

STATE
versus
ELLIOT REWU

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 5 February & 6 March, 2020 and 28 June, 2021

Assessors: 1. Kunaka
2. Mpfu

Criminal Trial- Murder

T. Kasema, for the state
B. Ndoro, for the defence

CHITAPI J: The accused was convicted on 6 February, 2020 and sentenced on 6 March, 2020. He has requested for a fully dressed judgment and this is it. The accused appeared before this court on an indictment for murder. The indictment alleged that on 29 April, 2019 at Manomano Village, Chief Mangwende Murehwa, the accused unlawfully caused the death of his 80 year old father, one, Chamunorwa Alex Makumborega (deceased) by striking the deceased with an axe three time on the head intending to kill him or realizing that there was a real risk or possibility that the accused's conduct may cause death but continuing to engage in the conduct despite realizing the existence of the possibility of death ensuing.

The accused pleaded not guilty to the indictment. State counsel advised the court that him and defense counsel had prepared a statement of certain agreed facts to curtail the trial. The statement of agreed facts was produced as exh 1. Its contents are very brief and it reads as follows:

“STATEMENT OF AGREED FACTS

1. The accused is facing a charge of Murder as defined in section 47 (1) (a) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].
2. The deceased was father to the accused.
3. On 29 April 2019 around 0500hours the accused struck the deceased with an axe three times on the head and ran away.
4. The deceased died on the 29th of April 2019 as a result of injuries sustained from the assault.
5. A post mortem was done and confirmed that death was a result of severe head injuries.

6. The accused and the deceased had a long standing dispute and on the fateful day they were intending to go to court for protection order.”

The State counsel produced by consent two further documents of evidence namely, the post mortem report detailing the findings of the doctor on examination of the remains of the deceased as exhibit 2 and the accused’s confirmed warned and cautioned statement as exh 3. In regard to exh 2, the report was prepared by Dr Reginald Gwisai at Murehwa Hospital where the autopsy was conducted on 30 April, 2019. The doctor made note that the deceased’s remains had 3 deep, linear lacerations on the right parietal aspect of the skull and a compound fracture with middle laceration and brain tissue extravasating from the cut. The doctor certified the cause of death as severe head injuries from trauma inflicted by a sharp object.

In the confirmed warned and cautioned statement, exh 3, the accused stated as follows:

“Accused reply in English (Translated)

I have understood the caution of the allegations being leveled against me of murdering chamunorwa Alexandra Makumborenga. I admit that I took an axe from my mother’s kitchen and I proceeded to where my Father who is now the deceased shouting at him for the reason that he was persisting with the story that I should proceed and appear before the Court so that I would be sent to jail. I then told him that I was going to attack him with an axe which I had taken from the kitchen. I then struck him on his head as a result of the anger that I had, I do not recall how many times I struck him even though I recall that it was more than twice and he fell down. I got out of the house and started running away proceeding to a nearby mountain after having dropped the axe in front of my mother Varaidzo Makumborenga and told her that I had finished the job meaning that I had struck my father with the axe.

SignedElliot Rewu”

After leading the above evidence, the State closed its case without calling oral evidence.

The accused elected to lead oral evidence. In summary, the accused testified that he is aged 38 years old, married and has a daughter aged 11 years. He stayed at the same homestead and subscribed to the apostolic faith. When asked whether he struck his father with an axe, he replied that the police officer had told him so. When asked to give a reason for striking his father, he states that it happened when he was about to go to court with his father where his father intended to obtain a protection order against him. When asked to explain the reason why the deceased had applied for the protection order, the accused responded that he had been told that the protection order if granted would ban him from home for a period. He stated that he was not happy for such

eventuality to happen and asked the deceased why the deceased had taken such a drastic stance against the accused as the deceased's first son.

The accused testified to some history of family discord arising from the accused's belief in witchcraft. The accused said that in 2015 he consulted some apostolic faith members or self-styled prophets who prophesied of the presence of certain "persons" who were said to be his father's children who were staying at the deceased's homestead. He testified that the deceased had been told about such persons by the apostolic prophets. The accused stated that the deceased had after the prophecy accused him of imputing wizardry on him. The accused stated further that the apostolic prophets had told the deceased that the "people" aforesaid were females and males and they would be intimate with the deceased's children.

