

THE STATE

versus

TAWANDA GONO

And

LEE SHUMBA

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 7, 9, 10, 13, 17 & 21 February and 10 March, 2017

Assessors

1. Mr J. Mushuku
2. Mr E.J. Gweru

Criminal Trial

E. Chavarika for the State

P. Munyanyi for 1st accused

J. Ruvengo for the 2nd accused

MAWADZE J: This case was poorly investigated, prosecuted in a very onerous way and also defended in a clumsy way. In our view this conclusion is inescapable when one looks at the evidence presented before us. The investigating officer was clearly untruthful. The State sought not to put before the court facts which were reasonably within its knowledge and the defence was hell bent to deny or, dispute the obvious.

Both accused persons are facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

The charge is that on 1st February at No. 23758 Zvita Street, Rujeko 'C' in Masvingo each of the accused or both of them intentionally caused the death of Emisirayi Chinyenetere by assaulting him all over the body with hands and booted feet inflicting injuries from which the said Emisirayi Chinyenetere died.

The accused persons and the now deceased were known to each other and neighbours in Rujeko 'C' in Masvingo.

The State case is that on 1 February 2015 a dispute arose between the now deceased and accused persons regarding the use of a foot path which passed through the now deceased's yard which had been barricaded by the now deceased. It is alleged the accused persons insisted in using the said foot path despite the now deceased's protestations. As a result, the State alleges that both accused acting in common purpose and in cahoots assaulted the now deceased with clenched fists all over the body and the head and proceeded to kick him with booted feet in the stomach and private parts as he lay down. It is alleged that the accused persons were only stopped from assaulting the now deceased by one John Hunyani. It is further alleged that the now deceased's health condition worsened the next day 2 February 2015 and he passed on before he could be ferried to Masvingo General Hospital. The post mortem report revealed the cause of death as head injury and abdominal haemorrhage arising from blunt trauma.

The accused persons for some inexplicable reasons completely denied that they assaulted the now deceased. Surprisingly they raise the defence of self-defence and defence of another. The contradiction is clear.

In their defence outlines both accused persons said the now deceased was the aggressor who attempted to hit them with an iron bar as they passed through his yard for no apparent reasons. The accused persons said they managed to avoid the blow with the iron bar and the now deceased pulled out a knife from his trousers pocket and first stabbed accused 1 Tawanda Gono (Gono) piercing his t-shirt and inflicting a minor injury on the arm. They said accused 2 Lee Shumba (Shumba) came to the rescue of accused 1 Gono by trying to hold the now deceased by the waist but he was stabbed by the now deceased on the knee causing accused 2 Shumba to fall down. In order to avert further attacks, the accused persons said accused 1 Gono managed to hold the now deceased in order to disarm him of the knife and accused 1 Gono and the now deceased fell to the ground. They both said accused 1 Gono and

the now deceased wrestled on the ground until the now deceased lost possession of the knife after which accused 1 Gono released the now deceased. They said they both went to ZRP Rujeko police station to report the matter and were accompanied to the scene by a police detail who recovered both the iron bar and the knife the now deceased had used. Both accused persons denied the assaulting the now deceased in the manner alleged or in any manner. They nonetheless insisted to have acted in self-defence and the defence of another.

The State led viva voce evidence from Martha Teketeke (Martha), John Hunyani (John), Edmore Matsikidze (Edmore) and Sgt Oswald Tongai Pamire (Sgt Pamire).

The evidence of Cst. Ncube and Dr. G. Zimbwa was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. Both the accused person gave evidence and called Cst George Mururi (Cst Mururi) as their defence witness.

In support of its case the State produced the following exhibits;

Exhibit 1 which is accused 1 Gono's confirmed warned and cautioned statement. The contents of that statement are the same as accused 1 Gono's defence outline save the addition that when a police detail attended the scene on 1 February 2015 the now deceased was warned to desist from violence and that it is this police detail who recovered the knife the now deceased had used to attack the accused persons.

Exhibit 2 is accused 2 Shumba's confirmed warned and cautioned statement which is also similar to his defence outline. The only addition being that the next day on 2 February 2015 accused 2 Shumba was informed that the now deceased was ill which prompted accused 2 Shumba to go to the now deceased's house where he found the now deceased complaining of stomach pains and hunger. Accused 2 Shumba said he went to advise the police of the now deceased's condition.

