

**THE STATE**

**Versus**

**GODREY SIWELA**

**And**

**JOHANNE MANGENA**

IN THE HIGH COURT OF ZIMBABWE  
BERE with Assessors Mrs E. Mashengele & Mr P. Damba  
BULAWAYO 22, 23 & 28 MARCH 2018

**Criminal Trial**

*W. Mabhaudi* for the state  
*L. Maunze* 1<sup>st</sup> accused  
*H. Moyo* for 2<sup>nd</sup> accused

**BERE J:** It all started as a simple dispute over eighteen dollars (18) owed to the 1<sup>st</sup> accused, Godfrey Siwela by the deceased, Mpilo Ndhlovu. The misunderstanding that commenced on 9 October 2016 spilled over to 10 October 2016 at Sidulini Business Centre, Filabusi, in Matabeleland South Province. It was this conflict which tragically ended the deceased's life on 10 October 2016 resulting in both the accused persons being charged with the murder of the deceased, to which both had pleaded innocent.

The broad facts of this case are that accused 1 picked up a quarrel with the deceased at Sidulini Business Centre over a debt of \$18,00. The dispute degenerated into a serious misunderstanding which led accused 1 to arm himself with stones and pieces of bricks which he randomly threw at the deceased. Sensing danger, the deceased fled from the scene with the accused 1 and accused 2 in hot pursuit. As the two accused were chasing after the deceased, accused 2 who had joined in the dispute is alleged to have picked up an old iron bar (exhibit 4), armed himself and accelerated the deceased's chase.

The two accused persons chased after the deceased for a distance of about 100 or so metres into a bush near the business centre in question.

After about 30 minutes or so the second accused returned to the business centre looking for a bucket of water which he took back in the general direction the deceased and the accused persons had taken during the violent chase. When the other patrons of Sidulini business centre made an inquisitive follow up they found the deceased lying supine, seriously injured and dead.

The two accused persons were nowhere to be seen. A report was immediately made to the police which resulted in the collection of the deceased's remains. The 1<sup>st</sup> accused was arrested on the following day and the second accused was only arrested seven months after the deceased's death after a long search by the police. The accused had to be arrested through an ambush.

The post mortem report gave the deceased's cause of death as (i) bronchoaspiration, (ii) extensive right subarchnoid haemorrhage (ii) trauma head due to assault using blunt object.

The same document noted several marks of violence consisting of -

- (1) Abrasion on the left forearm 3 x 1cm, 2 x 1cm
- (2) x 1cm
- (3) Abrasion on the right back 6 x 3cm, 4 x 2cm
- (4) Burst laceration on the right frontal in form of a star 3 x 2cm
- (5) Burst laceration in form a star on the left parietal 2 x 1cm."

Whilst the 1<sup>st</sup> accused accepted that he had a misunderstanding with the deceased, he sought to project the deceased as having been the aggressive part on the day in question. The 1<sup>st</sup> accused said it was the deceased who attacked him first with a stone on his "left hand eyebrow" (sic whilst armed with an axe. The 1<sup>st</sup> accused said he reacted by retaliating and having the watching members of the public disarming the deceased of the axe.

The 1<sup>st</sup> accused stated further in his defence outline that he observed the 2<sup>nd</sup> accused assaulting the deceased with an iron bar (exhibit 4). Thus the tenor of the 1<sup>st</sup> accused's defence outline was to raise the defence of self-defence and laying the blame for the deceased's demise squarely on the 2<sup>nd</sup> accused person.

The second accused person Johanne Mangena in his defence outline denied the charge and specifically denied having acted in common purpose with his co-accused in bringing about the demise of the deceased.

The second accused stated that he and the deceased were friends and that he and the 1<sup>st</sup> accused had no relationship hence his sole motive in getting involved in this case was to try and restrain the 1<sup>st</sup> accused person from assaulting the deceased.

The 2<sup>nd</sup> accused further stated that the genesis of the dispute between the deceased and the 1<sup>st</sup> accused was a debt owed by the deceased to the 1<sup>st</sup> accused. According to this accused person, it was this debt which led to a violent confrontation between the deceased and the 1<sup>st</sup> accused which led to the latter hitting the deceased with a stone on the head. E said that having seen the deceased felled by a stone used by the 1<sup>st</sup> accused, he panicked and fled the scene until his arrest.

### **The evidence**

The two principle state witnesses Ivious Ncube (a member of the neighbourhood watch committee) and Thembinkosi Tshabangu said that they were both at Sidulini Business Centre on the morning of 10 October 2016 and that they saw what happened.

The two witnesses disclosed to the court how the conflict started with the accused 1 having picked up a misunderstanding with the deceased over the latter's debt to the 1<sup>st</sup> accused. Both witnesses said the 1<sup>st</sup> accused became aggressive and started violently throwing stones and broken pieces of bricks at the deceased who dodged and sought cover among the other patrons who had gathered to witness the day's ordeal.

Both the state witnesses did not witness any aggression on the part of the deceased except hearing him plead with 1<sup>st</sup> accused to be given more time to repay his debt.

None of the two witnesses saw the deceased armed with any weapon as advised by the 1<sup>st</sup> accused person in his defence outline and in his evidence in chief. Both witnesses testified to the effect that the 1<sup>st</sup> accused's aggressive conduct towards the deceased got worse as he kept throwing missiles at the deceased, the deceased fled from the township and ran towards a bush nearby with the two accused in hot pursuit.

Both witnesses testified that as the two accused were aggressive pursuing the deceased the second accused was armed with an iron bar which he had picked during the melee. The two witnesses told the court that the two accused chased the accused for about 100 metres before they disappeared into this bush and that this was the last time they saw the deceased alive.

The two witnesses further testified to the 2<sup>nd</sup> accused coming back to the business centre and seeing him carry a bucket of water into the bush.

The witnesses were both in agreement that when they made a follow up into the bush to investigate what has happened in the bush they found the deceased lying supine, motionless and dead with both the accused persons having left the scene. It was their subsequent report to the police which ultimately led to the arrest of the 1<sup>st</sup> accused the following day after the murder and the arrest of the 2<sup>nd</sup> accused person seven months after the murder of the deceased.

In his evidence in chief the 1<sup>st</sup> accused maintained his story that the deceased was the one who started to fight him over his debt and that as he did so he was armed with an axe. He also told the court that he was acquainted with the 2<sup>nd</sup> accused as they were both involved in gold panning.

The accused also stated that on the day of the deceased's assault but before the conflict between the deceased and the 1<sup>st</sup> accused, the 2<sup>nd</sup> accused had purchased bread for tea after he

had suggested that it was not health for them to partake alcohol on an empty stomach, an averment which went unchallenged by the 2<sup>nd</sup> accused person when he gave evidence in chief.

The 1<sup>st</sup> accused concluded his testimony by alleging that it was the 2<sup>nd</sup> accused who delivered the decisive blow against the deceased.

The thrust of the second accused's testimony in chief was to project the 1<sup>st</sup> accused as a stranger to him and the deceased as someone who was closer to him. The accused stated that all his involvement in this dispute was motivated by his desire in serving the deceased from getting further punishment from the 1<sup>st</sup> accused and he alleged it was the 1<sup>st</sup> accused person who murdered the deceased by hitting him with a stone at the back of his head.

The accused completely denied ever being armed with exhibit 4, let alone using it. He told the court that he immediately disappeared from the scene of murder after the event because he had panicked.

The second accused called the investigating officer Constable Mariam Zinyulu as a witness. The witness confirmed recovering the suspected murder weapon exhibit 4 at the scene of murder and confirmed the difficulties they encountered in arresting the 2<sup>nd</sup> accused person. She said the accused had literally moved away from his permanent residence after this offence and that it took the police seven months to eventually arrest the accused person after laying an ambush for him.

### **Assessment of evidence**

Our view is that the two state witnesses who testified are two simple villagers who had no capacity to mislead the court. Our assessment of them is that they told a simple story as it unfolded. The truthfulness of their evidence was beyond reproach.

When they told the court that the 1<sup>st</sup> accused triggered the conflict by his aggressive conduct and that he made an abortive attempt to hit the deceased with several hand thrown missiles that evidence must be accepted without question.

If it is true that deceased was armed with an axe and that he had attempted to use the same against the 1<sup>st</sup> accused, surely that is the 1<sup>st</sup> thing that he would have vividly remembered on the 11<sup>th</sup> of October 2016, a day after this tragic event when he gave a warned and cautioned statement. The bulk of the 1<sup>st</sup> accused's testimony found no corroboration and wherever that evidence is in conflict with that of the state witnesses it must be rejected.

However, even liars sometimes tell the truth, the reason being that human nature by its very nature makes it impossible to sustain lies through and through. The second accused was seen carrying an iron bar and in hot pursuit of the deceased, in an aggressive manner, the first accused's version must be accepted as the truth when he says the second accused used the exhibit to strike the deceased.

