Judgment No. 135/14
Case No. HC (CRB) 92/14
X REF REG BYO 3169/13

THE STATE

Versus

ZIBUSISO MPOFU

IN THE HIGH COURT OF ZIMBABWE
TAKUVAJ
BULAWAYO2 SEPTEMBER 2014

Miss N. Ngwenya for the state
P. Muzvuzvu for the accused

Criminal Trial

TAKUVAJ: The Accused was charged with contravening section 47 of the Criminal Law (Codification and Reform) Act Chapter 9:23. It being alleged that on 20 December 2013 and at Railway Avenue, opposite EEG Electronic, Bulawayo, the accused person did wrongfully, unlawfully and intentionally kill and murder the deceased Ronald Dhliwayo after an altercation over R4.

Accused pleaded not guilty to the charge of murder but guilty to culpable homicide.

The State's allegations are as follows:

On the 20th day of December 2013 at about 23:00 hours both the deceased and accused were at 13th Avenue Bar drinking beer. Accused requested deceased to contribute R4 so that they could buy two litres of beer but deceased said he had no money. A misunderstanding arose as accused insisted that deceased should have contributed R4. The bar closed and the duo went out where they fought. The accused fled towards Railway Avenue with deceased in hot pursuit up to Luck Bird Panel Beaters where accused picked up a brick and struck deceased on the back with it. Wellington Sithole who was standing nearby called deceased and asked him why the two were fighting. The deceased explained that he wanted accused to give him his R4 he had earlier on given to him. Sithole restrained the deceased from fighting the accused. Deceased did not heed the advice and he returned to where accused was and the two again fought. Shortly thereafter the deceased ran away towards EEG Electronics shop but slipped and fell down.

The accused proceeded to kick deceased on the head several times with booted feet. Further, accused picked up a quarter concrete brick and hit deceased with it on the head near the right ear. Accused then ran away from the scene. The deceased died on the spot from injuries inflicted by the accused. The post mortem report number 1015/1009/2013 reads (1) Extensive Subarchnoid Haemorrhage, (2) Blunt Force Trauma, (3) Homicide.

In his defence outline marked as exhibit 2, the accused denied murdering the deceased

while pleading guilty to the charge of culpable homicide. The accused raised intoxication as his defence claiming that on the night in question he was "extremely drunk" to the extent that he could not appreciate what he was doing. Further, he contended that this state of intoxication made him exaggerate his response to the deceased's provocative behaviour.

The issue

The issue that falls for determination is whether the accused intended to kill the deceased.

The State case

The State led evidence from three witnesses namely Njabulo Dube, Wellington Sithole and Dr Sanganai Pesanayi.

Njabulo Dube was the 1st state witness. He told the court that he knew the accused from the time he was employed by the National Railways of Zimbabwe as a security guard. On 20 December 2013 he was at 13th Avenue Bar drinking beer. Whilst there he saw accused and deceased drinking beer together. When their beer ran out, accused told the deceased to buy some more beer but the deceased said his money had run out. Accused returned empty beer bottles to the cashier and was given R6 as deposit for the empties. The accused requested for R4 from the deceased so that they could buy one calabash of beer but the deceased insisted that he had no money. The bar closed and the patrons went out where the accused pulled the deceased to where taxis were parked. A misunderstanding arose over the R4 and a fist fight between the two ensued.

The accused ran away and deceased pursued him along Railway Avenue. The witness remained at 13th Avenue Bar but decided to follow after approximately 10 minutes. When he got near Links Bottle Store, he saw three people standing and another one lying down. He went to accused and deceased's workplace but did not find them there. As the witness was walking away from the premises, he heard accused calling him. The accused then told the witness that he had hit the deceased with a stone on the head opposite Links Bottle Store. The witness proceeded to the scene where he found the deceased lying down. He met Wellington Sithole there and the two looked for police officers.

The witness told the court that the accused and deceased were moderately drunk on the fateful night. He denied that the accused was excessively drunk because he was able to run fast. Also he said the accused drank one bottle of Black Label wile in his company but however conceded that accused and deceased could have consumed some alcohol before joining him.

The second state witness was Wellington Sithole. He knew accused and deceased as workmates. On 20 December 2013, the witness saw accused running past Links Bottle Store with deceased behind him. The two started fighting and the witness moved closer where he saw the accused running away before shortly picking up a "stone" and this time, the deceased ran away from the accused. The accused hit the deceased on the shoulder blade with the stone. The witness got nearer to the deceased and asked him what they were quarrelling about. The deceased told the witness that he wanted his R4 that he had given to the accused. The witness

advised the deceased to desist from fighting and the deceased assured him that he was no longer interested in fighting as all that he wanted was his money from the accused.

