

THE STATE
versus
TATENDA GUTSA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 29 September, 30 September 2016 and 29 November 2016

Criminal Trial

T Kasema, for the State
N Tsarwe, for the defence (*Prodeo*)

CHITAPI J: The accused was charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The indictment alleged that on 29 July, 2015 at Good hope Farm, Concession, the accused acting with intent to kill or realizing that there was a real risk or possibility that death might result from his conduct, unlawfully struck the deceased Simbarashe Madziva on the head with a wooden stick thereby causing injuries from which Simbarashe Madziva died on 30 July, 2015. When the charge was put to the accused, he responded, “I admit the charge”. Counsel for the accused indicated that the response by the accused did not accord with his instructions and he sought leave to clarify the accused’s admission. Leave was granted. After clarifications, the accused indicated that what he was admitting to was the fact that he struck the deceased with a wooden stick on the head but not that he intended the deceased’s death nor foresaw it as a real possibility. The accused’s plea was recorded as one of not guilty in consequence of the clarification. Defence Counsel confirmed the not guilty plea and the matter proceeded to trial.

State counsel sought the admission of the postmortem report and the certificate of weight of the wooden stick used by the accused to assault the deceased. The two documentary exhibits were produced as exh 1 and 2 after the state and defence outlines had been read into the record and marked Annexures A and B respectively. The post mortem report was prepared by Doctor

Mauricio Gonzalez, after an examination of the deceased's remains on 30 July, 2015. The doctor is employed as a registered Medical Practitioner. His qualifications are legal medicine specialist. He is based at Parirenyatwa Hospital and this is where he examined the deceased's remains. The doctor carried out both an external and internal examination of the deceased's remains. With respect to the external examination, the following observations were made:

- (i) the deceased weighed 80kg and measured 174 cm in height, being a well-nourished African male.
- (ii) a surface wound (6 cm) long on the outer parietal area.

There were no other abnormalities noted.

On the internal examination, the doctor observed the following injuries:

- (i) subgaleal haematoma on the intra parietal area.
- (ii) subarachoid haematoma of the brain.
- (iii) pulmonary oedema in both lungs.

The doctor concluded that the deceased's death was a result of subarachnoid hemorrhage. In layman's terms, this condition refers to bleeding within the subarachnoid space which is the space between the brain and the tissues which cover the brain (See www.healthline.com – accessed on 28 November, 2016). The secondary causes which led to the bleeding aforesaid were recorded as head trauma and assault.

The certificate of weight showed that the wooden stick used by the accused to assault the deceased as 1.55cm long and weighed 830grammes. It is also convenient at this juncture to comment on exh 3 which was also produced by consent. Exhibit 3 was the sketch plan of the scene of the assault or altercation between the accused and the deceased. The relevance of the sketch plan is that it shows that the events which will be outlined below took place within a farm compound and within a radius of between 4 – 5 metres.

The facts of the case are largely common cause. The State and defence counsels discussed the evidence intended to be led by the State. This culminated in the evidence of State witnesses Yotamu Zulu, Selina Masunga, Abeshel Mundandishe and Learnmore Garanowako as outlined in the State summary of witness evidence being admitted by consent.

Yotamu Zulu is a farm security guard at Good Hope Farm where the incident accrued. The deceased was his workmate. He tried to dress the deceased's wound after the assault. He also took possession of the wooden stick, exh 2. He also made indications to the police at the scene on 31 July, 2015. His indications are described in the sketch plan, exh 3.

Selina Masunga is a primary care nurse at Belgone Clinic in Mazowe. The deceased was brought to the clinic when she was at work. She dressed the deceased's wound and thereafter referred the deceased to Concession District Hospital for further management or treatment. This was on 29 July, 2015, the date of the assault.

Abeshel Mundandishe is a general nurse stationed at Concession District Hospital. He was on duty on 29 July, 2015 when the deceased was brought to the hospital. He observed a deep bleeding cut on the deceased's scalp and the deceased was unconscious. He sutured the wound and administered 1 gram of roceplin injection on the deceased intravenously. The deceased was referred to Parirenyatwa hospital in Harare.

Garanowako Learnmore is a doctor stationed at Concession District Hospital. He also examined the deceased whose blood pressure and pulse were normal. He however observed that the deceased was not responsive to stimuli, had impaired consciousness, dilated pupils and sluggish response to light. He then referred the deceased to Parirenyatwa Hospital after reaching the conclusion that the injury to the deceased's head was severe and required further specialist management. The above sums up the admitted evidence.

