

**THE STATE**

**Versus**

**QHUBEKANI MPOFU**

IN THE HIGH COURT OF ZIMBABWE  
BERE J with Assessors Mr J. Sobantu & Mr T.E. Ndlovu  
HWANGE CIRCUIT COURT 4 & 5 JULY 2017

**Criminal Trial**

*Miss M. Munsaka* for the state  
*G. Muviringi* for the accused

**BERE J:** Strange things indeed happen in our lives. On 8 July 2016 the deceased was injured in the most unusual circumstances. The injuries took the deceased to the Intensive Care Unit at Mpilo Hospital where the deceased, after undergoing several treatments succumbed and died on 17 August 2016, almost 40 days after the bizarre incident that occurred at Cross Dete. The accused who is alleged to have pushed the deceased right in front of oncoming motor vehicle stands charged of the crime of murdering the deceased to which the accused has pleaded not guilty.

The salient facts which are not in dispute are that on 8 July 2016, the accused and the deceased who were friends and working as touts at Cross Dete, had spend the better part of the day drinking beer together. It is not clear what sort of beer they were partaking.

When a Bravo bus arrived at the scene travelling from Bulawayo to Victoria Falls, the two touts and a number of vendors rushed to the bus. As usual the vendors were selling their items which included perishables whilst the two touts were busy unloading goods from the bus. Initially the deceased was said to have been holding high the lid to the boot of the bus whilst the accused and the conductor were busy unloading passengers' goods from the boot.

It was at this stage that the accused and the deceased picked up a quarrel over a dollar. The accused was demanding his dollar from the deceased who pleaded innocence. The accused threatened to assault the deceased who maintained his innocence.

Whilst the accused and the deceased were engaged in their routine activities of touting and loading the bus the deceased was hit by a passing motor vehicle and fell onto the tarmac whilst those present fled in different directions in panic.

The deceased was taken to hospital and ended up at the Intensive Care Unit at Mpilo Hospital where he died on 17 August 2016.

Upon the deceased's demise, the pathologist who compiled the post mortem report opined that the deceased had died of (a) septicaemia and (b) blunt abdominal trauma due to a traffic accident.

In summarizing the deceased's medical history the pathologist noted that the deceased had had an amputation above his right elbow, and that he had sustained blunt abdominal trauma and a fractured left femur due to the accident. The doctor also noted that before the deceased died he had had several operations and that he had defaulted his TB treatment in 2015.

The accused has offered a plea of not guilty and prayed for his outright acquittal and has firmly placed the blame of the deceased's death on the negligence of the deceased who ran onto the road thereby being hit by an oncoming vehicle.

In support of the state case the evidence of Tawanda Shumbayarerwa and the pathologist doctor I. Jekeny was accepted by the defence as recorded into the state summary and therefore went on to be admitted into the record of proceedings in terms of section 314 of the Criminal Procedure and Evidence Act<sup>1</sup>.

1. Chapter 9:07

The *viva voce* evidence of Pretty Moyo and Maria Mnkandla was contested by the accused.

For the defence, the accused's case was limited to the evidence given by the accused himself.

I now proceed to deal with the evidence that was tabled before this court.

Nothing much turns on the evidence of Tawanda Shumbayarerwa and Doctor Jekonya as the accused accepted this evidence. This evidence does not assist the court in appreciating the circumstances under which the deceased was injured.

The evidence of Pretty Moyo took the court to the scene of this crime at Cross Dete. The witness' evidence was that on the day in question both the deceased and the accused had been drinking together as they were friends and working as touts. According to this witness when a Bravo Bus arrived at the scene she together with the other vendors rushed to the sides of the stationary bus to sale their perishables and other items. The witness was selling her items close to the tarred road on the driver's side together with other vendors. The witness heard the deceased and the accused arguing over a dollar and as the argument went on the accused threatened to assault the deceased who continuously pleaded his innocence. The witness then heard the accused utter the following words to the deceased. "Today I am going to beat you up and skin you like a goat." The witness said it was the seriousness of these utterances which drew her attention to the deceased and the accused. The witness said she stood by to watch the day's ordeal. It was whilst this witness was standing by and at a vantage point that someone shouted alerting others of an oncoming motor vehicle. The witness' reaction was to immediately lean against the bus to avoid being struck by the oncoming motor vehicle. She said all the others selling from that side of the bus followed suit to avoid being hit by the oncoming motor vehicle.

Much to the witness's utter dismay and shock and as the oncoming vehicle was barely 3 metres away the accused who was holding the deceased by his shoulders and pushed the deceased right in the path of the oncoming motor vehicle. Upon the vehicle hitting the deceased

the witness panicked and fled to the other side of the bus without even waiting to see how the deceased had been hit.

The witness said at the same time the accused also ran in the same direction and what she remembered was the driver of the vehicle which hit the deceased following behind the bus and apprehending the accused at the scene.

Under cross-examination the witness confirmed that prior to the accident, the deceased and the accused had been drinking what she thought was what is commonly referred to as “hot stuff”. Much to the witness’s credit in our view the witness maintained that she did not quite witness where exactly the deceased was struck by the oncoming motor vehicle as she had upon impact or simultaneously with the impact fled to the other side of the bus where she thought was safe.

If Pretty’s evidence required any form of corroboration, then the evidence of Maria Mnkandla provided that missing link. Maria’s evidence fitted well into the testimony of Pretty and she added a new dimension to the evidence by giving the details of the actual impact which gap had been apparent in the evidence of Pretty.

