

THE STATE

VERSUS

TAMOLIN LAMOLA

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J with Assessors Mrs E. Mashengele & Mr Nyoni

BULAWAYO 9 & 10 JUNE 2015

Criminal Trial

T. Hove for the State

T. J. Mabhikwa for the Accused

TAKUVA J: The accused is charged with murder in that on the 23rd of December 2010 and at John Dip Business Centre, John Dip area in Matabeleland South Province, the accused did wrongfully, unlawfully and intentionally kill and murder Never Ngulube, a male adult during his life time there being.

The facts are as outlined in the Summary of the State which is exhibit one and I am not going to repeat its contents which were read into the record by the State Counsel. The accused pleaded not guilty and his defence outline was read into the record and produced as exhibit 2.

Briefly his story was that on the fateful day he was playing soccer when deceased insulted and later clapped him. He ran away to the shops but deceased followed him and found him there. Deceased accosted and further assaulted him with an open hand on his face. He further stated that he was cornered by the deceased who was spoiling for a fight and he was left with no choice but to pick his own stone.

He said he struck first, found an opening and made good his escape. The accused prayed that he should be acquitted of murder as he acted in self defence. After that the State produced the accused's confirmed warned and cautioned statement as exhibit number 3. The statement was read into the record and there is no need to repeat its contents. Exhibit 4 was an affidavit by constable Max Pascal Ndlovu who identified the body of the deceased to the pathologist.

Exhibit 5 was a post mortem report by doctor Casteiianos who found the cause of death as depressed skull fracture, head injury and assault. The state then led *viva voce* evidence from Danisa Lamola who is an eye witness. He said when he got to John Dip Business Centre a fight broke out between accused and the deceased. He did not know the cause of the fight but before it broke out he heard the sound of a clap which he categorised as a hard clap. He later realised that it was the deceased who had clapped the accused, he intervened and stopped the fight. He noticed that the deceased who was drunk and aggressive was now armed with two stones.

It was also his evidence that the accused also armed himself with a stone and proceeded to strike the deceased on the head with that stone. The deceased fell down still holding the two stones and the witness said the deceased was bleeding and he bandaged the wound and removed the deceased from the scene. According to this witness, prior to the assault the deceased kept on following the accused. Further, he said, the accused was angered by the assault perpetrated upon him by the deceased. As regards how the accused assaulted the deceased, the witness said the two were approximately five paces apart and accused aimed at deceased who was standing behind him but slightly at the side.

The witness maintained his version under cross examination, and in our view this witness simply told the court what he observed. Although he is related to the accused in that he is the accused's uncle, he did not endeavour to exonerate the accused. We noticed however that his *viva voce* evidence differed from the State's version in the summary. The State did not make an issue of it and the witness was not impeached. In our view the State probably attributed these discrepancies to mistakes and decided to let sleeping dogs lie.

In our view the witness was a credible witness and we accept his evidence in toto. The second witness one Lucas Tlou had no relevant evidence to the determination of issues in this case. The State then closed its case after the evidence of these two witnesses.

The Defence opened its case by calling the accused as a witness. He adhered to the defence outline and he confirmed the insults and assault at the football pitch by the deceased. He also said that the deceased confronted him at the shops where the deceased slapped him with an open hand and the first State witness intervened and restrained the deceased. The accused said that the deceased who at this stage was armed with a stone in one hand and a beer bottle in the other, followed him and blocked his way at a corner to a building. The deceased attempted to hit the accused with the beer bottle but the accused acted faster than the deceased, picked up a stone and threw it at the deceased without aiming at any particular part of the body.

The accused said he then fled from the scene, and according to him the deceased was complaining about policing duties performed by a youth group in which the accused is a member. Specifically the group was targeting stock thieves in that area and the accused said the deceased was not happy or appeared not to be happy about these duties. Asked in

cross examination why he had decided to hit the deceased the accused said firstly, it was because deceased kept on following him and secondly, the deceased had cornered him and he had no option.

