

**THE STATE****Versus****TAPIWA MAHOHOMA**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr Ndlovu &amp; Mr Sobantu

HWANGE CIRCUIT COURT 6, 7 &amp; 8 MARCH 2018

**Criminal Trial***Miss M. Munsaka* for the state*Mvhiringi* for the accused

**MAKONESE J:** On the 10<sup>th</sup> October 2017 and at around 1700 hours the deceased arrived home from work. She was employed as a nurse at Nkayi District Hospital. This was like any normal day for the deceased who was unaware that the events there were about to unfold would end her life in the most tragic circumstances. Upon arrival at her home, deceased was talking to a neighbour one Ndodana Mahlaulo (hereinafter referred to as “Ndodana”), when the accused emerged from the direction between deceased’s house and house number 718 Nkayi. The accused was carrying a metal tube which he was tossing from one hand to the other as he walked towards the deceased. Accused called out to the deceased to come to him but deceased ignored him and remained standing. Accused then charged towards the deceased, raising the metal pipe intending to strike deceased on the head. The deceased ducked and went behind Ndodana for protection. Accused struck Ndodana on the left side of the neck using the metal tube. Ndodana tussled with the accused for the metal pipe until he dispossessed the accused of the pipe. Ndodana then watched as the accused grabbed the deceased’s hand, before assaulting her several times on the face with clenched fists. Accused tripped deceased causing her to fall to the ground whereupon he kicked her several times on the head using booted feet. Accused then armed himself with a concrete brick which she used to strike the deceased on the head. The deceased was bleeding from the nose and mouth. When accused turned to Ndodana intending to further assault him Ndodana fled the scene fearing for his life and went to make a report at the police station. Accused was arrested along the Kwekwe-Nkayi Road after he had left the scene.

The accused is facing a charge of murder. The allegation being that on 10<sup>th</sup> October 2017 and at house number 718 Belmont, Nkayi, the accused assaulted Brilliant Ngwenya several times on the face with clenched fists, kicked her several times on the head with booted feet and further struck her on the head with a concrete brick intending to cause her death. The accused pleads not guilty to the charge of murder. He tendered a plea of guilty to the lesser charge of culpable homicide. The state rejected the limited plea. The matter proceeded to trial.

In his brief defence outline the accused averred as follows:

*“At the trial of this matter, the accused will plead not guilty to contravening section 47 of the Criminal Law (Codification and Reform) Act Chapter 9:23) ‘murder’, levelled against him but pleads guilty to contravening section 49 (a) of the Criminal Law (Codification and Reform) Act, that is culpable homicide and will state:-*

- 1. That on the fateful day deceased, who was accused’s girlfriend of 11 years, and accused had a quarrel over deceased’s sexual affair with Ndodana Mahlaulo.*
- 2. That deceased refused to sit down with the accused so that the two could resolve the issue amicably but instead mocked accused that she had found a better boyfriend than accused.*
- 3. That accused was outraged by deceased’s response as accused had spent a lot of money on deceased including buying and developing a stand for her in Hwange.*
- 4. That the accused did not have the intention to cause the death of the deceased but accused was negligent in his conduct.”*

The state tendered into the record of proceedings the outline of the state case. The evidence of the following state witnesses as is appears in the outline of the state case was admitted by way of formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07);

- (a) Chief Inspector Thomas
- (b) Dr Sanganayi Pesanai

The state then produced a post mortem report compiled by Dr Sanganayi Pesanai, at United Bulawayo Hospitals after an examination of the remains of the deceased. The report is filed under report number 940/939/2017. The cause of death is listed as:

- (a) Subarachnoid haemorrhage

- (b) Skull fractures
- (c) Blunt force trauma (head)
- (d) Assault

On marks of violence the pathologist made the following observations:

- (a) Abrasions and bruises on the right face cheek involving the right ear and back of ear (10 x 8cm)
- (b) Abrasions and bruises on the left tempo-parietal region
- (c) Blood on the face and head
- (d) Depressed skull fracture (6 x 4cm), left parietal temporal regional
- (e) Fractures both left and right anterior and medial fossae.