Under cross-examination, the witness confirmed that both the accused and the deceased had been drinking, and that both appeared drunk. She went further to say that she noted that the oncoming vehicle had struck the deceased by the abdomen, an observation which was confirmed by the pathologist.

The two witnesses, despite having been subjected to cross-examination part of which was clearly calculated to humiliate or hurt them stuck to their story. The credibility and the honesty of these witnesses was beyond reproach. It would be an idle characterization of the two witness’s evidence to project it as lies told to the court. It was in this spirit that the court had to caution the defence counsel about his choice of words when he labeled Maria a ‘liar’ in undeserving circumstances. In passing, I wish to state that when witnesses appear in court, there is need to use measured language against them to uphold the dignity of the court. Diplomatic

and respectable language must characterize the proceedings to protect all concerned. This is mainly so because the finding as to the truthfulness or otherwise of a witness's testimony falls within the province of the court.

When the accused testified, his strategy was to deny virtually everything said by the state witnesses. The accused denied ever quarrelling with the deceased over a dollar which both witnesses said they heard him demanding from the deceased. The accused denied pushing the deceased in the line of the oncoming motor vehicle and for the first time shifted the blame, not to the deceased but to the driver of the vehicle that hit the deceased.

We had difficulties in following the accused's position basically for the following reasons.

Firstly, if the driver of the motor vehicle was to blame for this accident, then the accused's defence outline should have clearly stated that. We suspect the accused made this unimpressive effort to lay blame on the motor vehicle driver after realising that owing to logistical challenges the state was no longer able to call the driver.

Secondly, and more importantly the court, having been thoroughly impressed by the credibility of the state witnesses' in telling the story as it happened, had to naturally reject the story told by the accused where it conflicts with that story told by the state witnesses.

Thirdly, if the state witnesses carried any malice against the accused as was implied by the accused's own testimony and the cross-examination of the witnesses, then surely the two witnesses could not have given evidence which was favourable to the accused himself like the acceptance of his drunkenness.

In all the probabilities of this case, we are satisfied beyond any reasonable doubt that the deceased was hit in circumstances described by the state witnesses. We specifically make it a finding of this court that the accused pushed the deceased in the road in the face of an oncoming

motor vehicle and the verdict should not have been an issue if there were no other challenges with the post mortem report as I will briefly deal with hereunder.

The post mortem report does not make it a definite finding that the deceased died as a result of the injuries caused by the conduct of the accused person.

Accepted, the post mortem report noted blunt abdominal trauma as one of the causes of death but we know as a court that the pathologist noted that the deceased also died of septicaemia, which clearly could not possibly have been caused by the accused. We also know from the history of the deceased that he had been suffering from tuberculosis and that he had defaulted his treatment in 2015. This might explain why the deceased was described in the post mortem report under nutrition as “wasted and dehydrated”. The situation becomes more clouded if one accepts reference to amputation of the deceased right elbow.

Under such circumstances it would be extremely difficult for the court to make a specific finding that the accused intentionally caused the death of the deceased. We accept that given the state of the accused and the deceased on the day in question and as testified by the state witnesses, the accused person was recklessly negligent in pushing the deceased in the face of oncoming traffic. A reasonable man placed in the circumstances of the accused would have foreseen the possibility of the deceased getting injured or dying.

The state case has been compounded by the absence of the evidence of Jack Terrence, the driver of the motor vehicle. There are certain issues centred on his driving conduct which would have clarified the circumstances surrounding the deceased’s injuries which the two state witnesses admitted they could not assist the court with.

In the result the accused is found not guilty of murder but guilty of culpable homicide.

## **Sentence**

In sentencing the accused person and in mitigation we will particularly note the following that has been highlighted to us by the accused’s counsel.

The accused is a young first offender burdened by the usual responsibilities of those married offenders of his age.

The accused has suffered 10 months in the form of pre-trial incarceration and that is a form of punishment.

The court acknowledges the moral and material support given by the accused's family to the deceased's family during both illness and bereavement of the deceased.

It has not escaped our minds that both the accused and the deceased were drunk and that in a way the accused's conduct must have been compromised by his state of mind at the time.

By committing this crime the accused has earned himself the stigma of a murderer and he will certainly live with this, that is punishment.

In aggravation and as is clear from our findings the accused's negligence in this case was on the extreme side and borders on recklessness making this case a border line one between murder with constructive intent and culpable homicide. As highlighted in our judgment it was purely because of the technical challenges involved in this case that the verdict had to be lowered to culpable homicide. The sentence must reflect that. As a court we are shocked by the conduct of the accused. Even in the face of a clear indication by the deceased that the deceased had no capacity to hit back the accused, the accused continued to exhibit his appetite for violence against the deceased.

We have noted the total absence of remorse on the part of the accused as this trial unfolded. The accused was even prepared to blame the deceased even in his grave despite him knowing that he played a big part in his death.

The accused's lack of remorse manifested itself in instructing his counsel to project the witnesses as liars which factor he knew or ought to have known could not possibly have been the position.

To push the deceased right in the face of oncoming traffic as found by this court shows complete disregard for life.

The accused has been convicted at a time when there is generally an outcry about the conduct of touts in this country and the sentence imposed must convey the correct message to those of the like mind of the accused.

Given the peculiar circumstances of this case we believe an unusually long sentence of incarceration is called for.

**Sentence:** 10 years imprisonment 2 years of which is suspended for 5 years on condition the accused does not within that period commit any offence involving violence or causing the death of someone and for which upon conviction shall be sentenced to a term of imprisonment without the option of a fine.

**Effective – 8 years imprisonment.**

*National Prosecuting Authority, state's legal practitioners*  
*Dube & Company, accused's legal practitioners*