

THE STATE
Versus
TAFADZWA CHIBWANA

HIGH COURT OF ZIMBABWE
MUZOFA J
CHINHOYI, 26, 31 October, 12 & 24 November 2023

Assessors

1. *Mrs Mawoneke*
2. *Mr Manyangadze*

Criminal Trial

R. Nikisi, for the State
Chikwangwani, for the accused

MUZOFA J [1] On the 7th of September 2022 and at Chipunza Street Rimuka, Kadoma, it is alleged that the accused acting in common purpose with his accomplices still at large stabbed Ian Mharadze using an unidentified weapon with intent to cause his death or realizing that death may result but persisted in their conduct. Ian Mharadze subsequently succumbed to the injuries he sustained.

[2] The State opted to proceed against the accused in the absence of his accomplices. As a matter of law, an accomplice can be charged and convicted even where the actual perpetrator is a witness or where for some reason the actual perpetrator cannot be brought to trial as in this case.

[3] For his participation in the assault on the deceased, the accused was arrested and charged with murder in contravention of S47 (1) of the Criminal Code.

[4] The accused denied the charge. In his detailed defence outline he narrated how the deceased attacked him. He did not even retaliate. His friends rescued him from deceased's attack. In short, he said he had no knowledge who caused the deceased's death.

The State Case

[5] The state case is that the accused and his accomplices were at Kumbowedza Hotel, Kadoma drinking beer. One Panashe Mugota was struck on the forehead by the accused. Panashe went back home where his wound was cleaned and bandaged. He returned to the Hotel with the deceased who inquired who struck Panashe.

[6] A misunderstanding ensued between the accused with his accomplices on one side and the deceased with his colleagues on the other. When the Hotel closed, the deceased and his friends intended to go to another and continue imbibing.

[7] On their way they met the accused who appeared to have been waiting for them. The accused challenged the deceased and friends. He charged towards them.

[8] The deceased pulled a knife ready for attack. The deceased's friends fled from the scene. They ran along Mariga Street. The deceased also fled but took a different street towards Chipunza Street.

[9] The accused and his colleagues pursued the deceased and caught up with him. They stabbed him and left him lying helplessly along a dusty road.

[10] The state produced the following exhibits by consent of the defence.

- i. A post mortem report. The cause of death was recorded as hypovolemic shock, laceration of the external artery and severe groin trauma due to stab wound.
- ii. The accused's confirmed warned and cautioned statement. His statement is similar, word for word to his defence outline. In short, he said he was attacked by the deceased and friends. The accused's friends came to his rescue and pursued the deceased. He remained lying by the road wounded. A good Samaritan one Kudakwashe Gangira assisted him.
- iii. The indications, the sketch plan and affidavits sworn to by medical personnel that examined the deceased's body.
- iv. The evidence of the following witnesses as summarized on the outline of the state case was formally admitted into the record of proceedings. Innocent Nyikadzino, Edmore Nkata, Cuthbert Chimweta, Mafios Dube and Sunweight Gavaza.

[11] The witnesses had no knowledge of what transpired on the fateful day. They got involved in the case after the commission of the offence. Their evidence can be summarized as follows.

[12] When the deceased was chased, he was finally caught up with and assaulted near No 9 Chipunza Street Rimuka where Juliet Chareuka and Innocent resided. Innocent assisted the deceased who was still conscious by then. The deceased he gave Innocent his address so that he may advise his relatives. Innocent proceeded to the address where he advised the deceased's relatives. The relatives then went to collect the deceased. Edmore Nkata's evidence was similar to Innocent's evidence.

[13] Cuthbert Chimweta was approached by deceased's relatives to assist them with transport. He used his motor vehicle to take the deceased to Kadoma General Hospital.

[14] Mafios Dube a police officer stationed at Battlefields police station, drove the deceased's body from Kadoma General Hospital to Pairenyatwa Hospital in a police vehicle. Sunweight Gavaza a police officer also attended the scene of crime. The deceased was still alive. He completed a request for medical examination for the deceased to access medical attention.

