

THE STATE
versus
LUKE CHIDHIZA

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 24 and 25 July 2018, 1, 6 and 9 August 2018
and 19 September 2018

Criminal Trial

ASSESSORS: 1. Mr Mudzinge
 2. Mr Chipere

L Musarurwa, for the State
B Mungure, for the defence

MWAYERA J: In this case a misunderstanding over desire to get beer on credit degenerated into a fight which culminated in the loss of life of the deceased one Shadreck Mashava. The accused pleaded not guilty to a charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged by the state that on 1 March 2017 at around 16:30 hours and at Hlinzana Village Chagonda, Chief Mapungwana, Chipinge the accused unlawfully and with intent to kill or realising that there was a risk or possibility that his conduct might cause death continued to engage in the conduct despite the risk or possibility, assaulted Shadreck Mtetwa by using booted feet and fists several times on the head thereby causing severe injuries on the head from which the said Shadreck Mtetwa died.

The accused in his defence outline which he adopted as evidence in chief maintained that he had no intention to kill the deceased neither did he have foresight that death may result. According to the accused the deceased attacked him for refusing to give him beer on credit since the deceased already had an outstanding debt. The first fight which was through exchange of blows was restrained by one Robert Mapanda. After about an hour the deceased came back to the accused's shop demanding that he be given beer on credit. The two had a misunderstanding and again a fight broke. The two engaged in fist and open hand fight as none of them was armed and they were both barefooted. The accused struck the deceased with open

hands and fists and the latter fell to the ground unconscious. The accused tendered a plea of guilty to culpable homicide. The state did not accept the plea and hence proceeded to trial.

After the close of evidence both counsels filed closing submissions timeously. We are grateful to both counsels for the submissions. It is important to mention at this stage that the defence maintained its plea of guilty to culpable homicide while the state conceded that the circumstances of the matter and evidence adduced fell short of establishing murder with actual intention. The state however, urged the court to consider all the evidence adduced in relation to murder with constructive intention as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Most aspects of the case are common cause. It is common cause the accused and deceased had a misunderstanding over demand for beer on credit by the deceased. The misunderstanding culminated in a fight which occasioned a swollen forehead on the deceased. The deceased died as a result of a head injury as per the post mortem report by Doctor Sipeyiye Kudakwashe exh I refers. Most state witnesses evidence was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Thus evidence of Chipo Makuyana, Kenas Sithole, Evidence Mbiri, Takesure Ngwenya, Donald Mhuru, Elias and Simbisai Masoka was on common cause aspects. It was apparent from the state witnesses and accused's evidence that on the fateful day the deceased who was drunk was unrelenting on his demand for beer on credit from the accused. Further, when the accused refused to give the deceased beer demanding clearance of an earlier debt the deceased started shouting at the accused insisting he be given beer then a misunderstanding degenerated into a fight of exchanging blows. The accused and deceased were successfully separated by Robert Mapande and the deceased walked away. After a while, the deceased came back and demanded beer on credit leading to another misunderstanding. Again the two fought exchanging blows. When the deceased aimed a blow which was ducked by the accused the deceased fell and the accused then kicked the deceased on the head resulting in the fatal injuries. Whilst the deceased was injured while on the ground the accused and the other villagers rendered first aid till an ambulance ferried deceased to hospital. The deceased then passed on upon admission at the hospital.

The oral evidence adduced from Tracy Paza, Lovemore Musiiwa and Robert Mpande is in conformity with the admitted evidence of the other state witnesses. The variance in detail and on number of kicks was clearly understandable given some of the witnesses were at the scene throughout, while others came out upon hearing noise and witnesses like Tracy Paza

were not constantly in attendance. Tracy Paza moved to the scene and back to her shop. She observed and when she got scared left and later came back. According to Lovemore Musiiwa and Robert Mapanda the accused kicked deceased once on the head with bare foot. As a result of the kick on the head the deceased sustained fatal injuries from which he passed on. The state witnesses Lovemore Musiiwa and Robert Mpande who gave oral evidence gave evidence in a fashion indicative of simplicity and honest. There were no exaggerations. They confined themselves to what they observed unlike the state witness Tracy Paza who was bent on reconstructions and hearsay and later explained she was on and off the scene.

The accused was the only witness in the defence case. He was consistent in his version of events of the day in question. His confirmed warned and cautioned statement was tendered as exh 2 by consent. The squabble was over desire by deceased to be given beer on credit despite not having cleared the earlier debt. The accused admitted he engaged in a fight with the deceased which culminated in the deceased sustaining a head injury from which he died. The accused admitted to having negligently caused the death of the deceased and thus maintained his plea of guilty to culpable homicide.

Having been presented with the full evidence and circumstances of this matter the court is left to decide on whether or not the accused foresaw that death may result due to his conduct. In other words the question is whether or not with the evidence adduced the state has managed to prove beyond reasonable doubt that the accused was aware or realised that there was a risk or possibility other than remote risk or possibility that his conduct might give rise to the death of the deceased. Given the sequence of events it would be stretching and shifting the onus on the accused to prove his innocence beyond reasonable doubt so as to impute legal intention on the part of the accused. We say so because there is no evidence placed before the court to show that the accused engaged in conduct he engaged in with the realisation that there is a real risk or possibility that his conduct may cause death. There was no formulation of intention. The deceased and accused fought.

