

THE STATE
versus
TAWANDA RUZANI

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 10 September, 1, 2 & 23 October 2015, 10, 11 December 2018 & 27 August, 2019

Assessors: 1. Mr Mhandu
 2. Mr Musengezi

Criminal Trial

Marevanhema, for the State
Mambara, for the Accused

BHUNU J: The accused stands charged with murder as defined in terms of s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He is alleged to have unlawfully and intentionally assaulted one Innocent Rutendo Mutingwa at Kuwadzana 5 Shopping Centre on 23 September 2006 hereinafter referred to as the deceased. The deceased later on passed away on 17 November 2006 at Harare Hospital.

The facts leading to the deceased's demise are somewhat common cause, save for his assailant's identity. It is not in dispute that on 23 September 2006 and at around 18:30 hours the deceased in the company of Kenedy Chipazeze and Vincent Muchemwa drove to Kuwadzana 5 shopping centre. They were coming from work. As they were about to get to the shopping centre they encountered a black Mercedes Benz motor vehicle and another sedan motor vehicle blocking the road with their occupants chatting about soccer.

An altercation ensued between the deceased, his companions and the occupants of the other two motor vehicles. Eventually the vehicles blocking the road gave way paving way for the deceased and his companions to proceed to the shopping centre. They intended to play the game

of pool. As they were waiting for their turn to play the deceased decided to visit the toilet to relieve himself. His two companions later received a report from one Caine Marange.

As a result of the report they proceeded to the scene where they found the deceased lying down on his stomach. Upon enquiry he revealed that he had been assaulted by the accused who had been seating in the Mercedes Benz blocking the road. He identified his assailant as having been wearing dreadlocks. Thereafter they took the deceased to Kuwadzana Clinic where they were referred to Harare Hospital. He was admitted and attended to by medical staff. Both Kennedy and Vincent gave evidence in this respect and they corroborated each other in every material respect. They were honest and truthful witnesses who did not embellish their evidence by saying that they saw the accused assaulting the deceased. I believed them.

Doctor Batiya examined the deceased in the course of duty. He observed that the deceased had bleeding left ear and gave him medication. He observed that the deceased had been struck by a blunt object. He concluded that he had sustained permanent loss of hearing in the affected ear.

The deceased was discharged from hospital on 2 October 2006. Upon his discharge from hospital he was interviewed by the police. He gave a written statement to the police on 3 October 2006 leading to the accused's arrest on a charge of assault as the deceased was still alive.

The deceased however later succumbed to death on 17 November. Upon his arrest the accused made two warned and cautioned statements to the police. Both statements were produced as exhibits 2 and 3 respectively. Exhibit 3 was recorded on 8 November 2006 on a charge of assault whereas exhibit 2 was recorded on 18 November 2006 after the deceased's death.

On the assault charge this is what the accused had to say:

"I have understood the caution but I do not admit to the charge levelled against me. I did not assault the complainant but we fought. I also sustained some injuries as a result of the fight. That is all I wish to say."

In respect of the murder charge, the accused made a warned and cautioned statement to the police on 18 November 2006. The statement was duly confirmed by a magistrate on 9 February 2006 wherein he had this to say:

“I deny the charge laid against me. I did not assault the person with the intention of killing him. I only wanted to revenge the assault he had meted on me. The person was also drunk. I only slapped him twice and pushed him and he hit against the wall.”

At his trial the accused made a feeble attempt to challenge the confirmed warned and cautioned statement but at the commencement of the trial within a trial and upon the trial magistrate taking the witness stand, the accused chickened out and withdrew the challenge against the warned and cautioned statement. The net effect of the withdrawal is that both statements to the police stand virtually unchallenged. Although counsel for defence later attempted to challenge the statements in his address, the challenge lacks merit and credibility as it runs counter to the accused’s undisputed statements to the police.

What therefore emerges quite clearly from the two unchallenged warned and cautioned statements before this Court is that the accused freely and voluntarily admitted to the police that he fought and assaulted the deceased. In the course of that fight he pushed the deceased causing him to hit his head against a wall.