Still in regard to events of 2015, the accused testified that he once confronted his mother over persons whom he had seen in the house at night whom he could not identify. The people wore white clothes and white hats and were leaning against the wall. His father had accused him of being a problem. The incident had happened around midnight. The accused testified the he continued visiting apostolic faith prophets. They would pray that the deceased should soften his heart in relation to the accused. They suggested that the problem be dealt with, but the deceased would snub him.

The accused stated that he was sober on the morning of 29 April, 2019 when he struck the deceased although he had taken alcohol the previous evening. He stated that after striking the deceased with the axe, he ran away into the mountains from where he heard people crying out at home and he felt sorry. He slept in the mountains before surrendering himself to the police on the next day. He wanted to find a way to get back home and apologize for his misdeeds.

When asked as to why he committed the offence, he responded that he did not know. He said that there was need to fix issues at home and that it was apparent that there needed to be performed some traditional rituals or that some rituals had actually gone wrong. Under cross examination the accused added other reasons for disharmony with the deceased, namely that the deceased sold a family field and also denied him the use of cattle to plough the land. When questioned by the Court whether he was now pleading not guilty, the accused said that he did not deny committing the offence but that he denied the assertion that he acted with intent to kill. He said that the deceased had goblins which the accused had referred to when he questioned his mother

about persons dressed in white whom he had seen in the house. He stated that the family believed in witchcraft and that they had consulted prophets on the issue. For his part, the accused believed that he suffered misfortunes as a result of the witchcraft issues bedeviling the family. The accused in particular stated that he worked for 12 years before leaving his job for no particular reason. He then started a carpentry enterprise or project but just quit it for no reason. He stated that he believed that the deceased was the source of the accused's misfortune.

The defense closed its case.

The court considered that it was necessary to hear evidence of a member of the accused's family in order to understand in more detail the background to the family's feud and the accused's brief. It is a well established principle that the court in a criminal trial has power to call a witness who has not been called by either the State or defence to give evidence where in the opinion of the court, the evidence of such witness is material in the proper determination of the case. Such power should not be invoked where the calling of the witness will prejudice the accused or the prosecution case as the case may be. The court will usually call for such evidence to clarify an issue arising in the trial which has a bearing on the guilt or innocence of the accused. The witness should only be called at the close of the defence case and the prosecutor and accused are given equal opportunity to cross-examine the witness on his or her evidence. It is the duty of the court to dispense justice and not treat criminal trials as a boxing ring where a determination is made based on points scored by either the prosecution or the defence. A criminal trial is held to unravel the truth and the court whilst it should not descend into the arena beyond seeking clarity on evidence adduced, nonetheless retains the right to call witnesses who may shed light in unravelling the truth concerning a matter. See *S v Timba* SC 81/91 where the scoring of points was held to amount to a misdirection.

The court called for the evidence of the accused's mother who was said to have been present when the deceased was struck by the accused with the axe. The accused's mother is Varaidzo Makomborenga. The court noted that the witness was present in court when evidence was led. The court warned itself to be wary of the evidence. She testified that there indeed family disharmony caused by the accused each time he was drunk. He would threaten and harass her together with the deceased. The accused made allegations that there were goblins for which it was necessary for the family to consult prophets. The witness testified that she and the deceased told

the accused to bring the person who had told the accused of the existence of the imaginary persons to come and remove them or exorcise the spirits of such person. The witness and the deceased had no knowledge or idea of the things which the accused was referring to.

The witness testified that the accused's favorite beer or intoxicant was lager clear beer. On the preceding night before the morning of the murder of the deceased, the accused came home in the evening having spent the day away from home. The accused asked for food which he however refused to eat when the witness gave him food. He went away and returned in the morning of 29 April, 2019. The accused found the deceased dressing up. He then accused the deceased of being busy dressing up to take the accused to court to be arrested. The witness intervened and told the accused that it was on account of the accused's behavior that it was necessary to take him to court. The accused was by the kitchen as he was shouting at the deceased. He then went into the kitchen and came out armed with an axe. The accused proceeded to the deceased's bedroom where the deceased was in the process of exiting the bedroom. The accused then struck the deceased on the head thrice with the axe before throwing the axe on the ground before he ran away. The deceased fell to the ground and died on the spot. The witness stated that she and the deceased lived under harassment by the accused and were once both assaulted after remonstrating with the accused for stealing maize from the homestead, selling it and spending the proceeds on beer. She testified that indeed she and the deceased had upon the insistence and pestering by the accused, consulted prophets. Their decision to do so was informed by the desire to pacify the accused and have peace prevail.

