THE STATE

Versus

BHEKIWE THEMBE

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J with Assessors Mr Damba and Mr Sobantu
BULAWAYO 16 MAY AND 26 JUNE 2024

Criminal trial

K. Nyoni, for the state
A Duri, for the accused

MANGOTA J:- The accused is charged with murder as defined in Section 47 of the Criminal Law (Codification and Reform) Act (Chapter 9:23) ("the Act"). The allegations which the State preferred against him are that, on 25 December, 2023 and at number 7935/38, Sizinda, Bulawayo, the accused assaulted one Orpha Thebe, his sister, whom he hit twice on the upper cheek and once on the occiput area of her person with a traditional wooden stool as well as all over the latter's person several times with open hands and, in the process, he caused the death of Orpha Thebe ("the deceased"). The State's further allegations are that, when he assaulted the deceased in the above-described manner, the accused intended to kill the deceased and/or that he realized that there was a real risk or possibility that his conduct might cause the death of the deceased and, his realization of a real risk or possibility of death occurring notwithstanding, he continued to engage in the said conduct.

The accused pleaded not guilty to the charge of murder but guilty to the crime of culpable homicide which plea the State refused to accept. He raises the defences of intoxication and provocation. He alleges that he was, on the day in question, so intoxicated as to be incapable of appreciating the consequences of his actions. He claims that on the date that the incident occurred, he had taken two keys whisky for the first time as a way of drowning his sorrows because he had recently lost his job. He alleges that the deceased provoked him extremely. She was the aggressor who fought him aggressively with fists, according to him. He states that he fought with the deceased and that, during the fight, he lost balance and fell as a result of which she pounced on his fallen condition and continued to assault him. He claims that, in a bid to ward her off and avoid her, he picked up the traditional wooden stool which was next to him and he used it to ward her off him with the result that she fell onto the floor.

He alleges that, believing that he had warded her off, he escaped her aggressive assault and left her lying on the floor as he proceeded to his bed-room where he locked himself and retired to bed. He moves us to find him not guilty of the crime of murder but that of culpable homicide.

The case of the accused and his dead sister is, in many respects, a one-sided story. It is one-sided in the sense that the deceased cannot be resurrected from the dead to come and shed light on what actually occurred on the night that she passed on. What we remain with is only what the accused person is telling us as having happened and no more than that. The observed matter places the State in a very invidious position. Invidious on account of the fact that it is upon it that the duty to prove the guilt of the accused rests.

It is in the spirit of its duty to discharge the *onus* of proving the guilt of the accused that the State produced, with the consent of the defence, the following exhibits which, in its view, support its case:

a) the post-mortem report which the doctor who examined the remains of the deceased compiled;
b) the accused's confirmed warned and cautioned statement-and
c) the traditional wooden stool with which the accused person assaulted the deceased.

These were marked exhibits 1, 2 and 3 respectively. The State, with the consent of the defence, applied, in terms of section 314 of the Criminal Procedure and Evidence Act, to introduce into the record the evidence of the following of its witnesses:

i) one Masciline Muvengedzwa;
ii) one Tembelani Sibanda- and
iii) one.Maibelys Gavilani Acosta the doctor who examined the remains of the deceased and compiled the post-mortem report.

The State led *viva voce* evidence from one Pasi Mukwashi, a sergeant in the Zimbabwe Republic Police who, at the time of the alleged offence, was stationed at Tshabalala Police Station in Bulawayo. He is the investigation officer of the case.

The trite position of the law is that he who alleges must prove. Van Der Linden clarifies this position of the law. The learned author states, in his *Institutes of Holland, 3rd edition*, page 155 that the *onus* of proof is on him who affirms and not on him who denies.

The State alleges that the accused person killed his sister. It, therefore, bears the burden of proving that he did so. For it to prove its case against him, it has to establish the elements of the crime of murder. These are defined in section 47 of the Act. The section reads, in the relevant part, as follows:

" (1) Any person who causes the death of another person-

a) intending to kill the other person; or
b) realizing that there is a real risk or possibility that his or her conduct may cause death and continues to engage in that conduct despite the risk or possibility shall be guilty of murder".

It is clear, from a reading of the cited definition of the crime, that murder has two elements which the State must prove, not on a preponderance of probabilities, but beyond a reasonable doubt. The elements in question are the *actus reus* which, in ordinary parlance, is known as the act of commission or omission and the *mens rea* or the mental element which must accompany the physical conduct (*actus reus)* of the accused person. Where one of these two elements is found to be absent, the accused cannot be convicted of murder. He may, depending on the evidence which is adduced, be found guilty of any crime which is a competent verdict on a charge of murder. He may, for instance, be convicted of attempted murder, culpable homicide or assault. Any of these are competent verdicts which a court may deliver on an accused who has been charged with the offence of murder.

