

STATE  
versus  
SAMUEL CHIKWANDA  
and  
LAZAROUS MUGOVA

HIGH COURT OF ZIMBABWE  
HUNGWE J  
MUTARE, 14, 16, & 21 June 2017

ASSESSORS: 1. Mr Magorokosho  
2. Mr Chipere

## CRIMINAL TRIAL

*M. Musarurwa* for the State  
*H Mandikate* for the 1<sup>st</sup> accused  
*P Nyakureba* for the 2<sup>nd</sup> accused

HUNGWE J: The accused persons both pleaded not guilty to a charge of murder. It is alleged that on the night of 28 May 2015, at Tandarai Bar (“the bar”) in Chikanga Phase 3, Mutare, the two accused persons, with intent to kill, or realising that there was a real risk or possibility that their conduct may cause death and continued to engage in that conduct despite the risk or possibility, assaulted Trymore Mlambo several times all over his body with clenched fists and booted feet and hit him with an empty beer bottle on the right upper arm thereby causing serious injuries from which the said Trymore Mlambo died.

In their defence both accused gave bare details whilst admitting certain factual averments by the State. In other words they left it to the State to prove its case.

The case for the State was built around the evidence of the only eye-witness account to the act given by the brother of the deceased Maxwell Mlambo (“Maxwell”). The evidence can be summarised as follows:

The 1<sup>st</sup> accused was the security guard at the bar in which 2<sup>nd</sup> accused was the barman. Amongst other of their duties the security guard operated a snooker table inside the

bar. The 2<sup>nd</sup> accused sold the tokens which a prospective player would hand to 1<sup>st</sup> accused who operated the snooker table. Around 23h00 the deceased bought two tokens for a dollar using a \$10.00 note. He was not immediately given his change nor did he request to play his turn there and then as other players were still on their game. Later when their turn to play came, deceased approached 1<sup>st</sup> accused and requested that he be allowed to play. The 1<sup>st</sup> accused indicated that time to close was up and as such they could not play. Deceased requested that he be refunded for both tokens. That request was turned down by 1<sup>st</sup> accused who suggested that they could still come and play the next day. The deceased then approached 2<sup>nd</sup> accused and requested his intervention over a refund at the same time asking if he could get his outstanding change. Second accused claimed that he did not owe him any change.

An argument then followed between the deceased and 1<sup>st</sup> accused. They pushed and shoved till this scuffle degenerated into a fist fight. Maxwell described how the fight progressed; how he tried to restrain both without success, how the 2<sup>nd</sup> accused then joined in. He gave a vivid description of how, probably due to inebriation, he was floored on no less than two occasions. By then the witness watched helplessly as the two accused took the fight to his brother.

He then described how 1<sup>st</sup> accused had disengaged from the three-sided fight which had moved to near the entrance to the bar. 1<sup>st</sup> accused had approached the counter from where he took an empty larger beer bottle. The 1<sup>st</sup> accused then struck the deceased on the upper right arm using the empty beer bottle. The deceased was thereafter kicked and pushed out of the bar. At that time, the deceased was already bleeding profusely. The bar was promptly shut with this brother laying prostrate in a pool of blood in the veranda.

Police were summoned. The witness then called upon both accused to come out and see the result of their effort. When both realised the gravity of the situation, the 1<sup>st</sup> accused took out buckets of water with which he drenched the unconscious deceased in the hope that he would come round. He did not. By the time Police came both accused had disappeared behind the bar inside their quarters. Soon after the police arrived, both accused were arrested. Police recovered the broken large beer bottle in the veranda.

The post mortem examination confirmed that death was due to excessive loss of blood from the deep laceration to the upper arm.

In assessing the credibility of the witness called by the State, we considered that the incident occurred late into the night in a bar. We considered it more likely than not that both

accused were the sober of the protagonists, than their adversaries. We considered it likely therefore that being the aggrieved parties, the witness and his brother may have been the more easily irritable. In those circumstances, their judgment and sense of self-control may have been weakened by the intoxicating liquor which they had taken. In spite of all this however, we were satisfied that they were not so drunk as to be incapable of appreciating the events as they unfolded. We conclude and find that Maxwell was a credible witness for the State. We make those findings on the basis of the following.

