

THE STATE
versus
JAMES MUGARAPANYAMA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 23, 24 & 25 January 2023, 2 & 3 March 2023

ASSESSORS: Mr. Shenje
Mr. Gweme

Criminal trial

A Masamha, for the State
L Mungeni, for the accused

MUREMBA J: The accused pleaded not guilty to the charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (The Criminal Law Code).

The allegations are that on 14 August 2022 and at Mount Pellia Chikwepa Business Centre, Macheke, the accused unlawfully assaulted Godfrey Kasambwe on the head and all over his body with a log thereby causing him injuries from which he died on 19 August 2022. It is alleged that the accused intentionally caused the deceased's death.

In denying the charge, the accused in his defence outline stated that he assaulted the deceased because the deceased had approached him first at 6am and accused him of taking firewood belonging to Kudzanai Kachembere. The deceased then threatened to assault him and was restrained by Kudzanai Kachembere. At around 1200 hours the deceased approached him again and grabbed him by the throat and strangled him. One Mudhara Don witnessed this. Mudhara Don together with other people who were gathered restrained the deceased. The accused said that he then went to his shop at the same business centre. At 4 pm he went to sit in the shade at Janet Sandiforo's shop. He sat next to Janet Sandiforo. The deceased came to the shade and started hitting him with clenched fists. The accused said he then retaliated to the continued provocation and a fight ensued between him and the deceased. Several blows were exchanged before the accused grabbed a wooden gum pole from the deceased and hit the

deceased on the head and shoulder with it in self-defence before being restrained by Kudzanai Kachembere.

The State's evidence

The State produced the post mortem report which states the deceased's cause of death as "brain damage, epidural haematoma in right hemisphere and severe head trauma secondary to assault". The State also produced the accused's confirmed warned and cautioned statement wherein the accused admitted to murdering the deceased by striking him with a wooden log. The accused also went on to say the following. The deceased had assaulted him first at around 6.00 hours and he did not retaliate. The deceased came back again at around 1200 hours, strangled him and he did not fight back. At around 1600 hours the deceased came back again and punched him twice with fists accusing him of having taken Mr Kachembere's firewood and giving it to some people. The accused said that he realized that the deceased would continue to assault him throughout the day. So, he (accused) then pulled a gum wooden pole or a log from a fireplace and followed him (deceased) to where he was standing. He struck him twice on the head and on the shoulder before being restrained by Nyakabawo and Kachembere. The accused said that he then went home and learnt of the deceased's death later.

The State also produced by consent the sketch plan which was drawn by the investigating officer Sergeant Gondongwe. This was drawn following the indications that were made by the accused and the State witnesses at the scene. The points that the accused indicated were the same points that the State witnesses indicated. The accused indicated the shade where he said he took the wooden log which he used to assault the deceased with. The accused also indicated the point where he said he assaulted the deceased. That point is 30 metres from where he had taken the log.

The State also produced the log that the accused used in assaulting the deceased. It was a big and heavy log weighing 1.68 kilograms and 1.77 metres long. It was very thick.

The State led *viva voce* evidence from Janet Sandiforo; Shadreck Nyakabawo and Joseph Gondongwe.

Janet Sandiforo said the following. She was seated with her friend at her shade around 10am when the accused and the deceased arrived arguing. They were drunk. The accused had a bottle of beer on his person. She asked the two what the problem was. The deceased said that the accused had taken his beer whilst the accused was denying it. The deceased then took some soil which he threw onto the accused's face. He also hit the accused twice on the mouth with

clenched fists. The deceased then stood up and left the place. He went behind the shop. The accused stood up and took a log from the shade. As he was pulling the log, he said that he was going to retaliate. He then followed the deceased behind the shop. Fearing that the accused might injure the deceased, Janet Sandiforo said that she then decided to follow the accused. When she followed, she found the deceased lying on the ground. He had been struck by the accused. People had started running to the scene. Mr Nyakabawo was one of them. He restrained the accused by taking the log from him. People then called the deceased's name and he then rose and walked to the witness's shade. Although the witness did not see any injuries on the head, the deceased said that he had been injured in the head. The deceased asked the witness to phone his relatives so that they could come and collect him. His young brother and sister came and collected him.

