

THE STATE

Versus

CLEMENT NDLOVU

IN THE HIGH COURT OF ZIMBABWE
BERE J with Assessors Mr J. Sobantu & Mr T.E. Ndlovu
HWANGE CIRCUIT COURT 30 JUNE & 3 JULY 2017

Criminal Trial

BERE J: The ‘accused’ Clement Ndlovu is charged with the murder of the deceased, one Witness Dube in contravention of section 47 (1) of the Criminal Law (Codification and Reform) Act [chapter 9:23].

When called upon to plead the accused offered a limited plea to culpable homicide, raising the defence of voluntary intoxication leading to provocation. The plea was rejected by the state leading to a fully fledged trial.

The facts which are not in dispute are as follows: On 23rd of September 2016, the accused boarded a commuter omnibus at Tsholotsho Business Centre which was going to Maqethula, in Tsholotsho, which happens to be his rural home area. The accused and the deceased who had known each other for quite some time and were friends commenced drinking along the way and they appeared to have been drinking a combination of ordinary beer and what is often referred to as “strong stuff” as the beer had to be mixed with some fizzy drink by the accused and the deceased. It was not in dispute that the beer which the two were drinking along the way had been bought by the accused.

Upon disembarking at his destination the accused went to his homestead. Problems started when the accused checked his groceries and realised that his packet of cigarettes was missing. The accused took his knobkerrie which in the court’s view really resembles a walking stick and went back to a homestead nearby where he knew the commuter omnibus was parked over night. Upon enquiring from the deceased the whereabouts of his packet of cigarettes the

deceased pleaded innocence and knowledge of same. The accused commenced assaulting the deceased all over the body with the knobkerrie which weighed 180 grams, with a length of 27 cm and a circumference of 5cm. The assault led to the breaking of the knobkerrie into two pieces. It was after he had been assaulted that the deceased produced the packet of cigarettes. The accused did not stop the assault until he was stopped by one of the respectable villagers at whose homestead the commuter omnibus was being parked for the night.

The accused's defence was that he lacked the requisite intent to commit the crime charged owing to a combination of voluntary intoxication and provocation by the deceased who had stolen his packet of cigarettes.

The evidence led by the state was largely not in dispute. The extraction of evidence commenced with the commuter omnibus driver who gave evidence concerning how the assault occurred and how the stolen packet of cigarettes was recovered from the deceased, but not before the latter had been assaulted by the accused. The witness took the court through every detail of the assault. The witness was certain that despite the accused and the deceased having partaken of alcohol, the accused knew what he was doing, an observation which was confirmed by Mr Lot Moyo and the accused person himself both in his evidence in chief and under cross-examination.

It was quite significant that all the witnesses who testified were in agreement that the distance from the accused's homestead to Lot's homestead where he followed and assaulted the deceased was quite considerable – it was given as between 1,5km – 2km. All this assisted in establishing was that the accused was conscious of what he was doing. In other words, the accused was clearly in control of his faculties as he was to himself in court.

The doctor who examined the remains of the deceased concluded in the post mortem report (exhibit II) that in his opinion the deceased died as a result of (1) generalized sepsis; (2) pneumonia splenitis which was exacerbated by septic bed sores; and (3) neck's trauma in unknown circumstances"

It was not in dispute that the assault on the deceased was carried out on 23 September 2016 and that the deceased succumbed and died on 14th of November 2016. The death occurred exactly 51 days after the assault.

When the accused gave evidence he largely confirmed the evidence led by the state and conceded that despite having initially projected the picture of someone who did not know what he was doing, he in fact appreciated what he was doing. The only point of divergence between the evidence of the accused and the state is that the accused maintained throughout his evidence (both in evidence in chief) and under cross-examination that he never at any stage during his assault on the deceased formed the intention to kill the deceased. The state on the other hand insisted that the accused formulated the intention to murder the deceased.

Leaning on the ratio laid down in *S v Dzaro*¹ the state led by *Mrs Gorerino* urged the court to return a verdict of murder with constructive intent. Whilst the defence led by *Mr Mashindi* was adamant that the tendered plea of culpable homicide was the appropriate verdict.

Let me say from the outset that the facts in *Dzaro* are quite distinguishable from the instant case. In *Dzaro*, the murder was quite brutal and vicious and consisted of 26 stabbings with “a knife large enough to slaughter an ox”. The learned Judge in that case opined that the stabbing was purposeful and directed to achieve only one goal – the deceased’s death. It is significant that the deceased in *Dzaro*’s case died on the spot and in the evening of the vicious assault.