The State led evidence from four witness. These were, Lameck Ngoro, Smart Kamhuka, Constable Luckmore Simbanegavi and Assistant Inspector Chikosha (retired). It is not proposed to individually deal with the evidence of each of the witnesses. The first two witnesses were civilians who were at the scene of the altercation and subsequent assault on the deceased by the accused using the wooden stick. The two police witness were involved in the investigation of the case. It is therefore convenient to collectively summarize the evidence of the civilian witnesses and similarly that of the police witnesses. There are no areas of conflict in the evidence save as may appear from the summary herein following.

From the evidence of the civilian witnesses, the following material evidence is captured as a summary of what they testified to:

1. The accused and Smart Kamhuka were resident at Audikraal Farm. It is a neighbouring farm to Good Hope Farm where the altercation between the deceased and the accused took place. The two are friends or acquaintances having grown up together at Audikraal farm where they were brought up by their parents.
2. On the fateful day the two went to Good Hope Farm. They each carried a satchel.
3. On arrival at the Good Hope Farm compound, the deceased approached them and demanded to search their satchels. The witness Smart Kamhuka submitted to the search. The accused resisted the search and enquired of the deceased why he wanted to search them whether the deceased was a police officer and challenging him to produce his identity card.
4. The deceased did not appear to have taken lightly to being challenged on his authority. He then slapped the accused on the cheeks. The accused remonstrated with the deceased as to why the deceased was slapping him and whether the deceased had authority to assault him. The deceased held the accused by the collar as he slapped him.
5. The deceased then let go of the accused and went to sit by a tree nearby. The accused upon being released by the deceased picked a wooden stick from a pile nearby and immediately followed the deceased where he sat. He struck the deceased once with the stick on the head. From the indications by the witness Smart Kamhuka as depicted on the sketch plan exh 3, the accused picked up a wooden stick from a pile which was 1 metre from where he had been released by the deceased who had been assaulting him and the accused moved 4 metres to where the deceased sat and struck the deceased with the stick.
6. The deceased slapped the accused about 4 times and was shouting at the accused asking why the accused was refusing to be searched and what was in the bag or satchel. The accused was provoked by the clapping and he was crying. The deceased was bigger than the accused in stature. The deceased did not dodge or block the blow with the stick because the accused's reaction was spontaneous with the deceased not having anticipated the blow. The witness Kamhuka did not see the accused pick up the stick from the pile but he saw him throw it down after assaulting the deceased with it. The witness Kamhuka testified that the accused's actions were in retaliation to the assault. The incident did not take long, presumably 2 minutes according to the witness, that is from the time the

- deceased was clapped by the accused, his picking a stick after being released and his striking the deceased on the head.
7. The deceased fell down after being struck with the wooden stick. Water was poured on him. A report was made to the witness Lameck Ndoro, a security guard and deceased's workmate. He attended the scene and found the deceased barely conscious. The deceased was bandaged on his head and taken to the local clinic with a concerned accused in attendance supporting the deceased on his lap.
 8. The accused and Kamhuka were visiting Good Hope Farm to pay a visit to the accused's relative. The satchels they carried were meant to carry vegetables on their way back. In searching the witness Kamhuka the deceased said that he was a police officer and there were persons coming to the farm to steal and that such people carried satchels. The witness Kamhuka submitted to the search unlike his colleague, the accused, who wanted the deceased to identify himself as a police officer first before agreeing to be searched.
 9. The police officer's evidence was on the peripheral. They received the assault report, referred the deceased for treatment by completing the requisite written requests for the deceased to be treatment, charged the accused, recovered the exhibit and had it weighed, drew a sketch plan, recorded witness statements and took the accused to court.
 10. The accused gave evidence in his defence. He said that he had a misunderstanding with the deceased when he visited his maternal aunt at Good Hope Farm. He testified that the deceased demanded to search his satchel and asked what was in it to which the accused responded that there was nothing in it. The deceased started to assault him with open hands on the face whilst holding him by the collar.
 11. The accused testified that he did not know the deceased prior to the incident nor the fact that he was a farm security guard. He said that he was slapped twice with so much force that his cheekbones were painful.
 12. He said that he thought that the deceased wanted to steal from him when he demanded to search the accused's satchel because the deceased did not identify himself but only insisted on searching the accused's satchel.
 13. He said that after the deceased has assaulted him, he released him and sat down. He immediately picked up a stick from a pile of wooden sticks which was about 1 metre

away and struck the deceased with it. He testified that he hit the deceased with the stick because he was angered and provoked by the assault upon him. He said that he never thought of fighting back without using a weapon. He also testified that women within the compound were telling the deceased not to assault him. He said he is the one who rushed to tell Lameck Ngoro about what had happened and Lameck Ngoro placed him under arrest.