The deceased was aggressive and he pestered the accused culminating in a fight. Despite being restrained the deceased came back and another scuffle ensued. There is no evidence of the accused having armed himself to wade off the attack from the deceased. The fight was with open hands clenched fists and bare feet. The fact that the deceased was drunk does not in any manner impute intention on the accused. The deceased was drunk but knew what he wanted and what he was doing. The two were fighting and the fact that the deceased was drunk is no basis for conviction of the accused of a charge of murder. When the deceased

fell to the ground he was kicked only once and the accused offered help to try and resuscitate him. There is no evidence to show that despite realising the risk or possibility of risk the accused was reckless as to the outcome. It is not in dispute that no weapon was used, further it is apparent that the two were fighting and when the deceased fell he was kicked once. Upon considering intention the court among other factors assess nature of force used, the weapon and circumstances of the matter. See the case of *S v Mema* HH 143/13. In this case the accused was involved in a fight of exchanging blows. There is nothing to show that the accused had actual or legal intention to cause the death of the deceased. That the assault was not protracted and that accused attempted first aid and called for an ambulance immediately after the fatal blow suggests that the accused had no requisite intention to cause the death of the deceased.

However, when the deceased who was in a drunken stupor, fell to the ground the accused was negligent in that he kicked the head causing injuries from which the deceased died. The accused ought to have realised that his actions may result in death but he failed to ensure or guard against the possibility of death. In this case the accused person negligently failed to realise that death may result from his conduct of kicking the deceased on the head albeit bare footed.

Accordingly the accused is found guilty of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Chapter9:23*].

Sentence

Sentencing is a delicate exercise which places an onerous task on the court to strike a balance between the offence, the offender, the interest of justice while at the same time tempering justice with mercy. The submissions in mitigation and aggravation by both state and defence counsel are of great value as they assist the court in coming up with an appropriate sentence.

We have considered all mitigatory factors submitted by Mr *Mungure* on behalf of the accused. The accused is a fairly young man of 33 who is married and has family responsibilities. He is given as the bread winner of his household which comprises of a wife and 4 dependant children. The accused suffered pre-trial incarceration for 6 months and that is certainly not an easy period. Even after being admitted to bail the accused suffered the trauma which goes with the suspense of having a murder case hovering over his head.

Mr *Mungure* has urged the court to take note of the circumstances surrounding the offence given the lack of sophistication on the part of the accused, a rural folk pestered for beer

on credit by a man who owed him. The two engaged in a fight not that the accused assaulted the deceased. It was unfortunate that the accused negligently caused the death of the deceased when during the fight he kicked the deceased's head resulting in the fatal blow. Further in mitigation as adduced by defence counsel is the fact that from the day of the commission of the offence the accused has shown contrition. He regretted the violent conduct as evidenced by rendering first aid and taking the deceased to hospital. Further the accused was consistent in admission of his negligence occasioning the death of the deceased. Strictly speaking the accused pleaded guilty to culpable homicide from the onset and ought to be given credit for the genuine penitence and remorse. He also assisted the bereaved family during the funeral. During trial the accused also assisted in desire to have the matter finalised by ensuring witnesses and himself attended. He did not abuse his being on bail.

However, no amount of compensation or remorse will bring back the lost precious human life. A fairly young man was robbed of life and as correctly observed by Mr *Musarurwa* in circumstances where such loss of life could have been avoided. The fact that the right to life is a constitutionally given right clearly sends signals that no one has a right to take away that life.

Conduct occasioning loss of life should be visited with appropriate punishment so as to send the right signal to society. The court cannot condone and treat leniently people who resort to violence as a way of resolving disputes. In this case the matter could have easily been resolved without accused coming out of his tuckshop to fight. The accused behaved irresponsibly.

Upon weighing all mitigatory and aggravatory factors it is our considered view that a short imprisonment term is called for. This is more so given the nature of the accused, the offence committed and the sentencing principles as enunciated in case law. See *S v Rubie* 1975 (4) SA @ 620 and also *S v Harrison* 1970 SA 684. Both counsel referred us to other case law which is relevant. See *S v Madungu and Another* HMA 33-18 wherein the court convicted two accused persons of culpable homicide. In that case the two accused kicked the deceased using booted feet directing the blows to the head and upper part of the body until the deceased was unconscious. The deceased eventually died as a result of the negligent conduct of the two accused. The court sentenced each accused to 2 years imprisonment of which 1 year imprisonment was suspended for 5 years on the usual conditions of good behaviour. We acknowledge the reasoning behind the sentence in that case. However, we wish to point out

that sight should not be lost of the fact that circumstances of each case are pivotal in passing sentence.

In the circumstances of this case the convict is sentenced as follows, 3 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition accused does not within that period commit any 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
Makombe & Associates, defence's legal practitioners