

THE STATE
versus
SIMBARASHE HENRY SIBANDA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 25 & 31 October 2017 & 1 November 2017

Criminal Trial

ASSESSORS: 1. Mr Rajah
2. Mr Chagonda

M. Musarurwa, for the State
T. G. Nenzou, for the accused

HUNGWE J: The accused faces a charge of murder as defined in s 47 (1) (a) or (b) of the Criminal Law Codification and Reform Act [*Chapter 9: 23*], it being alleged that on the 4th of May 2013 at Odzi Service Station and in the company of one Lucky Ncube, who is still at large, and with intent to kill or realizing that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility by stabbing Bernard Nyika with a knife on the right side of his chest thereby causing injuries from he died.

The accused's defence was that on the day in question he was drinking beer inside Ben's Sport Bar the deceased at one stage took over his bar stool when he had visited the wash room. Upon his return, they quarrelled over this issue. That quarrel degenerated into a fist fight which was stopped by other patrons. After a while the same fight erupted between the accused and the deceased. One Alexander Mandinyenya, ("Mandinyenya") restrained them both from fighting. This occurred outside the Bar. After the second fight the accused states that he and his friend Lucky Ncube then decided to make a report at the Police Station. On their way there, they saw the deceased who was coming from the Police Station. Because they suspected that they might be

arrested pursuant to the deceased's report, they decided not to proceed to the Station or to make the intended Police report. They had gone back to Ben's Sports Bar.

He says that for the third time another fight erupted when the deceased returned into the bar. When they had been restrained the accused says that the deceased left the bar. He continued to drink. His colleague, Lucky Ncube ("Lucky") went out of the bar on the pretext that he was visiting the washroom. His testimony was that upon Lucky's return, he noticed that Lucky was panting. He requested that they leave the bar. On their way home, Lucky confided to him that he had stabbed the deceased with a knife which he was holding at that stage. He noticed that the knife was blood stained, and so were his clothes. They collected their luggage and found their way to South Africa. He denied that he had stabbed the deceased or incited the said Lucky to do so.

The warned and cautioned statement that he gave three years after the event is along same lines. In essence, it exculpatory in nature and in it, he blames everything on Lucky.

From the evidence led in court the following is common cause or at least not seriously disputed.

1. Both the deceased and accused were Ben's Sports Bar ("the bar") at Odzi on the 4th of May 2013 around 19h15.
2. At one point the accused left the bar to answer to nature's call.
3. Upon his return, he found the deceased having taken over his bar stool.
4. He remonstrated with the deceased who happened to be an off-duty Police Officer, he was not in uniform.
5. That quarrel degenerated into a physical tussle.
6. The patrons knew the deceased. They intervened to restore peace between the two.
7. The accused was advised that the deceased was a Police Officer. In response, the accused is alleged to have remarked that it did not matter to him who the deceased was.
8. At some point much later, the two again engaged in an exchange of fist cuffs. Mandinyenya is related to the accused by marriage. He restrained the two.
9. The second tussle occurred outside, the first having occurred inside the bar at the counter.

10. Mandinyenya suggested that the accused goes home. At that time the accused's shirt was torn. He escorted the accused to the main road. The accused stated to Mandinyenya that he was going to proceed to Mutare for a peaceful night.
11. The deceased went to the Police Station.
12. A while later, someone shouted that the deceased had been injured at Rush Bar.
13. When Mandinyenya arrived at the scene, the deceased said that he had been stabbed.
14. Other off-duty Police Officers were attending to him. They conveyed the deceased to the local Clinic.
15. Accused and his friend, Lucky were nowhere to be found, despite the diligent search by Police Officers.

The critical aspect of the State case lay in the evidence given by Arnold Chazuza ("Chazuza"). He gave evidence as to what happened after the deceased had been stabbed. He testified that he was drinking from outside Rush bar with one other Police Officer Abel Makosa ("Makosa"). According to Chazuza, the deceased approached them and indicated to them that the accused had stabbed him. He referred to the accused as Simbarashe. At that stage, the witness did not know who Simbarashe was nor was he familiar with the accused.

