

THE STATE

Versus

KHOMBA FOREMAN SIBANDA

HIGH COURT OF ZIMBABWE
MOYO J with Assessors Mr P Damba and Mr M Ndlovu
BULAWAYO 24 SEPTEMBER AND 9 OCTOBER 2020

Criminal Trial

Mr B Gundani, for the state
Mr N Sibanda and Ms S Sibanda, for the accused

MOYO J: The accused person faces a charge of murder, it being alleged that on the 11th of November 2019 he struck the deceased Petty Sibanda with an axe on the head causing her instant death. The accused person denies the charge.

The following were tendered into the court record as exhibits and they were all duly marked.

- The state summary.
- The defence outline.
- The affidavit of the police officer who identified deceased's body to the Doctor who certified her dead.
- The post mortem report.
- The accused's confirmed warned and cautioned statement.
- The axe that was allegedly used in the commission of the offence.

The evidence of:-

- Betwell Moyo
- Khayelihle Sibanda
- Nlebgwe Dube
- Simbarashe Mubayiwa
- Cornelius Mataba and Doctor Erasmus Hapanyengwi

was admitted into the court record as it appears in the state summary.

The state called Felinotho Tshibuma to give evidence on behalf of the state and the accused person gave evidence for the defence. In essence this is a one version trial where the only version regarding the crucial moments on the fateful day is that of the accused person. The evidence of Felinotho Tshibuma is only relevant wherein she tells the court how she received the news of deceased's death from accused's son in South Africa and her leading police details to accused's home, with accused making indications resulting in the exhumation of the deceased's body. The accused person tells the rest of the story.

The narration of the events relating to this matter deserves a comment that this is one sad and most unfortunate incident to befall the community. The facts of the matter are largely common cause. Accused was 74 years at the time of the commission of the offence. He was married to the deceased. They have 8 adult children all based in South Africa. They lived together as husband and wife having done so for years. Currently they also lived with their grandchildren. The deceased was 66 years old at the time of her death.

Given an opportunity to take the witness stand, the accused told the court that he is an Agritex pensioner and a farmer. He said he would like to apologise before the court and he said he had been pained by what he did. He further said that he knows that what he did is very bad and that he regrets so much when he looks at how himself and his wife used to do things and that now he cannot do them. He told the court that they used to plan together, farm together, and do projects together. He further told the court that the wife always performed better than him in these projects and she had more energy. He said that together, with deceased they won competitions in farming and that at the time of her death they had a project to produce stock feeds. He told the court that deceased was a leader of many donor aided organizations and that she was the chairperson of the Early Farming programme. He told the court that he realises that he may not be able to do all those things without her. He told the court that on the fateful morning he woke up early intending to go and fetch firewood. He took an axe. He went to the kitchen and then left the axe there, he proceeded to deceased's bedroom hut to greet her. He questioned her as to the manner of their life in the homestead considering what she was doing. Deceased responded by saying if accused was not happy with her deeds he could do what he wanted to do. Accused then recounted the incidents relating to her behavior. He told her of the night he found her out while he had been to the fields to watch out for wild pigs. She denied

that. He told her of another incident when he found her not there and had to pour water on her bed and blankets as proof. When she came back she said she had been to the neighbour's homestead at night. Deceased had not responded and accused then proceeded to that neighbour's place and questioned the neighbor about deceased's claims but the neighbor had refuted that. When accused asked for advice from that neighbour, the neighbour had stated that she could not assist as she knew that deceased would overpower the accused.

On the fateful day deceased, then responded by saying accused could do whatever he wanted to do. Accused then took the axe and feigned an attack on deceased who then pushed the accused person and he fell. He became even angrier, and then took the axe and assaulted deceased using the back of the axe. He struck her on the head and she fell down, then he got afraid realising that he could have killed her. He then took a sack and an empty fertilizer bag, wrapped her body and hid it in the field by burying it headlong in an antbear hole after ferrying it there using a wheelbarrow. He then put some dry branches over the hole. He then prayed and washed the wheelbarrow at the homestead. He then sat at the homestead thinking of what to do next. He then went to the fields to collect the things that deceased had left there. He later phoned the children in South Africa and told them of their mother's demise. The police later came leading to his arrest. He also told the court that he is not a criminal but what he did was wrong and it was out of a heartache that he did what he did. He further said he would like to have a meeting with his family and ask them to go and apologise to his in-laws and to send them some token as well as to give his in-laws the deceased's property.

