

THE STATE
versus
ADAM HEATH THOMAS

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 13 October & 27 November 2022; 19 January; 1, 20, 27 February
& 28 November 2023

Assessors: Mr Gweme
Dr Mushonga

Criminal Trial

T. Mukuze, for the State
R. Kadhani, for the accused

MANYANGADZE J: The accused is facing a charge of murder, as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (“the Criminal Law Code”). It is alleged that on 23 June 2021, at No. 74 Hillside Road, Harare, the accused unlawfully and with intent to kill, struck Kenneth Ivan Thomas (“the deceased”) once on the back of the head with a baseball bat and strangled him, causing injuries from which the deceased died.

Briefly outlined, the allegations are that on 23 June 2021, at around 5.00 p.m., the accused confronted the deceased over the alleged abuse of the accused’s mother (deceased’s wife) by the deceased. The deceased was accused’s father. In the altercation that ensued, the accused struck the deceased with a baseball bat at the back of the head. The accused also held the deceased by the collar of his shirt and strangled him. Thereafter, the accused carried the now motionless deceased into the main bedroom, where he placed him on the bed and covered him with some blankets. The accused left the house the following morning, after locking all the doors.

The deceased’s body was discovered on 25 June 2021 and a report was made to the police.

The accused pleaded not guilty to the charge. In his defence outline, he avers that he did not intend to kill the deceased. He states that he has a history of mental health problems

dating back to the time he was in New Zealand in 2017 and was mentally disturbed at the time he assaulted the deceased.

The accused points out that in October 2021 he was diagnosed by Dr Mhaka with a condition known as psychotic depression, which is a severe form of depressive illness. He says he has been on medication for this illness since the diagnosis.

The accused claims he suffered an episode of the said depressive illness when he assaulted the deceased, after confronting the deceased about the abuse he had subjected his mother to, as chronicled in the diaries he had gone through.

The accused asserts that he was incapable of appreciating the nature of his conduct because of this illness. The accused also asserts, in the alternative, that notwithstanding an appreciation of his conduct, he was incapable of acting in accordance with that appreciation. He claims he was provoked to the extent of completely losing his self-control.

The State opened its case by tendering the accused's confirmed warned-and-cautioned statement, which was marked Exhibit 1. It also produced the post mortem report done by Dr Yoandry Olay Mayedo as Exhibit 2. The evidence of the deceased's gardener, Lassman Chenge, was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Oral evidence was led as follows:

ASHLEIGH HEYNES BODINGTON stated that the deceased was her uncle, and the accused is her cousin. She arrived at the deceased's residence on 25 June 2021, in the company of her husband. Only the gardener was at the house. He did not know where the accused and the deceased were.

The witness told the court that they had to break the bathroom window to get into the house. Once inside, she went into the main bedroom, where she observed that the deceased was lying on the bed, motionless. He was covered with blankets. She said that she realised that the deceased was dead. At that moment she noticed nothing unusual. She later observed blood on some bathroom tiles. She also noticed blood on a file she found in the lounge, and on a chair. She made a report to the police.

The witness's testimony was largely uncontroverted. Under cross-examination, she pointed out that she enjoyed cordial relations with the accused. They grew up as buddies. She lost touch with him when he went to live in New Zealand. The witness went on to tell the court that when the accused came back, sometime in 2019, she formed the impression that he was depressed. She indicated that the accused did not have a violent disposition.

ANNE TIGERE is a police officer who was at the time based at Rhodesville Police Station. She is the one who received the report from Ashleigh, the preceding witness. She told the witness to return to the house and find some means of getting inside the house. This was an unusual response from a police officer who had just received such a report. The witness however explained that she was adhering to instructions on COVID protocols, as the report was received during the COVID era.

The witness went on to state that Ashleigh returned and reported that they had seen the deceased's body. The witness further explained that initially, they treated the matter as a sudden death report, which is dealt with by opening a Sudden Death Docket, as opposed to a Crime Docket. The position changed after some blood was observed on the deceased's body. The accused became the prime suspect. The witness explained that the reason for such suspicion was that the accused was the one staying with the deceased. He had locked all the doors when he left the house. The witness was subjected to very brief cross-examination which did not controvert much of what she stated.

PRISCILLA MUTIZE, from Nyaradzo Funeral Company, also gave evidence. She told the court that she was part of the Nyaradzo team that removed the deceased's body on 25 June 2021. They found the deceased lying on the bed, covered in blankets. The witness stated that the deceased was well tucked in bed and was not lying down clumsily. She observed some blood on the pillow. She said she did not ascertain where it was coming from. She explained that she was afraid to verify this because of COVID. She said they took the body to Parirenyatwa Hospital, and later to Nyaradzo parlour.