On other remarks the doctor made the following observations:

- (a) Post mortem is consistent with crush injuries, she was hit on the left side of head, fractures extended to the right parietal bone.
- (b) Blood stained cement block (43 c 18 x 11) heavy no scale.
- (c) Metal tube 73cm and 9cm circumference.

The state tendered as exhibits the metal pipe and a concrete block weighing 14.1 kg. The accused denied that the concrete block that was produced as an exhibit is the one he had used to strike the deceased. Accused stated that he had used a small concrete brick approximately 8cm wide. A confirmed warned and cautioned statement recorded at Nkayi Police Station soon after accused's arrest was also tendered into evidence. The court's attention was however drawn to the fact that there were discrepancies on the contents of the English version of the statement and the Vernacular version. The variations in the contents of these two statements concerning to the same event meant that not much reliance could be placed on the statements on the most critical parts of the evidence. In particular, the English version averred that accused had struck the deceased once with an iron bar on the shoulder and once with a brick on her head. In the Vernacular version the accused stated that he had struck the deceased on the head whilst she was

on the ground. Due to these variations in content the state did not place much reliance on the warned and cautioned statement. The probative value of the warned and cautioned statement however remained, to the extent that accused admitted using both the metal pipe and the brick at some stage during the assault.

### **The state case**

The state called its main witness **Ndodana Mahlaulo**. He is a kombi driver who plies the Kwekwe-Nkayi route. He resides at 719 Nkayi, Belmont, and Nkayi. He knew the deceased as a neighbour. He had only known the deceased a few days before her demise. He only visits Nkayi once or twice a month and does not permanently reside at Nkayi. The witness had only met the accused once when he came to visit the deceased. The witness testified that around 1700 hours he was standing with the deceased behind house 718 Belmont, Nkayi. The deceased had asked to use witness' mobile phone. As the two were still talking, the deceased emerged from between deceased's house and house number 718 Belmont, Nkayi. The accused was in possession of a metal pipe which he was tossing from one hand to the other as he walked towards the witness and the deceased. The accused called out to the deceased, saying "Come", "come". The deceased ignored the accused. As accused got closer to the deceased he raised the metal pipe as he tried to strike her on the head. The deceased ducked and hid behind the witness for protection. The accused then struck the witness on the right shoulder. The witness managed to wrestle the metal pipe from the accused and stood some distance away not far from where the accused and deceased were. Accused grabbed deceased's hand and assaulted her several times on the face using clenched fists. Accused tripped deceased and she fell to the ground. Accused then kicked her several times on the head using booted feet, while she lay helpless on the ground. The witness observed that the deceased was motionless, and was no longer responding to the attacks by the accused. The deceased was bleeding profusely from the mouth and nose. As the witness watched, accused armed himself with a concrete brick which he used to strike the deceased several times on the head. The witness demonstrated how the deceased was struck and stated that accused outstretched his hands above his head and proceeded to strike the deceased with the brick on the head. Accused then turned his attention to the witness who decided to flee

the scene fearing for his own life. The witness proceeded to file a report with the police. The witness led the police in the direction the accused had left the crime scene. The accused was arrested on the Kwekwe-Nkayi Road. The court accepts the evidence of this witness to a large extent. He gave his evidence in graphic detail. The court, however found that the witness somewhat exaggerated his evidence regarding the assault he witnessed. It would seem unlikely that the accused lifted the 14.1kg concrete block in the manner described by the witness when the deceased was struck with this brick. If the brick had used in the manner described, several times, then the deceased's head would have been crushed beyond recognition.

