

THE STATE  
versus  
CHARLES HOFISI

HIGH COURT OF ZIMBABWE  
MWAYERA J  
MUTARE, 11, 13, 20 and 21 September 2018 & 10 October 2018

### **Criminal Trial**

ASSESORS: 1. Mrs Mawoneke  
2. Mr Raja

*J Chingwinyiso*, for the State  
*B Majamanda*, for the Accused

MWAYERA J: This is a case in which the accused is charged with murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] hereafter referred to as the criminal code. The state alleges that at Makweza Village, Chipinge, on 16 October 2017 the accused unlawfully and intentionally caused the death of Charles Khosa by stabbing him with a single scissors blade in the neck intending to kill him and realising that there was real risk or possibility that his conduct may cause death but continued to engage in that conduct notwithstanding.

The accused pleaded not guilty to the charge emphasising that he had no intention to cause the death of the deceased and that he did not realise his conduct would cause the death of the deceased. The accused further averred that he was drunk on the fateful day and that the deceased provoked him when he assaulted the accused with open hands and booted feet.

It is apparent that the accused and deceased had an altercation after partaking of home brewed beer commonly known as '7 days' a name derived from the number of days taken from brewing of the beer to actually serving when ready. The beer drink was at the accused's mother's place and accused's mother was selling the beer. It is a fact that the accused stabbed deceased with one scissors blade produced in court. The stabbing by the accused occasioned injuries from which the deceased bled and passed on. A post mortem report exhibit 2 was tendered by consent. Therein Dr Stephen Mbiri confirmed the deceased was injured in the neck and that the cause of death was hypovolemic shock secondary (2<sup>o</sup>) to severe

haemorrhage due to bleeding from a perforated left carotid artery. Most of the facts are common cause.

In this case the court is only to consider closely the circumstances of the attack on the deceased given the defences of provocation and intoxication raised. It is this close analysis which will then assist the court in determining the single issue identified in this case. The issue being whether or not given the alleged provocation and intoxication the accused had the intention to kill the deceased or realised that his conduct might cause the deceased's death. Although none of the witnesses gave an account of witnessing the actual stabbing, the mother of the accused and other witnesses rushed to the scene to investigate upon hearing screams that accused had injured the deceased. The accused only fled while holding the scissors blade after witnesses had seen him. He accepted having stabbed the deceased using the scissors blade which was tendered as exhibit 5 by consent.

Five of the State witnesses' evidence was formerly admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The evidence was on common cause aspects. Three witnesses gave oral evidence again on common cause aspects as will be discussed below, when we revisit each witness's account of what they observed. Jennifer Sithole's evidence confirmed that traditional beer was sold and drunk at her homestead until 12 midnight. She then started selling again in the morning around 08:00 hours and by mid-morning when Nyokase Muyambo arrived the beer was almost sold out. The witness was positive that both accused and deceased were at the beer drink although she was non-committal on whether or not she had seen accused drink and also she could not comment on the accused's state of sobriety.

The witness on retiring to rest after selling and drinking beer was roused by voices stating that the accused had stabbed the deceased. She went out to investigate and observed the deceased bleeding profusely from the neck as blood gushed out. According to the witness she did not at any time hear or observe the accused and deceased quarrel. She wondered why the deceased had been stabbed.

The witness identified the murder weapon produced in court, the scissors blade as the one she observed at the scene and the one which the accused had used to stab the deceased. The witness was reluctant to pin point whether or not the accused drank beer and was even non-committal of his whereabouts and doings. She only retorted he was somewhere there in the campus. We took this stance of being economical with detail to have been occasioned by the obvious relationship of mother and child. The fear of implicating her own flesh and

blood. The witness's evidence on common cause aspects of there having been a beer drink and the deceased having been stabbed by the accused was straight forward.

Nyokase Muyambo an aunt to the last witness who for the larger part of the testimony referred to herself as the mother of the last witness Jennifer Sithole and Jennifer Sithole equally referred to her as mother revealed she was not the natural mother of the witness. This did not cloud her testimony in any manner given the African custom of interaction in the extended family. Nyokase Muyambo arrived at the beer drink when the beer had been sold out. She was given a small quantity of beer to drink and she sat down whiling up time. According to the witness, the deceased was close by, quiet and very drunk. The witness told the court that the accused was also drunk walking about aimlessly. She was surprised when the accused furtively stabbed the unsuspecting deceased and fled from the scene. The witness was steadfast that there was no quarrel and exchange of harsh words before the stabbing occurred. She vehemently denied ever seeing deceased attack or provoke the accused in any manner. The deceased was seated within her reach. If the two had argued, she could have heard.