The witness was also subjected to brief and inconsequential cross-examination.

The State concluded its case with the evidence of the investigating officer, LUKE DEZA. His testimony is on record, and mainly focuses on the investigations he carried out, including indications. It is basically a narration of the standard processes of investigation an investigation officer is duty bound to carry out. Therefore, nothing much turns on it.

The defence opened its case by adducing evidence from the accused. He was the sole witness for the defence. The accused started by giving a rather lengthy background about his childhood, adolescent and adult years which spanned over three countries. He was born and bred in Zimbabwe, briefly stayed in the UK, and spent most of his working life in New Zealand. Details of the evidence are on record and need no repetition here. The salient features, for purposes of his defence, will be highlighted.

The accused stated that he started experiencing mental health problems whilst in New Zealand. He moved there in 2002, and returned to Zimbabwe in 2018, to help look after his mother whose health had deteriorated. She had undergone surgery for the removal of a brain tumour. During his stay in New Zealand, he had a romantic relationship with a woman called Cam. The relationship drained him emotionally as Cam had mental health problems and had at some point to be admitted at a mental health hospital. The accused did not specify the nature of the mental health issues this woman had. After this relationship ended, the accused had an affair with another woman he met at his workplace, Mitchel. Mitchel was a married woman. The relationship caused him a lot of anxiety and guilt. It was very short-lived, ending only after about 6 months. The accused explained that he had no family support and suffered a depression, for which he had medication prescribed for him. That was the first time for him to be on medication for depression. He stopped the medication after he returned to Zimbabwe, as he no longer had access to it.

The accused went on to state that the death of his mother, in September 2020, traumatised him. He pointed out that he was very close to her, as his father was at work most of the time. He further pointed out that his father subjected his mother to physical and emotional abuse during her lifetime.

After this historical background, the accused's testimony then moved to the day the assault in question occurred. The accused first narrated the events that took place earlier in the day, which apparently built up to the fateful confrontation. He had driven the deceased in town, where he wanted to collect some documents to do with his pension at the NSSA building. The accused said instead of going straight to NSSA, the deceased directed him off route, for reasons best known to himself. This diversion took them to the Botanical Garden area. The accused explained that a few days before, he had solicited the services of a commercial sex worker in Harare's avenues area and had suggested they go to the botanical garden. They haggled over the venue, as the lady was suggesting a different place. The accused said he ended up abandoning that mission, as it caused him a sense of guilt and shame.

Turning back to the day in question, the accused said they eventually drove back home. He was in the kitchen when the deceased told him that it was stupid of him to get lost the way he did, which was in apparent reference to the off-route drive towards the botanical garden. This angered the accused. It brought to his mind his near shameful escapade to the gardens with a commercial sex worker. It appeared as if the deceased was somehow aware of it and was taunting him. To use the accused's own words, he told the court, "I just lost control. I just

felt anger.” At that point, the deceased walked out of the kitchen and stood in the hallway. The accused said that he also left the kitchen and went to where the deceased was in the hallway. He stated that he grabbed the deceased and pushed him to the lounge, where he forced him to sit on a single seat sofa. Meanwhile they were exchanging harsh words. During this exchange, the accused said he told the deceased that he had come across some diaries which were kept by his mother. The diaries chronicled the abusive treatment the deceased subjected her to over the years. The account in the diaries included an affair the deceased had with a woman at his workplace. The accused remarked that the diaries made some sad reading.

The accused went on to state that he then left the lounge for the main bedroom, from which he fetched the baseball bat. He said it was kept in there by the deceased for security reasons, as there was once a burglary at the house. When he returned to the lounge, he struck the deceased once on the right side of the head with the baseball bat. He said they argued about the diaries, after he had struck the deceased. He stated that he could not remember what words they used as they quarrelled. The accused indicated that he noticed that the deceased was bleeding from the right side of his head. He took him to the bathroom to clean the wound. After that, the two men returned to the lounge, with the deceased walking on his own. He said he did not drag him back to the lounge. Back in the lounge, the deceased sat down, this time on a two-seater sofa. There was some heated verbal exchange, over the same subject matter i.e., the deceased’s ill treatment of the accused’s mother. The deceased got up and started pushing the accused. The accused also pushed the deceased. During this scuffle, the accused said he got hold of the deceased on the neck. The accused demonstrated how he held the deceased, showing a strangling action. He left the deceased lying on his back on the two-seater sofa and went into his bedroom. He later lifted the deceased from the sofa, and took him to his bedroom, where he placed him on the bed and covered him with some blankets.

The accused stated that he only realised in the morning that the deceased was no longer alive. He panicked, hurriedly assembled some clothing items, and drove away from the house. He was on the road for about five days, sleeping in his car, until the police found him and placed him under arrest.

