

THE STATE  
**versus**  
DESCENT MAPOSA

HIGH COURT OF ZIMBABWE  
MATHONSI J  
GWERU 21 MAY 2018 AND 22 MAY 2018

### **Criminal Trial**

*S Pedzisayi* for the state  
*A Chihiya* for the accused

**MATHONSI J:** At the time of the alleged offence on 20 August 2017 the accused person was a mere boy being only 18 years old but he was already engaging in activities reserved for older people he having been employed as a vendor at the Edgars Stores Flea Market in Zvishavane. He was also known to consume alcohol to such an extent that when under the influence of alcohol he would be violent in the extreme.

The accused person is now facing a charge of murder in contravention of section 47 (1) of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. The allegations are that on 20 August 2017 and at Edgars Stores Flea Market Zvishavane he stabbed the deceased Menshevick Goromondo Moyo (the deceased) another Flea Market vendor, with an okapi knife inflicting injuries from which he later died. At the time the deceased was aged 23. The accused pleaded not guilty to the charge and did not even tender a limited plea of guilty to a lesser offence.

In his defence outline the accused stated that on the day in question he was indeed at the Flea Market selling his wares comprising of cellphone accessories. When asked by a customer to fix a cellphone screen he had approached his friend Luckmore Matayaya, who manned a separate stall at the market, for a razor blade with which to perform the exercise. The accused stated that it is then that the deceased who had been drinking shouted that he should not take the razor blade without paying resulting in a misunderstanding and a shouting match between them.

It later degenerated into something worse as the accused says the deceased assaulted him with clenched fists sending him reeling on the ground.

He went on to say that he fell on Luckmore's wares which included some knives which were on sale as a result of which he picked and opened an okapi knife. Even though Hillery Ndlovu, the accused's supervisor tried to restrain the deceased the deceased still managed to break loose and attacked the accused with fists. As he blocked the deceased's fist, the deceased was stabbed and the knife fell to the ground. The stabbing was therefore not intentional.

From what the accused is saying, and the testimony of the two state witnesses who gave *viva voce* evidence, most of the facts, except for how the stabbing occurred, are common cause. Apart from that, most of the evidence of the state witnesses, that is the evidence of Garikayi, Moyo who saw the accused wrestling with the deceased forcing the deceased to the ground; Tamuka Bright Mutonga who witnessed the accused sitting on the deceased's belly as the deceased lay on his back while holding a knife with his right hand before disarming him; Trust Kutaika a police officer based at Zimbabwe Republic Police Zvishavane who beheld a stab wound at the back of the deceased and Freeman Chinyerere who recorded a warned and cautioned statement from the accused, was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07].

It is common cause that the accused and the deceased were both at Edgars Stores Flea Market in Zvishavane on the afternoon of 20 August 2017 before they had a misunderstanding over a razor blade which the accused wanted to take from among Luckmore's wares. It is common cause that during the misunderstanding there was a shouting match between them which led to a physical contact between them. It is common cause that during that episode the accused armed himself with an okapi knife, produced in court as exhibit four, which has a blade 10,5cm long. It is common cause that the knife in question was used to stab the deceased inflicting a wound from mid back, 3 cm from the scapula bone, which perforated the left pulmonary vessels and according to Dr S Pesanai who conducted the autopsy on the body of the deceased;

“stab wound went from back to front, left to right, top to bottom through the 7<sup>th</sup> rib, perforating the lower lobe and perforating the left pulmonary vessels.”

It is also common cause that the stab wound caused the death of the deceased as the doctor concluded that the cause of death was haemorrhagic shock, haemopneumothorax and perforated left pulmonary vessels.

Against all that evidence which is common cause we have the very fanciful defence of the accused person which not only defeats all laws of physics but also suggests that the deceased saw that the accused was armed with a lethal weapon but decided to charge against the knife and caused himself to be stabbed by it leaving the accused without any culpability at all. It does not make sense and constitutes an insult to the collective intelligence of this court.

