

THE STATE

Versus

MANDLA MOYO

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr J. Sobantu & Mr E. Mashingayidze
BULAWAYO 16 & 17 SEPTEMBER 2021

Criminal Trial

T. Maduma for the state

B. Mhandire for the accused

MAKONESE J: The accused is charged with murder in contravention of section 47 of the Criminal Law (Codification & Reform) Act (Chapter 9:23). It being alleged that on the 11th of July 2020 and at house number 1261 Old Luveve, Bulawayo. The accused stabbed one Nkosinathi Ndlovu once in the chest with a knife intending to cause his death or realizing that there was a real risk or possibility that his conduct may cause the death of his victim.

The accused denies the charge of murder and states that he had no intention to cause the death of the deceased. Accused tendered a limited plea of guilty with respect of culpable homicide. The state did not accept the limited plea. The matter proceeded to trial.

The accused was aged 35 years and deceased 31 years old at the relevant time. The deceased resided at 1261 Old Luveve, Bulawayo. The accused and the deceased were known to each other before the fateful day. The accused once rented a room at deceased's place. On the evening of the 11th July 2020 and at around 19:30 hours the accused arrived at 1261 Old Luveve, Bulawayo. He was selling some mobile phones. At the house was Musa Dube, Bongani Msimanga and Moffat Ngwenya. These men were in Moffat Ngwenya's room. The men were about to have their evening meal when the accused arrived. Accused washed his hands and joined in the meal. Shortly thereafter, accused left the house and went to buy some vegetables. The accused intended to have a second meal. As soon as accused got back to the house, deceased announced his arrival. Deceased accused the accused of stealing his cellphone. Accused responded and indicated that deceased owed him a sum of R500. Accused stated

that deceased was attempting to avoid settling the debt. A misunderstanding arose. Deceased demanded that accused should leave the house and get outside so that he could search him. Initially accused refused to co-operate but deceased pulled him out of the house. A fight ensued and accused and deceased exchanged blows. None of the men who were in the house went outside. Accused produced a knife and stabbed the deceased once in the chest. The deceased shouted out saying “*NaSimba naSimba, wangibulala*”. (This meant “Na Simba Na Simba he has killed me”) “NaSimba” was in apparent reference to a neighbour’s wife. Deceased’s colleagues got outside the house and found deceased lying by the verandah with a chest stab wound. The accused had fled the scene. Efforts to locate the accused proved fruitless. The deceased died as a result of injuries sustained in the assault. The matter was reported to the police. Accused was arrested on 13th of July at Highmount suburb, Bulawayo, following information received by police officers.

The state tendered an outline of the state case narrating the events leading to the murder. The facts are largely common cause and beyond dispute. The accused produced a defence outline in support of his case. The defence outline states in part as follows:

- “2. Accused will further state that the deceased entered Moffat Ngwenya’s room and found him with Musa Dube and Bongani Msimanga drinking beer. The deceased started accusing the accused of stealing his cellphone. The accused then demanded payment of R500 which was owed by the deceased.
3. After a few minutes, the deceased grabbed the accused by the collar and pulled him outside whereafter he started assaulting the accused with fists. The accused person retaliated and the two began to fight. A scuffle ensued between the two and the deceased dropped a knife which both began to fight for. During the scuffle, the accused person then accidentally stabbed the deceased person on the chest and he fell down.
4. Out of pain and shock, the accused person fled from the scene after seeing blood oozing from the deceased.
5. The accused was incapable of possessing the requisite intention required to sustain the charge of murder preferred by the state against him. If anything, the accused person was attempting to prevent himself from being stabbed by the deceased and

accidentally stabbed him, hence the plea of guilty to a charge of culpable homicide”.

The state tendered into the record of proceedings a post mortem report compiled by Dr S. Pesanai, a pathologist based at United Bulawayo Hospitals. The cause of death as opined by the doctor is:

- (a) Haemorrhagic shock
- (b) Stab wound

One marks of violence the report indicates that the following was observed:

1. Stab wound (5 x 1.5cm) clean margins located 8cm from the left nipple, 3cm from the midline 9cm from collar bone. Direction front to back, left to right, top to bottom.
2. Perforated percardium
3. Perforated right ventricle (4cm) laceration

The State case

The state led *viva voce* evidence from a single witness before closing its case.

