

THE STATE

Versus

ZIVANAI MUCHOWA

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO 20 FEBRUARY, 19 MARCH, 20 JULY, & 25 SEPTEMBER, 2020

Assessors

1. Mrs Chademana
2. Mr Chikukwa

Criminal Trial

Ms M. Mutumhe, for the state

Ms Moffat with J. Makuni, for the accused

MAWADZE J: The accused was arraigned for contravening s 47(1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] relating to murder.

The charge is that at House 48 Bossmine Compound, Mashava the accused caused the death of Edmore Jonathan by assaulting him all over the body with an iron bar.

The then 34 year old accused resides at No. 48 Bossmine, Mashava and is an uncle to the then 27 year old deceased Edmore Jonathan of Makotore Village, Chivi, Masvingo.

The facts giving rise to this charge are as follows:-

On 16 April 2019 at night the now deceased was playing a game of snooker in Shumba Store, Bossmine, Mashava with some unknown adult and a bet of \$2.00 was on offer for the

winner. Apparently a dispute arose as to who was the winner and thus entitled to the \$2. A quarrel ensued. The accused who was present intervened and declared that the now deceased had lost the game. The now deceased was unimpressed and a quarrel ensued between accused and the now deceased.

During this heated argument the accused and the now deceased pushed each other. However the now deceased appeared to relent as he advised accused that they were related and should not fight each other. The accused however took possession of the \$2 put as a bet for the winner and left for his residence. This prompted the now deceased to follow him.

Upon arrival at his home the accused hid in a fire place at the verandah of his house. When the now deceased arrived he started to knock at the door of accused's house, unaware that the accused was hiding.

The state alleges that the accused got out of the hiding place armed with an iron bar and hit the now deceased from the back. It is said the now deceased fell on the veranda and rolled on to the ground. It is alleged that the accused followed him and further assaulted him with the iron bar now alleging that the now deceased was knocking at accused's house because he should have been in a love affair or extra marital affair with the accused's wife one Mavis Chebundo.

According to the state, Brenda Sibanda accused's neighbour witnessed the assault and called the now deceased's relative Irene Dzemere. It is said both ladies could not intervene due to the anger exhibited by the accused and the vicious nature of the assault. The deceased is said to have pleaded for mercy to no avail. It is alleged that the assault only stopped when more people gathered and the accused fled from the scene leaving the now deceased in a pool of blood and severely injured.

Andrew Phiri and Irene Dzemere took the now deceased to the local Bere clinic. Due to the severity of the injuries the now deceased was transferred to Masvingo General Hospital and to Harare Hospital on 17 April 2019 but unfortunately passed on on 3 May 2019 while admitted in Harare due to the injuries. The accused was later arrested. The cause of the now deceased's death is said to be bilateral pneumonia, left haemothorax and fractured ribs caused by the blunt force.

In his defence outline the accused raised a cocktail defences including denial of fatally assaulting the now deceased, voluntary intoxication, self-defence and provocation.

The accused said he fought the accused inside Shumba Store because the accused provoked the accused by boasting that he, the now deceased was having an extra marital affair with the accused's wife.

After this brief fight the accused said he left Shumba Store for his residence as he was intoxicated. However he said he was attacked by the accused with a catapult on his way home sustaining some injuries. Upon arrival home the accused said he naturally asked his wife if she had an extra marital affair with the now deceased.

The accused said the now deceased suddenly arrived at the accused's residence threatening mayhem. He said he was attacked with stones whilst in his house. Sensing imminent danger to himself and his family accused said he decided to act in self-defence and defence of his family by hitting the now deceased with an iron bar causing the now deceased to fall down. In the process the accused said the now deceased fell from the steps on the verandah rolling on to the ground resulting in the now deceased being seriously injured. He said he was then able to disarm the now deceased of the knife he had and a catapult.

