

THE STATE

Versus

ONISIMO MARUVI FICHANI

IN THE HIGH COURT OF ZIMBABWE
TAKUVAJ
GWERU HIGH COURT CIRCUIT 29 & 31 JANUARY 2014

Shumba for the state
Ms Gubba for the accused

Criminal Trial

TAKUVAJ: The accused is charged with murder in that on the 18th of October 2012 and at Joboringo Primary School, Chief Nemangwe, Gokwe South in the Midlands Province, the said accused person unlawfully caused the death of Isaac Mbofana by striking him once on the head with a log, intending to kill him or realizing that there was a real risk or possibility that his conduct may cause death, and continued to engage in that conduct despite the risk or possibility.

The accused pleaded not guilty. The accused submitted that he acted in self-defence and in defence of a 3rd party, his brother one James Fichani. Accused alleged that “deceased and his team were holding logs threatening to assault his brother. He said he acted in putative self defence when he struck deceased. The accused denied using Exhibit 5 i.e. the log produced in court. Further accused said he drank beer on the day in question and that could have clouded his judgment. Finally he said he reacted to the provocation from the deceased and his team mates.

The state called two witnesses after the evidence of the rest of the witnesses summarized in Exhibit 1 was admitted in terms of section 34 (1) of the Criminal Procedure and Evidence Act [Chapter 9:07].

The first state witness was Penias Mbofana, a young brother to the deceased. In summary his evidence was that on the fateful day he was at the soccer match pitting his team Hotline and accused’s team Tank 3. The deceased was a linesman. The match ended 2 – 1 in favour of Tank 3. Before the match ended there was a misunderstanding relating to Tank 3’s second goal. Deceased raised his flag signaling off side. The referee consulted deceased and the goal was allowed.

Accused and one Mazengenya had an altercation after the second goal was scored. Mazengenya appeared to be dissatisfied in the manner the goal was scored and he took the ball and walked away saying they were no longer interested in the match. However, the match resumed and ended after regulation time.

After the match, accused and his brothers Kudakwashe, Nyasha and James led a group of

people in assaulting Mazengeny with booted feet and clenched fists. This occurred outside the stadium on the western side. Some people intervened to defend Mazengeny who eventually fled from the scene. Accused started attacking people indiscriminately. The witness got hold of the deceased by his arm and pulled him away from the commotion. He told the deceased that since Mazengeny had fled, they should leave that place since it was dangerous. Deceased who was not armed complied and they walked home. While on their way, they heard a voice shouting from behind "Hokoyo Hokoyo" which means Beware Beware. As the witness turned his head to look behind he saw accused with the log raised in the air. Shortly thereafter, he heard the sound of a log as it struck on deceased's head. The witness told the court that he was still holding deceased by his hand when he was hit with the log on the head.

As the deceased was falling down, the accused raised the log intending to attack the witness. The witness let go of the deceased who fell down and the witness fled from the scene for a distance of 20 metres. He saw accused approaching Takura Takawira while raising the log in the air. A young man then got hold of the log from behind the accused person. This prevented the accused from striking Takura Takawira. Accused walked for a short distance and threw the log on the ground and went away. The witness returned to where the deceased was and observed that he was lying on the ground bleeding from the nose. The deceased had already died.

The witness identified Exhibit 5 as the weapon used by the accused. He said he saw accused drinking opaque beer from a scud – (a 2 litres of opaque beer). According to this witness accused assaulted members of Hotline he came across including female supporters. He denied that Hotline members assaulted Tank 3 members. He said Tank 3 members were the "aggressors". He denied the version in the defence outline.

Specifically he denied that Mazengeny, Takawira and deceased confronted the accused. He denied that deceased assaulted accused with clenched fists on the head, face and neck. The witness said although he did not see anyone assaulting the accused, he saw blood on accused's face. The blood was flowing from accused's head. He admitted that accused and Mazengeny fought. The witness denied that it was the deceased who was holding the log advancing towards accused's brother. He said at the time the blow was delivered the "commotion or fracas" was over and people were leaving for their homes. When police officers attended the scene, the witness was present and he showed them the log which was lying not far from deceased's corpse.

Under cross examination the witness repeated that he saw accused hitting Mazengeny with fists. He denied witnessing accused hitting deceased with clenched fists as summarized in Exhibit 1. The witness insisted that it was only the accused person who had a log. Finally, he denied that he was fabricating his evidence.

In our view, this witness gave his evidence well. His version is lucid and logical in that he did not make it more interesting by adding details that are not true. Put differently, he did not embellish his story. Although the witness was naturally grieved by the death of his brother who was "very close" to him, the witness did not exaggerate his evidence. To the contrary some portions of his evidence are in fact favourable to the accused. For example he said he saw blood

on accused's face flowing from the head, he did not see accused assaulting deceased with clenched fists at any stage during the commotion, he did not see how accused was holding the log when he struck the deceased and that he saw accused drinking opaque beer. For these reasons we find this witness to be a credible and truthful witness. We therefore accept his evidence.

The second state witness was Takura Takawira a member of the neighbourhood watch committee. He knows the accused as a neighbour and was related to the deceased by marriage in that his wife and deceased's wife are sisters. On the day in question he was watching a match between Hotline and Tank 3. He is a supporter of Hotline. The teams were level at half time at one all. In the second half Tank 3 scored their second goal and deceased raised his flag signaling for an offside. However, he was overruled by the referee. At approximately 5 minutes before the match ended the witness heard the accused shouting at the deceased complaining about the deceased's decision to disallow the goal.

When the match ended, all Hotline players moved to the western side of the stadium to change. The witness then saw the accused assaulting Mazenganya with clenched fists and booted feet. The witness and others moved to where this was happening in a bid to stop the fight. The witness tried to stop the accused from further assaulting Mazenganya but the accused refused to pay heed, instead, he threatened to assault him as well. The witness decided to go away and as he was walking away he saw the 1st witness pulling deceased away telling him to leave. The witness said the 1st witness did this because the accused had threatened to assault the deceased as well.

The witness further said as they walked away from the stadium he saw accused's brothers assaulting women by kicking them with booted feet. The 1st witness, deceased and this witness were walking in a single file with this witness ahead of deceased and 1st witness who were almost walking astride. At some point the witness heard women calling out "Beware" and he and Penias turned. Deceased was in the process of turning his head when the witness saw accused raising the log with both hands. The log Exhibit 5 and hands were above accused's head and the log was about 30cm from deceased's head. The accused held the log by its thinner side in a vertical position. The accused then struck the middle of deceased's head. Deceased fell down and started bleeding from the ears and mouth. The witness walked towards the deceased but the accused charged towards him with the log high in the air intending to assault the witness. Someone got hold of the log from behind the accused and the accused threw the log near the deceased. The witness and Penias ran away and reported the matter to the police. Before leaving, he did not bother to check deceased's condition because he heard women shouting "he has died" "he has died".

The witness was certain the log i.e Exhibit 5 is the one accused used to strike the deceased with. He denied that accused and or his brothers were assaulted or threatened by anyone. He said accused took the log from a playing field where it was used to play see-saw by school children.

This witness' testimony was not seriously challenged in cross-examination. His evidence was not shaken at all. It remained intact. When asked why he said accused was not drinking

beer when the 1st witness had said he saw accused drinking beer the witness explained that he was not seated with the 1st witness throughout, therefore, it was possible that the 1st witness saw accused drinking beer but he himself did not see that. Again when asked why he said he did not see blood on the accused's face when the 1st witness said he did see blood flowing from accused's head, the witness said this could have happened but he did not personally see the blood on accused's face. We find the explanation given by the witness to be rational and consistent with events that were changing rapidly. An untruthful witness would have associated himself with each and every piece of action that occurred. The striking differences in the witnesses' testimony show that they did not discuss or rehearse their evidence before coming to court.

The second witness's demeanour was good in that he gave his evidence in a calm and confident manner. He did not contradict himself at all. We therefore accept his evidence.

The state closed its case and the defence opened its case by calling the accused to the witness' stand. The defence also indicated that they were going to call two more witnesses namely Philip Fichani and Obvious Baro.

Accused's version is that on the day in question he was the coach of Tank 3 and when he was preparing to start the match, Mazengeny came to where they were and accused them of having poached some players from Hotline. The accused said Mazengeny was given an opportunity to identify those players and when he did, those players denied belonging to Hotline. The match then started and Hotline scored first. After this goal Mazengeny took the ball saying accused's team should produce their own ball to complete the match. Clever Hute (accused's deputy) and Mazengeny exchanged words. According to accused, he intervened at this stage telling Mazengeny that he (the accused) and others who left Hotline and joined or formed Tank three were the ones who were the recipients of those balls. Mazengeny then shouted that he would deal with the accused after the match. The match resumed and accused's team equalized. After that, accused's team scored their second goal and there was a misunderstanding between Clever and the deceased. It did not take long and the match continued for a short while and it ended.

