

**THE STATE**

**Versus**

**NSUKUAZIFANI NCUBE**

IN THE HIGH COURT OF ZIMBABWE  
MOYO J with Assessors Mr T.E Ndlovu and Mr W. Zulu  
HWANGE 5 OCTOBER 2021

**Criminal Trial**

*Ms M Munsaka*, for the State  
*M Mthombeni*, for the accused

**MOYO J:** The accused faces a charge of murder it being alleged that on the 19<sup>th</sup> of March 2021 he assaulted the deceased Sithabile Gumbo on the head with a brick, thereby causing the death of the deceased. He pleaded Not Guilty to this charge but offered a limited plea to the charge of culpable homicide. The following exhibits were tendered into the court record.

- State summary
- defence outline
- accused's confirmed and warned and cautioned statement
- post mortem report
- the brick that was allegedly used in the commission of the offence
- the indication by the accused.

They were all duly marked.

The evidence of Memory Nkomo, Assistant Inspector Tavengwa and Doctor Gregori was admitted into the court record in terms of the law. Thandiwe Ndebele and Sibangisiwe Masuku gave *viva voce* evidence for the state. The accused gave evidence for the defence.

The facts of this matter are largely common cause. Accused and deceased were married, then separated about a month before the 19<sup>th</sup> of March 2021. Deceased moved out of the matrimonial home and took with her the parties' belongings. Accused moved out and went to live with his sister. He had no blankets. One day he went to collect blankets from deceased's place. He was given the blankets by deceased's daughter in the absence of the deceased. Deceased went to accused's place to collect the blankets, found accused absent and then collected the blankets in the presence of accused's sister who is the 1<sup>st</sup> state witness. Accused came and the sister advised the parties to go to the police as it was clear that there would be a misunderstanding over the blankets. Deceased then left the blankets. Accused also left intending to go to the police station. It would appear the parties went together (this is from accused's version)

Deceased caught up with accused and told him that she wanted him to beat her so that she would get her soldier friends to assault accused. Deceased persisted until accused turned back and later then assaulted the deceased. Accused pleads the defence of provocation. The accused struck deceased (according to him) 3 times on the head with a brick while he held deceased's head by the braids and assaulted her with the other hand.

The 2<sup>nd</sup> state witness says she saw accused assaulting deceased several times on the back of the head and that deceased already bled on the forehead. Accused beat deceased even while she bled from the forehead. The only issue for determination is whether per accused's actions there was legal intention.

Accused held deceased by the braids, assaulted her more than once on the head with a brick even to the point that she bled. He was only restrained by the 2<sup>nd</sup> state witness and another person. From the post mortem deceased suffered epidural hematoma, cranial trauma that is what caused her death. The degree of force was obviously excessive in the circumstances, and it being on the head a vulnerable part of the body. Accused continued to hit deceased on the head even while she bled profusely.

From these facts, it is clear that accused should have realised that death was inevitable but continued nonetheless and was therefore reckless. However, this court still has to assess the defence of provocation in terms of section 239 of the Code. The defence of provocation in terms of the Code will not suffice where the accused did not act reasonably in the circumstances. Defence counsel did not go there in her submissions. It is essential that accused's defence be placed within the ambit of that section, to show that he is covered by it in terms of his actions. Accused says he was angered by deceased's words that she wanted him to beat her and then she would set her soldier friends to beat him. This cannot be taken as an insult. It is a threat. Accused should have just walked to the police station and reported their misunderstanding. Deceased merely said that and kept on following accused, but she never manhandled him or insult him with words that are regarded as insults. It is for these reasons that this court finds that accused acted unreasonably in the circumstances and therefore the defence of provocation as envisaged in the Code is not available to him. It is for these reasons that accused will be found guilty of murder with constructive intent.

### **Sentence**

The accused is convicted of murder. He is a 1<sup>st</sup> offender and a breadwinner. He has spent 6 months in prison and is contrite. To some extent deceased's

conduct was unacceptable in the circumstances but accused need not react in the manner that he did. However, deceased died unnecessarily at the hands of the accused. The dispute could have been settled by the police without any loss of life. These courts frown at the loss of life through violence.

It is for these reasons that the accused will be sentenced to 14 years imprisonment.

*National Prosecuting Authority, state's legal practitioners  
Dube, Nkala And Company, accused's legal practitioners*