

PETROS LOZANE  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
PHIRI J  
HARARE, 29 May 2017 & 2 June 2017

Assessors 1. Mr Shenje  
2. Mr Gweme

## **MURDER**

*M Manhamo*, for the State  
*B. Hungwe*, for the defence

PHIRI J: The accused was facing a charge of murder in terms of s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] it being alleged that on 6 March, 2009 and at Village 22, Nyamatani, Chief Neuso Sanyati Petros Lozane unlawfully and with intent to kill caused the death of Joseph Lozane by striking him with an axe on the head once and twice on the back causing injuries from which Joseph Lozane died.

The brief facts as summarised by the State, were as follows:

“On the 6<sup>th</sup> day of March 2009 the accused and the deceased were drinking beer “chikokiana” at Lener Lozane’s homestead. The accused who is the son of the deceased requested Innocent Misha to ask for forgiveness from the deceased on his behalf since he spilled the deceased’s beer on the ground sometime in February 2009. The deceased accepted the apology. The deceased and other patrons then left for their respective homes to sleep and they were all drunk. The accused followed the deceased and started shouting at him, threatened to kill him. He got hold of the deceased but Innocent Misha managed to separate them. The deceased decided to go and put up at Misha’s homestead but the accused followed him. A fight ensued on the way between the accused and the deceased and the accused was overpowered. The accused went away and took two axes. He then came back and struck the deceased once on the head and twice on the back with one of the axes in full view of Patrick Lozane. The deceased fell down to the ground unconscious. He was taken to Kadoma General Hospital where he succumbed to the injuries sustained. A post mortem examination established that death was due to haemorrhage as a result assault.”

The State lined up six witnesses to prove its case.

Most of the evidence was formerly admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Innocent Misha testified in court. He testified that he had been drinking beer with the accused and the deceased on 6 March, 2009.

At some stage the accused requested the witness to ask the deceased for forgiveness in relation to some incident which occurred sometime in February, 2009. The apology was accepted but subsequently accused showed some disapproval of the deceased remarks.

Later the witness heard an altercation between the accused and the deceased and he found accused holding an axe and threatening his father and managed to disarm him. The witness took the deceased and his son to his home to put up for the night.

Subsequently accused followed them and fought with the deceased. Accused was overpowered. He returned after about forty minutes with an axe and struck the deceased. The accused run away.

The witness, testified that at some point the accused had been shouting and explaining how the deceased had made him suffer. There was mention of some cattle the deceased had taken from him. Accused also mentioned the fact that the deceased had ill-treated him as a child. He accused the deceased of taking money earned from some “piece jobs” accused had done.

The witness confirmed that the accused was severely drunk.

The witness and accused’s siblings subsequently gave chase and apprehended the accused. Both the deceased and the accused were injured and they were all ferried to a clinic. The deceased subsequently succumbed to death as a result of the injuries he sustained.

Doctor H Munzwa compiled a post mortem report which was accepted as evidence. He observed some injuries which the deceased sustained. He observed some cuts in the scalp, the chest wall and on the deceased’s back. He concluded that the cause of death was “haemorrhage caused by a sharp instrument and cuts aforementioned.”

That was the State case.

#### DEFENCE CASE

The accused testified. He adhered to his defence outline.

In his defence outline he stated that on the date in question he drank some inebriating opaque brew known as “Chikokiyana” at his aunt’s Lener Lozane’s homestead

He could not recall the quantity of the beer he consumed but he started drinking from as early as 9:00am up to the late evening. He testified that he lost recollection as to what transpired afterwards.

He explained that he had difficulty in accepting and appreciating the circumstances under which he is alleged to have committed the crime.

Under re-examination, by the court, the accused confirmed what had been observed by Dr Patrick Mhaka, that at the time of the offence he had partaken both alcohol and cannabis.

A psychiatric report confirming that the accused did not suffer mental illness “at the time the offence was committed or any time thereafter” Was produced as evidence.

#### Analysis of the evidence

It is this court’s considered view that indeed the accused had voluntarily partaken the opaque brew and cannabis.

It is also this court’s view that the deceased, to a greater extent, was aware and could appreciate what was going on as clearly he requested his neighbour Innocent Misha to seek his father’s forgiveness for his past misdemeanours.

The accused, twice, proceeded to his homestead and twice directed his attacks to his father. This court finds it incredible that accused persistently directed his anger, and attacks on his father, and, no one else despite the fact that there were other people at the beer drink and, or, where he launched the second attack on the deceased.

The interval between the last altercation with the deceased was a good forty minutes. Accused disappeared and returned armed with the second axe and specifically directed his attacks on one and only one person, his father.

This court also finds the evidence of Innocent Misha as that of a credible witness in that he clearly recalled the exchanges and dialogue between the accused and the deceased, for instance, the request for, an apology and accused’s complaint about ill treatment suffered at the hands of the deceased.

Drunk, as he was, he ran after commission of the offence. This court is accordingly of the view that the accused, though intoxicated, committed the offence, with the requisite state of mind.

