

THE STATE
versus
NOBERT MOYO

HIGH COURT OF ZIMBABWE
MAKONESE J
GWERU 28 & 30 MAY 2015

Mr *Mupariwa* for the state
Mrs *L. Mavhondo* for the accused

Criminal Trial

MAKONESE J: The 19 year old accused person is charged with murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged that on 23 March 2014 and at Mabuto Village, Chief Malisa, Silobela, the accused wrongfully and unlawfully caused the death of Busani Moyo by striking him once on the head with an axe intending to kill him or realizing that there was a real risk or possibility that his conduct may cause death and continued to engage in that conduct despite the risk or possibility.

The accused pleaded not guilty to the charge and tendered a plea of guilty to the lesser charge of culpable homicide. The state rejected the limited plea and the matter proceeded to trial.

The state tendered into the record of proceedings the state outline, marked Exhibit 1. The brief allegations are that on 23 March 2014 at around 1900 hours at Mabutho village the deceased met accused person. The deceased was in the company of Carrington Moyo and Ocean Moyo. The deceased then requested the accused to go and fetch or steal some unprocessed tobacco which was being sold by accused's grandfather. The accused refused to comply with the deceased's demand. The deceased responded by slapping the accused twice on the face with open hands before striking him with a fist. The accused person fled the scene, went to his homestead and moments later came back holding an axe. The accused then struck the deceased once on the head with the axe. The deceased collapsed to the ground bleeding profusely. The deceased was ferried to Donsa clinic where he was pronounced dead.

The defence tendered the outline of the defence case, marked Exhibit 2. The accused's defence is in the following terms:

- “1. The accused is aged 17 years and pleads not guilty to the charge of murder.
2. He is a Form three student at Donsa Secondary School in Silobela.
3. On 23 March 2014 in the evening he was coming from a function at his uncle’s homestead going home.
4. As he was going home he saw a group of man who were seated and among them were Busani Moyo (deceased), Carrington Moyo, Decent Ncube and Ocean Moyo.
5. Decent Moyo whistled at the accused and called him to come where they were seated.
6. The accused will say the deceased then asked him to go and steal some tobacco from his grandfather’s place of residence and accused refused.
7. The deceased insisted that accused should go and steal and accused refused whereupon the deceased slapped accused on the eye and struck him with a clenched fist on the chin.
8. The accused started bleeding from the mouth and ran away with the deceased following behind. The accused arrived home and armed himself with an axe.
9. The accused then struck deceased with an axe on the right side of the head whereupon the deceased fell to the ground.
10. The deceased’s friend Carrington Moyo attempted to assault accused who ran away with Carrington in hot pursuit.
11. The accused later went back to the scene he had struck deceased (sic) and he and Carrington arranged for a scotchcart to ferry deceased to the clinic.
12. The accused was arrested by the neighborhood watch committee the following day.
13. The accused will say that he had no intention to kill the deceased and will plead guilty to a charge of culpable homicide.”

The state then tendered the accused’s confirmed warned and cautioned statement as Exhibit 3. The statement was recorded at Zimbabwe Republic Police, Silobela on 25 March 2014. The brief statement is in the following terms:

“I admit to the allegation of striking the now deceased on the head with an axe. The now deceased had first slapped me because I had refused to go and steal tobacco belonging to my grandfather.”

The last documentary exhibit is the Post Mortem Report compiled by Dr Zimunya at Gweru Hospital on 27 March 2014. The Post Mortem Report was marked as Exhibit 4. The cause of death is reflected as:

- (a) Severe head injury
- (b) Skull fracture
- (c) Severe haemorrhage and brain trauma.

The state then produced its last exhibit, the murder weapon, being an axe with a wooden handle. The axe weighs 0.690kg. Its length is 68cm. The length of the blade is 7cm. The blade is 5.5cm wide. The axe was marked Exhibit 5.

The state sought and obtained formal admissions from the defence and the evidence of the following state witnesses as it appears in the outline of the state case was admitted into the record in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]; namely:

- (a) Lethu Moyo
- (b) Ackim Ncube
- (c) Bensen Alizo
- (d) Timothy Chamwaita

The state opened its case by leading evidence from Carrington Moyo.