**Rosemary Charuma** was the next witness for the state. Her testimony is largely common cause and not in dispute. She knew the deceased as they were both tenants at house 717 Belmont, Nkayi. She had known the deceased from the 12<sup>th</sup> September 2017. She knew Ndodana as a neighbour residing at 718 Belmont, Nkayi. She first saw the first witness on 9th October 2017. The witness stated that on the 10<sup>th</sup> of October 2017 and at around 1730 hours she was on her way home when she saw Ndodana carrying a metal pipe. She was informed by Ndodana that someone had been killed. The witness proceeded to the scene where there were several people gathered. The witness observed that the deceased was lying motionless on the ground. She had serious injuries on her head and behind the ear. She had abrasions on the left side of the face and there was blood on the ground. This witness stated that the concrete block brick that was produced as an exhibit was similar to the one she observed at the scene very close to the deceased. The witness could not however, confirm that the brick produced in court as an exhibit was the same she saw at the scene. The court accepts the evidence of this witness which was easy to follow. The witness' demeanor on the witness stand was impressive and she was not shaken under cross-examination.

**Sithabile Tshuma** was the third and final witness to give *viva voce* evidence. She is aged 62 years and resides in Bulawayo. She knew the deceased as her niece. She did not know the accused. She told the court that on the 9<sup>th</sup> of October 2017 around 0630 hours she received a call from the deceased's number. The caller identified himself as "Ndlovu" a boyfriend to the deceased. The caller stated that he had been in love with deceased for 10 years. The witness

indicated that the caller needed clarification on why deceased's relatives were allowing the deceased to reconcile with the father of her child. The witness said that the caller threatened that he would settle the matter with the deceased. On the 11<sup>th</sup> of October 2017 the witness learnt that the deceased had been killed at Nkayi on 10<sup>th</sup> October 2017. The witness stated that she later met the accused at Nkayi Police Station where she concluded that accused was the caller because of his voice, which she said was similar to that of the caller who referred to himself as "Ndlovu". The witness crucially told the court that she was not aware of the love relationship between the accused and the deceased. The court found the evidence of this witness to be credible. She had no reason to fabricate a story implicating the accused. The court accepted her evidence.

### **The defence case**

The defence led evidence from the accused **Tapiwa Mahohoma**. He testified that he was employed as a security guard with a company known as Peace Security Company. He was based at Kazungula border post. He resides at 4 Hillcrest, Hwange. He met the deceased in 2007 when they fell in love. At the time the deceased met her death they had been in a "secret" love relationship for 10 years. He had spent a substantial some money on the deceased, and in particular had secured a stand for her in Hwange. There was construction at the stand which he had funded up to below window level. On the 8<sup>th</sup> of October 2017 accused went to Nkayi on his way to Kwekwe. Accused returned to Hwange the same day in the afternoon. It is not clear what the purpose of accused's visit to Nkayi was on this day. The accused testified that on the 9<sup>th</sup> of October 2017 he received a call from the deceased informing him that he was no longer welcome at Nkayi. Their relationship had to end. Accused was not amused by deceased's attitude towards him and told the deceased that he would go to Nkayi to discuss the matter. The accused was evidently angered by the deceased as he felt he was being pushed out of deceased's life. Accused suspected that the deceased intended to reconcile with one Mabasa the father of deceased's 11 year old son. The accused stated that on the 10<sup>th</sup> October when he arrived at Nkayi he found the deceased seated on a septic tank talking to a man he later knew as Ndodana. The accused asked the deceased to come to where he was to discuss the issue but the deceased ignored him. This infuriated the accused who charged towards the deceased. In his possession

was a metal pipe. He tried to strike the deceased but was prevented from doing so by Ndodana. On his own version, the accused stated that he decided to strike Ndodana so that he could get out of his way. Having struck Ndodana with the metal pipe on the neck, Ndodana managed to wrestle the metal pipe from the accused. Accused then gained access to the deceased. The accused grabbed the accused's hand and twisted her. She fell down and he kicked her in the head with booted feet several times. The accused says that he noticed that the deceased had become motionless. He called out her name and she did not respond. He observed that she was bleeding from the mouth and the nose. The accused picked up a brick and struck the deceased on the shoulder, "so that she would wake up". The accused then turned his attention to Ndodana, who however fled the scene. The accused left the scene leaving the injured deceased lying on the ground. Accused was arrested along the Kwekwe – Nkayi road.

