

THE STATE
versus
TENDAI PEDZISAI

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 2, 16 June, 5 & 28 July 2022

Assessors: 1. Mr Chikukwa
 2. Mrs Chademana

E. Mbavarira, for the respondent
P. C Ganyani, for the accused

Criminal Trial

MAWADZE J: The main issue to be determined in this matter is how the now deceased sustained the fatal head injury on 2 August 2021.

The first point of call is a factual rather than a legal one. It entails simply a proper juxtaposition of the version by the state on one hand and that by the defence on the other.

The accused is facing a charge of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The charge is that on 2 August 2021 and inside Muchacha bottle store and shop at Chiredzana business centre, Zaka, Masvingo the accused intentionally and unlawfully caused the death of MUNZWA MUCHENI by pinning him on to the shop counter and then striking him with a steel bar stool on the head.

The then 41-year-old accused is from Tapera village and the then 72-year-old now deceased was from Matara village both in chief Nhema's area of Zaka Masvingo. They both shared the same dip tank which is the place where the dispute between them allegedly started on that day.

It is not in dispute that on 2 August 2021 whilst both were at dip tank the now deceased's ox was trapped and the accused assisted in rescuing it.

The state alleges that the accused soon thereafter at the dip tank demanded a token of appreciation from the now deceased and that the now deceased declined to offer any. They both went their separate ways.

That same day in the afternoon both the accused and the now deceased were to meet again in Muchacha bottle store at their local Chiredzana business centre.

At about 1500hrs that day the accused went into Muchacha bottle store to charge his cellphone. There were other beer patrons watching soccer on television. The accused then sat on a bar stool also watching soccer. Some thirty minutes later the now deceased also entered into the same bottle store.

The state alleges that the accused resumed his previous demand to the now deceased that he be paid for his efforts in rescuing the now deceased's ox that morning at the dip tank. It is said the accused demanded that the now deceased buy him a drink but the now deceased declined.

The state case is that this incensed the accused. It is said the accused stood up from the bar stool he was seated on and lifted up the same bar stool which he then used to pin the now deceased against the counter in the bottle store. It is alleged that one patron Obert Kunodziya tried to reprimand the accused for his conduct to no avail. The state alleges that the accused then proceeded to use the same bar stool to strike the now deceased once on the head causing him to fall down bleeding profusely. The now deceased fell unconscious and was pronounced dead on arrival at Mashoko hospital moments later. His death is said to be head injury.

The accused whilst admitting rescuing the now deceased's ox at the dip tank earlier that day in the morning denied asking for any token of appreciation from the now deceased at the dip tank or later that day in Muchacha bottle store. In fact, the accused said it is the now deceased who was abusive and aggressive when the two met in Muchacha bottle store.

The version by the accused is that when the now deceased found accused inside Muchacha bottle the now deceased as he entered just started shouting at the accused threatening to deal with

the accused. The accused said the now deceased looked drunk hence he tried to ignore him. The accused said the now deceased was unperturbed and proceeded to pick a bar stool charging towards the accused. The accused said as the now deceased was about to hit the accused with the said bar stool the accused reacted by strongly pushing the now deceased away causing the now deceased to hit on to the floor heavily. The accused said the floor of the bottle store had pot holes or was damaged hence the now deceased was fatally injured on the head.

The accused blames his prosecution on the alleged shoddy job by the police officers who investigated the matter. The accused's view is that the police should have recorded statements from all people present and not a selected biased few. The accused further alleges that one of the so called state witnesses the bar lady did not even witness how the now deceased was fatally injured as she had left the counter to go into a store room to collect beer for a local school headmaster called Masingwini. In fact, the accused said this bottle store was operating in violation of the then Covid 19 Regulations hence the bar lady was first charged and fined by the police before being turned into a false eye state witness in order to falsely incriminate the accused. The accused said indications done by the police at the scene of crime were improperly done and that when accused made his own indications the accused's legal practitioner known to the police was not advised.

The state led evidence on how the now deceased was fatally injured from Regina Kufa the bar lady and two patrons who are said to have been inside Muchacha bottle store Luis Muchacha and Matthew Mahike. Further evidence was led from Constable Meki Shandurwa to whom the initial report at the local police base was made and Assistant Inspector James Chidhakwa the investigating officer. Lastly Dr Godfrey Zimbwa who examined the now deceased's remains and compiled the post mortem report gave evidence for the state.

The accused testified and called one Charles Mukondo who is said to also have been inside the bottle store as a defence witness.

