

THE STATE
versus
GIBSON MUCHEMESI

HIGH COURT OF ZIMBABWE
BERE J
MASVINGO CIRCUIT, 3 and 4 October 2014

Assessors: 1. MR MUSHUKU
2. MR DAURAMANZI

CRIMINAL TRIAL

Ms T. Matenga, for the State
J. Maweni, for the accused

BERE J: The charge against the accused person is one of Murder which occurred at village Muzvidziwa, Chief Nyajena, Masvingo on 20 October 2013.

The facts of this matter which are largely common cause can be summarized as follows;

The accused who was aged 26 years was a son to the deceased who at the time of his death was 64years old. The two were staying at the same homestead and sharing the same hut which they used as a bedroom.

On the fateful day the accused arrived home from a drinking spree around 0100hrs and found the deceased having retired to bed. The accused then got into the bedroom hut and stumbled onto the deceased who was already in bed. The deceased then woke up and asked the accused why he had fallen on him.

The accused person then got out of the hut and armed himself with a log whose length was given as 2,22 metres and weighting 1,8kgs. On realising that the accused was armed the deceased got outside the hut and started running away from the accused who responded by

chasing after the deceased. When the accused caught up with the deceased he struck him once on the head. The deceased fell down. The accused continued to assault the deceased indiscriminately with the log.

After assaulting the deceased the accused went to awake two of his neighbours whom he advised of the assault to the deceased. The accused then retired to bed but after covering the deceased who was still alive but in pain with a blanket. The deceased was having difficulty with breathing. The deceased sustained a deep cut above the eyes had, a swollen face and a broken right arm as a result of the assault.

The deceased died early in the morning before any meaningful assistance had been rendered to him. The post mortem examination gave the injuries as a depressed skull and a fractured right arm and concluded that the cause of death was due to a head injury.

The accused denied the main charge and offered the limited plea of culpable homicide. The prosecution declined to accept the plea tendered and opted to pursue the main charge of murder.

In denying the charge the accused raised the defence of drunkenness. He said he had partaken about two creates of Chibuku scuds at Nyikavanhu Business Centre prior to his involvement in the fracas with the deceased.

It will be noted that when the accused gave his evidence in chief he shifted from his defence outline by introducing the element of provocation caused by insults poured on him by the deceased. He said the deceased labeled him a dog and that he told him that he was not going to allow him to put up at the place on that day.

The State case was centered around the evidence of one Revesai Marufu, a neighbour to both the accused and the deceased and to whom the accused first reported the assault on the deceased.

The witness testified that on the fateful day she was awoken by the noise emanating from the deceased's homestead. She vividly recalled hearing the accused uttering the following words; " I will kill you". She also heard the deceased yelling and crying. Shortly afterwards the accused knocked and banged open her not poorly secured bedroom door and reported to her that he had assaulted the deceased. She said she was frightened by the conduct of the accused who appeared to have been drunk.

The other evidence in support of the State case was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Basically all the evidence led by the State confirmed the issues which were not in dispute. It was generally consistent with the story narrated by the accused person.

As indicated although not quite explicit the accused sought to rely on drunkenness as a defence to the charge. The argument preferred was that he was drunk to the extent that he could not possibly be held to have intended to cause the deceased's death in the manner alleged by the State.

The State of the mind of the accused person cannot be a matter of speculation but must be inferred from the conduct of the accused person on the date in question.

It will be noted as correctly argued by Ms *Matenga* for the State that the common law position of the defence of intoxication has been watered down by the codification of our law. Voluntary intoxication like in the instant case would not afford a defence to the accused unless the provisions of s 221 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] are satisfied for the avoidance of doubt the relevant section reads as follows;

“221 Intoxication no defence to crimes committed with requisite state of mind

- (1) If a person charged with the crime requiring proof of intention, knowledge or the realization of a real risk or possibility –
 - (a) was voluntarily or involuntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime; but
 - (b) the effect of intoxication was not such that he or she lacked the requisite intention, knowledge or realization;

Such intoxication shall not be a defence to the crime, but the court may regard it as mitigatory when assessing the sentence to be imposed”.

Our current codified law pushes the *onus* on the accused to demonstrate that the alleged intoxication was such that it rendered him incapable of forming the requisite intention to commit the offence of murder.

The accused in this case gave a graphic account of his movements on the day in question starting with his drinking of beer at the business centre, picking up his way home, having some discussion with the deceased up to the time he fatally assaulted him. The accused was able to give the minute details of the assault itself and how he went around alerting other neighbours of how he had assaulted the deceased.

We are particularly concerned that even after the first strike had floored the deceased, the accused continued to indiscriminately assault the deceased. The post mortem report testifies to the seriousness of the injuries or the severity of the assault.

