

THE STATE

Versus

MARTIN CHIPANDE

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr. T Ndlovu and Mr. G Maphosa
HWANGE 11 JUNE 2021

Criminal Trial

Ms. M Munsaka, for the state
Ms. C Manyeza, for the accused

KABASA J: The accused appeared before us on a charge of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. He pleaded not guilty to murder but tendered a limited plea to culpable homicide. The state did not accept the limited plea.

The allegations are that on 20th March 2019 at about 2300 hours the deceased visited accused's 18-year-old stepdaughter in her room. A dispute arose between the accused and the deceased with the accused accusing the deceased of being a thief. The accused then attacked the deceased with a screw driver several times on the head. The following day the deceased was found dead a kilometre away from the accused's home with head injuries and a gunshot wound to the head. He had a pistol in his right hand.

In his defence the accused explained that he had come back from his garden when someone tried to open the door to his bedroom hut. His daughter professed ignorance of who that person was. The accused then went to his daughter's bedroom hut to ask for kitchen keys and realised there was someone in her room. That person demanded for money and threatened to kill the accused. He then attacked the accused whereupon he called out to his neighbours, Soul and Ngqabuto to come to his aid. The intruder left but they pursued him. They decided to abandon the pursuit when they failed to locate him. As he walked back to his home the intruder who had been hiding in the bushes attacked him, pulled out a gun and threatened to kill him. The accused stabbed him with a screw driver and ran away.

The following morning the deceased was found dead. The accused persisted with his prayer that he be found guilty of culpable homicide.

In presenting its case the state asked that Soul and Ngqabuto's statements be expunged from the record and they were so expunged.

The state proceeded to produce the following which were accepted into evidence and duly marked as exhibits: -

- Exhibit 1 - accused's confirmed warned and cautioned statement
- Exhibit 2 - The post-mortem report
- Exhibit 3 - A screw driver with a green handle, whose dimensions are 0,032 kg in weight, 16 cm length, circumference of the shaft 2 cm and circumference of the handle 6 cm.
- Exhibit 4 - An iron hammer whose dimensions are 1,408 kg weight, 27 cm length of the handle, 2 cm width of the handle, 10 cm length of the head and 13 cm circumference of the head.
- Exhibit 5 - A firearm certificate in deceased's name.
- Exhibit 6 - A pistol.
- Exhibit 7 - A ballistic report which showed that the firearm had been fired but it could not be determined when it was so fired.

The statements of 4 witnesses were also admitted into evidence in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07.

Evidence was then led from 2 witnesses, Beatrice Moyo who is accused's step daughter and the Investigating Officer.

Beatrice did not know what happened after the deceased was pursued by the accused in the company of Soul and Ngqabuto. Her evidence was to the effect that the deceased had visited her that afternoon and they agreed to meet that night. The deceased was supposed to come to her room but he had gone to her parents' room first where he tried to open the

door..When he eventually came to her room the accused inquired as to who the witness was talking to but she said she was on the phone. The accused then came to her room with a torch and the deceased left. The two then fought and she then heard the accused asking the deceased not to hold him like that as he was hurting him. The accused then called out to Soul for help and when Soul arrived the deceased fled. Accused, Soul and Ngqabuto pursued him armed with a hammer and an axe. The accused had made efforts to locate his catapult but failed to locate it. She did not see when they returned but the following morning she learnt of the deceased's death.

She then overheard the accused telling Soul and Ngqabuto that if “nothing of this is mentioned I will give you my wife's bank card.”

The witness appeared to be relating what she knew to have happened and nothing else. She impressed as a credible witness

Whilst her evidence established the fight between the accused and the deceased and the fact that accused appeared to have been on the receiving end, she was not able to shed light on what transpired after the accused and the 2 men pursued the deceased.

The Investigating Officer's evidence was not that helpful either. He described what he saw at the scene and went on to surmise what he thought had happened. His opinion however could not be accepted as he was not giving an expert opinion.