The witness observed the deceased approaching the accused and he suddenly saw the deceased running away with accused in hot pursuit. He then saw deceased falling down at the edge of the road near EEG Electronic Shop. At that point, he saw accused kick the deceased with booted feet on the head. The accused picked up a stone and struck deceased with it on the head near the right ear. It was the witness' testimony that accused then ran towards NRZ Main Station and disappeared into the darkness. The witness proceeded to where deceased lay and observed that he was breathing heavily as if he was running out of breath. He immediately went to 13th Avenue Bar where he informed police officer on patrol about the incident. The witness told the court that he was able to see clearly what transpired because visibility on this night was good as the area was illuminated by street and shop lights.

The 3rd and last witness was Dr S. Pesanayi. He is a duly registered medical practitioner based as United Bulawayo Hospitals. On 22 December 2013 he carried out a post mortem examination on the deceased's body and observed the following marks of violence:

1. Swollen right neck, bruises on the right neck, cheek and temporal region, left frontal region, temporal, cheek and shoulder.
2. Scalp haemotoma left occipital region, no skull fracture
3. Extensive subarchnoid haemorrhage covering the whole brain. He concluded that the cause of death was –
    a. Extensive subarchnoid
    b. Blunt Force Trauma
    c. Homicide

When shown exhibit 5, the witness said it could have caused the injuries as per post mortem report. Further, he told the court that he noticed that deceased had been assaulted multiple times and that the injuries he observe could not have been caused by a fall. Under cross-examination, the doctor explained that deceased's death could have been caused by both the fall and being hit by a stone as both events are capable of producing a blunt force trauma. He also told the court that kicks to the head with booted feet or repeated punching of the head with clenched fists can cause the brain to bleed resulting in injuries sustained by the deceased.

The state had the evidence of J. Mativenga admitted in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07). This witness recorded a warned and caution statement from the accused. He also recorded indications made at the scene by the accused person. The state then closed its case.

The accused opened his case by giving *viva voce* evidence. He testified that he and deceased started drinking beer at their work place at 3pm before knocking off. They then proceeded to a sports bar called Picadin where they drank 5 quarts apiece of Black Label. They also drank ¾ of a bottle of spirit called Mainstay. At around 10pm, they proceeded to Railway Avenue along 13th Avenue to drink opaque beer. When they got to Waverley they met the 1st state witness and each bought a pint of Black Label beer. After that he gave deceased R4 to buy

the calabash. When he confronted the deceased, he became hostile and abusive. The accused said he went outside and deceased followed him and grabbed him by the collar. Some taxi drivers intervened to stop the fight. Accused ran away and deceased chased him until he met the second state witness who asked them why they were chasing one another. Accused said he then stopped running and the deceased went towards the 2nd state witness and at that point deceased slipped and fell hitting the tarmac with the back of his head. The accused then picked up a stone and threw t at the deceased. According to the accused the stone "brushed deceased's cheek and chin". Accused then proceeded to his work place. In his opinion deceased died as a result of falling hard on the tarmac. Under cross-examination he denied hitting deceased on the back with a stone and he also denied telling Njabulo Dube (1st state witness) that he had hit deceased with a stone. Further accused claimed that when he hit deceased with a stone he was acting in self defence as he believed deceased would get up and attack him with a knife.

Analysis

Njabulo Dube gave his evidence well and was not shaken under cross-examination. The crux of his evidence is that he was in the duo's company in the bar, that there was a dispute over R4 which deceased was supposed to contribute in order to buy more beer. Accused was then seen by the witness pulling the deceased toward some taxis parked nearby. A fist fight ensued and accused fled. Witness followed later and met accused who told him that he had hit deceased with a stone on the head opposite Links Bottle Store. It was his opinion that both accused and deceased were moderately drunk on the night in question. The witness told his story with ease. He had no motive to lie against the accused. In fact some portions of his evidence are favourable to the accused for example he said that after the 1st fist fight accused fled from the scene with deceased in hot pursuit and that accused was moderately drunk. If the witness had a motive to falsely incriminate the accused, he would not have given such exculpatory testimony. We agree with the state counsel's submission that this witness gave an ungarbled and balanced account of events of the night in question. We therefore accept his evidence *in toto.*

Wellington Sithole's evidence is logical and consistent with that of Njabulo Dube and the accused's own version. He did not exaggerate or embellish his evidence at all. The witness would not have known that the dispute between the accused and the deceased centered around the R4 if he had not spoken to the deceased. The witness had no axe to grind against the accused because had that been the case, he would not have readily admitted the following facts;

1) that when he first saw the two, it was the deceased who was chasing after the accused.
2) that when he told the deceased not to fight, it was the deceased who went to where the accused was and confronted him.
3) that when deceased was running away from the accused, he "tried to turn, slipped and fell down" on his own.

