

THE STATE

Versus

RONALDO MASOPO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mr P. Damba & Mr O. Dewa
BULAWAYO 3 & 4 MARCH 2022

Criminal Trial

K. Ndlovu for the state
Mrs S. Drau for the accused

MAKONESE J: The accused appeared in this court facing a charge of murder in contravention of section 47 (1) of the Criminal Law (Codification and Reform) Act (Chapter 9:23) in that on the 15th February 2020 at 330 Lovendale, Bulawayo he struck the deceased on the neck, lower lip and ankle thereby causing his death wrongfully unlawfully. The accused denied the charge.

The state tendered an outline of the state case detailing the events leading to the death of the deceased. It shall not be necessary to repeat the contents of the state outline. In his defence the accused averred that he never had the intention to kill the deceased and that on the day in question he had an altercation with the deceased which led to a fight. The accused gave a brief defence and bare denial in this defence outline. The state produced a confirmed warned and cautioned statement recorded on the 18th February 2020. The English version of accused's warned and cautioned statement is in the following terms:

“I struck Thulani Ndlovu with an axe once in the mouth, once in the left side of the neck and once on the left leg. Thulani Ndlovu died on the way to the ZRP Nkulumane, Bulawayo as a result of injuries sustained.”

A post mortem report compiled by Dr Juana Rodriguez Gregori a forensic pathologist based at United Bulawayo Hospitals on 17th February 2020 following an examination of the remains of the deceased was tendered into the record by the state. The post mortem reflects that the cause of death was:

- (a) Asphyxia
- (b) Bronchoaspiration
- (c) Face confusion

In an explanatory affidavit dated 2nd of March 2022 the pathologist indicates that during the post mortem examination he detected Broncho aspiration which was caused by suffocation and occurred when vomitus could not exit and be expelled due to deceased’s inability to move.

State case

The state opened its case by leading evidence from its main witness **TALENT NKOMO**. The witness is a resident of Lovendale, Bulawayo. He was aged 18 years at the time of the commission of this offence. He is employed as a builder. The witness knew the deceased as a neighbor. The accused is his friend. The witness narrated that on the 15th of February 202 and around 1800 hours he

went to Tsepo Tshuma's house where he had left his mobile phone on a charger. The witness collected his phone but was told to return and collect his charger the following day. The witness was infuriated. The accused person arrived at the scene. A physical confrontation ensued between the accused and Learning Moyo and Forward Zondo. It would appear that accused was involved in the fight in a bid to rescue this witness. At that stage the deceased intervened and tried to restrain Learning Moyo and Forward Zondo from further assaulting the accused. The witness testified that he fled the scene fearing for his safety. Before he reached his residence, the witness heard someone screaming from the scene of the violence. The witness rushed back to the scene. Upon arrival he observed that the accused was lying on the ground. He was badly injured. The accused was unconscious. After about 2 minutes accused regained consciousness, stood up and chased after the deceased. The deceased ran towards a neighbour's house. Before deceased could get to that house, accused struck him with an unknown object causing him to fall down. The deceased sustained injuries on the lower lip and the neck. Accused was bloodied all over his face. Several people arrived at the scene before the police arrived. The deceased was taken to Nkulumane Police Station before an ambulance was summoned. The deceased was pronounced dead on arrival at the hospital.

The witness was subjected to cross-examination by accused's defence counsel. The witness stuck to his version on how the events had unfolded. The

witness confirmed that he did not actually observed how the deceased had been struck as he was at a distance. The witness gave his evidence well. He was a credible witness. We have no hesitation in accepting the evidence of this witness as being a truthful account of the events of the day in question.

The state then lead evidence from the second witness, **LLOYD MANGOMBA**. The witness is a resident of Lovendale Bulawayo. He was aged 17 years at the time of this offence. On the fateful day the witness was on his way from Nkulumane suburb and passing near deceased's place of residence. He observed that accused person was being assaulted by two assailants. Moments later the deceased arrived at the scene. The accused lost consciousness as a result of the assault. Accused was moved to an open space in a bid to allow him to get enough fresh air. After approximately 2 minutes accused gained consciousness. Accused stood up and started chasing after the deceased. Accused tripped the deceased. Accused then attacked the deceased with an unknown object which was wrapped in a T-shirt. The witness refused to be drawn into what the object was. The witness concluded that the deceased had been severely injured because his face was covered in blood. The witness indicated that at that stage accused fled the scene.

The witness was subjected to excessive cross-examination. Accused adhered to his version and refused to describe the nature of the object used to

assault the deceased. The witness testified that although it was in the evening there was sufficient lighting in the area for him to observe the injuries on the deceased. The witness emphatically stated that he did not see the accused wielding an axe. The witness did confirm that the deceased tried to restrain Leaning and Forward from assaulting the deceased. The witness decided to describe the nature of the injuries sustained by the deceased as he could only observe that his face was bloodied.

The evidence of the witness was clear. There was no tinge of exaggeration. The witness was credible in that his testimony was consistent in all material respects.

The state applied to have the evidence of Leaning Moyo as it appears in the outline of the state case to be expunged from the record. The application was granted. The state sought and obtained the admission of the evidence of the following witnesses, as it appears in the state outline into the record by way of formal admissions, namely:

- (a) Trevor Chikomo
- (b) Alexious Munkuli
- (c) Nego Alford
- (d) Dr Juana Rodriguez Gregori

The evidence of these witnesses was introduced into the record in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07). The state closed its case without leading further evidence.

