THE STATE

Versus

MELUSI TRUST MSIPHA

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr G Maphosa and Mr J Ndubiwa
HWANGE 3 AND 4 JULY 2023

Criminal Trial

Mr Dube, for the state
Ms L Mthombeni, for the accused

KABASA J: The accused pleaded not guilty to a charge of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. He tendered a plea of guilty to culpable homicide which the state rejected.

The allegations are that on 16 October 2022 at about 1730 hours the deceased was at a place called Junction Stores at a business centre in Nkayi and in his company were 3 others. They were having a meal when the deceased saw someone he knew and called him over. The two started insulting each other in jest. The accused who heard the insults remonstrated with them due to the foul language they were using. Although the unidentified man assured the accused that it was all in jest the accused was not amused and shouted at the deceased threatening to assault him. After their meal those who were in the deceased's company left and deceased remained behind. He later also stood up to go and wash his hands whereupon the accused followed him, withdrew a knife from his pocket and stabbed the deceased once on the head leaving the blade imbedded in the head. The deceased was ferried to Nkayi hospital but died upon admission.

In his defence the accused did not deny inflicting the fatal injury. He also did not deny using a knife. He however said he was defending himself as the deceased and his friends intended to assault him for daring to remonstrate with the deceased against the use of foul language.

The issue therefore is whether the defence raised by the accused is available to him. If it is and meets the requirements for such a defence, self-defence amounts to a complete defence. Where the means used to avert the attack were not reasonable in all the circumstances self-defence will amount to a partial defence, reducing murder to culpable homicide.

To prove its case the state produced the accused's confirmed warned and cautioned statement, which was duly marked exhibit 1. In that statement the accused said:-

> "I admit to the charges levelled against me. I stabbed deceased because he insulted the person I was sitting with by saying "mgodoyi" which means a lousy dog. I cautioned him not to insult the person I was sitting with. The deceased then left intending to drink water at a tap of which I followed him and stabbed him with a knife once on the head and he fell down."

The post-mortem report was produced and marked exhibit 2. The cause of death was:-

subdural hematoma

cranial trauma

assault

The doctor observed that there was haemorrhagic infiltrate and laceration located in the left frontal region of the scalp. There was a fracture due to penetration of the knife in the left temporal region of the skull.

The brain had an encephalic laceration on the left frontal region and big subdural hematoma in the right temporal-parietal region.

The knife which caused the fatal injury was produced and marked exhibit 3. The following are its dimensions:-

Length of the handle – 10 cm

Width of the handle – 2, 5 cm

Length of the blade – 8, 5 cm

Width of the blade at the wide end – 2 cm

Width of the blade at its tip – 3 mm

Weight – 50 grams

The evidence of three witnesses was admitted in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07. These witnesses are one Joshua Mafuta in whose company the deceased was together with the other two people they were having a meal with. The police officer who attended the scene and recovered the knife and the doctor who conducted the post-mortem.

Evidence was then led from one Morgan Ndebele. The gist of his testimony was that he was with the deceased and two other people when this unidentified man joined them. This man and the deceased started exchanging insults and they were doing so jokingly as people who knew each other. The accused approached and took exception to the nature of the insults. Although the unidentified man who accused said was his uncle assured him that it was all in jest, the accused would have none of it. He shouted at the deceased and threatened to assault him but the deceased replied that he was too young to assault him. After this witness had finished eating he washed his hands and went and stood about 7 metres away facing the water tap. The deceased also later stood up and proceeded to the water tap. The accused stood up as well and withdrew a knife from his pocket. The witness called out to the deceased to warn him whilst rushing to the water tap but he was beaten to it by the accused who proceeded to stab the deceased on the head after he first missed the abdomen. The knife got imbedded in the deceased's head and the accused fled.

This witness's evidence was straightforward and to the point. He did not appear to be bent on fabricating against the accused because he was known to the deceased.

The suggestion by defence counsel that his evidence was riddled with inconsistencies is not borne out by the evidence. The mere fact that he appeared not to have given the detail that it was him who asked the deceased and the accused's "uncle" not to use such foul language did not render him an unreliable witness.

His description of the assault could only have been from one who witnessed it and not that it was from a made up story.

We were fortified in concluding that he was a reliable witness because Joshua Mafuta whose evidence was accepted in terms of section 314 of the Criminal Procedure Evidence Act said he did not witness the assault but he was alerted to what was happening when this witness, i.e. Morgan called out to the deceased to warn him of accused's imminent attack.

This showed that Joshua was not at the scene but seated in the car and so could not have been one of those the accused alleged was attacking him. Equally Morgan could only have shouted because he too was not at this water tap where the accused followed the deceased who had gone to wash his hands.

The deceased was attacked when he was oblivious of the impending danger. The warning by the witness came too late.

This evidence showed that the accused's story was not true. Granted 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 (*R* v *Difford* 1937 AD 370).

The accused's story is that he was under attack after he asked the deceased not to use foul language. The deceased's friends said he was too young to say that to the deceased and agreed to assault him. They advanced towards him and he took the knife which was in the plate which had meat he and his uncle had been partaking. He retreated but the deceased and his four friends kept advancing. He tripped and fell and when he was down the deceased lunged at him whereupon he stabbed him with the knife.