The deceased's mother Jennifer Sithole made it clear in her testimony that she gave the deceased, whom she regarded as a nephew beer the first night of sale and also on the morning the beer was finally sold out as reward for the help he gave in sieving the opaque beer. There was no mention that she also gave accused free beer. This could probably explain the ambush and attack on the deceased who was drunk and seated. We can only surmise that the fact that the accused was not given free beer while deceased received free beer from the accused's mother could have caused jealous and angered the accused. Whatever the reason, it is not in dispute that the accused furtively stabbed the deceased in the neck leading to the fatal consequences.

Shadreck Pachawo a sergeant with the Zimbabwe Republic Police's testimony was for purposes of production of the recovered murder weapon. Nothing arises from his clear testimony even the accused admitted that the murder weapon tendered was the one he had used to attack the deceased.

Given the evidence of the state witnesses and in particular Nyokase Muyambo who was within the proximity of deceased, there is no evidence to show provocation occasioned to the accused other than the accused merely saying he was provoked. There was no argument or fight even going by the accused's version. According to the accused, the drunk deceased provoked him by questioning why he was belittling his brother's wife. Further in provoking

the deceased slapped the accused with open hands and booted feet then a fight broke out. We found the accused's version difficult to believe and it appeared false. No one else witnessed deceased assault accused. The accused sought to convince the court that despite this having been at a beer drink with a lot of patrons the quarrel, disagreement and fight was quiet and not witnessed by anyone. This flies in the face of the state witness' version that the deceased was in an alcohol induced stupor and was just sitting helplessly on the ground when he was attacked.

There is no way he could have engaged in physical fight with the accused in that state. For the accused to say he had earlier been provoked and later came to react to the provocation disqualifies him from benefitting under the defence of provocation which would reduce the murder charge to culpable homicide. This is for the obvious reasons that for the defence of provocation to be sustained one ought to have been provoked to such an extent that they lose self-control and act at the spur of the moment. The loss of self-control would be one which would be expected of a reasonable person in the circumstances of the accused and which would vitiate intention.

In terms of s 239 of the Criminal Code provocation can only be a partial defence to a charge of murder reducing it to culpable homicide if the requirements therein are met. Section 239 provides:

- (1) If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realisation referred to in section forty-seven, the person shall be guilty of culpable homicide if, as a result of the provocation;
  - (a) he or she does not have the intention or realisation referred to in section forty-seven; or
  - (b) he or she has the intention or realisation referred to in section forty-seven but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control.
- (2) For the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that
  - (a) he or she did have the intention or realisation referred to in section forty-seven; or
  - (b) the provocation was not sufficient to make a reasonable person in the accused's position and circumstances lose his or her self-control; the accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided in section two hundred and thirty-eight."

It is apparent to us that the circumstances of accused fail within the parameters of s 239 (2). Clearly the alleged provocation over belittling a sister in-law if ever it happened was not reacted to spontaneously. Further such provocation cannot possibly cause loss of self-control. The accused might have been angered by being questioned but that does not amount

to provocation occasioning loss of self-control. The accused did not act on the spur of the moment but went out to get a weapon and proceeded to exert revenge for some earlier utterance about belittling his sister in-law. Immediately before the attack there was no argument as testified by state witnesses whom we had no reason to disbelieve. In any event it is not in dispute that the deceased was very drunk and just seated helplessly when the accused approached stealthily and struck him. In the absence of instant and spontaneous reaction on the defence of provocation cannot be sustained as clearly there is room for formulation of an intention.

The accused suggested having been earlier attacked with open hands and booted feet by the heavily drunk deceased, again no one else corroborates this version. Further there is no evidence to show loss of self-control. The drunken state of the deceased could not pose any danger to the accused. The accused in a skirting and scanty manner sought to paint a picture that he was defending himself. The accused correctly did not pursue this defence for certainly he was under no attack and even if he had been struck with open hands the use of a scissors blade on the neck was clearly unreasonable and disproportionate to any contemplated attack on him. The defence of self-defence cannot be sustained as requirements have not been met. In any event there was no unlawful attack which the accused would have been defending. It remains the accused stabbed an unsuspecting drunk deceased. See *S v Mudenda* HB 66/15 where it was stressed that all requirements must be established for the defence of self-defence to be available. The court stated:

“The accused must show that there was an imminent attack. He must establish that the action taken to defend himself was reasonable.”

