

**THE STATE****Versus****NHLANHLA SITHOLE**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J with Assessors Mr Ndlovu & Mr Sobantu  
HWANGE HIGH COURT 9 MARCH 2018

**Criminal Trial**

*Mrs C. Gorerino* for the state  
*Miss S. Daka & Ms J. Change* for the accused

**MAKONESE J:** The deceased was aged 33 years at the time she met her death. The accused was aged 37 years at the time of the commission of the offence. Deceased was accused's estranged wife. Both the accused and the deceased were residents of Mafinyela Village, Lupane.

On 5<sup>th</sup> July 2017 and at around 1900 hours deceased arrived at accused person's homestead. Accused was not present on that day. The deceased decided to put up at accused's homestead for the night. The following day the 6<sup>th</sup> of July 2017 the deceased arrived at his homestead and found the deceased waiting for him. Deceased enquired about certain property she had left at the homestead and accused indicated that he had given the property to his second wife. Some discussions continued concerning this property for a long period of time but nothing was resolved.

On the 7<sup>th</sup> July 2017 in the early hours of the morning deceased returned to the accused's homestead in pursuit of her property which included a comforter, plates and cups. The accused indicated that he did not have the property that was being demanded by the deceased. The parties squabbled over the property and the issue suddenly took a horrible twist when accused grabbed the deceased by the collar and at the same time he was holding a hammer with his right hand. Accused then lashed out at the deceased and struck her with the hammer on the left side of the head. Accused started bleeding profusely. Accused picked a hoe handle and threw it at the

deceased striking her on the neck and back. Deceased fell down on her face. She died on the spot from injuries sustained in the assault. The accused fled from the scene and surrendered himself to the police the following day.

The accused appears in this court on a charge of murder. It is alleged that on the 7<sup>th</sup> July 2017 at Mafinyela Village, Lupane, the accused struck Florence Jeché on the head with a hammer and a wooden hoe handle on the neck intending to cause her death. The accused denied the charge of murder and tendered a limited plea to the lesser charge of culpable homicide. The state did not accept the limited plea. The matter proceeded to trial.

The accused tendered his defence outline denying the allegations in the following terms:

*“At trial, the accused person will plead not guilty to contravening section 47 of the Criminal Law (Codification and Reform) Act ( Chapter 9:23), murder, levelled against him but will plead guilty to the lesser charge of contravening section 49 of the Criminal Law (Codification and Reform) Act, culpable homicide and will state the following in his defence outline:*

- 1. On the fateful day, the accused was at his homestead when the deceased arrived and demanded property which accused had retained after their separation. Accused refused with the property and indicated to the deceased that she had taken her share and what was remaining was his.*
- 2. The deceased and accused argued about the property until the deceased insulted the accused about his mother indicating that by having a girlfriend the accused was following his mother’s footsteps as his mother was a prostitute.*
- 3. Accused was angered by these words and picked the nearest weapon in the house which happened to be a hammer and struck the deceased once on the left side of the head.*
- 4. The parties continued squabbling and arguing as accused pulled deceased out of the summer house telling her to leave, and when deceased was about to leave, accused picked a hoe handle and threw it at her and it struck her on the neck and back of the head and deceased fell down face down. Accused person panicked and fled the scene but later surrendered to the police.*
- 5. That accused only attacked the deceased after being insulted about his mother which angered him and did not have the intention to cause the death of the deceased or foresee the possibility of death but admits that he was negligent in causing the death of the deceased.”*

Accused's warned and cautioned statement was confirmed by a magistrate at Lupane on 19<sup>th</sup> July 2017. The statement was recorded at ZRP Lupane a day after the commission of the offence and is in the following terms:-

*"I admit the allegations levelled against me that I killed Florence Jeché my wife. I struck her with a hammer on the head once and with a hoe handle once on the neck. The quarrel was over the sharing of our household effects which she shared alone. She took her share away and was now coming to take away mine. The property in question included a scorch cart, two donkeys, a bed, cupboard, plates, pots and a blanket. This is what I know in connection with Florence Jeché's death."*

The state then tendered a post mortem report compiled by Sanganayi Pesanai at United Bulawayo Hospitals under report number 638/637/2017. The pathologist examined the remains of the deceased and opined that the cause of death was:-

- (a) Extensive subarachnoid haemorrhage
- (b) Multiple skull fractures
- (c) Head injury
- (d) Assault

On marks of violence, the post mortem reveals that the deceased sustained the following injuries:

