

THE STATE
versus
GARIKAI CHIPENI

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 30 and 31 January 2014, 26 February 2014 and 20 May 2015

ASSESSORS: 1. Mr Musengezi
2. Mr Gonzo

Criminal Trial

Ms P Chikangaise, for the state
O Kadare, for the defence

BHUNU J: The delay in handing down judgement in this case was due to the loss of the notebook and delay in transcribing the record of proceedings. The accused is charged with murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:07*]. He is alleged to have struck and mortally wounded his friend Lucky Mafuta on 18 December 2011 who eventually died on 9 January 2012. The facts surrounding the alleged murder are to a large extent common cause.

The undisputed facts are that the accused and the deceased were unemployed friends who decided to pool their resources together and embark on a joint business venture buying and selling airtime recharge cards. Each partner contributed an initial capital of US\$23.00. The deceased was responsible for keeping both the capital and proceeds of the business venture.

The accused eventually found alternative part-time employment resulting in the two agreeing to dissolve the partnership and share equally the business capital and profits on 18 December 2011. On the morning of that date the accused visited the deceased's lodgings at house number 559 Makomo, Epworth for that purpose. He found the deceased at home.

Instead of getting down to the business of dissolving the partnership and sharing the business proceeds the deceased took him on a wild goose chase. He first asked him to accompany him to Munyuki bar where they had a few drinks with a friend before returning to the deceased's residence.

At the residence the deceased could not produce the money alleging that it was with his father who was away drinking. When the accused suggested that he would go and fetch the father the deceased objected saying that his father detested being disturbed when drinking. This resulted in a brawl which broke out into a fist fight. There were no eye witnesses to the fight. What transpired during the fight can best be related in the words of the accused person's own words;

“... He grabbed me with his right hand by the neck. Thereafter I tried to get hold of his hand to remove it from my neck. He then said I was desecrating him. He then assaulted me using clenched fists. I was unable to retaliate because I then fell down. I fell on the bicycle and I sustained a cut on my left temple. Thereafter he took a piece of firewood that was behind the door next to the primus stove. I was now standing up. He feigned me with the firewood because he was aiming on the head. When he tried to assault me on the head I dodged and lifted my legs. He then assaulted me on the right leg. I was down and I did not get a chance to get up. After he had assaulted me I told him that he had injured me and he told me that he wanted to injure me. He did not say why he wanted to injure me. By the time I spoke to him that is when I got the opportunity to stand up. I stood up, I managed to get the piece of wood that was in his hand and we started wrestling for that piece of wood. When we started wrestling that is when I got the opportunity to get a piece of firewood behind the door. I assaulted him with the piece of firewood just above the ear once. When I assaulted him that is when I got the chance to escape because the deceased was older than me. I then managed to run away”

From the accused's own testimony it is apparent and a matter of common cause that he struck and killed the deceased with a blunt object as alleged by the State. The only point of dispute is whether or not he used the back of the wooden handle of an axe as alleged by the State or a piece of wood as alleged by the accused. In my view there is no material difference. The bottom line is that the accused struck the deceased a vicious blow with a blunt object on the head with sufficient force to cause fatal injuries. Because there were no eye witnesses to the commission of the offence the accused's own testimony which is consistent with the facts and all the other available evidence is to be preferred. This is what he had to say under cross-examination;

- “Q. Confirm you struck the deceased on the head with a hard object?
A. Yes.
Q. What object?
A. Firewood.

- Q. How big?
A. 45cm long.
Q. Thickness?
A. I could not put my hand around it.
Q. Meaning it was heavy?
A. Yes.
Q. The doctor said there were fragments where the deceased had been struck on the head?
A. I do confirm.

Q. That means you used severe force?
A. Yes.

Q. Why did you choose to strike on the head?
A. Since I was being assaulted that was the only way I could escape

Q. Why not strike on the hand?
A. When I struck the deceased on the head I was not looking where I was striking. I only wanted to strike him and escape.

Q. You appreciated the head was the most vulnerable part of the body?
A. Yes.

Q. Why did you not render him assistance?
A. I was afraid.”

The accused having admitted that he deliberately struck the deceased on a vulnerable part of the body the only issue that remains is whether or not he has a partial or complete defence for his conduct. The evidence establishes without any doubt that the accused struck the deceased with a heavy piece of wood on the head with severe force to cause multiple fatal fractures to the head. Having regard to the nature of the weapon used and the force applied the accused must have foreseen and therefore did appreciate that death was likely to ensue.

The fatal blow was however struck in circumstances of severe provocation and in the course of a fight. His defence that he was acting in self-defence is somewhat justified but having regard to all the available evidence he exceeded the bounds of self-defence. The deceased appears to have been a dishonest fellow intent on cheating the accused of proceeds from their joint venture business upon the dissolution of the partnership. Having led the accused on a wild goose chase he then attacked the accused in a bid to deter him from demanding his share of the business proceeds.

Murder is a specific intent crime that may be reduced to non-specific lesser crimes such as culpable homicide or assault by provocation or some blameworthy conduct on the

party of the deceased justifying the existence of a partial defence. See *S v Tenganyika* 1958 R & N 228 FSC. In this case I am satisfied that the deceased's conduct in attempting to cheat the accused and then attacking him is conduct sufficient to reduce the verdict of murder to that of culpable homicide. The accused is accordingly found guilty of culpable homicide.

SENTENCE

The accused stands convicted of culpable homicide. He killed his friend with whom he was in a business partnership of selling juice cards. In assessing sentence the court takes into account that the accused is a young first offender. He was only 21 years old at the material time. He is now 24 years of age. He is married with one child to look after. The accused is unemployed and has no valuable assets. He survives on buying and selling as a vendor. The court also takes into account that the accused is remorseful and contrite. He has been asthmatic since birth although he has now improved. It is feared that if he is sent to prison there might be a relapse.

The court will also take into account that the accused has spent two years in prison on remand pending trial. His relatives have offered to pay compensation but it appears they have not taken any effective steps to effect compensation which remains outstanding. The court also takes into account that there was severe provocation in that from the facts of this case it appears the deceased wanted to defraud the accused. On the other hand the court takes into account first and foremost the sanctity of human life. The accused's moral blameworthiness is aggravated by his failure to render assistance after he had seriously wounded the deceased. The offence of culpable homicide where life is needlessly lost is always considered by the courts to be a serious offence which calls for severe and deterrent sentences. In this case although laboring under severe provocation there was need for the accused to exercise self-restraint.

In the circumstances of this case I am in agreement with submissions made by state counsel that a short and sharp sentence would meet the justice of this case. In the result the accused is sentenced to four years imprisonment of which two years imprisonment is suspended for a period of five years on condition the accused does not again within that period commit any offence involving the unlawful killing of a fellow human being.

The Prosecutor General's Office, the State's legal practitioners
G Machingambi Legal Practitioners, the defendant's legal practitioners