

THE STATE
versus
THOBKILE MATHE

HIGH COURT OF ZIMBABWE
MOYO J
GWERU 5 FEBRUARY 2018

Criminal Trial

M Shumba for the state
W Mehlo for the accused

MOYO J: The accused person faces a charge of murder, it being alleged that on 25 September 2009, she stabbed her half-brother with a knife resulting in his death from the injuries sustained therein. The accused person pleaded not guilty to this charge, but instead tendered a limited plea to the charge of culpable homicide. The state counsel accepted this limited plea and rightly so. A statement of agreed facts prepared and signed by both parties was then tendered and marked exhibit 1.

The post mortem report was also tendered and marked exhibit 2. It gives the cause of death as hypovolemic shock due to bleeding from the wound. The kitchen knife that was allegedly used in the attack was tendered and marked exhibit 3.

The statement of agreed facts reads as follows:

1. Thobekile Mathe (hereinafter called the accused) resides in Warikanda Village, Chief Nemangwe in Gokwe District, and is employed as a church secretary. She was 24 years old at the material time.
2. Gilbert Dube (hereinafter referred to as the deceased) resided in Dibha Village, Chief Nemangwe in Gokwe District during his lifetime and was not employed.
3. The deceased was the accused's half brother in that they are born of the same mother but different fathers.

4. Sometime in September 2009, Setti Ngwenya, who is the accused's mother invited the accused to her home to help her with some domestic chores. The accused went there with her husband.
5. On the 25th of September 2009 at about 1900 hours, the accused was busy cutting vegetables with a knife preparing some food when the deceased arrived in the company of Ottas Ngwenya and Moses Ngwenya and were all drunk.
6. The deceased started making all sorts of complaints to Setti Ngwenya, who is his mother, in a rowdy manner chief among them being that she had brewed nasty beer and that she favoured the accused more than himself.
7. From then on, the deceased turned towards the accused and started insulting her and threatened to assault her. The accused apologized to the deceased for any wrong she could have done, but the latter did not accept the apology. The deceased continued shouting at the accused and advanced towards her intending to assault her. At that stage, the mother and Isaac Ngwenya intervened and the deceased calmed down.
8. After a while, the deceased again advanced towards the accused and assaulted her with fists on the face several times, as well as kicking her all over the body with booted feet. It is then that the accused in spontaneous reaction stabbed him once with a knife on the left side of the chest.
9. The deceased fell to the ground and some first aid applied. That is when it was discovered that the deceased had been stabbed. The deceased then died.
10. A report was made to the police leading to the accused's arrest and the deceased's body being ferried to Gokwe Hospital where Dr Muwandavaka conducted a post-mortem examination. He concluded that the cause of death was hypovolemic shock due to bleeding severely from the wound.
11. The accused accepts the evidence of the state witnesses and contents of the post mortem report. She denies the requisite intention to kill in either form of *Dolus directus or dolus eventualis*. Rather the accused acknowledges that through her conduct aforesaid, he caused the death of the deceased.

12. The state concedes that the accused was negligent in her actions and therefore accepts the accused's plea to culpable homicide.

The accused person is accordingly found not guilty on the main charge of murder, but is convicted of the lesser charge of culpable homicide.

Sentence

The accused person is convicted of culpable homicide. She is a first offender. She pleaded guilty. She is 5 months pregnant.

Deceased was the aggressor, on the day in question, she is the sole breadwinner in her family and she has waited for justice for 9 years. This is an unfortunate incident where the accused killed her own half brother who was certainly being a nuisance on the day in question. She was already carrying the knife using it when the deceased decided to attack her for no apparent reason at all. The facts of this matter are such that this court is inclined to mete out a sentence as per the case of *S v Homela* HB 214/15 that was cited by defence counsel. A life was lost in the most unfortunate of circumstances, but this court should endeavour to consider the accused's state of mind at the appropriate time. Her half brother, was assaulting her, and she overreacted by introducing the knife which she was carrying but she was indeed provoked at the time that she acted. The case of *S v Masuku* that was cited by the state counsel, is distinguishable from this case in that firstly, the accused had engaged in political violence, which is a deliberate plain for one to involve themselves in. The accused person in this court found herself in a situation, she was under attack. Again in the case of *S v Masuku*, the court was guided by the fact that *Masuku's* co-accused had already been sentenced and both counsel submitted that a similar sentence had to be given. It is the interests of justice that an accused's personal circumstances, the circumstances of the commission of the offence, and the interests of society at large be central to our sentence trends. It cannot be in the public interests as well to turn a blind eye to the hearing mitigation in the accused's favour. She was provoked. She acted at the spur of the moment. She waited for justice for 9 years not due to her own fault. She is 5 months pregnant. She is the sole breadwinner.

Life was lost and these courts frown at the loss of life in whatever circumstances. The guiding case in culpable homicide cases is that of *S v Sibanda* SC 214/13 where the Supreme court held that where a life is lost courts should give a sentence that registers the court's abhorrence of such conduct. However, this court is alive to the fact that there are indeed a handful of such cases that require justice to be tempered with mercy. It is for these reasons that the accused person is sentenced to 4 years imprisonment wholly suspended for 5 years on condition she does not within that period commit an offence involving violence, whereupon conviction she shall be sentenced to imprisonment without the option of a fine.

National prosecuting Authority, state's legal practitioners
Hore and Partners, accused's legal practitioners