With this witness's evidence the state closed its case. Following an adjournment, the state addressed the court highlighting the inadequacy of the evidence to prove murder and that as a result the state and the defence had come up with a statement of agreed facts. The state was now accepting the limited plea.

We were of the view that the state's concession was properly made. This is why: -

- 1) The deceased had come to the accused's home around midnight, tried to open his bedroom door before going to his 18-year-old daughter's bedroom hut.
- 2) The 56-year-old deceased had fought the accused when he sought to find out who his daughter was with in her bedroom.
- 3) The deceased had the upper hand resulting in the accused crying out that he was hurting him and calling out to Soul for help.

- 4) The circumstances surrounding the use of the firearm and who used it remained a mystery. The firearm belonged to the deceased.
- 5) The circumstantial evidence was not such that it could be said the proved facts called for the drawing of only one reasonable inference which inference was consistent with such proved facts. (R v Blom 1932 AD 202)
- 6) The post-mortem gave the cause of death as
 - (a) Superior central nervous lesion.
 - (b) Turkish chair fracture with pituitary lesion.
 - (c) Gunshot (pistol)

The use of a hammer and screwdriver was not discounted as capable of inflicting the injuries observed by the doctor. The doctor also surmised that the deceased could not have shot himself because “he is said to be right-handed.” Such conclusion was not based on the medical examination but on what the doctor was told.

- 7) The police do not appear to have dusted for finger prints on the firearm.
- 8) No attempts were made to dust for possible gunpowder residue on the accused or any of the 2 men he pursued deceased with and also on the deceased in whose right hand the firearm was recovered.

The paucity of evidence as to what happened between the time of the pursuit and the discovery of the deceased’s body made a conviction on murder nigh impossible.

The state’s decision to expunge Soul and Ngqabuto’s evidence left the accused’s version of events the only account there was regarding the circumstances leading to the deceased’s death.

It is because of the foregoing that we held that the state’s acceptance of the limited plea was proper in the circumstances.

The accused was accordingly found Not Guilty of murder but guilty of culpable homicide.

Sentence

The accused is a 48-year-old offender who stands convicted of the lesser crime of culpable homicide which he pleaded guilty to. By pleading guilty to the appropriate charge, he showed contrition and took responsibility for his actions.

The deceased in a way showed lack of respect by going to another man's home in the dead of night, trying to open that man's bedroom hut before proceeding to his 18-year-old daughter's bedroom. He was 56 years old, 10 years older than the accused. He was therefore old enough to be accused's daughter's father. He manhandled the accused at his homestead after being caught with the accused's 18-year-old daughter.

It can be said the deceased was the author of his own demise.

The accused has been in pre-trial incarceration for 2 years 3 months. One cannot underestimate his anxiety over such a long period awaiting his fate.

The accused will have to live with the knowledge that he took someone's life and contend with the stigma that goes with that.

That said, the fact is, a life was lost. People ought to respect the sanctity of life. The deceased had walked away and the accused should not have pursued him.

Life is a gift and once taken away it cannot be replaced. People must learn to shun violence and learn to talk and resolve issues amicably.

Culpable homicide is a serious offence and the courts must be seen to show that by imposing sentences that reflect the seriousness of such offences. Society expects no less.

The use of a hammer and a screw driver to strike a human being on the head speaks of some degree of callousness.

Were it not for the fact that the accused has spent 2 years 3 months in pre-trial incarceration, a sentence of 10 years would have been appropriate.

After considering the mitigatory factors as well as the aggravating ones, we are of the view that the following sentence will meet the justice of the case;

8 years imprisonment of which 2 years is suspended for 5 years on condition the accused does not within that period commit any offence of which an assault on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

Effective: - 6 years imprisonment.

*National Prosecuting Authority, state's legal practitioners
Mashindi and Associates, accused's legal practitioners*