MOFFAT SIBANDA testified that he was a tenant at 1261 Old Luveve, Bulawayo on the day of the incident. He stated that around 1930 hours he was at his house in the company of **Bongani Msimanga, Musa Dube**. As they were preparing to have their meal the accused arrived at the scene. He claimed that he was hungry and that he wanted to eat with them. At first the witness was taken aback by the conduct of the accused. His colleagues, however reminded him who accused was and used his nickname known as “*Ma 50*”. After finishing all the food accused, indicated that he wanted to have a second meal. Accused left the house to get some vegetables. As soon as the accused got back the deceased arrived at the house. The witness indicated that deceased alleged that the accused had stolen his mobile phone. This witness confirmed that at that time the accused was actually selling some phones which were in his possession. Deceased continued his assertions that accused had stolen his phone and that he wanted to search him. Deceased pulled the accused outside the house and the door slammed behind him as accused got outside. The witness was adamant that he did not witness what occurred outside before accused and the deceased. The witness stated that after a short period of time he heard the deceased screaming saying he had been stabbed. The witness and his

colleagues went outside and noticed that the deceased was on the ground. He was bleeding profusely. He had been stabbed. The accused was nowhere in sight. The witness and other persons searched for the accused in the vicinity but could not locate him.

The witness stuck to his version under cross-examination. The witness flatly refused to comment on how the deceased met his death. He testified that he was inside his room and did not have anything to say about what could have happened when deceased and accused were outside the house. This witness was a credible and consistent witness. The court had no hesitation in accepting his testimony.

The state made an application in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07) for the evidence of certain witness to be admitted into the record by way of formal admissions.

The evidence of the following witnesses as it appears in the summary of the state case was accordingly admitted by way of formal admissions;

- (a) Bongani Msimanga
- (b) Musa Dube
- (c) Clayton Moyo
- (d) Matirasa Mukuwapasi
- (e) Lucky Ndlovu
- (f) Zondiwe Bhebhe
- (g) Peas Nyathi
- (h) Doctor S. Pesanai

The state closed its case without leading further evidence.

Defence case

The accused elected to give evidence under oath. Accused maintained his version as contained in the defence outline. He testified that on the day in question he arrived at 1261 Old Luveve, Bulawayo around 1930 hours. He had been selling phones for the greater part of the day around the townships. He offered his phones for sale but Moffat Ngwenya and his colleagues indicated that they did not have money. The accused said that he joined Moffat Ngwenya, Musa Dube and Bongani Msimanga in a meal they were having. Soon after the meal accused left the house to buy some vegetables for a second meal. At that stage, as soon as he got back to Moffat Ngwenya's house deceased arrived at the scene. The deceased accused him of having stolen his phone. Accused indicated that deceased was attempting to block him from

claiming an amount of R500 owed to him. The deceased became aggressive and dragged him out of the house. As soon as the parties got outside, a fight ensued. The parties exchanged blows. Deceased struck the accused with a brick on the forehead and on the left side of his chest. During the scuffle the accused person observed that deceased had a kitchen knife. The kitchen knife fell to the ground. A struggle for the knife commenced. Accused states that he managed to take possession of the knife. In a bid to ward off the attack, the accused states that he accidentally stabbed the deceased in the chest region. Accused states that he used moderate force in delivering the blow. The accused states that when he struck the deceased he fell down and then got up. When he realized that blood was oozing from the deceased, he says he panicked and fled the scene. Accused then took possession of the kitchen knife which he threw away. The knife used in the murder was never recovered. Accused was not an honest witness and contradicted himself in material respects.