Because murder is a specific intent crime, where intention to kill is proved on the part of the accused, the matter is at an end. He will properly be convicted of the crime of murder without any further ado. In the majority of cases, however, actual intention to kill may be either absent or difficult to prove. Yet he may still be found guilty of murder on the basis that he had the legal intention to kill at the time that he caused the death of another person. The mentioned form of intention is referred to in paragraph (b) of sub-section (1) of section 47 of the Act. Its meaning and import are clear and straightforward. It operates on the premise that the accused realized a real risk or possibility that his conduct may result in the death of someone and he proceeds to engage in it irrespective of the consequences that may befall his victim. The long and short of the stated set of circumstances is that he has the requisite constructive intention to kill his victim.

The *actus reus* or the physical conduct of the accused is, by and large, not difficult for the State to prove. It more often than not operates on the principle of cause and effect. It seeks to

answer the question: but for the conduct of the accused, would the deceased have died. If he would not have died and the conduct of the accused is the effective cause of the death of the deceased, then *actus reus* is proved against the accused.

The intention to cause death is more difficult for the State to prove than the *actus reus*. It is difficult because the accused is able to easily assert, in defence of himself that he was not in his full and sober senses when he killed, or caused the death of, the deceased. It is, for instance, very easy for him to allege, as *in casu*, that he was intoxicated or that he had been provoked, when he killed his victim. Such an assertion places the State in a very difficult position. Difficult in the sense that it has to lead cogent and concrete evidence which is able to rebut the partial defence of voluntary intoxication and/or that of provocation. Where it fails to rebut such, the accused may be convicted of a lesser charge to the crime of murder or even get away with it altogether.

The above-analysed set of circumstances becomes more complex than it should when regard is had to the position of the law on the matter which is at hand. The law, as stated in decided case authorities, protects the innocence of the accused person. It insists on the point that he is innocent until the court finds him guilty of the offence. The stated principle of the law extends to his trial in terms of which he has no duty to prove his innocence. The principle was eloquently enunciated in *R* v *Difford*, 1930 AD 370 at 371 wherein the court remarked that:

> "…no *onus* rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false. If there is a very reasonable possibility of his explanation being true, then he is entitled to his acquittal".

It is clear, from a reading of the foregoing citation, that the accused has no burden which the law thrusts upon him. He can simply deny having committed the crime and challenge the State to prove its case against him. He may even tell some falsehood and, until the court is satisfied that his guilt has been proved beyond reasonable doubt, he may get away with it with little, if any, difficultly. Where, however, he tells a lie against mounting evidence which nails him to the cross, so to speak, the court remains at liberty to draw adverse inferences from his lies.

It is in the context of the foregoing matters therefore that we proceed to consider the guilt or otherwise of the accused person. He, on his part, does not deny that he is the effective cause of the death of his late sister. His attempt to plead guilty to the crime of culpable homicide suffices as evidence of the observed matter. It is clear, from a reading of the contents of the post-mortem report, exhibit 1, that, but for his actions, the deceased would not have died. Everything about her person, as examined and recorded by the pathologist, was/is normal. The doctor records that the deceased had a fracture in the parietal and occipital bone in the middle region of her skull. He concludes that she met her death from severe brain injury, skull bone fracture and severe head trauma.

The doctor's findings as read with the evidence of the witness for the State as corroborated by that of the accused leaves one with little, if any, doubt that the weapon -the wooden stool- with which the accused struck the deceased caused the injuries which led to the demise of the deceased. The accused states, in his defence outline, that he struck the deceased with the traditional wooden stool. He states, in his confirmed warned and cautioned statement, that he struck her three times with the stool. The area where he directed his blows, as is evident from the uncontroverted testimony of the investigation office, Pasi Mukwashi, is consistent with the findings of the doctor. Mr Mukwashi's evidence is that the accused told him that he struck the deceased with the stool twice on the latter's right cheek and once on the back of her head as a result of which she fell onto the floor where he left her lying until the morning of the following day.

The State produced the wooden stool through Mr Mukwashi. It weighed 5.3 kilograms. The accused corroborates the testimony of Mr Mukwashi on the number of blows which he delivered on the deceased's head. He states that he struck her with the wooden stool three times on the latter's face. He confirms the allegation that the deceased would not have died if he had not assaulted her as he did.

