

THE STATE
versus
CHRISTOPHER PIWA

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 7 & 19 June 2018

Criminal Trial

ASSESORS: 1. Mr Raja
2. Mr Chagonda

Mr *J Chingwinyiso*, for the State
Ms *S Dhlomo*, for the accused

MWAYERA J: A plea of not guilty to a charge of murder as defined in s 47 (1) (a) or (b) of the Criminal law (Codification and Reform) Act [*Chapter 9:23*] was tendered by the accused when he appeared before this court for trial.

The State alleged that on 4 August 2017 at House number 15450 Gimboki South, Dangamvura, Mutare, the accused person unlawfully caused the death of Taurai Nyakunu by striking him once on the head with a hammer or some other blunt object intending to kill him or realising that there was real risk that his conduct might cause death and continued to engage in that conduct despite the real risk or possibility resulting in injuries from which Taurai Nyakunu died.

The accused raised a defence of self-defence. He pointed out to the court that he assaulted the deceased with a stone in self-defence upon realising that it was imminent, the deceased was going to further assault him after the deceased had poked him on the forehead and the deceased was being aggressive.

As discerned from the summary of the state case on the day in question, the accused went to the deceased's homestead on a follow up for some money owed to him by the deceased. A misunderstanding ensued resulting in the accused assaulting the deceased leading to the fatal consequences. The State adduced evidence orally from three witnesses and the evidence of five witnesses namely Portia Bumhunza, Miriam Mapfumo, Lovemore

Mangezi, Emmanuel Mushaikwa and Dr E Sedze that is witnesses number 4–8 respectively as appears on the summary of the State case was formerly admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (by consent of defence counsel.)

It was clear from the evidence of Rufaro Jiriengo that on the night in question the accused and her husband, the now deceased had an argument when the accused came demanding for his money. The witness told the court that she observed the accused drag the deceased for a distance to the next stand about 5 – 5 ½ metres away. The witness told the court that although she had not seen the hammer earlier when the accused approached their home, she saw him strike the deceased with a hammer. She pointed out that visibility was aided by the moon and light from the house since the door was open. Although the witness was economical with her evidence on the nature of the argument, it was apparent what was central was the money owed to the accused.

The witness appeared lost and uncertain as she seemed to be still in a state of shock after the demise of her husband. Despite that state of confusion, it was clear that she with the help of her brother in law and a neighbour assisted the deceased to be taken to hospital where the latter eventually passed on.

Liberty Nyakunu, a brother to the deceased confirmed the accused was owed money by his brother, the now deceased. The accused had secured a building contract for \$240-00 for the deceased and the accused in turn was to get \$40-00. None payment of this \$40.00 or part of it as outstanding balance caused friction between the accused and the deceased. When the witness got to the scene the deceased had already been struck and was on the ground. The witness told the court that he observed the accused was holding a hammer using moon light and light from the house. The witness had been drawn to the scene by a text message sent by his brother the now deceased, telling him that the accused had come demanding his money and that he was aggressive. The witness seemed to have paid more attention to his brother who had been injured. He did not seek to give any description of the hammer in question. He appeared at the scene after the deceased had already been injured.

Doris Gombarume, a girlfriend to the accused confirmed having met with the accused and proceeded with him to the deceased's place where he was to collect money he was owed by the deceased. The witness did not see the accused holding a hammer neither did she see him with a hammer at the scene. To the extent that upon arrival at deceased's place the accused was not holding a hammer, the witness' evidence tallied with the wife of the deceased Rufaro Jiriengo's evidence. The witness was just standing by waiting for the

accused and she did not talk to the deceased's wife. The witness observed accused and deceased arguing with deceased poking the accused and accused dragging the deceased to the next yard and the two exchanged blows. The witness told the court that she could not clearly see everything but it was clear there was a scuffle which culminated in deceased falling down. After the fall she saw the accused and deceased but she did not see a hammer. The witness in general, was none committal as she indicated she watched from a distance.

The accused was the only witness in the defence case. He maintained he struck the deceased with a stone he picked from the ground and not a hammer. From the totality of the evidence before the court, there are apparent common cause issues worth noting. It is common cause the deceased was struck on the head by the accused and he died the following day. The death was caused by head injury as reflected in the post mortem report exh 2. The injuries observed by the doctor on the body namely skull fracture and haematoma around covering the brain and cerebral haematoma are consistent with blunt trauma. The state alleges that a hammer was used while the accused alleges a stone was used. From the evidence neither the hammer nor stone was recovered from the scene. The evidence on use of a hammer was haze and equally accused was at pains to describe the stone used. What remains a fact however, is that the deceased was struck in the head by the accused who used a blunt hard object occasioning fatal injuries. Also not in dispute is the fact that the accused accosted the deceased at the latter's house demanding for payment of what he was owed following cession of a building contract. It is also apparent from the state witnesses and the accused that the deceased was not armed in any manner. The issues that fall for determination can be safely crystallised as follows:

1. Whether or not the accused had an intention to kill the deceased.
2. Whether or not the defence of self-defence as raised by the accused is available to him in the circumstances of this case in a charge of murder as defined in s 47.