Analysis of the evidence

The facts of this matter are narrow. It is common cause that accused stabbed the deceased once in the chest. It is admitted by the accused that he delivered one fatal blow in the chest. Accused fell down. There is no dispute that the deceased succumbed to injuries sustained in the knife attack. The stab wound was deep and penetrating. The stab wound perforated the pericardium and the right ventricle. The only logical conclusion is that the accused applied excessive force in stabbing his victim. The accused was not being truthful when he testified that he used moderate force.

Mr Muduma appearing for the state persuaded the court to find the accused guilty of murder with constructive intent. He argued that whilst accused did not have the requisite *mens rea* to bring about the death of his victim, he reasonably foresaw that death was a possibility.

Mr Mhandire, appearing for the accused was constrained to concede that the proper verdict on the facts of the case and the applicable law was murder with constructive intent and not culpable homicide. It is our view that the conduct of the accused on the day in question meets the threshold of murder with constructive intent.

The legal position

It is not settled in our law that an accused person will be convicted of murder with actual intent where the state proves beyond reasonable doubt that the accused desired to bring about the death of the victim. Actual intention is

proven where there is sufficient evidence to establish that accused had as his aim and object, the death of the deceased. An accused may also be found guilty of murder with actual intent in circumstances where death is not the avowed object and intention but where, whilst engaging in some activity, accused foresaw death as a substantial and certain result of that activity and proceeds regardless.

An accused will be guilty of murder with constructive intent where he does not mean to bring about death but foresees it as a possibility. The state must prove subjective foresight and a possibility and not probability that death may ensue.

See: *S v Mugwanda* 2002 (1) ZLR 574 (S)

Disposition

It is admitted by the accused that his intention was ward off the attack by deceased. Accused plunged the knife into the chest region of the deceased. The results of the post mortem examination leave no doubt that the degree of force used to stab the deceased was excessive. We conclude that culpable homicide is not a proper verdict for the reason that the test applied is whether a reasonable man would have foreseen the death of the victim.

In the present case the established facts are that accused delivered a fatal blow to the deceased. The injury was serious. The deceased died of haemorrhagic shock and stab wound in the heart. Accused's conduct soon after the commission of the offence is indicative of the fact that he was well aware that the stab wound was fatal. The accused not only fled the scene with the murder weapon but went into hiding. He was only arrested after two days.

We are satisfied, that on the evidence presented before us, accused did not have the requisite *mens rea* to bring about the death of the deceased. Accused however, foresaw that death was a substantially certain result and he engaged in the stabbing regardless as to whether death would ensue.

In the result, accused is found guilty of murder with constructive intent.

Sentence

The accused has been convicted of a very serious offence. In assessing an appropriate sentence the court takes into consideration the mitigating circumstances of the case and weighs them against the aggravating factors. The court must, in all instances balance the personal interests of the accused and the interests of justice. A just sentence is one that does not seek vengeance against

the accused but one that blends justice with mercy. The accused is a first offender. He tendered a plea of guilty to the lesser charge of culpable homicide. Accused did not seek to absolve himself from the case, but rather, chose to minimize his moral blameworthiness. The accused is a married man with the usual attendant social responsibilities. Accused is the sole breadwinner for his family. The court must take into account the fact that accused has already spent one year 4 months in remand prison pending his trial. Accused has therefore already served part of sentence. The accused was provoked by the deceased who accused him of stealing a phone. The deceased was the aggressor. Accused was physically attacked by the deceased prior to the stabbing. The conduct of the deceased tends to lower the moral blameworthiness of the accused. The court observes however, that accused used a lethal weapon, a kitchen knife which he thrust into deceased's chest with fatal consequences. Accused used excessive force as revealed by the findings of the pathologist. The knife perforated the pericardium and the left ventricle. The deceased's chances of survival were remote. After committing the offence accused fled the scene leaving the deceased to bleed to death. Accused went into hiding and was only arrested by the police as a result of information regarding his whereabouts. The courts must emphasise that violence of any kind will not be condoned. The courts must protect the sanctity of human life.

In the result, an appropriate sentence is as follows:

“Accused is sentenced to 10 years imprisonment”.

*National Prosecuting Authority, state's legal practitioners
Masawi & Partners, accused's legal practitioners*