THE STATE
versus
NAISON CHAYAMBUKA
and
MOSES MUSUSA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 21 and 22 & 23 February 2017

Murder trial

A Masamha, for the State
I Goto, for the 1st Accused
O Marwa, for the 2nd Accused

TSANGA J: The two accused were arraigned before this court on a charge of murder it being alleged that on the 1st of January 2016 around 00.30 hours at Home Plus bottle store in Bromley NRZ Quarters, they unlawfully and intentionally murdered Blessing Tondodza by head butting, kicking and assaulting him with a jacaranda switch and a metal fluorescent lamp holder on his head thereby causing injuries from which the said Blessing Tondodza died.

The first accused tendered a limited plea of guilty to culpable homicide whilst the second accused had changed his mind and applied for separation of trials on account of his election to proceed with the murder trial. The separation was granted and the state proceeded with the limited plea in relation to the first accused but did not address mitigation and aggravation pending the finalisation of the trial of the second accused.

However, overnight the second accused had a change of heart regarding proceeding with the murder trial, opting instead to proceed with the limited plea. His counsel, Mr *Marwa* explained that he had been summoned by prisons at the behest of the second accused who now wished to tender a limited plea of guilty with respect to culpable homicide. The state conceded to the application in view of its position that from the facts, the second accused was clearly guilty in his actions of the lesser crime of culpable homicide. This court granted the

application by the second accused to change his plea as it was of the view that on the facts it was indeed properly made.

The statement of agreed facts (Annexure 1) as applicable to both accused in light of their limited plea, though initially dealt with separately *mutatis mutandis* were as follows:

1. The first accused Naison Chayambuka resides at NRZ Quarters, Bromley Goromonzi whilst the second accused Moses Mususa reside at Bromley Tobacco Graders Compound, Goromonzi.
2. The deceased Blessing Tondodza was a male adult and resided at Adiusa Farm Bromley.
3. On the 1st of January 2016 both accused persons and the complainant were patrons of Home plus Bottle Store Bromley together with other revellers.
4. One of the patrons Prosper Matseketu picked an argument with the bar lady, Catherine Shava over US$0.50 change which deceased said he was owed. The argument escalated ending in the first accused intervening in a bid to verify. As the first accused was interrogating Prosper Matseketu the deceased confronted him.
5. The deceased then struck the first accused with a fist once on the face and the first accused reacted by head butting the deceased three time on the face. The deceased then struck the first accused with a water glass before he bolted out of the bottle store with the first accused in hot pursuit.
6. The second accused Moses Mususa joined in the chase and the two caught up with the deceased at NRZ Bromley Quarters. The second accused who was armed with a fluorescent light metal holder struck the deceased once in the head. The accused also kicked the deceased on the head as deceased lay on the ground. Other people who had followed the parts pleaded with the accused persons to stop assaulting the deceased. They complied.
7. The deceased died on the spot and post mortem report was later conducted on 7 January 2016 by Dr Pesanayi. He concluded he cause of death as follows:
8. i) haemorrhagic shock
   ii) stab wounds and
   iii) assault

The following exhibits were produced by the State in the following order:

a) The post mortem report (Exhibit 1)
b) The confirmed warned and cautioned statement by the first accused (Exhibit 2)
c) The sketch plan (Exhibit 3)
d) The confirmed warned and cautioned statement by the second accused (Exhibit 4)
e) The metal fluorescent lamp holder (Exhibit 5)
f) The jacaranda tree switch (Exhibit 6)

It was agreed that the accused persons negligently caused the death of the deceased.

Both defence counsel confirmed that all the essential elements of the culpable homicide had been explained to the accused who had understood them and that the limited plea of guilty to culpable homicide was genuinely made. The court in both instances returned a verdict of guilty to the lesser charge of culpable homicide as pleaded.

The defence counsels addressed the court on mitigation. The first accused was said to be a family man with three children aged 6, 3 and 2. He was aged 24 at the time he committed the offence, he is also a young first offender and as such it was urged that he

should be treated with leniency. The cases of *S* v *Mpofu* 1985 (1) ZLR at 255 *and S* v *Muchimikwa* 1985 (2) ZLR at 328 were cited in support of this contention. The fact that he did not waste the court's time in that he pleaded guilty to culpable homicide was also said to be a factor which should weigh in his favour when it comes to sentencing him in that in so doing he facilitated the smooth administration of justice. (*S* v *Katsaura* 1997 (2) ZLR at p 102). Additionally the fact that the offence was not premeditated but rather one that arose from an act of provocation was equally regarded as a factor to be stirred into the pot of leniency.