A total of four exhibits were produced during the trial. These are;

Exhibit 1 the post mortem report, Exhibit 2 the steel bar chair, Exhibit 3 the certificate of weight of the steel chair and Exhibit 4 an affidavit by Dr Godfrey Zimbwa which more or less regurgitates the findings in the post mortem report.

The cause of the now deceased's death is not an issue perse. It is severe head injury. The point of departure between the state and the defence is this;

The state is alleging that the accused inflicted the severe head injury with a bar stool made of metal Exhibit 2 whose weight as per Exhibit 3 is 6.5kg.

The defence on the other hand alleges that the accused simply pushed away the now deceased in a bid to ward off an impending attack causing the now deceased to hit his head hard onto the damaged floor which had pot holes. The defence alleges that it is the sharp edges of the said holes or pot holes on the floor which caused the severe head injury.

Dr Zimbwa as per Exhibit 1 the post mortem report done on 4 August 2021 observed the following injuries;

1. *Laceration on right frontal parietal area ±4 cm long scalp deep underlying bone fracture severe bleeding.*
2. *Bilateral peri orbital haematoma with severe nose bleeding.*
3. *Bruising on occipital area."*

Dr Zimbwa in Exhibit 1 then concluded that death was due to severe head injury caused by blunt trauma. In the affidavit Exhibit 4 Dr Zimbwa further elaborated that the injuries were caused by a sharp edged instrument and blunt object.

In his *viva voce* evidence Dr Zimbwa said the laceration he observed on the now deceased's head was on the right side of the head towards the front part between the ear and the forehead. This is where there was also the underlying bone fracture. Dr Zimbwa explained that the swelling on both eyes was caused by the bleeding under the skin of the head. He said the mild trauma at the back of the head where there was some bruising could have been because the now deceased fell on his back. He said to inflict the fatal injury severe force was used as skull bones by their nature a very hard and do not fracture easily.

In cross examination Dr Zimbwa said the metal part of the bar stool Exhibit 2 could cause the injury he observed being the laceration and underlying skull fracture. The doctor discounted that the injury could have been caused by falling on to the floor and hitting hard on the pot holed floor. The doctor reasoned that an object which causes an injury leaves an injury which is like its "*thumb print*". He said if it is some hole on the floor a similar impression like circular or curved injury would result which was not the case in *casu*. Dr Zimbwa said his own assessment was that a single blow was delivered to the now deceased's head possibly causing him to fall on his back

hence the bruising at the back of the head. Lastly, he explained that the facial injuries were caused by the blow to the head.

We find the doctor's evidence to be clear, straight forward and logical. It is tandem with the version by the state rather than with that of the defence. Two factual findings demonstrate this point. Firstly, the fatal injury on the head is said to have been inconsistent with having been caused by a pot hole or damaged floor. Secondly if the now deceased fell on his right side as the accused and his witness said how was he then bruised at the back of the head? Lastly the doctor was clear that the metal bar stool could inflict the fatal injuries he observed.

We find no basis to disbelieve the evidence of a professional witness like Dr Zimbwa who clearly has no interest in the matter.

We now turn to the evidence of the two police details in order to address ancillary issues raised by the accused especially in his defence outline.

Cst Meki Shandurwa [Cst Shandurwa]

At the material time Cst Shandurwa was at Chiredzana police base. He said on the day in question it is the accused who first arrived at the police riding his motor bike and reported that he, the accused, had an altercation at the nearby bottle store with the now deceased. As he was explaining this Matthew Mahike and the bar lady arrived. The accused did not finish to explain what he said had happened but left in a huff riding his motor bike. The two witnesses then reported that the accused had fatally assaulted the now deceased. Cst Shandurwa rushed to the scene and found the now deceased unconscious lying on the floor of the bar with a cut on his head. He said the floor of the bar was smooth, not damaged and there were no pot holes.

The accused's conduct clearly raises eyebrows. Assuming his version of events is true that he acted in self-defence or injured the now deceased by a mistake why would he not be eager to tell his version to the police immediately? Why would he choose to leave in a huff soon after the arrival of the bar lady and Matthew Mahike? Was it not prudent for him to also go back to the scene with the police? No plausible explanation is given by the accused for such conduct. We now know the accused never bothered to assist the now deceased or to assess the extent of the injury the now deceased had suffered more so as accused said

many patrons had fled as a result of being frightened by the extent of the injury and the gushing blood.

Assistant Inspector James Chidhakwa [Ass Insp Chidhakwa]

Ass Insp Chidhakwa attended the scene after Cst Shandurwa. He recorded statements from about 10 witnesses but discarded some because they had not witnessed the actual assault. The material witnesses made indications to him and he recovered Exhibit 2 the metal bar stool said to have been used to fatally injure the now deceased. Just like Cst Shandurwa he said the floor of the bottle store was very smooth and plain without any damage or pot holes.

Ass Inspector Chidhakwa said he indeed fined the owner of the bottle store for violating Covid 19 Regulations and not the bar lady a mere worker .

At the end of the day the allegations made by the accused in his defence outline simply turned out to be hot air. There is no factual or objective basis to have criticised the police details, let alone to allege that the investigations were poor. Statements were recorded from relevant witnesses and there would be no cause to call irrelevant witnesses. One wonders as to why police would intimidate and force the bar lady to lie. In fact, if the bar lady was fined would she not be bitter against the police? Interesting enough the accused himself did not call his so called many relevant witnesses.

Ass Inspector Chidhakwa in fact said when state witnesses made indications the accused was on the run only to hand himself to the police on 11 august 2021 in the company of his legal practitioner. One may wonder loudly as to why if accused's version of events is true the accused would be in hibernation from 2 August 2021 to 18 August 2021 instead of reporting to the nearest police station at his earliest convenience.

Lastly, we deal the material issue of how the now deceased was fatally injured.

Regina Kufa [Regina 33 years old]

Regina said it is the accused who asked to be paid some token of appreciation by the now deceased as soon as the now deceased entered the bottle store. Regina had not been at the dip tank in the morning so how did she know of what had happened at the dip tank if the accused had not raised that issue of being paid a token of appreciation inside the bottle

store? She said the now deceased queried if accused had offered help so as to be paid by the deceased with a drink accused was requesting.

According to Regina it is the accused who lashed out at the now deceased calling him stupid. She said the now deceased's explanation that he, the now deceased had no money to buy the drink and the promise to buy one on another day failed to pacify the accused. Thereafter she said the following happened;

- i) the now deceased was standing leaning on the counter.
- ii) the accused stood up from the bar stool Exhibit 2, picked it and pressed its legs on to the now deceased's neck against the counter. (She demonstrated that the now deceased's neck was in between the metal legs of the bar stool)
- iii) Obert Kunodziya tried to reprimand the accused but accused told him to back off.
- iv) accused then removed the bar stool from position he had put it, held it properly and hit the now deceased on the head.
- v) the now deceased fell down and accused left the bottle store.

Regina said she rushed to fetch water in order to try resuscitate the now deceased but the now deceased did not respond. She closed the bottle store and rushed to the nearby police base to make a report. The accused who was there at the police left in a huff as she arrived. Regina said there was about to 12 people inside the bottle store when this incident happened. She went back with the police and found the now deceased still unconscious. Regina denied that she did not witness this incident. She said she witnessed all this as she was seated on a chair in the bottle store not that she had left the counter. She denied that the floor of the bottle store had pot holes and insisted the head injury was caused by Exhibit 2 the metal bar stool which she said accused used with severe force causing excessive bleeding.

In our assessment Regina was a brilliant witness. She said both accused and the now deceased were sober. Her demeanour was excellent. She was a coherent and steady witness, well meaning and unshaken. We find no motive for her to lie. She clearly saw what happened.

Luis Muchacha (Luis 42 years old)

Luis is the dip tank attendant. The now deceased's is his uncle and accused is a local person. He said accused demanded token of appreciation at the dip tank. Later that day he said he was in the bar when accused attacked the now deceased. His evidence is on all fours with Regina on sequence of events and we find no need to repeat it. The only difference is in relation to the exact part of the metal bar which he said accused used to hit the now deceased on the head from what Regina said. He too said both accused and the now deceased were sober. He too dismissed accused's version as false.

The criticism that he is related to the now deceased and the owner of the bottle store in our view is inconsequential. Luis was at the dip tank and witnessed what happened. He also witnessed the events inside the bottle store.

Matthew Mahike [Matthew]

Matthew knew both accused and the now deceased as local persons. He is 64 years old. Matthew heard accused demanding a drink from the now deceased and that the now deceased declined to offer one. He again narrated the sequence of events just like Regina and Luis. He said accused used the front part of the metal stool to hit the now deceased and left. He is the one who accompanied Regina to the police. He said accused used severe force.

It is clear to us that Regina, Luis and Matthew materially corroborated each other on the sequence of events leading to the fatal blow on the now deceased's head. The only difference is that Regina said it is the metal bar at the back of the stool which hit the now deceased but Luis and Matthew said it is the front metal bar. In our view that would not distract from the fact that the metal part of the bar stool was used to strike the now deceased's head. Again, it becomes inconsequential as to which exact part the of the head the blow landed and whether the visible injury was on the side of the head or the centre of the head. The bottom line is the blow landed on the head. The only difference is that Regina said the metal bar at the back of the stool hit the now deceased and Luis and Matthew said it is the front metal bar. In our view that would not distract from the fact that a metal bar of the tool was used to hit the now deceased's head. Again, it becomes inconsequential as to which exact part of the head the blow landed, and whether the visible injury was on the

side of the head or the centre of the head. The bottom line is that it is the head and the doctor pronounced where the more visible harm was inflicted. Witnesses cannot be expected to say exactly where the blow landed with mathematical precision.

The Accused evidence

The accused's version of events cannot possibly be true.

There is no discernible motive as to why those inside the bar, the police and the doctor would gang up against the accused. The version of how the now deceased fell explains the injury at the back of the head not that he fell on his right side. All witnesses who were in the bottle store and the police did not see the so-called pot holes accused referred to. Accused's conduct at the police base and being at large for days is inconsistent with his version of an unfortunate incident or an act in self-defence.

The same analysis applies to a great extent to the evidence of accused's witness Charles Mukondo. He never gave a statement to the police. He could not explain satisfactorily as to how he ended up being identified by the accused as a defence witness. He just emerged at the eleventh hour after all state witnesses had testified. He simply regurgitated the accused's improbable version of how the now deceased was fatally injured. We reject his evidence.

It is our finding that the accused assaulted the now deceased with Exhibit 2 the metal bar stool inflicting fatal injuries. The accused directed the blow to the head. He used severe force causing the skull fracture. It is the blow which caused the skull fracture not that the deceased hit hard on to the floor. We reject the accused's version that the floor had pot holes or was damaged.

While we may give the accused the benefit of doubt that he may not have intended to cause death he nonetheless foresaw that the weapon he used, the force he applied and the position he directed the blow could cause the now deceased death.

In the result we have entered the following verdict;

VERDICT: Guilty section 47 (1) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]: - Murder with constructive intent.

SENTENCE

You now stand convicted of murder with constructive intent.

The offence of murder is inherently a very serious offence which invariably attracts a lengthy custodial sentence even for first offenders.

The sanctity of human life can not be over emphasised. The courts have a duty to protect life and to punish severely those who have no respect for human life.

It is saddening to note that many people resort to violence even at the slightest provocation or over minor disputes. There was really no cause for you to even pick an argument with the now deceased.

The court is simply amazed by your lack of contrition. Throughout the trial you pushed the false narrative that the now deceased was the aggressor and that he was fatally injured either in your self-defence or through a mistake.

The now deceased was a very old man at 72 years of age who literally had both feet in his grave. It would be foolhardy to believe that such a man old enough to be your father posed any serious physical harm to you.

Your conduct after attacking the now deceased is aggravating. You did not render any assistance at the bottle store. After getting to the police, you fled. You were at large for 9 days as was later corrected both counsel.

The nature of the attack itself was not only uncalled for but brutal. You used a bar stool weighing 6kg. You directed the blow to the head of a 72-year-old defenceless man. Severe force was used as you broke the skull. His death was clearly instant.

Indeed, the court has considered mitigating factors.

Your age has been corrected and we take it that you are now 37 years old. You have a very young family of 3 children aged 14 years, 10 years and 4 years. They are all in primary school in grade 6, grade 5 and ECD respectively.

The assets you have may not sustain them for a long time. You own 96 pigs, 10 cattle, 12 goats and 7 donkeys. The savings you have of US \$250 is insignificant.

To some extent the court take it as a mitigatory factor that you surrendered yourself to the police *albeit* after 9 days as has again been corrected instead of 16 days.

It has not been disputed that you and your family tried to engage the now deceased's family and possibly offer compensation as per our African custom. Indeed, you were hamstrung by the fact that this criminal trial had not been finalised.

The stigma that you caused the now deceased's death shall forever haunt you.

We take cognisance of the fact that you delivered just one blow *albeit* fatal.

As a first offender you deserve some measure of lenience.

In terms of the section 47 (3) (b) Criminal Law (Codification and Reform) Act [*Chapter 9:23*] we do not believe that we are obliged to impose a sentence of not less than 20 years despite that the now deceased was 72 years old. This is in light of the mitigating factors we have stated. In the exercise of our discretion, we have decided to sentence you as follows;

"15 years imprisonment"

National Prosecuting Authority, counsel for the state
PC Ganyani Legal Practitioners, counsel for the accused