THE STATE

Versus

CLAYTON SIBANDA

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr. G. Maphosa & Mr. T. Ndlovu
HWANGE 15 JUNE 2021

Criminal Trial

B. Tshabalala for the state
Ms. L. Mthombeni for the accused

KABASA J: The accused was charged with murder as defined in s47 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. He tendered a plea of not guilty to murder but guilty to the lesser charge of culpable homicide. The state did not accept the limited plea. He faced a second charge of malicious damage to property to which he pleaded not guilty.

It is alleged that on 28th December 2020 at Johannes Masuku's homestead, Siambora Village in Binga, the accused unlawfully struck Johannes Masuku with a log once on the head intending to kill Johannes Masuku or realizing that there was a real risk or possibility that his conduct may cause death but continued to engage in that conduct despite the risk or possibility.

After striking Johannes Masuku the accused proceeded to damage the windscreen of a Datsun 120Y registration number AAX 5791 by smashing the windscreen with a log.

The state summary was produced and marked annexure 'A'. In brief the state alleged that on 28th December 2020 the accused met the deceased's grandson at Siambora Shopping Centre and reminded him of the assault this grandson had perpetrated on him earlier that month at a party they had both attended. The accused then told the grandson that he was going to kill his grandfather in retaliation.

That same day at around 17:30 hours the accused went to the deceased's home where he assaulted him with a log on the head. The deceased sustained injuries and was ferried to hospital where he was admitted and later discharged. He however succumbed to the injuries on 9th January 2021.

The day of the assault the accused also smashed the windscreen of a Datsun 120Y which was parked at the deceased's yard.

In his defence, which defence outline was tendered and marked Annexure B, the accused explained that the deceased's grandson had been in the habit of assaulting him. After the assault at the party they both attended in early December he had reported to the deceased and asked for water to clean the wound inflicted by the grandson. The deceased took exception to the accused's conduct and reported the matter to the village head.

On the 28th December 2020 the grandson assaulted him again and the accused went to report to the deceased. The deceased reacted by advancing towards him saying words to the effect that his grandson had played with the accused; he should have beaten him. Anticipating an attack as deceased was armed with a walking stick, the accused picked up a stick with which he hit the deceased once on the head. He then fled. The deceased was ferried to hospital where he was discharged after receiving treatment but subsequently died on 9th January 2021.

He reiterated that he had no intention to kill the deceased when he hit him with the stick.

The post mortem report was tendered into evidence and marked exhibit I. The state then produced the accused's confirmed cautioned and cautioned statement which was duly marked exhibit 2.

The post mortem report gave the cause of death as: -

1. Cerebral edema
2. Acute subdural haematoma
3. Head trauma

The confirmed warned and cautioned statement, which the accused gave in Shona was to the following effect.

> "I admit that I assaulted Johannes Masuku and he got injured and went to the hospital but I do not know whether he died due to the assault."

The statements of the following three witnesses were admitted into evidence in terms of s314 of the Criminal Procedure and Evidence Act (Chapter 9:07);

1. Constable Mhlanga
2. Sergeant Nyoni
3. Doctor Gregori

The state then led evidence from 3 state witnesses, these witnesses were the deceased's grandson who accused was unhappy with on the day in question, another of the deceased's grandsons, 8-year-old Nelson Masuku and Gideon Mufunye.

The first witness' evidence was to the effect that after the accused assaulted him at a party they both attended in early December 2020, he retaliated by striking him with a stone before fleeing. The accused followed to the witness grandfather's homestead complaining about the assault and asked for water to clean his wound. The matter was thereafter resolved amicably at a meeting called by the village head.

On 28th December 2020 the witness met the accused at the shops and the accused reminded him of the earlier assault. The witness responded that the matter had been resolved whereupon the accused told him that he was going to kill his grandfather.

The assault on his grandfather occurred in his absence. He arrived home when his grandfather had already been assaulted.

This witness appeared to be relating that which he knew to have happened. We did not get the impression that he was out to embellish his evidence in order to get back at the accused.

He admitted the early December assault and equally admitted that he did not witness the assault on his grandfather.

Had he been bent on embellishing his evidence he could easily have placed himself at or near the scene and testified to that assault but he did not.

He impressed as a credible witness and his evidence could therefore be safely relied on.

The fact that the young man he was with when the accused issued the threat against his grandfather was not called as a witness cannot be used against him and does not detract from his credibility.

His evidence established the fact that the accused was still angry about the incident which had occurred about 3 weeks prior to the day of the fatal assault on the witness' grandfather.

The accused announced where he was going after leaving the shops and he indeed proceeded to the deceased's homestead.