[15] Four witnesses gave oral evidence. Panashe Mugota was the first witness. On the fateful day, he was in company of Kelvin Sanzu, Benjamin Mapuranga and Noel Musauli drinking beer at Kumbowedza Bar. He went outside the verandah. From nowhere he was struck on the head near his left ear by a bottle. He did not see who hit him.

[16] His friends took him home, cleaned his wound and bandaged him. The deceased was a tenant at accused's residence. He arrived and inquired as to what happened. After being told, the deceased mocked the witness for being a victim of an assault.

[17] Later they together with the deceased returned to the bar. He said they wanted to drink beer. The assertion was highly contested. Under cross examination it was contended that they returned to revenge.

[18] When they got to the bar, deceased inquired who had assaulted the witness. The accused teased the deceased because he thought he had assaulted the witness. They started arguing. They left the bar.

[19] On their way home the accused and friends caught up with them. The accused challenged them that he cannot be bullied by other men. The deceased retrieved a knife from his pocket. The accused ran away, the deceased pursued him. The accused's friends followed and pursued the deceased. He and his colleagues took to their heels and went straight home.

[20] After a few minutes someone arrived at their place and advised them that the deceased was badly injured. They went to the scene of crime. They attended to the deceased and caused him to be conveyed to Kadoma General Hospital.

[21] Under cross examination he confirmed that they were very drunk on the day. It was apparent that on this night a gang fight occurred. The deceased's gang pitting the accused's gang although Panashe would not admit it.

[22] Panashe was not candid why they returned to the Hotel. He was evasive. However, we did not find it normal for a person having been struck and wounded now bandaged, to go back to drink beer. He did not go to report neither did he seek medical attention. The probabilities are that when the deceased and colleagues proceeded to the Hotel it was not for the sole purpose of drinking but to take revenge for the assault on Panashe.

[23] However, Panashe's evidence established that the deceased was the main aggressor who produced a lethal weapon amongst the antagonists. He pursued the accused who was fleeing. Most crucially he did not know who assaulted the deceased.

[24] The second witness was Juliet Chatewuka. Juliet's evidence was simple and straight forward. The waring gang finally landed in her yard. This was around 0200 hours when people should be in deep sleep. She saw three men and heard noise and a voice threatening someone with assault. She called through her window for them to solve their differences amicably. For that she was threatened. She could not identify the people she called her son in law who assisted the deceased when his assailants left.

[25] Charity Chikwawa was the investigating officer. She recorded statements from witnesses. She also recorded a statement from the accused which was subsequently confirmed. Indications were made by witnesses Kelvin, Panashe and the accused. She came up with a sketch plan which was produced as an exhibit.

[26] Her responses under cross examination were damning to the state case. She conceded that the only link between the accused and the offence was an utterance heard by

Juliet that “you stabbed me and I want to stab you” although Juliet could not identify whose said the words and who they were directed to.

[27] She also conceded that the circumstances could point to the deceased as the aggressor who could have killed the accused if he had a chance. This was so because at the Hotel the accused did not admit that he assaulted Panashe since he was scared of the deceased. When they met along the road and when the deceased produced his knife the accused fled. Such conduct is not attributable to a person intending to cause death. If anything accused tried to avoid the fight. Deceased was clearly spoiling for a fight.

[28] She could not arrest the accused’s accomplices as they escaped. Although Kelvin Sanzu was with Panashe and the deceased his evidence was different to Panashe’s. What is important though is that unlike Panashe he indicated that the deceased went to the bar to revenge. He confirmed that the deceased had a knife which he wielded and the accused fled. He did not see how deceased got injured because he fled when the situation tensed up. He did not hear the accused claiming that he could not be bullied by other man. Nothing much turned out of his cross examination. He was a truthful witness we accept his evidence in its totality.

The state then closed its case.

The Defence Case

[29] The accused adopted his defence outline. He gave oral evidence to fill in some gaps.