If there was any truth in this story one would have expected him to have stated as much to the police when his warned and cautioned statement was recorded.

The incident occurred on 16 October 2022. On 17 October 2022 the accused was given an opportunity to state his side of the story. He did not mention that he acted in self-defence. He did not even mention an attack on his person either physically or verbally. His warned and cautioned statement supported Morgan's narration of how the deceased was stabbed.

Asked why he did not mention the self-defence story he explained that he was in shock. What would it have taken to merely say I was being attacked and so I stabbed him to ward off that attack, even for one in shock? The truth just comes out without even thinking. What shock was that that saw him able to recount the fact that the deceased had insulted the person he was sitting with and that he cautioned the deceased against the use of such foul language? And further that when the deceased then got up to go to the water tap he followed him and stabbed him once on the head.

This is the story he gave because that was the truth of what happened as recounted by Morgan and supported to some extent by Joshua.

Where a person acts in self-defence that is the very first thing that they mention when asked to explain why they caused the death of the victim.

The self-defence story is, as the state correctly pointed out, an afterthought borne out of a scheming mind. A mind that with the benefit of reflection, now seeks to downplay what happened and justify action which caused the death of someone.

Even in his defence outline he never mentioned that he was actually being assaulted by the deceased and his friends. All he said was that they were advancing towards him taunting him and threatening to beat him up.

In his evidence however he sought to portray a picture of one who was under attack by four men who were much older than him.

> "The four of them stood up and advanced towards me. I then stood up and picked the knife and moved backwards as they were assaulting me with open hands and booted feet."

We were of the considered view that he is a young man with little respect for the truth. His story would not have been difficult to relate had it been the truth of what happened. It is not easy to tell a lie and sustain it, one is bound to trip over as they vainly try to build upon a lie. This is what happened with the accused. The inconsistency which the witness was criticised on is a criticism that fits like a glove on the accused. He is the one who was inconsistent.

Section 253 of the Criminal Law Code sets out the requirements for the defence of person. The very first requirement is that the accused must be under an unlawful attack.

From the foregoing there was no unlawful attack. The accused is the one who was attacking and had Morgan been able to get to the water tap before accused did maybe the deceased would not have been stabbed.

There being no unlawful attack the defence all but crumbles. There is no self-defence to talk about.

That said, the accused used a knife to stab the deceased in the head with such force that the 8, 5 cm blade was imbedded in the deceased's head. He had to be taken to hospital with

the knife stuck in his head. The head is a very vulnerable part of the body and a knife is undoubtedly a lethal weapon. A person who plunges a knife into someone's head cannot be said to lack the realisation that there is a real risk or possibility that such conduct may cause death.

The accused may have taken some alcohol but he knew what he was doing. In any event voluntary intoxication is not a defence in circumstances where such intoxication did not have the effect of rendering that person incapable of formulating the requisite intention or realisation that their conduct may result in death.

In the result the accused has no defence to the charge of murder. It matters not whether his conduct falls under section 47 (1) (a) or (b), the fact is the causing of the death of another is murder as defined in section 47 of the Criminal Law Code (*State* v *Mapfoche* SC 84-21)

The state has therefore proved its case beyond a reasonable doubt and the accused is accordingly found guilty of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23.

Sentence

The accused is a 20 year old first offender. He was 19 when the offence was committed.

Throughout the trial he showed he was remorseful and kept apologising. This was a genuine sign of remorse.

At 19 he was youthful, his irrational behaviour bears testimony to the irrationality of youth. That is why it is odious to impose on youths the same penalty that would be appropriate for a more mature offender (*S* v *Zaranyika and Ors* 1995 (1) ZLR 270 (H)).

Youthful as he is he now faces the stigma of being labelled a murderer. It is a burden he has to live with for the rest of his life. The deceased's death is likely to weigh on him for the rest of his life.

The 2 cattle he had from his own resources and the 5 he inherited from his father were taken as compensation by the deceased's family.

He probably lacked the presence of a father figure as his father is late and he was raised by his mother and grandmother.

Whilst there is need to mete out a punishment that fits the offence, the court also must not lose sight of the need to consider the offender. Too harsh a sentence is as ineffective as a too lenient one (*S* v *Ndlovu* HB 14-96).

The sentence must fit the offence, offender and be fair to society. (*S* v Z*inn* 1969 (2) SA 537).

In aggravation is the fact that a life was unnecessarily lost. Life is precious and ought not to be lost at another person's hands. Courts have time without number exhorted members of the public to respect the sanctity of life.

The accused involved himself in a matter that had nothing to do with him and the murder was senseless.

The 8, 5 cm blade of the knife sunk into the deceased's skull exhibiting the viciousness of the assault.

The sentences of 18 years – 20 years the defence counsel referred to (*S* v *Masvave* HB 27-13, *S* v *Moyo* HB 241-20) are the acceptable range in cases of this nature.

We however, do not lose sight of the accused's remorseful countenance and the evidence that he deeply regrets what he did.

Whilst we should not allow maudlin sympathy for the accused to influence our ability to assess an appropriate sentence, a humane approach has nothing to do with maudlin sympathy (*S* v *Rabie* 1975 (4) SA 855)

The accused must be punished but not with a vengeful attitude.

That said the following sentence meets the justice of the case:-

15 years imprisonment

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