The second witness was 8-year-old Malvern. He opted to testify in court although the choice of the use of the Victim Friendly Court facility was explained to him. He appeared a bit overawed by the experience if his countenance was anything to go by.

Whilst the state appeared to suggest that he had not witnessed the assault and suspected nothing until after penning the cattle he was herding and saw his grandfather lying on the ground and not responding to his call, in his testimony he said he witnessed the assault. He described the stick's diameter as about 2-3cm and that was gleaned from the indications he made and about 1m long. The accused held the stick with both hands when he struck the deceased. After that he hit the motor vehicle which was in the yard creating what he called "a small hole".

We must say it was not easy to determine whether this witness was saying what he recalled to have happened or what he believed he was expected to say. The presence of his grandmother to whom he ran to report the incident, did not help the situation.

The description of the stick, which description tallied with the accused's own description was not such that one would need two hands to hold it.

We are alive to the fact that a witness cannot be expected to explain what it is the police choose to write in a statement and equally what the state in its summary chooses to include but we were left wondering as to why such a simple and straightforward account of what the witness said he observed could be difficult to capture and have it suggested that he suspected nothing and saw nothing until he saw his grandfather lying on the ground.

The police in investigating crimes obviously desire to get the most relevant witnesses who will be able to shed light on what happened. Malvern would have been the star witness as the only one who witnessed the assault. It would not have been difficult to get him to repeat what he had seen. Why then would the police have a statement which clearly revealed that Malvern was herding cattle and suspected nothing, so much so that he even went to pen the cattle still

suspecting nothing, until he went into the homestead and found his grandfather lying down injured.

Had Malvern witnessed the incident as he sought to portray in court, he would have rushed to call his grandmother there and then and not do so only when he tried to call his grandfather who was unresponsive. This makes it very difficult to accept Malvern's evidence at face value and to rely on it.

The truth is most probably that he indeed suspected nothing when he saw the accused and did not witness the assault, only to see his grandfather lying unresponsive on the ground after he had penned the cattle.

Equally puzzling is the description he gave of the damage to the Datsun 120Y. The witness spoke of "a small hole". Surely such a description cannot amount to a "smashing of the windscreen" as given by the state when describing the damage caused by the accused. We therefore found it difficult to place much reliance on this child's evidence.

The last witness was the neighbor to whom the accused reported what he had done to the deceased.

It was the witness' evidence that the accused told him that he had an altercation with the first witness who ran away before the accused went to the deceased's home. The witness went further to say the accused told him that he had killed someone but would not say who he had killed. When the accused left, he told the witness that he was going home and arrange what was to happen to his children whilst he also pondered on what he was to do.

This witness was well acquainted with both the accused and the deceased. He did not witness the assault and had no personal knowledge of what had earlier on transpired between the accused and the deceased's grandson.

We regarded the witness as an independent witness who had no reason to embellish his evidence for or against the accused. He gave the impression of one who was merely relating what he was told and nothing else. We found him to be a credible witness.

That said, the following was largely common cause. This being so because the accused reiterated the fact that he had no intention to kill and described how he assaulted the deceased.

The fact is it was really the 2 i.e., the accused and the deceased who were at the scene of the assault.

It is however not in dispute that:

1. The deceased was approached by the accused on 28th December 2020 whilst he was at his homestead.
2. The accused assaulted the deceased using a stick.
3. The weapon used was not recovered and the court was not able to have a clear appreciation of its dimensions.
4. The accused struck the deceased once on the head.

5. The deceased was treated at the hospital and subsequently discharged but died about 12 days later.
6. The cause of death was as a direct result of the assault perpetrated on him by the accused.

The issue is whether the accused intended to kill the deceased or he was negligent in causing the deceased's death.

We have no problem dismissing the accused's version of self defence. We agree with state counsel's submission that if there was indeed self defence the accused would have stated so at the very first opportunity he was given to explain the circumstances surrounding the assault which led to the deceased's death.

We are not in any way suggesting that the accused ought to convince us as to the truthfulness of his story as he has no obligation to do so.

As was stated in *R* v *Difford* 1937 AD 370.

> "The accused need not convince the court as to the truthfulness of his story. Whatever explanation he gives, no matter how improbable it may be, the court cannot dismiss it unless it has been shown to be not only, improbable but beyond doubt false."

The improbability of the accused's story lies in the fact that after he struck the deceased, he went to the third witness' home confessing that he had killed someone. He however narrated an altercation he had had with the deceased's grandson and never once mentioned that the deceased had posed a threat to him.

Surely it would not have been anything that required much thought for him to simply tell this witness that he went to the deceased to report to him what his grandson had done but the deceased made as if he was bent on attacking him and so he hit him to avert that perceived attack. He did not say that and it would have come naturally to say so had it happened. It had not happened and so it did not occur to him at the time to try and justify what he had done by claiming self defence.