The court's attention was drawn to the case of *S* v *Silent Kazembe* HH 378 /15 in which the court held that provocation of the lack of premeditation should not be ignored when determining an appropriate sentence. In that case which had come on review from the lower court that the latter had imposed a sentence of seven years imprisonment. On review, the court in analysing mitigatory factors reduced the sentence to three years. Mr *Goto* highlighted however that in that case the accused had compensated the deceased's relatives and assisted at the funeral - factors which may have further nudged the court towards a more lenient altered sentence. The accused herein was said not to have been in a position to render such assistance because he was in custody at the time of the funeral. The case of *S* v *Nhongo* HH 52/03 where the accused were sentenced to 7 years for each count for culpable homicide arising from a provoked assault was also drawn to this court's attention. Accordingly, Mr *Goto* deemed a sentence of six years imprisonment with one year suspended on the usual conditions to be appropriate in the present circumstances.

Accused number two was equally said to be a family man with two minor children age d 8 and 5. He was 25 at the time of the offence. His 22 year old wife was said to be unemployed. The court was asked to take judicial notice of the circumstances he grew up in order to explain his moral turpitude. He grew up in a farming community and was orphaned at an early age. He was employed as a tobacco grader at a farm where he lived with his family. On the night in question, being New Year's Eve, he had revelled with members of the community and had imbibed a considerable amount of opaque beer. The resultant inebriation therefrom is said to have clouded his better judgement.

In the frenzy of the moment he had weighed violently in dispute between the first accused and the deceased. The spot light was also placed on the fact that he had spent almost 8 months in custody before he had been released on bail. Following his indictment in November he has been in custody. It was highlighted that he has therefore effectively done

almost a year of incarceration - a factor which it was said ought to be taken into account in sentencing him. His plea of guilty to a lesser charge though delayed by prevarication was said to be one genuinely made. The case of *S* v *Nhongo* (*supra)* was equally drawn upon to highlight the sentence in that matter. The case of S v *Makombe* HB 110 /15 in which the deceased pleaded to culpable homicide and received a sentence of 36 months with 18 months suspended was also mentioned. He had slapped the deceased who had hit his head on hard surface. Additionally, the case of *S* v *Matuke* HH 165 /16 was said to be of relevance. Therein a 23 year old accused had committed an offence whilst still 20 when he had struck the deceased with a log. In essence Mr *Marwa* argued on behalf of the second accused that the range of sentencing in cases of this nature was between 5 to 8 years with the actual sentence depending on the circumstances of each case. A non-lengthy custodial sentence of six years with two suspended was urged.

The state in turn addressed the court on aggravation. Mr *Masamha* highlighted the convergence of the personal circumstances of both accused in terms of age and family realities. The inebriation of the accused persons as contributing to the offence was noted but at the end of the day he emphasised the sanctity of human life which had been lost.

In aggravation, he highlighted that the deceased had managed to make good his escape from the scene of the scuffle but had been followed in a determination to cause him harm. The injuries he had sustained had been serious as evidenced by the fact that he had died almost instantly from the assault. The post-mortem report also spoke to the gravity of the injuries being the cause of death. As such he placed emphasis on the fact that had it not been for the actions of the accused persons, death would not have occurred. Equally aggravatory was deemed to be the absence of compensation of any sort paid to the deceased‘s family in keeping with cultural expectation where a loss of life has been inflicted. This was said to be indicative of a lack of contrition on the part of both accused persons. Furthermore, no assistance had been rendered to the deceased following the assault. He was left still alive and died thereafter. *S* v *Jaure* 2001 (2) ZLR 393 was drawn on the need for assistance as an act of repentance. Furthermore, as regards the second accused, Mr *Masamha* argued that far from his time in custody justifying a somewhat lesser sentence to first accused his moral blameworthiness was said to be higher in that it was him who had struck the deceased with the metal fluorescent light pole and the jacaranda switch stick. The first accused on the other hand assaulted him with booted feet. He therefore argued that the two at the end of the day should still be treated equally even whilst taking into account the longer time spent in custody

by the second accused. Whilst a plea of guilty was acknowledged as a persuasive factor for a lenient sentence, he argued that both accused had started on the deep end of the pool.

In urging for a crisp penalty Mr *Masamha* argued that it behoves the courts to play their role in public order by meting out a sentence that maintains public confidence in the justice delivery system. Given the rising incidents of murder in society and to dissuade the public from taking the law into their own hands, a rehabilitative stint in prison was as inevitable. The sentence he prayed for as sufficient to meet the justice of this case was 8 years with two suspended.

