

THE STATE
versus
TALENT CHAKABVA

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 11, 12, 13, 14 and 21 June 2018

Criminal Trial

ASSESORS: 1 Mrs Mawoneke
2. Mr Mudzinge

J Chingwinyiso, for the State
Mrs C Kanengoni, for the accused

MWAYERA J: This case involves an allegation of murder of one brother by the other blood brother. It is the State's contention that on 15 August 2017 and at Village 51 Nyamusosa, Mayo, the accused unlawfully caused the death of Gabriel Masomera by striking him with a log once on the head with the intention to kill him or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility, resulting in injuries from which Gabriel Masomera died. The accused pleaded not guilty to the charge of murder as defined in s 47 1 (a) or (b) of the Criminal Law (Codification and Reform Act [*Chapter 9:23*]).

The accused raised a defence of self-defence. In his defence outline the accused pointed out that the brothers who had been assisting their parents at the brick kiln had a misunderstanding over allegations by deceased that accused had extra marital affairs. This issue was brought to the attention of the accused in the presence of his 10 year old son one, Wisdom Masomera. This did not go down well with the accused hence the two engaged in a war of words. The mother on realising the two were argumentative ordered them to proceed to their respective homes. Whilst on the way according to he accused's version the deceased started physically assaulting the accused thus prompting the accused to pick a log and strike the deceased once and then accused fled as he was in fear that the deceased would get up and follow him to fight again.

The summary of the State case captured the basis of the allegations on the day in question as follows:

The accused and deceased were at their parents' home assisting their parents to burn bricks at a kiln. The deceased remonstrated with the accused on the latter's behaviour of having extra marital affairs and this led to a misunderstanding. The accused left for his home but decided to waylay the deceased who followed and accused struck him with a log.

The issue that falls for determination is whether or not the accused had the requisite *mens rea* when he caused the death of the deceased. The State adduced evidence by tendering documentary evidence and leading evidence from witnesses. The confirmed warned and cautioned statement of accused. The post mortem report by Dr Roberto Trecu, Affidavit of evidence by Dr Matsvai and sketch plan drawn through indications of witnesses and accused were produced as exh 1-4 respectively by counsel.

Evidence of all the other witnesses 2 and 4-11 was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Rosemary Chitagu the mother of the accused and deceased, and Winston Muchineripi Masomera gave oral evidence. Rosemary Chitagu's evidence was on common cause, aspects that on the day in question their children including the deceased and accused were assisting them at the brick kiln. In the evening the family gathered by the fire outside while the father and mother were inside the kitchen hut. According to the witness the children, that is the boys were drinking beer courtesy of the witness and her husband, the second witness. According to the witness the beer purchased for the "boys" was 2 crates of opaque beer commonly known as "scud". The witness told the court that not all the beer was consumed and none of their children was drunk. The witness told the court that the deceased remonstrated with the accused over his wayward behaviour of having extra marital affairs. This did not go well with the deceased who left for his home. The deceased remained behind and indicated he would stroke the fire to ensure that the fire at the kiln was attended to. Thereafter, the deceased bade his mother farewell. Within a short space of time she heard noise and words to the effect "arise, arise, muka, muka" and advised her husband that their children were fighting but the latter was dismissive. The witnesses went out to investigate and she found accused standing while deceased was lying on the ground injured. The witness told the court that the accused was shouting in a weird manner that she thought maybe he was possessed given she was used to him being a respectable young man but on that day when she sought clarity from him he disrespected referring to her in singular, "hey you don't talk to me." The accused went away with the log while the witness was trying to

resuscitate the deceased using water after she had notified her other son Benjamin. The deceased regained consciousness and was taken to the clinic then hospital where he eventually died. The witness' evidence was straight forward and she maintained understandably as a mother, that she was shocked in the manner the accused had struck his brother given ordinarily the two were close and accused respected his elder brother. She maintained that there was no illicit brew of nipper or kachasu/tototo partaken by the children at the residence. She also suggested she did not know how to brew this beer.

