

THE STATE
versus
TINASHE MTISI

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 30 and 31 March 2021, 6, 9 and 16 April 2021,
11 May 2021 and 20 May 2021

ASSESSORS: 1. Mr Rajah
 2. Mr Magorokosho

Ms *T. L Katsiru*, for the State
N Nhambura, for the accused

MWAYERA J: The accused is charged with the crime of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The section provides as follows:

“(1) Any person who causes the death of another person –
 (a) intending to kill the other person; or
 (b) realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility; shall be guilty of murder.”

Murder consists of the unlawful and intentional killing of another person. Both the *actus* and *mens rea* must be proved beyond reasonable doubt for one to be liable of murder. See *S v Moyo* HC 72/07 and see also *S vs Lovemore Kurangana* HH 267/17. See also *A Guide to Criminal Law of Zimbabwe* by Prof G. Feltoe pp 101-103. The state has to prove that the accused had either actual or legal intention when he engaged in the unlawful conduct which is the cause of the consequence that is death of the deceased. Actual intention exists where the perpetrator sets out with an aim or desire to kill and proceed to kill. On the other hand legal intention exists where the perpetrator commits the *actus reas* foreseeing that it may cause death of the other but despite the foresight proceeds with his conduct. The case of *S v Mugwanda* SC 19/2002 is instructive. The court with precision and clarity explained actual and legal intention when it stated as follows:

“On the basis of the above it follows that for a trial court to return a verdict of murder with actual intent it must be satisfied beyond reasonable doubt that:

1. Either the accused desired to bring about the death of his victim and succeeded in completing his purpose, or
2. While pursuing another objective foresees the death of his victim as a substantially certain result of that activity and proceeds regardless... on the other hand, a verdict of murder with constructive intent requires the foreseeability to be possible (as opposed to being substantially certain, making this a question of degree more than anything else) in the test for culpable homicide the test(s) he ought to, as a reasonable man have foreseen the death of the deceased.”

Having outlined the law we propose to now turn and examine all the evidence adduced in order to ascertain the only issue in this case. The issue is whether or not the accused with actual or legal intention caused the death of the deceased.

The accused is being charged of murder in that on 29 December 2019 and at Caravan Park Lodge, Chipinge the accused unlawfully caused the death of Kudakwashe Msindo by assaulting and throttling him with intent to kill him or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility, resulting in injuries from which Kudakwashe Msindo died. The brief facts of the state case are that the accused, while carrying out his security duties at Caravan Park in the middle of the night intruded into the room in which deceased and his girlfriend had booked and retired to bed. The accused entered through the window with an intention to steal. When a bag fell, it made noise which roused the deceased. The accused in a bid to escape tussled with the deceased. The deceased maintained grip of the accused's t-shirt while accused was assaulting him so as to escape. The two fell outside through the window and the struggle continued leaving deceased injured and accused shirtless.

The accused pleaded not guilty to the charge of murder and proffered a plea of guilty to culpable homicide. The accused in his defence outline which was later adopted as evidence in chief denied having the requisite intention to kill the deceased. He outlined that he entered the room in which the deceased and his girlfriend were sleeping solely for purposes of stealing. The deceased was awakened by the sound of a falling bag and a fight ensued as the accused was trying to escape. The accused and deceased tussled and both fell outside through the window. The deceased maintained his grip of the accused's t-shirt which he remained with when the accused finally shoved him off and he fell to the ground. The accused then escaped. He believed that during the fight that is when the deceased sustained injuries which culminated in his death.

The state adduced evidence from 12 witnesses with only one giving oral evidence. The other 11 witnesses' evidence was formerly admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as it was not contentious evidence.

Natalie Anne Freeman's evidence which was admitted was essentially that when she and her boyfriend now deceased had retired to bed at Caravan Lodge they were disturbed by an intruder who turned out to be the accused, one of the security guards. The deceased grabbed the accused to stop him from escaping. The two engaged in a fight which culminated in accused strangling the deceased by the neck. The accused made good his escape after his t-shirt ripped off and he left it at the scene. The witness alerted the owners of the lodge who immediately came together with the accused whom both the witness and deceased and other witnesses identified. According to the witness at that stage the deceased narrated what had transpired following which he soiled himself and lost consciousness. The witness together with others ferried the deceased to hospital where he was pronounced dead on arrival.

