THE STATE
versus
AARON HAKUTANGWI

HIGH COURT OF ZIMBABWE
MUSAKWA J WITH ASSESSORS
HARARE, 6, 7, 12 and 13 February and 4 June 2014

**Criminal Trial**

*B. Murevanhema,* for the state
*L. Chiperesa,* for the accused

MUSAKWA J: The accused pleaded not guilty to a charge of murder whose incident occurred on 7 March 2008 at Mabelreign Shopping Centre in Harare. It is not clear why the matter took six years to prosecute.

It is common cause that the accused and the deceased were known to each other. It is also not in dispute that prior to the incident the accused and one of the State witnesses, Tapiwa Gora and the deceased were engaged in the business of tree cutting. The accused and Tapiwa Gora had performed a job in Raffingora for which payment was due. On the day in question there was a dispute between them regarding the payment. Tapiwa Gora thought that the accused had received payment but had not disclosed so.

The accused is said to have made insults against the Goras' parents. This did not go down well with Tapiwa's younger brother, Danmore who slapped the accused once. The accused ran out of the bar in which they were. He picked up stones and threw them inside the bar. One of the stones bounced and struck the deceased's nephew Innocent Makoto.

The accused ultimately hurled a piece of brick which struck the deceased on the head. The deceased fell on the tarmac and died. Post-mortem examination established that the deceased sustained a depressed fracture accompanied with subarachnoid haematoma. The cause of death was given as fractured skull and diffuse axonal injury arising fro assault.

In his defence the accused stated that he spent the day drinking opaque beer that was laced with breakers, a type of alcoholic spirit. He was in the company of the deceased.

Later in the afternoon, Tapiwa and Danmore arrived. The accused had an argument with Tapiwa concerning payment for the job they had performed in Raffingora. Tapiwa attacked the accused. The accused rushed out of the bar with Tapiwa and Danmore in pursuit. In defence the accused threw a quarter brick at Danmore who ducked and the brick struck the gate. Tapiwa and Danmore continued to pursue the accused. Danmore caught up with the accused and struck him with a fist at the back of the neck. The accused was further tripped and he fell down.

The accused felt provoked. The deceased tried to restrain Tapiwa and Danmore from assaulting the accused. When the deceased held Danmore the latter threatened to beat him. After the deceased released Danmore, the latter advanced towards the accused. The accused picked up a piece of brick which he threw at Danmore. When Danmore ducked the brick struck the deceased at the back of the head.

Doctor Mubako who conducted the autopsy testified that given the history of the case he concluded that death arose from a fractured depressed skull. A blunt instrument used with considerable force could have been used. He explained what is meant by diffuse axonal. This relates to neurons which are a type of cell. A fracture of the skull would normally lead to haemorrhage. An assault to the head would result in shock and this leads to a decrease in blood pressure. Consequently the brain fails to get the requisite blood supply in order for it to function normally. This may lead to impulses to the brain failing and consequently vital organs like the heart will be affected.

In any event, in light of the accused's defence and testimony the deceased did not die as a result of sustaining injury from a fall.

According to Innocent Makoto when the accused threw a stone from outside, it bounced off some object and struck his leg. This witness then left for another bar. The deceased sought to restrain the accused. Tapiwa and Danmore also joined and it looked like the disturbance was over. The deceased walked back towards the bar whilst holding Tapiwa and Danmore who were flanking him. That is when the accused screamed as he picked a stone and threw it. The stone struck the deceased and he fell down and started to bleed.

This witness was the furthest from the scene. His version is slightly different from that of the other witnesses. He cited two instances when missiles were thrown. He was not sure of the exact nature of the object that struck the deceased. Even the time when the incident took place was given as just after lunch. He had arrived at the bar and found the

others already present. It seems his focus was to get some food. Although he did not notice the type of beer the accused drank he said the accused was not very drunk.

Tapiwa testified that when he had an argument with the accused, Danmore slapped the accused who then ran outside from where he threw stones. One of the stones struck Innocent Makoto. When the accused looked for more missiles the deceased got to him. Tapiwa also followed and got hold of the accused and told him to desist from throwing stones. The accused then dropped the stones.