He testified that the deceased asked them to check how bad his wounds was. When Chazuza inspected the stab wound, he noticed that the wound was bleeding profusely. They decided to ferry the deceased to the clinic. Other Police Officers went out in search of the accused and his accomplice. After conveying the deceased to the clinic, they tried to locate the accused again. It was all was in vain. He emphasized that at the time he did not know the accused.

The other Police Officer, Makosa testified in confirmation of the fact that when the deceased arrived where he was drinking with Chazuza, the deceased complained that he had been stabbed by the accused by name. This was around 20h30.

Shorai Maluwa testified that he was walking near Mutezo Farm around 21h15. Around that time, he met the accused and Lucky. He did know these two at the time. They both were running. The two asked him if he could escort them to the main Harare-Mutare road using a private or secret or route. Curious he asked them why they wanted to use a private road. According to him, in response Lucky told him that they needed to get to Mutare as quickly as possible. He obliged and lead them along a path that led to the main road.

The witness testified that along the way, Lucky dropped a blood-stained knife. Lucky immediately picked it up. They then continued on their journey. The witness also noticed that the accused's shirt was blood-stained. He also noticed that the accomplice's clothes had even more blood stains. At the main road, the two men changed into a fresh set of clothes. The accused paid him for his efforts. He later learned that these two men were involved in the stabbing of the deceased.

Titus Chisikana "(Chisikana)" met the accused and his accomplice just before the two men went on the run. He testified that around 20h00 he was in the company of one Ngonidzashe Dororo. They were coming from Ben's Sport Bar headed for the local Police Station. Two men suddenly emerged from a grassy area next to the road. It later turned out that it was the accused and Lucky. This chance meeting occurred near the gate to the police station. The two men complained to him about the deceased's behavior at the bar over a bar stool earlier that evening. Whilst engaged in conversation with the two men, the witness observed the deceased passing by. He appeared to be coming from the Police Station and headed for Ben's Sports Bar. At that stage, the accused and his friend then left the scene. They followed the deceased who was alone. To Chisikana, it became obvious that the accused and his friend were looking for the deceased. He later learnt of the death of the deceased the next day.

The accused's defence amounts to an alibi. He claims that he was not present when the deceased was stabbed. The issue therefore is whether, when he denies being present when the deceased was stabbed, he is telling the truth. Put differently, the question is: has the State adduced sufficient evidence to put to the guilt of the accused beyond a reasonable doubt? It is clear that there is no direct evidence as to the accused's involvement in the death of the deceased. The State case is therefore based on circumstantial evidence.

However, the evidence placed before the court in our view, unerringly points to the accused and his accomplice, and no one else, as having stabbed the deceased. We come to this conclusion for the following reasons.

We are satisfied that the three State witnesses, namely Alexander Mandinyenya and Arnold Chazuza as well as Abel Makosa gave their evidence truthfully. As for Mandinyenya, the fact that he is related to the accused, in our view, excludes any motivation for false implication of the accused. He would have no reason to lie against the accused. If, however, he had some reason to

do so, such a reason would, in all probability be apparent to the accused. In any event, the accused does not say that Mandinyenya was not telling the truth, nor does he say that the witness would have a reason to mislead the court. Besides, this witness does not state that he saw the accused stabbing the deceased. His evidence on its own is quite innocuous. The witness testified that he saw the accused engage in a scuffle with the deceased (or fight with the deceased) on no less than two occasions. On the last occasion of those occasions, he had reason to make sure that the accused leaves the bar. He decided on this course of action in order to avoid another scuffle. He had escorted the accused to the main road. At the main road, Mandinyenya extracted an undertaking from the accused that he would not come back to the bar. He then left the accused at the main road at around 20h00 hours.

Chisikana's evidence placed the accused and Lucky somewhere away from the main road. According to him, around 20h30 the two men were near the gate to the police station. Their clothes had nothing unusual about them. They both complained about the deceased's conduct at Ben's Sports Bar. As they were talking to each other, deceased passed by. The two men literally broke their conversation to follow the deceased. It appeared to him that the two were looking for the deceased. Again as I observed earlier this evidence, on its own, is quite innocuous. It is telling that Chisikana became the last person to see the deceased before he was stabbed. The accused had expressed displeasure at the deceased's conduct giving reason or motive to seek to harm the deceased. Chisikana also gave one piece of evidence; again apparently innocuous. It is that they seem to have been looking for the deceased. He also testified that they emerged from a grassy area; they were not using conventional thoroughfare when they were looking for the deceased.