This witness testified that he is 19 years old. He knew the deceased during his lifetime as his friend. At around 1900 hours on 23 March 2014 he was in the company of Ocean Moyo and the deceased. The accused then arrived and joined them. The deceased asked the accused to go home and fetch some unprocessed tobacco for him. The tobacco was being sold by accused's grandfather. The accused refused to comply with the demand. This infuriated the deceased who slapped the accused on the face with an open hand. The accused left the scene, went to his homestead and came back armed with axe. The accused struck the deceased with the sharp end of the axe on the left side of the head just above the left ear. The deceased fell to the ground. The accused fled the scene. The witness went and summoned elders to the scene. The deceased

was ferried to Donsa clinic where he later died. The witness indicated that the accused and deceased enjoyed a good relationship prior to this date. He confirmed that the deceased was drunk. He was so drunk that he was staggering. He stated that prior to the incident deceased had consumed an unknown quantity of traditional brew. Apart from minor discrepancies in his evidence, the evidence of this witness was credible. His evidence was easy to follow and it is a true reflection of the events leading to the assault of the deceased. We accept the evidence of this witness.

The state called its second and last witness, one Pathisani Moyo. This witness stated that he is 19 years old. He knew both the deceased and the accused persons. They attended the same school together and they were all friends prior to this date. The witness stated that during the evening of 23 March 2014 he was called by the first witness Carrington Moyo. He lit a torch and illuminated the area. He saw Carrington standing by the side of the road. As he got closer he saw that the deceased was injured and lying down on the ground bleeding from the head. An axe with a wooden handle was embedded in the deceased's skull. The witness and Carrington went to alert the elders about the incident. The witness learnt that the deceased had been struck by the accused with an axe. The witness says that when he later returned to the scene in the company of the elders, he observed that the axe was missing. The witness was later informed that the deceased had died. The witness confirmed that prior to this incident he had seen the deceased, Carrington Moyo, Ocean Moyo and Shepherd Moyo consuming alcohol. He did not know the type of beer they were drinking but it was traditional brew. From the evidence of this witnesses the deceased, Carrington, Ocean and Shepherd were drunk at the relevant time. The evidence of Pathisani Moyo is credible and consistent. It corroborates the evidence of the first witness. We accept his evidence. His evidence was not contradicted under cross-examination in any material respects.

The accused person then gave evidence under oath and essentially confirmed what was stated by the two state witnesses. He testified that on the day in question he was coming from his maternal uncle's homestead and when he was about to arrive home, Decent Ncube whistled for him to come to where he was. He met Decent and as they were conversing, the deceased arrived and asked him to go and steal tobacco for him from his grandfather's homestead. Accused stated that his grandfather sold the tobacco and it was not possible for him to go and

steal the tobacco. Accused said deceased persisted with his demand but he turned him down. Deceased was annoyed by deceased's refusal and clapped him with open hands upon the face. Accused stated that deceased also punched him with a fist below the right eye. Accused was angered by the assault and ran to his homestead where he collected an axe and came to confront the deceased. Accused struck the deceased with the axe on the head. The deceased fell to the ground and accused fled the scene. Accused returned to the scene and removed the axe from the deceased's head. He went and hid the axe at a relative's homestead. Accused later returned to the scene. He found elders at the scene trying to render assistance to the injured deceased. The deceased was ferried to hospital where he later died as a result of injuries sustained in the assault.

Analysis of the evidence

In this matter most of the issues are common cause. It is not disputed that in the evening hours of the fateful day the deceased was in the company of Carrington, Shepherd and Ocean. They were drinking traditional beer. They were all drunk to a certain degree although the deceased was seen staggering by the first witness. The accused person arrived at the scene and deceased requested him to go and fetch some tobacco from his grandfather's homestead. The accused refused and this did not go down well with the deceased who assaulted the accused. The accused reacted by going to collect an axe from his homestead. He came back and struck the deceased on the side of the head (left parietal region). The axe was embedded in the deceased's head. The accused fled the scene only to retrieve his axe which he pulled out of deceased's head. He hid the axe but he later returned to the scene. He did not deny the offence. He was arrested on allegations of murder. He raised the defence of provocation and self defence. On the admitted and established facts there can be no doubt that such defences are not sustainable for the following reasons:

- (a) The provocation was not such that the accused would have lost self-control and run some distance to collect the axe and return to inflict the fatal single blow. There was enough period for accused to cool off.

