

STATE
versus
WHATMORE CHIKUKWA
and
SIMEON CHISIYA
and
COURAGE KAFANDA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 15, 16 & 21-23 June 2017

ASSESSORS: 1. Magorokosho
2. Chipere

Criminal Trial

Mrs J Matsikidze, for the State
B Mungure, for the 1st accused
Ms Y Chapata, for the 2nd accused
T Tandiri, for the 3rd accused

HUNGWE J: The three accused men are serving members of the Zimbabwe National Army. They face charges of murder. They all deny that they were in any way involved in the killing of one Blessward Shenje on 27 August 2015 in Rusape.

The summary of the case for the State alleged the following facts against the three accused. Around 2300 hours on that day the three accused approached Hardlife Chingema (“Chingema”) a guard at Desim Neighbours Night Club (“Desim”) or (“the Night Club”) or (“the club”) and asked him if there was any member of the Dongo Football Club (“Dongo FC”). He

did not confirm the presence of that club's members in the night club. They asked him to narrate what had occurred at the club on an occasion when some army personnel were manhandled by the Dongo FC members. He did so.

The three accused then proceeded into Desim Night Club. Inside they approached the Blessward Shenje who they dragged outside and began assaulting him using clenched fist and booted feet. Chingema restrained them. The deceased ran back into the club. The three left for another night club. The three then came back into the Club. They again began to assault the deceased. When he managed to extricate himself from their clutches he ran towards Max Village. The three pursued him throwing missiles at the deceased who was in full flight. They caught up with him and resumed assaulting him as before. One of them used a broken beer bottle to slit open deceased's abdomen, thereby exposing his intestines.

Deceased managed to walk up to the Police station where he made a report. The accused returned to Desim Night Club and continued to partake of alcoholic beverages. They were arrested by police inside the Night Club. The deceased was rushed to Rusape and was immediately transferred to Parirenyatwa Hospital where he passed on a few hours after admission.

The 1st accused in his defence on the outline denied that on 27 August 2015 he had seen or assaulted the deceased. He however admitted that on that day he had a misunderstanding with one Robson Bobo which culminated in him assaulting Bobo. He put down his being identified as the assailant by Chingema to a mix-up with the assault on Bobo.

2nd accused in his defence admitted that he was at Desim Night Club on the day in question in the company of the 1st and 3rd accused. They began drinking beer. At some point 1st accused went out. Soon afterwards there was commotion outside the club. Together with 3rd accused he went outside to investigate. It turned out that 1st accused was fighting Robson Bobo. Together with 3rd accused, they restrained 1st accused. Thereafter, they went back into the club.

As they did so, they noticed that 1st accused had a broken beer bottle inside his back trousers pocket. When they both asked why he carried such an object they did not satisfactory answers. Inside the bar they took a position away from the rest and asked Chingema if they could buy clear beer without empty deposit bottles. Chingema obliged.

As they drank 1st accused would occasionally get out of the club for a while and come back. After a while police details came into the club and arrested them. 1st accused was not present. They only saw him under arrest after he had been bitten by police dogs. They were not advised about these charges then. He only learnt later at the police station that they were suspected of having gravely injured the deceased. He denied ever seeing the deceased or assaulting him in the manner alleged. He stated in his defence outline that he will rely on the evidence of one Anyway Tungwarara to vouch for him in the matter.

3rd accused's defence outline closely followed that of the 2nd accused. He confirmed that they were together at the club; that after a while 1st accused went outside. There was commotion which drew their attention. Upon getting out to investigate, they found 1st accused fighting one Robson Bobo.

He confirms that they restrained 1st accused and went back inside. They then noticed that 1st accused had a broken beer bottle in his back pocket. When they asked him why he carried it, they did not get satisfactory answers. He confirmed drinking inside the bar, whilst 1st accused went in and out of the bar. They were arrested when 1st accused was outside. They later saw him handcuffed and bitten by dogs. He also would rely on Anywhere Tungwarara to vouch for this sequence of events.

The State case was built around the evidence of the Club owner, the Club Security guard and the two arresting details. The first witness, Simbarashe Chakawarika, owns the Desim Neighbours Night Club. He was present at the club. He knows 1st accused as his patron. He saw him engage in a fight with a person he did not know. This person turned out to be Robson Bobo. He could not identify the other people he says helped the 1st accused to assault this person. He claims that 1st accused and others latter carried a random attack on his clients.