In explaining the now deceased's injuries the accused said other than acting in self-defence by delivering a single blow with an iron bar the now deceased was injured when he fell from the steps leading to the verandah. The accused said the now deceased was however able to flee from the scene despite being injured.

During the course of the trial a total of 4 Exhibits were produced by consent being Exhibit 1 the Autopsy report, Exhibit 2 accused's confirmed warned and cautioned statement, Exhibit 3 Certificate of weight of the iron bar and Exhibit 4 the iron bar.

As per Exhibit 3 the iron bar Exhibit 4 has a weight of 2.3 kg and is 83 cm long. We noted that it is quite sharp on the other end and fairly heavy.

In his warned and cautioned statement the accused confirmed the fight with the now deceased inside Shumba Store after which he said the now deceased followed accused to accused's house. He said he then struck the now deceased with an iron bar at accused's house in self-defence.

The narrow issue in this matter relates to how the now deceased was injured and also the cause of his demise. In resolving this issue we shall consider the evidence of state witnesses who allegedly witnessed the assault, and those who observed the injuries sustained by the now

deceased. This would then be juxtaposed with the accused's evidence, specifically whether factual issues he raises are not only truthful but amount to the various legal defences he raised.

Ultimately the now deceased's cause of death is not meaningfully disputed. As already said the Autopsy report Exhibit 1 was produced by consent and Dr Bopoto who compiled it testified.

Dr Bopoto only examined the now deceased on 3 May 2019, some 16 days after the assault and after the now deceased's death. Dr Bopoto was non-committal as to what exactly caused the injuries he observed on the now deceased's body which he listed as;

- i) Broken left arm above the elbow
- ii) Multiple lacerations and bruises
- iii) Sub jackal haematoma (bleeding under the skin of the skull)
- iv) Fractured 3rd to 5th ribs resulting in damaged lung and bleeding inside the chest which in turn caused pneumonia
- v) Bleeding under the skin of the abdomen

All Dr. Bopoto said these injuries were most likely caused by blunt trauma which could be a result of falling from steep steps or an assault. Dr Bopoto was not privy to the exact facts of the state case. He found it difficult to commit himself as to whether a fall from some steps whose height or steepness he did not know could cause such injuries. Equally he could not rule out the alleged assault. All he was clear about is that the cause of death was bilateral pneumonia, left haemothorax, and fractured ribs caused by blunt trauma.

Dr Bopoto's professional predicament is understandable. He only examined the now deceased's body 16 days after the incident. He was not given the alleged facts. The now deceased had been in hospital from 16 April 2019 to 3 May 2019. Some of the injuries were attended to and could have healed. As to how the now deceased was injured we have therefore to consider other evidence.

The evidence of the Investigating Officer Sgt Gold Zishiri is also not very material as he only took over the matter which was initially treated as attempted murder after the now deceased's death on 3 May 2019. All he said is that it is the accused who surrendered the iron bar Exhibit 4 used to assault the now deceased. We find the accused's evidence in this regard that police just picked an iron bar to be improbable.

Sgt Gold Zishiri said he indeed established during investigations that both the accused and the now deceased were drunk on the day in question. He however was unable to establish the degree or extent of their intoxication. In this regard the accused himself testified that he was moderately drunk and fully appreciated his conduct. This means therefore that defence of voluntary intoxication the accused raised in his defence has no bearing to the accused's conduct and at most is a mere ruse.

Sgt Gold Zishiri said other than making indications at the scene the accused also gave his warned and cautioned statement Exhibit 2. Most importantly he said the accused never raised the issue that the now deceased had a catapult or that the accused sustained any injuries. This means that these issues are now being raised in court by accused as an afterthought. Sgt Gold Zishiri confirmed that indeed the now deceased followed accused to accused's house. He however dismissed the accused's assertion that there was any love affair between the accused's wife and the now deceased. Indeed this is so because if such a love affair existed the accused would not have failed to mention it in his warned and cautioned statement Exhibit 2.

