

THE STATE

VERSUS

TICHAFARA SITHOLE

IN THE HIGH COURT OF ZIMBABWE

CHEDA J

GWERU 18 MAY 2010 AND 16 JULY 2010

Mr. I. Hore for applicant

Mr. D. Zashura for respondent

Judgment

CHEDA J: The accused is charged with the crime of murder to which charge he pleaded not guilty.

The allegations against him are that on the 8th August 2009 he unlawfully, wrongfully and intentionally killed Milton Maphosa by shooting him with a .38 special Taurus revolver. The use of such weapon was confirmed by the production of a Forensic Ballistic report and a post-mortem report was also produced in addition thereto.

Evidence of the following witnesses was admitted by consent:

- (1) Cuthbert Gundai
- (2) Farai Matibenga
- (3) Stephen Musiiwa and
- (4) Dr Castelianos

The State led evidence from two witnesses. The first witness was John Mwanja who is employed by Securitas Security P/L where accused and deceased were also employed. His evidence was that on the day in question he reported for duty as usual and was then sent to

accused's house by accused himself to collect a bulb. Upon his return he heard accused saying to deceased that they were not working properly, to which deceased responded that in his opinion they were. At that juncture accused stood up and hit deceased with a fist resulting in deceased falling down. After the deceased had fallen down, accused picked up a fire extinguisher and hit the deceased on the stomach. While the deceased was sitting down accused further picked up a brick and threw it at him. The witness asked why he was assaulting the deceased and he responded by saying "leave me". Accused then rushed to take a revolver from one of the drawers and went further to ask for ammunition from the witness. The witness refused to give him. While doing so, accused was advancing towards him. The witness sensed danger and he ran away to make a report to the police which he eventually did. As it turned out the accused managed to find ammunition on his own. To his knowledge there was no bad blood between accused and deceased as he often saw them talking to each other and on that day deceased did not provoke the accused in any manner. Again to his knowledge deceased had never subjected accused to unfair treatment. We find that this witness gave his evidence very well to such an extent that he captured all the events of the day except the shooting. For that reason we accept his testimony in its entirety.

The next witness was Junior Bakali who was deceased's wife. It was her evidence that on the day in question the deceased left the house for his work place to collect his hat. The last witness came to the house, having been sent by deceased to collect a bulb which she gave him. After a short while she heard footsteps of the accused coming back. Deceased then stated that he had a misunderstanding with accused. Within a few minutes she saw accused on the doorway and suddenly heard a gunshot sound. She then saw deceased falling down. Accused then

ran away while she ran after him. She then saw accused placing the revolver on his forehead but, thereafter, he continued to run away. It was also her evidence that accused was a gentle person and he had a casual relationship with the deceased.

We find that this witness was credible. Although it was her husband who was killed by accused, she did not seek to exaggerate the events at all as she told the court that accused was not a troublesome person and that he had a cordial relationship with the deceased. The State then closed its case.

Accused's evidence is that the deceased had always made his working environment very difficult in that he made him work overtime which was not paid for, he raised his concern with the authorities but all this came to naught. Even his attempts to be transferred to Bulawayo were not successful and he believes that was as a result of the deceased blocking him. On the day in question their misunderstanding was as a result of a telephone call which came through while he was in the office with the deceased. It was not his duty to attend to it as he was off-duty then. A misunderstanding took place that resulted in him fighting the deceased. It is further his evidence that he assaulted deceased firstly with fists, he threw a brick at him, but, missed. Deceased then grabbed a fire extinguisher which he repossessed from him and threw it at him.

It is also his evidence that he pulled out a revolver which was in a locked drawer after breaking it open, using an iron bar. Being armed with a loaded revolver, he followed deceased to his house where he found him sitting down and fatally shot him.

When asked why he shot him, he stated that he did so in order to leave a mark on him and that he wanted him to feel pain. Accused admits using a revolver and fatally shooting the

deceased. The question is, what are the circumstances surrounding this shooting? When misunderstanding took place, there were just the two of them in the office as John Mwanja was not present then.

The court called Emmanuel Dube who was then the Branch Operations Manager. His evidence was that he was in charge of both Kwekwe and Gweru and was not aware of accused's frustration by the deceased. Neither is he aware of accused's inability to claim his overtime, by reason of deceased's efforts to block him. He further stated that it was not possible for the deceased to have prevented accused from claiming his overtime as all overtime claims were sent directly to Harare. In addition, he also told the court, that if he was frustrated he should have made a report directly to him as he was the one who had transferred him. He also stated that accused was not supposed to be in the control room as he had knocked off duty.

We find that on this fateful day, there is a possibility that there was a misunderstanding between accused and deceased, but, it is not clear who started it.

The question then is, should accused be found guilty of murder with actual or legal intent. In order to determine this issue we have to look at his behaviour and conduct on the day in question. He initially hit deceased with a fist and he fell down. While he was still on the ground he picked up a fire extinguisher and again hit him on the stomach. He also threw a brick at him. At this point, deceased was on the ground and helpless. He stood up and proceeded to his house without retaliating. He got to his house and sat on a chair, before he could fully relate to his wife what had transpired as he had merely said' "I had a misunderstanding with the accused", the accused came up and shot him without saying anything at all. It is important

to look at accused's conduct on this day. It is clear that there was some work related discussion between accused and deceased which according to accused upset him and this resulted in some cumulative anger in him. According to Emmanuel Dube there was no reason for him to have been angry with deceased as all his grievances should have been channelled through either to him or Head Office.

Accused first hit deceased with a fist and he fell down thereafter he continued to use a fire extinguisher on him. He, thereafter, broke a drawer and took a revolver, demanded ammunition from John Mwanja but did not give him as he ran away from the scene as accused was then armed. Having gotten hold of the revolver and ammunition, he loaded it and proceeded to fatally shoot at the deceased who was sitting down in his house and unarmed. This was without warning.

We find that the fact that accused looked for the revolver which he accessed by breaking a drawer and finding ammunition, loaded it and proceeded to accused's house after accused had left the scene, is clear indication that he actually intended to kill the deceased which he did. We, therefore, find that the state has proved its case against accused beyond reasonable doubt.

The court finds accused guilty of murder with actual intent.

Cheda J.....

Criminal Division Attorney General's Office applicant's legal practitioners
Hore and Partners, respondent's legal practitioners