During cross examination the witness was adamant that at the shade the accused and the deceased never fought. Instead, it is the deceased who struck the accused twice on the face with a clenched fist and walked away. The witness said that she observed that the accused's mouth turned red when he was struck by the deceased. He then followed the deceased after about 5 minutes with the log. The witness did not witness the accused assaulting the deceased. She arrived at the time the accused was now being restrained. This witness gave a clear and straight forward account of what she witnessed. She remained unshaken under cross-examination. She impressed the court as a credible witness.

Shadreck Nyakabawo was not an eloquent witness but the gist of his evidence was as follows. He was passing through the business centre going to his home when he saw the accused striking the deceased twice on the back of the head with a log. When the deceased was struck for the first time he was standing. The deceased did not see the accused approach him as he was facing the other side. He fell down upon being struck. The accused struck him again on the back of the head as he was lying down. When the accused wanted to strike for the third time, he made utterances that he would kill someone. He said killing was not new to him as this is what he used to do as an artisanal miner. The witness said that when he observed that the accused wanted to strike for the third time, he advanced and restrained him by holding the log. He said this was around 11am. The witness said that he had not been present when the altercation between the accused and the deceased started. Although this witness was not eloquent, his evidence was not really discredited.

Joseph Gondongwe, the investigating officer also testified. He gave a narration of the investigation that he did. He visited the scene and recovered the murder weapon which he took for weighing and measurement. He said that he investigated the accused's defence that he had been assaulted by the deceased in the presence of other people but he secured no witnesses to corroborate or confirm the accused's version. The witness said that he interviewed one Kudzanai Kachembere who distanced himself from the incident the accused was talking about. He said that he perceived nothing. The accused was not able to mention any other names of people who had witnessed what he had said. The witness said that he had learnt from his investigations that the incident of the accused assaulting the deceased had happened at 11am.

The accused's evidence

The accused was the sole witness for his case. He adopted his defence outline as part of his evidence-in-chief. He maintained that the deceased had tried to attack him in the morning at 6am in connection with the firewood which he was saying the accused had taken. He said Mr Kachembere had restrained the deceased. However, the problem is that this Mr Kachembere was not called as a defence witness to confirm the accused's story. This is the same Mr Kachembere who told the investigating officer that he had seen nothing. The six o'clock incident that the accused talked about was therefore not confirmed by anyone.

The accused said at 12 noon the deceased approached him once again and held him by the neck and throttled him. However, the accused was not able to call any witness to confirm this incident. He said that the deceased then followed him again at 4pm at Janet Sandiforo's shade. The deceased hit him twice with a fist and threw some soil onto his face. This confirms what Janet Sandiforo told the court. The accused said that when this happened, he became very angry resulting in him retaliating. The two then started fighting. The accused said that the deceased then took a log from the shade and hit him with it behind the right shoulder. The accused said that is when he forcibly took the log from the deceased. The two started wrestling for the log. The accused said that blood started coming out of his mouth and he was feeling pain in his mouth. He said that he then struck the deceased angrily without foreseeing that he would be injured. He said that he hit the deceased twice on the shoulder with the log. He denied striking the deceased on the head. The accused then changed and said that he was just hitting the deceased without seeing where he was hitting him because of anger. The accused also denied that he had made utterances that he would kill someone and saying that he was used to killing people at the mines. The accused said that when they were fighting, they pushed

each other and ended up at a place which was about 15 metres away from where the fight had started.

The accused said that he was moderately drunk on the day in question because he was actually doing work at his shop where he does carpentry. When asked whether he was conscious of what he was doing, the accused then said that he was slightly drunk and knew what he was doing. He said that he had taken three Super beers, but initially he had said that he had drunk only one. The accused ended his testimony by telling the court that he had sold his beasts and rendered financial assistance to the deceased's family for the treatment of the deceased before he died.