The accused also said that at the time the fatal blow was delivered, the first State witness was not in between the two of them but some 11 paces away. It should be noted however, that the accused had earlier on admitted that the witness was standing between the two of them and he specifically indicated the distance between deceased and himself as five paces away. The accused further stated that he wanted to hurt the deceased and then escape from the scene. He however denied that he wanted to kill the deceased.

In our view, the accused performed quite fairly as a witness. However, his version as regards how and why he struck the deceased is not supported by other evidence. We find in particular that his version that he was cornered as untrue for the following reasons.

Firstly, he never mentioned it in his warned and cautioned statement which he made when events were still fresh in his mind. For this reason we find that this is an afterthought by the accused. If indeed he had been cornered this would have been the strongest point in his defence and he was expected to have mentioned it. Secondly, his uncle who gave evidence favourable to him, did not say that the accused was cornered by the deceased.

Thirdly, his description of the scene and how he claimed to have been cornered was less convincing. Apart from saying that he had been blocked by the accused who was standing 5 paces ahead of him he did not say why he could not move to the left or to the right or backwards. For these reasons we find that the accused lied on this portion of his evidence in order to bolster his defence. And as indicated before, the fact that he was

cornered is clearly an afterthought. Therefore, accused's evidence surrounding the delivery of the fatal blow is not worthy to be believed. In this respect, the court accepts the evidence of his uncle as the truth. The sole legal issue to be determined in this case is whether or not the accused acted in self defence, that is at the time he hit the deceased with the stone. The State counsel conceded that the accused cannot be found guilty of murder and that he should be found guilty of culpable homicide.

Mr *Mabhikwa* for the defence argued that the accused should be acquitted, because self defence is a complete or full defence. In terms of our law a victim of an unlawful attack is entitled to defend himself. However, this defence has strict limits or requirements. The requirements are as follows:

1. there must be an unlawful attack
2. that attack must be directed upon an accused person or upon a third party
3. the attack must have commenced or be imminent
4. the action taken must be necessary to avert the attack
5. the means used to avert the attack must be reasonable.

The rationale behind these restrictions is to ensure that people do not take the law into their own hands. So whenever such a defence is raised in a criminal matter the courts have a duty to examine the requirements closely. Applying these principles to the facts *in casu* we find as follows:

1. that there was indeed an unlawful attack upon the accused by the deceased. By this attack we are referring to the claps, that is, the assault at the football pitch and the assault at the Business Centre. So quite clearly the second requirement has also

been met which is that the attack must have commenced. We also find that the action taken by the accused to avert the attack was necessary in that the deceased was causing a significant threat to the accused at the time. However, the means used by the accused to avert the attack were unreasonable in the circumstances. In arriving at this conclusion, the court had to avoid an armchair approach in assessing the danger posed against the accused and the means he used to avert that danger. The court accepts that a person found in the accused's shoes is not expected to have acted rationally or in a calculating manner. We, however, find as we have done that the accused was not cornered at all. Our law imposes a duty on a person to flee where running away would not have placed him in a more dangerous position. We find therefore, that *in casu* the accused could have fled from the scene and the evidence does not make this a dangerous option. We were told that the deceased was drunk and that although he carried a stone or stones, at no time did he use those weapons. It is common cause that the deceased was drunk and indeed the evidence shows that he was behaving in a foolish manner. It is also common cause that during the assault that was perpetrated upon the accused by the deceased, no weapon was used, the accused was simply clapped with an open hand. The question which should be answered is whether it should be permissible that a person who is clapped produces a gun and shoots his assailant. We find that the evidence shows that the accused's life was not at all in danger. We find also, that the accused was not in danger of any serious bodily injury. In our view, the accused was simply angered by deceased's behaviour and he decided to retaliate. In that process, he exceeded the bounds of reasonable self defence by killing the deceased. From the

injuries on the post mortem report it can be inferred that the accused used excessive force in propelling that murderous stone. The post mortem shows that there was a fracture on the skull. And it is accepted that the skull consists of some of the strongest bones in a human body. So the accused ought as a reasonable man to have foreseen that striking deceased on the head with a stone would be fatal. Accordingly, the accused is found not guilty of murder but guilty of Culpable Homicide.