Defence case

The accused elected to give evidence under oath in support of his defence. Accused testified that he was 21 years old at the time of the commission of this offence. He was a resident of Lovendale, Bulawayo. He was employed by Steelforce at the time. In the early evening hours of the fateful day he was on his way to a tuck shop in the company of Talent Nkomo and Polite Khanye. Talent proceeded to a certain house close to deceased's residence to collect a mobile phone which he had left there for charging. Talent was involved in a dispute over the phone charger. Accused testified that Talent was being assaulted. He tried to stop the fight, but instead he ended up being assaulted. Talent fled the scene leaving him at the mercy of his attackers who appeared to have been drunk. Accused stated that the deceased was one of the three persons who attacked him. He indicated that he only knew the identification of the assailants when he was served with state papers. Accused went on to state that h was viciously attacked and lost consciousness. When he regained consciousness he was dazed and confused. He chased after the deceased as he believed the fight was still on. Accused states that he took a screw driver from his pocket and used it to attack

the deceased in the neck, lower lip and the leg. Deceased fell to the ground injured. Accused left the scene and proceeded to his house.

Under cross-examination the accused admitted that Talent Nkomo was his friend and that he knew of no reason why he would fabricate evidence against him. The accused maintained that deceased had participated in the assault that led him to lose consciousness. The witness sought to depart from the clear and ambiguous version of events as contented in the confirmed warned and cautioned statement. The accused failed to explain the inconsistencies between his oral testimony and the contents of the warned and cautioned statement.

The accused was not a credible witness. He gave conflicting defences to the charge. When the charge was put to him accused's response was as follows:

“I admit the charge. I had a misunderstanding with those people which resulted in me doing this.”

In his defence outline the accused states that he never had an intention to kill the deceased and that on the day in question he had an altercation with the deceased which led to a fight, resulting in the death of the deceased.

Analysis of the evidence and application of the law

The circumstance leading to the death of the deceased are relatively straight forward. Accused was first attacked by Learning Moyo and Forward Zondo. Accused was thereby assaulted and lost consciousness. When accused regained

consciousness he chased and attacked the deceased with an unknown object. The deceased sustained serious injuries in the neck, lower lip and the leg. The deceased died at the hands of the accused. The post mortem report reveals that the death was:

- (a) Asphyxia
- (b) Bronchoaspiration
- (c) Face confusion

The attack on the deceased was severe. The state did not lead sufficient evidence to prove that the accused had the requisite *mens rea* to bring about the death of the deceased. The accused acted recklessly and used a lethal weapon in attacking the deceased. The deceased was not posing any danger to the accused and in fact was running away from the scene when he was attacked. It is our view that the state succeeded in proving that the accused foresaw the possibility that his reckless conduct could lead to the death of his victim.

In *S v Mugwamba* SC-19-2202, the Supreme Court held that:

- “1. The expression intention to kill does not in law necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis*, as distinct from *dolus directus*.
2. The facts that objectively the accused ought to have reasonably foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused

and what would have gone on in the mind of *bonus purterflaulies* in the portion of the accused. In other words, the distinction between subjective foresight and objectively foreseeability must not become blurred. The *factum probender* is *dolus act culpa*. There are two different concepts never to coincide.

3. Subjective foresight, the any other factual issue, may be found by inference. To constitute proof beyond reasonable doubt the inference must be the only dream. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee even if he ought reasonably to have done so and even if he probably did so.”

See also: *S v Mhlanga & Ors* 1963 (1) SA 692 (AD) at page 694

Accordingly, accused is found guilty of murder with constructive intent.

In the result, accused is acquitted on the charge of murder, but found guilty on the lessor charge of culpable homicide.

Sentence

The approach to sentencing is to take into consideration the interest of justice and those of the accused. The court must carefully balance those interests in order to achieve a just and fair sentence. A sentence must meet the ends of justice and serve to rehabilitate the offender. In this matter the accused has been convicted of a serious offence. A life was recklessly lost. The factors in mitigation and in favor of the accused have been highlighted by *Mrs Drau*, appearing for the accused. The main factors that instigate the sentence are these:

- (a) the accused is a youthful offender who was aged 21 years at the time the offence was committed.

- (b) the accused is a first offender
- (c) the accused was not the initial aggressor and was responding to a vicious attack that had been directed at his person
- (d) the accused acted in haste for he regained consciousness and attacked an innocent bystander
- (e) the accused acted out of immaturity
- (f) the accused has been in custody for the past 2 years awaiting his trial

Against these mitigatory factors, *Mr Ndlovu* the following factors are to be taken into account in aggravation

- (a) the accused did not show any flicker of remorse or contrition
- (b) the accused sought to mislead the court by proffering patently false defences
- (c) the accused attacked an innocent bystander who was fleeing and posing no danger to the accused
- (d) the accused used excessive and brutal violence in retaliation to the perennial continued attack upon him
- (e) the accused acted with reckless abandon and used a lethal weapon
- (f) the injuries sustained by the deceased are consistent with the use of an axe. Witnesses observed a cut in the neck, a torn lip and a bloodied face.

(g) the accused showed no mercy to his victim who had fallen down

(h) the accused attacked a fairly old and aged 42 year relation to his age.

In all this, the court finds that the sentence to be imposed must reflect the indignation these courts have against the use of violence in the resolution of disputes. The court shall indeed take into account the fact that the accused himself was subjected to a sustained and brutal attack by his assailants and lost consciousness. The moral blameworthiness of the accused though on the higher side must be carefully balanced against the mitigating factors.

It is my view that lengthy custodial sentences should be imposed on youthful first offenders sparingly. This is because the sentence must be rehabilitative in respect to youthful offenders.

In the circumstances, accused person is sentenced as follows:

“Accused is sentenced to 8 years imprisonment of which 3 years is suspended for 5 years on condition accused does not within that period commit an offence involving violence and for which upon conviction he is sentenced to imprisonment without the option of a fine.

Effective sentence 5 years.”

National Prosecuting Authority, state’s legal practitioners
Pundu & Company, accused’s legal practitioners