In our view, a biased witness would have denied it totally. For these reasons we find that

this witness was a truthful witness and we accept his evidence.

Dr Pesanayi's evidence is common cause and as such does not require any scrutiny suffice to say the observations and conclusion he made are consistent with the rest of the evidence before the court. The witness admitted that the summary of history was given to him by the police before he conducted the post mortem examination. He agreed that death may result from a hard fall at the back of the head.

The accused performed poorly as a witness. We are of the view that his version is laced with a web of lies which it was necessary for us to disentangle.

We say so for the following reasons:

(a) the accused's version in his warned and cautioned statement, his defence outline, his evidence in chief and his answers under cross-examination are fraught with contradictions and inconsistencies in that:
    (i) the reason for the fight in the warned and cautioned statement is put as deceased's failure to account for accused's money, namely $5,00 for beer and 4 rands for cigarettes , yet in his evidence in chief the accused said it was only 4 rands that deceased converted to his own use.
    (ii) In the warned and cautioned statement the accused said he was at work when he sent deceased to go and buy beer and cigarettes, yet in his evidence in chief, he said this occurred inside the bar after they had consumed a lot of alcohol together.
    (iii) in the warned and cautioned statement he said when deceased failed to return with his beer and cigarettes, he "followed him" , and yet in his evidence in chief, he said they left their work place together and went to Picadin Sports bar and subsequently to these other bars.
    (iv) the defence outline simply contains a bold assertion that the accused was "extremely drunk" without any further factual averments or rebuttals.
(b) The accused's explanation of what he did when deceased slipped and fell down is false and meaningless in that while he admits throwing the stone, he nevertheless denies that the stone caused injuries to the deceased – in his own words "it merely brushed the deceased's chin and cheek."
(c) Equally untrue and inconsistent with the medical evidence is accused's version that he did not kick the deceased on the head while deceased was lying down. According to the doctor, the multiple injuries he observed on the deceased's neck, cheek and head are inconsistent with falling down. The question becomes, if accused did not inflict these injuries who could have done so in the given period? Clearly it was the accused.

The Law

Our law, in terms of s 47 (1) (a) or (b) (1) any person who causes the death of another person – (a) intending to kill the other person, or (b) realizing that there is a real risk or possibility that his or her conduct may cause death and continues to engage in that conduct

despite the risk or possibility;

shall be guilty of murder.

Put differently, there must be actual or legal intention to kill. Actual intention exists where an accused's aim and object is the death of the deceased or where he continues to engage in activity which he realizes will almost certainly result in death. On the other hand, legal intention exists where an accused does not mean to bring about death but he continues to engage in an activity after he foresees that there is a real risk that the activity will result in the death of a person. It has three elements namely: (a) subjective foresight; (b) of the real possibility (and not probability) of death; and (c) recklessness.

In terms of section 49 of the Code "Any person who causes the death of another person –

(a) negligently failing to realize that death may result from his or her conduct; or
(b) realizing that death may result from his or her conduct and negligently failing to guard against that possibility;
shall be guilty of culpable homicide

It is trite that in deciding upon whether there was legal intention all the factual evidence which bears upon and could have affected the accused's perception, powers of judgment and state of mind and foresaid at the time he committed the alleged crime must be most carefully scrutinized. Factors such as the level of intelligence, personality, intoxication and provocation are obviously material in this regard.

If the court concludes that an accused did not foresee the possibility of death but that he should have foreseen it and the reasonable person would have guarded against it, the correct verdict is culpable homicide.

In casu, the legal issue is whether the accused is guilty of murder with constructive intent, i.e. contravening section 47 (1) (b) or culpable homicide (section 49 of the Code). The contention made on behalf of the accused is that he be found guilty of culpable homicide because he was so drunk on the night in question that he did not know what he was doing or that his "perception of his conduct was significantly impaired. It was submitted that the state "virtually" failed to refute the fact that the accused drank 5 quarts of Black Label (beer), numerous Mainstay shots and one pint of Black label."

Defence counsel further submitted that "more significantly, the state could not refute the fact that the accused was highly intoxicated."

On the other hand the state counsel relying on Syyman *Criminal Law* 3rd Ed Butterworths, 1995 at p 207 argued that "*in casu*, it is humbly submitted that although accused had taken alcohol on the day in question he was not intoxicated to the extent of failing to appreciate the nature and consequences of his conduct. Inspite of alcohol the accused still fully appreciated the nature of his conduct and consequences thereof. He still remembers the events of that day in detail. It is clear that his forgetting of the material events of that day is feigned."

