THE STATE

versus

NABOTH MACHEKE

HIGH COURT OF ZIMBABWE

BERE J

MASVINGO CIRCUIT COURT, 10 & 11 June 2015

ASSESSORS : 1. Mr Mushuku

 2. Mr Dhauramanzi

**Criminal Trial**

*E. Chavarika*, for the State

*C. Maboke*, for the accused

 BERE J: On 15 October 2013 Tichawanda Chiminya (the deceased) was stabbed to death by the accused in Hillside, Macheke, Masvingo. The accused is charged of having murdered the deceased to which the accused pleaded not guilty.

 The facts in his case are essentially not in dispute and are as follows: On the fateful day the deceased and the accused had a disagreement over some money. The accused was alleging the deceased had stolen his $20-00, which allegation the deceased refuted. The argument appeared to have resolved itself. However, when the deceased walked out of the cabin from where the argument had started, the accused followed him and in a flash stabbed him with a knife just below the left ear. The deceased died the following day from the stab wound. The post mortem concluded that the deceased had died as a result of “internal (intracranial) Bleeding Secondary to stabbing” (See exh II).

 In his defence outline, the accused stated that as the two were outside the cabin they were engaged in a fight over $20-00 and in the process the deceased produced a knife from the back of his trousers pocket and advanced towards him intending to strike him. The accused went on to say that he grabbed the knife in a bid to disarm the deceased and the two fell down and in the process the deceased was accidentally stabbed.

 The State led evidence from the following witnesses: Talent Rwainda and Tinevimbo Chiuya. The evidence of Tawanda Gwande, Detective Constable Mutasa, Ambiji Phili and Doctor Pesanai was admitted into the record of proceedings as summarised in the State Summary in terms of s 314 of the Criminal Procedure and Evidence Act[[1]](#footnote-1). The accused’s confirmed warned and cautioned statement (exh 1) post mortem report (exh II) and the accused’s indications (exh III) were produced by consent.

 The accused was the sole witness for the defence.

 All the evidence of the State witnesses with the exception of the evidence of Tinevimbo Chiuya was not able to actually take the court to the spot of the murder. This was because the attack on the deceased took place outside the cabin whilst the majority of the witnesses were inside the cabin.

 The evidence of Talent helped the court in appreciating the source of the conflict or disagreement between the accused and the deceased, The witness confirmed that there were allegations and counter allegations between the accused and the deceased over $20-00. The accused was alleging that the deceased had stolen $20-00 from him whilst the deceased was insisting that the $20-00 he had was in fact his and that this led to a violent confrontation between the two outside the cabin which resulted in the stabbing of the deceased.

 The witness’s evidence also helped to explain that immediately after the accused had stabbed the deceased, he and his colleague Freddy fled from the scene and were never seen again. As stated the limitations of this witness’s evidence was that he did not actually witness how the stabbing took place but only reacted to the screaming of the deceased after he had been attacked by the accused.

 The best evidence available for the State came from Tinevimbo Chiuya who appeared to have been placed at a vantage point compared to the rest of the State witnesses. The witness stated that by the time he arrived at the scene of the murder he did not notice any dispute between the deceased and the accused as all appeared normal. He stated that as he stood by the door of the cabin the deceased asked him to pave way for him as he exited the cabin. Almost immediately thereafter, the accused followed the deceased outside and he had his back to the two, that is, the deceased and the accused. The witness said immediately he heard a thudding sound and that when he turned he saw the accused person pulling a home made knife from the lower part of the deceased’s ear. He heard the accused threatening to kill the deceased if the latter did not give him his money. The witness also heard the deceased complaining that the accused had injured him for his (deceased’s) money.

 The rest of the witness’s evidence dealt with the effort that he and others made in an effort to get the deceased treated and how he eventually learnt of the demise of the deceased the following morning. It was from this witness that the court got to appreciate the nature of the murder weapon since it was never located. The witness estimated the length of the home made knife to have had a blade which was about 9 cm in length with the handle’s length being 6 cm.

 Our assessment of this witness’s testimony is that it was well given and his credibility was beyond reproach. The witness gave us a fair account of what transpired on the day in question. Our view is that if there was a fight or a struggle between the accused and the deceased as suggested by the accused, this witness, given his vantage positioning could have witnessed it. In our view the accused must be disbelieved when he created the impression of the deceased having threatened to attack him first. That was simply not true and a creation of the accused’s poor imagination.

