

THE STATE

Versus

LUCKSON MADUNGA

And

WATSON MUTOVORI

HIGH COURT OF ZIMBABWE

MAWADZE J,

MASVINGO, 26, 27 MARCH, 11 JUNE & 29 JUNE, 2018

Assessors

1. Mr Mushuku
2. Mr Dauramanzi

Criminal Trial

B.E. Mathose for the state

F. Chiraraira for accused 1

Ms L. Chivasa for accused 2

MAWADZE J: Initially both accused were charged together with one Shepherd Ziwacha (Shepherd) but Shepherd is now at large. The accused persons are facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

The charge is that on 7 July 2010 at Mufakose beerhall in Triangle one of the accused or both of them caused the death of Coster Chiwande by kicking him all over the body with booted feet.

Both accused persons reside in Mufakose B in Triangle. The now deceased was a member of the ZRP attached to the Support Unit and was based at Buchwa Camp. At the

material time he and other details had been deployed to Triangle. The now deceased's rural home is Ganyani Village, Chief Sadza in Shurugwi.

On 7 July 2010 the now deceased and a fellow workmate Matambudziko Maluleke (Maluleke) were off duty and in civilian attire in Triangle when they decided to proceed to Mufakose beerhall to drink beer at about 16.00 hrs. The accused persons were also at the same beerhall with other patrons drinking beer watching soccer until the time the beerhall closed at about 23.00 hrs.

The state alleges that as the beerhall was about to close the now deceased and Maluleke attempted to effect a trap arrest on one Shepherd, an alleged known dagga dealer. It is alleged that Shepherd fiercely resisted the arrest and elicited the assistance of other beer patrons. It is said during this melee some unknown patrons snatched the packet of dagga Maluleke had been handed over by Shepherd. It is further alleged that the beer patrons pounced on the now deceased and Maluleke. The accused persons are alleged to have joined in the assault which led to the now deceased's death.

In his defence outline accused 1 Luckson Madunga (Luckson) stated that although he was at the said beerhall he did not assault either the now deceased or Maluleke.

In his confirmed warned and cautioned statement Exhibit 2 accused 1 Luckson said he witnessed a fight between Shepherd and one Maluleke who identified himself as a police officer. He said the two pushed each other until they got to a nearby market. Accused 1 Luckson said as he left home he saw some clothes, a jacket and t-shirt on the ground belonging to Shepherd. Accused 1 Luckson said he then picked the clothes and took them to Shepherd at the market. At the market Maluleke was busy identifying himself as a police officer producing his identity card to Shepherd. Accused 1 Luckson said he then left the scene and did not see the now deceased at all.

On the other hand, accused 2 Watson Mutovori (Watson) in his defence outline said Maluleke fought Shepherd until the two got out of the beerhall where accused 2 Watson restrained them. Accused 2 Watson said thereafter he went home leaving Maluleke and Shepherd going towards a nearby market. He too denied assaulting the now deceased. This is the same version accused 2 Watson gave in his confirmed warned and cautioned statement Exhibit 3 and that as he left Maluleke had produced his identity card saying he was a police officer. Accused 2 Watson further said in his evidence that he is implicated in this matter

simply because he was drinking beer with his colleague Shepherd, also an alleged accomplice in this matter.

The post mortem Exhibit 1 was produced by consent. Accused 1 sought through counsel *Mr Chirairo* to belabour the point that the pathologist said the circumstances of the offence as per the police report were that the now deceased was attacked or assaulted by robbers. To his mind accused 1 believes this is at war with the state case and is fatal to the charge preferred. Accused further contends that both the police and the pathologist were not called to explain this apparent contradiction that the now deceased was fatally injured during the course of a robbery.

While this may have been prudent for the state to do the totality of the evidence before us is clear that the now deceased was assaulted during a brawl at the beerhall on the day in question. Further, accused 1 Luckson's defence is simply that he did not take part in the assault of the now deceased. To our minds the police or the pathologist may have simply made an error in summarising the alleged circumstances of the offences which error is cured by evidence led during the trial. Further the cause of the now deceased's death is not in issue. He suffered from pneumonia and had head injuries both arising from an assault. At the end accused 1 Luckson's protestations are inconsequential. The simple task before us is whether accused 1 Luckson and or accused 2 Watson fatally assaulted the now deceased.