The first witness's evidence was confirmed by Mathius Bhasera the owner of the lodge who gave oral evidence. The witness recounted that accused was one of his security personnel on the night in question. The witness told the court that upon being advised of an intrusion into the deceased and girlfriend's room he proceeded to the scene. He came across the accused who was on duty as a security guard that night. The witness was surprised to observe the accused not wearing his yellow and black striped t-shirt. Upon confronting the accused the latter in the presence of the first state witness and deceased revealed that he had observed the window to the deceased's room open and entered for purpose of stealing. According to the witness when the noise of a bag falling roused the deceased the two then engaged in a fight which ended with the deceased sustaining injuries and accused leaving his t-shirt at the scene. The witness assisted in taking the deceased to hospital. At that stage the deceased had soiled himself and was having difficulties in breathing. According to the witness the deceased was pronounced dead upon arrival at the hospital. The witness gave his evidence well and his evidence remained intact even during cross-examination. He was a highly credible witness. The third state witness Chiedza Masvovera's (a wife to second witness Mathius Bhasera) evidence was formerly admitted. Her evidence was on common cause aspects that both deceased and the witness Natalie Anne Freeman identified the accused as the intruder who then assaulted the deceased in order to escape apprehension.

Brian Chiota and Ngoni Mugadui's evidence was basically in conformity with other state witnesses. It was to the effect that accused left his t-shirt after intruding into the guest's

room. They both assisted to carry the injured deceased for him to be ferried to hospital. That the deceased was confirmed dead at hospital is common cause. The state witness Kudakwashe Sipeyiye's evidence was also to that effect. The police investigating team lead by Assistant Inspector Daniel Mhini carried out investigations. The police recorded a warned and cautioned statement from the accused, recorded indications, drew a sketch plan and recovered the accused's t-shirt as well as identified the deceased's body which they requested for a post mortem report. The last state witness's evidence of Doctor Makumbe was formerly admitted. The doctor examined the remains of the deceased at the request of the police and compiled a post mortem report in which he concluded cause of death was pneumothorax tracheal trauma. The post mortem report was tendered as exh 1 by consent.

Also adduced in evidence by consent is the confirmed warned and cautioned statement by the accused exh 2 refers. Worth noting is the fact that the accused's version per his defence outline and evidence in chief was consistent. In fact the version tallied with the state witness's evidence. It is not in dispute that accused a security guard at the lodge intruded into the deceased and girlfriend's room. Upon waking up the deceased made effort to apprehend the accused which effort was resisted and a scuffle ensued. The two fell out through the window while the deceased grabbed hold the accused's t-shirt so as to not let go. The deceased was finally overpowered and injured. He remained with the t-shirt while accused fled, only to come back with his employer and reveal what had transpired. Exhibit 3 confirmed indications by the accused again confirmed the intrusion into the room by the accused. The deceased maintained grip of accused's t-shirt to apprehend him but accused who was determined to escape dragged deceased out by the window grabbing the neck. They had physical combat tussling on the ground till the accused wriggled out of t-shirt and left the deceased injured and lying on the ground. Also produced in evidence was the sketch plan exh 5 and photo album exh 6 depicting the lodge and indications by accused at the scene and also deceased remains. The torn stained yellow and black stripped t-shirt was also produced as exh 6 by consent.

As a witness during the defence case the accused sought to minimise the manner he assaulted the deceased as he departed from his confirmed indications and emphasised that they both fell from the window and rolled on the ground. The accused had earlier in evidence narrated that he actually dragged the deceased out through the window since the latter was not prepared to let go his t-shirt. If accused's narration is correct that he was ahead while deceased was pulling t-shirt behind, it follows then the accused's earlier version in warned

and cautioned statement and indications that he grabbed the deceased by the neck is more plausible. It was apparent from the manner he testified during the defence case that accused on realising the cause of death sought to minimise his role in so far as the neck injuries were concerned. However in general the accused could not remove himself from having caused the injuries which culminated in the deceased's death although he denied having an intention to kill and admitted being negligent.

