

REPORTABLE (14)

SPENCER SITHOLE
v
THE STATE

SUPREME COURT OF ZIMBABWE
HARARE: 11 JANUARY 2024

I R. Mafirakureva, for the applicant

T M. Nyathi, for the respondent

IN CHAMBERS

MAVANGIRA JA:

1. This is an opposed chamber application for leave to appeal brought in terms of r 21 of the Supreme Court Rules, 2018

THE FACTS

2. The applicant was indicted before the High Court on a charge of murder as defined in s 47 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. The allegation against him was that on 11 April 2017 he caused the death of one Gugu Mkwanzani (the deceased) by striking him with a wooden stool. The applicant pleaded not guilty and a trial ensued.
3. The State led evidence from Josephine Morrow who testified that the applicant was her ex-boyfriend. She described her relationship with the applicant as one that was “*on and off*.” It was her testimony that when the deceased met his death their relationship was “*off*.” She denied the applicant’s allegation that the incident leading to the deceased’s death happened

after he had stumbled upon her and the deceased being intimate when he walked into her bedroom unannounced.

4. The State also led evidence from one Violet Mamova who testified that Josephine Morrow was her aunt. She knew the applicant as her aunt, Josephine's boyfriend. She testified that on the fateful day she heard screams coming from Josephine's bedroom. Josephine came running and told her that the applicant was assaulting the deceased. She was told to call the police and she did so using their gardener's phone. Her evidence was corroborated by that of Susan Mamova, also a niece to Josephine.
5. Siphon Moyo, Josephine's gardener, also testified and confirmed that his phone was used to call the police. He also said that he saw the deceased coming out of the house covered in blood. The deceased asked him to hide him as he was hurt. He hid the deceased in the servants' quarters.
6. David Sibanda, a member of the Zimbabwe Republic Police, also gave evidence. He said that he received a call to attend a scene at Josephine's house where he found the deceased in the servants' quarters. The deceased was unable to speak. He also recovered a blood-stained wooden stool. His evidence was corroborated by that of fellow police officers Dzikamai Mutiunovava and Tafara Sibanda.
7. The ambulance technician who took the deceased to the hospital also testified. His evidence was mainly on the injuries he observed on the deceased. The doctor who conducted the post-mortem examination and prepared the post-mortem report that recorded the cause of the deceased's death also testified. The cause of death was recorded as:

- “1. respiratory failure,
2. intrathoracic haemorrhage,

3. multiple rib fractures and
4. assault.”

8. The applicant’s defence was that he had spent the preceding day drinking beer with Josephine Morrow, his girlfriend. They thereafter parted ways and he went to his home. The following morning, he could not find his car keys and he assumed that he had left the keys in Josephine’s car. He proceeded to Josephine’s house and walked straight into her bedroom where he found her being intimate with the deceased. He asked the two why they were making a fool of him. He alleged that the deceased and Josephine provoked him by asking him if he was married to her. A fight broke out. The deceased wanted to strike him with a wooden stool. He disarmed the deceased and struck him with the wooden stool several times. He submitted that he did not intend to cause the death of the deceased.
9. After hearing evidence from the State and defence witnesses, the court *a quo* accepted Josephine’s version on the status of her relationship with the applicant as at the time of the incident. The court accepted that the two had been seeing each other for six years, had no children together and were living apart. Furthermore, that it was a causal relationship characterised by numerous fights and disagreements that led to occasional break-ups followed by reconciliation. Although they loved each other, they had fundamental differences that made marriage impossible. Josephine was legally married to another man, although they were on separation at the time, and had her own children; she did not want to have children with the applicant. On the other hand, the applicant was single and wanted to have children. They did not jointly own any movable or immovable property.
10. The court also noted the following as common cause facts. The applicant and the deceased had known each other for a period of six months before the incident occurred. The deceased

was in love with Josephine. On 10 April 2017, the applicant and Josephine were drinking beer together until late at night. On 11 April 2017, in the morning, Josephine and the deceased were in bed, naked, at the former's house. The applicant entered the bedroom which was unlocked and shouted the following words at them: "*you guys have been making me a fool out of this!*" The deceased got out of bed and put on his boxer shorts. The applicant assaulted the deceased with clenched fists on the face several times. He also struck the deceased with a dressing table stool all over the body several times. The deceased sustained multiple rib fractures that caused intrathoracic haemorrhage and respiratory failure. The deceased died from these injuries.

11. The court also pertinently found the following facts as proven. Josephine was in love with the deceased at the time of the murder. On 11 April 2017, the applicant, who had a hangover, went to Josephine's house. Upon arrival, despite seeing the gardener working, he jumped over the gate and entered the premises. He entered Josephine's unlocked bedroom and found her and the deceased in bed, naked. He was angered and proceeded to assault the deceased with clenched fists on the face several times causing him to bleed from the nose and mouth. The deceased did not get an opportunity to fight back. The applicant then picked up a stool and struck the deceased with it repeatedly and indiscriminately while the deceased was lying down. Josephine screamed and urged the applicant to stop assaulting the deceased. He stopped. The deceased sustained the serious injuries described in the post mortem report and from which he died.
12. The court *a quo* found that the applicant did not have actual intent to kill the deceased. It found that the applicant realised that there was a real risk or possibility that his conduct might give rise to the death of the deceased but he continued to assault the deceased despite

realising that risk or possibility. The court also found that the applicant “did not lose his self-control but acted consciously and voluntarily despite the provocation.” Ultimately, the court found the applicant guilty of murder with constructive intent and sentenced him to 17 years’ imprisonment.