This court accepts, and holds that the accused’s conduct falls in the ambit of the offences envisaged in s 221 of the Criminal Law (Codification and Reform Act [*Chapter 9:23*])

This section stipulates that;

“(1) If a person charged with a crime requiring proof of intention, knowledge or realisation of a real risk or possibility-

- (a) was voluntarily or involuntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime; but
- (b) the effect of the intoxication was not such that he or she lacked the requisite intention, knowledge or realisation;

Such intoxication shall not be a defence to the crime, but the court may regard it as mitigatory when assessing the sentence to be imposed.

Accordingly this court is enjoined to consider the circumstances surrounding the commission of the offence and weigh them against the fact that the accused had partaken of intoxicating substances being alcohol and dagga.

It was testified that the accused spent a greater part of the day drinking beer. He was visibly drunk according to the eye witness's testimony of Innocent Misha.

From the facts presented in this case accused conducted himself in such a way that, despite the intoxication, he was fully aware of his actions, and targeted only the deceased. He knew what he was doing and this court finds that he had the requisite intention.

The facts of this case are similar to those in the case of BHEKINKOSI MASILELA H.B 195/14.

Wherein MUTEAMA J reasoned as follows in a case involving an intoxicated accused; at p 32:

“By way of inferential reasoning we are fully satisfied beyond and he formed the requisite intention to kill the deceased .. he was resilient in his endeavour to ensure that the deceased died. He singled her out from the rest of the other people around her”.

In the present case accused followed his father and threatened to assault him. He twice armed himself with a dangerous weapon and attacked the deceased on the head with an axe. “He had the presence of mind to run away after the attack.”

MUTEAMA J in the MASILFLA CASE, aforementioned, made the following remarks, at p 2:

“But in the case where the accused despite voluntary intoxication, was nevertheless aware of what he was doing and was capable of forming the necessary specific intent, he should be convicted of murder with actual intent.”

In the case of *S v Muchemesi* HH 287/15 BERE J considered the applicability of s 221 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], and stated as follows:

“Our current codified law pushes the onus on the accused to demonstrate that the alleged intoxication was such that it rendered him incapable of forming the requisite intention to commit the offence of murder ..... We are particularly concerned that even after the first strike had floored the deceased the accused continued to indiscriminately assault the

deceased. The post mortem testifies to the seriousness of the injuries or the severing of the assault.”

In the present matter the facts are similar. Accused, though intoxicated, remained in full control of his faculties and intended to cause fatal injuries to the deceased.

Accordingly this court hereby finds the accused guilty of murder with actual intent as defined in s 47 of the Criminal Law (Codification and Reform) [*Chapter 9:23*].

### SENTENCE

In considering sentence this court shall take into account what has been submitted in mitigation and aggravation.

The accused is a first offender and a married man with three children.

The court will also take into account the period of the pre-trial incarceration from March 2009 to September, 2009, and, from 2014 to the present date. Almost close to 4 years. This court also will take into consideration the fact that accused has been awaiting his trial for close to eight (8) years.

In this regard the court has taken into account the four factors suggested by DUMBUTSENA J, as he then was. In the case of *S v Corbett* 1990 (1) ZLR 205 (SC) it outlines these factors pp at 210 to 215 in respect of the Inordinate delay in respect of bringing a matter to trial.

The court takes into account the fact that accused suffers from tuberculosis and has not received treatment.

It also has taken into account that the accused person was intoxicated at the time of the commission of this offence.

The court also takes considers the fact that accused donated cattle (2 beasts) towards the treatment of the deceased. The court also accepted the fact that accused is being haunted by the death of his father.

However in aggravation this court accepts submissions made, by the State Counsel, that regrettably there is a marked increase in the number of cases where violence is used in order to resolve disputes. There is also an increase in the number of cases where life is needlessly lost as a result of intoxication.

A deterrent sentence is therefore called for to demonstrate that offenders who use intoxication as justification for violence and wanton destruction of life should be dissuaded from such conduct.

Once again, this court emphasizes, the fact that life is sacrosanct. Murder, is a very serious offence. The deceased suffered a brutal murder at the hands of his own child, and, this was witnessed by his siblings, who in fact, assisted in his apprehension.

Accused ran away from the scene of the crime and appeared not to demonstrate any remorse in the manner in which he committed this offence. His demeanor, during the conduct of his trial, did not show that he was taking responsibility in respect of his commission of this offence.

The court has taken into account submissions by both counsel as regards sentencing guidelines for instance, in *A Guide to Sentencing* by Professor Geof Feltoe and case authorities cited by State Counsel i.e.

*S v Muchineripi* HH 287/2014

*S v Fichani* HC 16/14

*S v Nziranzafa* HH 325/15

This court also takes into account the general guidelines provided in General Laws Amendment Act No. 3 of 2016. See subsections 2 to 6 thereof. In all the circumstances this court considers that a sentence of 15 years will meet the justice of this case.

The accused is accordingly sentenced as follows;

15 years imprisonment.