

THE STATE

versus

NICHOLAS MUTENDERA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 19 & 27 January, 2017

Assesors

Mr Mushuku
Mr Mutomba

Criminal Trial

Mr E. Chavarika, for the state
Mr R. Fambasayi, for the accused

MAWADZE J: The accused is facing the charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in that on 14 January 2016 at Gutsaruzhinji Village, Mkwesine the accused caused the death of TIZIRAI MUTENDERA by hitting him with a stone on the right earlobe intending to kill the said TIZIRAI MUTENDERA or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility.

The 29-year-old accused and the now deceased who was 42 years old were brothers. They lived separately in Mkwesine area.

On 14 January 2016 there was a traditional beer ceremony at the accused's homestead where members of the Mutendera family or clan including the now deceased were in attendance. There were also other close relatives and neighbours. From the evidence led

before us an altercation arose between the accused's wife ELIZABETH MAVHU and accused's sister VONGAI MUTENDERA. This altercation was centred on the allegation that sometime in the past VONGAI MUTENDERA had stolen some clothes belonging to accused's wife. This altercation sucked in the accused who intervened on the side of his wife.

The State alleges that the accused assaulted his sister VONGAI MUTENDERA who fled and sought refuge at one SIMPLICIO MATSENGO's homestead. It is alleged that upon his return the accused also assaulted his mother who had tried to restrain him and this resulted in a misunderstanding between accused and the now deceased who took exception to the accused's conduct. The State alleges that the now deceased took accused's amplifier and said he would only return it when the accused paid some token to appease their mother whom the accused had assaulted. It is the State case that this angered the accused who then intercepted the now deceased who was leaving the accused's homestead. The accused is alleged to have picked a stone and threw it at the now deceased at a close range hitting him on the right earlobe. The now deceased is said to have collapsed, bleeding profusely and was unconscious. The now deceased was taken to a local clinic the next day and later transferred to Chiredzi District Hospital where he subsequently died due to the head injury.

In his defence outline the accused said the now deceased arrived at accused's homestead on the day in question already drunk in the morning. He said his sister VONGAI MUTENDERA and an aunt SERUDZAI later arrived in the afternoon after which they engaged in an altercation with the accused's wife over some clothes belonging to accused's wife which VONGAI MUTENDERA had previously stolen. The accused said when these two attacked his wife he rushed to rescue his wife and his mother also got entangled in this altercation.

The accused said the now deceased then joined in the dispute alleging the accused was not respecting the now deceased and wanted to discipline the accused. The accused said the now deceased proceeded to hit him with clenched fists and proceeded to a pile of firewood intending to pick a piece of firewood so as to assault the accused. Due to pain already inflicted on him by the now deceased the accused said he picked the stone and threw it at the now deceased. The accused said he aimed the lower part of the body but the now deceased was now in a bending position intending to pick a piece of wood hence was hit on the head. The accused said the now deceased fell down and he and others applied first aid as the now deceased was bleeding. The accused said at his own expense he later took the now deceased to a local clinic called Chipiwa and later to Chiredzi District Hospital where

unfortunately the now deceased passed on. The accused's defence is that he acted in self-defence and also in a drunken stupor. It is his defence that he had no intention to kill his brother or cause the death of his elder brother.

A total of 3 exhibits were produced by consent and they are;

Exhibit 1 is a post mortem report compiled by Dr A. Dube who examined the now deceased on 20 January 2016 and observed that the now deceased had bruises on the right earlobe and that some discharge was coming from that right ear. The Doctor concluded that death was due to severe head injury. The cause of the now deceased's death is not in issue. It was caused by the stone which was thrown at the now deceased by the accused inflicting the fatal injuries.

Exhibit 2 is the accused's Confirmed Warned and Cautioned Statement. The bulk of the contents of that statement outlines the events of that day leading to the now deceased's injuries and subsequent death. We may simply highlight what we believe are material contents of that statement as follows;

- (i) that his sister Vongai had previously stolen his wife's clothes and that this sparked the dispute between his wife and Vongai that day when Vongai arrived.
- (ii) that it is Vongai and accused's aunt or sister in law who teamed up to assault accused's wife which caused accused to intervene by assaulting Vongai with a switch.
- (iii) that the now deceased then intervened and assault the accused using booted feet causing accused to fall
- (iv) that it is the now deceased who rushed to pick a log to further assault the accused.
- (v) that due to pain inflicted on him the accused decided to retaliate and did so by hitting the now deceased with a stone at close range on the ear.
- (vi) lastly, that when he realised he had seriously injured the now deceased the accused rendered first aid and took him to a local clinic and then to hospital where the now deceased died.