The State, it is our view, proved the *actus reus* element of the crime of murder of the deceased by the accused beyond reasonable doubt. It is evident that, but for his conduct, the deceased would still be alive. He, on his part, states to an equal effect. He affirmed the same at the time that he was under cross-examination.

The accused pleads intoxication as a defence for his conduct. He alleges that he was so intoxicated as to be incapable of appreciating the consequences of what he was doing when he

assaulted the deceased in the manner which he did. He, in the mentioned regard, challenges the State to prove that, although he had taken intoxicating liquor on the date of the fateful event, he knew what he was doing.

The question which begs the answer is whether or not the accused who claims to have taken two keys whisky for the first time was so drunk that he was unaware of what he was doing when he assaulted his sister to death. Whilst it is accepted that, intoxicating liquor inhibits a person's cognitive faculties as Professor G Feltoe states in his *A Guide to the* Criminal *Law of Zimbabwe, 3rd edition*, page 22, we remain of the view that the accused did appreciate the consequences of his conduct. He, for instance, was able to find the way to his home. He also remembers knocking at the door of the house where his late sister was sleeping. He, in fact, remembers all the events of the night in question very well. He states that it is the deceased who provoked him, that she was the aggressor who fought him aggressively, that he lost balance and fell down during the fight, that the deceased pounced on him and continued to assault him in his fallen state, that he made an effort to ward her off him, that he struck her with the wooden stool and that she fell onto the floor where he left her lying down.

The amount of detail which he gives of the incident is not consistent with that of the mind of a person who was in his drunken stupor as he would have us believe. It is consistent with the mind of the person who was very much alive to the situation which was then around him. He, in our view, would not have remembered such events as he described in his defence outline if he was so drunk as not to be able to know what had actually occurred. Indeed, his statement which is to the effect that he fought the deceased back when the latter was allegedly assaulting him shows, in clear terms, that he was at all material times alive to what was happening to him. His defence of intoxication cannot therefore hold. He, in our view, raised it out of the realization that the deceased was no longer alive to be able to tell us the other side of the events of the date that she met her death at his own hands.

The effort which the accused made to exonerate himself from the crime with which he stands charged is not only amazing. It is also unfortunate and regrettable. It is unfortunate in the sense that he overdid the tricks which were then in his bag of lies to a point where he left his case difficult, if not impossible, to believe. He continued to build upon his case as the trial continued to be heard. His attempt to file what he termed his amended defence outline which is dated 15 May, 2024 in place of the one which he filed the previous day -14 May, 2024- speaks volumes of his intention to mislead not only the court but also the State.

A comparison of the two defences both of which emanate from the mind of the accused person shows a marked difference in respect of the events of the date that he killed his sister. He, it is our view, realized that the first defence outline which he filed on 14 May, 2024 contained such detail as would expose and deny him the opportunity to stick to his narrative of him having been so drunk as not to know what he was doing. He remained alive to the fact that the defence which he filed on 14 May, 2024 would expose him to the finding by the court that he appreciated the consequences of his conduct. He, in the process, sought to tone down that matter by making mention of matters which would not expose his mind to the crime of murder. He told a clear lie in his amended defence outline. Not only did he do that. He also left out the issue of him having been provoked by the deceased which issue featured prominently in the defence outline which he filed on 14 May, 2024.

The trite position of the law is that, if a witness tells a lie, as the accused person did *in casu*, his story will be discarded and the same adverse inferences may be drawn as if he had not given any evidence at all: *Leader Trade Zimbabwe (Pvt) Ltd* v *Smith*, HH 131/03; L.H. Hoffman and D.T. Zeffert, *South African Law of Evidence, 3rd edition*, page 472.

The fact that the accused left out the defence of provocation in his amended defence outline shows that the deceased did not provoke him at all. He, in our view, raised the defence only as a way of getting himself off the hook, so to speak. He lied in-between his teeth when he alleged that the deceased provoked him. He was not provoked at all when he struck his sister, the deceased, to death. Provocation is therefore not available to him.

On an analysis of the evidence of the State as read with that of the accused, we are satisfied that the State proved the guilt of the accused beyond any reasonable doubt. It proved both elements of the crime of murder in a clear and cogent manner. He, on his part, put up a very poor show. He failed to rebut the concrete and cogent evidence which the State led against him. The accused is, accordingly, found guilty of the crime of murder as charged.

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