

THE STATE**Versus****LIFE MULAUI**

IN THE HIGH COURT OF ZIMBABWE

MABHIKWA J with Assessors Mr P. Damba & Mr E. Mashingaidze

BULAWAYO 14, 15 & 26 JUNE 2018

Criminal Trial*Miss N. Ngwenya* for the state*T. Ndlovu* for the accused

MABHIKWA J: The deceased was 25 years old when he met his death. 21 year old Life Mulauzi now appears in this honourable Court charged with the murder of the deceased as defined in section 47 of the Criminal Law (Codification and Reform) Act chapter 9:23. It being alleged that on 10 September 2016 and outside Crocodile Night Club in Beitbridge, he struck Fred Mashele with a stone once on the head intending to kill him or realising that his conduct could cause the deceased's death but nonetheless continued to engage in that conduct despite the risk or possibility.

Background facts

The brief facts of this matter are that an older brother to the deceased, one Delelani Mashele was at Muleya shop verandah at Lutumba Business Centre on 10 September 2016 when the accused snatched a hat from his head. Delelani then tried to recover his hat from the accused who was vehemently denying ever snatching it. As they argued, the deceased arrived. He parked his vehicle and asked what his brother was doing at that place. Delelani explained that the accused had snatched his hat but was now denying. A misunderstanding and a scuffle ensued. During the scuffle, the accused allegedly broke loose, picked up a stone and struck the deceased on the head once with it. A policeman was called and the accused was subsequently arrested moments later in the same evening. At the time, deceased was already seriously ill and unable to speak. He was ferried to Beitbridge Hospital where he was later referred to Mpilo

Hospital but unfortunately succumbed to the injuries and passed on 3 days later on 13th September 2016.

The accused, both in his warned and cautioned statement to the police and in his defence outline in court completely denied striking the deceased. His defence was that he was approached by Delelani Mashele who accused him of stealing a hat. He denied. At that time 3 people arrived and Delelani told them that he had stolen his hat. He stated that the trio plus Delelani Mashele then started assaulting him and he fell to the ground. They continued kicking him but he managed to escape and run away. He added that he was pelted with stones as he escaped. He never saw the person who struck the deceased neither did he throw any stone himself. He stated he was himself a victim of assault by the deceased and the now witnesses.

Issues

The issue is whether it is the accused who killed the deceased.

What emerged from the evidence as testified by Delelani is that he was at a verandah at the business centre, talking on the phone when the accused suddenly appeared from the back and snatched a hat from his head. He said he had earlier seen the accused and described what he had been wearing earlier. As he followed the accused, the accused disappeared. He then met his neighbour one Tshiedza Mbedzi who agreed to accompany him. Mbedzi is probably the person referred to as Chipikiri by the witness Lerio in his evidence. Outside Crocodile Bar, they found accused seated in the company of friends on stones. Accused at the time was in the process of removing the jacket and handing it over to another person. Delelani then demanded his hat, whereupon the accused became aggressive. At the same time the accused's friends picked up stones. However, the accused's colleagues retreated to a darker place leaving the accused with him (Delelani) and Tshiedza. As they were demanding the hat from the accused the deceased arrived. He disembarked from the vehicle he was driving and asked what his brother was doing there in the dark. He responded by explaining what had happened. The deceased then got of the vehicle and started asking the accused. The accused and his friends started throwing stones. Delelani was adamant that he saw the stone that struck the deceased on the fontanel area of the

head. He said in any case, only 2 other stones had been thrown and he saw where they landed. Delelani further testified that the murder stone was thrown by the accused after he had just broken loose from a brief struggle with the deceased where they had been holding each other by their shirt collars.

Accused is alleged to have picked up the stone (Exhibit 6) and struck the deceased with it from very close range of about 2 metres or less. He says the deceased was struck on the fontanel area of the head.

Realising that deceased was seriously hurt and could hardly speak, they put him in his taxi. They called a policeman by phone. Somebody assisted by showing them where accused and his friends had parked their scotch cart. The state witnesses and the policeman waited in ambush. The accused was arrested on arrival with his friends. He allegedly had removed his shirt and was still carrying stones in his hands.

This evidence was corroborated by the post mortem by Dr Jekenya which was produced by consent of both parties as exhibit 5. The doctor observed, as a mark of violence, a swollen left parietal region and a 2,5cm sutured wound on the left tempo-parietal region. The English Oxford Dictionary meaning of the parietal and fontanel areas or region shows that the two are at almost one and the same place of the head. The words seem to be used interchangeably by laymen, hence the court's finding that the use of the words fontanel area by Delelani who is just a laymen seems to be corroborated by the post mortem's use of the word parietal region when one then considers the two phrases, respective English meanings.

The court's finding is that the 1st state witness' account of the evening's incident, is by and large, credible and remained intact after cross-examination.

The 2nd state witness Lerio Muleya testified that he arrived at the business centre in the company of the deceased at about 23:00 hours on the fateful day. The deceased was driving a motor vehicle. They made a turn after noticing deceased's brother Delelani talking to some people. Deceased drove towards them and parked the car. He got out asking his brother what he

was doing there. He was told that the accused had taken Delelani's hat. He says the place was slightly lit by lights from the particular shop and others at the business centre. Further, the deceased had left the lights on and facing the scene of altercation. He heard the deceased asking the accused about Delelani's hat. He then observed the deceased and the accused grabbing each other by their collars. Some young men, who were behind the accused, started throwing stones. The accused then slapped the deceased with an open hand and broke loose. He picked up a stone and struck the deceased. Thereafter, accused and his colleagues ran away deep into the darkness. Asked about visibility at the scene at that time of the incident, the witness stated that it was at night but he could observe the accused pick up a stone from behind him and striking the deceased on the fontanel area of the head. He stated that he was able to observe all this from the vehicle because the vehicle lights were on illuminating the area in front of him where it all happened. He testified that accused had about 4 other colleagues who subsequently ran away with him. This witness apparently remained an onlooker who did not involve himself in the fracas inspite of the fact that he had got to the scene in the company of the deceased. The court accepts his evidence as largely truthful and corroborative of the evidence by Delelani Mashele.

It must be stated that counsel for the defence indeed quizzed the two witnesses on some discrepancies between their evidence and the outline of the state case. There were indeed such discrepancies notably the claim in the state outline that the deceased grabbed accused by the collar and threatened to assault him if he did not give back his brother's hat and that after the threat the accused picked up a stone struck the deceased on the head and fled from the scene, there being no mention of a struggle between the two as revealed by the evidence. It is trite law however, that for such discrepancies to be fatal to the state case, it must be shown that;

- (a) The outline of the state case is not merely a précis given by the police and not confirmed by the witnesses;
- (b) The discrepancies go to the root of the state case to the extent that without a reasonable explanation as to their origin, the state case is fatally flawed.

In casu, the difference is minor and inconsequential in our view. Whilst the outline of state case suggests that the accused is the one who grabbed the accused and threatened to assault him, the state witnesses testified in court that both young men grabbed each other by their collars and briefly struggled.

However, both are in agreement that after they briefly struggled which was not in any way life threatening to the accused, he picked up a stone and struck the deceased on the head. The 2nd witness did not take note of the stone itself but the 1st witness did and identified it as the “murder stone”. The stone (exhibit 6 – weight 2.674kg) and was thrown to the deceased from a distance of about 2 metres.

The accused himself stuck to his defence that he was merely a victim. Firstly, he was accused of stealing. Secondly, he was manhandled and assaulted. In the advent of all this, he was merely mesmerised, and when opportunity availed itself, he ran away unharmed and without retaliating at all. He did not see who or what hit the deceased causing his death. Considering is alleged involvement with the deceased, this version is hard to believe and the court rejects it as untruthful.

The accused portrays himself as the proverbial lamb led to the alter for sacrifice slaughter rendering no resistance at all. This is highly unlikely.

Further, it is important to note that when asked by counsel to narrate what happened on the fateful day accused says he left Crocodile Bar in the company of his friends. He then says when outside, “I met and continuously uses the 1st person “I” throughout, conveniently removing his companions from the scene without explaining what had happened to them. This he obviously does to avoid a situation where they would be called and disagree with in testimony. To that extent he puts even his own counsel in a difficult situation. This case would have needed testimony from not only him but also one or more of his companions to dilute credibility of the state witnesses. As it stands, the state witnesses remain uncontested in evidence.

In the circumstances, it is the court's finding that the accused caused the deceased's death in the manner narrated to by the state witnesses, including as shown by the evidence produced in terms of section 314 of the Code.

The court will however rule out actual intention to kill in this matter. The accused struck only once and ran away from the scene. Also from the totality of the surrounding circumstances, nothing suggests or points to the fact that he had formed an intention to kill. However, he used, with severe force a 2,674kg stone aimed at the head from close range. No wonder, the damage caused by the stone as observed by Dr Jekonya and also the fact that soon after the strike, the deceased could not even speak and died 3 days later after transportation to Beitbridge and Bulawayo Hospitals. The fontanel area of the head is known to be sensitive even for an adult.

Death was foreseeable, and the court finds that the accused indeed foresaw the possibility of causing death with such a stone but nonetheless proceeded with his conduct in the face of such possibility and regardless of whether death occurred or not.

Accordingly, the accused is found guilty of murder with constructive intent.

Reasons for sentence

The court takes into account all that has been said in mitigation of sentence on behalf of the accused in particular the fact that at 21, he is still youthful and immaturity played a part in his conduct. The court has been urged to consider that the immaturity factor played a part to the extent that both parties could have handled the dispute differently had they been more mature.

There is indeed a host of authority to the effect that whilst the age of majority is pegged legally at 18, practically it does not act as a boundary wherein once crossed, then the individual immediately transforms into complete adulthood. It has been stated in some cases that even education does not erode youthfulness and immaturity to the extent that a university student of about 22 years of age may still act with youthfulness. Lack of maturity is usually noticed in a person's reactions to situations such as these. The court has been urged to consider that accused

spent 22 months in custody pending trial i.e. close to 2 years. These two factors weigh heavily in favour of the accused in mitigation of sentence.

The court of course is cognizant of the fact that the accused is a young first offender who, depending on the sentence, may still pick up the pieces of his life after serving it.

The accused is however convicted of a serious offence in murder with constructive intent. He acted with complete disrespect and disregard of the sanctity of human life. A young life (23) was unnecessarily lost over a very petty issue – a hat. The disturbing factor is that our people especially the young are increasingly engaging in acts of violence on very petty matters. Quite often these courts sit and preside over cases where lives are lost over a fight over a cigarette, a woman, 50c, a funny joke and so the courts cannot sit back and appear to condone people who get prepared to kill over such petty issues.

The court also considers it aggravating the fact that the accused only picked the stone and used it after having managed to break loose. The position would have been quite different had he used the stone to break loose.

Further the court considers that the accused cannot properly claim to have been provoked in this case because although he was confronted by Delelani and later by the accused, he was the initial cause of the confrontation when he snatched the hat.

The court had initially contemplated a sentence on the high side for such a killing. However, following the revelation by the accused's counsel with the concurrence by state counsel that he has been in custody for close to 2 years and that the court is urged by both counsel to consider that factor as a sentence also served the court will indeed exercise leniency.

The sentence of 5 years 3yrs suspended as proposed by defence counsel would certainly trivialize the offence and cause an uproar in society.

The accused is thus sentence to 14 years imprisonment.

*National Prosecuting Authority, state's legal practitioners
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