They followed the deceased. Some thirty or so minutes later after this encounter the next witnesses to see the deceased are Arnold Chazuza and Abel Makosa. At 20h30 the deceased approached these two off-duty Police Officers. He advised them that Simbarashe had stabbed him. The deceased asked the two to inspect his wounds. They found it bleeding profusely. Again some thirty minutes afterwards, around 21h00 hours, the accused and Lucky met up with Shorai Maluwa. They had been running and both were panting. They inquired of Shorai Maluwa about a private route to the main road. In other words they were avoiding detection.

At that stage both the accused and Lucky's clothes were blood stained. As they walked to the main road one of them dropped to the ground a blood-stained knife. It is Lucky who picked it

up. At the main road they both changed into fresh. They did not explain to Maluwa why they were changing into fresh clothes or how their knife had got blood stained. On the contrary, they paid him a token of \$5.00. That payment, in our view, was not only meant to thank him for having shown them a secret route to the main road but also to buy his silence should the need arise. He had unknowingly facilitated their escape to Mutare and then out of the country.

Again, this evidence does not on its own link the accused to the stabbing. However it does place him very close to the brutal murder of the deceased. They had a bag or bags. After they stabbed the deceased they both went to fetch their bags. This explains the thirty minutes between 20h30 hours and 21h00 hours before they made good escape. They had by then complete their mission; which included hunting down the deceased and dealing with him as they deemed fit. They wanted to go out of the area as soon as possible. They said as much to Shorai Maluwa. Without realising it, Shorai Maluwa used his knowledge of the area to facilitate and help them evade capture by the other patrons who had seen them scuffle with the deceased. Again, on this evidence does not implicate the accused in the murder of the deceased. However, taken cumulatively with the other events of that evening we are left in no doubt in our minds as to what happened. The evidence of these five witness proves beyond doubt that it is the accused and his accomplice and no one else who stabbed the deceased. How is it that his clothes are seen with blood-stains soon after the stabbing? This stabbing, according to the evidence, occurred soon after the accused and his friend were seen by witnesses following the deceased from the Police Station gate towards Ben's bar. From that point on, the evidence shows that it is the accused who asks for a private route to the main road. Again it is the accused who gives Maluwa \$5.00 for Maluwa's efforts.

It makes no difference, in our view, that the knife was carried by Lucky and not the accused. If there was only one knife it follows that only person would have to carry it. Therefore only one person would have stabbed the deceased. If Lucky stabbed the deceased, which we doubt as there is no evidence of any motive for him to have done so, then the accused associated with this cause such that he approved of it. As such, he is just as guilty as the actual perpetrator. We are of the view that it is the accused, and no-one else, who stabbed the deceased. He had the motive to do so. We come to this conclusion because he had previously fought with the deceased twice, or three times according to him. Secondly he had followed the deceased as the deceased went to the Police

Station. Thirdly, he had complained to Titus Chisikana about the deceased at the gate to the Police Station. Fourth, he had abandoned the idea of reporting the deceased to the Police. Fifth, he had followed him from the Police Station gate. This was the last time the deceased was seen without the mortal wounds and alive.

Sixth, he asked for a secret escape route from Shorai Maluwa. Seventh, by the time he was asking for this route, he had blood-stained clothes. Eighth, it is the accused who paid off Shorai for having shown the secret route. In light of the above the State has proved beyond a reasonable doubt that it is the accused who committed this crime. He therefore must be found **guilty of murder** as defined in Section 47 (1) (a) of the Criminal Law Codification and Reform Act, [Chapter 9:23.]

MR MUSARURWA: My lord I have no record for the accused person, if he may be treated as a first offender.

HUNGWE J: Q. Yes Mr Nenzou?

MR NENZOU ADDRESSES THE COURT ON MITIGATION: Thank you my lord and gentlemen assessors, in mitigation we submit that the accused person is aged 23 years and at the time of the commission of the offence he was aged 19 years. It is our submission in that regard that youthfulness might have played an integral party in affecting or influencing his decision making, in the same vein we also submit that it is the trend in this jurisdiction that the courts will always treat youthful offenders with leniency. The court should also take into account that there was also a degree of provocation on the party of the deceased who was the aggressor and he also assaults the accused person, further the court is also urged to take into account the fact that the accused person was drunk on the date in question. This reduces his moral blameworthiness.