As they walked back Danmore was ahead, with the deceased behind him. Tapiwa and the accused then followed. The accused then screamed "I will kill you!"as he threw a stone which struck the deceased who was behind Danmore. He described the missile as a piece of brick. He estimated the accused to have been about 2,5m and 3m from the deceased. The witness further stated that although the accused consumed beer he was not drunk. He based this on his view that a person who consumes two litres of opaque beer commonly called 'scud' cannot get very drunk. In another breadth he also stated that the accused appeared drunk.

Tapiwa was of the view that the accused did not intend to kill but wanted to suppress the issue of the money that he had received. He clarified that the accused had aimed to strike Dnamore with whom he had had a misunderstanding.

Danmore's testimony was more or less similar to that of Tapiwa. He confirmed slapping the accused because of the slurs he had made. After the accused threw some stones he went to a heap of bricks from where he picked two pieces. Tapiwa rushed and grabbed him by the shirt which got torn. The deceased also got hold of the accused's shirt which got torn.

After the commotion was over the witness confirmed that he walked ahead of the deceased whilst the accused and Tapiwa were behind them. He then heard the accused scream. As he turned he saw the deceased falling. He had not seen the accused picking the brick. The incident took place on the tarmac behind the shops.

Having known the accused for four years he was of the view that he was not very drunk. He said when the accused got drunk he became verbally abusive. On this occasion the accused walked and talked normally. Whilst inside the bar the accused had conversed nicely. It was only later that he began to shout.

As to why the accused struck the deceased, Danmore stated that the accused explained to Police officers that he had intended to attack the witness but missed. However, the accused did not explain why he wanted to attack the witness. He disputed that he and Tapiwa attacked the accused. He further disputed that when the accused struck the deceased he was defending himself from attack.

Under cross-examination the witness further stated the accused got angry after he slapped him. That is why the accused rushed to a pile of stones. He said the deceased was between 1,5m and 3m from the accused whilst he was about 3m-4m from the accused. Whilst he confirmed that he heard the accused scream he said he did not hear him utter any words.

On the other hand the accused confirmed his working relationship with the deceased whom he had known for four years. He stated that he and the deceased had been drinking beer since 9 a.m. they drank opaque beer which they laced with a spirit called breakers. As a result he was so drunk that he could not run properly. Tapiwa and Danmore arrived between 3.30p.m and 4 p.m. he said he was assaulted by Tapiwa for denying having received money from their contractor. Thus he denied insulting the Gora family. He felt greatly provoked by the assault.

Regarding their respective distances he said the deceased was about four metres away whereas Danmore was about a metre away. On why he threw the brick he said he was defending himself from attack. Nonetheless he conceded that the scuffle was over when he threw the brick. This is despite his earlier claim that the scuffle was not over. Surprisingly he also stated that he did not intend to strike anyone. This is because he said he wanted Tapiwa and Danmore to desist, considering the manner in which they had held him.

Under cross-examination he conceded that when he ran out of the bar he did not stagger. He also conceded that he could appreciate what was taking place. He further conceded that he used vulgar words and that Danmore could not have been involved if the discussion was amicable. He could not dispute that the first brick he threw struck Innocent Makoto. This is because when it struck the gate or door frame it broke. Although he claimed to have been defending himself he conceded that when he struck the deceased the scuffle was over. He eventually stated that when he threw the brick he was targeting Tapiwa and Danmore. He further explained that he was aiming at the belly in the hope that if they were hurt they would desist.

What needs to be determined is the accused's intention in relation to the deceased. That the accused was drunk is not in doubt. It is only the extent of his drunkenness that was

in dispute. The accused claimed to be severely intoxicated such that he was staggering and could not run away from Tapiwa and Danmore. None of the state witnesses supported that claim. In any event the accused himself claimed that he knew what he was doing. His recollection of events confirms so. Therefore the defences of intoxication and provocation do not absolve the accused. See also s 221(2) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

Notwithstanding this finding that is not the end of the matter. The state argued that the accused should be found guilty of murder with constructive intent. On the other hand Mrs Chiperesa prayed for the accused's outright acquittal. The concept of constructive intent is no longer part of our law. In this respect see s 15 (4) of the Code which states that-

> "For the avoidance of doubt it is declared that the test for realisation of a real risk or possibility supersedes the common-law test for constructive or legal intention and its components of foresight of a possibility and recklessness wherever that test was formerly applicable."

Prosecutors and legal practitioners must be alive to this development, taking into account when the Code came into operation. There is no evidence that the accused ever fought with the deceased. In addition there is no evidence that the accused aimed to attack the deceased when he threw the brick that caused the fatal injury. What is not in dispute is that the accused set out to attack Danmore who was behind the deceased. In the process he missed Danmore and fatally struck the deceased. This is the typical *aberratio ictus* situation. Thus the State is seeking a verdict based on the accused's intention in relation to Danmore and not the deceased.

The court did not benefit from any address on the accused's intention in relation to the deceased and the test to be applied. The approach adopted by the state is what was criticised and abandoned in *S* v *Ncube* 1983 (1) ZLR 111 (S). In that case the appellant had pleaded guilty to assault with intent to do grievous bodily harm. Whilst attempting to stab his uncle with a spear the appellant's brother had stepped in and received a blow in the face. On review the propriety of the conviction was queried and it was suggested that the matter be taken up on appeal.

In abandoning the transferred malice approach as enunciated in *R* v *Mabena* 1968 (1) RLR 1 BECK JA made the following remarks at 112 to 113-

> "Both E Mr Colegrave and Mr Chigovera, who appeared for State, attacked the judgment of the Rhodesian Appellate Division in *R* v *Mabena* 1968 (1) RLR 1; 1968 (2) SA 28 (RAD) and submitted that it should not be followed.
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> In Mabena's case *supra* it was held that "if A attacks B in circumstances which show that he must have realised that what he did was likely to kill B but by mistake kills instead in circumstances which show that he ought to have realised that what he did was likely to cause serious injury to C, he is guilty of the murder of C" per BEADLE CJ at 11 G-H).
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> That statement of the law lends qualified approval to the proposition that an *aberratio ictus* ("a convenient Latin expression descriptive of the situation where a blow aimed at A misses him and lands on B" - (per HOLMES JA in *S* v *Mtshiza* 1970 (3) SA 747 (AD) at 751D) affords no defence to the author of the blow that went astray. The qualification that was attached to the court's approval of this proposition stems from the fact that the court was dealing with a situation in which the author of the deflected blow was found to have been negligent in relation to the person on whom the blow actually fell. As is apparent from the passage at p 3 B-E of the report, the court expressly refrained from dealing with the deflected blow was found to have been negligent in relation to the person on whom the blow actually fell. As is apparent from the passage at p 3 B-E of the report, the court expressly refrained from dealing with the position of the author of a "deflected" blow of whom it could not be said that he ought reasonably to have foreseen that the blow might miss the intended victim and fall harmfully elsewhere."

In further articulating the approach to be adopted in respect of an unintended victim, BECK JA went on to say at 116-

> "I am, with respect, satisfied that the decision of the Appellate Division in Mabena's case, supra, must now be held to be wrong. There is no need for such a rule, qualified though it was, which, contrary to principle, permits conviction for an offence for which the requisite mens rea is lacking. Mabena did not have towards Machiki, the man he accidentally killed, dolus in any form, and could not therefore, properly be held to have been guilty of murdering Machiki. His conduct constituted an attempt to murder Ranga, the man he intended to stab, and with regard to whom he had the necessary dolus for murder; and it also constituted culpable homicide in respect of Machiki, towards whom he had mens rea in the form of culpa. No other offence was established on the facts that were found."

In the absence of any evidence to the contrary, this is the situation that is applicable in the present matter. Having been provoked by being slapped by Danmore the accused saw red and sought to revenge by throwing missiles. On account of this rage and despite the belief that the commotion was over, he ultimately aimed a piece of brick at Danmore which however missed and struck the deceased who was walking ahead of Danmore. A reasonable person would not have acted in such a manner in the circumstances. As such the accused person ought to have realised that death might result from his conduct.

Accordingly the accused is found guilty of culpable homicide.

*Mkuhlani Chiperesa Legal Practitioners*, accused's legal practitioners