

STATE versus
ARNOLD JERI

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 19, 20, 21 June, 14, 21 & 31 July 2017

ASSESSORS: 1. Mr Mtambira
2. Mr Mhandu

Criminal Trial

SW Munyoro, for the State
J Mudimu, for the accused

TSANGA J: The accused was charged with murder in that on the 8th day of September 2016 at Umsweswe bottle store, Pingo in Kadoma, he unlawfully and with intent to kill caused the death of Linda Runyararo Mushangi by stabbing her on the stomach with a knife causing injuries from which she died.

The summary of the state's case was that on the day in question, the accused, Arnold Jeri who had been drinking beer at Umsweswe bottle store when the deceased, Linda Mushangi, visited her friend, Tatenda Gwata, had tried to endear himself to the deceased but had been spurned. This had apparently irked the accused who had slapped the deceased on the face with an open hand and had intensified his assaults with booted feet. The deceased had picked up an empty beer bottle and had hit him with it. Attempts had been made to stop the accused from assaulting the deceased. She had used this window of opportunity to run away from the accused by seeking refuge from some patrons. The accused had followed her with a knife and had tried to stab her from both left and right sides before he succeeded in stabbing her in the stomach from the left. She had screamed and had run out of the room and had collapsed at the foot of the veranda. Accused was said to have run way from the scene. He had eventually surrendered himself at ZRP Nyamapanda on 14 November 2016.

The accused defence was that the deceased had shouted at him using obscene language and that she had caught him unaware and struck him twice with a beer bottle on the head. He had used his knife in self-defence as he wanted to disarm the deceased whom he said was

holding a broken beer bottle. It was during this time that he had accidentally stabbed the deceased's stomach.

Admitted in evidence as exh 1 was the post-mortem report done by Dr Gonzalez, a duly attested medical practitioner and forensic pathologist. His report concluded that the deceased died as a result of hypovolemic shock, abdominal aortic artery damage, and the stab wound. Admitted as exh no. 2 was the accused's confirmed warned and cautioned statement which captured his stated defence. Also admitted as exh 3 was the sketch plan drawn by the Investigating officer Sergeant Blessing Tsuro. Exhibit 4 was a photograph of the deceased after the stabbing. It showed her lying down with her intestines clearly protruding from her stomach as a result of the stab wound.

The statements which were admitted as evidence in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] were those of Doctor Gonzalez basically summarising the post mortem report and that of Gift Chari an attested member of the ZRP who had visited the scene on the fateful day. The gist of his evidence was that at around 20:30 on that day he had received a murder report. He had teamed up with Kadoma CID, Canine and District Reaction group and had gone to the scene. Upon arrival he had found the deceased on the ground in front of the bottle store. The area had been well lit and he had observed the stab wound and the protruding intestines. The following day on 9 September the body had been ferried to the general mortuary.

It was therefore not in dispute that the accused had stabbed the deceased in the stomach. The main issue for resolution were the circumstances surrounding the stabbing, in other words, the reasons for the misunderstanding. The state relied on the oral evidence of Tatenda Gwata the bar lady who was present on that day as well as the accused's friend Kabanga Muyambo also known as Denny who had also been present. Oral evidence was also led from the Investigating Officer Blessing Tsuro.

The state's evidence

Tatenda Gwata: She worked as bar lady for the owner who had several bars and bottle stores. The deceased was her friend who would come to the bar to assist her with relief duties and preparing food. She knew her as a relative of one of the women who also worked at the bar. She also knew the accused as a patron at the bar. He was called *Pipiro* by his friends. She had been working at that particular bar for a week as the owner had several bars. Her collection of

the events of that day was that Kabanga Muyambo had been the first to arrive at the bar and she had sold him beer. The accused had then arrived later.

The deceased had arrived between 16.30 and 17:00 hours. They had discussed what they would eat and had decided on buying plain *sadza* to consume with milk. It was when the deceased was coming from buying the *sadza* that the accused had thrown an empty bottle of water at her and the deceased had protested and indicated that she did not like that behaviour. The accused had not responded but when they started eating he had returned again and wanted to know why he been excluded from joining them in their meal. He had not been answered.

It was at around 20:00 hours that the accused had again approached the deceased saying she should come to him as he had summoned her on several occasions. The deceased had responded that she had already told him that she was not interested in his advances. She had asked the deceased if she had any relationship with the accused to which she had said no. The accused had at that point slapped the deceased on the face and had kicked her resulting in her hitting the refrigerator. He had also gotten hold of the deceased and had head butted her several times.

At that point this witness had screamed and had thrown a bottle top at Kabanga Muyambo the accused's friend who had been asleep. So vicious was the attack against the deceased that she had had to close her eyes and hold her face in her hands as she let out that the accused would injure the deceased from the way he was head butting her. It was also at this point in the assault that the deceased had taken an empty beer bottle and had hit the accused with it. Kabanga Muyambo had woken up and had tried to pull the accused away but he had been beaten and pushed against some empty crates stacked against the wall. The accused had pushed Kabanga Muyambo outside the bottle store and had himself come back to continue his pursuit of the deceased who had now taken refuge behind one of the three patrons who were in the bar. He had continued his assault even as one of the men stood between the accused and the deceased as a human shield.

It was also her evidence that two of the men had managed to subdue the accused and had taken him out of the bar but he had come right back in. It was when he returned again that he had drawn a knife from his satchel which he had been carrying on his back. He had once again gone to the deceased who was behind a patron and had tried to stab her several times until he had been successful in doing so on the left side. The deceased had screamed that she was dying and had run outside at that point before collapsing to the ground. Accused had put back the knife in his satchel and had walked out of the bar.

Whilst at the height of the assault on the deceased she had hidden behind a door, she had nonetheless been able to continue observing from a vantage point provided by wide gap between the hinges. The police had been called and had attended the scene. She had only left the following morning when her statement and photographs from the scene had been taken.

Asked to comment on the accused's sobriety at the time of the assault she stated in her examination in chief that on that day she herself not observed him drinking but had noticed that he was carrying a bottle of water which looked like it had water inside although she did not verify its actual contents. She however did not think he was drunk. As to whether the deceased had provoked the accused in any manner she had not heard anything and certainly at no time had she heard the deceased hurl any insults at the accused.

In cross examination she confirmed when asked that she had heard that the deceased was a sex worker but that she had not seen her solicit at the bar in question. Counsel for the accused had also put it to her that she herself was a sex worker like her friend before the court objected to this line of questioning of the witness's moral turpitude as irrelevant to the case at hand. She conceded that hitting someone with a bottle was dangerous. She was asked why the other three men who were drinking in the bar had not intervened at the time of the slap on the basis that if she had done nothing to the accused they would not have left him to assault the deceased. She did not know their reasons for not intervening then. She had also stood steadfast that the deceased was no longer armed with a bottle and was merely hiding behind the man in question for protection when she was stabbed by the accused. As regards the accused sobriety it was put at her that the bottle of water that the accused was carrying may in fact have contained alcohol and that she could therefore not dispute that he was drunk.

From her therefore what we deduced materially were the following crucial points:

- It was the accused who had assaulted the deceased first and had engaged in a vicious assault including pushing and head-butting the deceased.
- It was during this assault by the accused on the deceased that the latter had retaliated by hitting him with a bottle.
- Efforts had been made to restrain the accused from further assaulting the deceased before the fatal stab.
- At the time of the stabbing the deceased had been standing behind a patron who had stood as a buffer between the accused and the deceased.

Kabanga Muyambo. His evidence was that he had arrived at the bar at 11 am in the morning whilst the deceased had arrived at around 15:00 hours. He said he had bought the accused three opaque beers and that when the accused had finished these he had consumed a drink called double punch mixed with water. He himself had fallen asleep at around 18:00 hours whilst accused whilst still drinking his double punch. However he had still been awake when the deceased and Tatenda the first witness had eaten their meal. He had observed the accused talking to the deceased but said he had not heard what the conversation had been about but the tone had been cordial.

He said he had been awoken suddenly by glass shards falling on him when a bottle hit the accused. He had seen the accused head butting the deceased and had grabbed the accused who shook himself free and jumped over the counter and continued beating the deceased. He had followed him and dragged him from there and the accused had started beating him until he fell against some crates alongside the wall. He said he had managed to pull the accused outside but the latter had rushed back in again. This corroborated Tatenda Gwata's evidence that there had been efforts to restrain the accused from assaulting the deceased save to say that she had said it was the accused who managed to push this witness outside whilst the witness said it was him who pushed accused outside. This was not material since no two persons experiencing the same event have identical experiences particularly because they cannot be precisely at the same place at precisely the same time.¹ The crucial point on which there was consensus was the clear effort to restrain the accused. Further corroborated was Tatenda Gwata's evidence that the deceased had sought shelter behind one of the patrons and that the deceased had not been holding any beer bottle fragment at that time.

As this witness was about to return inside he had observed the accused putting something in his bag and walking away. His view was that the deceased was not a violent person and that if any provocation had taken place it was likely to have been the accused who had provoked the deceased as he had witnessed the two talking nicely before. He further corroborated the first witness's evidence that on that day the deceased was definitely not drinking at the very least up to the point he fell asleep. He told the court that he had known the accused for over a year and that he had at least three girlfriends at the same time.

¹ Barry R. Morrison and Warren Comeau *Judging Credibility of Witnesses* 25 *Advoc. Q.* 411 2001-2002 pp 411-440 at p 422

Sergeant Tsuru; His evidence largely spoke to the indications he had recorded. The accused had been unable to say where exactly the deceased had fallen as he had walked away from the scene at the time.

The accused's evidence

The accused then gave his evidence. He could not remember what time he had arrived at the bottle store as he had no watch. He surmised it was in the afternoon around 14:00. He confirmed that he was drinking beer bought by Kabanga Muyambo and not by himself. He could also not recall what time the deceased had entered the bottle store save that she had arrived when he was already there. His evidence was that the deceased had come to the counter where he was and they had started talking and drinking together. It was whilst they were talking that the deceased had stated that she wanted to sleep with him for a small fee. He had told her he had no money but she had been persistent. According to him the deceased had then hurled insults at him calling him useless and a pauper and had then poked him on his forehead with her finger. She had used profanities and had even slapped the accused after uttering the profanities. He had become angry at the insults and had slapped her and grabbed her head and butted her. That is also when she had hit him with a bottle. He said she had continued uttering profanities and had come after him with a broken bottle. That was when Kabanga Muyambo got hold of him but he had shaken him loose. The deceased was by now behind one of the patrons but was still trying to advance to him with a broken bottle. He had taken out the knife to scare her from using the bottle and had intended to strike her on the arm. He had stabbed her in the stomach instead when he thought he had stabbed her in the arm. He had the knife on him because he had intended to go hunting.

The law

The accused relied on the defence of provocation in that the deceased had mocked him for being less of a man. Section 238 of the Criminal Code deals with provocation. In cases other than murder it is not a complete defence but may act in mitigation. In murder cases, the initial question is whether the deceased had an intention to kill when he reacted to the provocation. If he had no intention to kill, the conviction is culpable homicide. If he had an intention to kill then the next question is whether a reasonable person faced with the same provocation would have acted like wise. If so the accused would be found guilty of culpable homicide and not murder. (See *S v Mafusire* 2010 (1) ZLR 417(H))

He also relied on self-defence in that he was in fact the one protecting himself from being attacked by the deceased with a broken bottle. The elements of self-defence are:

- a) an unlawful attack;
- b) upon accused or upon a third party where accused intervenes to protect that third party;
- c) the attack must have commenced or be imminent;
- d) the action taken must be necessary to avert the attack;
- e) the means used to avert the attack must be

reasonable. See *S v Mabvumbe* HH 39-16 and *S v Muchairi* HB 12-15.

Lastly the issue of the accused and everyone else in that bar being drunk on that day was also raised by defence counsel throughout the trial. Voluntary intoxication in terms of s221 of the Criminal Code is merely mitigatory rather than exculpatory. See *S v Masina* HH-245-10.

Analysis of the factual evidence

The evidence at every turn pointed to the accused having been the aggressor. When the bottle was thrown at him by the deceased it was in her self-defence as she was being head butted by the accused. There was no evidence that the deceased was provoked. Instead he was the one who provoked the deceased when he assaulted her for ignoring his advances. There was also no credible challenge to Tatenda Gwata's evidence regarding the accused's harassment of the deceased in the initial instance as being what led to the unfortunate events. Indeed the court observed that the accused was most at pains in crafting his version of events when it came to relating the cause of the violent rupture. What was particularly observable from the accused's narration of his version of events was that he clearly struggled to tell his story. His own counsel had had to prod him several times to give the fuller accounts of what happened. This, to the court, was indicative of a person who was having to make up his story as he went along since deceivers tend to use fewer words in communication and make fewer factual statements for fear of being caught in the lie.² His narrative was no more than pejorative utterances about the deceased as a 'prostitute.' The story that the deceased had harassed him for sex and had become annoyed at his lack of cooperation and uttered profanities at him was clearly made up. There was no evidence from any of the two witnesses that they had heard the deceased utter any obscenities against the accused as he claimed that could have led to his

² See Morrison and Comeau above at p 422

being provoked as he was the first to assault the deceased before she threw the beer bottle at him when he was head butting her. She had been assaulted for showing no interest in him and rejecting his advances. In such a situation where there is a contest of credibility between an alleged male assailant and an alleged female assailant the court is indeed entitled to take cognisance of the fact the vast majority of crimes of violence are committed by men.

The self defence argument equally fails to hold. We found the evidence by Tatenda Gwata and Kabanga Muyambo that there had been efforts to get the accused to stop his assault on the deceased by taking him outside to be credible. At the time that he stabbed the deceased, there was no unlawful attack upon the accused that was imminent and from which he needed to protect himself. We also found their evidence credible that the deceased was at that time no longer armed with a bottle. We also found Kabanga Muyambo's evidence credible that when he woke up to the bottle shards, and observed the deceased fighting the accused behind the counter, she was now at that time merely using her hands, defending herself and simply trying to shake off the accused. In other words the bottle incident had passed which in any event the evidence showed had been instigated by the accused; head butting of the deceased. Indeed if she had still been holding a broken bottle piece at the time of the stabbing, then the reasonable reaction of the man she stood behind would have been to face her in an effort to get her to drop the bottle. The deceased's position behind this man suggests in every sense that she was in a protective as opposed to a combative position. The accused was therefore clearly not in any immediate danger at the time that he stabbed the deceased. He was on a mission to inflict harm which he had started. He had already decided very earlier on before his fatal stab to avenge what he perceived as a rejection by the deceased of his advances by assaulting her. The deceased had sought the protection of patrons but he had doggedly persisted with his assault until the fatal stab. She was killed as a result of a stab wound to the stomach. He had clearly aimed at a fragile part of the body to inflict maximum harm. So vicious had been the stabbing with the knife that it had exposed her intestines.

Ultimately, this is a criminal case of murder in which a woman said no to a man's advances and was killed for doing so. The accused's assault of the deceased in the initial instance when he slapped her for ignoring him, was his exercise of power over her and has to be understood for what it was – an ultimate display of power over her rejection. The deceased was attacked because she failed to respond his whims and fancies. He had slapped her, pushed her against the fridge head butted her and when she had thrown a bottle at him to release his

grip he had gone into a frenzied rage even when he was clearly no longer in danger just to show her who was the master.

His conduct in this regard went against the very tenets of our Constitution³ which in section 51 accords every person the inherent right dignity and to have that dignity respected and protected. Harassment violates that dignity. It also violates the right to freedom from all forms of violence from both public and private sources as articulated in s 52 (b) of the Constitution. The genderness of violence arises from the fact that women unlike men are the ones most likely to encounter forms of violence in the private sphere at the hands of private actors. Dignity and freedom from violence are integral to the rights of women in all spheres of their lives. The accused's conduct was clearly an affront to these rights. Women are clearly not objects without rights. It is therefore vital that the killing not be legitimised or trivialised in any way by ignoring the constitutional imperatives.

This is therefore not a case of murder in a gender neutral context. The genesis of the attack that led to the killing of the deceased must be understood for what it was – a form of gender based violence. It would be truly amiss for this court to fail to make this connection to gender based violence from the onset because that is ultimately what the killing was about in this case. The facts speak to the dangerous perception that a woman's "no" does not mean "no" and more significantly that a woman does not have right to make independent decisions about what whom she likes or does not like and whom she wishes to associate with or not to associate with. Insights from *Kabanga Muyambo* that the accused had at least three girl friends at the same time, lead to the conclusion that the accused was clearly a man not accustomed to women saying no to him. He obviously perceived his manhood to have been challenged due to his own dangerous sense of entitlement in his dealings with and perceptions of women. This motive of rejection that started the attack should not be trivialised as it clearly unmask the root of gender based violence.