Her evidence in this respect and on all material aspects was confirmed and corroborated by the husband Winston Muchineripi Masomera. The latter confirmed that their children were on the day in question drinking opaque beer commonly known as "scud". This was after assisting the parents at the brick kiln. His evidence as regards the sequence of events was the same as that of his wife. The accused left after having been remonstrated with over having extra marital affairs and an argument about tobacco seed. A while later the witness was called to the scene where the deceased was lying unconscious. Despite taking deceased to the clinic and hospital the latter died. The witness was firm that there was no illicit brew being partaken at his house on the night in question but opaque beer. He just like his wife pointed out that his wife could not brew the illicit beer as she was a member of the apostolic sect. He was equally surprised at how the accused turned violent on the night in question as he ordinarily respected his elder brother.

The accused was the only witness in the defence case. He maintained that he was acting in self-defence and that he was intoxicated. Upon considering the totality of the evidence the court is left to decide on whether or not the defences of self-defence and intoxication can be sustained in this case or put in other words whether or not the defences as suggested by the accused negate the intention to kill the deceased.

The accused in his account pointed out that the deceased punched him with clenched fists and also struck with open hands. This he said happened while at the home stead when they had a misunderstanding about his alleged issues of extra marital affairs. This alleged physical combat was not confirmed by the State witness who pointed out that their children/sons only shouted at each other about the issue but there was no exchange of blows. Both the father and mother intended to stop the argument over tobacco seed and or extra marital affairs. By the way we have no reason to doubt the State witnesses' evidence. If we are to accept that the accused did not waylay the deceased his version was that the deceased was assaulting him with open hands hence he defended himself. The question is the defence of self-defence available

in the circumstances. Section 253 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] provides for the defence as a complete defence were all requirements therein are met.

The requirements can be safely summarised as follows:

1. An unlawful attack must have commenced/or be imminent
2. The conduct by the accused was necessary to avert the unlawful attack and that he could not otherwise escape from the attack.
3. The means used to avert the unlawful attack were reasonable in all circumstances and harm caused was not grossly disproportionate to that liable to be caused by the unlawful attack.

In the circumstances of this case all the requirements cannot be reached. The accused used a log to strike the deceased's head whereas the accused stated that the deceased was unarmed, such a reaction was grossly disproportionate and in any event given the good head start by the accused one wonders why he did not make good his escape. When the accused testified in evidence in chief, and under cross examination, and even in the closing submissions it was apparent the defence of self-defence was raised as a mere gamble as the accused failed to account for how he was attacked or assaulted to warrant the use of a log to avert the attack. The defence could not be substantiated given the sequence of events. The impression created from the accused's version is that he did not take lightly to being remonstrated to about extra marital affairs during the presence of his 10 year old Wisdom Masomera. This would have been an issue of provocation but not a defence to murder. Clearly the suggested provocation and time taken to react would not vitiate the intention.

The other defence raised but not really pursued in the defence case is, intoxication. The accused's version was that he and his brothers had partaken illicit brew kachasu. This was contrary to the evidence of both the mother and father of the accused who gave evidence to the effect that opaque beer was consumed and that none of the children was drunk. Even if it was to be accepted the accused was drunk such voluntary intoxication leading to drunkenness is not a defence to murder but might be mitigatory. The accused in testifying and recounting the sequence of events revealed he was appreciative of what was going on. He was not amused to be remonstrated with over extra marital affairs in the presence of his child which would be natural. This reaction by the accused shows he was in control of his faculties.

It is common cause that the accused struck the deceased in the head using a log. The assault caused the deceased to fall and he sustained head injuries. It is also not in dispute the

deceased died due to severe cerebral oedema subarachnoid haemorrhage and head trauma due to blunt trauma.

The question is, did the accused have the requisite intention to kill the deceased. The answer comes from the totality of the circumstances and the definition of intention as laid out in s 47 and case law *S v Mugwanda* 2002 (1) ZLR, *S v Mema* HB 148/13. It is either one sets out with an aim to kill and achieves the desires or one desire or one sets out to achieve another objective and in doing so foresee the death of his victim as substantially certain but never the less proceeds with the conduct. This would constitute murder with actual intention. Secondly, the legal intention which is where one realising that there is risk or possibility other that remote risk or possibility that his conduct might give rise to death and despite the realisation proceeded with the conduct. In this case given the circumstances one cannot say the accused set out with an actual intention to kill and killed the deceased. It appears the accused struck the deceased for having humiliated him in front of his child. When he did so he struck using a log on the head, a vulnerable part of the body. Given the nature of injuries occasioned by the fatal blow and where it was aimed, the weapon used, a log and that severe force was used follows that the accused was aware that his conduct might cause death and despite the realisation of the risk or possibility he persisted with his conduct. In any event our courts have always highlighted that assault on the head which is a delicate part of the body is almost always likely to cause death. As occurred in this case the assault in the head was fatal in circumstances where the accused realised the real risk or possibility of death and he persisted with his conduct. The accused thus had the legal intention. See *S v Mhako* 2012 (2) ZLR 73.

The accused is accordingly found guilty of murder as defined in s 47 (1) (b) of the Criminal Law Code [*Chapter 9:23*].

Sentence

In reaching at an appropriate sentence we have considered all mitigatory and aggravatory factors submitted by the defence counsel Mrs *Kanengoni* and State counsel Mr *Chingwinyiso*. We must commend both counsels for the help in referring us to case law which are of course guidelines. We are also indebted for being reminded of the circumstances of the matter. The accused is a first offender who despite not pleading guilty showed remorse by assisting in the due administration of justice as evidenced by the common cause aspects. During trial accused showed he regretted his actions and was in pain in coming to terms with having caused his own brother's death.

We did not read his sobbing in court to be fake, but that which was coming from inside at the pain of the death of a beloved blood brother due to the accused's own violent conduct. The accused is given as a family man with fairly heavy responsibility. His children and wife will endure hardship during the period of incarceration. We have also taken note of the fact that the accused has been in custody for 10 months awaiting the finalisation of the matter. The trauma that goes with the suspense when one has such a serious allegation hanging on them cannot be under stated. We are indebted to the State counsel for reminding us of the circumstances of the commission of the offence and the testimony of the accused and deceased's mother. She surely did not seek to trivialise the offence but sought to request the court to temper justice with mercy as she clearly was at pains to accept that the accused and deceased had ended this way given the close relationship. Also the burden of taking care of 2 sons' families would be excessive on her.

In passing sentence as correctly observed by both counsel the courts seek to match the crime to the offender while at the same time being fair to society.

However, in aggravation is that fact that precious human life was unnecessarily lost. The accused could have proceeded to his home as opposed to wait as if to way lay and seek revenge for being remonstrated with on his way ward behaviour. The deceased's family, wife and children in particular will never have a father figure in the form of the deceased. This matter can also be classified as domestic violence, where a brother fatally attacked the other. Such lack of respect of relationship and the social fabric aggravates the offence. The court has to add its voice in disapproving the social evil of domestic violence. It should be clear to the accused and society at large that misunderstanding and disputes are not solved by resorting to violence. The accused stands convicted of a serious offence which calls for severe punishment as evidenced by the penalty provisions. No one has a right to take away another's life as provided for in the Zimbabwean Constitution. In passing sentence it is imperative for the court to have due regard to the crime and offender and be fair to society while at the same time considering the circumstances of such case. In cases of a serious nature like murder, the courts have to pass deterrent sentences not only to deter the accused but to deter the community at large and also give society confidence in the justice delivery system. The court should thus act firmly, humanly, compassionately and bear in mind the realistic human weaknesses and pressures of society which lead people to commit crime. The offender should therefore be adequately punished and not be broken by the punishment. In this case the fact that the accused is a blood brother to the deceased cannot be ignored given the accused's clear show of remorse

and regret when he testified. The parents and his siblings are at pains to come to terms with the death of one of their sons at the hands of their other son. The whole family will suffer the pain that goes with a brother killing another brother and the stigma that attaches.

Upon considering all mitigatory and aggravatory factors and circumstances of this case, we feel a short imprisonment term will meet the justice of the case. The accused is sentenced as follows:

10 years imprisonment.

*National Prosecuting Authority, State's legal practitioners
Matsika Legal Practitioners, accused's legal practitioners*