We find comfort in this finding because in our view the second accused person could not possibly have run after the deceased in such an aggressive manner as described by the two credible witnesses if the intention was not to use it.

Further more, the fact that after this murder, the 1<sup>st</sup> accused went into hiding for seven months cements our finding. Our view is that the second accused's conduct after the deceased's death fits well into him having played a prominent role in the deceased's murder.

As for the second accused, and as rightly conceded by his counsel during court addresses, the evidence tendered in these proceedings does not rise to the defence of self-defence as pleaded.

We accept that the 1<sup>st</sup> accused was extremely aggressive in the full glare of the other patrons. If the 1<sup>st</sup> accused had the audacity to try and hit the deceased in such an aggressive manner in the full glare of other members of the public, what more could he have done after catching him in a bush? What he did is consistent with his conduct as exhibited in public. Any lingering doubts about the accused's conduct are confirmed by his disappearing from the scene after the murder.

Our view is that the accused persons disappeared from the scene of the murder because they had panicked after realising the devastating effect of their conduct.

We accepted that there were no eye witnesses to this murder and that the court has to largely rely on circumstantial evidence when it comes to the actual murder of the deceased as dictated by the ratio in the case of *S v Blom* where the learned judge laid the law as follows:

The inference which the court has to make in this finding that the two accused persons acting in common purpose took turns to randomly assault the deceased and in the process causing numerous injuries as outline in the post mortem report.

The injuries are consistent with the determination to punish the deceased as demonstrated by the two accused's combined effort in aggressively chasing after the deceased armed with stones and an iron bar.

It is not difficult for the court to make a specific finding that the deceased died as a result of the serious assault caused on him by the two accused persons acting in common purpose as envisaged by section 196 of the Code which speaks to the liability of co-perpetrators.

We must now move to consider the appropriate verdict.

The evidence as accepted by the court do not provide for the ambitious verdict of acquittal suggested by the second accused's counsel not the conservative verdict of culpable homicide as advocated by the 1<sup>st</sup> accused's counsel.

We believe the state counsel was on firm ground in advocating for the return of verdict of murder with constructive intent. As noted by the Supreme Court in the case of *Robert Mugwanda vs The State*<sup>1</sup>

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<sup>1</sup> Judgment No. SC-19-02 a p 10

“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).”

Our view is that when the two accused persons pursued the deceased armed with stones and exhibit 4 into the bush and proceeded to use such weapons against the deceased, they must have reasonable foresaw that their combined action would lead to the demise of the deceased. Indeed, the deceased died because of the combined conduct of the two accused persons.

Consequently, the accused persons are found guilty of murder with constructive intent.

### **Sentence**

In sentencing the accused persons we will be guided by the submissions made for the accused by their two counsel and the issues highlighted by the state counsel.

For both accused persons we accept that they are first offenders and family men with the usual demanding responsibilities.

Although not highlighted in mitigation, we accept that both must have partaken of liquor. Though not a justification, we accept that the beer must have affected the two accused in some way.

For accused 1, we did note traces of remorse as he gave a partial admission throughout the proceedings and the fact that he has spent more than 18 months in prison awaiting this trial must operate in mitigation of sentence. In aggravation, we accept that the punishment to which the deceased was subjected to was clearly disproportionate to his request to be given more time to repay the debt of \$18,00.

It is aggravatory that the 2 accused persons literally hunted down the deceased to death and subjected him to brutal assault using both exhibit 4 and stones. The post mortem report makes bad reading of the extent of the injuries.



We are particularly concerned by the attitude exhibited by the 2<sup>nd</sup> accused persons in his desperate attempt to avoid the long arm of justice. It was fortuitous that he was eventually arrested after 7 months of literary running away from the police.

Our annoyance at his conduct will be reflected in the sentence that we are going to impose on him.

Deceased was a young man of 29 years and the accused were more mature individuals who should not resorted to violence in prematurely ending of deceased's life. There was absolutely no provocation exhibited by the deceased but the two combined to bully him to death with reckless abandon.

Accused 1 - 18 years imprisonment

Accused 2 - 20 years imprisonment

*National Prosecuting Authority state's legal practitioners*  
*Dube, Mguni & Dube, 1<sup>st</sup> accused's legal practitioners*  
*Joel Pincus, Konson & Wolhuter, 2<sup>nd</sup> accused's legal practitioners*