He did not mention the issue of self defence but was only repeatedly confessing to having killed the deceased because he was never under any attack from the deceased, actual or perceived. He was out to punish the deceased for the sins of his grandson.

There was no provocation either. The accused went to the deceased as a way of getting even with his grandson. The evidence established as much.

Can it however be said the accused desired death and that was his aim and object (*State* v *Herald Moyo* HB-19-17).

A stick was used, whose dimensions were not certain as it was not recovered. However, from the description given it cannot be described as a log, it could have been at most 2 – 3cm in circumference and about $^{+/-}$ 1m long.

It can hardly be described as a lethal weapon in the circumstances. It was used once and there was no mention of repeated blows. There was no fracture to the skull which in a way

indicates that the force used was not excessive and the weapon itself not heavy to cause a fracture of the skull. However, it was used with considerable force to cause the head injury resulting in the swelling of the brain and the subdural haematoma.

In *State* v *Mugwanda* 2002 (1) ZLR 547 (S), CHIDYAUSIKU CJ stated that for a verdict of murder with actual intent, a trial court must be satisfied beyond a reasonable doubt that the accused desired to bring about the death of the victim and succeeded in doing so. (See also *State* v *Jealous Tomasi* HH-217-16)

We do not lose sight of the fact that the accused had mentioned that he was going to kill the deceased. However, that ought not to be taken in isolation. The accused's actions must also be indicative of a person out to cause the death of another.

In *State* vs *Norbert Moyo* HB-113-15 MAKONESE J had this to say:

> "It is now trite law that for a court to return a verdict of murder with actual intent, the court must be satisfied beyond a reasonable doubt, either that the accused desired to bring about the death of his victim and succeeded in completing that objective, or that while pursuing another objective the accused foresaw the death of his victim as a substantially certain result of that activity and proceeded regardless. A verdict of murder with constructive intent, on the other hand, requires the foreseen result to be possible as opposed to being substantially certain, making it a question of degree more than anything else."

In this case the accused used a stick to strike the deceased once. Granted he struck the deceased on the head but can it be said under those circumstances he realized the risk or possibility that his conduct may cause death and continued regardless.

We are not of the view that the evidence before us proved beyond a reasonable doubt an actual intention to kill or that the accused realized the real risk or possibility that his conduct may cause death.

The accused's statement that he did not know that the deceased died due to the assault somewhat speaks to the fact that by striking the deceased once with a stick, albeit on the head, he did not realise the real risk or possibility of death occurring.

There is no doubt however that he was negligent by failing to realise that death may result from his conduct.

We are consequently satisfied that the state has failed to prove beyond a reasonable doubt the crime of murder but that of culpable homicide.

As regards the malicious damage to property the scanty evidence fell short of discharging the onus on the state to prove its case beyond a reasonable doubt. The accused is therefore entitled to the benefit of that doubt.

The accused is accordingly, found not guilty of murder but guilty of culpable homicide as defined in s49(a) of the Criminal Law Code.

As regards the second count he is found not guilty and acquitted.

Reasons for Sentence

The accused is 32 years old married with 3 minor children. The eldest is 6 years and the youngest is 2. His family is a very young family. He is the sole breadwinner, employed as a farm hand and earning US$20 - $30 per month. He has no assets of meaningful value.

He showed some measure of contrition by taking responsibility for his actions when he tendered a plea of guilty to culpable homicide. Whilst the state had not accepted that plea the accused stands convicted of the lesser offence of culpable homicide.

He is a first offender. He had therefore lived a crime free life for 31 years.

Aggravating is the fact that a life was lost. The deceased had done nothing and was minding his own business at his home. The accused sought to punish the 65-year-old grandfather for the sins of his grandson. He showed disrespect for the elderly.

Evidence showed that he is what we can call "a village bully" and his behavior ultimately resulted in the loss of life. Life should not be lost at the hands of another. Society must respect the sanctity of life and where such respect is lacking the courts must mete out exemplary sentences.

The accused assaulted the deceased and left him there for his very young 8-year-old grandson to witness and call for help. That may cause some psychological harm to the young boy who has now lost his grandfather. The grandmother has been left a widow because of accused's actions.

The offence occurred in December 2020 and the matter has been finalized in June 2021. The accused was therefore not in pre-trial incarceration for an inordinate period.

Culpable homicide is a serious offence and the sentence ought to reflect so.

The following sentence is therefore appropriate as it fits both the offender and the offence.

> "9 years imprisonment of which 2 years is suspended for 5 years on condition the accused does not within that period commit any offence of which an assault on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine."

Effective – 7 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Dube, Nkala & Company accused's legal practitioners