It is imperative for the court to analyse the evidence in relation to whether or not the accused had the actual intention to kill the deceased. It is settled that for actual intention to avail one ought to have set out with an aim to kill and proceeds to kill. In this case the accused set out to collect what he was owed from the accused. A misunderstanding ensued during the confrontation which led to a scuffle which culminated in the accused striking the deceased with a blunt hard object on the head. Evidence before the court does not show that the accused desired to bring about the death of the deceased and that he succeeded in accomplishing his purpose. To that end therefore murder with actual intention has not been

proved. From the evidence adduced it is clear the accused while pursuing to be paid money owed to him by the deceased engaged in confrontation with the deceased. The two struggled till they were out of the deceased's yard. The deceased was unarmed when the accused struck him severely on the head causing injuries from which the deceased died. I say severely struck because of the nature of head injury which occasioned a depression and fractured skull. The accused by striking the deceased in the head with a hard object, a stone per his admission or hammer per state's version foresaw that death would result. In other words the accused by using violence, in pursuing his money foresaw the real risk or possibility of death occurring by striking the deceased's head, but none the less persisted with his action thereby occasioning the death of the deceased. Courts have highlighted factors that fall for consideration on deciding on the intention in murder cases. In the case of *The State v Munodawafa* SC 220/95 the court pointed out that the weapon that is used, the manner in which it is used and the part of the body where it is directed assist in establishing the intention. See *S v Mungwanda* 2002 (1) ZLR 574. In this case a hard object aimed on the head would mean death was foreseeable.

In the present case given the manner in which the accused struck the deceased, the weapon used and the part of the body struck the accused engaged in violent conduct realising that there was real risk that his conduct might cause death and that despite the realisation persisted with the conduct. The accused by aiming a hard object on the head of the deceased realised the real risk and was reckless by persisting with the attack despite the realisation. The self-defence raised as a defence cannot be sustained in the circumstances. The wording of s 253 is clear that the defence of self-defence is a complete defence where certain requirements have to be met. In this case the deceased and accused were fighting or involved in a scuffle in open space. The deceased was not armed. The deceased if at all he was under attack could have easily escaped. In any event, given the deceased was unarmed the means used was clearly disproportionate. The accused struck an unarmed man in the head with a hard object on the head. The attack on the deceased was unjustified. The accused had the requisite legal intent and fatally struck the deceased thus causing the death. Accordingly, the accused is found guilty of murder as defined in s 47 (1) (b) of the Criminal law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

In passing sentence we have considered all submissions in mitigation and aggravation as advanced by Ms *Dhlomo* for the accused and Mr *Chingwinyiso* for the State respectively. The submissions just like closing submissions which were filed timeously are of great help for the court in coming up with an appropriate disposition and befitting sentence. We are indebted to both counsels for the help extended to the court.

The accused is given as a first offender. Ms *Dhlomo* requested the court to consider the accused's personal circumstances. The accused is a family man with responsibilities to fend for his wife and children all of whom are dependants on him. The accused has been in custody for almost a year and the trauma that goes with having such serious allegations hanging over his shoulders cannot be overlooked. Although the gesture of compensation and assisting the bereaved family will not bring back the lost life the courts cannot pretend that it is not a sign of regret and contrition on the part of the accused.

However, as correctly observed by Mr *Chingwinyiso*, precious human life was lost in circumstances where it could have been avoided. To strike someone on the head with severe force to occasion death is a clear indication of lack of respect of the sanctity of human life. Although the accused was owed at most \$40-00, it was deplorable conduct to engage in violence as a way of collecting his debt. Even criminals are not subjected to violence to pay for the criminal wrong. To then cause death of a family man with responsibilities over a debt of \$40-00 is frowned at in a civilised and progressive society. The deceased died at a tender age leaving a young wife and children who depended on him for sustenance. The courts should pass deterrent sentences not only to deter accused but society at large. It should be made clear that violence does not pay and that taking the law into one's own hands where there are channels through law enforcement agents has no room in a progressive society. The right to life is a God given right which the legislature saw fit to protect in our Constitution, s 48 is instructive.

Upon considering all mitigatory factors and aggravatory factors given the circumstances of this case, it is our considered view that imprisonment is called for. The international sentencing principle demands that upon considering sentence the court should seek to strike a balance between the crime and offender while at the same time satisfying the societal interest of administration of justice.

It is our considered view that the following sentence is appropriate.

12 years imprisonment.

National Prosecuting Authority, State's legal practitioners
Mutungura and Partners, accused's legal practitioners