The accused did not impress the court as a credible witness. During the defence case he said a number of new things that were inconsistent with what Janet Sandiforo a witness for the State said yet Janet Sandiforo was never asked to comment on these things when she testified for the State. For instance, the accused said that the log was pulled by the deceased when Janet Sandiforo had gone into the shop. Janet Sandiforo was not even challenged when she said that it was the accused who had pulled the log. She was not challenged because she had told the truth. This is confirmed by what the accused said in his confirmed warned and cautioned statement. He said that he is the one who pulled the log and followed the deceased. In the warned and cautioned statement, the accused never said a fight happened between him and the deceased. Instead, he said that he struck the deceased twice on the head and on the shoulder yet in court he was now saying a fight occurred between him and the deceased. He tried to distance himself from the contents of his statement saying that he cannot read. He said that the police officers told him that he would say everything that happened in court. He denied saying some of the things contained in his statement. He then changed and admitted that he had told the police that he had struck the deceased twice on the head and on the shoulder. It was clear to the court that the accused was not being truthful. He was just trying to find excuses to save himself. This warned and cautioned statement was actually confirmed at the magistrates' court. The confirmation shows that the contents of the statement were a true reflection of what he had told the police. Janet Sandiforo's evidence is further confirmation that the contents of the accused's warned and cautioned statement were true. The two are identical in all material respects in as far as they relate to the incident that happened at Janet Sandiforo's shade. The two show that it was the accused who pulled the log and not the deceased. They also show that no fight happened between the accused and the deceased.

The accused also admitted that he made indications to the police at the scene of crime. The accused denied that he had the intention to kill the deceased. He said that he acted out of extreme anger and things were now just happening on their own when he was assaulting the deceased. Put differently, the accused was simply saying that he had now lost control because of anger.

Analysis

From all the evidence led before the court it is clear that the altercation that led to the accused severely assaulting the deceased was as narrated by Janet Sandiforo and as confirmed by the accused in his confirmed warned and cautioned statement. In short, the deceased threw some soil onto the accused's face and struck him twice on the face with clenched fists. The accused did not retaliate there and then. The deceased left the place whereupon the accused decided to pull a log in order to follow the deceased and retaliate. The accused followed after about 5 minutes and went on to strike the deceased on the head with it twice. He was restrained when he was about to strike the deceased on the head for the third time.

The accused's defence is simply that of provocation. Citing the provisions of s 239 of the Criminal Law Code which provides for the defence of provocation, Mr *Masamha* for the State submitted that the circumstances in the present case were such that the accused lost self-control. He had been assaulted and wanted to revenge. He was also intoxicated notwithstanding the fact that the intoxication was self-induced. Mr *Masamha* went on to cite the case of *S v Edward Gumbo* HB 119/18 saying that the court in that case reduced the charge of murder to culpable homicide after it was found that there was hurt and anger that had been brewing in the accused prior to the date he assaulted the deceased. He also said that the accused was drunk on the day he assaulted the deceased. Mr *Masamha* submitted that the present case is not different and should be treated the same way. Mr *Masamha* submitted that the accused lacked the actual intention to kill the deceased. Mr *Masamha* further submitted that the accused however realized that his conduct may cause death, but nevertheless continued to engage in that conduct. Mr *Masamha* submitted that this was so because he was overpowered by anger and intoxication. Mr *Masamha* submitted that the attack on the deceased was not fatal because the deceased did not die instantly. He further submitted that the conduct of assisting the deceased to get treated is not consistent with the conduct of a person who intended to kill. He went on to submit that cumulatively, the accused negligently caused the death of the deceased. For this he referred to s 49(b) of the Criminal Law Code which provides that "*Any person who causes the death of*

another person realizing that death may result from his or her conduct and negligently failing to guard against that possibility shall be guilty of culpable homicide”.

