

THE STATE

Versus

HERBERT MTHIMKHULU

IN THE HIGH COURT OF ZIMBABWE

MOYO J with Assessors Mr J. Sobantu & Mr E. Mashingaidze

BULAWAYO 10 MARCH & 25 MARCH 2022

Criminal Trial

Guveya for the state

M. Manenji for the accused

MOYO J: The accused person faces a charge of murder it being alleged that on the 8th of August 2020 at Golide Homestead Village 3, Springs Farm, Bulawayo he unlawfully caused the death of Nokwanda Dube by hitting her several times with a black piece of hosepipe all over her body. The accused denies the charge but tendered a lenient plea of culpable. The following exhibits were tendered into the court record and they were all duly marked.

- The state summary
- The accused's defence outline
- The post mortem report
- The accused's confirmed warned and cautioned statement
- The hosepipe that was allegedly used in the commission of the offence
- The evidence of the following witnesses was admitted into the court record as it appears in the state summary in accordance with the law.

Anna Dumburashe

Zanele Muchatura

Abraham Dapi

Jonathan Matsunge

Talent Ncube

Craig Ignasio Matirasa

Dr S. Pesanai

The state led *viva voce* evidence from 2 witnesses. The 1st to testify was Caroline Mthimkhulu. She told the court that accused is her brother and the deceased was her sister-in-law. She told the court that her aunt one Alice Jele lied to the accused person that deceased had a boyfriend. Deceased was accused's wife. The 2 then had a misunderstanding and the accused called deceased to the boy's bedroom. He then assaulted her. She tried to restrain them but she failed. The deceased was seated while accused was assaulting her and she was screaming. She did not see what accused used to assault the deceased. Later Lyon Nyathi came and restrained them. She told the court that the assault took about 20 minutes. Deceased then said she could not walk because she felt dizzy. She then started vomiting and also breathing heavily. She then passed on. She said deceased died in her hands. She confirmed that she knew the hosepipe that was tendered in court and marked exhibit 5 since accused carried it with him when he called deceased to the bedroom. She confirmed under cross-examination that accused was visibly angry. These were the material aspects of this witness' evidence.

The 2nd state witness was Lyon Nyathi who told the court that he is married to the 1st state witness. He said that he is the one who restrained the accused from assaulting the deceased after his wife had failed to restrain him. He said accused assaulted deceased with a hosepipe. He said he did not see how accused assaulted the deceased as he found accused questioning deceased when he entered the room where they were. He said that he would say the assault took about 30 minutes. He said that they then left for their homestead. He confirmed that the hosepipe tendered in this court was the one used to assault the deceased. Under cross-

examination he confirmed that accused was visibly angry because he had been informed that the deceased had extra-marital affairs. Those were the material aspects of this witness' evidence. The state then closed its case.

The post mortem report gave the cause of death as cerebral oedema, intramuscular haemorrhage, assault.

The accused person gave evidence for the defence. He told the court that on the 8th of August 2020 his aunt told him that his wife (the deceased) had committed adultery. At that time deceased had gone to fetch some water. He got angry and called deceased when she returned. He took a hosepipe and assaulted her. When she questioned her deceased answered by saying whoever told you, told you so let it be. He said the 1st state witness and her aunt came and restrained him and he stopped assaulting her. He said the 2nd state witness and Oscar also came and further restrained him and he stopped. Deceased then carried her bucket and they went to their house. She then said she was not feeling well and accused then called the 1st state witness. The 1st witness came, made some porridge for the deceased but she vomited when she started eating, then she passed on. He said that he thought he was reprimanding her. Under cross-examination he said that he chastised the deceased whilst angry. He also told the court that he picked the hosepipe in the yard. He said that he made a mistake and that he thought that he was chastising her. When questioned on that he caused deceased's death he answered by saying he was apologetic as he did not expect that it would get to that. He was further questioned on that from Alice Jele's homestead, deceased walked on her own and carried a bucket of water but that the 1st state witness later found her serious and unable to hold herself when she was now at accused's homestead. Accused answered by saying he did not know what worsened her since she had complained of stomach pains in the morning. He

confirmed that he used the hosepipe that was tendered in court to assault the deceased. The defence case was then closed.

What then is accused's guilty of?

The state counsel submitted that accused must be found guilty of murder since he had the requisite legal intention and that therefore he should be convicted of murder with constructive intent. The state counsel submitted that Lyon Nyathi confirmed that he was told by Caroline Mthimkhulu that the assault had further occurred at accused's homestead and that therefore the assault was prolonged and indiscriminate. The defence counsel submitted that the accused should be convicted of culpable homicide since he acted out of anger and that the assault was not prolonged. He said Lyon Nyathi confirmed that he was not sure if the assault had continued at accused's homestead. He further submitted that the weapon used showed lack of intention to commit murder on accused's part.

From the facts we now have to analyse if there is any proof beyond a reasonable doubt that the accused person did have the legal intention to commit murder.

1. A misunderstanding occurred between accused and deceased after accused had been told that deceased had an extra-marital affair.
2. Accused became angry
3. Accused picked a hosepipe that was lying in the yard and went with deceased into the boy's bedroom and assaulted her for about 20 – 30 minutes.
4. Accused and deceased left for accused's homestead wherein deceased became worse and later died.
5. We have no evidence of a further assault on the deceased as both eye-witnesses told the court they did not witness any. Neither do we have any proven facts upon which this

court can infer further assaults. There is no fact in the court record that establishes that point as such the submission by the state counsel that such a fact was proven by Lyon Nyathi's evidence is not correct.

From the facts, there is no evidence to the effect that accused had the requisite legal intention to commit murder looking at the totality of the circumstances of this case that is, the fact that the parties had a misunderstanding, accused got angry, the nature of the weapon that he used as well as the duration of the assault which was about 20 – 30 minutes. This court cannot reasonably hold that beating a person with a hosepipe for about 20 – 30 minutes will be so reckless that death would be reasonably foreseeable as a possibility. The accused speaking for himself said it is a reprimand gone wrong. The state has not led any evidence to rebut that nor to prove beyond a reasonable doubt that accused saw death as a real possibility but nonetheless continued with the assault.

Professor Feltoe in his Guide to Criminal Law in Zimbabwe 2005 Edition at page 96 states that accused can only be convicted of murder if the only reasonable inference that can be drawn from the facts is that he had the legal intention to kill. He states further that in deciding upon whether there was legal intention all the factual evidence which bears upon and could have affected accused's perception, power of judgment and state of mind as well as foresight at the time he committed the crime must be most carefully scrutinized. He goes further to state that factors such as intoxication, provocation, level of intelligence, personality etc would obviously be relevant. It is therefore this court's view that accused's anger, the nature of the weapon he used, the duration of the assault all create doubt as to whether he did have the requisite legal intention. In our criminal justice system, where there is a doubt, the accused person benefits.

It is for these reasons that the accused will be found not guilty of murder but instead will be convicted of 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 spent 1 year 7 months in remand prison. He is a sole breadwinner. He has shown remorse in this court. He had been angered by the information given to him by his aunt. However, a life was unnecessarily lost under the most unfortunate of circumstances. Domestic violence is a cancer that is growing in our society. Lives are being lost violently in households where people fail to resolve disputes in a civil manner. A sentence that will send a message out there that violence as a way of life cannot be tolerated by these courts should be given. Ordinarily, the accused was going to be sentenced to about 7 years in prison but because he has already spent more than a year in remand prison this court will discount the prison term. It is for these reasons that accused will be sentenced to 5 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Nyawo Ruzive Legal Practice, accused's legal practitioners