We noted that there are material differences between the accused's defence outline and his confirmed warned and cautioned statement. This relate to two aspects, which are the manner in which accused said he was assaulted by the now deceased and the reason he attacked the now deceased with the stone. The accused gives different versions on how he

said he was attacked or assaulted by the now deceased and he failed to reconcile these versions throughout the trial. Further, the accused in his warned and cautioned statement suggests when he hit the now deceased with the stone he was simply retaliating for the pain inflicted upon him. In the defence outline he raises self-defence and voluntary intoxication. In his address to the court *Mr Fambisayi* for the accused conceded to these disparities and alludes these inconsistencies to accused's alleged high level of intoxication.

Exhibit 3 is the stone which accused used to assault the now deceased. It weighs 1,99 kg.

The evidence of four state witnesses was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. We summarise this evidence as follows;

1. **ELIZABETH MUTENDERA**

She is a sister to both accused and the now deceased and was at accused's homestead on the day in question. She confirmed that she saw accused hitting the now deceased with a stone on the right earlobe inflicting the fatal injuries which caused the now deceased to fall down unconscious bleeding profusely. She helped in ferrying the now deceased to local clinic the next day when the now deceased was still in critical condition and was later taken to Chiredzi hospital where he died. We note that Elizabeth Mutendera does not at all state that the now deceased attacked the accused. She also does not state or imply that the accused acted in self-defence.

2. **SGT MUZOMA**

Sgt. Muzoma is the Investigating Officer who recorded accused's warned and cautioned statement which was later confirmed Exhibit 2.

3. **CST. MUPEPEYAPI**

This police officer simply witnessed the recording of accused's warned and cautioned statement by the Investigating Officer Sgt. Muzoma.

4. **DR A. DUBE**

The Doctor examined the now deceased's body on 20 January 2016 and compiled the post mortem report Exhibit 1 in which he attributed the cause of death to severe head injury.

We now turn to viva voce evidence led from two witnesses by the State and accused's evidence.

SIMPLICIO MATSENGA

He is married to accused and now deceased's sister one ELIZA MATENDERA and resides in the same village with the accused. He was at accused's homestead for the traditional ceremony on that day.

Simplicio Matsenga (Simplicio) said he arrived at the accused's homestead that day at about 10.00 hours and found both the accused and the now deceased already drunk. He joined others present for the ceremony which was being held inside the house.

Simplicio said accused's sister Vongai later arrived and entered into the house where she greeted people inside. He said as Vongai left the house and at the door way the accused's wife also known as Elizabeth head-butted Vongai alleging that Vongai had previously stolen her clothes being underpants and a jacket. Simplicio said accused left the house and picked a log which he intended to use to assault Vongai as all people got out of the house. He said Vongai fled to Simplicio's homestead nearby and locked herself inside the house as accused chased after her.

Simplicio said the accused upon his return was calmed down by his mother but instead he assaulted his mother causing her to fall down. Simplicio said accused was alleging that his mother had given birth to a thief like Vongai. It is at this stage Simplicio said the now deceased intervened pointing out that it was improper for the accused to assault their mother. The now deceased then took accused's amplifier which was being played saying he would only return it to accused if accused paid a chicken to appease their mother he had assaulted. He said as the now deceased was about to leave the accused intercepted him and hit the now deceased with a stone on the head causing him to fall down. The accused was protesting that the now deceased should not take accused's amplifier.

Simplicio said by the time accused hit the now deceased with a stone, accused was unaware that his sister TADZEI had already retrieved the amplifier from the now deceased. Simplicio said the accused had not realised this because accused was very drunk.

According to Simplicio the now deceased was hit with a stone at a close range of about 10m and that he was caught unaware. He said the now deceased fell down unconscious bleeding profusely.

Simplicio said when this incident happened at about 3.00 pm both accused and the now deceased who had been drinking beer since morning were already heavily intoxicated, unlike him who was moderately drunk. In fact, Simplicio said the accused was so intoxicated that he seemed not to appreciate fairly what he was doing.

According to Simplicio accused and the now deceased enjoyed cordial relations as brothers. As a brother in law he too enjoyed good relations with both accused and the now deceased.

Simplicio denied that the accused was attacked or acted in self-defence but that accused was incensed when the now deceased took accused's amplifier as accused said he wanted to discipline the now deceased. He said accused threw the stone at the now deceased with a lot of force at close range.

Under cross examination Simplicio denied that the now deceased tried to pick a piece of wood to assault the accused. He dismissed as completely untrue that accused acted in self-defence.

In our assessment Simplicio gave his evidence well. He is related to both accused and the now deceased as a brother in law married to their aunt. No reason was suggested to him as to why he would mislead the court in his evidence or show bias towards either accused or the now deceased. He was very candid with the court that both accused and the now deceased were heavily intoxicated. We assess him as a credible witness who besides being moderately drunk had a fair recollection of the events

SIMON HARUZI MUDZINGWA (Simon)

Simon is not related to both accused and the now deceased. He said he arrived at accused's homestead that day at about 14.00 hrs when the ceremony was over and people were now just drinking beer.