It is Cst Cornwell Mandivengereyi who first attended to the now deceased on the day of the alleged assault at Bere Clinic. He said the now deceased was groaning in pain and could hardly talk as he complained of severe chest pains. He said the now deceased explained he had been maimed by the accused with an iron bar. He observed that one of the now deceased's hand and one of the legs were fractured. Thereafter Cst. Cornwell Mandivengereyi went to the scene of assault at accused's residence where he observed a lot of blood on the ground. The accused had fled and was only arrested after some days for attempted murder. From this evidence it cannot possibly be true as accused alleges that the now deceased fled from the scene of assault.

The first medical person to attend to the now deceased on the date of the alleged assault is a male nurse Tawanda Ratsauka at Bere Clinic in the morning of 17 April, 2019. He observed the following injuries;

- i) Stab wounds on both legs perforating the legs
- ii) Broken left arm
- iii) Possible serious chest injuries
- iv) Excessive bleeding
- v) Bruises all over the body

Tawanda Ratsauka described the injuries as very severe, and life threatening hence he immediately transferred the now deceased to Masvingo General Hospital. More so as the now deceased could neither walk or sit.

Our view is that these injuries observed by the witnesses could not possibly been caused by falling from some steps as accused alleges. This is due not only to their multiplicity but severity. Further the accused sought to down play the injuries the now deceased sustained.

Both Brenda Sibanda accused's neighbour and Irene Dzemere the now deceased's aunt called by Brenda Sibanda said they witnessed how the accused brutally assaulted the now deceased on the night in question as the now deceased lay helplessly at accused's house pleading for mercy.

Brenda Sibanda (Brenda) said she was woken up by the now deceased's cries. Her evidence is that when she got out of her house she saw the now deceased lying helplessly on the ground. She could clearly see because of some lights illuminating the place. Accused was using the iron bar Exhibit 4 to assault the now deceased all over the body. She said the now deceased was constantly crying out saying;

"uncle why are you killing me"

In turn she said the accused retorted that he would indeed kill the now deceased.

Brenda said due to the severity of the assault she was scared to intervene more so as accused also threatened to assault his (accused's) wife who tried vainly to verbally restrain the accused. As a result Brenda said she ran to call the now deceased's aunt Irene Dzemere. Upon he return with Irene the assault was continuing and that it only stopped when more people gathered and accused fled.

Brenda said when she got near the now deceased she noticed that the now deceased's legs had been pierced with the sharp end of the iron bar Exhibit 4 and the now deceased was bleeding profusely. The now deceased could no longer walk or sit.

According to Brenda several blows were delivered and the assault was prolonged using the iron bar Exhibit 4. She said severe force was exerted as accused used both hands.

Brenda dismissed that accused acted in self-defence. She said the now deceased was lying helpless on the ground crying for mercy but would be struck all over body and pierced with

the iron bar. She said accused could not have been defending his wife because accused's wife was also standing close by pleading with the accused to stop the assault.

We are not persuaded by accused's assertion that Brenda falsified her evidence because she was allegedly not in good books with the accused's wife. This is the most lame excuse accused could give.

Irene Dzemere (Irene) said when she was called by Brenda she too stood a distance, afraid to intervene as the accused was viciously attacking the now deceased using the iron bar Exhibit 4. Irene said accused was lying down crying that out accused was killing him but the accused was unmoved. She said the assault only stopped when more people gathered and the accused fled. Thereafter Irene said she then got to where the now deceased was and observed the following;

- i) Perforations all over the body
- ii) Broken hand
- iii) Broken leg
- iv) Excessive bleeding
- v) The now deceased could not walk, or sit and could barely talk

Irene was assisted by other people to ferry the now deceased to Bere Clinic and accompanied him to Masvingo General Hospital where some of the injuries were sutured. She said after 4 days the now deceased was transferred to Harare.