The other defence raised by the accused is that of intoxication. No witness even accused's own mother pointed out that the accused was drunk to the extent of not knowing what he was doing. In fact for the accused to pull out the scissors blade, stab and then run away is consistent with a man appreciating what is going on. The accused voluntarily imbibed traditionally brewed beer and he was walking about appreciating the goings on.

The unlawful conduct of stabbing the deceased cannot be whisked away by intoxication. Sections 221 and 222 of the Criminal Code are instructive and relevant. In the case of *S v Musina* 2010 (2) ZLR 498 it was clearly spelt out that provocation and intoxication in circumstances where the individual does not lose self-control and is capable of formulating intention is not a defence to murder. In befitting circumstances it may be mitigatory. See also *The State v James Chishakwe* HH 17/18.

Given the circumstances of this case and evidence adduced one cannot say that the accused set out with a desire to kill the deceased and proceeded to kill the deceased. Murder as defined in s 47 of the Criminal Code encompasses murder with actual intention which incorporates setting out with an aim to kill and killing or setting out with an objective when it is substantially certain that death will occur and then cause death with actual intention. See *S v Mungwanda* 2002 (1) ZLR 574 where the court discussed the forms of intention. In this case actual intention has not been established when one considers the totality of the evidence before the court. The state has however proved beyond reasonable doubt that the accused realised that there was a real risk or possibility that his conduct may cause death and despite the realisation he continued to engage in the conduct despite the risk or possibility. The accused had the common law constructive intention. See *S v Mhako* ZLR (2) 73. We are satisfied that by taking a scissors blade to stab the neck of a man in a drunken stupor in a furtive manner the accused had the relevant *dolus eventualis* to cause death.

Having pointed out that the accused had the requisite legal intention to cause the death of the deceased he is accordingly found guilty of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

### **Reasons for Sentence**

In an endeavour to reach an appropriate sentence we have considered all mitigatory and aggravatory factors submitted by Mr *Majamanda* and Mr *Chingwinyiso* respectively.

It has been submitted in mitigation that the accused is a first offender. He is a fairly young man aged 28 years old with family responsibilities. Further the accused will live with the sting and stigma of having killed his nephew. The accused has been in custody for about 1 year going through the motions that go with the trauma and anxiety of suspense awaiting finalisation of a grave offence of murder.

The offence was committed at a beer drink after partaking of the traditionally brewed beer that reduces the moral blameworthiness but certainly not the legal liability. We must hasten to point out that these courts are inundated with murder, culpable homicide and assault cases emanating during beer drinks. We certainly frown at it being an excuse for violent disposition. Responsible citizens in a progressive society ought to engage in self-evaluation. If beer gets the better of an individual such that they will stampede on other people's rights then there is an option not to drink.

In aggravation, as correctly stressed by Mr *Chingwinyiso* for the State is the fact that precious human life was unnecessarily lost in circumstances where this could have been avoided. Further the accused used a sharp lethal object, a scissors blade to stab the deceased in the neck which is a vulnerable part of the body. Indeed the deceased died a painful death in the hands of the accused person. The attack was uncalled for.

The courts have a duty to pass sentences which will not cause alarm and lack of confidence in the justice delivery system. The message has to be sent loud and clear that the Constitutionality enshrined God given right to life should not be tempered with and then seek to hide behind intoxication. The legislature in its wisdom saw it fit to provide for death penalty, life imprisonment and any shorter term sentence so as to deter people from resorting to violence as a tool of resolution of disputes.

In this case, life was just lost out of lack of respect of the fundamental right to life. We are indebted to counsels for relevant cases cited. As correctly observed the circumstances of each case are pivotal in deciding on an appropriate sentence. The universal sentencing principle of seeking to match the offender to the offence and ensuring that justice is done is opposite. Given the tender age of the accused there is indeed a need to pass a sentence that will not break the accused but hope that the motions of the trial, sentence and the time he will spend at the correctional prisons will reform and rehabilitate the accused. The offence is indeed deserving of a custodial sentence.

The accused is sentenced as follows: 11 years imprisonment.

*National Prosecuting Authority, State's legal practitioners  
Khupe and Chijara Law Chambers, accused's legal practitioners*