Mr *Mungeni*'s submissions were similar to those made by Mr *Masamha*. He also relied on the case of *S v Edward Gumbo* cited by Mr *Masamha* in moving for a conviction of culpable homicide. Mr *Mungeni* submitted that the accused *in casu* lacked the actual intention to kill the deceased because of provocation and intoxication. He further said that the rendering of financial assistance by the accused to the deceased's family for the treatment of the deceased was another factor which showed his lack of intention to kill the deceased.

The court is disappointed that the two counsels never took time to do a proper analysis of the defence of provocation as it is provided for in s 239 of the Criminal Law Code. Instead, they chose to simply refer to the *Gumbo* case which they said is on all fours with the present case and urged us to follow the judgment in that case. It is a wrong approach to simply follow a decided case without first analyzing the applicable law, in *casu* s 239 of the Criminal Law Code. The first step is to analyse the applicable law. After analyzing the law, that is when a comparison with a decided case should be made to see whether the cases are similar or distinguishable. Besides, even if the facts of the cases are similar, the court should first satisfy itself that the law was correctly applied before it follows the decided case. So, the approach in following decided cases is not to follow them blindly without doing a proper analysis of the law and the case. We will therefore start by analyzing the provisions of s 239 before analyzing and applying the *Gumbo* case. The provision reads:

“239 When provocation a partial defence to murder

(b) 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 provision provides that provocation can be a partial defence to murder. In murder cases there is a two-stage approach in applying the defence. The first stage is to decide whether the accused had the intention to kill or the realization that death could occur when he or she reacted to the provocation. If the accused did not have the intention or realization, he or she will not be convicted of murder, but culpable homicide. If the accused had the intention to kill or realization that death could occur, the court will proceed to the second stage, which is to decide whether the accused lost his or her self-control and killed the deceased in circumstances where even a reasonable person faced with this extent of provocation would also have lost self-control. If the accused lost control and a reasonable person would also have lost control, the accused will have a partial defence and will be found guilty of culpable homicide: see Prof G Feltoe *Commentary on the Criminal Law (Codification and Reform) Act [Chapter 9:23]* Legal Resources Foundation, 2nd Edition 2012 @p 216.

It is unfortunate that both the State counsel and the defence counsel did not apply this two-stage approach to the facts of the present case. If they had done so, they would have properly guided the court in reaching the correct verdict. Be that as it may, we will apply the two-stage approach to the facts of the case. The question that we pose in the first stage is: did the accused have the intention to kill or have the realization that there was a real risk or possibility that his or her actions could result in the death of the deceased? It is our considered view that in the circumstances of this case, the accused intended or at the very least realized that there was a real risk or possibility that his actions could result in the death of the deceased, but nevertheless persisted with his conduct. We say this because after the deceased had thrown soil onto his face and struck him twice on the face with clenched fists as they were in the shade, the accused remained seated. He did not retaliate and the deceased left the shade and walked away. It was only after 5 minutes that the accused stood up and pulled a big log as he was making utterances that he was now going to retaliate. He then followed the deceased for 30 metres and struck him on the head when he was looking the other side, unaware of the accused approaching. The accused aimed for the head. The deceased fell down there and then upon being struck for the first time. The accused had used a dangerous weapon to strike on a delicate and vulnerable part of a person. If the accused had not intended death, he would not have aimed at the head of the deceased. Besides, the assault did not happen in the heat of the moment because the accused did not retaliate there and then when the deceased assaulted him at Janet Sandiforo's shade. It took the accused about 5 minutes to decide to retaliate. It also took him 30 metres to follow and catch up with the deceased. All this while the accused formed the

intention to kill the deceased which is evidenced by his first move of aiming for the head when the deceased was looking in the other direction. The idea was to strike the deceased when he least expected.