- (a) Abrasion on the left knee (2 c 1cm) right knee (2 x 11cm), abrasion on the left shoulder
- (b) Laceration on the left leg (5 x 2cm) exposing the tibia bone
- (c) Swollen eye
- (d) Blood from nose and mouth
- (e) Face covered with sand and blood

An internal examination of the remains of the deceased also revealed the following injuries:

- (a) Extensive scalp haematoma occipital region involving the neck

- (b) Depressed skull fractures, left occipital (4 x 3cm) multiple fracture occipital bone involving both posterior and fossae
- (c) Extensive occipital and temporal lobe subarachnoid haemorrhage cerebral haemorrhage

On other remarks the pathologist concluded that the injuries were caused by a blunt heavy object, and that multiple blows were applied.

The state tendered into the record the physical exhibits, namely the hammer and hoe handle. The hammer had a measured weight of 880 grammes. The hoe handle weighed 940 grammes, its length is 91.5cm, the circumference of the handle is 11cm and the circumference of the head is 22cm.

The evidence of the following state witness as it appears in the summary of the case was admitted into the record by way of formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07), namely:

- (a) Lenin T. Jarat
- (b) Sikhumbuzo Sibanda
- (c) Dr Sanganayi Pesanai

The state then led *viva voce* evidence from its main witness, **Nonsikelelo Nyoni**. This witness narrated that she knew the deceased as her aunt and the accused as her uncle who was married to the deceased. On the 5<sup>th</sup> of July 2017 she spent the night at accused's homestead together with the deceased. The accused was not present. On the following morning the 6<sup>th</sup> July 2017 the witness proceeded to Beauty Moyo's homestead where she spent the whole day leaving deceased at accused's homestead.

The witness returned to accused's homestead around 1900 hours. The accused and deceased were both present. She heard deceased asking accused about the whereabouts of a comforter, cups and plates. The accused alleged that he had handed the property to his second

wife. The issue of the property remained unresolved. The witness and the deceased later departed from accused's homestead. The following day the 7<sup>th</sup> July 2017 the deceased proceeded to accused's homestead. The witness arrived at deceased homestead later that same morning and found accused and deceased in a summer hut. They were still discussing the property the deceased said belonged to her. The witness then described how the accused had grabbed the deceased by the collar. The witness said that she observed the accused raising a hammer. As she approached the parties she noticed that the deceased was bleeding from the head. The deceased and accused were shoving each other. The witness tried to restrain the accused from further assaulting the deceased. The accused angrily rebuked the witness and she fled from the scene. She said that accused threw a shovel at her as she ran away to alert other villagers. The witness returned to accused's home only to find that the accused had already left. The deceased was lying on the ground with her face down. She observed that deceased had a wound on the left side of the head and was bleeding. She ascertained that deceased was dead.

The court has no hesitation in accepting the evidence of this witness. Her evidence reads well. She was comfortable on the witness stand. She was not contradicted under cross-examination in any material respects. She was not shaken in any way. The court finds her to be a credible witness.

The state closed its case.

### **Defence case**

The accused gave evidence under oath. He narrated how the deceased had come to his homestead on the fateful day demanding that he gives her certain property which she had not collected at the time of their separation. The property included a bed, a comforter and some cups and plates. The accused largely stuck to his defence outline. He stated that he had no intention of assaulting the deceased but that the deceased had provoked her by uttering words to the effect that accused was following in his mother's footsteps by having a girlfriend,(the second wife) and that deceased's mother was a prostitute. The accused stated that he was insulted by the deceased and responded by striking her with a hammer once on the head behind the left ear. The

accused stated that he lost his temper and that when he further struck the deceased with a hoe handle on the neck and back she fell down with her face facing down. Accused stated that he did not deliver several blows as suggested in the post mortem report. Accused could not explain how the deceased had sustained abrasions on both legs. Accused suggested that these injuries on deceased' legs could have been sustained as she fell on the ground. Accused conceded however when questioned by his defence counsel that the ground at his homestead is not rocky but in fact sandy. The exposed tibia bone could not possibly have been caused by the fall to the ground. Accused admitted using the hammer produced as an exhibit as well as he hoe handle in the assault. Accused could not deny that he caused the injuries that led to the demise of the deceased.

The accused was not a truthful witness. His version of events is not consistent with the established facts and the results of the post mortem report. The accused was at pains to try and underplay the nature of the injuries he inflicted upon the deceased. The court found the accused to be evasive on the critical parts of his evidence. The court makes a specific finding that the accused was not a credible witness.