Exhibit 3 is the post mortem report compiled by Dr Zimbwa after conducting an autopsy of the now deceased on 4 February 2015. The Doctor noted the following;

- (i) bleeding from the mouth and nostrils
- (ii) significant abdominal distension paracentesis showing blood
- (iii) massive scrotal and penile haematoma
- (iv) abdominal bruising

The doctor concluded that the cause of death was head injury and abdominal haemorrhage arising from blunt trauma.

It is significant to note that the cause of the now deceased's death has not been put into issue. The injuries observed on the now deceased by the doctor are clearly consistent with an assault. All the accused persons are saying is that they do not know how the now deceased, who had hitherto been fit to attack two persons viciously, sustained those injuries and passed on the next morning.

Exhibit 4 is the Report Received Book (RRB) made on 2 February 2015 in relation to the now deceased's condition and subsequent death by Edmore. In our view this exhibit is of no probative value and its contents are not in issue.

The defence produced Exhibit 5 which is a home made knife with a rubber handle and Exhibit 6 an iron bar. These are the weapons allegedly used by the now deceased to attack the accused persons. It is significant to note that these exhibits 5 and 6 were produced with the consent of the State.

What is telling is that these exhibits had been brought to court from the police station and they had the relevant tags put on by the police. What is baffling is that the State made no reference at all to these exhibits in their case. Further the State did not seek to produce such exhibits in their possession and or explain to the court how such exhibits ended up in the custody of the police. While the State is *dominis litis*, it still has the duty to disclose all relevant information or evidence which assists the court to properly ventilate the issues in dispute and arrive at a fair and just verdict. To withhold certain evidence simply because it is unfavourable to the State case is not only unethical but is clearly not in the interest of justice. It only emerged during the defence case how these exhibits were recovered.

The evidence of Cst Ncube is simply that he witnessed the recording of the accused persons' confirmed warned and cautioned statements. As already said Dr Zimbwa compiled the post mortem report whose contents we have alluded to and are not in issue.

In our view the narrow issue to be resolved by the court is whether indeed the accused persons assaulted the now deceased and inflicted the fatal injuries. In this regard we turn to *vive voce* evidence led in court.

Martha Teketeke (Martha)

The now deceased was a neighbour of Martha and she knew both accused persons as they lived in her neighbourhood. She said the now deceased stayed alone in an incomplete house and was apparently mentally unstable, poor and destitute. According to Martha the now deceased would at times prevent people from using a path which passes through his yard especially when he was drunk.

Turning to the events of the day in question Martha said the now deceased was drunk. She said as she was doing her laundry she heard the now deceased telling both accused that they should not use the path which passed through his yard. She heard both accused insisting that they would use that path. She was obstructed by a house and could not see the accused and the now deceased but just heard their voices.

Martha said the now deceased threatened to stab both accused with a knife if they insisted on using the path in issue and that the accused persons in turn threatened to beat up the now deceased. She did not see how the confrontation between the now deceased and accused persons started but went on to explain what she saw when they were now within her sight.

When both accused persons and now deceased were within her sight she saw both accused persons assaulting the now deceased. She could not in specific detail explain how each of the accused assaulted the now deceased but said accused 1 Gono used booted feet. Martha said the now deceased fell down and people who had gathered stopped the assault but accused 2 Shumba would not take heed as he continued to assault the now deceased. In fact, she said within her sight it is accused 2 Shumba who assaulted the now deceased most severely. According to Martha the now deceased at that point was on the ground and did not fight back in any manner.

Martha said when the assault stopped she saw the now deceased washing some blood at water tap. She did not see any injuries the now deceased sustained. Martha only heard of the now deceased's demise the next day.

Under cross examination Martha insisted that accused 1 Gono assaulted the now deceased with booted feet. She further said she only saw the knife Exhibit 5 at the police

station as it was alleged it had been with the now deceased. She said accused 2 Shumba used his hands to assault the now deceased. Martha conceded under cross examination that she heard accused persons ordering the now deceased to drop the knife and the now deceased insisting that he would not drop the knife.

In our view Martha was an eye witness to the assault of the now deceased by the accused persons although she did not witness how the assault started. She has no motive to lie against the accused persons and no such motive was suggested to her. We are therefore inclined to accept her evidence.

John Hunyani (John)

John has known the now deceased since 2005 and described his behaviour as generally erratic when drunk. He stays in the same neighbourhood with accused persons and the now deceased.

John's testimony was that on the day in question he was at his work place when he was attracted to the scene of crime by the people who were shouting that the now deceased was being assaulted. He said he peeped over the durawall from his workplace and saw people gathered at now deceased's house. Curiosity took the better of him and he rushed to the scene. On arrival he said he found the now deceased lying down and being assaulted by accused 2 Shumba with booted feet. He verbally told accused 2 Shumba to stop the assault and accused 1Gono was just standing by. John did not check if the now deceased or any of the accused had injuries nor did he seek to ascertain the cause of the assault. He said accused 2 Shumba did not take kindly to his remonstrations of accused 2 Shumba as accused 2 Shumba alleged the now deceased had injured accused 2 Shumba with a knife.

Under cross examination it was extremely difficult to appreciate the evidence of John as he rumbled on many occasions without answering questions put to him. John continually changed his evidence to the extent that the import of his testimony is unclear. Initially he said he witnessed only accused 2 Shumba assaulting the now deceased but later changed and said both accused persons were assaulting the now deceased with clenched fists and booted feet. When he was taken to task about this inconsistency John changed again and said he only saw accused 2 Shumba assaulting the now deceased.

The assessment we made of John was that he was a confused witness who had no consistent story to tell the court. He appeared to be a confused if not overzealous witness who was unnecessarily dramatic. Despite saying he had refreshed his memory by reading his statement he nonetheless could not say whether both accused persons or accused 2 Shumba only assaulted the now deceased. The only consistent aspect of his evidence is that accused 2 Shumba assaulted the now deceased. John is not a witness in which the court can comfortably repose its faith in.

Edmore Matsikidze (Edmore)

The evidence of Edmore is largely unchallenged. He is a friend of both accused persons and stayed in the same neighbourhood with the now deceased. His evidence relates to the events of the next day 2 February 2015.

Edmore passed through the now deceased's house on 2 February 2015 when he found the now deceased groaning in pain. On inquiring what was wrong the now deceased told him that he had been assaulted by the accused persons the previous day on 1 February 2015. This prompted him to go to accused persons' house where he found accused 2 Shumba and advised him of the now deceased's report and state of health. He said accused 2 Shumba did not protest but was co-operative as he agreed to accompany Edmore to the now deceased's house. Edmore said in the presence of accused 2 Shumba the now deceased repeated the allegation that the accused persons had severely assaulted him the previous day and in the process injured him. In view of the now deceased's critical health state he took accused 2 Shumba to Rujeko police station and filed a report. However, upon his return with the police to the now deceased's house they found that the now deceased had passed on.

Under cross examination Edmore said the now deceased was in the habit of prohibiting people from using path which passes through his yard when drunk.

It is clear that the now deceased as he explained his condition to Edmore implicated both accused persons as his assailants. This evidence can be described as dying declaration which is admissible in our law. See *Criminal Procedure in Zimbabwe* by John Reid Rowland at 18 – 21.

Sgt Oswald Tongai Pamire (Sgt Pamire)

Sgt. Pamire is the investigating officer in this matter and has 15 ½ years experience in the police force. However, in his evidence he did not exhibit such experience as a police officer. In fact, besides being needlessly irrational and a very poor witness he was amazingly untruthful.

Sgt Pamire took over the investigations in this matter on 2 February 2015 after the now deceased's death and the RRB Exhibit 4 had been completed. He proceeded to record statements from State witnesses who implicated both accused persons in the assault of the now deceased. The accused persons were arrested and he recorded their warned and cautioned statements Exhibits 1 and 2. Sgt Pamire also recorded statements from Cst George Mururi who had attended the scene of crime on 1 February 2015 pursuant to a report by accused persons at Rujeko police station. Surprisingly in his evidence he professed ignorance that accused persons had made such a report at Rujeko police station the previous day on 1 February 2015 to Cst George Mururi. The detailed statement to that effect which he recorded from Cst George Mururi was tendered by the defence in court. We wonder why during his evidence when he was misleading the court the trial prosecutor, who is an officer of this court did not bring this statement to his attention in order to lay bare his misleading evidence. In fact, it is Cst George Mururi who gave him the knife Exhibit 5 recovered at the scene of crime on 1 February 2015. Again Sgt Pamire misled the court that he did not know how the knife Exhibit 5 had been recovered!

Sgt Pamire said although accused persons alleged that they had been injured by the now deceased he did not see any injuries on them. It is difficult to accept his evidence to that effect moreso as he never bothered to take accused 1 Gono's t-shirt allegedly pierced with the knife as an exhibit in order to disprove accused 1 Gono's assertions. To his credit he admitted that the iron bar Exhibit 6 was identified to him by accused persons during indications as one of the weapons used by the now deceased in attacking the accused persons. What we find irritating about his evidence was the persistent denial that he was aware accused persons had made a report of assault against the accused persons on 1 February 2015 to Cst George Mururi at Rujeko police station when he had a recorded statement from a fellow police officer to that effect.