14. Under cross examination the accused said that he knew Lameck Ngoro as a guard at this farm because Lameck Ngoro used to visit the farm where the accused resided. He did not know the deceased as one of the guards and he met him for the first time on the date of the incident. The accused said that his reaction in assaulting the deceased was spontaneous and when he reacted and struck the deceased, the deceased was in the process of sitting down. He did not anticipate that his actions would result in tragedy.
15. Asked why he used a stick and why he aimed for the head, he responded that he picked on a weapon because the deceased was bigger than him. He denied aiming for the deceased's head and said that he did not take time to think of which part on the deceased's body to hit. He just hit out with the stick which he just picked up when he looked behind him and saw some sticks.
16. Asked the crucial question as to why he did not run away upon the deceased stopping the assault on him and releasing him, the accused said that he did not think about it. He agreed that he used excessive force but that he acted in anger.

The above summation constituted the State and defence evidence in this trial. The court has to decide whether the accused intended to kill the deceased or foresaw the real risk of causing the deceased's death. Both questions must be answered in the negative. The objective facts of the matter clearly show that the deceased is the one who authored the unfortunate events of the day by first assaulting the accused who was resisting being searched until the deceased had produced his authority and identity. The deceased felt challenged and decided to show his authority through the use of force. He held the accused by the collar and assaulted him with open hands on the face twice although State witness Kamhuka said that it was 4 times.

The accused pleaded the defence of provocation as an excuse for his conduct. State counsel referred the court to the case of *S v Masina* 2010 (2) ZLR whilst the defence counsel referred to the case of *State v Nangani* 1982 (1) ZLR 150 (s). Nangani's case though not irrelevant must be considered against the backdrop that the defence of provocation to a murder charge has since been codified under s 239 of the Criminal Law Codification and Reform Act. The sections read as follows:

“239. When provocation a partial defence to murder

- (1) If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realisation referred to in section *forty-seven*, the person shall be guilty of culpable homicide if, as a result of the provocation-
 - (a) He or she does not have the intention or realisation referred to in section *forty-seven*; or
 - (b) He or she has the intention or realisation 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 or her self-control.
- (2) For the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that –
 - (a) He or she did have the intention or realisation referred to in section *forty-seven*; or
 - (b) The provocation was not sufficient to make a reasonable person in the accused's position and circumstances lose his or her self-control;the accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided in section *two hundred and thirty eight*.”

The upshot of s 239 is that where in a murder charge the court finds that the accused was provoked and acted under provocation, he will escape conviction on the principal charge of murder but will be liable to be convicted on the lesser charge of culpable homicide. In order that the provocation reduces the conviction to culpable homicide, the court should be satisfied that the nature of the provocation was such as negated the accused's intention to kill or realise that his action could cause death. If not, and the accused is held to have had such intention or realization, he or she will still be guilty of culpable if the court is satisfied that the accused lost his self-control and the nature of the provocation would lead a reasonable person in the circumstances which the accused was subjected to, to lose self-control.

An analysis of the above would therefore mean that the first rung is subjective. If the court finds that the accused did not have an intention to kill or to that he did not realize the real risk that his action may result in death because of the provocation, a verdict of culpable homicide is returned. The court focuses on the accused and the nature of the provocation and decided whether he or she became incapable of forming the intention or the realization. If it rules so, the

court returns a guilty verdict to culpable homicide. If however get court finds that the accused did have the intention or realization aforesaid but that he lost self-control when he acted because of provocation, the court will consider the nature of the provocation and all the surrounding circumstances of the commission of the offence. The court then considers whether a reasonable person placed in the shoes of the accused would have lost self-control taking into account the nature of the provocation. If it answers the question in the affirmative, again a guilty verdict to culpable homicide is returned. The second rung of the test is therefore an objective enquiry. The section then provides that where both rungs are answered in the negative but provocation was nonetheless present, such provocation is to be treated as a factor in mitigation.