[30] His evidence was that at the Hotel he spoke to a certain lady and they were about to conclude their agreement to go to a hideout. Panashe came and asked the lady for his change. A dispute ensued. Panashe dragged the lady. Unamused by the ill treatment of his intended catch for the night, the accused reprimanded Panashe. Panashe left.

[31] Panashe returned with three men including the deceased. The deceased challenged him, he ran away. The deceased pursued him, caught up with him and stabbed him twice on the ribs and once on the right thigh. He called out to his friends who came and chased the deceased. He remained lying on the ground. A certain man assisted him. He took him to Gweru where he was treated. When he recovered, he then went to his rural home in Chiundura.

[32] His cross examination was brief. He conceded that his friends had knives on the day. He denied that he had a knife. Although the state counsel tried to insinuate that as an artisanal miner he had a knife, he insisted he had none.

The defence case was then closed.

The Closing Submissions

[33] In its closing submissions the state urged the court to find the accused guilty of murder with constructive intention.

[34] The state conceded that there was no direct evidence but circumstantial evidence. The chain of events were re-enacted as follows: That the accused was stabbed by the deceased. Accused's friends came to his rescue. They pursued the deceased and eventually caught up with him near Juliet's yard. Juliet saw three men attack the deceased. She heard one say 'you stabbed me on the back I must stab you too' or words to that effect. There is no way any of the accused's accomplices could have been stabbed on the back. An inference must be made that the accused was one of the assailants. He was the genesis of this conflict. He must be found liable on the doctrine of common purpose.

[35] For the accused, it was submitted that the circumstantial evidence before the court does not satisfy the cardinal rules of such evidence as enunciated in *Mangoma-v-S* 36/20 where the *locus classicus* case of *R-v-Blom 1939 AD 188* was referred to.

[36] The court was urged to consider the evidence and ask itself whether the inference sought to be drawn is consistent with all the proved facts. Secondly whether the proved facts exclude every reasonable inference except the one sought to be drawn.

[37] According to the defence, the deceased had set out to cause some harm thus he carried a knife to mete out revenge. He stabbed the accused on the ribs and thigh. There was no evidence to controvert the accused's defence that when he was stabbed, he fell down. He remained there until someone helped him. It is his friends who pursued the deceased.

[38] Further to that, it was submitted that another inference can be drawn from the circumstantial evidence. There is a possibility that the accused's friends could have caught up with deceased. A fight ensued with one being stabbed and deceased escaping. They continued to pursue him and finally caught him near Juliet's house. These friends then revenged and stabbed the deceased leaving him in a pool of blood.

The Law

[39] The state bears the onus to prove beyond a reasonable doubt that the accused was both the factual and legal cause of the deceased's death. The accused must have intended to cause the death or realized that death may result but reconciled himself with it.

[40] The test as to whether the accused intended the death is subjective. It may be difficult and indeed impossible to get into the mind of a person but the test has been approved and justified. The learned author Jonathan Burchell¹ cited with approval the following to justify the subjective test,

'Individuals are regarded as autonomous persons with a general capacity to choose among alternative courses of behaviour, and respect for their autonomy means holding them liable only on the basis of their choices.

[41] The only way to get to an accused's intention can be derived from the circumstances surrounding the commission of the offence. In murder cases the weapon used, the number of blows delivered, the part of body aimed at are some of the pointers of intention. For instance, a person cannot direct a bullet to the head and turn around to claim that he had no intention to cause death.

[42] This then means everything boils down to evidence. In this case the evidence relied on by the state is circumstantial. The law is settled and has been captured as submitted for the accused.

Factual and Legal Analysis

[43] There is no doubt in our minds that the court has to determine this case based on circumstantial evidence. It is competent to convict on circumstantial evidence as long as the court is satisfied that such evidence satisfies the established two requirements already alluded to.

[44] It is common cause that the deceased pursued the accused and stabbed him. The accused prevaricated on where exactly he was stabbed. In his warned and cautioned statement he said he was stabbed twice near the ribs, once on the right thigh and once on the back. In his defence outline he said he was stabbed on the thigh and ribs.

