

THE STATE**Versus****SMILE NCUBE**IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mr Ndlovu & Mr Sobantu
HWANGE CIRCUIT COURT 14 MARCH 2018**Criminal Trial***Miss N. Munsaka*, for the state
M. Ncube for the accused

MAKONESE J: In this matter the accused is facing a charge of murder. It is alleged by the state that on 13th September 2017 at Nyelesi Line, Sipepa, Tsholotsho, the accused assaulted Anoteneta Moyo several times on the head using a knobkerrie intending to kill her or realising that death could ensue if he continued to engage in that activity. The accused pleaded not guilty and tendered a plea of guilty to the lesser charge of culpable homicide. The state did not accept the limited plea and the matter proceeded to trial.

The state tendered the outline of the state case which now forms part of the record. In brief the facts of the matter are that the deceased was aged 56 years at the time she met her death. The accused who was aged 35 years is the deceased's step son. On 13th September 2017 around 9 pm, deceased was seated in a kitchen hut in the company of Tithibele Ncube, Rozinah Ncube and Lethokuhle Ncube. There were four children sleeping in the same room. Whilst they were in the kitchen hut, accused arrived carrying a knobkerrie. Accused enquired from Lethokuhle as to why she had left their homestead contrary to his instruction that she should not leave the homestead unattended. Accused then started assaulting Lethokuhle on her back and lower limbs using the handle of the knobkerrie. This angered the deceased who remonstrated with the accused. Deceased indicated that she is the one who had sent Lethokuhle on an errand. Deceased then told the accused that it was better if he assaulted her instead of the child. Accused then turned his attention to the deceased and started assaulting her several times on the head using the knobkerrie. The accused was using the knob of the knobkerrie. Tithibele Ncube, Rozinah Ncube,

Lethokuhle and the children fled from the kitchen fearing for their lives, leaving accused and deceased in the kitchen hut. A little while later Tithibele Ncube and Rozinah Ncube observed a flame inside the kitchen hut, prompting them to go and investigate. They were confronted with a horrific scene. Deceased was lying inside the kitchen covered with a plastic mat which was burning. The deceased's clothes were on fire. Accused had fled the scene. Tithibele and Rozinah managed to extinguish the fire using water fetched from one of the huts. Deceased crawled out of the kitchen and lay by the door. She died. Deceased had sustained serious injuries on the head, the right eye globe, the right eye and part of the nose were missing. She suffered burns on the right arm, chest, abdomen and thigh.

The accused's defence outline was also read into the record of proceedings. Accused averred that the death of the deceased was an accident as it was never his intention to murder her. He stated that the actions of Lethokuhle had infuriated him and he determined that she needed to be chastised for failing to follow his instructions. He assaulted her once in the hut and once outside the hut and let her go. On entering the hut, he was taken aback when deceased confronted him challenging his actions at chastising the young Lethokuhle. The accused alleged that deceased challenged to beat her up or go and ask his dead mother instead of inflicting pain on the youngster. This provocative statement angered the accused and amounted to an insult. This alleged insult was worsened by accused's belief that deceased performed acts of witchcraft by sprinkling water in his bedroom. Accused stated that he lost self control and assaulted deceased fatally owing to the accumulated provocative deeds of the deceased. The accused used the knobkerrie that he was carrying to hit the deceased in a fit of rage. His avowed intention was to punish her for her hurtful and irresponsible utterances. Accused denied trying to set the deceased on fire and postulated that the deceased who was injured at the time might have accidentally crawled into the fire, resulting in her clothes igniting the plastic mats deceased was sitting on before the assault. Accused further denied removing any parts from deceased and suggested that since the body spent the night in the open, animals like dogs might have gorged her eye and nose.

A post mortem compiled by Dr Sanganayi Pesanayi was produced and tendered into the record. The report was prepared and filed under report number 864/863/17. The post mortem lists the cause of death as:

- (a) Extensive subarchnoid haemorrhage
- (b) Basal skull fracture
- (c) Head injury
- (d) Assault

The accused's confirmed warned and cautioned statement recorded at ZRP Tsholotsho was confirmed by a magistrate on the 30th October 2017. In that statement accused admits that he assaulted the deceased but denies that he intended to bring about her death. The accused admits that he struck the deceased four or five times using the knobkerrie.

The state then produced the knobkerrie used in the commission of the offence. It weighed 0.25kg and had a measured length of 65cm.

The state led evidence from its first witness **Rozinah Ncube**. To a large extent the evidence of this witness is common cause. She testified that on the fateful day the accused arrived at her homestead around 8:50 pm. She remembers that time because they were waiting to conduct their evening prayers at 9:00 pm. The witness was inside a hut around a fire with Tithibele Ncube, Lethokuhle Ncube and other children. The witness stated that the accused quizzed Lethokuhle why she had left the homestead unattended contrary to his instructions. The accused stood up and struck Lethokuhle upon her back and lower limbs with the handle of the knobkerrie. At that stage the deceased challenged the accused as to why he was assaulting the child. The deceased indicated that the accused would rather assault her instead. In a fit of rage accused struck the deceased with the knobkerrie repeatedly on the head. She sustained serious injuries and was bleeding profusely.