13. Dissatisfied with the decision of the court *a quo*, the applicant wished to appeal. The time frame for seeking leave to appeal against the decision of the court *a quo* having lapsed, the applicant made an application in the court *a quo* for condonation for non-compliance with the rules and for leave to appeal. The application was dismissed. The reasons for the dismissal of the application are not part of the record. The order of the court *a quo* reads:

“IT IS ORDERED THAT

The application for leave to file and (sic) application for condonation and leave to appeal in person is hereby dismissed, and (sic) leave to prosecute appeal in person is hereby dismissed.

1. The delay of 3 years and four months from the date of sentence is inordinate.
2. The Applicant’s prospects of success against both conviction and sentence are non-existent.
3. The grounds of appeal all relate to issues that were extensively discussed in the judgment.
4. The Applicant is merely re-cycling arguments that were found to be without merit
5. The interests of justice require that the application which is without merit be dismissed.”

14. Following dismissal of the said application, the applicant lodged the present application seeking the following relief:

“RELIEF SOUGHT

1. The application for condonation and extension of time within which to file leave to appeal be and hereby (sic) granted.

2. The applicant be and hereby (*sic*) ordered to file his application for leave to appeal within 10 days of granting of this order.
3. No order as to costs.”

15. I note in passing that the applicant has not done a composite application to simultaneously seek not only condonation and an extension of time but also leave to appeal. In para 2 of the relief that he seeks, he seeks an order that will enable him to file an application for leave to appeal. This judgment will therefore be confined to the determination of the application for the relief sought as reflected in para 14 above.

THE LAW AND ITS APPLICATION TO THE FACTS

16. In an application of this nature, the applicant should satisfy the court that he or she has a reasonable explanation for the delay and also establish good prospects of success. This position is well captured in *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) where the following are set out as the relevant factors for consideration:

- (a) that the delay was not inordinate, having regard to the circumstances of the case;
- (b) that there is a reasonable explanation for the delay;
- (c) that the prospects of success should the application be granted are good; and
- (d) the possible prejudice to the other party should the application be granted.

17. Further, in *Kombayi v Berkout* 1988(1) ZLR 53 (SC) the following was stated:

“The broad principles the Court will follow in determining whether to condone the late noting of an appeal are: the extent of the delay; the reasonableness of the explanation for the delay; and the prospects of success. If the tardiness of the applicant is extreme, condonation will be granted only on his showing good grounds for the success of his appeal.”

LENGTH OF DELAY AND REASONABLENESS OF EXPLANATION THEREFOR

18. The judgement of the court *a quo* was handed down on 21 August 2018, the applicant ought to have applied for leave to appeal within ten days from the date of the judgment. He failed to do so. On 2 February 2022 he applied to the court *a quo* under HCA 5/22, for condonation for the non-compliance with the rules and for leave to prosecute his appeal in person. As reflected in para 13 above, the application was dismissed on 20 February 2023. In terms of r 20 (1) of the Supreme Court Rules, 2018, the applicant ought to have approached this Court within ten days from the date of the dismissal of his application. He only did so on 20 December 2023. This was ten months after the lapse of the time limit. On the face of it, the delay is inordinate.
19. The explanation tendered by the applicant, for the delay, is that he did not have any funds with which to pay for the services of legal practitioners and that he had to engage his relatives in Bulawayo and in the United Kingdom to assist him with same. The requested assistance only came through on 11 December 2023.
20. The applicant also attributes the delay to the fact that, unknown to him, the court *a quo* had on 20 February, 2023, issued an order dismissing his application for leave to prosecute his appeal in person. He claims that he only became aware of the order on 29 June 2023; his erstwhile legal practitioner having allegedly not advised him of the order at the time that it was issued. When his current legal practitioner advised him about it, he was already way out of time. He attributes the resultant delay in filing this application to these two factors. Taking them into account, I am inclined to find that the explanation for the delay is, in the circumstances, reasonable.

WHETHER OR NOT THE APPEAL HAS GOOD PROSPECTS OF SUCCESS

1. *Whether or not the court a quo erred in finding the applicant guilty of murder with constructive intent.*
21. In addition to having a satisfactory explanation for the delay that has necessitated the application, the applicant must also establish good prospects of success on appeal
22. In his application, made, in terms of the rules of this Court, on Form 4, the applicant raises two grounds of appeal in respect of his intended appeal, to wit:
 - “1. The court *a quo* erred in finding the appellant guilty of murder with constructive intent where the essential element of intention had not been established beyond reasonable doubt.
 2. The court *a quo* erred in failing to apply to the facts of the matter the provisions of s 239 (1) of the Criminal Law (Codification and Reform) Act to the effect that the appellant had lost his self-control, where provocation would sufficiently make a reasonable person in his position and circumstances lose his self-control.”
23. The applicant alleges that the court *a quo* erred in finding him guilty of murder with constructive intent in circumstances where intention was not proved. Constructive intent has been defined by the courts in various cases.