¹ Principles of Criminal Law, fifth edition at p348

[45] The warned and cautioned statement is likely to contain the truth of where he was stabbed unlike the defence outline which was drafted after a year. So we accept that accused was stabbed on the back.

[46] Juliet said he saw three men attack the deceased who was on the ground. In his defence and statement the accused said he called out to his friends Tafadzwa Moyo, Tafara and “Sabhuku”. He had three friends on the night. Panashe confirmed that the accused’s gang had four people including the accused. In our view if Juliet saw three men the probabilities are that he saw the accused’s three friends.

[47] We considered the argument by the state that it is the accused who had been stabbed on the back. The utterance heard by Juliet that “you stabbed me on the back I want revenge” leads to just one inference that it was the accused who uttered them therefore he acted in common purpose with the rest of his accomplices at large.

[48] The difficulty with that proposition is that, there was nothing to disprove the accused’s defence that he did not pursue the deceased. As correctly stated by the defence, there is also a possibility that one of the accomplices could have been stabbed by the deceased when he was pursued.

[49] We are alive to the fact that a piecemeal approach to assessment of evidence is not the best approach. What must be done is after assessing each piece of evidence, the totality of evidence should be considered weighing the probabilities of both the state case and the defence case.

[50] The position enunciated in the leading case of *S v Difford* 1973 AD 370 is now entrenched in our system. A court must always consider the accused’s defence. If his explanation is reasonable the court must accept it. The court can only reject the accused’s explanation if it is so palpably untrue that it is unworthy of belief.

[51] The accused said he did not pursue the deceased. The state did not disprove that the accused remained lying where he was stabbed. He was rescued by Kudakwashe Gangira who took him to Gweru for treatment. The accused mentioned this in his warned and cautioned statement. The police did not make an effort to confirm this by recording a statement from Kudakwashe. There was no mention by the investigating officer of any efforts to locate Kudakwashe.

[52] To our mind, part of his defence remained intact. It therefore brings us to the conclusion that the probabilities of this case are that, after deceased was stabbed it was time for his friends to avenge. Just as deceased being friend to Panashe had avenged on accused.

[53] It is unfortunate that the friends are bare and brunt yet the two antagonists Panashe and the accused were no longer in the picture.

[54] If the accused's three friends pursued the deceased and Juliet saw three men attacking the deceased then the only inference is that along the way a close combat took place and one of the accused's accomplices was stabbed.

[55] We do not accept the state's submission that Tafadzwa Moyo's wife said he had no back stab wound therefore, the only person who was stabbed on the back was the accused. The state with the greatest respect conveniently forgot that among the accomplices there was Tafara and Sabhuku. There was no evidence that these too were not stabbed. In fact, there was no evidence that Tafadzwa was not stabbed. This was hearsay from the investigating officer. That evidence would be inadmissible hearsay.

[56] We find that the accused's defence is highly probable, it is persuasive and hard to discard. The proved facts do not leave one inference to be drawn.

[57] Although proof beyond a reasonable doubt is not proof beyond a shadow of doubt otherwise it would be impossible to achieve. In *Miller v Minister of Pensions* [1947] All ER 372 (KB) the court had this to say on the standard of proof,

“... the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. The degree is well settled. It need not reach certainty but it must carry a high degree of probability.”

[58] To our mind the required proof must be such that taking all the evidence into consideration a reasonable man can point to the accused. That is not so in this case. A doubt and questions remain lingering. The evidence raises suspicion but that is not enough.

[59] Murder is a serious offence that attracts a lengthy custodial sentence. The court must therefore be careful in its assessment of evidence. It must only convict where there is proof beyond a reasonable doubt.

[60] In this case there is no evidence beyond a reasonable doubt. The matter must be resolved in accused's favour.

Accordingly, the accused is found not guilty and acquitted.

National Prosecuting Authority, the State's legal practitioners.

Chikwangwani Tapi Attorneys, accused's pro deo legal practitioners.