Considering the common cause aspects it is apparent that the accused instead of guarding the premises intruded into the deceased's room for purposes of robbing the inmates of their valuables in particular money. The bag that fell made noise which roused the deceased. The accused was determined to escape while the deceased was also determined to apprehend the intruder. The fact that the deceased grabbed accused's t-shirt and deterred the accused from escaping prompted the accused to fight to avoid detection. The accused finally dragged the deceased by the neck outside. Worth noting is the eye witness Natalie Anne Freeman's evidence confirming the attack on the deceased's neck by the accused. Outside the two engaged in the physical combat. The deceased maintained grip of the t-shirt while accused physically assaulted him to let go. The tussle continued outside and the deceased who was now badly injured remained holding the t-shirt after the accused wriggled out of it. The deceased's aim was to apprehend the intruder while the accused's aim was to escape out at all costs. The blows inflicted by the accused were severe and aimed at the chest and neck which are vulnerable parts of the body. This speaks volumes to intention. The accused is the one who had intruded and the deceased sought to defend himself and property from the intruder. The accused even after falling outside was determined to make good his escape and thus he consciously continued to severely physically assault the already injured deceased so as to disable and foil any apprehension. Severe trauma to the chest and neck was inflicted in a bid to avoid apprehension. Intention can easily be inferred from the manner of assault and the body parts to which the blows were directed. Considering the circumstances of this case the accused foresaw that by assaulting the deceased in the manner he did, death would occur. Despite that foresight the accused persisted thus intentionally causing the death of the deceased.

The accused is accordingly found guilty of murder with legal intention 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 mitigatory and aggravatory factors submitted by Mr *Nhambura* and Ms *Katsiru*, for the defence and state respectively. We have taken holistically circumstances of the offence. The accused is a first offender who regrets the offence as evidenced by his plea of guilty albeit to culpable homicide. He from the onset admitted having caused the death of the deceased. The accused has been in custody for 1 year 4 months with a murder charge hanging over his head. The anxiety and trauma that goes with the pre-trial incarceration in face of serious charges cannot be over stated. The accused is a family man with responsibilities. He is willing on humanitarian grounds to customarily compensate the bereaved family. The accused stands convicted of murder with constructive intention. The society does not know of the differences of murder with actual or legal intention. The accused will live with the stigma of being a murderer.

In aggravation is the fact that no amount of compensation and remorse can bring lost precious human life. The deceased died at a prime age of 40 because of the accused's greedy and savage conduct. The right to life is a God given right which is also constitutionally guaranteed. No one has a right to take another's life for whatever reason. In this case the deceased lost his life through conduct of the accused who intruded for purposes of stealing. What further aggravates the offence in this case is the fact that accused a security guard was supposed to protect guests and his employer's business but he turned villain and jumped in through the window to steal. The accused pounced on unsuspecting guests for purposes of stealing. The accused's moral blameworthiness is high. Considering that the deceased soiled himself immediately after assault and lost consciousness culminating in his death the assault must have been severe. Society abhors violence worse still inhuman attack on a fellow human being for purposes of stealing or robbing.

The offence which accused stands convicted of is serious and prevalent. We are alive to the need for matching the offence to the offender while ensuring that justice is done. Ordinarily for murder which occurs during a robbery capital punishment or life imprisonment is called for. In this case however we are persuaded to agree with Mr *Nhambura* that the accused jumped in through the window unarmed although with an intention to steal. No weapon was used to subdue the deceased and the accused did not benefit from the unlawful enterprise. The accused tried to escape thereby causing the deceased's death.

The accused's removal from circulation is called for.

Sentenced as follows:

26 years imprisonment.

National Prosecuting Authority, State's legal practitioners
Mugadza Chinzamba & Partners, accused's legal practitioners