Under cross-examination this witness was unable to identify 2nd and 3rd accused as the persons involved in the assault upon Robson Bobo. In the end this witness evidence places 1st accused outside the club where 1st accused admitted assaulting Robson Bobo. He said he left the identification of the assailants to his security guard Chingema.

Hardlife Chingema gave a different version on the events which prompted his employer to seek police intervention. He told the court that he saw 1st accused, their regular patron, assaulting someone he later learnt to be Robson Bobo. Although he initially told the court that

2nd and 3rd accused were also assaulting Bobo, he later changed whilst being led by the Prosecutor and said, 2nd and 3rd accused came to refrain 1st accused from assaulting Bobo.

His evidence thus far therefore is exculpatory of the 2nd and 3rd accused.

Chingema in his evidence speaks of another incident involving Robson Bobo and the 1st accused. As a result of this subsequent confrontation he says that Bobo had fled towards a disused bottle store. They chased him and came back. Clearly Chingema's evidence relates to the assault on Bobo assault not the assault on the deceased. Chingema however goes on to confirm that after he sold them beer without empties, his employer asked him to identify those responsible for the commotion. He indicated the 1st accused as the person responsible for the commotion involving Robosn Bobo. His evidence did not link any of the accused to the assault on the deceased. In material respects it contradicted the State summary of the case against the accused.

Knowledge Mamvura is the Police Officer to who the deceased made a report of how he was assaulted. Deceased told him that he had been stabbed with a broken bottle by one of the three army men and that Chingema knew this man who stabbed him. The arresting detail proceeded to Desmin Night Club with a canine unit of the Police Rusape and in the company of the club owner. He asked Chingema to indicate those responsible for an earlier commotion. Chingema indicated the three accused persons. 1st accused bolted out of the club. He was apprehended following a chase by the police dogs. The other two were arrested separately inside the club. This followed indications made to him by Chingema.

The case for the State was apparently made in the defence case through 2nd accused's witness, Anyway Tungwarara. In assessing the credibility of this particular witness we took into account that this witness was not a surprise witness to the State. The State always knew of his evidence and its impact. Although counsel for the State suggested that the witness was being partial to the accused, we were unable to make such a finding especially in light of the fact that his evidence specifically incriminated one of the three accused. This witness's evidence corroborated 2nd and 3rd accused in its material respect. It sealed the yawning gaps which were apparent in the State witnesses' evidence.

Under cross examination this witness remained unshaken. There was no suggestion that he was a professional witness but just someone close to the deceased. As such one would have

expect the Prosecutor, rather than the defence, to have been called him. His evidence reads well if not better than that of the State witnesses in the crucial respects. We were unable to disregard the impact of his evidence because not only did it shine a better light on those matters which remained unclear in the State case, but it also gave the motivation of the sequence of the actions by the various actors in this tragedy.

We make this finding because he is the only witness who places the deceased inside the night club both on the earlier incident and on this occasion. He also explains the reasons behind the events of 27 August 2015. As an example, he explained that as a result of his close friendship with the deceased, he was present when 1st accused played second fiddle to deceased in a fight over a woman called Mazvita. Deceased had punctured 1st accused with a screw driver in the palm. 1st accused walked away and promised to take his revenge. This happened on the Defence Forces Day in August 2015.

On 27 August 2015 1st accused placed a challenge in a game of snooker in which the deceased was knocking out his opponents. When he realized that next opponent to play him was the 1st accused, he left the night club. 1st accused followed him outside. All along 2nd and 3rd accused remained inside drinking beer. The witness was afraid for the safety of his friend. He could not bring himself to ask these two to intervene as they had previously done in the earlier incident involving Robson Bobo as he hoped that deceased would be able to make good his escape. He even feared for his own safety in light of the notoriety which the ZNA members carried around town. To crown it all he had seen the broken green bottle carried by 1st accused in the back pocket.

When he gathered enough courage to go out and check on his friend, his worst fears were confirmed as he saw the deceased hurry away with his hands on his stomach. He hoped for the best but expected the worst. 1st accused returned to rejoin his two colleagues.

In urging us to convict all three accused, *Ms Matsikidze*, for the State, relied on the evidence of this witness and argued that 2nd and 3rd accused ought to be found guilty on the basis that they are at law co-perpetrators. She cited s 196 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] for the preposition.

The answer to this submission is that before the State could rely on the presumptions and the reverse onus in s 196 (1) and 196 (2) the State must lay a legally sound foundation

establishing that two or more people had knowingly associated with each other with the intention that each or any of them shall commit or be prepared to commit any crime and that the actual perpetrator commits the crime and the co-perpetrator be present with the actual perpetrator during the commission of the crime.

