

THE STATE
vs
GARIKAYI MAGWEREGWEDE

HIGH COURT OF ZIMBABWE
MAWADZE J.
MASVINGO, 3rd and 15th June, 2021

Criminal Trial

Assessors

1. Mrs Chademana
2. Mr Mushuku

B.E. Mathose, for the applicant
L. Muvengeranwa, for the accused

MAWADZE J: The sole issue for determination in this criminal matter is how the now deceased was fatally injured.

The then 26 years old accused was arraigned before this court facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

The charge being that on 5 September, 2019 in Chiwara Village, Chief Nhema, Zaka the accused intentionally and unlawfully caused the death of one Pride Tovadini by stabbing him in the chest with a knife.

The events leading to the now deceased's death are largely common cause.

On 5 September, 2019 the 24 year old now deceased a resident of Kwezuva Village and the then 26 year old accused a resident of Magweregwede Village, both of Chief Nhema, Zaka

were amongst the patrons partaking in the traditional beer at one Parade Chiwawa's homestead in Chiwawa Village, Chief Nhema, Zaka. They were in a kitchen hut in the afternoon around 1400 hrs.

A dispute arose between the accused and the now deceased over the occupancy of a chair.

The undisputed facts are that the accused was seated on the chair inside the kitchen hut. The accused then left the kitchen hut to go and relieve himself outside. He left his hat on that chair. In the accused's absence the now deceased decided to remove the accused's hat and sat on the same chair. Upon his return the accused took unkindly to the now deceased's conduct and demanded the chair back. A misunderstanding erupted resulting in a fist fight. The patrons restrained the two protagonists. However after a short while the now deceased apparently unsatisfied with how the fight had ended approached the accused again.

The now deceased proceeded to hold the accused by the shirt and started to pull him out of the hut. The two held each other and went out to the kitchen hut.

The dispute is what then happened out of the kitchen hut.

The State alleges that while outside the kitchen hut the accused pulled out a knife from his pocket and stabbed the now deceased in the chest causing severe bleeding and his death. The accused is said to have fled from the scene and was later arrested some 10 km from the scene at Gadziriso Business Centre. The knife was never recovered.

In denying this charge the accused as per his defence outline Annexure "B" raised about three defences. These are voluntary intoxication, self-defence and a mistake or accident.

In his defence outline the accused said while outside the kitchen hut the now deceased assaulted him with fists, open hands and a stick. The accused said both himself and the now deceased were intoxicated. It is accused's case that when the now deceased tried to deliver one of the blows with the stick he missed. The stick hit the ground. It broke into two pieces. Accused said he picked the other part of the stick in a bid to defend himself and fend off the attack by the now deceased. The accused said he held the stick towards the now deceased. The now deceased oblivious to all this charged towards the accused and literally ran into the pointed stick and was thus accidentally stabbed by the stick the accused was holding.

In support of its case the State led viva voce evidence from only two witnesses Towadini Ngonidzashe one of the patrons at the beer drink and Assistant Inspector James Chidhakwa the arresting and also investigating officer.

The evidence of other two State witnesses Pomerai Tadzvirirwa a fellow patron at the beer drink who is now being said to be in South Africa and Dr Godfrey Zimbwa who examined deceased's remains and compiled the post mortem report Exhibit 1 was admitted in terms of s 314 of the Criminal Procedure and Evidence, Act [*Cap 9:07*].

The accused gave evidence and did not call any witnesses.

The cause of the now deceased's death is uncontentious.

As per Exhibit 1 the post mortem report the doctor observed the following injuries;

“Single stab wound on left sternal edge in second intercostal space ± 3 cm wide, smooth edges penetrating deep into the lungs. Severe bleeding.”

The cause of death was haemorrhage shock caused by this stab wound.

Dr Zimbwa's evidence simply repeats these findings in Exhibit 1 the post mortem report.

We now turn to the evidence led by the State.

Pomerai Tadzvirirwa

As already said his evidence is not in issue. He was a neighbour to both accused and the now deceased. He was one of the beer patrons. He confirmed what led to the dispute between the accused and the now deceased and how the two were restrained by other patrons. Later on after about 30 minutes he confirmed that it is the now deceased who rekindled the dispute over the said chair by grabbing the accused. He said the two held each other and went out of the kitchen hut. When he later followed the now deceased had already been stabbed and was unable to speak. He rendered first aid to no avail. The now deceased who had collapsed passed on. The accused had fled only to be brought later by the police after his arrest the same day.

Assistant Inspector James Chidhakwa (Ass Insp Chidhakwa)

The evidence of Ass. Insp. Chidhakwa relates to how the accused was arrested and the investigations he carried out.

He said after receiving the report of murder he teamed up with fellow police officers from ZRP Zaka police station. They were not using a police vehicle but a Zaka Rural District Council vehicle. He said when they got to Gadziriso business centre some 10 km from the scene of crime

they met a member of the local police special constabulary who advised them that the accused was approaching the business centre.

