THE STATE

versus

COLLEN MAKURA

HIGH COURT OF ZIMBABWE

BERE J

MASVINGO, 10 June 2011

**Criminal Trial**

**Assessors**

Mr Dauramanzi

Mr Mushuku

*L. Masuku,* for the plaintiff

*C. Ndlovu,* for the defendant

BERE J: On 1 November 2010 the accused and the deceased were drinking traditional beer at one Jestina Mutasa’s homestead at Munhungeyi Village, Chief Nhema, Zaka. The two had a misunderstanding which led the accused to fatally stab the deceased on the right side of the chest with an okhapi knife.

The post-mortem external examination conducted on the deceased revealed that the deceased had sustained a single penetration stab wound on the right side of the chest above the nipple. It also recorded that the doctor had noted substantial bleeding as a result of the stab wound. The cause of death was given as haemorrhagic shock due to the stab injury.

From these facts the state alleged that the accused intentionally caused the death of the deceased and moved the court to return a verdict of murder with constructive intention.

The defence argued very strongly against the verdict of murder with actual intent and

instead advocated for murder with constructive intent.

The state evidence started with the production of the following exhibits with the consent of the defence; accused’s warned and confirmed statement, the post mortem report and the okhapi knife whose dimensions were given as 24cm in length with the length of the blade being 10cm and with the width of the blade at its widest part being 2,5cm. its weight was given as 70 grams.

This was followed by the production of the evidence by way of admissions in respect of the recorded evidence of Zivanai Denhere, Sergent Freeman Chinyerere, Constable Mgcini Tshuma and Doctor Zimbwa.

Amos Kwangware, Moses Mashiri and the accused Collen Makura gave viva voce evidence in court and their evidence was tested under cross-examination.

There was no agreement amongst the 3 witnesses as regards the exact cause of the misunderstanding between the deceased and the accused. The three witnesses gave varying explanations as the possible cause of the fatal assault.

The court does not consider the reason for the assault in this matter to be the central issue. The decisive and critical issue is how the deceased sustained the fatal injury.

The two state witnesses were in agreement that the accused violently stabbed the deceased on the right side of the chest and that the attack was so severe that the deceased could only stagger and that from the moment he was stabbed the deceased was unable to utter a word. The deceased died shortly at the same sport before any meaningful assistance could be rendered to him.

Whilst Moses Mashiri suggested that the accused delivered two blows, we are unable to accept this part of his evidence as it is in consistent with exhibit II, the post-mortem report. We are more inclined to accept the version of the first witness Amos Kwangware as it accords well with exhibit II and the accused’s warned and cautioned statement exhibit I.

Other than the minor discrepancies in their testimony we are satisfied that the deceased sustained injuries in the manner described by the two witnesses. The two explanations accords well with exhibit 1 which was recorded at Zimbabwe Republic Police Zaka on 23 November 2010, barely two days after the tragic event.

There was another dimension to Amos Kwangware’s testimony when it was suggested to him that the okhapi knife that claimed deceased’s life actually belonged to the deceased. The witness denied this suggestion. He indicated that the knife actually belonged to the accused person. In justifying his position he explained that on the morning of 28 November 2010 prior to the murder they had as a village gathered for a meeting. It was his very clear and unsolicited explanation that at that meeting the accused had much to the surprise and disbelief of those who heard him exhibited the same knife and vowed to use it to kill someone that same day. It was because of this that he was categoric that the knife belonged to the accused as opposed to the deceased as suggested by the accused person through cross-examination and his evidence in chief.

We have examined the evidence of the two state witnesses and we are satisfied that despite all the criticism raised by the defence and the prosecution against some aspects of that testimony, the two substantially told the truth. We find no reason to disbelieve their evidence. We accept their evidence as true and accurate on the manner the deceased met his fate.

We are unable to accept the evidence told by the accused as true. His explanations were glib and unsatisfactory in many respects.

We were not impressed and of course completely taken aback by his contradictory explanation as to the origins of the murder weapon. In his defence outline he stated;

“When accused blocked one of the blows a knife fell from deceased’s pocket and landed on the ground” Compare this with his evidence in chief when he suggested the exhibit fell from the deceased’s pocket as a result of the heavy blow he delivered on the deceased’s chest. Strange and contradictory explanations!