After the match, the accused said they got into the pitch celebrating and returned to their original position where they were drinking beer. Shortly thereafter accused said he saw a group of people being led by Mazengeny, Takawira and the deceased approaching them. When they arrived Mazengeny approached the accused and said what is it that they were saying earlier? Before he answered, he was struck twice with a fist above the eye by the deceased. Mazengeny tried to knock him but ducked and retaliated by punching deceased above the left eye. Takura tried to stop the fight but the accused refused to be restrained. They struggled further and accused was hit with a stone on the head by Mazengeny. He fell down but later stood up and went to Clever's house to wash off the blood. Ahead of him there were some women who were lifting Mazengeny who had been assaulted.

While walking the accused saw deceased holding a log which looked like Exhibit 5 and the same time talking to accused's elder brother James Fichani. Deceased and one Thomas Poterayi were advancing towards his brother. The accused said he then walked a distance of 2

metres, picked up a log of a Mopani tree and walked one step. Poterayi then shouted “Beware”. He then lifted up the log “intending to strike deceased on his hands”. Deceased turned to face the person who had called out. Deceased shifted his position after the accused had released the log. The accused said he did not see where he struck the deceased but he saw him falling down and he kept holding the log.

Accused said when the incident occurred he was not very drunk as he could appreciate what was happening. He said he was “half drunk”. Accused said he did not see deceased raise his flag to signal an offside – he said he only heard that later. Asked why deceased would assault him if he had not spoken to him, accused said he was “surprised to see them coming to where he was”. He admitted under cross examination that Mazengeny was assaulted by Tank 3 members. He also said he attacked deceased with a log in retaliation for assault perpetrated upon his person earlier on. When it was pointed that he was contradicting himself in that in his defence outline and evidence in chief he said he was acting in defence of his brother, accused said he was confused by the question.

Accused was an incredible witness in our view. He told a false story pregnant with contradictions and improbabilities. Accused denied using Exhibit 5 but could not explain why he failed to show the police the log he claims to have used. Further he failed to give a satisfactory explanation as to why he did not mention that fact in his warned and cautioned statement. Accused lied to this court about the log.

Secondly, we find it highly unlikely that accused as a coach did not witness the deceased raising his flag after accused’s team scored its second goal. Scoring or watching a goal being scored in a soccer match is the climax. This in most cases is the most exciting part to everyone. For a coach to then say he did not witness this event makes this evidence suspicious. In our view, accused witnessed that event and protested. He is now distancing himself from that incident because he realizes that this turned out to be the reason why he assaulted the deceased.

Accused failed to prove that he acted in defence of his brother. From his own evidence, the brother was 12 metres away from where the deceased was. In his own words the deceased was “talking” to his brother. Accused did not call James or any of his brothers to corroborate his version that James was under attack. There was no explanation given for the failure to call the two witnesses that the defence had earlier on indicated as defence witnesses.

Accused is not very clear on what exactly was happening to his brother. In the defence outline he said his brother was being attacked by the deceased and other people with logs. In evidence in chief he said he was 12 metres away and acting in putative self defence.

We find that the accused has introduced his brother simply to bolster his false defence.

Accused also exaggerated the type of beer he drank on the day in question. Earlier he said he drank pints and Chibuku. Later he changed and introduced Chateur which is a brandy with a higher alcohol content. Accused wanted to mislead the court into making a finding that he was so intoxicated that he did not know what he was doing.

Perhaps the most dramatic part of the accused's evidence is how he struck the deceased with the log. Accused denies in part the state's version but proceeds to proffer a series of events that are totally incredible and inconsistent with known facts including the injury sustained by the deceased. Accused said he struck deceased when deceased had turned and his back was towards him (accused). If this had happened deceased would have been hit at the back of his head. The post mortem shows the exact opposite. Accused says the person who shouted the warning "Hokoyo" is Poterayi who according to the accused was walking side by side the deceased, not behind deceased. Accused then said deceased turned to look at the person who shouted and it is at that stage that his blow landed. He said he hit the deceased on the head because deceased changed his position when he turned to look at Poterayi. This explanation is false for a number of reasons.

