

THE STATE
versus
LIBERTY CHIRIMUDOMBO

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 12 May & 24 October 2023

Assessors: Mr Gweme
Mr Jemwa

Criminal Trial

V Ngoma, for the State
R Gasa, for the accused

MUTEVEDZI J: The accused Liberty Chirimudombo faces a charge of murder. The allegations against him are that on 23 August 2022 at OK Mbare complex, he assaulted Munashe Mandebvu (the deceased) on his back and on the head with a wooden stick. The state alleged that he did so with intent to kill the deceased or realising that there was a real risk or possibility that his actions could lead to death but regardless of that realisation of the risk or possibility he persisted with his conduct. The deceased died from the injuries he sustained from the assault. In detail the state alleged that the deceased was apparently homeless and lived at OK Mbare premises and survived from hand outs given to him by some workers at the shop whom he assisted with labour. On the day in question he was behind the shop complex with one Trish Katonha and Aiti Chigwada both employees at OK. The accused approached them and demanded that the deceased hands over to him a pair of sandals and money amounting to USD \$ 29 and ZW\$ 1 600 which he claimed the deceased had stolen from him. The deceased denied such theft. An argument ensued. The accused picked a wooden stick with which he pointed at the deceased. Sensing violence, Aiti Chigwada intervened and pulled the accused towards the exit from the premises. The deceased followed. At the gate, both the accused and the deceased continued their argument. They squared up to each other spoiling for a fight. Trish Katonha once more intervened and cautioned them against fighting. They both did not heed

the warning. The accused then struck the deceased on the head, on the legs and on the back with the wooden stick which he had earlier picked. The deceased bled from the head as a result. The deceased ran back into the premises where he picked up bricks with which he threatened to hit the accused. He did not do so as he was stopped by Aiti. He ran back to the exit. The accused followed him. Thereat he struck the accused with a brick and once more ran back into the premises' car park. The accused pursued him. In the car park a mob gathered and surrounded them. It urged the deceased to proceed to the police to report because he was wounded. The deceased obliged and went to Matapi Police Station to report. On 24 August 2022, the deceased's injuries got worse. He was in pain and sought assistance from one Tongoona Chitiki who escorted him to ZRP Mbare post. At that time he could hardly speak. He was referred to hospital where he was attended to but died shortly thereafter. Doctor Laurelien Marlagai Martinez examined his remains and concluded that the death was due to brain damage, perenchimatos haemorrhage and severe head trauma secondary to assault.

The accused denied the allegations. His defence was that he knew the deceased as a drug peddler in Mbare. Three days prior to his death, the deceased had stolen his money and sandals. The accused said he had been looking for the deceased since the night he stole from him. On 23 August 2022 around 1100 hours he then saw him at Ok Mbare walking towards the back of the complex. He followed him but once he noticed that he was being followed, the deceased took off. He ran towards the back of the shop. The accused said he pursued the deceased and found him talking to three employees at the shop who had already given him food. He demanded his sandals and money from the deceased. The deceased in turn mocked the accused that he slept at the veranda of Ok Mbare shop because he was homeless. That infuriated the accused who threateningly advanced towards the deceased still demanding his property. The deceased shouted back and a melee ensued. They both pushed and shoved each other. The deceased was holding a tin of baked beans with which he pointed at the accused. The accused picked up a broken broom handle which was about a metre long and threatened the deceased in return. One Kaitano, who during the trial turned out to be Aiti Chigwada tried to restrain them without success. He then advised them that management at the shop were against violence and as such the two of them had to go outside the premises to iron out their differences. The accused said he had given up the argument but as he walked towards the gate, the deceased followed him with a half brick in hand challenging him to a fight. He poked the accused in the face and belittled him as a small boy who could not beat him. The accused became angry and frustrated. He was still holding the mop handle whilst the deceased still