Reasons for sentence

When people are unlawfully killed no doubt it aggravates the offence. I am in agreement that the courts need to send a firm message about the dangers of resolving disputes through violence. The courts should not encourage a culture of violence as a dispute resolution mechanism. As stated in the case of S*tate* v *Bonginkosi Sibanda* HB 91-12, sentences imposed must send a clear signal to society that violence of individuals against other human beings is not tolerated and that society needs to be protected against unlawful attacks on other persons. When a lack of diligence to prevent or respond to interpersonal violence is apparent, then the courts as organs of the state responsible for passing effective sentences could be found wanting. Not only is interpersonal violence an obstacle to peace and security but it is also crucial that it be discouraged in the strongest terms as a considerable amount of resources both legal and social that could be used for constructive programmes end up being diverted towards addressing issues arising from such violence.

Having said, there should always be a balancing act because it is still crucial that the punishment of any accused person fits the crime and the offender. As stated in the *S* v *Shoriwa* 2003 (1) ZLR 314 (H):

> " Whatever the gravity of the crime and the interests of society, the most important factors in determining the sentence are the person, and the character and circumstances of the crime: *S* v *Dualvani* 1978 (2) PH, H176 (O). *T*he determination of an equitable quantum of punishment must clearly bear a relationship to the moral blameworthiness of the offender. However there can be no injustice where in weighing the offence, offender and the interests of society, more weight is attached to one or the other of these, unless there is overemphasis of one which leads to disregard of the other…."

Also in arriving at an appropriate sentence this court cannot lose sight of the fact that culpable homicide is ultimately a crime in which the perpetrator is unaware of the substantial and unjustifiable consequences that will result from his actions. As defined in s 49 (a), a

person who negligently fails to realise that death may result from his conduct is guilty of culpable homicide. Also, even where a person realises that death may result from his or her conduct it is the negligent failure to guard against such conduct that gives rise to culpable homicide. The point is ultimately in such circumstances a person is less culpable.

I turn now to the state's counsel's proposition that in deciding on the appropriate sentence some weight should be attached to the fact that neither of the accused have paid any compensation to the deceased's family and neither did they assist in burying the deceased. State prosecution is indeed at the core of the official criminal justice system in bringing those who commit crimes to book. It is just as true that criminal prosecutions in the context of the official law are not the sole determinants of justice. Influenced by deep seated customs and traditions people often draw on their own norms of compensation where there has been a killing. These norms centre on reparations rather than retribution. (See *S* v *Kazembe* above where the accused had assisted at the deceased's funeral with cash and a beast and had also been charged three beasts a compensation).

There are clearly positive aspects in the conscious effort to incorporate aspects of the traditional justice system in the formal criminal justice system in the state's reasoning on sentence. It increases the legitimacy and relevance of the criminal justice system as a whole in a context where parallel systems of law in essence remain very real in the lives of the people. But there is also need to appreciate the fuller picture. It is important to recognise that the wider family as opposed to the accused is often at the centre of these payments. *In casu* accused were said to be young and would hardly have accumulated any assets of their own. No doubt the harsh economic climate will have had an impact on the ability to pay. As such poverty *per se* should not be a reason for imposing a harsher sentence. In any event, the payment of reparation under customary norms is not time bound. The sins of the father are said to affect generations. Also too lengthy an incarceration for culpable homicide, founded as it is on negligence and recklessness as opposed to actual intention to kill, would merely delay the accused's availability to put into motion that which the official justice system does not achieve.

In any event, in reality neither the state nor the defence counsels are very far off from each other in their suggestion of the ultimate sentence to be imposed. There is at most a difference of two years. A comfortable medium between the two sentences would be accommodative of the genuine concerns raised by each side. In imposing sentence this court is also cognisant of the need not pay lip service to the fact that the accused are first offenders.

I am in agreement with defence counsels as well as the state that the sentence range in such cases is indeed anything from 6-8 years.

I am in agreement with the State that on balance there is no compelling reason for giving the second accused a lighter sentence at this point from the first accused when he in fact played a somewhat weightier role in negligently causing the death of the deceased. In giving both the same sentence, this court shares the view that the year second accused is said to have already served whilst awaiting trial, effectively compensates for his weightier role.

Accordingly each of the accused are sentenced as follows:

Seven (7) years imprisonment of which 2 years is suspended for five years on condition accused is not within that period convicted of an offence of which violence is an element and for he is sentenced to imprisonment without the option of fine.

Effective sentence: 5 years imprisonment.

Criminal Division, National Prosecuting Authority Office, State's legal practitioners
Muunganirwa & Company, 1st accused's legal practitioners
Rubaya & Chatambudza, 2nd accused's legal practitioners