We now turn to the evidence of the accused persons.

Accused persons' evidence

The evidence of both accused persons was similar to what they both told the court in their defence outlines which is basically the same as their confirmed warned and cautioned statements. No useful purpose in our view would be served by repeating it at this stage.

Both accused persons identified the knife Exhibit 5 and the iron bar Exhibit 6 as the weapons the now deceased used to attack them, and that they caused the recovery of those exhibits by the police.

While the accused persons described the now deceased as mentally stable the State witnesses referred to his mental instability and erratic behaviour when under the influence of alcohol. As accused persons were well known to the now deceased we doubt they were not aware of this trait.

The other unconvincing aspect about the accused persons' testimony was their insistence that they were unaware of the cause of the altercation between themselves and the now deceased. To our minds it is clear as daylight that the source of the dispute or altercation was the now deceased's insistence that the accused persons should not use the path which passed through his yard. The accused persons insisted in using that path. This is the only logical inference which can be inferred from the facts and is supported by the evidence of Martha. We are not persuaded by the rather bizarre evidence of the accused persons that Martha did not witness this incident. We are equally not persuaded that they are implicated in the assault of the now deceased solely on account of their back luck.

Constable George Mururi (Cst. Mururi)

Cst Mururi was called as a defence witness and this in our view was occasioned by the manner in which the State sought to present their case and Cst Pamire's misleading evidence. We say so because the State was aware of Cst Mururi's evidence as his statement was recorded during investigations but the State chose to ignore that evidence.

Cst Mururi confirmed that on 1 February 2015 both accused persons came to ZRP Rujeko to report an altercation they had had with the now deceased who had barricaded a foot

path which passes through the now deceased's yard with an iron bar. The accused persons reported that they had tried to remove the iron bar which had caused the now deceased to attack them. This is precisely why we dismiss as untrue the evidence by the accused persons that they were not aware of the source of the dispute between them and the now deceased. Cst Mururi said accused persons said the now deceased had attempted to hit them with an iron bar and that when that failed he pulled out a knife Exhibit 5 and inflicted some minor injury on accused 1 Gono's elbow and another minor injury on accused 2 Shumba's leg.

Cst Mururi said both accused persons disclosed to him that the now deceased was of unstable mental state hence they did not want to make a formal report but simply wanted him to be admonished for such conduct moreso as both accused persons had not been seriously injured. Again this is why we precisely reject the accused persons' evidence that they did not know the now deceased's state of mind. In fact, Cst Mururi said he personally knew that when the now deceased was drunk he was of violent disposition, would behave as mentally unstable and would even visit Rujeko Police Station for no apparent reason.

After receiving this report Cst Mururi accompanied both accused persons to the now deceased's house where he recovered the knife Exhibit 5 and took it to the police station. He later handed over the same knife to Sgt. Pamire on 2 February 2015 after the now deceased's death as part of exhibits. Cst Mururi said he found the now deceased on 1 February 2015 lying down in a drunken state hence the now deceased was unable to meaningfully answer to his enquiries on what had happened. We are persuaded to accept that the now deceased was drunk as per Cst Mururi's evidence because how was it possible that the next day the now deceased was able to tell Edmore what had happened, but had failed to tell Cst Mururi the same explanation the previous day. If at all the now deceased had failed to give any explanation on 1 February 2015 to Cst Mururi due to serious injuries inflicted on him, he would have not miraculously been able to do so to Edmore the following day when his condition would have worsened.

Cst Mururi said he nonetheless cautioned the now deceased and the accused persons were satisfied by that. He said he did not see any injuries on the now deceased but observed minor injuries on both accused persons which was consistent with their report.

Cst Mururi said the next day he was on duty when Edmore made a report that the now deceased was unconscious in her house. He proceeded to the now deceased's house and found him seated naked leaning on the bed with many empty beer bottles scattered on the floor. The now deceased was unresponsive to his inquiries and he called for an ambulance but the now deceased passed on before he could be ferried to hospital.

In our assessment we find Cst Mururi's evidence to be very useful to the court. In our view he was a clear and straightforward witness.