In *Mugwanda v The State* 2002 (1) ZLR 574 at 581D – F, the following was enunciated:

- “ On the basis of the above authorities it follows that for a trial court to return a verdict of murder with actual intent it must be satisfied beyond reasonable doubt that: -
- (a) either the accused desired to bring about the death of his victim and succeeded in completing his purpose; or
 - (b) while pursuing another objective foresees the death of his victim as a substantially certain result of that activity and proceeds regardless.
On the other hand, 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). In the case of culpable homicide the test is – he ought to, as a reasonable man, have foreseen the death of the deceased.”

24. In the case of *S v Humphreys* 2015 (1) SA 491 (SCA) at para 13 the court had the following to say:

“... like any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.”

25. As aptly stated by the court *a quo* at p 14 of its judgment:

“... when a man lifts up a weapon like the stool in *casu*, (weighing 6.6kg and made of very hard and thick wood), and strikes a human body several times with it on the chest and back causing numerous fractures of the ribs, it would be artificial to say the least of it, to hold that he did not realise that his conduct might give rise to the death of the deceased. The evidence shows that the accused realised that the stool was a dangerous weapon which he did not want used against himself. Despite overpowering the deceased, the accused continued to recklessly thrash a man lying helplessly before him and then to repeat it several times. The resultant bilateral rib fracture caused massive intrathoracic haemorrhage. In these circumstances, the conclusion is inescapable that the accused realised that there was a real risk or possibility that his conduct may cause death but continued to engage in that conduct despite the risk or possibility.”

26. In addition to the weight and dimensions of the stool being placed before the court *a quo*, the court also had the added advantage of seeing it. It thus made holistic findings of fact based on the oral as well as the physical evidence that was placed before it. It is trite that appeal courts will not lightly interfere with factual findings made by a trial court which has had such benefit and has had the added advantage of what one may describe as the “ambience” of the trial proceedings including, but not limited to, the visual experience of exhibits and the demeanor of the witnesses.

27. In the light of the above observations, the court *a quo* cannot be faulted for convicting the applicant of murder with constructive intent. Although the applicant did not have the actual

intent to bring about the death of the deceased, such was a foreseeable result of his actions and the applicant therefore must have foreseen that death could result. On that account, the intended appeal does not have good prospects of success.

2. Whether or not the court a quo erred in finding that the applicant did not lose self-control as a result of provocation.

28. The applicant asserts that the court *a quo* erred by not finding that he lost self-control as a result of provocation. Section 239 of the Criminal Law Codification and Reform Act, [Chapter 9:23] deals with provocation as a partial defence to murder. The section provides as follows:

“239 When provocation a partial defence to murder

- (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 47, 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 but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances accused of murder 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 subs (1) but the court may regard the provocation as mitigatory as provided in section 238.”

29. In interpreting the above provision, the High Court in the case of *The State v Mugarapanyama* HH 211-23 held that:

“The provision provides that provocation can be a partial defence to murder. In murder cases there is a two-stage approach in applying the defence. The first stage is to decide whether the accused had the intention to kill or the realization that death could occur when he or she reacted to the provocation. If the accused did not have the intention or realization, he or she will not be convicted of murder, but culpable homicide. If the accused had the intention to kill or realization that death could occur, the court will proceed to the second stage, which is to decide whether the accused lost his or her self-control and killed the deceased in circumstances where even a reasonable person faced with this extent of provocation would also have lost self-control. If the accused lost control and a reasonable person would also have lost control, the accused will have a partial defence and will be found guilty of culpable homicide:”

30. In *casu*, the applicant could not have lost self-control as a result of the alleged provocation by the deceased. He was not married to Josephine Morrow. Josephine was his ex-girlfriend. The court believed the evidence of Josephine to the effect that when the incident occurred, their relationship had ended. There was therefore no valid reason or justification for the applicant to be provoked or angered as their relationship had ended. Josephine had moved on. Furthermore, the applicant’s conduct of jumping over the gate to gain entry into the premises seems to suggest that he might have already been in a belligerent state when he went to Josephine’s house. However, this aspect does not appear to have been interrogated during the trial. For that reason, not much can be read into this if taken in isolation. Nevertheless, the lingering questions with regard to that conduct remain, particularly when the said conduct is viewed in the context of what then transpired. This is so because he could have asked the gardener to open it for him or he could have opened it for himself in

view of the gardener's evidence that although it was closed, the gate was not locked. In the circumstances, the court *a quo* cannot be faulted in its finding that the applicant did not lose self-control, even without the consideration of the applicant's conduct in jumping over the gate. In the result, although the applicant has a reasonable explanation for the inordinate delay, the intended application does not have good prospects of success because the ultimately intended appeal has no prospects of success on the merits. The application thus has no merit.

31. It is accordingly ordered as follows:

“The application be and is hereby dismissed.”

Moyo & Nyoni Legal Practice, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners