

THE STATE  
**versus**  
BONGANI MHLANGA

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 16 AND 17 JANUARY 2018

### **Criminal Trial**

*T Muduma* for the state  
*Mrs S V Padera* for the accused

**MOYO J:** The accused person faces a charge of murder, it being alleged that on 1 March 2017, he assaulted the deceased Bright Sibanda who is his half-brother with a hoe handle. The deceased later died from the injuries he had sustained which were on the head. The accused pleaded not guilty to murder but tendered a limited plea to culpable homicide. The state rejected that plea and the matter proceeded to a full trial.

The following documentary exhibits, were tendered the state summary was marked Exhibit 1, accused's defence outline was marked Exhibit 2, his confirmed warned and cautioned statement was marked exhibit 3 and the postmortem report was marked exhibit 4.

The hoe handle that was allegedly used in the commission of the offence was not brought to court as it was allegedly not recovered.

The facts of this matter are fairly straight forward, the two brothers had an altercation earlier in the evening where they fought over 10 pula. The deceased assaulted the accused on the head with a spirit level, resulting in the accused suffering injuries on the head in the form of a cut. They were restrained. Later at home, as accused arrived, deceased was narrating to Tauyanashe Muturukwa what had happened in the altercation. Accused was within hearing distance, he armed himself with a hoe and hit the deceased once on the head. The deceased then fell to the ground injured and bleeding profusely. The post mortem report gives the injuries as a laceration on the right parietal region which was 8cm with a depressed skull fracture in the same

region as well as brain damage and subarachnoid haemorrhage in the same region. The cause of death is given as

- 1) brain damage
- 2) depressed skull fracture
- 3) assault.

The first state witness Tauyanashe Muturukwa did not see accused strike the deceased, he only realized that deceased had been struck. The second state witness Elvis Katena observed from some distance, accused carrying a hoe behind him and raising his arms above his head as he struck the blow on deceased's head. He confirmed that the accused did not use the hoe itself to strike the deceased but the back of the handle.

The accused's version is basically similar to that of the state save to vary the circumstances in the kitchen when he assaulted deceased. State witness say deceased was unarmed but accused says he was, state witness also say he aimed at the head and he says he did not. Whatever version one adopts, it is the nature of the assault which is decisive on the verdict in our view.

The state counsel submitted that from the weapon used, and the injuries suffered the accused must be found guilty of murder with constructive intent. We have not been favoured with the weapon that was used. And a hoe handle can be any size. It was the state's duty to provide the court with the exhibit if it so much wanted to lean on its nature. A hoe handle is a form of log that varies in thickness, length and width as well as weight. How can this court sit here and imagine a lethal hoe handle? The state bears the burden of proof and it cannot seek to have this court assume issues that it should prove. The nature of the injuries I do not know how they lead to a conclusion on the intention. There are numerous culpable homicide cases wherein an accused person would either have been dealt a single blow on the head with a knobkerrie, a village wooden stool, a stone or a log. I am not aware of any principle of law that stipulates that where such was used on the head and a person suffers skull fractures and brain damage, then definitely murder has been committed. Only in the presence of other relevant considerations can one be persuaded as such. In fact there is ample case law to the contrary, which I believe is the reason why the state counsel could not cite even a single case in support of the state's contention.

The defence counsel on the other hand contends that the verdict should be culpable homicide.

### The Law

We now have to assess what the accused is guilty of.

#### Distinction between murder with constructive intent and culpable homicide

Professor Feltoe in his Guide to *The Zimbabwean Criminal Law* 2005 Edition at page 96 says that in deciding upon whether there was legal intention all the factual evidence which bears upon and could have affected the accused's perception, powers of judgment and state of mind and foresight at the time he committed the offence must be most carefully scrutinized, factors such as intoxication provocation, level of intelligence, personality etc. would obviously be relevant in this regard. If the court concludes that accused did not foresee the possibility of death but that he should have foreseen it, the correct verdict is culpable homicide.

This assessment however, is for those borderline cases which I do not believe the current case is.

In this case the accused and deceased fought, they were restrained, they were both drunk, accused used a hoe handle and dealt a single blow on the deceased. We were not favoured with the size and dimensions of the hoe handle and without its size and weight you cannot hold that from its usage only an intention to kill can be deduced. This case is a straightforward culpable homicide like any other knobkerrie, village wooden stool, log, single blow cases onto the head. That the blow was on the head and resulted in a fracture would not on its own amount to an intention to kill.

This case is certainly no different from the following cases by the High Court where the verdict was found to be culpable homicide.

In the case of *S v Mukwacha* HH 233/16, the accused and deceased had an earlier altercation where accused was assaulted, he later came back with a knife and stabbed deceased once on the chest. A verdict of culpable homicide was given by the court.

In the case of *S v Mbanu* HB 114/15. The accused and deceased had an altercation while herding cattle, accused struck deceased with a knobkerrie on the head once, deceased later

collapsed and died of a severe injury, trauma on skull. He had a depressed skull fracture. The accused was convicted of culpable homicide. In the case of *S v Sibanda and another* HB 216/15, the accused struck the deceased once with a stone on the head and the deceased died from severe brain oedema, subdural haematoma, severe head trauma, and was convicted of culpable homicide.

In the case of *S v Ncube* HB 162/15 the deceased struck accused on the head once with a log. The deceased died from subarachnoid haemorrhage, depressed skull fracture, blunt force trauma, and the verdict returned was that of culpable homicide.

The list is endless, these single blow on the head cases where a culpable homicide verdict was returned are so many that one wonders what motivated the state to reject the limited plea by the accused person. Whilst the state has the prerogative to prefer charges against an accused, one would expect that they do so after a proper examination of the facts and the evidence at hand. Certainly, an accused person should not be charged with a more serious offence as a matter of course, but the state counsel should carefully examine the burden of proof and the state's ability to sustain the charge. In this case, even the weapon used was not tendered, and its size, shape and weight obviously could not be assessed. These facts where a hoe handle was used and a skull fracture resulted from a single blow on the head could obviously not sustain a murder charge by the stretch of any imagination.

At the core of any justice delivery system is the consciousness by all the stakeholders, to adopt all possible avenues that would lead to curtailed litigation, as that does not only amount to a speedy finalization of cases, but, it also saves the limited resources that we have. The accused person is accordingly acquitted on the murder charge and is convicted on the lesser charge of culpable homicide.

### Sentence

The accused is convicted of culpable homicide. He assaulted his half-brother with a hoe handle resulting in his death. He is aged 34. He is married has two minor children. He pleaded guilty to the appropriated charge. He said he was hurt by his brother's death. Deceased had assaulted accused before. He spent 10 months imprisonment before trial. However, this court frowns on any loss of life in which violence is involved. Families are butchering each other day in and day

out. Violence is now the norm in our society and this court should at all times emphasise the sanctity of life. The accused spent 10 months in prison before that. The accused person is accordingly sentenced to 10 years imprisonment with 3 years imprisonment suspended for 5 years on conduct the accused person does not within that period commit an offence involving violence, whereupon conviction he shall be sentenced to imprisonment without the option of a fine.

*National Prosecuting Authority*, state's legal practitioners  
*Pundu and Company*, accused's legal practitioners

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