In the assessment of the evidence led in the trial, the court found the bulk of the material evidence to have been admitted and/or not seriously in dispute. The state counsel argued that the accused should be found guilty of murder with actual intent on the basis that he acted with *dolus eventualis* or recklessly and carelessly without caring whether harm would result from his conduct. Reliance was placed on the case of *S v Tachiona & Anor* 1994 (2) ZLR 402 (H) wherein it was held that *dolus eventualis* connoted a combination of recklessly and carelessly acting without giving a thought as to whether or not harm would result from one's conduct.

The defence counsel submitted that the accused must be found to have acted under provocation resulting from his conviction that there was no justification for the deceased to seek a

peace order against him and his fears that the deceased was engaged in acts of witchcraft. He argued that

The accused acted out of anger which had bottled up in him over a long period of time. Reliance was placed on *S v Hamunakwadi* 2015 (1) ZLR 392 in which the court stated that witchcraft provocation can amount to a partial defence if death was caused in the heat of the moment in the presence of anger and fear of imminent death, the accused reacted to an act which he genuinely believed to be an act of witchcraft against the accused or a person under the accused's care.

The issue of witchcraft beliefs leading to provocation does not really arise in this matter. In the confirmed warned and cautioned statement, the accused stated that he was incensed by the deceased's insistence that the accused should appear at court for the determination of a peace order suit brought against the accused. The accused believed that he would be imprisoned at the court. He then advised the accused that he would attack him with an axe which the accused had already armed himself with after collecting it from the accused's mother's kitchen. What angered him was the prospect of appearing at court or being summoned to court to answer a peace order case. The accused was determined that the case should not be proceeded with. He decided that to avoid the process he had to get rid of the deceased. In fact he struck the deceased several times on the head before telling his mother that he had finished the job and throwing the axe in front of his mother.

In terms of the provisions of s 238, provocation is not a defence to a murder charge except where any other enactment provides otherwise. Provocation is relevant to sentence where it can be pleaded as a mitigatory factor. At best provocation can be a partial defence as provided for in s 239 in which case if the defence is established a court can return a verdict of guilty to culpable homicide. It is in this case not necessary to interrogate in any great detail the requisites for provocation to succeed as a defence in this matter.

The accused must show or prove that he was provoked. The court did not find any evidence to indicate or suggest that the deceased provoked the accused before the accused struck the deceased and the whole situation. It cannot be reasonable for one to be provoked by a call to attend court. The deceased did not say anything provocative to the accused nor conduct himself in a provocative manner towards the accused.

The evidence showed that the accused acted consciously of what he desired to do which was to avoid having go through the court motions. He consciously decided that to avoid to do so, he would need to get rid of the deceased. He pre-armed himself with the axe before proceeding to the deceased's bedroom where upon seeing the deceased, the accused in a calculated act, cowardly but consciously attacked the deceased by striking him on the head 3 times before declaring his mission as having been accomplished.

In the determination of this case, the court must consider the accused's state of mind or intention when he acted. Section 13 of the Criminal Law (Codification and Reform) Act, provides as follows in defining intention:

- “(1) Where intention is an element of any crime, the test is subjective and is whether or not the person whose conduct is in issue intended to engage in the conduct or produce the consequence he or she did.
- (2) Except as may be expressly provided in this code, or in the enactment, the motive or underlying reason for a person's doing or omitting to do anything, or forming any intention in immaterial to that person's criminal liability in terms of this Code or any other enactment.”

Following on the above definition of intention, the accused was proved to have engaged in the conduct charged, that is, arming himself with an axe and proceeding to where the deceased was and there and them striking the deceased on the head three times with the axe and leaving him for dead. That is the consequence which he desired. He pleaded provocation which the court found not to be applicable in the circumstances of the case and the evidence. The accused's motive of wanting to avoid going to court was irrelevant to the determination of his intention, inasmuch as the court considered that his motive did not qualify to excuse him under the partial defence of provocation.