Under cross-examination he confirmed that he struck the deceased 3 times on the back of the head using the back of the axe. He said that deceased had pushed him when he struck her. He further told the court that he interpreted deceased's words to the effect that he could do whatever he wanted as disrespect. Asked why he decided to go and collect the axe he said he had gone to look for something to use to assault her and then found the axe. Further questioned as to why he had to use the metal part of the axe and not the wooden part, he then said he was confused at that point in time. He said that he suspected the deceased had an affair. He said he confronted deceased so that they could talk about it but she responded in a disrespectful way. He said that he did not specifically look for the axe but that it is the one that was available at that point in time.

He admitted that he was wrong by introducing the axe and that he could have resolved the dispute through mediation, he told the state counsel that he would not dispute what was being put to him but that he was angry, provoked and confused. He said after striking her for the last time that is when he panicked and started shivering. Questioned about his realization that he would cause her death by striking her in that manner, he answered by saying he was confused, he did not know what he was doing and that if he had realised he would not use the axe. He said he had suspected deceased of having an affair for 5 months prior to the fateful day. He said at the time he buried his wife he was confused. He further told the court that he was trying to reprimand the deceased by using the axe and he thought deceased would relent when she saw him holding an axe but she did not. He said he is very sorry and he still wonders what had happened that caused him to kill his own wife in that manner.

The state counsel submitted that the element of provocation was not to the extent as to reduce accused's moral blameworthiness and that he should accordingly be found guilty of murder with constructive intent.

Defence counsel submitted that accused should be acquitted on the murder charge and instead be found guilty of culpable homicide.

The facts of this matter clearly show a chronology of events that point towards a dispute gone wrong.

Since July 2019, accused suspected his wife of having an affair. He would find deceased not present in her bedroom hut. Deceased would dispute and on one occasion accused had to pour water on her bed as proof that she was not there. She then said she had gone to the neighbours who, however, refuted that. On the fateful day accused went to greet deceased and questioned her about the issues they had. She was disrespectful telling him off, that is to say he could do whatever he wanted. Accused got angry, wanted to discipline deceased and looked for something only to find the axe he had left outside. He feigned an attack on deceased who reacted by pushing him with the axe and causing him to fall. He became even more angry and then struck deceased thrice on the head with the back of the axe causing her death. This is the analysis. This court makes the following findings:-

- 1) Accused suspected deceased to have an affair over a period of 5 months.

- 2) Deceased always denied and on the fateful day deceased was disrespectful when questioned.
- 3) Accused had intended to use the axe to fetch firewood, and he in fact left it outside deceased's hut when he went to talk to her.
- 4) He then took it when he was now looking for something to assault deceased.
- 5) He feigned an attack which deceased did not yield to.
- 6) He then struck deceased with an axe thrice on the head with the back of the axe and not the sharp edge.
- 7) Speaking for himself he says he was angry, provoked and confused.

The state counsel submitted that this court should play down the degree of provocation since what deceased had said did not warrant that accused takes and uses an axe and that accused should have just slapped the deceased. He submitted that the provocation was not sufficient to make a reasonable person in accused's standing to lose self control to the extent of using the axe.

Section 239 of the Code provides that:-

“If after being provoked, a person does or omits to do anything which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realization referred to in section 47, the person shall be guilty of culpable homicide if as a result of the provocation he or she does not have the intention or realization referred to in section 47.”

The accused's narration, has been given vividly and honestly in our view, what he says must be the truth from his narration, it is difficult for this court to reject his version that he sought to reprimand the deceased out of anger, used an available but dangerous weapon and that he used the back part of the axe and not the sharp edge as well as his own narration of how he felt at that particular moment. There is no other evidence to the contrary. His story is believed as it is and nothing can be taken from it. There is no other evidence conflicting with accused's version causing this court to draw inferences against him.

It is my considered view that a court should not, whilst sitting after an incident has occurred, where the accused person serializes his thoughts and feelings, demand that such

thoughts and feelings should have conformed to a certain standard where there is no justification to do so. This is especially where accused is the only witness and is seemingly credible to the extent that, the court has no other piece of evidence controverting accused's version to the extent that the court can therefore justifiably draw inferences against accused's conduct. It is my considered view that in such a situation the accused person must be given the benefit of the doubt. His feelings of anger and his thoughts that deceased was being disrespectful and his expression of having been confused in anger, should not be adjudged with an armchair approach. In all other matters to do with this case, accused has clearly been telling the truth about what transpired. It then follows that when he expresses his intention, his anger, his confusion, he must still be telling the truth. That should not be taken away from him merely because he is an accused.

In this matter, accused and deceased had a misunderstanding over suspected infidelity by deceased. Deceased was disrespectful upon being questioned on the fateful day. Accused did not go in with the axe when he intended to question the deceased, the axe was introduced after he became angry. The accused did not use the sharp end of the axe but used the blunt end. Accused told the court that he was angry, provoked and confused.

We then have to look at the distinction between murder with constructive intent and culpable homicide *vis avis* the circumstances of the commission of the offence by the accused person in this case.

Profesor Feltore in the *Guide to Criminal Law in Zimbabwe* 2005 Edition at page 96 gives the following narrative:-

“In deciding whether there was legal intention all the factual evidence which bears upon and could have affected accused's perception, powers of judgment and state of mind and foresight at the time he committed the offence must be carefully scrutinized. Factors such as intoxication, provocation, level of intelligence, personality etc. would obviously be relevant in this regard. If the court concludes that accused did not foresee the possibility of death but that he should have foreseen it (that is, a reasonable man would have foreseen it) and the reasonable person would have guarded against it, the correct verdict is culpable homicide.”

In this case accused used the blunt end of the axe and acted in anger and confusion per his own testimony and this court cannot take that away from him. In other words the state has not disproved what happened in accused's state of mind as he committed the offence. He is an

elderly man, who is remorseful and has seemingly told the court the truth. His credibility is such that when he then says I wanted to reprimand her and the axe was the nearest object, and I was angry and confused, I felt disrespected, together with the manner he then struck deceased by using the blunt end of the axe and not the sharp one, will make this court accept his version as it is and give him the benefit of the doubt. After all he is the only witness.

That he struck deceased 3 times on the head cannot be the sole consideration. The entire set of facts as presented must be alluded to so that the court comes to a fair and just conclusion.

It is our view that accordingly, the appropriate verdict should be culpable homicide. The accused is thus acquitted on the charge of murder. The accused person is accordingly found guilty of culpable homicide.

Sentence

The accused is convicted of culpable homicide. He is a first offender at 75 years old. There was an element of provocation on deceased's part. The accused lost his wife and serialised how the loss causes him emotional stress. He will forever live with the stigma. He was very remorseful. He has spent almost a year in pre-trial incarceration. However, domestic violence is a cancer in our society which becomes even more complicated if it is committed by elderly people of accused's position as they should lead by example. However, in sentencing an accused, the court should consider, the circumstances of the commission of the offence, the accused's personal circumstances and the interest of society at large. The circumstances of the commission of the offence are the most unfortunate. This is one case that is difficult to formulate a sentence on because of accused's age and remorsefulness *vis a vis* the death of a person. However, the accused's age, works strongly in his favour. The sending of a man to prison is to reform and rehabilitate him. In this case, accused's version in court showed that he is already reformed. He sees his error and acknowledges it. Prison is a rigorous form of punishment wherein if you condemn a 75 year old man of accused's physical appearance, you might not even achieve the intended purpose as he is not likely to last in prison. In other words one would be condemning an elderly, remorseful and seemingly reformed man who is already in the afternnon of his life to death. That cannot be in the interests of justice.

It is for these reasons that accused will be sentenced to a fine coupled with wholly suspended prison term with the hope that it will hang over his head and keep him in good parts for his remaining journey on this earth.

Accordingly accused is sentenced as follows:-

- 1) Accused shall pay a fine of \$15 000-00 or in default of payment 3 years imprisonment.
- 2) In addition, he shall be sentenced to 5 years imprisonment wholly suspended for 5 years on condition he does not within that period, commit an offence involving violence whereupon conviction he shall be sentenced to imprisonment without the option of a fine.
- 3) The accused is given up to the 9th of November 2020 to pay the fine

National Prosecuting Authority, state's legal practitioners
Tanaka Law Chambers, accused's legal practitioners