sine qua non* of the death) but the perpetrator cannot be held responsible for all consequences to determine whether the act is linked to the death sufficiently, closely for it to be right to impose legal liability. This is a question of law which raises consideration of legal policy".

In incorporating the principles above to the case at hand the main thrust of the state's argument is that, even though the deceased died

several weeks after the brawl with the accused, the injuries sustained in that scuffle caused his death. Put differently, they are saying there is a causal link between the deceased's death and the assault perpetrated on him by the accused.

In that regard, the first detour the State has to overcome is the question of fact, factual causation. It has to illustrate from the evidence adduced that indeed the slight cut on the forehead was caused by the accused's use of the butt of the bottle or the head butting.

Here we have two conflicting standpoints, the head butt or the beer bottle butt. By elimination a full beer bottle cannot fail to break upon impacting the human skull. elimination. A bottle if struck on the bone of the forehead of the victim it surely breaks on impact. This bottle allegedly used is said not to have broken.

Secondly, it is absurd that during the storm of a fight the one at the receiving end of a fight picks a bottle and thuds it by its butt not by its side or by swinging it sideways. In any event, Panashe admitted that he was drunk. His evidence is not reliable. He lost a relative. He was his drinking buddy. His evidence was recorded well after the event. The court has already discarded the notion that accused whilst lying down being pummeled by someone sitting on him will then reach out to a bottle on some counter or uplifted platform.

There is what is legally known as the thin skull rule. This comes from the fact that some beings have fragile thin bones and can succumb to even minor blows. Taking this fact into context, it cannot be ruled out that the deceased head butted the accused and through that process injured himself. A head but can logically cause injuries as it will be colliding with strong human bone framework. This is consistent with a small cut noticed by Panashe Sabore. And the unpreparedness of the rest of State witnesses

to readily describe the deceased's wounds. We have already entertained the evidence of both Joel Mayuni and the defence witness who saw the accused with a swollen face soon after the fight. These witness's evidence was credible as opposed to that of the deceased's buddies.

The accused has no onus to prove his defence. If his word is probable then it must be believed. In this case the accused's rendition of events is corroborated by a witness called by the State whose evidence is found credible. This witness could have exhibited animosity against the accused as he was at the center stage of the cause of the friction. This witness went on further to state that the beer bottle was on an upper place at the time the deceased and the accused were fighting and it was never used in his presence. Accused has no onus to prove any further than giving a laudable explanation. *S-v-Jana 1988 (2) SA84*.

The State failed to rebut that though deceased died, the injury was as a result of his own initiated head butt. He succumbed from a wound in the head depicted by the pathology report as having been caused by a head trauma, brain abscess and brain damage. The State suggests that these were caused by the impact of the beer bottle butt on the deceased's forehead. In our view, the culprit is non -other that the accused.

As it where the State has failed to prove the first hurdle on factual causation. It was not established that the accused caused the said fatal wound. As such there is no need to venture in the 'but for' test.

Accused person is accordingly found not guilty and acquitted.

National Prosecuting Authority for the State.

Burukai & Associates for the Accused.