

THE STATE

Versus

PETER TSHUMA

IN THE HIGH COURT OF ZIMBABWE
MOYO J with Assessors Mr P. Damba & E Mashingaidze
BULAWAYO 4 JULY 2023

Criminal Trial

K. Shava for the state
L. Nyamapfene for the accused

MOYO J: The accused faces a charge of murder, it being alleged that on the 12th of December 2021, he assaulted his wife Silethokuhle Gumbo several times all over the body with a rubber whip, booted feet and open hands intending to kill Silethokuhle Gumbo or realizing that there is a real risk or possibility that his conduct may cause the death of Silethokuhle Gumbo but continued to engage in that conduct despite the risk or possibility. The accused denied the charge. He tendered a limited plea of guilty to the lesser charge of culpable homicide.

The state did not accept that plea and a full trial was held. The following were tendered into the court record.

1. The state summary
2. The defence outline
3. The accused's confirmed warned and cautioned statement
4. The post mortem report and the whip being the weapon that was allegedly used.

Sibonginkosi Ndlovu and Kenneth Ndlovu gave *viva voce* evidence for the state while the accused gave evidence for the defence. The evidence of Espina Ndlovu, Luciano Mhindula, Gravious Mateuro, Alex Mandubani and Dr S. Penasai was admitted into the court record as it appears in the state summary.

The facts of this matter are largely common cause.

Accused and deceased lived together as husband and wife and on the fateful day accused came to find deceased not at home around 20:00 hours. He looked for deceased at her mother's homestead, did not find her, came back later to find deceased in bed. He then enquired as to where deceased had been and she said she had been home throughout. Accused insisted that she was not home when he arrived but deceased maintained that she had been home. This annoyed the accused who then took a whip and assaulted the deceased all over the body thereby causing her injuries that later caused her death. He also assaulted deceased with booted feet and open hands.

It is not clear for how long the assault took but Sibonginkosi says she heard noise in deceased's bedroom, went to check, found accused assaulting the deceased tried to quell the fight, failed ran for about 15 minutes to Kenneth Ndlovu's homestead. Kenneth Ndlovu says he came in about 5 minutes to find accused assaulting deceased for about 5 minutes and then the assault stopped. So it is not clear as to the duration of the assault but it may have lasted some minutes not hours, if one pieces together the times given by Sibonginkosi Ndlovu and Kenneth Ndlovu. The post mortem report gives the cause of death as, (1) subarachnoid hemorrhage (2) severe assault.

The marks of violence are given in the post mortem report as bruised right upper arm, hip, thigh, back, breasts, left thigh, back arm and breast. Internal examination, the doctor observed a heamatoma on the right occipital region. There were no skull fractures. The brain had subarachnoid hemorrhage. Small blood vessels were ruptured. There was extensive bleeding into the muscles. The evidence of Kenneth Ndlovu is that the assault stopped soon after his arrival, and that he found deceased seated on the floor, he spoke to deceased who told him her own version of the misunderstanding between her and the accused. From his evidence it appears all people retired to bed, deceased had no obvious serious injuries except the marks of the whip. Both witnesses told the court that it was on the following morning that deceased was no longer responding to conversation.

The state submitted at the end of the trial, that because accused used hard objects, a safety shoe and a rubber whip as well as that he did not listen when people were trying to stop him, all that showed that he had the realization and that he did foresee the possibility of death from his actions.

The defence counsel submitted that the weapon used was not lethal, the injuries were concentrated on the thighs, arms and other parts of the body from where a person would not ordinarily die.

In order to come to the appropriate verdict, this court has to apply the following legal principles: That is, to first differentiate between murder and culpable homicide. Did the accused have the requisite legal intention to commit murder? In other words did the accused person realize or foresee death as a possibility for his actions but persisted nonetheless?

In the *Guide to Criminal Law in Zimbabwe* by G. Feltoe 2005 edition at page 96. Professor Feltoe succinctly differentiates between homicide murder and culpable homicide:

“Where it is alleged that X (accused) had legal intention to kill, X (accused) will usually deny that he foresaw that his actions would result in death. The question is whether, as a matter of inference, he did have such foresight despite his denial. He can only be convicted of murder if the only reasonable inference that can be drawn from the facts is that he had legal intention to kill. If the court draws this inference the court decides that he must have and did foresee the possibility of death. (In effect a finding that he was lying when he asserted that he did not foresee that possibility). If there is a reasonable doubt as to whether he had legal intention, he must be given the benefit of the doubt and can only be convicted of the lesser charge of culpable homicide if it is proved that he negligently caused the death in question.”

He further states that;

“In deciding whether there was legal intention all the factual evidence which bears upon or could have affected X’s (accused’s) perception, powers of judgment and state of mind and foresight at the time he committed the alleged crime must be most carefully scrutinized. Factors such as intoxication, provocation, level of intelligence, personality, etc would obviously be relevant in this regard. If the court concludes that X (accused) did not foresee the possibility of death but that he should have foreseen it and the reasonable person would have guarded against it, the correct verdict is culpable homicide.