 The attire by the accused as described by Tinevimbo was such that it could have disguised the murder weapon which must have been in the hand of the accused when he followed the deceased outside the cabin. The witness said the accused was wearing a work suit jacket whose sleeves were completely covering the hands of the accused such that if he was holding the knife (which we believe he was) it would have been difficult to see it.

 In his evidence in chief and under cross-examination, the accused gave a rugged and incoherent story which had his counsel make a well informed concession that his story was unbelievable and a complete departure from his instructions. The most notable aspect of the accused’s story was its unexplained contradiction with his confirmed warned and cautioned statement and the indications the accused gave when he returned from South Africa almost two months after the offence had been committed.

 In both his statement and indications the accused made an unequivocal admission that he had stabbed the deceased because he believed he had stolen his money, This version would be consistent with the evidence of Tinevimbo and must be accepted as the truth. We accept that the accused stabbed the deceased in the manner he explained in his recorded statement and as confirmed by Tinevimbo.

 We accept as a court that there was a serious argument between the deceased and the accused over $20-00 and that the accused must have thought the deceased had taken his money and wanted to punish the deceased in the hope that he would return his money. This is confirmed by the utterances which Tinevimbo heard from the accused threatening to kill the deceased if he did not give him back his money.

 We must now consider the appropriate verdict. The facts as accepted do not in our view show an actual intent to kill the deceased by the accused. The situation would have been quite different if the accused had followed his utterances as captured by Tinevimbo with another attack which would have caused the deceased’s death.

 However, what is inescapable conclusion is that given the nature of the murder weapon as described to the court by Tinevimbo and where the accused person plunged it – just below the left ear, the accused person must have foreseen that the use of such a weapon on that delicate part of the deceased’s body would certainly result in the death of the deceased and continued with the stabbing. See the case of Robbert Mugwanda vs the state[[2]](#footnote-2).

 In these circumstances the accused is found guilty of murder with constructive intent.

**Verdict**

 Guilty of murder with contractive intent.

**Extenuation**

 It is a long established tradition of this court that youth-fullness, where it is found to exist be accepted as extenuation. The accused indeed appears much younger than his age, when he appeared in the dock.

 We also accept that a verdict of murder with constructive intent does constitute extunation. All in all we are satisfied as properly guided by both counsel that extenuation does exist in this matter.

 **Sentence**

 In passing sentence in this matter we will be guided by the following factors in mitigation and aggravation as advised by both counsel.

 In mitigation we accept that the accused is a fairly young offender who committed this offence believing the deceased had taken his money. This is the accused’s first brush with the law.

 Standing above all the other factors in this case is the accused’s genuine remorse as demonstrated by his conduct when he gathered whilst in South Africa that his victim had died. Whereas the average person would have taken advantage of the distance to completely remove himself from the jurisdiction of this court the accused did the most unusual. He took the imitative to surrender himself to the South African law enforcement officers who deported him back to this country to face this trial. We comment the accused for that shows unmistakable remorse.

 Perhaps I must spare a page in this judgment for the father of the accused who encouraged the accused to come back home and face the consequences of his action. That is a rare breed of parentage and we applaud the accused’s father for showing great maturity.

 The accused appears to have genuinely believed that the deceased had stolen his $20-00 and the mistake he did was to try and solve the problem by resorting to this crime.

 In aggravation we accept that a young life was lost in really undeserving circumstances. Our people must learn to respect life because once lost it cannot be recovered.

 We are extremely concerned with the ease with which young men are resorting to the use of knives to deal with their problems. We cannot be a nation of knives.

 Punishment of fellow individuals must be left to be dealt with by those who are trained to deal with it otherwise chaos would rain supreme.

 We also, accept that from the time of his arrest until now the accused has been kept in remand prison for 2 years and this is punishment on its own.

 18 years imprisonment.

*National Prosecution Authority*, State’s legal practitioners

*Ruvengo & Maboke,* accused’s legal practitioners

1. Chapter 9:07 [↑](#footnote-ref-1)
2. Judgment No. S.C 19/2002 p.9 [↑](#footnote-ref-2)