

THE STATE

Versus

PASSMORE MUSANIKA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mr Matemba and Ms Baye
GWERU CIRCUIT 29 & 30 JANUARY 2020

Criminal Trial

M Shumba, for the state
T Zishiri, for the accused

MAKONESE J: The accused appears in this court on a charge of murder. It being alleged that on the 27th August 2018 and at Arizona 74 mine, Matobo area, Gweru, accused unlawfully and intentionally killed his brother, Jaison Musanika by stabbing him with an okapi knife twice in the chest. The accused pleaded not guilty. He suggested that the deceased was accidentally stabbed during a fight that ensued following a misunderstanding.

The state tendered a state outline summarizing the evidence of the witnesses who were lined up to testify against the accused. The state led evidence from one witness, Hardlife Musanika before closing its case. The evidence of Andrew Mataya, Alfred Temba, Ester Denhere, Welcome Dube, Doctor Musanika and Roberto Lara Diaz was admitted into the record by way of formal admissions.

The accused tendered a defence outline in the following terms:

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1. The accused understands the nature of the allegations levelled against him and will plead not guilty to murder but will plead guilty to culpable homicide and he will state that:-
2. That he is a male adult aged 28 years residing at Village Mafa, Chief Nemangwe, Gokwe.
3. He will state that the deceased was his brother.
4. The accused will state that on the day in question and at Arizona Mine, he met the deceased and had a misunderstanding regarding the way deceased was selling gold ore.

5. The accused will tell this Honourable Court that while there, they got into a fight.
6. He will state that he was overpowered by the deceased and they both fell to the ground.
7. The accused will state that other people present noticed the fight and intervened to stop the fight.
8. The accused will further state that as a result of the fight they were engaged in, deceased then withdrew a knife to try and scare the accused.
9. He will further state that during the tussle they both fell on the ground and that is when the deceased was accidentally stabbed by the knife which was in his hand.
10. The accused will state that at that point he got scared and ran away.
11. The accused denies ever intending to stab the deceased with a knife and he will further state that it was not his intention to bring about the death of the deceased.”

After his arrest, the accused made a warned and cautioned statement to the police on 29th August 2018. The statement which was subsequently confirmed by a magistrate at Gweru on the 11th September 2018, reads as follows:-

“I do admit to the charges being levelled against me. I stabbed my brother Jaison Musanika with an okapi knife two times on the chest which resulted to his death after a misunderstanding over the issue that his young brother had taken gold ore which we had panned together and sold it alone.”(sic)

The confirmed warned and cautioned statement was produced by consent. The state then tendered a Post Mortem report compiled by Doctor Roberto Lara Diaz following an examination of the remains of the deceased. The cause of death is listed as;

- (a) hypovolemic shock
- (b) intra abdominal haemorrhage
- (c) Wound on the left lung
- (d) Stab wound

On marks of violence the Post Mortem report reveals that the deceased had a wound caused by a sharp object which penetrated the thoracic cavity located above the sterna cleft. The pathologist also observed a wound 2cm deep located on the left side of the chest.

An okapi knife used in the stabbing was produced and tendered as an exhibit. The knife has a 9 cm blade, and a handle 14.7 cm long. The widest part of the blade is 3.2 cm. The knife was blood stained and weighs 0.054 kgs.

The state to relied largely on the oral evidence of Hardlife Musanika. The witness testified that both accused and deceased are his uncles. On the fateful day he was in the company of the deceased, the accused, Doctor Musanika and Carlton Marume. They were at Arizona mine where they were working at a mine owned by a Mr Dube. A dispute arose between accused, Doctor Musanika and the deceased. The accused was complaining that deceased and Doctor had stolen his gold ore. A scuffle ensued and the parties were restrained from fighting. At some point, the accused produced an okapi knife and attempted to stab the deceased before the witness dispossessed the accused of the knife. The witness was forced to return the knife to the accused after being threatened with assault. The witness indicated that accused and the deceased engaged in a physical exchange of blows. The accused was brandishing an okapi knife. In his evidence in- chief the witness was categorical that he observed the accused stabbing the deceased twice in the chest region. The deceased fell to the ground and he later died at the spot he had been stabbed. The accused fled the scene. Under cross-examination the witness became evasive and claimed that when the deceased was stabbed he had left the scene. He said he feared for his life. It was clear that the witness was caught in between. He could not completely exonerate the accused but at the same time he desired to tell the truth.

At the close of the state case the court established the following facts as common cause:

- (a) the accused admitted in his confirmed warned and cautioned statement that he had stabbed the deceased twice in the chest region
- (b) the injuries reflected in the Post Mortem Report are consistent with stab wounds.
- (c) the witness Hardlife Musanika saw the deceased brandishing a knife and trying to stab the deceased.