The accused was evasive under cross-examination. His version of events as he narrated the account departed from his defence outline in material respects. As the evidence was laid out in court it became clear that accused did not tell the truth when he said that on the fateful day he had a quarrel with the deceased over her sexual relationship with Ndodana. There was no such quarrel between deceased and the accused. The accused's allegation that the deceased had "mocked" him saying she had found a better boyfriend than him was also debunked when it was established that accused was never in fact "mocked" in the manner described in his defence outline. As the accused presented his case his defence case it simply collapsed under the weight of the evidence. The accused's defence counsel properly conceded that there were variations between accused's defence outline and his evidence under oath. No explanation for this variance in accused's evidence was proffered. The court makes a specific finding that the accused was not a truthful witness. He failed to explain why he found it necessary to attack the deceased who lay motionless on the ground with a concrete brick. His suggestion that he wanted to "wake her up" is not only unreasonable but illogical.

The issue that remains for determination by this court is whether the accused had the requisite *mens rea* to cause the death of the deceased when he attacked her. *Ms Munsaka*, counsel for the, state argues that the manner of the assault and the nature of injuries reflected in

the post mortem report leads to a conclusion that the accused intended to bring about the death of the deceased. *Mr Muvhiringi*, counsel for the defence, argued that this is one of those borderline cases between murder with actual intent and constructive intent. He conceded that the defence of provocation was not available to the accused and could not be sustained on the facts. In terms of s239 of the Criminal Law (Codification and Reform) Act, (Chapter 9:23), to operate as a partial defence, the provocation must have resulted in the accused losing self control. The accused was angered by the deceased's telephone call advising him not to visit Nkayi. He drove all the way from Hwange to Nkayi a distance over 290 km. A reasonable person in the accused's shoes would have had sufficient time to cool down and exercise self restraint.

### **Requirements for actual intent**

The accused will be found to possess the requisite intention to kill where the state proves beyond reasonable doubt that from the conduct of the accused it is clear that he desired to bring about the death of the deceased. It must be proved on the evidence that accused's object and motive was to bring about the death of the deceased. The court may only formulate the intention of the accused from his conduct. The manner of the assault, and how, and on which part of the body the assault is directed will in each particular case lead the court to formulate the accused's intention. In other words it must be proved that accused set out on a plan to kill the deceased, making death his aim and object. In his book, *The Guide to Zimbabwe Criminal Law*, Professor G. Feltoe at page 110, discusses the distinction between positive or actual intention and constructive or legal intention and constructive or legal intent in a lucid manner. The author characterises the distinction as follow:-

#### Actual intention

- (a) Desires death. Death is the aim and object; or
- (b) Death is not the aim and object but in the process of engaging in some activity foresees death as a substantially certain result of that activity and proceeds regardless as to whether the consequences ensue.

Legal intention

Accused does not mean to bring about death but foresees it as a possibility whilst engaged in some activity regardless as to whether death ensues.

- (a) Subjective foresight
- (b) As to the possibility and not probability
- (c) Recklessness

For the court to return a verdict of murder with actual intent the court must be satisfied beyond reasonable doubt that:

- (a) The accused's fixed and settled intention was to bring about the death of the victim.
- (b) While pursuing another objective he foresees death of his victim as a substantially certain result and proceeds with his conduct recklessly.

See the case of *Robert Mugwanda v The State* SC-19-02. See also *State v Mutara* H-05-15.

