

THE STATE
versus
TALENT NYAMOMBE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 21, 22, 23 June 2021, 8, 10 March 2022, 3, 18 June 2022

Murder Trial

J Mugebe, for the state
F Murisi with R Chikaka, for the accused

FOROMA J: The accused was charged with murder as defined in s 47(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] it being alleged that on 23 December 2016 at Gute Nite Club Ziko Dema the accused unlawfully and intentionally caused the death of Benjamin Chandimhara by strangulating the deceased with a shoe lace.

The accused pleaded not guilty to the charge claiming that the deceased committed suicide in his bar after he had offered him an opportunity to sleep in his bar at his own request in order to protect him from further assaults by other bar patrons who the deceased had fought with inside the bar. The accused in his defence outline also suggested that if deceased had not committed suicide there was a possibility that the deceased had been killed by somebody from among the people he had fought with that night.

The State produced the summary of the State case which the court marked Annexure A and the defence produced the defence outline which was marked Annexure B. The State opened its case by producing the evidence of Kurayi Chiota with the consent of the defence in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as summarized in Annexure A aforesaid. The said evidence was summarized as follows:-

“Kurai Chiota is a male adult and known to the accused. On 23 December 2016 and at around 0935 hours he was summoned to the scene of crime. He was told that someone had committed suicide by hanging inside the night club. He went there and observed the deceased lying on the floor with a shoe lace tied on his neck and the body was partially on the floor. He was also to identify the deceased.”

The State also produced the accused's confirmed warned and cautioned statement with the accused's consent which in fact the accused had also incorporated as part of his defence outline – the statement was marked Exhibit 1.

Before the State led oral evidence in support of its allegations against the accused it also produced the following exhibits with the accused's consent - the post mortem report – Exhibit 2 the affidavit by Doctor Pesanai explaining the post mortem results – Exhibit 3. Pictures A and B showing deceased's body after his death – Exhibit 4 and sketch plan as Exhibit 5.

In addition to Kurai Chihota the State led evidence from seven witnesses in support of its allegations against the accused namely Prince Washayabunha, Trymore Mutukumira, Fradreck Muzoriwa, Nomsa Besa, Zondai Chagunda, Bright Gadhi and Doctor Sanganai Pesanai. The evidence of each witness is summarized below before analysing the significance of such evidence in arriving at outcome of the trial.

The witness Prince Washayabunha was the first State witness and gave evidence under oath. He testified that he knew the accused as the operator of Gute Bar. He had been drinking at the said bar the night before the deceased was found dead in accused's bar aforesaid. He witnessed an altercation between deceased and his girlfriend outside the Gute Bar and also had a brief encounter with the deceased whom he claimed pushed him and he pushed him back before they were restrained by other patrons. During cross examination he testified that he arrived at the bar after 9:00 p.m. and left between 12:00 midnight and 1:00 a.m. While at the bar he observed that the deceased was behaving in a rowdy manner. He also testified to the deceased having lost the fight between him and his girlfriend and that people mocked him for losing a fight to a woman.

The next witness was Trymore Mutukumira. He too gave evidence under oath and testified that though he is now employed at ZRP Beit Bridge as a Detective Sergeant in 2016 he was assigned the task to complete investigations of this matter initially handled by one Jindu. He recorded indications made by Panashe Chihwai; accused's warned and cautioned statement and some statements from witnesses and obtained the post mortem report. He did not interview Tapiwa Nyamombe the accused's brother.

The third witness was Fradreck Muzoriwa a 39 year old who used to play music in Gute Bar as a disc jockey. He knew the accused as the operator of Gute Bar and on 23 December 2016

in the early hours he was playing music in the Gute Bar when some commotion erupted which involved the deceased and two patrons namely Panashe and Prince which commotion resulted in damage to accused's bar furniture. He explained that the deceased used a chair in the fight which missed his target and hit a table which broke. The noise which was made as the chair landed on the table as the table broke caused the deceased to wake up and came into the bar area and assisted the witness quell the fight between deceased and the other two. As it was about time to close the bar the accused declared the bar closed and asked patrons to leave the bar. Before leaving the bar the witness heard the accused complain to the deceased saying that last time deceased had damaged accused's Public Address System and did not pay this time he would not get away with it. The witness also testified that the accused ordered everyone to leave the bar and closed the premises. Accused remained with the deceased and one Tapiwa (the accused's brother) in the bar.