menacingly brandished the half brick. The accused then turned back intending to assault the deceased with the mop handle. The deceased turned his head as he tried to flee. The accused then hit him with the mop stick. Unfortunately, so alleged the accused, he did not check exactly where he struck the deceased. The assault happened fast and in the heat of the moment. The deceased then ran towards the gate where there was a pile of bricks. He threw down the half brick and picked a full one which he hurled towards the accused. It hit the accused on the hand. He said he fell down and when he rose, the deceased had ran out through the gate. He followed him and noticed that he had been apprehended by a mob. He observed that the deceased was bleeding from the head. The accused was also bleeding. The mob wanted to take them both to the police. The deceased however refused and was taken away by his friends. The next day, the accused said he did not come to work but when he did two days later he was advised by Kaitano that the man he had fought with had died. The news shocked him because he had only lightly assaulted him with a broken mop handle. In any case, when he had last seen him, the deceased was energetic and did not appear like he had been seriously injured. He rounded his defence by arguing that he did not intent to kill the deceased. There was no bad blood between them. They were both angry at each other and the fight was a light one in which they both had participated. He did not even foresee that death could result. He prayed for his acquittal.

State case

The prosecutor opened her case by applying for the formal admission of the evidence of witness Charles Dalufi, Tongoona Chitiki and Doctor Martinez in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The defence consented. The evidence of the three witnesses was therefore formally admitted in terms of the said provision as it appears on the state's summary of evidence. **Tongoona Chitiki's** testimony was basically that on 24 August 2022 around 0200 hours he was approached by the deceased who was distressed and could hardly speak. He then escorted the deceased to the police where he was referred to hospital. **Charles Dalufi** is a police officer. All which comes out of his testimony is that he was the investigating officer in the murder case. Likewise **Doctor Martinez's** testimony related to his official function as a pathologist. His findings were detailed in the post mortem report which was tendered by consent and admitted as exhibit 1 in the trial. The cause of death was not contentious. It is as stated earlier. The prosecutor also sought and obtained by consent, the production of the accused's confirmed, warned and cautioned statement. It became exhibit 2. It was confirmed by a magistrate at Mbare Court on 19 October 2022. In it the accused repeated the same issues which he stated in his defence outline.

Trish Katonha

She works at Ok supermarket. She was present when the accused and the deceased fought. The fight started in exactly the way described in the state papers and by the accused in his defence outline. She then advised the protagonists to go and fight outside the premises. The accused grabbed the deceased by the hand intending to drag him outside. The deceased did not want to be led by accused. The witness said she followed and continued to urge them to go and fight outside. At the main exit from the premises, the two engaged in a physical brawl. She said she couldn't recall who started the fight at the gate but the accused was calling on the deceased to climb down from the higher place he was standing on so that they could fight from a level field. When the brawl degenerated, the accused struck the deceased with the mop stick which was about a metre long and about ten centimetres thick. He struck him once on the legs, once on the back and once on the left side of the head. She said although she could not tell the amount of force which had been used she recalled that the stick broke into two during the assault. The deceased cried out that the accused had injured him. He rushed towards the exit and picked a brick which he intended to strike the accused with. The deceased was bleeding from the spot where he had been hit on the head. When the accused realised that the deceased had picked a brick, he ran towards the gate but when he was about to open the gate, the deceased threw the brick which hit the accused on the hand. They both went out of the premises pursuing each other. A mob had gathered outside the gate. They urged the deceased to get treatment because he had been injured. In the witness's view the injuries didn't seem that bad. The deceased was also drunk. Not much came out of the witness's cross examination by counsel for the accused.

Aiti Chigwada

His testimony was that the deceased was drunk. The accused was sober but was angry. The two were people he regularly interacted with. He then narrated the incident in identically the same way as witness Trish Katonha had described it. He saw the accused striking the deceased on the legs with the same mop stick described by Trish. He then went to empty the rubbish trolleys he was using for cleaning up the place. When he returned he observed that the deceased was bleeding from the head. He described the measurements of the stick. They were more or less the same as those estimated by Trish. He insisted that he saw the accused strike the deceased once although it was hard. He also said he saw the accused trying to leave but the deceased was blocking the accused's way and was holding a brick. Once again the cross examination of Aiti did not reveal anything significant.

With the evidence of the two witnesses and the testimonies which had earlier been admitted in terms of s 314, the prosecutor closed her case.

Defence case

The accused gave evidence in his defence. It was in a lot of ways a replica of his defence outline. He is a 19 year old. He worked casual jobs at Ok where he mainly off loaded and loaded delivery trucks. He insisted that contrary to what Trish had told the court he had only struck the deceased once. That witness, so he alleged, was running around calling her colleagues to assist so it is possible that she did not witness the entire brawl as it happened. He confirmed that the conflict arose from his suspicion that the deceased had stolen his property. He added that the deceased was an aggressive drug peddler who lived on the streets.

Common cause issues

Several issues are common cause in this trial. They are that:

- a. The deceased and the accused both worked casual jobs at Ok Mbare.
- b. They were both known to the two state witnesses Trish and Aiti who occasionally assisted them with food
- c. On the day in question a conflict arose between the deceased and the accused. The accused alleged that the deceased had stolen his property.
- d. The deceased was drunk. The accused wasn't but was very angry at the deceased.
- e. A physical fight erupted between the two after initially hurling insults at each other. It is not clear who actually started the brawl because the two of them had pushed, shoved and insulted each other for some time.
- f. The deceased assaulted the accused with a brick on the hands
- g. The accused assaulted the deceased at least twice once on the legs and once on the head. I conclude so because the two witnesses both agree that he assaulted him on the legs and the accused himself admits that he assaulted the deceased once on the head.
- h. When the brawl stopped, the deceased did not look like he was badly injured. He could walk on his own and could speak properly

Issue for determination

The only issue which arises for determination in this case is whether given the alleged aggression and provocation by the deceased, the accused harboured the intention to kill.

We have already indicated that the fight between the accused and the deceased bordered on a drunken brawl. The deceased was drunk and from the testimonies of the witnesses was

acting in a disorderly manner. The accused said he knew the deceased as a drug peddler because he traded a commodity called *skunky* which is similar to marijuana. The possibility that he was high on some substance or on alcohol is therefore high. The accused on the other hand was said to have been sober. He also said he was sober but was angered by the theft of his property allegedly by the deceased. When he confronted the deceased all he wanted was the return of his property. The deceased did not only deny stealing that property but also mocked the accused that he was a homeless person who slept in the open. The accused said that provoked him and resulted in the angry exchange between them and him assaulting the deceased as earlier explained.

The criminal Law Code provides that provocation is not a defence to all other crimes except in murder cases where it is a partial defence. Section 238 thereof provides that:

“Except as provided in section two hundred and thirty nine, and subject to any other enactment, provocation shall not be a defence to a crime but the court may regard it as mitigatory when assessing the sentence to be imposed for the crime.”

Section 239 provides that:-

“(1) If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realization referred to in section forty seven, the person shall be guilty of culpable homicide if, as a result of the provocation-

- (a) He or she does not have the intention or realization referred to in section forty-seven; or
- (b) He or she has the intention or realization referred to in section forty-seven and has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control.

(2) For the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that -

- (a) He or she did have the intention or realization referred to in section forty-seven; or
- (b) The provocation was not sufficient to make a reasonable person in the accused's position and circumstances lose his or her self-control;

the accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided in section two hundred and thirty eight.”

Clearly therefore provocation only works as a part defence to the crime of murder. In all other cases it can only be used to reduce an accused's moral blameworthiness which plays a part in sentencing.

In *S v Netsai Mafusire* HH 130/10 MUSAKWA J (as he then was) explained that in murder cases there is a two stage examination of the defence of provocation which a court must undertake. The first is for the court to ask itself whether at the time the accused alleges that he

reacted to the provocation, he/she had the intention to kill. If he/she did not harbour any intention to kill he/she cannot be convicted of murder but only of culpable homicide. If the accused intended to kill the court must proceed to determine whether the accused lost his or her self-control and killed intentionally in circumstances where a reasonable person, provoked to that magnitude would have also been susceptible to losing self-control. In such circumstances if the accused indeed lost self-control in circumstances where a reasonable person would have acted in the same manner the partial defence of provocation is available to the accused. He/she can only be convicted of culpable homicide. It is not enough to simply say a reasonable man would have lost self-control in the particular circumstances. Rather the accused must show through evidence that he indeed lost self-control. It follows therefore that the provocative words or action must be thoroughly interrogated to make the necessary determination.