Having stated that the court has to make its findings on the realization or otherwise of the possibility of death as a matter of inference, it follows that this court can only infer legal intention if all the proven facts point only to that conclusion.

The proved facts are;

1. Accused and deceased had a misunderstanding.

2. Accused assaulted deceased using a rubber whip, booted feet and open hands.
3. The state alleges that he used safety shoes per Sibonginkosi's testimony, accused refutes this and the sole conclusion to make is that he had shoes, without specifying the type. In any event whether it was a safety shoe or any other type of shoe, this court is not able to discern the significance of the type of shoe.
4. The injuries sustained per the post mortem report are concentrated on the right upper arm, hip, thigh, back, breasts, left thigh, back arm and breast. There is also a haematoma on the right occipital region.
4. The State has not proved that the assault was very protracted maybe running into hours, in fact what can be gleaned from the evidence of Sibonginkosi Ndlovu and Kenneth Ndlovu is that it could have lasted some minutes as I have already shown herein.
5. Deceased was not visibly injured, was not bleeding, did not pass out, or lose consciousness during the assault. In fact Kenneth Ndlovu spoke to her asking her what the problem between her and accused was. She sat on the floor and narrated to him. In fact he found deceased seated on the floor soon after the assault.
6. After the assault, all the other people present did not see a medical emergency, this speaks to deceased's condition.
7. It is in the morning of the following day, that deceased was no longer responding to conversation.
8. Accused himself says he assaulted deceased as a means of reprimand and did not realize that she could die from his actions.

The proven facts do not point to a single conclusion of legal intention and therefore murder for what will the court conclude about accused's usage of a whip? It is not a lethal weapon and it cannot be said in using it accused should have realized that death would be a possibility. The concentration of the violence on the limbs and the torso, also makes it difficult for this court to find that the only reasonable inference to make was that accused realized and foresaw that his actions would result in death. That the deceased never passed out or became

incapacitated during the beating with accused relentlessly continuing nonetheless works in accused's favour.

That he kicked her we are not even aware of which injuries resulted from the kicking and that she suffered a haematoma in the right occipital region does not on its own become the only fact for drawing a conclusion and an inference. An inference must be drawn from all the proved facts. In the case of *S v Sibanda* SC-5-14, the Supreme Court in reducing a conviction of murder to culpable homicide stated as follows:

The proved facts in their totality do not support a realization by the accused that deceased would possibly die, why should accused have realized this yet even the other people that were there did not? They only acted to stop the assault and not that because they saw that deceased was about to die. An accused must not be given an onerous burden of being treated with antagonism by the court so as to turn a blind eye to positive facts that benefit an accused. In any event the burden lies on the state and where it has failed to sustain it, the court should give an appropriate verdict. The state counsel emphasized that hard weapons were used, this court does not understand what hard weapons entail. Lethal weapons are weapons that are expected to cause death in their usage and they are the only weapons that the court can safely infer intention from. Many other factors come into play as to the duration and nature of the assault, the condition of the deceased during and after the assault, the visible injuries if any from whereupon it can be inferred that there was clearly a real risk and possibility of death in the circumstances beyond any doubt.

To reject the obvious glaring facts in favour of an accused person would be to do an injustice. Beating a person with a whip and concentrating on their limbs and torso cannot and will not create a realisation that death would be possible in the circumstances except perhaps where the deceased was visibly injured so as to clearly show that his or her life is in danger. Such evidence is not there and the injury to the head cannot be treated in isolation from the rest of the evidence. The totality of the facts before us are such that this court is unable to conclude that the only reasonable inference that can be drawn is that a realization of the possibility of death existed. There is therefore a reasonable doubt that the accused realized and foresaw death as a possibility from his actions.

It is for these reasons that the accused will be found not guilty of murder but will however be convicted on the lesser charge of culpable homicide.

Sentence

The accused is convicted of culpable homicide. He is a 1st offender. He pleaded guilty to the appropriate charge. He is a family man and a sole bread winner. He has shown remorse and seems to have told the court the truth which is why most factors were largely common cause. He has spent 18 months in remand prison. However, a life was unnecessarily lost under the most unfortunate of circumstances. Accused should not have assaulted his wife, he should have sought mediation from the community elders if there were issues between him and deceased. This court frowns at the loss of life through violence. Deterrent sentences must indeed be given. However, sentencing is not a one jacket fits all excuses, each case depends on its facts, there is considerable mitigation, that is, being a 1st offender, plea of guilty, remorse and pre-trial incarceration.

Accordingly an effective sentence of 6 years will meet the justice of this case, but because accused has been in prison for a period of 18 months he is entitled to a discount of these months from his effective sentence leaving him with 4 years and a half years effective.

The accused will thus be sentenced as follows:

6 and half years imprisonment with 2 years imprisonment suspended for 5 years on condition, accused does not within that period, commit an offence involving violence, whereupon conviction he shall be sentenced to imprisonment without the option of a fine. That leaves him with 4 and half years effective.

National Prosecution Authority, state's legal practitioners
Masiye-Moyo & Associates (Inc. Hwalima, Moyo & Associates), accused's legal practitioners