- (i) even if deceased turned his head to the left this could not have change the position of his head since he had simply turned sideways.
- (ii) if this had happened, accused should have hit deceased on his stretched arm or missed him completely.

For these reasons, we reject the accused's evidence and accept that of state witnesses.

Factual findings

We therefore find the following as proved:

- (a) accused armed himself with the log i.e. Exhibit 5
- (b) accused hit deceased with that log on the head.
- (c) accused aimed his blow at deceased's head
- (d) the deceased died from the injuries inflicted by the accused
- (e) accused was not acting in self defence or in defence of his brother
- (f) accused was never assaulted by the deceased but accused fought with Mazengeny
- (g) deceased was not armed and the only person who was armed with a log is the accused
- (h) the accused's motive was to punish deceased for raising his flag
- (i) accused had taken some alcohol, but he appreciated what he was doing
- (j) accused fractured 4 bones situate on the front part of deceased's head. These injuries are consistent with the state witnesses' testimony.

The law

For accused to be found guilty of murder he must have acted with intent to kill i.e. *dolus directus or delus eventualis* i.e. actual or legal intent. To establish intention, it is sufficient if accused subjectively foresaw the possibility of his act causing death and was reckless of such result. For a trial court to return a verdict of murder with actual intent it must be shown that either (a) accused desired to bring about the death of his victim and succeeded in completing his purpose; or (b) while pursuing another objective he foresees the death of his victim as a substantially certain result of that activity and proceeds regardless. A verdict of murder with constructive intent requires the foreseeability to be possible as opposed to being substantially certain, making this a question of degree more than anything else – *Mugwanda v S* SC 19-2002

As regards putative self defence the law requires that the mistake must be reasonable as

well as genuine. *S v Moyo* SC-45-84.

Let me deal with the defence first. Putative self defence refers to a situation where an accused takes defensive action because he mistakenly believes himself to be under attack. Where an accused alleges that he acted in defence of another person, the court applies the reasonable person test.

In casu, as pointed out before the accused has failed to establish the requirements of the defence. Critically the accused has failed to show that there was an unlawful attack upon James. Once that requirement is not met, the rest logically falls away.

As regards putative self defence, accused's mistake leading to the defensive action was neither genuine nor reasonable.

For these reasons, the defence is rejected. Coming the question of intention, the state submitted that the proper verdict is one of guilty of murder with actual intent. He urged the court to base this decision on the following factors,

- (a) that the state's evidence was not really challenged by the defence – *S v Mhlanga* 1987 (1) ZLR 70

Therefore it must be accepted

- Self defence does not arise in that at no time was accused under attack and at no time was his brother under attack. There was no unlawful attack. The court should reject the defence
- (b) results of the post mortem report – deceased hit on the front part of his head
- (c) accused attacked deceased from behind
- (d) accused used both hands when hitting deceased with the log
- (e) size of log – 2.5m long, 4cm thick and according to the doctor, the log was blood stained
- (f) accused used excessive force
- (g) accused aimed at deceased's head

On the other hand defence counsel submitted that accused be found guilty of murder with constructive intent in that he should have foreseen his action would cause death.

In our view the distinction between murder with actual intent outlined above and murder with constructive intent is one of degree.

In our view anyone using Exhibit 5 to pound on a human head cannot deny that he or she foresaw death as a substantially certain result. The log weighs approximately 5kg and accused raised it high with both hands. He swung it downwards with excessive force aiming at deceased's head. The resultant injuries also confirm that the force used was severe.

Therefore we find accused guilty of murder with actual intent.

Extenuation

- Intoxication is an extenuating circumstance. *In casu* we have found that accused was drunk. We therefore find intoxication to be an extenuating circumstance.
- Anger and provocation after being assaulted
- Also we find that accused acted as a result of anger after being assaulted on the

head

Mitigation

Accused is aged 33 years, married with three minor children. He spent 7 months in custody pending trial. He paid 25 herd of cattle to deceased's family as compensation.

Aggravation

Accused has been found guilty of murder with actual intent. This is a serious offence. Human life was unnecessarily lost. Accused brutally attacked the deceased by crushing his head.

Sentence

23 years imprisonment.