

THE STATE
versus
PHILLIP MASHAVA

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 16, 20 & 22 June 2016

Assessors: 1. Mr Chidawanyika
2. Mr Chipere

Criminal Trial

M. Musarurwa, for the state
M. Simango, for the defendant

MWAYERA J: Having been indicted to answer to a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] the accused pleaded not guilty to the charge. It is the state's contention that on 31 July 2015 and at Derust Farm Compound, Chipinge the accused accompanied by Simon Puranyemba Simango who is still at large unlawfully and with intent to kill, assaulted Happymore Mashume with an axe and a machete on the shoulder twice thereby causing injuries from which the said Happymore Mashume died.

According to Dr. NR Chinhema who examined the body the deceased sustained cuts on the left shoulder and right wrist. The doctor observed that the cut on the shoulder was deep with exposure of blood vessel. He concluded that cause of death was Hypovolaemia Secondary to severe acute bleeding. The post mortem report exh I by consent refers. Further in evidence the axe and machete were produced as exhibits. Also a pair of brown shoes, cream shirt blood

stained and yellow blood stained t-shirt. A sketch plan drawn to scale by Sergeant Chatiza showing indications by accused and witnesses, a confirmed warned and cautioned statement by the accused were also produced as exhibits. The state also produced as exh 5 photographs depicting the dead body of the deceased. This did not save purpose given the cause of death and the recovery of the body from the river is not in dispute as between the state and defence. Evidence of 7 witnesses was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as common cause. 5 witnesses inclusive of the accused gave oral evidence.

Sekai Mwaneka's evidence was basically to the effect that while she was at her home selling illicit brew (kachasu/sope) she observed the accused's wife sitting in a compromised position with the deceased. She described the posture of the two on the bench as that of accused wife's thighs or legs on top of the deceased while the latter was inserting his hand into the skirt whose zipper was open. Her version was similar to accused's version in so far as the manner of sitting was concerned. She recalled how the accused took a hosepipe and assaulted his wife with it. This again conforms with the accused's version. The witness told the court that thereafter the accused and his wife left for their homestead. She was not privy to what transpired there but she told the court that the accused's wife latter returned and requested to put up at her house because of squabbles with her husband. The witness's evidence was clear and to the point.

Edison Musimandoyo a neighbor to the accused told the court that on the day in question in the evening he heard noise at the accused's homestead. He heard the accused shout and order the deceased to go away from his homestead and he also heard accused shout at his wife labeling her prostitute. He latter heard accused sharpen his axe and shout at the deceased for the latter to leave. The witness observed Simango Puranyemba strike the deceased on the hand and the two chased one after the other via his compound. It was getting dark and he could not clearly see but there was some noise at the neighbor's house when he retired indoors. The witness who appeared terrified by the incident spoke in low tones but there is nothing to criticize about his evidence. He did not seek to comment on what transpired behind the house as he could not see. The following day he also witnessed the recovery of the body of the deceased from a nearby river.

Hebert Makuyana recounted events of day in question when he passed via that witness Musimandoyo's residence while he was in the company of Puranyemba Simango. Puranyemba Simango proceeded to the accused, his uncle's homestead where there was some noise. The witness just like Musimandoyo heard Puranyemba inquire what was wrong from his uncle the accused following which he was advised the deceased had proposed love to his wife in the afternoon. This angered Puranyemba who chased after the deceased and strike him with a machete on the shoulder. They chased after each other and at that time Musimandoyo went indoors and the witness proceeded to his place going past the accused's residence. He observed accused strike the deceased with an axe on the shoulder and the latter fell down. As he passed by going to his home he heard the accused and Puranyemba say the deceased should go away from the residence but he did not know if the latter had died. The witness was put to task on why his observations differed from Musimandoyo Edison but he stood his ground that he initially observed while passing by Musimandoyo's residence and the latter moved close as he passed by the accused's residence. The witness said it was at night but there was moonlight. We must point out that the witness's evidence was on the events he observed while at Musimandoyo's residence there were no material different from Musimandoyo's version that of Puranyemba and deceased chasing each other. The other detail he stood his ground he observed on way past the accused's home. In any event the accused in his defence outline and evidence in chief even in his confirmed warned and cautioned statement does not deny the fracas occurring. It is the sequence of events which he sought to challenge. In the confirmed warned and cautioned statement the accused confirmed the state witness version that he chased the deceased away and the latter resisted then he sharpened his machete and axe and that his nephew Puranyemba joined in.