During cross examination the witness was clear that he did not witness the accused assault the deceased and that he only knew the relationship between accused and deceased as that of a bar operator and his customer. This witness' testimony was somewhat inconsistent in that in one breath he agreed that the reason why deceased remained inside the bar was for his own protection and in another he contended that the deceased was prevented by the accused from leaving the bar until the issue of repair to the damaged bar furniture had been addressed. In re-examination the witness however said that accused grabbed the deceased and stopped him from leaving the bar. He however admitted that although he had taken beer he was only moderately drunk as he could still discharge his duty of playing music in the bar as a disc jockey.

In his response to the court on whether the deceased voluntarily remained in the bar the witness answered that the accused stopped the accused from leaving the bar. He also testified that the deceased was stopped from leaving the bar not so much for his own protection from his enemies outside the bar but so that he would put right the damage he had caused to accused's bar furniture.

The fourth State witness was Nomsa Besa and she too gave evidence under oath. Her evidence was that she met the deceased at the Gute Bar on the night in question and described deceased as drunk and rowdy. She had tried to restrain the deceased as the deceased picked a quarrel with some patrons whom deceased accused of stealing his money. The witness further testified that the accused closed his bar pre-maturely as a result of the commotion that had developed involving the deceased. Deceased had caused some damage to bar furniture but the

way such furniture was damaged as described by her differed from the evidence of the third witness. As the accused ordered the patrons to leave the bar the deceased approached her pleading with her to protect him from the accused who he claimed wanted to beat him and was preventing him from leaving the bar because he had damaged bar furniture. She tried to persuade accused to let deceased go suggesting the matter be reported to the police but accused was not prepared to let the deceased go. Nomsa eventually left the place leaving the deceased, accused and his brother in the closed bar. Although she could not tell how the deceased met his death she could not say that deceased had committed suicide. She disputed the defence's suggestion that the deceased remained behind in the accused's bar for his own protection and at his own request. The witness dismissed as false suggestions that there was any bad blood between the accused and herself.

Nomsa did not know of any special relationship between accused and deceased save that deceased was a regular patron at accused's Gute bar where the deceased had been found dead. When it was put to her that accused accommodated the deceased in his bar at accused's request in order to avoid deceased being assaulted by the other patrons outside the bar the witness disputed this and reiterated that when she initially left the bar she returned to the bar and through the screen unsuccessfully tried again to persuade the accused to free deceased to no avail. At the time deceased was pleading with accused to forgive him and let him go. It is significant to note, that despite accused denying that he ever spoke to Nomsa Besa concerning the deceased the witness was adamant about the discussion insisting that she had no reason to lie against the accused.

The fifth State witness was Bright Gadhi a member of the ZRP of 18 years' service. At the time of the alleged murder he was a member of the Criminal Investigations Department at ZRP Marondera. He attended the scene of the alleged murder at Ziko Business Centre in response to a ZRP Dema call and found ZRP Dema details already at the scene. He too testified under oath and indicated that when he entered the bottle store owned by the accused (Gute Bar) he was shown the deceased's body by details from Dema ZRP who had arrived at the scene earlier. He described in detail his observations which *inter alia* were that the deceased's body was hanging from a burglar bar on a shoe lace tied to the neck and that he did not observe any wounds from outside. He untied the shoe lace from the neck and as he did so some liquid came out of the deceased's mouth which had a strong stench of alcohol. He did not observe the neck lace to have been inside the deceased's flesh and did not observe any injuries nor any signs of a struggle. A police detail in his company

took photographs using his own cell phone. The witness could not determine the cause of death but suspected suicide. He had not recorded a statement from the accused at the time because he had not suspected the accused to be the culprit.