We are aware that there is a slight contradiction in the evidence of this state witnesses namely Luckmore Matayaya and Hillery Ndlovu regarding how the deceased was stabbed. Matayaya denied that the deceased and indeed the accused had fallen onto his stall prior to the stabbing. He tried to distance himself from the action suggesting that when the fracas was unfolding it was 3.75 metres away from him and he conveniently did not witness what happened as he buried his head in the sand, ostrich style, attending to a customer. On the other hand, Hillery Ndlovu, who impressed us as a reliable witness given the clarity of his presentation, testified that the two combatants had actually come into contact exactly at Matayaya's stall because the accused had lifted the deceased's legs felling him onto Matayaya's stall.

We believe the evidence of Ndlovu which actually finds corroboration from an unlikely source, the accused person himself. While Matayaya told the truth about most of what happened we find that his strange selective amnesia where he conveniently only failed to witness the stabbing is not harmful to the state case. In fact we attribute it to a feeble attempt by the witness either not to be the one to nail a person he described as his bossom friend who was so close to him that he knew everything happening around him including his habits, his violent disposition and that little secret of a small axe he at times carried around or a failed attempt to down play the culpability of the accused. It will not work.

Mr *Chihya* for the accused person has suggested, albeit timidly, that the accused relies on essentially two defences namely intoxication and defence of person. He submitted that both the deceased and the accused were so intoxicated that day that the accused could not have formed an intention to kill. What we know from the evidence that has been given is that the

accused consumed alcohol from morning while still working. In terms of section 221 of the Penal Code voluntary intoxication which does not lead to lack of the requisite intention shall only be taken as mitigating sentence. In our view the provisions of section 222 relating to intoxication resulting in lack of intention do not apply in this case because the accused was able to form an intention. He was not motherlessly drunk and was still able to perform his duties.

Regarding defence of person, section 253 sets out the requirements for this defence. They are that the person was under an unlawful attack which had commenced or was imminent; his or her conduct was necessary in order to avert the attack and he or she could not escape from or avert it; the means used to avert the attack were reasonable in the circumstances and harm was caused to the attacker.

In our view none of those requirements have been established by the accused who was clearly a loose and very dangerous cannon on this day. He was the aggressor.

Having regard to the totality of the evidence we are satisfied that the state has proved its case beyond a reasonable doubt. The circumstances however do not established actual intention.

In the result the accused is found guilty of murder with constructive intent.

#### Reasons for sentence

In assessing sentence we take into account that the accused was aged 18 years at the time of the commission of the offence. He will soon be 19 years old. He is therefore youthful indeed. His conduct may therefore be attributable to immaturity and youthful excitability.

We are also mindful of the fact that the accused had consumed alcohol for a long period on the day in question which poisoned his mental faculties. He comes from a broken family and therefore lacked parental guidance. It actually shows in his demeanor even as he testified in court. It means therefore that he has become a dangerous member of society and slightly unhinged because of his upbringing which left a lot to be desired. Those mitigatory factors must however be balanced against the aggravation of a young person who deliberately chose a wayward path of alcohol abuse and violence. This is a young man who had taken to keeping not just an extremely dangerous okapi knife which he used to fatal effect against an innocent person.

He also kept a small axe with evil intent. It was always a question of time before he killed someone. He did kill the deceased on 20 August 2017.

As much as this court is required to take into account youthfulness in considering sentence, there is no doubt that the fact that a precious innocent life was lost at the hand of a delinquent who was an accident waiting to happen means that in its duty of upholding the sanctity of human life this court's hands are tied. Imprisonment is clearly unavoidable. The sentence will however be tailor-made to fit a youthful offender.

The accused is therefore sentenced to 12 years imprisonment.

*National Prosecuting Authority, state's legal practitioners*  
*Makonese Chambati & Mataga, accused's legal practitioners*