Even if one were to temporarily accept the story told by the accused, one would still find it extremely unbelievable that the deceased would have been keeping the opened okhapi in his front pocket before it dropped from his chest pocket in the dramatic manner suggested by the accused person.

In any event, the accused completely discredited himself by producing a defence outline which was a complete departure from his confirmed warned and cautioned statement. To compound his situation the accused attempted to disown his warned and cautioned statement by alleging (I suppose much to the surprise of everyone, his counsel included) that he was literally forced into making the warned and cautioned statement. The accused portrayed himself in bad light and wherever his evidence was in conflict with the evidence of the state witnesses it was our well considered view that, we reject his explanations.

She accused made an attempt to raise the defence of self-defence and his counsel correctly read the evidence and conceded such a defence was unsustainable.

From the respective positions of the State and the defence there is no denying that the accused was responsible for the unlawful killing of the deceased.

The State counsel argued in favour of a verdict of murder with actual intention as the primary consideration while the defence passionately argued for murder with constructive intent. Counsel referred the court to the case of *Josphat Mlambo* v *The State* SC 175/92. Counsel’s persuasion stemmed from the fact that according to his reading of evidence when the offence occurred the accused was drunk to the extent that he could not have formulated an intention to kill. He was persuaded by the 11 litres of traditional beer which the accused alleged to have partaken on the day in question.

On the contrary, the State argued that the accused had already made the intention to kill before he had even started drinking beer and that the conduct of the accused person after the commission of the murder demonstrates that he was in full control of his faculties.

In the court’s view, having accepted the evidence of Amos, it is clear that long before the stabbing the accused had already formulated the intention to kill before he went to partake beer at Jestina Mutasa’s homestead.

The actions of the accused person before he stabbed the deceased as explained by Amos and Moses were well timed and calculated to kill hence his remark “I have stabbed” after the act itself. This showed the accused’s celebration of an accomplished objective. His was certainly not an impulsive behaviour.

The accused’s behaviour after the stabbing of running away from the murder scene and desiring to go to the police coupled with his narration of the events of the day here in court demonstrates clearly that he knew what he was doing.

Besides, both Moses and Amos were in agreement that although the accused had partaken of beer he was not all that drunk to the extent that he could be said not to know what he was doing.

Cumulatively, we are satisfied that all these factors distinguish this case from Josephat Mlambo’s case and the ratio pronounced therein would be in appropriate in this matter.

The accused, having formulated the intention to kill before partaking of beer, subsequently drank beer to gather some courage and to nourish this timing, used a lethal weapon to violently stab the deceased on the deceased’s delicate and vital organ, the chest with devastating consequences.

In such situation we are more than satisfied that the accused intended to cause death, and death he achieved. There can only be one verdict – murder with actual intent.

Verdict – guilty of murder with actual intention.

SENTENCE

In assessing sentence in this case we accept that the accused person has fairly heavy family responsibilities as outlined by his counsel. He has a young family which naturally looks up to him for its welfare.

The accused person has been in custody awaiting trial for months and we are satisfied this period should be taken into account in computing the appropriate sentence.

It is commendable that at family level there has been some effort initiated to appease the sprit of the deceased by paying 18 head of cattle to the deceased’s family.

We accept that on the fateful day the accused was reckless in using an okhapi knife against the deceased who had not even posedany threat to him. This was in our view an unprovoked attack despite what the accused alleges as some long outstanding misunderstanding on the day in question.

We find it as negating remorse the abortive attempt by the accused person to disown the murder weapon and suggesting that it belonged to the deceased. We think it is a heartless approach by an accused to continue to try and lie against a deceased person whose demise he did. He did this merely because of the absence of the deceased to defend himself.

Whilst it is true that the accused looks forward to some day when he will be reunited with his family, the deceased’s dependants cannot look forward to that because of the accused’s evil hand of cutting short the deceased’s life.

The use of the okhapi knife was certainly disproportionate to the anger to which the accused may have been subjected to by the conduct of the deceased. The deceased was violently attacked at a time when from the look of it he least expected such an attack.

The bragging by the accused after the attack on the deceased only helps to aggravate this case and this case specifically screams for an exemplary penalty.

The message must go loud and clear that these courts as custodians of societal rights will not tolerate the conduct of those who toy around with human life as we hold it sacred.

Sentence: 18 years imprisonment.

*L. Masuku*, legal practitioner for the plaintiff

*C. Ndlovu*, legal practitioner for the defendant