The witness stated that she and the other occupants of the hut fled outside fearing for their own lives. They screamed to alert the neighbours. The witness further stated that accused

indicated that he was the one at fault as he had caused the death of the deceased. The witness and others returned to the hut where they found the deceased groaning in pain. Her clothes were burning. The mat on which she had been sitting was also on fire. They collected water in buckets and put out the fire. The deceased lay on her back facing upwards. She died moments later. The next day the witness observed that the deceased had serious head injuries and that the left eye globe was missing; the ear was missing as well. The witness confirmed that the relationship between the accused and the deceased was bad. She attributed this to the fact that the deceased did not realise that the accused had grown up and that on occasions when the accused returned from South Africa the deceased would choose to vacate the homestead for 2 or 3 days. The witness denied that the deceased uttered offensive words concerning the accused. She however conceded that his reaction on that evening is consistent with one who had lost self control. The court finds the evidence of this witness to be credible in material respects. She did not seek to exaggerate her testimony and the court accepts her evidence.

The next state witness was **Tithibele Ncube**. She is also a close relative of both the deceased and the accused person. She gave her evidence fairly well and to a large degree her evidence corroborated the first witness. The witness did not remember the deceased uttering any offensive words regarding the accused's late mother. This witness also confirmed the existence of a sour relationship between the accused and the deceased prior to the events of the fateful day. On the day in question this witness could not really say with certainty what led the accused to behave in such violent fashion towards the deceased. She gave her evidence in a comfortable manner and she was not shaken or contradicted under cross-examination.

The last state witness was Sergeant **Thobile Mzamo**. He was the Investigating Officer in this case. He gave evidence of a very formal nature narrating how he effected an arrest on the accused and recovered the knobkerrie that was used in the assault. He recorded a warned and cautioned statement from the accused. The statement was confirmed by a magistrate at Tsholotsho on the 30th of October 2017. The accused made indications at the scene of the crime freely and voluntarily. The witness gave his evidence well and the court found him to be a credible witness. A few questions were put to him by the accused's defence counsel.

The defence opened its case by leading oral evidence under oath from the accused, **Smile Ncube**. The accused stuck to his defence outline and whilst conceding that he assaulted the deceased thereby causing her death, he maintained that he lost self control as a result of provocation. He stated that deceased had made reference to his late mother and this deeply offended him. He snapped and lost self-control. He did not intend to cause the death of the deceased and did not reasonably foresee death as a possibility. He acted at the spur of the moment and did not realize that he might bring about the death of his victim.

The court has been referred to similar decided cases that deal with the issue of provocation; *S v Mafusire* 2010 (1) ZLR 417 (H) ; *S v Tenganyika* 1958 R&N 228(FS) ; *S v Hamunakwadi* HH323/15; *S v Dzaro* 1996(2) ZLR 541(H) and section 239 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). It is this court's view that the sole issue for determination is whether the defence of provocation and the alleged belief in witchcraft is available to the accused, in these circumstances.

The court observes that the defence that has been raised by the accused is essentially that he was offended by the deceased's utterances. He lost self-control. The court further notes that the degree of proof required in a criminal case is proof beyond reasonable doubt. This court may not reject the accused's version of events unless it is proved that the defence is palpably false or not reasonably possibly true. See *S v Difford* 1937 AD370 and *S v Kuiper* 2000(1) ZLR 113(S). From the nature of the poisoned relationship between the deceased and accused prior to this offence the accused's defence of provocation, in particular the utterance of the offensive words cannot be said to be false beyond reasonable doubt. It seems to me that on the fateful night the accused must have been provoked to such an extent as to lose self-control. It is reasonably possible that deceased, who openly showed her dislike for the accused, uttered the alleged offensive words. In our law it is well established that ordinarily provocation does not amount to a full defence on a charge of murder, but is mitigatory, in circumstances where a reasonable man in the shoes of the accused would not have lost self control. Where there was sufficient provocation to cause the accused to lose self control the accused would be guilty of culpable homicide.

In the circumstances, this court makes a finding that this is a borderline case between culpable homicide and murder with constructive intent. I would, I must point out, have rejected the defence of provocation, had it been demonstrated that this defence was palpably false. The evidence before the court shows that there was cumulative provocation. The accused was being resented by the deceased. The accused clearly lost self control leading to the fatal attack on the deceased.

The accused is accordingly, found not guilty of murder, but guilty of culpable homicide.

Sentence

The accused has been convicted of a very serious offence. The court shall take into account all the mitigating features of the case that have been advanced on accused's behalf. Accused is aged 35 years. He is married and is a family man with the usual responsibilities. Accused has been out of employment since the commission of the offence as he has not been able to go back to South Africa where he was employed prior to the commission of the offence. The accused is a first offender. In aggravation, this court finds that the accused behaved recklessly. He assaulted his step mother with the use of brutal force. He struck the deceased on the head with a lethal weapon, a knobkerrie repeatedly. He used excessive force. Accused person did not respect the deceased who was not only his step-mother but was elderly. The injuries observed by the pathologist indicate that the deceased suffered subarachnoid haemorrhage. She sustained extensive scalp haemorrhage and fractured anterior cranial fossae. The courts have a duty to protect the sanctity of human life. The loss of life in this case was totally unnecessary and avoidable. The court finds that this case calls for a lengthy prison sentence.

The following is an appropriate sentence:

“Accused is sentenced to 10 years imprisonment of which 3 years is suspended for 5 years on condition accused is not within that period convicted of an offence involving violence and for which he is sentenced to imprisonment without the option of a fine.

Effective sentence 7 years imprisonment.”

National Prosecuting Authority, state’s legal practitioners
Ncube Attorneys, accused’s legal practitioners