As regards the proper verdict *in casu*, the state counsel relying on *S* v *Mugwanda* SC-19-02 where it was stated that "intention is never an issue in a culpable homicide case and liability stems from an inference of negligence deriving from proven or established facts" submitted that

> "In the present case, we can accept hat being involved in a fist fight and deceased falling after being chased and getting injured is negligent and a reasonable person ought to have foreseen that injury would occur. If the assault had stopped there, the state might have conceded that this was a case of culpable homicide.
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> However, the accused proceeded to brutally kick the deceased on the head with booted feet and hit him with a stone on the head. This was done to a man who was incapacitated by the fall and as such posed no threat to him. Clearly, this action negated that aspect of negligence. The accused was now demonstrating an intention to kill."

In our law, voluntary intoxication is a practical defence in that where an accused is charged with a specific intent crime, he will be found guilty of a lesser crime if he was so drunk that he was unable to and did not form the intention for the specific intent crime in question. In non specific intent crimes he will be found guilty of that crime even if he did not have the requisite intent, intoxication, may, however, serve to mitigate the sentence.

In respect of murder, this doctrine was applied in numerous cases – see for example *S* v *Dube* 1997 (1) ZLR 229 (h) and *S* v *Dzaro* 1996 (2) ZLR 541 (H).

Applying these principles *in casu* we make the following findings:

(i) the deceased and the accused consumed alcohol on the day in question. However, it is not the amount of liquor that mattes but its effect on an accused's mental faculties.
(ii) the accused and the deceased quarreled and fought over 4 rands.
(iii) the accused armed himself with a stone twice during the altercation. In both instances the accused used the stone on the deceased effectively.
(iv) initially, the deceased was the aggressor but later the opposed happened.
(v) the deceased fell down while running away from the accused.
(vi) The accused kicked the deceased who was lying down with booted feet on the head.
(vii) further, the accused hit deceased on the head behind the right ear with a stone similar to exhibit 5.
(viii) the deceased died from injuries inflicted by the accused.
(ix) at all material times, the deceased never produced a weapon let alone a knife.
(x) the accused foresaw the possibility of his act causing a fatal injury to the deceased, reconcile himself with this appreciation and proceeded recklessly not caring whether death ensued or not.
(xi) although the accused consumed a considerable amount of liquor this did not remove his ability to discern what he was doing and was still able t form the intention to commit murder.

(xii) Certainly the evidence of Njabulo Dube and Wellington Sithole who saw the accused when it mattered on the night in question and shortly after the events concerned does not subscribe to the accused a state of drunkenness indicative that he was unaware of what he was doing and unable to appreciate the consequences of his actions.

For these reasons, we find the accused guilty of murder with constructive intent as defined in section 47 (1) (b)) of the Criminal Law (Codification and Reform) Act Chapter 9:23.

Extenuation

The verdict of guilty of murder with constructive intent is an extenuating factor. It is trite that intoxication is an extenuating circumstance. We have found that accused was moderately drunk on the night in question. This to some extent reduces his moral blameworthiness. We find that there are extenuating circumstances in this case.

Miss Ngwenya – accused is a first offender

Mitigation – Mr Muzvuzvu

Accused spent 9 months in custody pending the trial. He is married and his wife is pregnant. Court should consider the limited plea as a degree of remorse. Court should also take into account the fact that accused is a first offender who was intoxicated at the time of the commission of the offence. A sentence in the region of 10 to 15 years will meet the justice of the case.

Miss Ngwenya (aggravation)

Accused stands convicted of a very serious offence of murder. His moral blameworthiness is very high. Duty of the courts to discourage violence in solving disputes. Duty of courts to uphold the sanctity of human life. Pass deterrent sentence in cases where human life is lost *S* v *Mudzama* SC-76-04 – constructive intent – young, intoxicated – reduces the moral blameworthiness.

Sentence

In assessing an appropriate sentence we have considered what was submitted in mitigation and in aggravation. Accused is 23 years old. He was intoxicated on the day in question.

Accused stands convicted of a very serious crime. Humanity in general and the courts in particular must uphold the sanctity of human life. *In casu*, life was needlessly lost. The accused's response was totally irrational and disproportionate resulting in a senseless murder which could have been avoided had accused exercised minimum restraint. This court would want to sound a warning to those who voluntarily consume liquor and then fail to exercise restraint when confronted by seemingly provocative acts by fellow drunkards. People should learn to resolve disputes amicably. A disturbing trend has developed where people get killed

over petty squabbles.

For these reasons the accused is sentenced to 18 years imprisonment.