Zondai Chagunda a member of ZRP based at Dema ZRP was the sixth state witness and also testified under oath. He said that he was the detail manning at the Charge Office when a report that some person had committed suicide in accused's bar was received. After making an entry in the Report Received Book he left for the scene with the informant (accused) arriving at the scene around 11:00 a.m. He was shown the deceased's body and before he approached the deceased's body he called some details who operated in the area namely Constable Jindu and Sgt. Gadhi whom he showed the deceased's body. While at the scene he called people who had gathered outside to assist identify the deceased as accused had professed that he did not know deceased's name. No one from the people gathered outside claimed they knew the deceased by name. The wife of deceased was then called and she identified the deceased as her husband and she claimed he had left home about a week earlier and that his whereabouts had not been known since then. The witness also testified that the shoe lace was above the neck not inside the deceased's flesh. The police removed the deceased's body from the scene at about 2:00 p.m. He and other details from Marondera could not conclusively determine the cause of death even though the scene seemed to suggest *prima facie* that it was a suicide case. He did not observe any evidence of struggle at the scene where body of deceased was found. According to the witness accused had told police that he had known deceased as a customer and deceased's wife indicated that they had come to the Ziko area and had been less than a year in the area. It was this witness who after the scene visit by CID from Marondera and taking of photos took the deceased's corpse in a police body box to Chitungwiza where deceased was certified dead.

The last State witness was Doctor Sangnai Pesanai who also gave evidence under oath. He testified that he qualified as a Medical Doctor in 1995 and had been a pathology since 1999. He compiled the post mortem report Exhibit 3. On 3 January 2017 and at Harare Central Hospital he performed a post mortem on the remains of one Benjamin Chandimhara a 40 year old male adult who had died 22 December 2016. The history given was that deceased had been found dead head suspended from a burglar bar and the rest of his body on the floor and that he had been involved in a fight earlier. On examination he noted a shoe string (shoe lace) with a black sliding

noose round the deceased's neck and a groove on middle of neck. He observed the tongue hanging out of mouth (cyanosed). Had a small cut on the eye.

When he opened the skull he did not observe any fracture of the skull. He also did not observe any abnormality of the heart and no bleeding of the brain but minor bleeding on the larynx and trachea. There were no fractures on the neck. He noted some accumulation of fluid in the chest and in the lungs which is caused by difficulties in breathing. His conclusions as to the cause of death were as follows:-

- 1) Asphyxia which is difficult in breathing caused by blockage of breathing
- 2) partial hanging

The pathologist explained that there are two kinds of hanging –

- i) complete hanging where body is found completely suspended and;
- ii) partial hanging whereby the body is not completely suspended and part of the body is touching the ground

According to the pathologist there was a time deceased spent experiencing difficulty in breathing before he died and that is what caused choking. The pathologist also explained that there are two types of strangulation –

- i) manual strangulation using hands or;
- ii) ligature where one uses a string

Manual strangulation using hands would leave bruises and scratches from nails on the neck and usually causes breaking of some bones on the neck. Eyes – the conjunctiva would be bleeding due to pressure caused by strangulation. Ligature – the rope or string would leave a groove in the middle of the neck. The difference between complete hanging and complete strangulation ligature is that the groove in a complete hanging would be high and oblique caused by the weight of the body when one jumps as they commit hanging. In the complete strangulation case the groove goes round the whole neck and you may find nail marks showing attempts by victim trying to remove string around the neck. According to the pathologist the deceased was neither strangulated nor did he die of complete hanging. The pathologist also testified that the groove observed on the deceased's neck could not be produced after the death of victim. The pathologist described cyanosis as an indication of a body deprived of oxygen.

According to the pathologist the primary cause of death in this matter was the choking which is caused by the oesophagus being constricted as a result of partial hanging. The pathologist made it quite clear that he did not find evidence of self-hanging in this case.

The pathologist excluded all other causes and remained with partial hanging and the other two causes as indicated i.e. choking and asphyxia. He also indicated that a partial hanging could be effected on a person who has passed out and then take the victim to the burglar bar.

The State closed its case after the pathologist was excused.

The accused gave evidence under oath and closed his case without calling any witnesses. His evidence essentially consisted of his defence outline which he adopted as his evidence in chief and indicated he would aside by. Accused also adopted his warned and cautioned statement Exhibit 1 and indicated he had nothing further to add.