The evidence of Dr Estrada the pathologist, Tendai Masvinyangwa, Dr W. Phiri and D/Cst Mupedzi was all admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*].

As already said Dr Estrada examined the now deceased's remains on 15 July 2010 and compiled Exhibit 1 the post mortem report which states the now deceased's cause of death. As per that report there is clear evidence of assault noted like trauma on the temporal right area, bruises on left arm and right side of the face.

Dr W. Phiri of Chiredzi District Hospital attended to the now deceased in the early hours of 8 July 2010 and noted the following;

- i. the now deceased was smelling alcohol
- ii. the now deceased was unconscious
- iii. the now deceased had bruises on his body notably the face

iv. he put the now deceased on drip and inserted a catheter

Tendai Masvinyangwa, a nurse at Chiredzi District Hospital also attended to the now deceased who had been brought from Collin Saunders hospital in Triangle after an alleged assault. This nurse observed that the now deceased exuded smell of alcohol, was unconscious with bruises on the head which was also swollen. It is therefore clear that the now deceased had been severely injured as he was unconscious. It is common cause the now deceased was transferred to Parirenyatwa hospital where he passed on on 14 July 2010.

The evidence of D/Cst Mupedzi is that she witnessed the recording of both accused confirmed warned and cautioned statements and also indications they made at the scene of crime.

The state led *viva voce* evidence from Matambudziko Maluleke (Maluleke) Newyear Unganai, (Unganai), Cst Darlington Dukwendo and another detail Peter Taurai Chitsanzara.

In our assessment the evidence of both police officers is largely immaterial. Cst Dukwendo attended the scene on the day in question and found only the now deceased, Maluleke and Unganai present. He was advised of the now deceased's assailants by name by Maluleke and Unganai as the now deceased could no longer talk. He noted head injuries on the now deceased and ferried him to Collin Saunders hospital in Triangle. The other detail Chitsanzara later attended the scene during investigations and his evidence is not useful.

The critical evidence in this case is that of Maluleke and Unganai who allege were eye witnesses to the now deceased's assault. We turn to that evidence.

Matambudziko Maluleke (Maluleke)

Maluleke a fellow workmate of the now deceased gave background information leading to the attack on the now deceased. He said as they were at the Mufakose beerhall they gathered information that one Shepherd was selling dagga. They were shown the said Shepherd whom they kept under surveillance as he moved in and out of the beerhall. They were drinking beer until the time the beerhall was about to close.

Maluleke said he and the now deceased hatched up a plan to trap Shepherd with Maluleke posing as a buyer of dagga. At around 22.00 hrs Maluleke called Shepherd outside the beerhall and inquired if he could be sold a large quantity of dagga. Shepherd fell for the trick but he was only left about 1 kg of dagga, which he offered for \$15.00.

Maluleke said he pretended to be taking out the cash to buy dagga but pulled out his police identity card and pronounced to Shepherd that he was under arrest for selling dagga. He held Shepherd by the belt. At that point he said all hell broke loose.

Maluleke said Shepherd fiercely resisted the arrest and felled Maluleke to the ground. The two rolled on the ground as Maluleke kept a tight hold on his prey and Shepherd trying to wrestle free. He said as they struggled outside the beerhall the prized exhibit being the packet of dagga was snatched from Maluleke by some unknown person. By then a crowd hostile to Maluleke's efforts had gathered and threatened to assault him. Sensing the impending danger, he managed to bite Shepherd on the hand as Shepherd was now holding on to Maluleke. Due to pain inflicted Shepherd released him.