Ass. Insp. Chidhakwa said he then saw the accused who was pointed at him some 50 m away. As the accused approached he said the accused realised that the occupants of the council motor vehicle were police officers. The accused took to his heels. The police officers who were armed gave chase. One of the details fired 8 warning shots. The accused was undeterred and continued to flee. He said after a spirited chase the accused was apprehended, subdued and arrested.

Upon arrest the accused declined to give any warned and cautioned statement or to explain what had happened. The accused decided to keep his peace. He did not say anything. They then took him to the scene of crime some 10 km away. He said still the accused would not say anything.

At the scene of crime Ass. Insp. Chidhakwa said many beer patrons were unwilling to be taken as State witnesses except Towadini Ngonidzashe and Pomerai Tadzivirirwa from who he recorded statements.

Ass. Insp. Chidhakwa said upon examining the now deceased's body he observed a stab wound on left upper side of the chest and that the now deceased was frothing from the mouth and nose.

Ass. Insp. Chidhakwa said witnesses present said the now deceased had been stabbed with a homemade okapi like knife with a blue handle. The accused was uncooperative and did not respond. He never recovered the said knife.

While at the police station the following day Ass. Insp. Chidhakwa said the accused was still difficult to deal with as he gave various versions of what had happened. He recorded these various statements from the accused but the accused would proceed to disown each version during confirmation proceedings. As a result no statement was confirmed. In brief he said accused first said the now deceased fell on to a piece of firewood as they wrestled. He then changed and said he stabbed the now deceased with a piece of firewood in self-defence. Lastly, he disowned both the versions.

Ass. Insp. Chidhakwa said even when he took the accused to the scene to be shown the said piece of firewood the accused could not indicate it but said it was possibly used to make

fire. Ass. Insp. Chidhakwa said since accused was arrested 10 km from the scene of crime the accused had ample time to dispose of whatever weapon he could have used if he so wished.

When asked to explain what explanation accused gave for fleeing Ass. Insp. Chidhakwa said all accused said was that he has inherent phobia or fear of the police.

Ass. Insp. Chidhakwa said upon arrest the accused was smelling of beer but was not very much intoxicated as he outpaced the police for a considerable distance with Cst Bhunu firing 8 warning shots before he was apprehended.

Towadini Ngonidzashe (Towadini)

Towadini is the only eye witness to how the now deceased was stabbed. He only came to the beer drink briefly around noon as he was herding cattle. He was sober. The now deceased is a son to his elder brother and accused is a fellow villager.

Towadini also confirmed the case of the altercation between the accused and the now deceased over a chair accused was using. The deceased was refusing to vacate the chair. A scuffle ensued between the two. Harsh words were exchanged.

Towadini said he then left the kitchen hut leaving accused and the now deceased quarrelling. He later observed the now deceased pulling the accused out of the kitchen hut. He clearly explained how the now deceased was stabbed. Towadini said while outside the kitchen hut accused pulled out a homemade like okapi knife with a blue handle from his pocket as other patrons shouted that accused had a knife. Both accused and the now deceased were holding each other. He said the accused then stabbed the now deceased while holding the now deceased and thereafter released him. The accused then fled. The now deceased tried to walk away. Towadini ran to the now deceased calling him to stop but the now deceased could not respond. Thereafter the now deceased collapsed and died.

Towadini said upon checking the deceased's body he saw that the deceased's shirt had been pierced on the chest. He further observed a stab wound on that spot on the chest which was very deep. The accused then briefly came back to pick his pair of sandals and shirt and fled only to return later with the police under arrest the same day.

Towadini was very clear that he vividly saw how the now deceased was stabbed as he was very close to the scene. He said the accused fled with the knife which he believed was recovered. He said the now deceased hardly walked for 10 m after he had been stabbed and died.

He emphatically denied that the now deceased was injured with a stick or piece of firewood. He insisted that the accused's version was false as the accused stabbed the now deceased while holding him and only released him after stabbing him once.

Towadini said both accused and the now deceased could not be said to have been very drunk.

Analysis of evidence and findings made

Towadini gave very clear evidence. He did observe clearly what happened as he was sober. There is nothing to show he was biased in favour of the now deceased as son of his elder brother. He was clear the now deceased was the cause of the dispute and the aggressor. He never sought to minimise the now deceased's role in this fracas. Counsel for the accused could not meaningfully cross examine him. In that vein therefore we are inclined to accept his evidence.

The evidence by Ass. Insp. Chidhakwa is largely uncontroverted save for the number of warning shots fired. The accused further said no statement could be confirmed because the police were intimidating him. Nothing can be further from the truth. All the police wanted to know is how the now deceased was fatally injured. Again we find Ass. Insp. Chidhakwa's evidence credible.

The accused's version of events cannot possibly be true on how the now deceased was fatally injured.