The facts show that when 1st accused followed the deceased outside neither of the other two were aware why he was going outside or that they realised that there was a real risk or possibility of 1st accused committing a crime. It can hardly be argued therefore that they knowingly associated with 1st accused for the purposes of committing a crime. Nor can it be argued, in our respectful, view that when 1st accused stabbed the deceased, the other two were present with him at the scene. They did not encourage assist abet or collude in the commission of the crime.

The State has failed to prove these two essential components of the requirement in s 196 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Consequently these two are entitled to a finding of not guilty. They are acquitted.

On behalf of the remaining accused, who is the 1st accused, it was argued by *Mr Mungure* that since the case against 1st accused is wholly based on circumstantial evidence, and that since the State has not proved such facts as would exclude the reasonable inferences from those facts pointing to the guilty of the accused, he ought to be acquitted as well. Reliance was placed on the case of *Muyanga v State* HH-79-13 in which, relying on *R v Blom* 1939 AD 288, I observed and explained in a common-sense approach the requirements of the law regarding circumstantial evidence. Broadly, the requirements of the law on circumstantial evidence amount to the following:

- (a) The circumstances from which an inference of guilty is sought to be made must be cogently and firmly established;
- (b) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
- (c) The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that, within all human probability, the crime was committed by the accused and no one else; and

- (d) The circumstantial evidence, in order to sustain a conviction, must be complete and incapable of explanation by any other hypothesis than that of the guilt of the accused; and
- (e) Such evidence should not only be consistent with the guilt of the accused but should also be inconsistent with his innocence.

In our view, the circumstances surrounding the death of the deceased, taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no-one else. We come to that conclusion for the following reasons.

1st accused had earlier on came second best in an earlier fight with deceased. He promised revenge. On this day the he 1st accused first picked a fight with Robson Bobo. He was restrained. When he later on saw the deceased playing a game of snooker, he grabbed the opportunity to challenge him at the snooker table. The deceased sensed danger and walked out of the club. 1st accused followed him outside. An egg vendor announced that there was commotion outside. When a witness, Tungwarara rushed outsides, he saw the deceased running away from the club. 1st accused was walking away from that spot back to the club.

We are satisfied that when the 1st accused denies that he saw the deceased at the club on the fateful day, he was lying. When he denied that he had fought with the deceased on Defence Forces Day, he was lying. When he denied to the court that he carried a broken bottle prior to following the deceased outside, he was again lying. When he denied stabbing the deceased he was also lying. He stabbed the deceased to settle the outstanding grudge over Mazvita. In doing so, the accused was settling an outstanding grudge against the deceased who had given him a hiding on Defence Forces Day.

In our view he cannot escape a finding that he committed the crime charged. He is guilty of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23].

P.P. No record.

REASONS FOR SENTENCE

In assessing sentence I take into account the factors canvassed by your learned counsel in mitigation. These are basically that you are a youthful first offender who is a breadwinner to his family. The fact that you had consumed liquor at the time you committed this crime may have caused your poor judgment resulting in the fatal stabbing of the deceased. That is all anyone could have said in your favour. I say this because I find that there are more aggravating factors than mitigatory ones.

First and foremost, is the fact that you are a member of a disciplined force. Not only did your conduct fall far short of what the Zimbabwe National Army, through the Defence Act, [Chapter 11:02], expected of you, but society at large looked to you as its defender. Instead, you made a conscious decision to mete out revenge and punishment to a civilian who had beaten you over an issue involving a woman. When you were beaten on that Defence Forces Day, you promised to revenge. As testified by a witness in court, on this day, upon a chance meeting with the deceased, the latter decided to walk away from you. He must have been aware that you might want to carry your threat through. He walked away, signifying his unwillingness to engage you in a fight which he probably thought was over. You were not satisfied by this as you followed him outside and inflicted upon him the fatal injuries from which he died. This increases your moral blameworthiness. Society expects members of the force to build peace in the communities and not to destroy life. You failed to live up to the general expectation of society.

In light of the above, a sentence which reflects society's abhorrence of this type of behavior from one of its own is called for. In the result you are sentenced as follows:

22 years imprisonment.

National Prosecuting Authority, legal practitioners for the State
Makombe & Associates, 1st accused's legal practitioners
Henning Lock, 2nd accused's legal practitioners
Tandiri Law Chambers, 3rd accused's legal practitioners