Shadreck Nyakabawo said when the deceased was on the ground, the accused struck him on the back of the head again. By striking the deceased with the same big log on the head for the second time, the accused clearly meant nothing but the death of the deceased. The deceased was now on the ground and totally defenceless, but still, the accused wanted to strike for the third time with the same big log on the head again. He was now saying that he would kill someone. He was even bragging that he used to kill people at the mines. If he had not been restrained by Shadreck Nyakabawo, he would have struck the deceased for the third time on the head with the big log. If this cannot be defined as an intention to kill, then we do not know what can be defined as an intention to kill. At the very least the accused did realize that there was a real risk or possibility that he would kill the deceased, but nonetheless continued with his conduct. He did not stop until he was restrained. It is our finding that the accused did intend to kill the deceased.

We move on to the second stage of the approach which is to decide whether the provocation by the deceased was sufficient to make a reasonable person in the accused's position to lose his or her self-control. The accused said that he had lost self-control and the assault was now just happening. Case authority shows that this second stage of the defence of provocation only succeeds in a limited range of situations where the provocation has been very severe: see Prof. G Feltoe *Commentary on the Criminal Law (Codification and Reform) Act* [Chapter 9:23] Legal Resources Foundation 2nd Edition, 2012 at p 217. Prof. G Feltoe says this can happen in cases where the accused discovers his or her spouse in the act of adultery and kills the spouse or the lover. It can also happen in a case where the accused discovers a man raping his daughter or sodomising his son. Prof. G Feltoe refers to the case of *S v Nangani* 1982 (1) ZLR 150 (S) where a man killed his wife in circumstances which led him to believe that she had engaged in sexual intercourse with another man. He was found guilty of culpable homicide instead of murder even though he had the intention to kill. Prof. G Feltoe also refers to the case of *State v Ncube* S 14-87 where a woman stabbed to death a woman who had been committing adultery with her husband when she found her kissing her husband. The court found that although she intended to kill the woman, she had lost her self-control. The conviction of murder was reduced to culpable homicide.

In the circumstances of the present case Janet Sandiforo heard the accused and the deceased arguing over beer. The two were good friends. To her, they appeared drunk because they were not understanding each other and the accused was holding a small bottle which had beer. The deceased then threw soil onto the accused's face and struck him twice with clenched fists on the face. The accused's mouth turned red. It must be borne in mind that throughout the trial the accused maintained that although he had been drinking beer he was slightly or moderately drunk and he knew what he was doing. He never attributed his actions on the day in question to intoxication, but to provocation by the deceased. It is our considered view that the provocation perpetrated by the deceased on the accused was not sufficient to make a reasonable person in the position of the accused to lose his or her self-control as the accused did. The extent of provocation was not that much. The averment by the accused that the deceased had provoked him three times on that day was not true. Other than him merely saying so, he failed to show that the deceased had provoked him earlier at 6am and 12 noon. The investigating officer was not able to find any witnesses to confirm the accused's assertions. At trial the accused mentioned some witnesses to these incidents but he did not bring any. On this basis this court does not believe that these two incidents ever happened.

Besides, the accused said that the second incident happened at 12 noon and that the third and last incident happened at 4pm. The evidence by the two State witnesses Janet Sandiforo and Shadreck Nyakabawo was to the effect that the only incident they witnessed which would be the third and final incident according to the accused, happened around 10 - 11am. The two witnesses could not have lied about this time. They had no reason to do so. So, if the incident they witnessed happened around 10 - 11am, it means therefore that the second incident that the accused talked about could not have happened at 12 noon as he said. It simply means that there was never a second incident. The accused just made up what he called the 6am and 12 noon incidents in a bid to defend himself and to strengthen his defence of provocation. This is proof that he realized that the incident that happened at Janet Sandiforo's shade alone would not be sufficient to make a reasonable person in his position to lose self-control as he did. Being thrown soil at and being struck twice with clenched fists on the face with no injuries sustained cannot be regarded as sufficient ground for loss of self-control to the extent of hitting a person on the head with a very big log like what the accused did. We thus make a finding that the degree of provocation in the circumstances of this case did not warrant the accused to go berserk as he did. The defence of provocation cannot therefore be a partial defence to the murder charge that the accused is facing.