It is our view that the accused foresaw the possibility of death ensuing from his conduct as a substantial possibility. He kicked the deceased on the head several times with booted feet. Then as she lay motionless on the ground accused delivered a blow to the head with a brick. The established facts are that the brick was used on the deceased upon her head when she was already motionless. The injuries reflected in the post mortem report shows that the injuries were extensive and deep. There was a depressed skull fracture and the pathologist concluded that these injuries were consistent with crush injuries. The fracture in the skull extended to the right parietal bone. The post mortem further indicates that a concrete block (43 x 18 x 11cm) which was blood stained was observed. It was heavy but was not weighed by the pathologist. This fact is further corroborated by Chief Inspector Thomas who recovered the concrete brick which was blood stained. Rosemary Charuma stated that the brick she was shown in court was of the same size as the one she had seen at the scene. We are satisfied that the accused must have used the

concrete brick and not a half brick. The chain of events indicate that when accused left Hwange for Nkayi he wanted to confront the deceased on her proposed termination of their affair. Ndodana said the accused was in an angry and aggressive mood. The deceased was assaulted and when she fell to the ground she never raised up again. The accused tried to call out the deceased but she did not respond. She never responded. The accused says that he shook her to make sure she was not hearing him. As a parting shot accused struck her with a concrete block on the head. Accused's intention was to bring about the death of the deceased.

The facts of this case are striking similar to those in *Lenson Sithole v The State* SC-16-07. In that case the appellant and deceased were engaged in an extra marital relationship. The relationship had commenced in 1998. In January 1999 the appellant and deceased met along a certain path. The two walked together for a distance. The appellant took a machete from his cycle and struck the deceased with it five times on the head. The deceased collapsed and died. The trial court has found that the appellant became bitter when the deceased started to ignore him after he spent what he considered to be a substantial amount of money on her. The attack did not take place on the spur of the moment. On appeal the Supreme Court confirmed the conviction of murder with actual intent.

In the present case the accused's defence is that he spent a considerable amount of money on the deceased in securing a stand for her. He said he spent close to US\$4 000 in carrying out construction at the stand. When he was told that the relationship was coming to an end he became infuriated. He travelled to Nkayi. He did not have any discussion with the deceased and on his own version he attacked her with booted feet on the head until she was motionless.

His settled intention and desire was to cause the death of the deceased. It is the view of this court that the state proved beyond reasonable doubt that the deceased intended to cause the death of the deceased.

In the result, and accordingly, the accused is found guilty of murder with actual intent.

**Reasons for sentence**

The accused has been convicted of a very serious offence. The court has taken into consideration all the factors in mitigation as outlined by accused's defence counsel. Accused is a family man, married with 3 children. He is the sole breadwinner. The accused has through his defence counsel conceded that the provocation, though not a defence that could be sustained on the evidence, ought to be taken into account in assessing sentence. The court notes that the accused was angered by the fact that his love affair with the deceased was being brought to an abrupt end. Accused says he had spent considerable sums of money in securing a stand for the deceased. Put in another way, the accused had invested financially and emotionally in this relationship. The accused however, took the law into his own hands and decided to punish the deceased for having rejected him. The courts cannot condone any conduct that promotes violence as a means of resolving disputes. The accused tried in vain to raise spurious defences and showed no remorse or contrition. In spite of his offer of a plea to the lesser charge of culpable homicide, his conduct on the fateful day is deplorable. He kicked the deceased several times on the head with booted feet after assaulting her with clenched fists. All his blows were directed upon the head. The crush injuries observed by the pathologist are consistent with the use of the concrete block. This was a barbaric attack upon a defenceless woman. It is this court's view that the accused must be sentenced to a lengthy prison term to indicate the court's revulsion towards murders convicted and arising from crimes of passion.

In the circumstances, the court considers the following to be an appropriate sentence.

“Accused is sentenced to 25 years imprisonment”

*National Prosecuting Authority*, state's legal practitioners  
*Mvhiringi & Associates*, accused's legal practitioners