The injuries observed by both doctors who examined the deceased both before and after his death are consistent with the manner in which the accused says he assaulted the deceased. In particular the pathologist Dr Humberto Morales who conducted the post-mortem examination concluded that death was due to subaracnoid Haemorrhage due to head injury caused by a blunt object. That kind of an injury cannot be excluded where the accused admits having hit the deceased’s head against a wall.

It is therefore self-evident that the accused convicts himself through his own mouth. Having come to that conclusion it is not necessary to consider the various other defences raised by the accused. For instance, there is absolutely no merit in the halfhearted defence of an alibi which was never raised before the police. For that reason, that defence is clearly untruthful and a product of recent fabrication. There is equally no merit in the accused’s attempt to blame others for the assault in circumstances where he is not disputing his conduct of pushing the deceased and hitting his head against a wall.

Although there were no eye witnesses to the assault, the accused puts himself at the scene of crime and confesses to having delivered the blow which is consistent with the injuries which led to the deceased’s demise. In the absence of any other evidence tending to show how else the

deceased could have sustained those fatal injuries, the only reasonable inference to be drawn is that he sustained the injuries when the accused pushed him and he hit his head against the wall. We accordingly unanimously find as a fact proved that the accused caused the deceased's death when he pushed him causing him to hit his head against a wall thereby inflicting fatal injuries to the head.

Although the state managed to prove that the accused is responsible for the deceased's death, it conceded that it failed to prove that the accused intended to kill the deceased. That concession is well made as there is no evidence beyond establishing that he pushed the deceased in a drunken brawl. That evidence falls short of establishing that the accused had the requisite intention to kill when he slapped and pushed the deceased against the wall. The accused cannot therefore be convicted of murder in the absence of the essential element of the intention to kill.

The available evidence however shows beyond reasonable doubt that the accused negligently caused the deceased's death by pushing and hitting his head against the wall. That finding of fact renders him liable for culpable homicide. The accused is accordingly found guilty of the competent verdict of culpable homicide.

SENTENCE

The accused was convicted of culpable homicide. He hit the deceased's head against a wall in a scuffle following a misunderstanding.

In assessing sentence the court takes into account that he is a responsible family man and sole bread winner. He has three children all of school going age

He looks after his deceased brothers' two children of school going age as well. The court also takes into account that there was a long delay in bringing this case to finality through no fault of the accused.

The defence counsel has asked for a non-custodial sentence placing reliance on the case of *S v Richard* 2001 (1) ZLR 129 (S). In which the accused was sentenced to a non-custodial sentence of a fine of \$4000.00.

The facts of that case are however diametrically different from the facts of this case. In that case there was no animosity between the accused and the deceased. The deceased was accidentally shot as a result of a recotched bullet when the accused was trying to shoot a pigeon.

In this case the accused deliberately struck the deceased's head against a wall in a scuffle following a road rage. He was fortunate to be convicted of the lesser crime of culpable homicide instead of murder with constructive intent.

While the court is cognizant of the accused's dilemma it cannot lose sight of the sanctity of human life. Whenever sacred human blood is needlessly spilt, the court takes a serious view of the offence.

In this case, the accused's moral blameworthiness is of a very high degree indeed in that he was the aggressor. He bashed the deceased's head against the wall causing his death in circumstances where the altercation was over and emotions had cooled down.

He was not candid and open with the court as he gave a patently false defence of an alibi.

In assessing the appropriate sentence the court seeks to do social justice. Whereas the accused has a family to look after. The deceased also had a family to look after. By his unbecoming conduct he permanently deprived the deceased's family of a father and bread winner.

The court is in agreement with counsel for the defence's submission that the average sentence for culpable homicide is in the region of five years' imprisonment.

In cognizance of the protracted delay the court will reduce that sentence to an appropriate level. Giving a non-custodial sentence in the circumstances of this case will trivialize and cheapen the sanctity of human life. There is therefore need for a short and deterrent sentence. In the result the accused is sentenced to three years' imprisonment of which 18 months are suspended for a period of 5 years on condition the accused does not again within that period commit any offence involving assault or the unlawful killing of a fellow human being and for which he is sentenced to imprisonment without the option of a fine.

J. Mambara & Partners, accused's legal practitioners
National Prosecuting Authority, state's legal practitioner