In cross examination the accused testified that the deceased was his longtime friend and deceased was also a long-time customer at the bar. He claimed that he met the deceased for the first time at the soccer field at Murisa in Seke where the deceased imparted some words of advice on how to successfully run a business. Accused denied that deceased broke any of the bar furniture on the night in question contrary to what Nomsa Besa and Muzoriwa had said in their evidence. The accused denied vehemently that any property had been damaged in the bar on the night in question. The accused also indicated in response to the court that he did not suspect anybody to have caused deceased's death.

The accused believed that both Nomsa Besa and Muzoriwa lied and gave incriminating evidence against him because there was bad blood between him and each one of them. He however, admitted that he had not claimed in his defence outline or warned and cautioned statement that any bad blood existed between him and the said two witnesses. The accused admitted that his warned and cautioned statements did not make any reference to deceased's body being tied to the burglar bar. He believed that the deceased committed suicide in his bar and denied that he caused the deceased's death.

ANALYSIS OF EVIDENCE

It is common cause that:-

- 1) Deceased died in Gute Bar owned by the accused.

- 2) On the night in question at about 2:45 a.m. the deceased remained in accused's bar when accused closed his bar as a result of some commotion that had taken place in the bar which involved the deceased.
- 3) Witnesses Nomsa Besa, Fradreck Muzoriwa were in accused's bar at the time the accused closed his bar as a result of the commotion aforesaid and both witnessed the fact that the deceased did not leave the bar when it was closed early that morning.
- 4) The pathologist's post-mortem of the remains of the deceased established that the deceased died as a result of asphyxia, bronchial aspiration and partial hanging. He could not say that the post mortem findings were conclusive as to whether the death was caused by suicide or homicide.

The issues requiring resolution are the following:-

- a) whether the deceased damaged the accused's bar furniture on the day in question
- b) whether the deceased voluntarily remained in the accused's bar when the bar was closed due to some commotion that had involved him (deceased) or did the accused prevent deceased from leaving the bar when all others were forced to leave the bar as a result of the afore said commotion.
- c) who caused the death of the deceased.

The State's evidence established beyond reasonable doubt that the deceased was prevented by the accused from leaving the bar so that the deceased would attend to the issue of the bar furniture which he had damaged. The evidence of Muzoriwa was clear that the accused prevented the deceased from leaving the bar not to protect the deceased from assaults by the people deceased had fought but so that deceased would attend to put right the damage he had caused to accused's bar furniture. Accused's denial that deceased damaged some bar furniture is a dishonest attempt by accused to conceal that he was upset by the deceased's conduct as a result of which he needed to get deceased to put right the damage before he could leave the premises. The court does not accept accused's claim that deceased pleaded with accused to let him sleep in the bar for fear of further attack by the people deceased had fought in the bar. This is because in his confirmed warned and cautioned statement which accused adopted as part of his defence outline accused referring to deceased said. "He was very apologetic to the broken top table and he pulled out US\$3. I refused it since the furniture was already broken." This evidence confirms that some bar

furniture had been broken and the deceased had accepted liability for the damage. One is compelled to ask the question – if no furniture had been broken that night why would the accused have made reference to it in his statement? The accused in his confirmed warned and cautioned statement also claimed that the deceased had been his friend since 2015. This is not a truthful statement but one which the accused fabricated to give credence to justify his claim that deceased had not been prevented from leaving the bar but that deceased as accused's friend had requested to be accommodated in order to save himself from further attacks by the people he had fought in the bar. It is important to note that in his evidence Zondai Chagunda a police detail at Ziko Police Baze on 23 December 2016 testified that after receiving a report of the death by suicide he accompanied by the accused visited the scene. He further testified that accused told him that he did not know the name of the deceased whom he only knew as a regular customer at the night club (bar). As a result, the witness had to ask people who were gathered outside the night club if they could identify the deceased by name to no avail. This evidence was not challenged. If the deceased was accused's friend as claimed by the accused one would find it strange that the accused did not know his friend and long standing bar patron by name. Incidentally accused did not comment about this evidence by Zondai Chagunda in his defence outline nor did he dispute the said evidence during cross-examination. The court dismisses the claim of a close relationship between accused and deceased to be a fabrication meant to dent the suggestion that accused could have meant any harm to the deceased when deceased remained in the accused's bar after everybody had been told to leave the bar as a result of the commotion that involved the deceased.