In this regard the requirements for this defence are well canvassed under section 239 of the Criminal Law (Codification and Reform) Act. It shall not be necessary to recite the provisions of this section.

The defence of self defence would also clearly not be available to the accused person for the reason that that the accused was not under any imminent danger when he fled the scene to collect the axe. By his own admission, the accused indicated that deceased had walked back to where he was when he asked for tobacco. The accused was safe in his home when he collected the axe but decided to confront the deceased. The requirements for the defence of self defence are governed by the provisions of section 253 of the Criminal Law (Codification and Reform) Act. It shall not be necessary to recite the provisions of this section suffice to say that at the time the accused delivered the fatal blow he was not under any unlawful attack from the deceased whether perceived or real.

The court now has to determine whether the state has proved beyond reasonable doubt that the accused had the requisite actual intention to kill. It is now trite law that for a court to return a verdict of murder with actual intent, the court must be satisfied beyond reasonable doubt, either that the accused desired to bring about the death of his victim, and succeeded in completing that objective, or that while pursuing another objective the accused foresaw the death of his victim as a substantially certain result of that activity and proceeded regardless. A verdict of murder with constructive intent, on the other hand, requires the foreseen result to be possible as opposed to being substantially certain, making it a question of degree more than anything else.

See the case of *State v Mugwanda* 2002 (1) ZLR 574 (S).

In the instant case given the background of the misunderstanding between the deceased and accused one cannot say that when the accused went and collected the axe and before striking the deceased his sole and intended objective was to kill the deceased. Under cross-examination the accused said that he took the axe because he thought if deceased attacked him again he would defend himself with the axe. The accused further asserted that he delivered one single blow intending to strike the deceased on the shoulder but he realized that he had struck the deceased on the head. The fact that one single fatal blow was delivered by the accused tends to suggest that accused acted recklessly and applied excessive force in the circumstances. He ought to have foreseen that death might ensue.

It is my view that state has proved that the accused foresaw that death might occur as a result of his conduct. He lacked the requisite actual intention to bring about the death of the deceased. He should therefore be guilty of murder with constructive intent.

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

Sentence

The accused person has been convicted of murder with constructive intent. He was aged 17 years at the time of the commission of the offence. He has now just turned 19 years. The state and defence agree that there was indeed extenuating circumstances in that the accused has been found guilty of murder with constructive intent and that is a juvenile offender. In assessing an appropriate sentence the court must take into account all the mitigatory factors that have been placed before the court on accused's behalf by his defence counsel. The court takes into consideration that the accused readily admitted having committed the offence. He tendered a limited plea of guilty with respect to culpable homicide. He did not seek to dissociate himself from this offence from the outset. He was to some extent provoked by the deceased. His reaction was however disproportionate, and was excessive in the circumstances. The court notes that accused acted rather foolishly and there was a high degree of thoughtlessness on his part. He struck the deceased on the head and used severe force to the extent that the axe remained embedded in the deceased's skull after the attack. The deceased must have died a very painful death. The sentence the court imposes must however be rehabilitative and reformatory in nature. The accused is still young and the sentence that we impose must not have the effect of totally breaking him or condemning him. The court must indicate that the use of dangerous weapons such as axes and knives by young people in the resolution of disputes has gone out of hand. The courts have duty to pass appropriate sentences that reflect that the sanctity of human life is paramount. It is not possible to replace a human life and in this case life was recklessly lost. The sentence imposed must fit the offence, and the offender. The sentence must be just and fair.

In the result the appropriate sentence is as follows:

“Accused is sentenced to 12 years imprisonment”.

*National Prosecuting Authority's office, state's legal practitioners
Mvura-Mavhondo & Partners, accused' legal practitioners*