In this case, the provocation alleged related to the deceased mocking the accused as a homeless person who slept in the open in addition to the deceased denying that he had stolen the accused's property. The accused himself alleged that the deceased was a homeless person who stayed on the streets of Mbare. It defies logic that he could be provoked about being homeless by a person who himself did not have a home. Further it is possible that the deceased knew in reality that the accused did not have a home because they both lived on the streets. It is unreasonable for anybody in those circumstances to get angry over such remarks to the extent of assaulting another to death. Further the fact that the deceased denied stealing from the accused was not supposed to make the accused angry. Instead a reasonable person who was convinced that the deceased was the thief who had stolen from him would have approached the police and made a report. As it stands that did not happen yet there is evidence that a police station or police base was very close to where the theft allegedly occurred. We conclude therefore that this kind of provocation was not sufficient enough to trigger rage in any reasonable person. Whether the accused was provoked therefore becomes immaterial.

There is doubt however that the accused ever intended to kill the deceased. Where an intention to kill is not expressly stated, it can be inferred from other things such as the weapon used or the force used to inflict harm on the deceased. There was in this case, no indication from the witnesses that when the accused accosted the deceased behind Ok shop or at any time thereafter he expressed an intention to kill the deceased. Even if we admitted that he was the aggressor in the fight (which we are still doubtful of) the fact that he used a mop handle roughly about a metre long and about 10 cm thick would show that the intention to murder was not apparent. He thrust that stick in the heat of the moment. He did not look where he was striking the deceased. The incident happened when he had equally been pursued by the deceased and

threatened with a half brick. The deceased had challenged him to a fight. It is against that background that the court is constrained to find that the accused at no time entertained the intention to kill the deceased. He did not even foresee that assaulting the deceased with the mop stick of the dimensions already described could lead to death. We have evidence that the deceased was in many ways equally aggressive. When both of them were directed to leave the back of the complex to go and resolve their dispute from outside the premises, the witnesses said the accused wanted to leave but the deceased did not. When the accused finally left the deceased pursued him. He hurled profanities and challenged the accused to a fight. Both of them were behaving irresponsibly. The fact that the deceased came out of the fight worse does not make the accused more culpable than the dead person. If he had been afforded the opportunity the deceased would have likely caused the same harm to the accused without necessarily intending to kill him.

Without the requisite intention, the accused can only be convicted of culpable homicide. But even that has to be proven beyond reasonable doubt. The offence of culpable homicide presupposes that the accused has no intention to kill. It further envisages the presence of negligence on the part of the accused. It follows therefore that where culpable homicide is premised on an assault, two tests must be satisfied. To begin with the assault must have been intentional. Where there was no assault for instance because the act was not voluntary, the matter must not go beyond that. In this case however, the accused admits that he assaulted the deceased. A court faced with that scenario must not rush to convict the accused simply because he intentionally assaulted the victim who unfortunately died as a result. The law requires that it be further proved that when the accused assaulted the deceased, he must have reasonably foreseen that death might result from his conduct. Or where he realised that death could occur he negligently failed to guard against the possibility of the occurrence of death. It follows therefore that what is important is the accused's negligent failure to foresee the possibility of death resulting from the assault and not the intention to assault. The question to ask in this case is therefore whether the accused would have reasonably foreseen that death could occur as a result of his conduct of assaulting the deceased with a one metre long by 10 cm thick mop stick in circumstances where both of them were engaged in a common fight. Our conclusion is that it was not reasonably foreseeable. As already indicated it was unfortunate that a life was needlessly lost but the point remains that the mop cannot by any standard be regarded as a lethal weapon which when used to strike an opponent once on the head could result in a fatality. The pathologist's findings add weight to this view. The surface wounds which he noted as

stated in para 16 of his affidavit were abrasions in the frontal and occipital regions. The skull had no fractures. Those findings are consistent with how the accused said he assaulted the deceased.

It is against that background that we are not convinced that prosecution managed to prove that the accused is guilty of murder beyond reasonable doubt as required by law. We have equally demonstrated the apprehension we have regarding proof that he is guilty of the competent verdict of culpable homicide. At the very least he can only be guilty of an assault. In the circumstances we direct as follows:

1. The accused is found not guilty and is acquitted of the charge of murder
2. He is however found guilty of the permissible verdict of assault as defined in s 89(1) of the Criminal Law Code.

Nyadzawo & Associates, accused's legal practitioners
National Prosecuting Authority, state's legal practitioners