Both accused, clearly, were less than honest when they both denied assaulting the deceased or his brother, Maxwell. In all probability their attitude to the issue of refunds for the two tokens and the change provoked the deceased. 1<sup>st</sup> accused refused to accede to the demand for change from the \$10, 00. 2<sup>nd</sup> accused, for his part, refused to let them play their turn or refund the value of the tokens. The deceased must understandably felt cheated by the two accused. He would have easily initiated the fight with 1<sup>st</sup> accused. Being the sober of the two, the 1<sup>st</sup> accused would have made easy prey of the deceased in the fight that followed. 2<sup>nd</sup> accused felt that he needed to assist his fellow brother. He joined the scuffle that erupted and fought off Maxwell before setting upon the deceased. At that juncture 1<sup>st</sup> accused then used an empty bottle on the deceased with fatal consequences. We therefore reject the accused's denials of an assault on the deceased as false. Although Maxwell may have downplayed his and the deceased's role, we are satisfied that he gave the more probable version of what took place on this fateful night. He saw the 1<sup>st</sup> accused strike the deceased with an empty bottle. It does not matter in our view whether 1<sup>st</sup> accused struck or stabbed the deceased once or twice. The fact is that 1<sup>st</sup> accused inflicted the injury from which the deceased died.

The question is whether by striking the deceased with an empty larger beer bottle the 1<sup>st</sup> accused intended to kill the deceased, or realised that there was real risk or probability that such conduct may cause death and continued to engage in such conduct despite the risk or probability.

We had no difficulty in finding that both accused had no intention direct to kill the deceased when they assaulted him. This was a drunken brawl initiated by the deceased from which they could have extricated themselves. It was their daily business to deal with revellers. It cannot be said, on these fact that both accused had, as their aim and object, the killing of the deceased when they set upon him in a fist fight. It was an uncontrolled fit of rage on their part as the patrons constituted a continuing nuisance.

However when the 1<sup>st</sup> accused decided to resort to the use of a weapon in our view, the matter assumed a completely different complexion. At that stage Maxwell had joined in but had been floored by 2<sup>nd</sup> accused. The 2<sup>nd</sup> accused had set upon deceased who, by both accused's admission, was now near the entrance/exit of the bar. The 1<sup>st</sup> accused then made a conscious decision to fetch an empty bottle to supplement their arsenal against a drunken patron who was incensed by their refusal to refund them on the tokens or give back the change owed. In our view, 1<sup>st</sup> accused realised that there was a real risk or probability of death when he made the decision to use an empty beer bottle to assault the deceased but persisted with such conduct despite the risk or possibility.

Where realisation of a real risk or probability is an element of a crime the test is subjective and consists of the following two components:-

- a) a component of awareness, that is whether or not the accused realised that there was a risk or possibility, other than a remote risk or possibility, that conduct might give rise to the relevant consequence, or that the relevant fact or consequence existed when he engaged in the conduct and:-
- b) a component of recklessness, that is whether, despite realising the risk or possibility referred to above, the accused persisted in that conduct. See s 15 of Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] (“the Code”) or (“the Criminal Law Code”).

Put differently recklessness, in its ordinary meaning, covers a wide range of states of mind from failing to give any thought to whether there is any risk of the relevant kind, to recognising the existence of the risk and nevertheless deciding to ignore it. Before one can be held to have been reckless, there must have been something which ought to have drawn the attention of an ordinary prudent person to the possibility of the relevant harm occurring and the ordinary prudent person would not, on consideration, have treated the risk as negligible.

Applying the above test we are of the view that the accused, both being sober employees of a bar, would have realised that engaging the deceased, who was inebriated, in the manner they did, carried with it a real risk or possibility of death occurring. A prudent person schooled in the art of their profession would not have ruled out such a risk as being negligible especially when both of them set upon the deceased and used a weapon in the form of an empty bottle on this person.