Under the circumstances the court was satisfied that there were really no material factual disputes in the matter and that on the agreed facts, the accused's evidence and the rest of the evidence and surrounding facts, the accused intentionally killed the deceased. A verdict of guilty to murder with intent as defined in s 47 (1) (a) of the Criminal Law (Codification & Reform Act, [Chapter 9:23] is hereby entered.

SENTENCE

The accused has been found guilty of murder with actual intent. The sentence provisions where the accused is found guilty of murder with actual intent provide, that the accused should be or shall be sentenced to death, imprisonment for life or a definite period of imprisonment where the murder determined that the murder was committed in aggravating circumstances. The operative provision appear in s 47 (4) of the Criminal Law Codification and Reform Act. In this case the conduct of the accused caused the death of the accused an 80-year male being. In terms of the provisions of Section 47 (3) the fact that the victim is over 80 years old is to be considered as a circumstance of aggravation, the court made a finding that the murder appeared to have been premeditated. It was not an accidental death. The accused was determined that he would resist the deceased's insistence that their dispute should be solved at court where a case for a Peace Order had been opened. The accused used a dangerous weapon in the form of an axe. The accused aimed the axe at a dangerous part of the body being the head. The accused inflicted multiple blows on the deceased's head. The murder was certainly committed in aggravating circumstances. The court made a finding that the accused acted for selfish reasons. There was no provocation. If anyone can argue the presence of provocation, then the accused himself is the one who provoked the situation. The death sentence looms very high over the accused's head.

The accused's counsel made submissions that notwithstanding the presence of those aggravating circumstances this is a case where the court should consider exercising its discretion not to impose the death penalty. He submitted that the court must have regard to accused's beliefs in witchcraft which beliefs were not shared by the deceased and the accused's mother. The court did not accept that the deceased's family was a troubled family. The cause of troubles was the accused. Instead of being an asset to the family as the first born son the accused terrorized his parents to a point where he would beat up both of them, forcing them to consult prophets and n'angas because of the accused's beliefs and not their beliefs.

The case before the court is a difficult one for the court to consider what the appropriate sentence should be. The reason is that the death was a family tragedy. It is not an outsider who caused the death of the deceased. The accused killed his own father. If the court imposes the death penalty the accused's death will add to the family tragedy. This is the problem that presents itself to the court when murders are committed within the family setting. The court should then seriously

consider personal deterrence and the accused's rehabilitation as opposed to giving undue weight to general deterrence. As I indicated the prospect of the death penalty being imposed loomed very high, but the court had to temper justice with mercy and accepted that the accused remained a part of the deceased's family although he needed to refocus. Having killed his father meant that there will be no father again for the accused and the family. The accused's mother gave evidence that and if the court sentences the accused to death she loses a son again. So the suffering becomes not that of the accused but that of his mother. The death sentence will send the accused's mother into mourning again because the accused still remained her son despite being a bad apple. But the accused must be punished because the accused, started a life of crime at the deep end. Even though he is a first offender, he committed a serious offence. He however showed some contrition by accepting that he was the one responsible for the death of the deceased. The court accepted that the accused appeared to have entertained some simmering anger against his father whom he suspected to be responsible for the accused's perceived misfortunes. Perhaps what he needed to do was not find the solace in the brown bottle when his fortunes were low. He reacted to his loss of employment by indulging in alcohol. When a troubled person abuses alcohol he will always find fault in other people. The accused's mother testified that the accused was troublesome each time he partook of the wise waters. The court considered that given the circumstances of the case as discussed the death penalty could be avoided.

The next level after exercising the discretion not to impose the death penalty is to consider life imprisonment. The accused is 38 years old with a child. There is no evidence that the accused cannot be rehabilitated nor that he is beyond redemption. In the view of the court the accused needs to be given another chance. Imprisonment for life will not give him that chance. Despite the callousness of the murder the court did not consider that this is a case in which society is better off without the accused forever. He is not a danger to society generally. It is for that reason that court had to consider what sentence would meet the justice of the case and also take account of the accused's personal circumstances. The law is also clear that where there are aggravating circumstances and the court has determined not to pass the death penalty, then the court must pass a sentence of a minimum of 20 years. In the view of the court a 20-year effective sentence should meet the justice of the case. In order that the accused serves at least 20 years taking into account

remission for good behavior a sentence that will ensure that he serves the 20 years is the one that should be imposed.

The accused is sentenced to 30 years' imprisonment.

National Prosecuting Authority, State's legal practitioners