The killing in this instance was unfortunately trivialised by the accused and his defence which sought to depict the deceased and her friend Tatenda Gwata as no more than prostitutes and drunkards. Even if the deceased was a sex worker, she was certainly not without rights to dignity and freedom from violence. She was furthermore not engaged in any sex work that evening. It was the accused who formulated his opinion that she had no right to say no to his advances because she was a sex worker. It was equally preposterous and certainly unlikely to

³ Constitution of Zimbabwe Amendment (No.20) 2013

be so to suggest that Tatenda Gwata, entrusted with money as the cashier at the bar, would have been drunk beyond herself whilst on duty on that day. The suggestion appeared to be that any woman who sets foot in a bar or works in bar must be perceived to be a prostitute and a drunkard. This demonising of women who do not fit society's framework of the moral woman in society in fact shows the depth of patriarchal perceptions of women to which even counsel are often not immune.

As courts, it is our duty to be alive to the constitutional imperatives and to make the gender connections from the everyday cases that we deal with. The motivations for the assault were clearly gendered and to fail to speak to the gender dimensions of this case would be to legitimise gender based violence within the criminal justice system. Our efficacy as courts in addressing gender based violence rests in ensuring that the criminal justice system speaks to the lived realities and experiences of all its victims. Equally important is showing our appreciation and understanding of the manifestations of gender violence in the cases that we are confronted with. This trajectory is apparent in a number of court decisions that have addressed gender violence. (See for example cases such as *S v Muchekayawa* 2012 (1) ZLR

272 (H); *S v Gudyanga* 2015 (1) ZLR 238 (H); *S v Sibanda* 2015 (1) 681 (H). Such open recognition in the cases that we deal with, helps to put into gender violence into the consciousness of the law and society in general from the perspective of the courts thereby aiding the process of change.

As regards the nature of legal intent behind the murder, the case of *S v Mhako* 2012 (2) ZLR 73 (H) discusses the common law concept of "constructive intent" and its replacement under the Criminal Law Code [Chapter 9:23] with "**realisation of risk or possibility of death ensuing from conduct**". As discussed therein, there are two components to be considered the first being whether or not the accused realised that there was a risk or possibility, other than a remote risk or possibility, that (i) his conduct might give rise to the relevant consequence; or (ii) the relevant fact or circumstance existed when he engaged in the conduct. The second is a component of recklessness, that is, whether, despite realising that risk or possibility referred, the accused continued to engage in that conduct.

In this case we find that the accused realised the real risk or possibility that his conduct of attacking the deceased with a knife, that death might result. Secondly, despite that realisation he had continued with this conduct regardless.

The verdict is that the accused found guilty of murder in terms of s 47 (1) (b) of the Criminal Code.

Mitigation

The convicted is a first offender. He was aged 21 at the time of the offence. He is said to have been orphaned at a young age and was living with an uncle in Mudzi. He has also since been ostracised by his family as well as his wife and child. He has also been stigmatised by his community at large for the murder. The fact that he was intoxicated is said to be a factor that ought to be seriously considered especially as the drink that he consumed that night was in fact prohibited because of its high alcohol content. The court is also urged to take into account that he had ultimately surrendered. He is said to be repentant and is now a church goer in prison.

Aggravation The state on the other hand emphasised the seriousness of the offence and that a human life had been lost. The deceased was aged 25. Furthermore, the convicted had been relentless in the attack which could have been avoided as there were clear attempts to stop him before the fatal stab. He was also the aggressor. Also emphasised was the need to send a clear message on the lack of tolerance for violence in general and gender based violence. Whilst he had surrendered he was said to have done so because the net was closing in. In terms of sentence the state pointed to the case of *S v Chimbira* HH 558/15 in which the accused was sentenced to 25 years imprisonment under similar circumstances. It also drew on the case of *S v Siziba* HB 244-16 in which a 19 year old received a 20 year sentence for murder. However, as counsel for the defence correctly pointed out the sentence was for murder committed in the course of robbery.

The court is cognisant of the fact that a key purpose of sentencing is to also give an accused a shot at rehabilitation. The accused's relative youthfulness cannot be ignored. Whilst still youthful he was however an adult in terms of the law. His inebriation has also been considered but again sight should not be lost that he wilfully consumed a drink which he knew to be prohibited. The sentence in my view ought to be one that gives the convicted a real chance at changing his views about women. It cannot and should not be curtailed to unreasonable levels simply on account of his age. As an abusive youth he risks the real possibility of morphing into an abusive adult if his sentence is taken lightly. In fostering respect for women, much will depend on whether there are any conscious efforts directed at rehabilitating him in this regard whilst he is in prison.

Balancing all factors placed before this court, the accused is sentenced to 15 years imprisonment.

Mudimu Law Chambers, Accused legal practitioners (Pro Deo)
The National Prosecuting Authority, for the state