Of particular significance to the court was an indication by the accused that when he struck the first blow with the log which was tendered as an exhibit he was very clear of where he aimed at.

It can only be an idle appreciation of the circumstances that when the accused aimed his blow on the head of the deceased he did not appreciate the fatal consequences of his conduct. It occurs to us that the indiscriminate assault which followed when the deceased was already down and helpless was meant to finish off the deceased.

Under such circumstances it cannot by any stretch of imagination be argued that the accused lacked the requisite *mens rea* to commit the crime charged.

The mildly raised defence of provocation occasioned by voluntary intoxication is adequately covered by our codified law. Section 239 of the Criminal Law (Codification And Reform) Act [*Chapter 9:23*] was specifically crafted to conclusively deal with this scenario. The section reads as follows:

“239 When provocation a partial defence

- (1) If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realization referred to in section forty seven, the person shall be guilty of culpable homicide, if, as a result of the provocation –
 - (a) he or she does not have the intention or realization referred in section forty seven; or
 - (b) the provocation was not sufficient to make a reasonable person in the accused’s position and circumstances lose his or her self – control;
- (2) for the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that –
 - (a) he or she did have the intention or realization referred in section forty-seven or
 - (b) the provocation was not sufficient to make a reasonable person in the accused’s position and circumstances lose his or her self-control; the accused shall not be

entitled to a partial defence in terms of subsection (i) but the court may regard the provocation as mitigatory as provided in section two hundred and thirty-eight.”

With the above in mind it is imperative to consider the accused’s explanation to try and find if it can fit into the above cited provision in order to exonerate the accused person from the referred criminal liability.

The accused’s version was that when he got home he accidentally sat on the deceased who had earlier retired to bed thereby awakening the deceased. The following exchanges took place between the two with the deceased posing the following question:

“Q : Since you come home drunk daily can you give me some of the money from the proceeds of the sale of your beast.

Accused: I have used all the money. It was then that he insulted me saying I was a dog and that he was not going to allow me put up at his place that day”.

This is the furthest the discussion went. This discussion is what preceded the violent assault that took the deceased’s life.

It cannot be argued by any stretch of imagination by any reasonable person that the genuine parental concerns raised by the deceased could have caused any reasonable person in the circumstances of the accused to behave in the manner he did. Our view is that his behavior was most irrational and disproportionate in the circumstances. The defence of provocation can therefore not be sustainable. It cannot be available to the accused person.

Given the manner in which the accused assaulted the deceased and taking into account the injuries observed on the deceased by all the state witnesses and confirmed by Dr Mhere through the post mortem report, we are not able to arrive at any other conclusion other than that when the accused assaulted the deceased in the manner he explained in this court he was in full control of his faculties and he knew what he wanted to achieve. The objective was to fatally injure his father the deceased.

This view is further strengthened by the fact that even when the accused realized he had seriously injured the deceased, he could not even assist him by carrying him into the hut or take him to hospital which was no more than three kilometers away from the homestead. The accused, instead found the audacity to enjoy his sleep until the following day. That conduct is consistent with the accused’s resolve to seriously injure the deceased.

During the course of closing submissions counsel for the accused persuaded us to draw an analogy between this case and the case of *S v Witness Sibanda* HB30/13. We are grateful to counsel.

However, our view is that, that case is clearly distinguishable from the instant case for a variety of reasons. In the first place in the Sibanda case, the assault was a single brick strike not on the deceased's head as in this case but on the abdomen. Secondly, in this case there were repeated assaults on the deceased and the resolve or determination of the accused is demonstrated by his chasing after the deceased.

We are satisfied that despite the accused having partaken alcohol on this day, he remained in full control of his faculties and he must have intended to cause fatal injuries to the deceased.

Verdict:

Guilty of murder with actual intent.

EXTENUATION:

The accused is a youthful offender. He had partaken of alcohol on the day in question. We accept these would constitute extenuation.

Sentence

We accept that the accused had partaken of liquor on the day in question. Obviously that must have affected the accused's person's conduct. The accused is a younger first offender – 26 years old. Accused has been awaiting the conclusion of this case for almost a year.

It is a fact that the accused will probably be traumatised by the thought of having killed his own father. This punishment might haunt the accused for the rest of his life.

The accused risks being regarded as an outcast by his fellow siblings because of this case.

In aggravation, we note that this was a brutal murder by a son against his own biological father.

The head injuries suggest that severe force was used to punish the deceased. The assault was clearly unprovoked and there is a genuine need to pass a deterrent sentence to send the message loud and clear to would be offenders.

We do not believe that the proposed sentence of 12 years would be appropriate to someone who killed his own father in such a callous manner.

Sentence : 22 years imprisonment.

National Prosecuting Authority, State legal practitioners
Chikanda & Mapatsenyika, respondent's legal practitioners