We need to comment that it is not in every case where an accused renders assistance to the victim after brutally assaulting and injuring them, that the gesture should be interpreted to mean that the accused lacked the intention to kill or did not realize that there was a real risk or possibility that their conduct could result in the death of the deceased. In the majority of cases the rendering of assistance is done out of the realization of the real consequences of one's actions. Reality would have sunk in that they will be arrested and be imprisoned if the victim dies. *In casu* the accused even said that when he later learnt that the deceased had passed on, he left his home and went to live in the mountain out of fear of being arrested. The reality of what he had done had now dawned on him. The accused said that up to this day he regrets what he did. This goes on to show that sometimes accused persons render help out of regret and remorse or contrition more than anything else. Being regretful and remorseful is not synonymous with lack of intention to commit the offence at the time the offence was committed. Regret and remorse come after the fact, i.e., after the offence has been committed and after the intention has been executed. It is therefore necessary and important to properly and critically analyse the circumstances of each case of murder to see whether the assistance that was rendered by the accused to the victim/deceased or his or her family was done as a sign of lack of intention to commit the offence in the first place or it was done out of regret, remorse or contrition. Sometimes it is done out of fear of the family of the victim or people that are present. In the circumstances of the present case, we stand by our finding that at the time the accused attacked the deceased he had the intention to kill him. The accused only rendered financial assistance after he was approached by the deceased's relatives asking for money for the treatment of the deceased. Clearly, this was probably done out of fear of the deceased's family and / or regret and remorse.

We also noticed that Mr *Masamha* in his closing submissions confused the culpable homicide verdict that is entered when an accused person is charged under s 49 of the Criminal Law Code and the culpable homicide verdict that is entered when a charge of murder is reduced to culpable homicide because of the defence of provocation. The two scenarios of culpable homicide should not be confused. Under the first scenario under s 49, the accused acts negligently and cause another person's death. The accused realizes that there is a risk of death and fails to guard against the risk of death. This is not what happened in the present case and we do not appreciate why Mr *Masamha* submitted that cumulatively the accused person negligently caused the death of the deceased. This case was never a case of negligence. Instead, it was a case which falls under the second scenario which is a case of murder with a possible

partial defence of provocation. If the defence of provocation had succeeded, the murder charge would have been reduced to culpable homicide. If a murder charge is reduced to culpable homicide because of the existence of the partial defence of provocation, this should not be interpreted to mean that the accused killed the deceased due to negligence. It simply means that although the accused committed the offence of murder intentionally or recklessly, there is an acknowledgment that he or she did so after having been provoked. Put differently, the fact that there was provocation that resulted in the accused killing the deceased intentionally does not mean that the accused negligently killed the deceased.

We also need to comment on the *Gumbo* case that the two counsels referred to and said it falls on all fours with the present case. With all due respect we do not agree with them. In that case the accused's granddaughter passed on being the third one to die in a row. The deceased who was a neighbour of the accused did not attend the funeral. The accused and deceased met on a later day. The accused asked the deceased why he had not attended his grandchild's funeral. The deceased was dismissive and told the accused to ask the kraal head about it. The deceased even punched the accused. The accused went on to pluck four sticks from a nearby bush and assaulted the deceased all over the body. The accused was drunk on the day. The accused who was charged with murder was convicted of culpable homicide. MOYO J remarked that the accused had used sticks which are primarily not lethal or dangerous weapons. She went on to say "*the number of blows with the kind of weapon used by the accused cannot necessarily be held to be life threatening in the context of death being a possibility as opposed to mere carelessness on the part of the accused*".