The above findings apply squarely on 1<sup>st</sup> accused especially. Second accused stands on a different footing in so far as he is not the person whose act was the proximate crime of

the death of the deceased. Whilst he may not in fact be the actual perpetrator in the sense that he did not deliver the empty beer bottle blow from which the deceased died, it is trite that at law he is considered a co-perpetrator who is legally liable as the actual perpetrator. A co-perpetrator is a person other than the actual perpetrator who was present with the actual perpetrator during the commission of the crime and who knowingly associated with the actual perpetrator (and any other co-perpetrators) with the intention that each or any of them will commit or be prepared to commit the crime actually committed. See s 196 of the Code.

To be a co-perpetrator the person must be physically present with the actual perpetrator when the actual perpetrator was committing the crime and must have knowingly associated with the crime committed. It is not necessary that there be a prior conspiracy with the actual perpetrator for a person to be guilty as a co-perpetrator. In other words, the co-perpetrator forms common purpose with the actual perpetrator by joining in a crime before it is committed and without having conspired with the actual perpetrator in advance to commit that crime.

The presumption applies where two or more persons have associated together in any conduct that is preparatory to the conduct which resulted in the crime with which they are charged, or have engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime with which they are charged and the persons were present at or in the immediate vicinity of the scene of crime in circumstances which implicate them directly or indirectly in the commission of that crime.

Once these features are present, unless they prove the contrary on a balance of probabilities, each of the two or more persons present will be presumed to have knowingly associated with each other for a criminal purpose and will also be presumed to have associated with each other to commit the crime that was actually committed or if it was not the specific crime that they had associated with one another to commit, it will be presumed that each person realised that there was a real risk that the crime actually committed would be committed.

If any of these persons fail to rebut this presumption by discharging the onus upon him or her, he or she will be liable to be punished as if he was the principal offender.

In the present matter both accused specifically admit that 2<sup>nd</sup> accused came to the assistance of the other accused in order to forcibly eject the deceased. Clearly they associated together to perpetrate an assault. In our view since 1<sup>st</sup> accused did not intent to kill, but

however realised the risk inherent in the use of the bottle, the other accused must similarly be found guilty as a co-perpetrator in terms of s 196 of the Code.

In the result both are found guilty of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

Both accused are first offenders

### REASONS FOR SENTENCE

In assessing your sentence I take into account what your learned counsel submitted in mitigation on your behalf. Principally, it was submitted that you are both first offenders. You have both lost your jobs with the bar owner. You are married and therefore any custodial sentence will have adverse effects on your young families. You have been waiting trial for the past two years. I also take into account that you expressed contrition. As I pointed out in the judgment, the deceased in some way contributed to the scuffle in which he later died.

But that does not in any way reduce your moral blameworthiness. Liquor outlets are places of enjoyment and relaxation for the patrons. They give you a source of livelihood. Those patrons deserve to be treated with respect not in the manner in which you treated the deceased. Being the hosts of revellers one expected you to have exercised your patience with your clients and serve them not to abuse them to a point where they felt provoked to the extent of picking up a fight with you who were sober. The expectation of society is that those who run liquor outlets have the capacity and patience to handle drunk clients without resort to violence at the outlet as happened here. Your actions were clearly uncalled for and went beyond the call of duty resulting in unnecessary loss of precious human life. After you had inflicted fatal injuries, you left him bleeding profusely outside the bar. Had you rushed him to a medical facility he probably would have survived the assault. In my view, this increases your moral blameworthiness and calls for a stiff sentence.

In the circumstances I consider that the following sentence will meet the justice of this case.

Each: 13 years imprisonment.

*National Prosecuting Authority*, legal practitioners for the State  
*Mugadza Chinzamba & Partners*, legal practitioners for the 1<sup>st</sup> accused  
*Maunga Maanda & Associates*, legal practitioners for the 2<sup>nd</sup> accused