### **Whether the accused was provoked by the deceased**

The accused contends that he assaulted the deceased in the manner he did because he was subjected to extreme provocation. The accused indicated that deceased insulted him by inferring that his mother was a prostitute. This court accepts that the words attributed to the deceased were indeed deeply offending. Notwithstanding the offensive nature of the words uttered by the deceased the court must consider whether provocation is available to the accused as a partial defence to the charge of murder. This defence has now been codified under our law in section 239 of the Criminal Law (Codification and Reform) Act, which provides as follows:

- “(1) If after being provoked a person does or omits to do anything which could be an essential element of the crime of murder if done or omitted, as the case may be with the intention or realization referred to in section forty-seven, the person shall be guilty of culpable homicide, if as a result of such provocation.
- (a) he does not have the intention or realization referred to in section forty-seven;  
or

- (b) he or she has the intention or realization 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 self-control ...”

The reasonable man test has always been a subjective test. The evidence in this case reveals that the accused person was squabbling with the deceased over the sharing of property. This argument had gone on for at least two days. The accused contends that he lost his self-control when the deceased insulted him by inferring that his mother was a prostitute. This angered the accused. He completely lost his marbles and grabbed the deceased by the collar before striking her with a hammer behind the ear. Accused proceeded to strike the deceased on the head and neck with a hoe handle. The deceased sustained fatal injuries and died on the spot. The accused’s reaction is not what is expected of a reasonable man who finds himself in such circumstances.

In *S v Dzaro* 1996 (2) ZLR 541 (H) the court stated per head note that:-

*“the extravagant nature of the accused’s conduct could not be regarded as conclusive proof of extreme provocation or loss of self-control. If that were so, it would be strange justice which punished moderate killers and provided a defence for the more brutal butcher.”*

In the present matter, it is our view that, on the facts of the case a reasonable person in the accused’s position, inspite of the degree of provocation in the form of the insults would not have acted in the manner he did. Consequently the defence of provocation is not be available to the accused.

### **Whether the accused is guilty of culpable of homicide or murder with constructive intent**

The established facts, which by and large are common cause and not in dispute are that accused armed himself with a hammer weighing 8890 grammes. He struck the deceased on the head. He aimed at the upper part of the body. The results of the post mortem report are consistent with multiple blows having been delivered to the head of the deceased. The words that were uttered by the deceased did not warrant the accused to retaliate in the manner he did.

He used excessive force against a defenceless woman. The accused reasonably foresaw that death could ensue but notwithstanding that realization engaged in that activity. In his book the learned author G. Feltoe, *A Guide to the Criminal law of Zimbabwe* (2<sup>nd</sup> edition) page 110 the requirements for murder with constructive intent are succinctly set out as follows:-

#### 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.

The three essential requirements are:

- (a) subjective foresight
- (b) as to the possibility not probability
- (c) recklessness

On the evidence presented before us, we are satisfied that the accused acted recklessly and foresaw death as a real possibility. He continued with his conduct regardless of the consequences. The accused is accordingly found guilty of murder with constructive intent.

#### **Reasons for sentence**

The accused has been convicted of a serious offence. The court shall take into consideration all the mitigating factors of the case as outlined by accused's defence counsel. The accused is a first offender. He is married and has 4 children. The deceased was his estranged wife. The accused has spent over 7 months in remand prison awaiting trial. Accused has thus served part of his sentence. The accused's sentence shall therefore be discounted to take into account the pre-trial incarceration. The court notes however, that the accused has shown little remorse. He is however commended for handing himself to the police. He pursued his defence to the bitter end. He has not exhibited any measure of remorse or contrition. The accused acted violently against a defenceless woman. He attacked her with a very lethal weapon on the head behind the ear. He further struck her with a hoe handle on the head and neck even after he



realised that she was bleeding. This was a brutal and cowardly attack on the deceased. A young life was needlessly lost. The time had come for our courts to act firmly against domestic violence. People have lost respect for human life. The sentence this court shall impose must indicate that courts frown upon persons who take the law into their own hands to settle disputes by the use of violence. In the result, and accordingly, the accused is sentenced as follows.

“Accused is sentenced to 20 years imprisonment.”

*National Prosecuting Authority, state’s legal practitioners  
Mweli Ndlovu & Associates, accused’s legal practitioners*