The accused's version of how the now deceased was stabbed is akin to the now deceased committing suicide by running into a sharp stick pointed at the now deceased! If this is what had happened why would the accused not be keen to tell the police soon after his arrest. Further, why would the accused fail to give consistent version to the police?

In his defence case the accused continued to give conflicting versions. He was now heard to be saying he does not know how the now deceased was stabbed or injured. Infact he said when he left the scene of crime he was not aware that the now deceased had been injured or stabbed. That cannot possibly be true because why would he flee from the scene. Further why would he give graphic details in his defence outline on how the now deceased was injured?

The accused's conduct soon after the now deceased's fatal injuries, upon seeing the police and after his arrest betrays a guilt mind and unwillingness to be truthful. He fled from the scene of crime. He fled from the police. He was unwilling to explain the truth of what he said

happened. It is ridiculous for the accused to say he fled as warning shots were being fired because he was afraid to be shot. Surely why would police just fire warning shots upon seeing the accused? No wonder why accused was not able to show the police the said piece of firewood he now refers to.

During the course of the trial the accused abandoned two of his defences of voluntary intoxication and self-defence. He said although he had drank alcohol he fully appreciated all he did and what happened. Indeed that is correct because he explained in detail his altercation with the now deceased. He was able to flee from the police only to be arrested after a spirited chase. That is inconsistent with being very drunk not to appreciate his conduct, let alone to vitiate the requisite intention. The defense of voluntary intoxication as provided in s 221(1) (a) and (b) of the Criminal Law Code [Cap 9:23] cannot be available to the accused. At most his intoxication can only be mitigatory not that it vitiated the requisite *mens rea*.

The accused also abandoned his defence of self-defence as he said he did not use any weapon to fend off the attack by the now deceased. One wonders whether if the defence of a mistake has any basis as accused was now saying when he left the scene he was unaware the now deceased had been injured nor is he aware how the now deceased was injured. Thus accused virtually abandoned all his defences. This shows how incredible a witness he was.

In terms of s 269 of the Criminal Procedure and Evidence Act [Cap 9:07] it is competent to return a verdict of guilty on the basis of single evidence of any competent and credible witness. Towadini was both a competent and credible witness. The accused's version of events is clearly false.

We have no doubt that the accused stabbed the now deceased with a knife. As per the post mortem report the stab wound had smooth edges which is consistent with a knife and not some broken piece of firewood.

It is clear severe force was used as the knife caused a very deep wound penetrating into the lungs. The accused may have lacked actual intent to cause death but he should have foreseen that by directing the blow at such a vulnerable part of the body with a weapon of such nature exerting such severe force death could result.

Accordingly the accused had constructive intent to cause death.

Verdict: Guilty of contravening s 47(1) (b) of the Criminal Law (Codification and Reform) Act, [Cap 9:23]:- Murder with constructive intent.

Sentence:

The accused now stand convicted of murder with constructive intent.

It is unfortunate and saddening that such serious and heinous crimes are committed by young persons. The resort to violence by such young persons is a serious cause for concern. It is therefore important that such young people are constantly reminded of the sanctity of human life and that once a life is lost it cannot be replaced. There is no plausible reason as to why such young persons visit places of entertainment with knives in their pockets. Further, disputes should be resolved amicably and not through violence. *In casu* a precious young life was lost over a very minor dispute of occupancy of a chair at a beer drink.

The lack of contrition by the accused is amazing.

After fatally stabbing the now deceased at the beer drink he fled from the scene without offering any help and disposed of the knife used. Upon seeing the police some 10 km away from the scene of crime accused was determined to escape. The firing of 8 warning shots could not deter him. After being apprehended the accused was totally unco-operative with the police.

The attack itself on the now deceased was brutal. A lethal weapon, a knife was used. It was directed, not at the leg but a vulnerable part of the body being the chest which houses delicate organs. Severe force was used as the knife penetrated into the chest up to the lungs. This caused instant death. The need for a deterrent sentence cannot be over emphasised.

This court is alive however to the fact that the accused is and was a youthful first offender. The sentence to be imposed should not break him but allow him to pick the pieces and live a useful life.

The accused is barely literate after only attaining Form 2 and of rural background. He is still single, unemployed without savings or assets.

The court notes that the accused has suffered from pre-trial incarceration since September 2019, a period of almost 2 years. The stigma of causing the now deceased's death will haunt him forever.

The accused's family as per the African tradition paid 14 herd of cattle as compensation. Although this may not bring back the lost life such a gesture will go a long way in appeasing the bereaved now deceased's family.

There are also mitigating factors surrounding the commission of the offence. The accused was intoxicated and may have acted in that manner without properly applying his mind. The now deceased was the cause of this altercation and persistently the aggressor.

A proper balance of the aggravating and mitigating factors should therefore be made.

Accordingly the accused is sentenced as follows;

"12 years imprisonment".

National Prosecuting Authority, counsel for the State
Legal Aid Directorate, pro deo counsel for the accused