The court dismisses the accused's claim that Nomsa Besa harboured bad blood with accused. No such bad blood was referred to in the accused's defence outline despite accused having been availed a summary of the witness Nomsa Beza's testimony as summarized in Annexure A containing a summary of evidence that the state proposed leading from the listed state witness. The court is satisfied that the suggestion that Nomsa Besa's evidence was tainted by bad blood is also a recent fabrication. The court finds that Nomsa Besa's evidence was truthful and reliable and corroborated Fradreck Muzoriwa's testimony that accused prevented the deceased from leaving the bar at the time all other patrons were asked to leave the bar which was being closed as a result of the commotion that had taken place which commotion had involved the deceased who in the melee had damaged accused's bar furniture. Nomsa Besa also testified that the deceased

pleaded with her to persuade accused to let him leave and that when she prevailed on accused to let the deceased go home accused who was cross told deceased that he had previously damaged his public address system (PA) system and did not pay and that this time he would not get away with it. Despite Nomsa Besa's further pleas to accused to let deceased pay for repairs to the damaged furniture the following day, accused would not listen and insisted that deceased was not going anywhere and at that time accused uttered a cryptic threat that "the deceased would tell others." Nomsa Besa was quite fair in her evidence. She did not seek to excuse deceased's conduct that night which she described as quarrelsome and at some stage had sought to restrain him. Neither did she seek to suggest that she knew how deceased had met his death. According to the pathologist's testimony the deceased did not die from strangulation. Neither did he die from complete hanging. As accused prevented deceased from leaving the bar only the accused can explain what happened to the deceased after he remained in the bar which had been closed. Contrary to accused's testimony that, the shoe lace "showed to be inside the neck flesh" where the pathologist testified that there was a groove on the middle of the deceased's neck but there were no fractures to the neck bones. The pathologist opined that there was a time deceased spent having difficulty in breathing. He was emphatic that the groove he observed on the deceased's neck could not have been produced after deceased's death. In his view he did not find evidence that the deceased had hanged himself in a complete hanging scenario. Although accused was adamant that he believed the deceased hanged himself such belief is baseless for two reasons:-

- 1) Deceased was afraid to leave the bar as according to accused he could be further attacked by the people outside amongst whom were those he had fought inside the bar. If deceased was afraid of being attacked by persons outside the bar with the risk of getting killed clearly deceased was concerned about preserving his life and- if so, surely, deceased's taking his own life as suggested by accused considering accused's claim that he had offered deceased protection is inexplicable. Besides the fact that the deceased was desperate to be protected from assault by accused shows that he was not so drunk as not to know what he was doing.
- 2) The pathologist did not find evidence of self-hanging in this case.

The court finds that this case was poorly investigated by the police. No statements were recorded from accused's brother or from the accused's friend Almighty Marembo. No attempt was made

to uplift finger prints from the window panes or sill where the shoe lace that was tied to deceased's neck was tied.

Be that as it may accused's story is not believable. In fact, it does not have any ring of truth and it is self-contradictory. The court finds that the accused's defence is beyond doubt false and one which was fabricated in an effort to escape blame for the deceased's death.

DISPOSITION

The court is satisfied that the accused in his determination to punish the deceased for damaging his bar furniture the second time around choked the deceased and hang him using the shoe lace of deceased's shoe resulting in the death of the deceased. The deceased was unable to fight back or defend himself because he was drunk and accused took advantage of deceased's drunkenness. In the circumstances the court finds the accused guilty of murdering the deceased as charged.

The offender has been convicted of the murder of Benjamin Chandimhara who died in Gute Night Club in the early hours of 23 December 2016. Although the offender claimed that the deceased committed suicide the court's finding was that the offender choked the deceased by hanging him using a shoe lace which led to bronchial aspiration and asphyxia as established by the pathologist.