The denial by both accused persons that they did not assault the now deceased at all cannot be sustained in view of the evidence placed before us. To our minds the cause of the altercation is clear, though petty. There is an eye witness who witnessed the assault on the now deceased by the accused one Martha. Accused 2 Shumba is further implicated by John despite the imperfections of John's evidence. There is also a dying declaration by the now deceased made to Edmore in the presence of accused 2 Shumba which implicates both accused persons. Given the results of the post mortem report the only probable cause of the now deceased's fatal injuries point to an assault, which assault was perpetrated by the accused persons. From the evidence placed before us there was no *novus actus interveniens* that might have broken the chain of causation which would explain the now deceased's injuries. A *novus actus interveniens* or *nova causa interveniens* is an abnormal, intervening act or event which is in accordance with general human experience which serves to break the chain of causation see *South African Criminal Law and Procedure, Vol 1, 4th ed* by Jonathan Burchell at pp 102.

As we already pointed out the defence by both accused persons of denying assaulting the now deceased in any manner and at the same time alleging they were acting in self-defence and defence of another is illogical.

The requirements of self-defence or defence of another are outlined in s 253(1)(a) to (d) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. While the evidence placed before us show that the now deceased in most probabilities attacked the accused persons initially with the iron bar Exhibit 6 and later on with a knife Exhibit 5 and that it was well within the accused persons lawful right to attack the now deceased in order to avert the unlawful attack our firm view is that the means used by the accused persons to avert this

unlawful attack were not reasonable. The now deceased had failed to use the iron bar and had let go the knife. The now deceased had virtually been overpowered. The accused persons nonetheless continued to attack him viciously as he lay on the ground unarmed. To our minds the defence of self-defence or defence of another can only be available to the accused persons as a partial defence as is provided for in s 254 of the Criminal Law (Codification and Reform) Act, [Cap 9:23]. It cannot in the circumstances of the case amount to a complete defence to the charge of murder.

VERDICT:

Not guilty of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [Cap 9:23] but guilty of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act, [Cap 9:23].

SENTENCE

The accused persons now stand convicted of the lesser charge of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act, [Cap 9:23].

Our view is that if both counsel for the State and the accused persons had objectively applied their minds to the facts of this case, this protracted trial could have been avoided and the matter proceeding by way of statement of agreed facts. Be that as it may in assessing sentence we have taken into account submissions made on behalf of both accused persons and those against them. Both accused 1 and accused 2 are aged 30 years and 26 years respectively. Accused 1 is married with a 6 year old child and his wife is expecting. Accused 1 is employed by the Rural Electrification Agency as an Assistant Linesman. Accused 2 is married with 3 children and has the extra burden of looking after his siblings. He is not employed. Both accused persons have no meaningful assets or savings which can sustain their respective families in their absence.

We have considered that this unfortunate and tragic event seemed to have occurred at the spur of the moment without any premeditation. The accused persons who have not had any brush with the law deserve to be treated with some measure of leniency. It is also a fact that this altercation was started by the now deceased who was the aggressor. Further no dangerous weapon was used by either of the accused persons. They simply assaulted the now

deceased with clenched fists and booted feet. We also note that accused 2 was co-operative when he was located at his house and advised of the now deceased's deteriorating health condition.

Cases of violence which result in loss of life are very prevalent. It is saddening that precious lives are being lost due to petty disputes which should be resolved amicably. It would appear that many of our young people no longer respect the sanctity of human life and easily resort to violent conduct resulting in tragic consequences. *In casu* it is saddening to note that life was lost simply over a dispute of use of a path. The accused person could have avoided this by simply acting in a responsible way by walking away and using an alternative route. Instead they chose to engage in mortal combat with a drunk person whose mental status was open to doubt. The court has a duty to inform the accused persons and society at large that human blood is sacred and cannot be shed away without dire consequences. It is clear that both accused persons who are quite young and fit brutally assaulted the now deceased clearly oblivious as to the consequences. The accused persons should learn to restrain themselves and act responsibly at all material times.

In our view there is no basis to treat either of the accused persons different from the other. Their moral blameworthiness is the same.

Each of the accused person is sentenced as follows;

6 ½ years imprisonment of which 1 ½ years imprisonment are suspended for 5 years on condition each of the accused does not commit within that period an offence involving the use of violence upon the person of another for which each of the accused is sentenced to a term of imprisonment without the option of a fine.

Each of the accused shall therefore serve an effective term of imprisonment of 5 years.

National Prosecution Authority, counsel for the State

Pundu & Company, pro-deo counsel for accused 1

Ruvengo Maboke and Company, pro-deo counsel for accused 2