- (d) the evidence of Andrew Mataya admitted by way of formal admissions confirmed that after the fatal stabbing accused had surrendered the knife to the witness and confessed that he had stabbed the deceased.
- (e) The blood stained knife used in the stabbing and was handed to the police by Andrew Mataya.

The accused elected to give evidence under oath in support of his defence. Accused's defence was an incoherent account of what had transpired. On several instances he failed to answer simple questions and chose to say he had no comment. Accused's defence was that during the scuffle with the deceased, the deceased was accidentally stabbed. His version was that the deceased was in possession of the knife. He portrayed the deceased as the aggressor. The accused admits that what triggered the misunderstanding is the issue of gold ore that had been sold clandestinely by Doctor Musinika and the deceased. The confrontation between the accused and the deceased led to the death of the deceased. At the close of cross-examination, and possibly faced with the weight of evidence against him, the accused admitted that he had stabbed the deceased twice in the chest. The accused stated that he had erred and asked the court and his relatives for forgiveness.

Mr Shumba, appearing for the state submitted that where the accused tells a lie this could in certain instances provide corroboration of evidence of his guilt. For this proposition he cited the case of *State v Mhlanga* 1987 (1) ZLR 70 (SC). In this matter the court laid down the criteria to be applied where a lie told by an accused could provide corroboration. The criteria is as follows:

- (a) the lie had to be deliberate.
- (b) it had to relate to a material issue.
- (c) the motive for the lie had to be the realization of guilt and fear of the truth.
- (c) The statement had to be clearly shown to be a lie by evidence other than that of a witness or an accomplice but by admission or by evidence from an independent witness.

In this case, the accused lied that the deceased had been stabbed accidentally. He lied that the okapi knife was not fully open when the deceased sustained two stab wounds that

penetrated the thoracic cavity and the lung. The accused's admission in his confirmed warned and cautioned statement is an unequivocal admission of guilt. The statement was produced by consent and at no time did accused distance himself from the contents of the statement. The Post Mortem Report is further proof of the nature of injuries sustained by the deceased which are consistent with the stabbing.

The evidence against the accused is compelling and overwhelming. His guilt is not in doubt. What the court ought to determine is whether the state succeeded in proving that accused stabbed the deceased with actual intent to cause his death.

Mr Zishiri, appearing for the accused, properly, in our view, conceded that the state had succeeded in proving that accused is guilty of murder with constructive intent. It is trite law that for legal intention to be established the state must prove that the accused did not mean to bring about the death of his victim, but that he foresaw that whilst engaging in some activity, he proceeded with that activity regardless as to whether death ensued.

See: *Robert Mugwanda v The State* SC 19/02.

On the facts and the evidence placed before us, it is clear that it has not been proved beyond reasonable doubt that accused aimed and desired to bring about the death of the deceased. It is the specific finding of this court that in stabbing the deceased twice in the chest the accused must have used excessive force and foresaw that death could ensue.

In the result, and accordingly, the accused is found guilty of murder with constructive intent.

Reasons for Sentence

The accused has been convicted of a very serious offence. In assessing an appropriate sentence the court is enjoined to consider all the mitigating features of the case as outlined by accused's defence counsel. The accused is a first offender who was aged 27 years at the time of the offence. He is now 29 years old. He is a family man with a wife and 3 children. He is the sole breadwinner. He has spent over one and half years in remand prison pending this trial. The court shall take this into account. The accused caused the death of his elder brother. His conduct on the day in question reflects the moral decay in our cultural values. The accused ought to have restrained himself and shown respect to the deceased. He punched the okapi

knife in the air before plunging the knife into the deceased's thoracic cavity with fatal consequences. Accused delivered a second blow with the knife penetrating the deceased's lung. The accused's conduct in this matter shows that he acted callously and intended to inflict serious injury on his brother. The level of violence exhibited by the accused over the missing 150 grams of gold ore cannot be condoned. The accused and his companions who were all artisanal miners ought to have known that violence can never be tolerated by these courts. Further, the court noted with dismay, that accused showed very little remorse or contrition. He gave a false and incomprehensible defence even in the face of overwhelming evidence against him. The court shall impose a sentence that suits both the offender and the interests of justice. The object of the sentence must be rehabilitative and not condemn the accused person. It is the view of the court that given the seriousness of the case a lengthy prison term is called for.

Accordingly, accused is sentenced to **“18 years imprisonment.”**

National Prosecuting Authority, state's legal practitioners
Garikai and Company, accused's legal practitioners