In casu, the court has come to the conclusion that the accused did not have any intention to kill the deceased. He also did not realize a real risk or possibility of his actions resulting in the death of the deceased. The accused was provoked by the deceased who assaulted him first for questioning the deceased's authority to search the accused as well as asking the deceased to identify himself. The accused was assaulted in a show of power and in the open compound where bystanders were telling the deceased not to assault the accused. The accused acted on the spur of the moment and acted in anger by grabbing the nearest weapon which he saw, being the stick. His retaliation was immediate and not measured nor aimed at any particular part of the deceased's body. The reaction was spontaneous and unfortunately the blow landed on a vulnerable part of the deceased's death. The accused simply retaliated in a split of a second following the assault and humiliation which the deceased subjected him to. The accused is therefore liable for the lesser verdict of culpable homicide.

Even if the finding of lack of intention is not supportable, it is the finding of the court that the nature of the provocation which the accused was subjected to and felt was such that a reasonable person placed in like circumstances would have lost self-control. Therefore applying the objective test, the conclusion would still remain the same that the accused would be liable to be convicted on the lesser charge of culpable homicide.

In the circumstances the courts verdict is follows:

“The accused is found not guilty of murder as defined in s 47 of the Criminal Law (Codification and Reform), Act [Chapter 9:23]. The accused is however found guilty of culpable homicide pursuant to the provisions of s 239 (1) of the same Act.”

Sentence

The court will consider the triad of the personal circumstances of the accused, the circumstances of the offence and the interests of society. This was indeed a tragic incident. It is not easy to assess an appropriate sentence in the circumstances of this case. A life was lost. The loss of human life resulting from a crime of violence is a serious matter. Society frowns on such cases. The sanctity of human life must be respected lest society goes back to the dark ages. The constitution guarantees the right to life and all other rights flow from this right. It must rank as the number one right.

The deceased is the one who first assaulted the accused for reasons which would appear not to be justifiable. The accused resisted a search by the deceased whose identity he did not know. The deceased thought that his authority was being challenged. He decided to demonstrate his authority by a show of power. He assaulted the accused instead of simply identifying himself and justifying the search. The accused was overcome with emotion following the humiliating assault on him. He acted spontaneously without thinking. He decided to retaliate or hit back. He used a weapon which was nearest to him and struck the deceased once on his person without checking or aiming for any particular part of the body. The one blow landed on the deceased's head and the rest as the saying goes is history. A life was lost.

From the circumstances of this case, the degree of provocation shown by the deceased was high. He is the one who resorted to violence first. This notwithstanding, the accused was not justified to also turn violent. Indeed two wrongs do not make a right. The accused should have kept his emotions in check. Although the accused reacted by using a weapon, his degree of culpability was slight. He acted on the spur of the moment. The consequences were unintended and unforeseen. The deceased was older, heavier and stronger than the accused hence the accused's use of a weapon.

The accused is a youthful first offender aged 20 years old. He has been in custody since July, 2015 when he was arrested. This period of incarceration has made him to see that crime does not pay. He will live with the stigma of having killed another person. The accused is unsophisticated. He only did grade 7. His youthfulness no doubt contributed to his failure to control his emotions and overreacted. The considerations in the case of *State v Tamolin Lamola* HB 144/15 have guided the court in assessing an appropriate. No other form of punishment other

than imprisonment presents itself as appropriate for a case of culpable homicide involving violence or the use of a weapon. In the cited case, a sentence of 2 years imprisonment with 1 year suspended on conditions of good behaviour was imposed. In *casu*, the accused needs to be deterred as well as like-minded persons.

The court will therefore pass a sentence that will be retributive and deterrent taking into account the extent to which the accused deviated from the standard of care expected of a reasonable person in the position he was subjected to. The deceased was almost twice the accused's age. Youths are not expected to go about retaliating against their elders. One is expected to make good one's escape than standing one's ground. Whilst the harm is irremedial, which unfortunately is the nature of death, the court is still required to achieve a proper balance after considering all the relevant factors. In the circumstances of this case, a wholly suspended prison term will be appropriate.

The accused is sentenced as follows:

3 years imprisonment wholly suspended for 5 years on condition the accused is not within that period convicted of an offence involving violence upon another person for which he is sentenced to imprisonment without the option of a fine.

Tadiwa & Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners