

THE STATE**Versus****EMMANUEL MAPFUMO**

IN THE HIGH COURT OF ZIMBABWE

BERE J with Assessors Mr P.M. Damba & Mrs A. Moyo

BULAWAYO 20 & 21 MARCH 2018

Criminal Trial*T. Hove* for the state*P. Mukono* for the accused

BERE J: On the 3rd of October 2017 at around 0100 hours the 55 year old deceased (Cliff Fungulani Chioza) a taxi driver had his taxi parked at Kalahari Bar taxi bay, Beitbridge, his permanent place of employment.

The deceased was hired by the accused Emmanuel Mapfumo and his girlfriend Perfedious Moyo to take them to house number 3673 Mfelandawonye area in Beitbridge where Perfedious resided. Little did the deceased know that this was the last time he would ever drive his Honda Fit taxi motor vehicle.

Upon arrival at the destination the accused instructed his girlfriend to go and clean the house whilst he remained with the deceased pretending to be paying for the hired taxi. Without warning the accused turned on the deceased and subjected him to electric shock ordering him to surrender his motor vehicle to which the deceased naturally resisted. The accused reacted by drawing out his okapi knife which he sunk into the deceased's right chest and as the deceased was helpless the accused pushed him out of the motor vehicle and sped off with the vehicle.

The deceased died on the spot and his remains were recovered later that morning in a pool of blood. The investigations that followed through the network service provider led to the recovery of the deceased's Vodafone's cellphone with accused's wife in Chartsworth, Gutu

which in turn led to the arrest of the accused and the recovery of the deceased's stolen motor vehicle at Esbank toll gate between Guruve and Harare on the 8th of October 2017.

When the charge of murder was put to the accused in court the accused pleaded not guilty which really amounted to some token denial since in his defence outline he virtually accepted the evidence against him as put forward by the state.

The state case kicked off by the consensual production of the following exhibits: the accused's confirmed warned and cautioned statement, the post mortem report, the electric shocker, pepper sprayer, okapi knife and Vodafone cellphone belonging to the deceased. This was followed by the leading of evidence from Brian Maradzo, Josiah Mahwete, Detective Assistant Inspector Vusumuzi Buhle Sibanda and Detective Sergeant Masendu. The rest of the evidence was admitted as summarised in the state summary in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07].

As already highlighted there was virtually no serious contestation or challenge of the evidence as given by the state with the accused agreeing to virtually everything stated by the state.

The post mortem report tendered as an exhibit in these proceedings concluded that the deceased's death was due to (a) pneumohaemothorax (b) hypovolaemic shock and (c) deep stab wound on the deceased's chest.

The accused conceded to have initiated an unprovoked attack on the unsuspecting deceased with an electric shock in an effort to immobilize him before demanding the deceased's motor vehicle. It became common cause that when the deceased resisted to succumb to the demand by the accused, the accused reacted by pulling out his okapi knife and stabbing the deceased right on his chest leading to the deceased's death and the accused's subsequent speeding off with the stolen motor vehicle.

In his confirmed warned and cautioned statement the accused gave a chilling description of how he attacked the deceased leading to the latter's demise.

As a court we had the unenviable discomfort of viewing the murder weapon, the okapi knife (which is inscribed AK47 okapi), and whose details were given as follows: length 33cms, length of the metal blade 15cm with the wooden handle being 18cm in length. There can be no denial that this particular knife is a terrible lethal weapon. It is unimaginable that one would dare imagine using such a knife upon another human being let alone in the chest if death is not the dominant motive.

As indicated there was virtually no argument on the manner in which the killing itself took place (the *actus reus*) but the two contrasting positions centered on the verdict that must be passed in this case. Mr T. Hove, for the State moved the court to return a verdict of murder with actual intention whereas Mr P. Mukono for the accused advocated for the verdict of murder with constructive intent.

I propose to briefly deal with the legal principles that guide the court in an action of this nature. As correctly advised by both counsel the legal position has been traversed before and one such case which attempts to clarify the position of our law is the case of *Robert Mugwanda v The State*¹ where the Supreme Court puts the position this way;

“Professor G. Feltoe, in his book, *The Guide to Zimbabwean Criminal Law* discusses the distinction between positive or actual intent, and constructive intent or legal intent in a manner that is very lucid and instructive. The learned author characterises the distinction as follows:-

Actual Intention

- (a) Desires death. Death is aim and object, or
- (b) Death is not aim and object but in the process of engaging in some activity foresees death as a substantially certain result of that activity and proceeds regardless as to whether this consequence ensues.

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Legal intention

Does not mean to bring about death but foresees it as possibility whilst engaged in some activity and proceeds with the activity regardless as to whether death ensues.

- (a) subjective foresight
- (b) as to possibility not probability
- (c) recklessness”

On the basis of the above ... it follows that for a trial court to return a verdict of murder with actual intent it must be satisfied beyond a reasonable doubt that:

- (a) either the accused desired to bring about the death of his victim and succeeded in completing his purpose; or
- (b) while pursuing another objective foresees death of his victim as a substantially certain result of that activity and proceeds regardless.

On the other hand, a verdict of murder with constructive intent requires the foreseeability to be possible (as opposed to being substantially certain making this a question of degree more than anything else)...”

Having laid down the legal principles involved, I now move to consider what we perceive to be the correct verdict in this case.

In both his evidence under oath in court and in his confirmed, warned and cautioned statement, the accused speaks to an unprovoked and sudden attack on the deceased who at most must have been expecting to get his fare for the hired taxi.

The accused commenced his attack on the deceased by using an electric shocker and at the same time demanding that the deceased surrender his motor vehicle to him. By the way, the deceased had no obligation to accede to this greedy demand. Naturally, the deceased refused to part with his motor vehicle under such circumstances.

The accused's immediate reaction was to pull out his okapi knife and sink it into the deceased's chest followed by the accused pulling the deceased out of the motor vehicle and speeding off with the stolen car.

The court has already commented on the nature of the okapi used in this case. To use such a lethal weapon on a fellow human being by aiming at the most vulnerable part can only be read to imply the substantial certainty of death ensuing. The conduct exhibited by the accused could not possibly have been aimed at any other result other than bringing about the death of the deceased.

Under such circumstances the court need not stretch its mind further but to return a verdict of murder with actual intent.

The accused is thus found guilty of having committed the crime of murder with actual intent.

Sentence

We have considered the circumstances of this case, the callous and ruthless manner in which it was carried out. We are satisfied beyond doubt that this murder was committed in extremely aggravating circumstances, having been committed in the act of robbery.

The factors in aggravation far outweigh whatever could be considered in mitigation.

The deceased died a very violent death not because he had done anything wrong to the accused but was merely trying to use his taxi motor vehicle to earn out a living.

The deceased did not in any way provoke the accused but had acceded to the request by the accused and his girlfriend to provide them with transport. For all this the accused saw it fit to reward the deceased by terminating his life.

The accused was motivated by nothing else but greed. The message must go loud and clear that the sanctity of fellow human life must be respected by those who want to enjoy life.

We hear the accused well when he says he has been in cells awaiting this trial for no more than 6 months. We also accept that he is a first offender and that he co-operated with the investigating team but against all this must be viewed the sad reality that he ended an innocent man's life unnecessarily and in order to steal his motor vehicle.

We believe this court would be betraying society if we were to be swayed to impose any sentence other than death. Those who cheaply regard fellow human beings' lives must appreciate that their lives can also be prematurely terminated.

We are particularly concerned in this case that the deceased, because of the age disparity between him and the accused qualified to be the accused's father. The accused allowed greed to blind his objectivity. The ultimate penalty is the most appropriate one for the accused.

The sentence of this court is that the accused be returned to custody and that the sentence of death be executed upon him according to law.

National Prosecuting Authority, state's legal practitioners
Messrs Danziger & Partners, accused's legal practitioners