SENTENCE

In assessing an appropriate sentence the court will consider what has been said on your behalf in mitigation by your legal practitioner. I must point out that this has been a difficult case to sentence because it is really a border line case. We will consider specifically the fact that you are a youthful first offender as a strong mitigating factor. We will also consider that the deceased in this case was the aggressor in the sense that he assaulted you twice with an open hand for no apparent reason. We will also consider that the deceased accosted you at the shopping centre and he was behaving in a violent manner towards yourself. We will therefore find that as far as the circumstances surrounding the commission of the offence are concerned you were extremely provoked by the deceased. As regards your personal circumstances, we will take into account that you have a child that you have to look after as well as your mother, and that as a first born child you have a responsibility to look after your siblings who are still young and of school going age. The court accords full weight to the fact that youthfulness can influence accused persons to behave irrationally or in an immature manner. And this is what happened in this case in that your failure to choose the right option was as a result of your immaturity. We will also

take into account as a strong mitigating factor the fact that you assisted the deceased's family at the time that he required medical assistance. Further we will take into account that your family and yourself voluntarily agreed to perform some cultural or traditional rituals wherein you paid 7 cattle and 5 goats to the deceased's family. Also, you contributed towards funeral expenses in the form of food and transport. This in our view shows that you are contrite and that contrition extends to your family as well. We note also that although you fled from the scene you later on turned up on your own. We were also referred to the case of *S v Muchinikwa* 1985 (2) ZLR 328 (S). Those are the mitigatory factors that we will consider. As against those mitigatory features we will also consider the following aggravating features:

The State submitted that the loss of human life is an aggravating feature and we agree with the State counsel that it is the only aggravating feature. What this means therefore is that the scale tilts in favour of the accused person in the sense that there are weighty mitigating features than aggravating features. This is so because the State conceded that the accused has been in pre-trial incarceration for two years and two months and that delay is solely attributable to the State. The State Counsel also referred us to two cases, namely *S v Makumbe* HB-32-13 and *S v Ngwande* HH-30-06. We were urged by Mr *Mabhikwa* to impose a sentence that is of a non-custodial nature. The submission was that Culpable Homicide is usually based on negligence, we do not entirely agree because Culpable Homicide that arises from the use of violence is a serious offence. The accused's liability in this case is not based on negligence but it is based on the fact that self defence is a defence that excludes the unlawfulness element of the crime not the intention of the accused person. It has been said time again that these courts must uphold the sanctity of

life. In this case it is the accused who obviously was angered by the deceased's conduct, over reacted and ended up using disproportionate force to avert the attack. We take the view that the accused must be punished for that. The courts continue to urge people to show extreme restraint when subjected to provocation.

However, the bottom line is that the court must impose a sentence that fits both the offender and the interests of justice. We agree with Mr *Mabhikwa* that in deserving cases community service may be imposed for Culpable Homicide. However, in this case we are of the view that to do so would trivialise the offence and send a wrong and dangerous message to the community out there. *In casu*, had it not been for the very weighty mitigation factors that were outlined above this court would have sentenced the accused to a much longer term of imprisonment in the region of 10 years.

However, we must discount the accused in view of the very strong mitigating factors which we have mentioned namely that he is a youthful offender, that he was provoked and that there was an unlawful attack upon his person. Those reasons will then lower the appropriate penalty to the range of 3-4 years and if one were to further deduct the two years that the accused has already spent in custody one is left with 2 years imprisonment. In the circumstances the accused is sentenced as follows:

2 years imprisonment of which one year imprisonment is suspended for 5 years on condition accused is not within that period convicted of an offence involving violence on the person of another for which he will be sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Messrs T. J. Mabhikwa & Partners accused's legal practitioners