

THE STATE
versus
EDWARD GUMBO

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 17 AND 18 MAY 2018

Criminal Trial

Ms N Ngwenya for the state
A Ndlovu for the accused person

MOYO J: The accused person faces a charge of murder, it being alleged that on 30 August 2017, he assaulted the deceased and resulting in deceased's death.

The facts of this matter are largely common cause. The accused's granddaughter passed on being the third one to die in a row. Deceased did not attend the funeral as a neighbour to the accused. Accused later met deceased on the fateful day and asked him why he had not attended his grandchild's funeral, deceased was dismissive and said that accused should enquire about that from the kraal head. Deceased allegedly then punched the accused. Accused then plucked four sticks from a nearby bush and assaulted the deceased all over the body. Accused was drunk at the relevant time. The accused says he was hurting about the death of his grandchildren from the same type of illness at the material time. The post mortem gives the cause of death as:

- 1) Subarchnoid haemorrhage
- 2) Blunt force trauma assault

The following exhibits were tendered before the court:

- The state summary
- the defence outline
- the affidavit of the police officer who identified deceased's body to the pathologist.
- the post mortem report
- the accused's confirmed warned and cautioned statement and the sticks that were allegedly used in the commission of the offence. All these were duly marked.

Mbonisi Ndlovu gave *viva voce* evidence for the state, he however, did not witness the assault, he got there after the fact. He observed a cut on the deceased's forehead and the deceased was lying down. The evidence of Dexter Mutasa, Saviours Chirara, Munyaradzi Chisenwa and Dr S Pesanai was admitted into the court record as it appears in the state summary.

The accused person gave evidence for the defence and his version on the altercation and the assault is the only version that is available. The accused person per his own version tendered a limited plea to culpable homicide. In our view the state should have accepted this limited plea in terms of section 271 (1) of the Criminal Procedure and Evidence Act. The state counsel however submitted that the accused person should be found guilty of murder with constructive intent as the accused indiscriminately assaulted the deceased and that there was excessive haematoma as per the post mortem report. The online dictionary defines a haematoma as "a localized collection of blood outside the blood vessels due to trauma including injury and may involve blood continuing to seep from broken capillaries."

This in essence means the deceased had excessive bleeding into tissues on the scalp. This can thus not be linked to any force or number of blows. I say so for it does not necessarily follow that for one to bleed excessively severe force should have been used or that one should have been struck many times for them to bleed excessively. A person can be struck once and bleed excessively in as much as he can be struck many times and bleed excessively. A person can also be struck with less force and bleed excessively in as much as he can be struck with severe force and bleed excessively. It cannot be argued that from the existence of excessive haematoma then the only reasonable inference to be drawn is that severe force or numerous blows were conducted to that part. This court simply does not know that fact as it has not been proven by the state.

On the issue of many indiscriminate blows, the accused used sticks which are primarily not lethal or dangerous so the number of blows with the kind of weapon used by the accused cannot necessarily be held to be life threatening in the context of death being a real possibility as opposed to mere carelessness on the part of the accused.

Professor Feltoe in his *Guide to Zimbabwe Criminal Law* 2005 edition at page 96.

"The courts have frequently stressed that there is a clear distinction between murder based upon a finding that the accused had legal intention to kill and culpable homicide.

In the first case the subjective test is applied, and in the second case the objective test is used. In deciding upon whether there was legal intention all the factual evidence which bears upon and could have affected accused's perception, powers of judgment and state of mind and foresight at the time he committed the alleged crime 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 (i.e that a reasonable man would have foreseen it) and the reasonable person would have guarded against it, the correct verdict is culpable homicide."

In this case, the state did not prove beyond a reasonable doubt that the accused foresaw death as a real possibility neither did the state prove that there are facts wherefrom the only reasonable inference that can be drawn is that the accused person foresaw death as a real possibility.

The state should diligently prove the assertions it makes on the guilt of an accused person. The state's mere say so, does not meet the required threshold of proof. It is not the state's wishes that carry the day, but it is the substance in the facts as proven before the court that do. In this case clearly, there is absolutely no fact that takes this matter anywhere near murder. The facts clearly show that there was an altercation between accused and deceased. Accused was drunk. Accused was hurting from the loss of his grandchildren and his emotional state counts in his favour. The deceased did not answer accused's question in an appropriate manner. The deceased assaulted the accused. Accused then plucked four sticks/switches from a nearby bush and assaulted deceased all over the body. Surely if accused wanted to kill the deceased he would not have used sticks in a bush where he could have gotten stones or logs. It is also a point in accused's favour that deceased did not suffer any fracture. It is for these reasons that the accused person is acquitted as pleaded on the charge of murder but is convicted of the lesser offence of culpable homicide.

Sentence

The accused person stands convicted of culpable homicide. He is a first offender. He is 44 years old and is a family man. He pleaded guilty to the appropriate charge. He had an altercation with the deceased against the background of an upset emotional state. He has shown remorse. He has spent 8 months in remand prison. However, this court frowns at the use of violence to resolve

disputes. Likeminded people should be aware that these courts uphold the sanctity of human life. Loss of life through violence is not to be taken lightly by these courts, lest a wrong message is sent out there. However, in sentencing, the court should not over emphasise the interests of society, sentencing is a three pronged enquiry, that looking at the circumstances of the commission of the offence, the personal circumstances of the accused person and the public interest at large. A careful balance must be struck amongst these three, meaning that the court should balance an accused's personal circumstances, the circumstances of the commissions of the offence and the societal interest. Where meaningful mitigatory features exist, the court cannot turn a blind eye to their effect on the sentence, simply because it stresses public interest, that would not be in the interests of justice in my view. The accused does have striking mitigation in the form of his emotional state at the time, to some extent the provocation by deceased's answer and the punching by the deceased, the 8 months he has spent in remand prison, his plea of guilty to the appropriate charge and his show of remorse. It is for these reasons that the accused person is sentenced to 5 years imprisonment with 2 years imprisonment suspended for 5 years on condition the accused person is not within that period convicted of an offence of which violence is an element whereupon conviction he shall be sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Dube and Associates, accused's legal practitioners