MOYO J said that death was not foreseen as a real possibility. She further said that there were no facts in the matter that took the matter anywhere near murder. The judge remarked that if the accused had intended murder, he would have used stones or logs. She said that the deceased did not suffer any fracture. The court took note that right from the start the accused had tendered a lesser plea of culpable homicide which was premised on lack of intention to cause death. *In casu* the accused used a log, not sticks and the deceased suffered brain damage and severe head trauma secondary to assault. The two cases are not comparable at all. In the *Gumbo* case the court convicted the accused of culpable homicide on the grounds that the accused had acted carelessly and that the facts did not support a charge of murder at all. It was not because the accused had raised the defence of provocation or intoxication as the two counsels in the present case sought to portray. A reading of that judgment shows that the court

did not even discuss the defences of provocation and intoxication. The *Gumbo* case is therefore distinguishable and irrelevant to the present case.

We also took note that in moving for a conviction of culpable homicide Mr *Masamha* submitted that the accused had no intention to kill because the deceased had not died there and then upon being assaulted. That death did not occur there and then is neither here nor there. The accused struck the deceased twice with a log on the head and intended to strike for the third time as he made utterances that he would kill someone. At this juncture the deceased was lying helplessly on the ground. Had it not been for the people that restrained the accused, he could have killed the deceased at the scene. In his own words the accused said that he had lost control of himself and things were now just happening on their own. Intention to kill can actually be expressed by the killer, like what happened in the present case. By saying that he would kill someone and that he was used to killing people at the mines, the accused actually expressed or verbalised his intention to kill the deceased. However, it is not always the case that the killer actually expresses intention to kill. In the majority of cases intention to kill is implied by the killer's actions. The use of a lethal weapon aimed at a vulnerable part of the body, regardless of whether or not the deceased died instantly or at the scene can satisfy the intent element. The intent element is not proven by the deceased having died instantly. Depending on the circumstances of the case, an accused person can be convicted of culpable homicide in a situation where the deceased died instantly. For instance, negligent driving leading to a fatal accident; negligent use of a firearm or assault leading to death when the perpetrator did not have the intention to cause death, but death was reasonably foreseeable. What is therefore important is to consider and critically analyse the accused's actions holistically. In *casu* considering the accused's actions of using a lethal weapon on the head of the deceased twice and only stopping after being restrained, coupled with utterances that he would kill someone, there is no doubt that he intended to kill the deceased.

In view of the foregoing, we find the accused guilty of murder as defined in s 47(1)(a) of the Criminal Law Code.

Sentence

In mitigation we considered the following. The accused is 39 years old. He was provoked by the deceased who struck him with a clenched fist twice on the face and threw some soil onto his face. He is a family man with 5 children and a wife. He is the breadwinner of the family. The accused is a first offender. He showed contrition by helping the deceased's

family financially. He sold his beasts and gave the deceased's family money for the treatment of the deceased before he died. When the deceased died, the accused assisted by contributing towards funeral expenses. The accused is going to live with the stigma of having killed someone. To make matters worse, he killed his friend. The accused was under the influence of alcohol when he committed the crime. The accused is HIV positive. He said that he discovered this recently when he was tested for HIV in prison. So, he is still to come to terms with his new status.

In aggravation we considered the following. The accused committed a very serious crime. He killed a person with actual intention to do so. He caused the deceased to lose his life at a tender age of 30 years. The accused committed the offence after he had been slightly provoked. The degree of provocation did not warrant the accused to react in the manner that he did. He overreacted. The accused ought to learn that violence does not resolve problems and that there is need to respect the sanctity of human life. The crime of murder is now rampant in this jurisdiction. People are being killed over very minor issues. There is need for the courts to send a clear message to society that human life matters and that it needs to be respected by imposing stiffer penalties. Whilst there is need to temper justice with mercy when passing sentence, it must be realised that unduly lenient sentences for murder offences promote anarchy in society. People will kill willy-nilly knowing that there will go to prison for a short period. There is need for sentences that are deterrent to both the offenders and other would-be offenders.

On the basis of the circumstances of the case, the mitigatory and aggravatory factors and the cases cited by counsels, a sentence of 20 years imprisonment will meet the justice of the case. Accused is thus sentenced to 20 years' imprisonment.

*National Prosecuting Authority, State's legal practitioners
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