Defence counsel urged the court to consider the following facts in mitigation:-

- 1) that the deceased was the aggressor in that he had damaged bar furniture in the offenders night club.
- 2) that the offender contributed US\$100 through his uncle towards deceased's funeral expenses.
- 3) that the offender has since made peace with deceased's family who accepted that the deceased committed suicide.
- 4) the offender took it upon himself to assist the deceased's family by assuming responsibility for the education of one of deceased's children and Nyasha Chandimhara whom he has enrolled at Lifestyle College in Chitungwiza and currently in form two. The offender had been paying for this child's educational requirements since the deceased's death.

Defence counsel pleaded with the court not to pass the capital punishment (death penalty) and proposed a sentence of 8 years imprisonment with a portion suspended on condition of good

behaviour. He also urged the court to take into account that the offender spent about a year awaiting the outcome of his trial. In aggravation the State urged the court to consider:

- (i) that the deceased died at the prime of his life;
- (ii) the fact that human life was needlessly lost warrants a sentence that emphasizes the sanctity of human life which the Constitution of the country regards as a fundamental human right. The State though not supporting the imposition of the capital punishment urged the court to impose a sentence of not less than 25 years imprisonment.

Before proceeding to consider the weight of the submissions by both counsels it is important to note that the law does not permit the suspension of any sentence imposed for a conviction of murder. Defence counsel urged the court to suspend a portion of the sentence of imprisonment on the usual conditions of future good behaviour which the court cannot lawfully do as this is expressly prohibited by s 358(2) of the Criminal procedure and Evidence Act [*Chapter 9:07*].

The loss of life by deceased was most regrettable. It is most unfortunate that the deceased died for merely damaging night club furniture. The offender as proprietor of a beer outlet ought to have always born in mind that the nature of his business (a night club) was fraught with the risk of damage to furniture and fittings as the behaviour of patrons after imbibing alcohol is predictably violent. While damage to bar furniture by bar patrons cannot be condoned the reaction of the offender to the damage caused by deceased cannot be condoned at all. The submission by defence counsel that deceased was on this day the aggressor by reason of having damaged the offender's business furniture is unfortunate and a reflection of total disregard of the sanctity of human life. The court finds it totally inexcusable that the offender could not exercise restraint and dealt with his patron so harshly. Even if the damage of this fateful day was a repeat of damage by the deceased it could never be an excuse for the offender as a proprietor of a liquor outlet to mete out such punishment (deprivation of life) to his patron.

Considering that Nomsa Besa pleaded with the offender to free the deceased and discuss reparation the following day or report to the police his complaint against the deceased's conduct the offender's determination to get even with the deceased becomes the more unpardonable. It is difficult to comprehend how a university graduate who would have been expected to know better

decided to take the law into his own hands when he could easily have reported the matter to the police and institute a civil claim for the loss caused by the deceased.

The court finds it aggravatory that the offender sought to disguise his dastardly act as an act of suicide by the deceased. This proves that the offender was not remorseful in the least. Regrettably quite a number of people fell for the offender's trick (i.e that deceased committed suicide) amongst them members of the police force and the deceased's family if the defence counsel's submissions are anything to go by.

The court will not abdicate its obligation to emphasise to the society through an appropriate sentence that resort to violence and self-help will not be tolerated as very often that leads to loss of life or limb. The offender's decision to take responsibility for the education of one of deceased's children's education though laudable can never replace the lost parent as once lost humanity life not replaceable.

The court has considered the periods proposed by both the defence and State as appropriate sentences and finds neither to be appropriate in the circumstances of this case even though capital punishment is however not considered as warranted. The 25 years proposed by the State seems to us too harsh and yet the 8 years imprisonment suggested by the defence counsel does not adequately emphasise the sanctity of human life needlessly lost in this matter.

In the circumstances and taking into account the submissions by both counsels and the youthful age of the offender and pre-judgement incarceration the court sentences the offender as follows:-

“You are sentenced to 15 years imprisonment.”

F Murisi, accused legal practitioner
National Prosecuting Authority, state's legal practitioners