The state also adduced evidence from Peter Kasora the officer who received exhibits. His evidence was confirming recovery of the blood stained t-shirt from accused's residence the machete and axe both of which were blood stained and recovered from accused's bedroom. One sandal which was blood stained was recovered from the place where the body was and another from the accused's kitchen. The witness's evidence is clearly common cause.

The accused adopted his defence outline as evidence in chief.

The accused was not candid with the court as he was clearly exposed as trying to hide behind a finger simply because the co-perpetrator one Puranyemba was at large. He admitted using the machete and not axe and that when Puranyemba took the axe and chased the deceased he retired in doors. On realising the axe was recovered from his house in the bedroom with blood stains he knew he had to explain how the axe got to be there. He sought to give an unsatisfactory explanation that he just found the axe in his compound the following morning. The accused could not explain how the t-shirt he was wearing got blood stained and he sought to unconvincingly whisk away the blood stains as dirty. Again on realising the contradictions in his testimony he sought to point out that he was threatened by the police, which threat he did not disclose to the magistrate who confirmed his confirmed warned and cautioned statement which to a large extent supports the state case. The accused's incredible story that when his nephew came to his assistance of a supposed paramour of his wife he retired indoors is not only unsatisfactory but unbelievable. More so when viewed with the totality of the evidence before the court.

It is apparent from the evidence that on the night in question the accused was accosted by the deceased while he was at his homestead. Earlier in the afternoon the accused had seen the deceased seated in a compromised position with his wife at a beer drink. The accused had assaulted his wife over this misdemeanor and went home with his wife who he further assaulted for failing to cook because of the drunken state. Upon arrival of the deceased the accused ordered the latter to leave but the deceased resisted leading to an altercation. The accused's nephew one Simon Puranyemba Simango joined in. The accused who had sharpened his machete and axe resorted to using these weapons together with his nephew. It is also very clear that Puranyemba only joined in after revelation of what the problem was by the accused. The accused is the one who took out the weapons used in striking the deceased. The two were acting with common purpose *visa viz* the intruder that is the deceased. There is nothing from the accused's testimony or the state witnesses which can lead one to come up with a deduction that the accused and the co-perpetrator were not acting with common purpose. It is a fact that the deceased died as a result of injuries sustained from the physical confrontation with the accused and Simango Puranyemba. Given the common cause aspects what falls for determination, is given the defence

of provocation and self defence raised by the accused has the state discharged the required onus in proving that the accused either with *dolus actulis* or *dolus eventualis* caused the death of the deceased. From the evidence the accused did not set out with a desire to bring about the death of the deceased or murder the deceased with actual intention. The accused requested the deceased to leave his place of residence after the deceased had come asking after the accused's wife whom he was drinking with in the afternoon.

The accused told the court the deceased struck him with a small bench on the legs and in his defence outline he said he was struck on the legs and forearm. The discrepancy is not really material because what comes out is that accused said he was assaulted. In raising the defence of self defence as outlined in s 253 one has to meet the requirements set out therein. One does not require more than ordinary wisdom to discern that the accused used disproportionate means to avert an assault by a bench. Further using lethal weapons such as a machete and axe to wade off an assault from a small wooden bench means the accused exceeded the limits of self defence and that defence is not available to the accused in this case.

Having made a finding that murder with actual intention cannot be sustained in the circumstances of this case, one has to look at whether with the self defence or provocation raised the charge of murder with constructive intention can be sustained. The subjective test being whether the accused foresaw that there was real risk and possibility that by assaulting the deceased in the manner he did harm or death would ensue but none the less proceeded with his conduct.

The defence of provocation raised by the accused is provided for in s 239 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in circumstances where one would have lost self-control in circumstances where a reasonable man in their position would lose self-control. The defence is available as a partial defence where a finding of loss of self-control negating intention exists. This entails that provocation should only be accepted as a partial defence if there was a spontaneous reaction causing loss of self-control. See *Zimpack (Pvt) Ltd v Mugarabi SC 196/94* wherein KORSAH JA quoted with approval the remarks by LEWIS JA as he then was in *George Tsiga v The State AD 77/76* where in relation to provocation he said:

“It is of essence of a defence of provocation that has the effect of reducing the crime of assault with intent to commit grievous bodily harm to common assault or murder to culpable homicide, (my emphasis) that the reaction to the provocation must be sudden, in the sense that the person provoked acts at the spur of the moment and in circumstances where he has temporarily lost his power of self-control and does not appreciate what he is doing.”