Given all this clear evidence it is foolhardy for the accused to believe that his version of events can possibly be true. It cannot be true that he only assaulted the now deceased once on the hand or back with iron bar. There is nothing at all that the accused, in perpetrating such a prolonged assault on a helpless now deceased, was acting in self-defence or defence of his family. The injuries the now deceased sustained could not be as a result of falling from some stairs or steps but brute force with an iron bar.

Exhibit 4

Indeed faced with this overwhelming evidence the accused sought to find escape routes. He was now heard to say the now deceased hit on some pillar. To his credit he conceded that that there was no love affair between his wife and the now deceased but that the dispute simply arose from a game of snooker.

We are not persuaded, as accused alleged that Irene was never at the scene. If indeed accused was a victim as he said why would he flee and not report to police, let alone seek be treatment of the injuries he alleges he sustained at the hand of the now deceased.

At the end of the day it is clear as day light that the accused simply cherry picked on any possible defence which came to his mind which defences had no bearing at all on the true facts. We will not burden ourselves by even trying to analyse the legal requirements of all such defences like voluntary intoxication, self-defence or provocation because factually they do not arise in this case and are unavailable to the accused.

Despite that it is the now deceased who followed the accused to accused's house, the manner in which accused assaulted the now deceased, the force he used during the prolonged assault, the indiscriminate nature of the assault, the weapon he used and the resultant injuries clearly show that the accused did foresee that death may result but was oblivious to such consequences.

In the result, we find the accused guilty of murder with constructive intent.

VERDICT

Guilty of contravening section 47(i) (b) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]:- Murder with constructive intent.

REASONS FOR JUDGMENT

In assessing sentence we shall balance both the mitigatory and aggravating factors in this matter.

The offence the accused stand convicted of is a very serious offence which invariably attracts lengthy custodial sentence. There are no reasons as to why we should depart from this approach.

Loss of life through unlawful violent conduct should be condemned by all right thinking people. The sanctity of human life and the sacred nature of human life cannot be over emphasised. It is therefore the duty of the courts to ensure that those who fail to value human life are punished severely. The offences of this nature are very prevalent in Masvingo Province. What is worrying is that some people resort to violence, more often with fatal consequences over

seemingly trivial and minor disputes. *In casu* the dispute centred around the game of snooker and a bet of a paltry \$2. Surely can a life be lost over \$2.

Your moral blameworthiness is aggravated by the manner you assaulted the now deceased. The assault was not only prolonged but brutal. Your conscience was not pricked by the now deceased's cries for mercy. From the evidence before us it appears as if you were possessed by some demonic spirit. We are at loss as to what really incensed you to that extent. You indeed inflicted very serious injuries on the now deceased. What elevates your moral blameworthiness is also your lack of contrition throughout the trial. You were not even prepared to accept that you fatally assaulted the now deceased but sought to distance yourself from the fatal injuries he suffered.

Be that as it may we have taken into account the mitigatory factors which were passionately outlined by your counsel *Ms Moffat*.

You are 35 years of age, married with two children and other dependants to look after. Your lengthy incarceration would prejudice them.

This is your first brush with the law, albeit on the deep end. You nonetheless deserve some measure of lenience.

Although a life lost cannot be replaced in any manner, the gesture you made which is in line with our African custom of paying some compensation should be viewed in a positive light. You paid for all of the funeral expenses and also for the memorial service. In addition to that you paid compensation of 15 head of cattle.

We are cognisant of the fact that you suffered from a lengthy pre-trial incarceration period of 17 months.

There are also indeed mitigatory circumstances surrounding the commission of the offence. These include *inter alia* that you were intoxicated and may not have acted in the same senseless manner if you were sober. Further, it is the deceased who also contributed to this tragic event as he is the one who followed you at your residence in the middle of the night. We can only guess as to the motive of the now deceased.

In our view the following sentence is appropriate in the circumstances:

SENTENCE:- 15 years imprisonment.

National Prosecuting Authority, counsel for the state

Legal Resources Foundation, Masvingo, pro deo counsel for the accused