Simon said the problem started when an altercation erupted between accused's wife and accused's sister which caused accused to intervene. He said accused attacked his sister whom he chased up Simplicio homestead where she sought refuge.

Simon said upon his return from chasing after his sister accused assaulted his mother who had tried to intervene in the fracas. This prompted the now deceased to take accused's amplifier saying he would only return it to accused after accused would have appeased their mother. Simon said this resulted in exchange of harsh words between accused and the now deceased which prompted the now deceased to state that he was now leaving accused's homestead. Simon said as the now deceased was leaving accused picked a stone Exhibit 3 and threw it at the now deceased hitting him on the right ear. He said the now deceased fell down bleeding profusely and was unconscious. This promoted Simon to tell accused and other family members to immediately take the now deceased to hospital.

Simon said when this incident happened he was not drunk as he had just arrived. He however said both accused and the now deceased were extremely drunk. He disputed that accused attacked the now deceased in self-defence but most probably due to his high degree of intoxication as accused was not prepared to be restrained by anyone which conduct was out of character for the accused as he normally took advice from Simon when sober. In fact, Simon said accused seemed not to appreciate all what accused did due to intoxication.

Under cross examination Simon said he was a good friend of the accused and had no cause to falsely implicate the accused. He said he and other people witnessed accused hit the now deceased with a stone as they were now out of this house when all this commotion erupted. He denied that the now deceased tried to pick a log or attacked the accused in any manner and that the accused did not act in self-defence. In our assessment Simon gave a clear and coherent account of what transpired especially on how the now deceased was attacked. He was virtually sober. Again no motive was suggested as to why he would lie in his evidence. In fact it was not refuted that he is accused's friend. We find no reason not to accept his evidence.

ACCUSED'S EVIDENCE

From the accused's evidence most of the sequence of events are not in issue. The accused admitted that he intervened in a dispute between his wife and his sister Vongai, although accused says both Vongai and accused's aunt Sarudzai teamed up to attack his wife. Accused confirmed that his mother held him restraining him and that his sister Vongai fled. The accused denied assaulting his mother but said he simply pushed her away.

The accused said the now deceased proceeded to attack accused on the false allegation that accused had assaulted their mother. Accused said he was hit with a log and fell down. He said the now deceased continued to hit him as he lay down saying he was disciplining accused for assaulting their mother. Accused said he picked a stone as the now deceased was trying to pick a piece of wood to further assault him. Accused said he aimed to hit the now deceased's lower part of the body but hit him on the head as the now deceased was bending down to pick the piece of firewood.

The accused refuted that he was heavily drunk, insisting that he fully appreciated what he was doing and what transpired. Accused said both Simplicio and Simon were inside the house and did not witness what happened between him and the now deceased. The accused said Simplicio and Simon connived to falsely incriminate him as they are friends. Accused

said Simplicio want to have accused incarcerated so that Simplicio would not pay outstanding lobola for accused's aunt which lobola accused always demand.

Accused said he hit the now deceased from a distance of 2m with the stone and that deceased was more intoxicated than accused. The accused denied that there was any dispute in respect of his amplifier.

In our view the accused did not fare very well as a witness. We have already alluded to the contradictions or inconsistencies between his explanation on how he was allegedly attacked by the now deceased and his reason for attacking the now deceased. Even the accused's Counsel concedes to this material contradictions. The issue that accused acted in self-defence only emerges here in court. In his confirmed warned and cautioned statement accused was clear that he simply retaliated and does not mention acting in self-defence. This material contradiction by the accused puts his story or defence into serious doubt.

It is clear to our minds that accused is building his case as the trial progresses. The accused did not suggest to both Simplicio and Simon any possible reasons as to why both would falsify their evidence. The allegation of connivance was belatedly raised by the accused. The same goes for the allegation that Simplicio owes some outstanding lobola. It was never suggested to both of them that they did not witness how accused hit the now deceased with the stone as they were inside the house. The inescapable conclusion is that all these assertions by the accused are a result of an afterthought on the part of the accused. All these issues could not have possibly escaped accused's mind. It is for these reasons that we do not find accused to be a credible witness.

FINDINGS BY THE COURT

We accept the clear version given by both Simplicio and Simon on how the accused attacked the now deceased. These two witnesses materially corroborated each other on how accused attacked the now deceased and why he did so. They were both eye witnesses to the attack and fairly sober. Our finding is further fortified by the fact that they materially corroborated each other on the altercation between Vongai and accused's wife, how accused got involved to this altercation, the assault by accused of his mother, why the now deceased intervened, the source of dispute between accused and the now deceased, degree of both accused and now deceased's level of intoxication and most importantly how accused attacked the now deceased. They both discount that the accused acted in self-defence.