In the circumstances of this case the deceased who had earlier been seen in a compromised position with accused’s wife followed the deceased at his house. Despite being shouted at and being told to go away the deceased was unrelenting. The deceased was involved in a altercation with the accused who then armed himself with an axe and machete sharpening the same in deceased’s presence till he was struck the first time but still did not budge till the nephew of the deceased Puranyemba Simango arrived and joined in the fracas. The manner in which the accused ran around the yard shouting and instructing and sharpening the machete and axe is consistent with a man who had lost self-control. The challenge of being pursued by a man whom he had seen in a compromised position with his wife caused his actions to snap and he appeared like a man who had gone berserk even the force with which he struck the shoulder exposing blood vessels shows a man whose emotions had taken the better of him thereby negating intention as contemplated in s 47 1 (b). The accused, given the loss of self-control occasioned by the unnecessary challenge could not have foreseen the possibility of death occurring such that the charge of murder with constructive intention cannot be sustained. The test to be applied in determining whether or not on available facts a person is guilty of murder with constructive intent or culpable homicide, the court is called upon to take into account the factual evidence which could have affected the accused’s perception and powers of judgment.

In *casu* the accused was challenged and accosted by a man whom he had seen in a compromised position with his wife at a beer drink and now at his house the man was demanding to have the woman. Despite being chased away he kept hovering at the accused’s house leading to the fracas that occurred which culminated in him sustaining injuries from which he bled to death. The accused lacked the requisite intention as given in s 47 but certainly negligently caused the death of the deceased when he struck the deceased with a lethal weapon and watched his nephew armed and strike the deceased with a lethal weapon. The accused created a dangerous situation but did not take steps to guard against death arising from the dangerous situation that he created and as such he is guilty of culpable homicide.

Accordingly accused is found guilty of culpable homicide as defined in s 49 (b) of the Criminal Law (Codification and Reform) Act.

Sentence

Sentencing exercise is not an easy exercise as it involves striking a balance between the crime, the criminal and the societal interests of justice while at the same time seeking to blend justice with mercy.

The sentence should not be overallly harsh as to break the accused neither should it be unduly lenient so as to lose meaning not only to the accused but society at large. It has to be a befitting sentence taking into account the circumstances of each case as presented. In passing sentence we have had due regard to submission by Ms Simango on behalf of accused in mitigation we have also had due regard to aggravatory factors submitted by Mr *Musarurwa* for the state.

It has been submitted on behalf of the accused that he is a first offender. Further that he is a family man, father of two juveniles. His wife and children look up to him for support. The accused has been given as regretting the offence. As correctly pointed out all fellow villagers who testified confirmed the accused as person of good character not prone to violence. This is also confirmed by him not having a criminal record. We are alive to the fact that accused has been in custody for a year. However, as submitted in aggravation the accused stands convicted of a serious offence which occasioned loss of precious human life. No one has a right to take away another life for whatever reason. The accused took the law into his own hands and administered instant justice which had fatal results. Further in aggravation is the fact that the accused teamed up with his nephew when they negligently caused the death of the deceased. We are also alive to the fact that after the act the accused sought to conceal the body in a pool of water. Such unrelenting violent conduct ought to be visited with punishment. It is accepted the deceased brought about the situation on himself as he like a goat persistently nagged the accused over his wife while the accused was at his homestead, but the accused ought to have reported through proper channels for the dispute to be resolved. Allowing people to resort to violence whenever they are angered would lead to lawlessness and anarchy.

The sentence to be imposed ought to reflect that precious human life was negligently lost. Upon weighing mitigatory factors *visa viz* aggravatory factors and circumstances of this case. It is our considered view that a deterrent sentence to deter not only accused but other like-minded people that violence is not a solution is appropriate.

Sentenced as follows:

6 years imprisonment of which 3 ½ years is suspended for 3 years on condition accused does not within that period commit an offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Mupindu Legal Practitioners, defendant's legal practitioners