In the instant case, we have been privileged to see for ourselves exhibit III, the knobkerrie that was used by the accused. I have already noted in passing that that knobkerrie would easily pass for a walking stick. The witness who saw it being used, Hlanganani Moyo was very clear in his evidence that the knobkerrie was never used on the deceased’s head or any other

1. 1996 (2) ZLR 541 (H)

delicate part of the deceased's body. It looks like, the bulk of the assault on the deceased was with open hands and lightly dressed feet as testified by the accused and not controverted by the state. The accused person said he was wearing light, tennis shoes when he was stepping all over the lower parts of the deceased's body.

The question that confronts the court in the instant case is best dealt with by G. Feltoe² when he attempts in simple terms to deal with the distinction between murder and culpable homicide. The respected author makes the following lucid observations:

“Where it is alleged that X had the legal intention to kill, X will usually deny that he foresaw that his actions would result in death. The question then is whether, as a matter of inference he did have such foresight despite his denial. He can only be convicted of murder if the only reasonable inference that can be drawn from the facts is that he had legal intention to kill. If the court draws this inference the court decides that he must have and did foresee the possibility of death. (In effect, a finding that he was lying when he asserted that he did not foresee that possibility). If there is reasonable doubt as to whether he had legal intention, he must be given the benefit of the doubt and can only be convicted of the lesser crime of culpable homicide if it is proved that he negligently caused the death in question.”

In the case before us, we have carefully considered the drunken state of the accused person which we reckon is not sufficient to constitute a fully fledged defence, but accept that it must have affected his power of judgment in some way. Together with his drunkenness we have also considered the knobkerrie that was used and how it was used coupled with the admitted stepping on the deceased by the accused.

Our view is that , if the accused had intended to kill the deceased, his actions would have been apparent from the manner he used the knobkerrie. The accused could have easily commenced and ended the assault on the most vulnerable parts of the deceased's body. Further, if the accused had the intention to kill the deceased, he would not have easily stopped assaulting the deceased when approached by Lot Moyo.

2. *A Guide to the Criminal Law of Zimbabwe* by G. Feltoe (2nd Edition), Legal Resources Foundation page 110

A careful examination of all these factors coupled with the findings in the post mortem report as regards the cause of death lead us to the inescapable conclusion that by all stretch of imagination the accused could not possibly have reasonable foreseen the possibility of the deceased's death. Our unanimous position is that the accused was merely negligent in the way he assaulted the deceased. For this reason the accused is found not guilty of murder but found guilty of culpable homicide.

The situation that was confronted by the accused in this case is envisaged by section 224 of the Code³ which is framed as follows:

“224 Voluntary intoxication leading to provocation

If a person while in a state of voluntary intoxication, is provoked into any conduct by something which would not have provoked that person had he or she not been intoxicated, the court shall, in accordance with Part IX, regard such provocation as mitigatory when assessing sentence.”

In all the probabilities of this case, the accused ought to be found guilty of culpable homicide.

Verdict – guilty of culpable homicide

Sentence

In our effort to arrive at a just sentence we will be guided by the following factors in mitigation as submitted to us by *Mr Mashindi* for and on behalf of the accused.

The accused is a first offender with the usual family commitments. The accused has two wives and 3 minor children who look up to him for sustenance.

We accept as mitigatory that on the day in question both the accused and the deceased were drunk and that their conduct must have been affected by this drunkenness.

3. Criminal Law (Codification and Reform) Act [Chapter 9:23]

It is highly mitigatory that the deceased largely triggered the events that led to his death by stealing from the accused who was a close friend and who had bought and offered to share with him the beer which the two were partaking along the way.

The deceased did not readily admit the theft but only did so after he had been assaulted by the accused. We have no doubt that the accused must have felt betrayed by the conduct of the deceased.

In aggravation we find ourselves having to once again emphasise the sanctity of human life in this case and in general terms.

It was wrong for the accused to choose violence as a solution to the challenge that confronted him. The accused could have easily sought the involvement of the commuter omnibus driver or Mr Lot Moyo to resolve this issue.

It is disturbing to note that even after the deceased had returned the packet of cigarettes to the accused and apologised, the accused continued with his chosen criminal conduct of taking the law into his own hands.

Practice has taught us that those who take the law into their own hands are losers in the end. Such conduct is rarely rewarded, it creates more serious challenges like in this case where it led to the deceased's death.

Sentence - 5 years imprisonment 2 years of which are suspended for 5 years on condition the accused does not within that period commit any offence involving violence upon the person of another and for which upon conviction the accused shall be sentenced to a term of imprisonment without the option of a fine.

Effective sentence – 3 years imprisonment.

National Prosecuting Authority, state's legal practitioner
Mashindi & Associates, accused's legal practitioners