It is also vital to take into account the fact that the accused person has shown remorse, this is so because having been staying in South Africa after the commission of the offence he decided to come back and let justice take its course. As rightly pointed by my brother he is a first offender and the court is urged to place weights on that fact.

Lastly my lord and gentlemen assessors the court should also take into account the fact that the accused person faced a pre-trial incarceration for a period in excess of a year he has been in custody since 11 October 2016 to date. That is all unless the court wishes me to address on

Q . Thank you. Mr Musarurwa.

MR MUSARURWA: The aggravating features of this matter will be that again this is a case where life was unnecessarily lost and if we are to look at the reasons for killing the now deceased it's not even a genuine reason because you can't surely argue for a bar stool and then you kill someone for arguing for a bar stool. Also what is aggravating is that the accused person after stabbing the now deceased he ran away although he later decided to come back, he in a way contributed to hide the murder weapon in question and this court was deprived the benefit of seeing that knife that was used to end the now deceased's life.

Also despite that the accused person was advised that the now deceased was a Police Officer he even pointed out that he did not care whether the accused was a Police Officer and he was not afraid of Police Officers, and that I think militates against him. Also my lord I would refer this court to the general laws amendment number 3/16 under party 20 (viii) s 8 sub section 2 which directs this court in determining an appropriate sentence to be imposed to a person convicted of murder and without limitation on any other factors or circumstances which a court may take into account. The court shall regard as aggravating circumstances if and for the circumstances that are provided under that subs 2 there is sub s (d) which shows that the victim was murdered in a public place or in an aircraft public passenger transport vehicle vessel rail car or other public conveyance by the use of means such as fire explosives or the indiscriminate firing of weapon that caused or involve the sub sequential risk or serious injuries to bystanders, like in this matter the murder occurred in a public place because that is where the now deceased was stabbed, he was actually stabbed outside a bar on a public place. Also the court shall also take into consideration the sub s 3 of that s 8 which says that a court may also in the absence of other circumstances of mitigating nature or together with other circumstances of an aggravating nature regard as an aggravating circumstance that the fact that the murder was premeditated for (a) which I do not think that that is the position for this matter but the sub s (b) which then says the murder victim was a Police Officer and in this matter the murder victim was a Police Officer. That will be all my lord.

SENTENCE

HUNGWE J: In assessing sentence I take into account what your learned counsel has submitted on your behalf. What we find to be mitigating in your case is the fact that at the time you committed this crime you were a young man of 19 years, in your teens. We accept the fact

that you were consuming alcohol might also have contributed to the commission of the crime. We are also aware of the contributory role that the deceased played. He was a fellow reveller at Ben's Sport Bar. You both failed to restrain yourselves when situation was deteriorating between yourself and him. If he had not persisted with his conduct probably this crime may not have occurred.

We do not find that his conduct was provocative but we find that he might have contributed by failing to restrain himself in the way in which he conducted himself being a Police Officer. Probably this was due to the fact that he was also consuming intoxicating beverages. His sense of judgment might have been impaired in the process. We are aware that you came back to Zimbabwe to face the music so to speak, but that does not detract from the fact that you have been convicted of a serious offence in which human life was unnecessarily lost. Throughout the trial you did not display or exhibit the appropriate demeanour for somebody who was contrite. You persisted with a story that was quite clearly not truthful. You and Lucky know what transpired when you stabbed the deceased. Your guilty in our view is beyond doubt.

The legislature provided for the maximum penalty in circumstances where there is a finding of aggravation. We did not find that the crime was committed in circumstances of aggravation simply because on the totality of the circumstances, we are unable to find that this crime was premeditated. In our view, the fact that the deceased had been continually involved in brawls with the accused demonstrates that the deceased was engaged in a fight that ended tragically. This was not a premeditated murder but a result of a drunken beerhall brawl. Of course there was persistence in your part when you pursued the deceased even after he had gone to the Police Station. In our view it demonstrates that you were determined to exact revenge rather than you planned to kill the deceased .

In our view a sentence which will send an appropriate message is justified.

You are sentenced to **20 years imprisonment.**