From the facts and evidence placed before us the defence of self-defence as provided for in s253(1) of the Criminal Law (Codification and Reform) Act, [Cap 9:23] is not available to the accused. It is a fact that accused did not act in self-defence.

It is a fact that the accused attacked the now deceased with the stone which weighed almost 2kg. The stone was thrown at a very close range of 2 metres as per accused's version. It is not true that the now deceased was in a bending position. This means accused aimed at the head and hit the now deceased on the right earlobe. It is clear that severe force was used as the now deceased was immediately incapacitated and seriously injured. The severe head injury inflicted is the proximate cause of death. The question to be answered is therefore whether the accused had the requisite intention actual or constructive to cause death.

In our view despite accused's protestations we accept the evidence of both Simplicio and Simon that the accused was heavily intoxicated and did not fully appreciate his conduct. The effect of the defence of voluntary intoxication as a defence to a charge which requires proof of intention or *mes rea* is provided for in s 221(1) of the Criminal Law (Codification and Reform) Act [Cap 9:23]. The degree of intoxication can vitiate the requisite *mens rea* or intention. Our view is that the accused's brain had been numbed by the alcohol he had taken. This therefore means he had no requisite intention actual or constructive to kill the now deceased. Our view therefore is that the accused was so intoxicated that he did not have the intention to commit the specific intent crime like murder. The accused, however, was negligent in his conduct and cannot escape liability in respect of a permissible verdict on a charge of culpable homicide.

VERDICT: NOT GUILTY OF MURDER BUT GUILTY OF c/s 49 of the Criminal (Codification and Reform) Act [Cap 9:23] – CULPABLE HOMICIDE.

SENTENCE

There is an old folklore song which was also sang by the late musician Jonah Sithole whose lyrics sound like this in shona;

'Handiza guta, kana ndaguta ndinorova mai. Doro renyu rinonaka, kana ndaguta ndicharova mai.'

Loosely translated the person is saying once he or she gets drunk after consuming very intoxicating traditional beer he or she will assault his or her mother! This is exactly what the accused did in this case. It is an admonition or taboo for one to assault his or her mother. In our African culture this is frowned upon.

The events leading to the demise of the accused's elder brother are aggravating and elevates the accused's moral blameworthiness. The accused intervened between an altercation between his wife and sister not to restore peace between them but to stoke the flames of combat. From there the accused was on a warpath as he went a gear up by assaulting his mother who tried to knock sense in his drunken mind. The accused went on to attack his elder brother who had rightly admonished him leading to the demise of the elder brother. The family is indeed the nucleus of society and everyone is expected to foster peace and tranquillity in the family not to cause death within the family.

The deceased needlessly lost his life. This court has a duty to protect the sanctity of human life. It is very disturbing and worrying that cases involving the loss of life arising from minor disputes are very prevalent in Masvingo. Some of these tragic events happen after consumption of alcohol. The court should as a matter of urgency draw a line in the sand and ensure that a message is clearly sent that disrespect of human life is intolerable. In this case the deceased's family has lost a father and husband. The accused deserve to be harshly punished. It is fortunate that accused's degree of intoxication has saved him from being convicted of a more serious offence of murder.

While voluntary intoxication is not a mitigatory factor in assessing sentence where an accused has been convicted of the offence of culpable homicide as provided for in s 221(2) of the Criminal Law (Codification Act) [*Cap 9:23*], the court has taken into account the accused's personal circumstances.

The 29-year-old accused is a first offender who deserves to be treated with some measure of leniency. The accused is an unsophisticated rural man who is barely literate. His family of 5 children and a wife survives on his manual labour hence they would be adversely affected by his incarceration. The court has been advised that the accused had assumed an extra burden of taking care of the deceased's 6 children. The accused who was employed earning US\$120.00 per month has lost his job as a result of this conviction and incarceration.

It is mitigatory that accused will always live with the fact that he caused the death of his elder brother. Such stigmatisation will always weigh heavily on accused's mind. The court notes in accused's favour that after he realised that he had seriously injured the deceased he did not only render first aid but went out of his way to dispose of his assets to raise money to pay for transport which ferried the deceased to hospital.

In the result the accused is sentenced as follows;

8 years imprisonment of which 3 years imprisonment are suspended for 5 years on condition accused does not commit within that period any offence involving the use of violence upon the person of another for which the accused is sentenced to a term of imprisonment without the option of a fine.

Effective sentence: 5 years imprisonment.

National Prosecuting Authority – Counsel for the State

Legal Resources Foundation, pro deo Counsel – for the accused.