Maluleke said the now deceased who was close by inquired from the people present as to who had snatched away their prized exhibit, the dagga. He said this is how the now deceased's woes started and unfolded the follows;

- i. Shepherd delivered a fist on to the now deceased who fell down
- ii. Accused 1 Luckson joined and started to kick the now deceased with booted feet as the now deceased lay on the ground
- iii. Accused 2 Watson also joined in the assault kicking the now deceased
- iv. The mob inclusive of accused 1 and accused 2 was shouting that Maluleke and the now deceased wanted to masquerade as police officers and that if they were indeed police officers they could not reap when they did not sow by getting dagga for free
- v. Maluleke said only accused 1 Luckson, accused 2 Watson and Shepherd assaulted the now deceased for about 2 – 3 minutes with booted feet as the now deceased lay outside the beerhall at a well-lit area
- vi. Maluleke said realising that the now deceased was in grave danger he restrained accused 1 Luckson and a security guard present restrained accused 2 Watson. By then some people present were shouting the names of accused 1 Luckson, accused 2 Watson and Shepherd saying they had killed the now deceased. At that stage all the three assailants fled.
- vii. Maluleke said the now deceased had been gravely hurt. He could hardly breath. The security guard called for a motor vehicle which ferried the now deceased to Colin Saunders hospital.

Maluleke insisted that the now deceased's assailants were accused 1 Luckson, accused 2 Watson and Shepherd as a mob of about 20 people just watched. He disputed that the mob joined in the assault.

The evidence of Maluleke firmly implicates accused persons in the assault of the now deceased. Indeed, Maluleke had consumed alcohol just like the accused persons but he had a full appreciation of what happened. His recollection of events in sequence cannot be faltered. Although this was at night he explained that the area was well lit from lights at the market and beerhall. This was not seriously refuted by accused persons. We are at pains to find why Maluleke would falsely implicate accused persons who were strangers to him and not drug peddlers like Shepherd. In that vein we are inclined to accept his evidence.

Newyear Unganai (Newyear)

Unganai was a security guard deployed at Mufakose beerhall on the night in question. He is well known to both accused persons and Shepherd who stay in the same compound with him.

Unganai testified on how the now deceased was fatally assaulted. He said after the soccer match patrons trooped out of the beerhall and he and the cashiers started to lock up the premises. As he was closing one of the gates he observed the following;

- (a) Shepherd pushed the now deceased who fell down and started to kick him with booted feet
- (b) Accused 1 and 2 joined I the assault also kicking the helpless now deceased who was visibly more drunk compared to Maluleke
- (c) A group of about 15 people gathered watching the drama and were shouting that accused 1 Luckson, accused 2 Watson and Shepherd were killing the now deceased in the manner they assaulted him
- (d) Maluleke then held one of the accused persons after which the assault stopped
- (e) Unganai realised the now deceased had been severely injured as he was unconscious and bleeding from the head. He called for a motor vehicle to ferry the now deceased
- (f) Unganai said only accused 1 Luckson, accused 2 Watson and Shepherd assaulted the now deceased. The other people just watched. He said the blows were directed on the head and the ribs

In our assessment Unganai gave his evidence well and materially corroborated Maluleke. The only notable contradiction between them we observed is that Unganai denied that he restrained accused 2 Watson as per Maluleke's evidence. He dismissed suggestions that he harboured a grudge against any of the accused persons over some kudu meat.

Unganai was sober and on duty. He could not have failed to see what transpired at his premises leading to the fatal injuries inflicted on the now deceased. It is indeed preposterous that that he would falsely implicated accused persons over some kudu meat.

The truth of the matter is that accused persons indeed assaulted the now deceased in the clear manner explained by both Maluleke and Unganai. They acted in common purpose and in concert. They used booted feet directing the blows to the head and upper part of the body. Fatal injuries were inflicted as the now deceased was rendered unconscious. We however do not believe that the accused persons formulated the requisite intention to kill the now deceased. They were simply negligent in the manner they assaulted him. In the result we find them not guilty of murder but they cannot escape liability on a permissible verdict of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

VERDICT: Both accused. Not guilty of murder but guilty of contravening s 49 of Criminal Law (Codification and Reform) Act [*Cap 9:23*] – Culpable homicide.

SENTENCE: Each accused 2 years imprisonment of which 1-year imprisonment is suspended for 5 years on condition each accused does not commit within that period an offence involving the use of violence upon the person of another for which each accused is sentenced to a term of imprisonment without the option of a fine.

EFFECTIVE FOR EACH: 1-year imprisonment.

National Prosecuting Authority, counsel for the state

Saratoga Makausi Law Chambers, pro deo counsel for accused 1

Legal Resources Foundation, Masvingo, pro deo counsel for accused 2