Under cross-examination, the accused stated that he was “infuriated” by the way the deceased made him drive past the botanical garden. He was made to drive past that place 3 times. He remarked that the deceased “was messing with me”. The accused could not explain why he struck the deceased with the bat and went on to strangle him. It also emerged that the

accused had gone through his mother's diaries before. He did not come across them for the first time on the day he assaulted the deceased.

In the main, the accused seeks outright acquittal, on the basis that he was mentally disordered at the time of the commission of the offence.

In the alternative, he prays that it be found that he lost self-control due to provocation. The law relating to mental disorder is well set out in the relevant legislation, which is the Criminal Law Code and the Mental Health Act [*Chapter 16:12*]. The defence referred to the relevant provisions of these two pieces of legislation. The Criminal Law Code sets out the substantive law in s 227(1). The Mental Health Act sets out the procedure to be followed and provides for the powers of the court in ss 28 – 29.

Section 227 of the Criminal Law Code provides:

“(1) The fact that a person charged with a crime was suffering from a mental disorder or defect when the person did or omitted to do anything which is an essential element of the crime charged shall be a complete defence to the charge if the mental disorder or defect made him or her:

(a) incapable of appreciating the nature of his or her conduct, or that his or her conduct was unlawful, or both; or

(b) incapable, notwithstanding that he or she appreciated the nature of his or her conduct, or that his or her conduct was unlawful, or both, of acting in accordance with such an appreciation.

(2) For the purposes of subsection (1), the cause and duration of the mental disorder or defect shall be immaterial.

(3) Subsection (1) shall not apply to a mental disorder or defect which is neither permanent nor long-lasting, suffered by a person as a result of voluntary intoxication as defined in section two hundred and nineteen.”

This defence is pleaded in para(s) 5 and 6 of the accused's defence outline, wherein is stated:

“Dr Mhaka evaluated the accused during his admission at the psychiatric hospital and diagnosed him with psychotic depression, which is a subtype of major depression that occurs when a severe depressive illness includes some form of psychosis. It was Dr Mhaka's assessment that psychosis of the nature suffered by the by the accused is a sign of mental disorder, and consequently, prescribed medication to the accused to help treat his psychotic depression, which medication the accused has been taking from sometime in October 2021 to date.

The defence will establish that, at the time of the alleged offence, the accused had a psychotic episode in which he had paranoid delusions, abnormal suspiciousness, and symptoms of severe depression; and that a result of his mental disorder, he was incapable of appreciating the nature of his conduct, or that his conduct was unlawful, or both.”

Curiously, there is no mention or any reference whatsoever to this form of defence in the accused's confirmed warned and cautioned statement. If he was in a state of confusion and panic when the statement was made in July 2021, soon after the commission of the offence, he could possibly not have remained so in October 2021, when the statement was confirmed. This

explains why the remand court dealt with him as a normal accused person. Should this issue have been raised, the procedure under s 28 of the Mental Health Act would have been followed. This section requires that an accused person in the condition claimed by the accused be examined by two doctors. This is done before referral to a specialist like a psychiatrist. The record of the remand proceedings, which is attached to the trial record, has no record of such a process having been done. This procedure can also be done when the accused appears in this court for trial. In the case referred to in para 31 of the accused's closing submissions, *S v Matakadira* HH 353/15, that was the procedure followed. The subsequent psychiatric examination ordered by the judge followed an initial examination by two doctors, in terms of the Mental Health Act.

The State noted this anomaly in para(s) 13 and 14 of its closing submissions, which read:

“The accused at trial brought a new tangent to the events of 23 June 2021. He introduced a defence of having been mentally disordered and not having been in his mental faculties for the first time. It is important to note this was never recorded in the police statement given by the accused.

The statement, which was given freely and voluntarily, states that the accused assaulted the deceased after a confrontation took place which resulted in an argument and altercation embedded in deceased's perceived ill treatment of accused's mother.”

In para(s) 16 and 17 the State further makes the following pertinent comments:

“The mentioning (*sic*) of the mental disorder in the statement deserves two possible interpretations. Firstly, that the mental disorder was to some extent influential during the dispute, and secondly, that before the statement was recorded, the accused had thought about it and toyed with the idea that it would be helpful to feature it in his defence to the allegations.

Following the same reasoning, the failure to mention the condition can be interpreted as firstly, having not fuelled the dispute that led to the assault on the deceased, or secondly, not having been regarded as a possible escape avenue for the accused. In other words, his mention at trial is conspicuous as a belated afterthought and nothing more.”

In his evidence in chief and under cross-examination, we note that the accused emphasises the fact that he lost self-control. He claims he was provoked by the behaviour of the deceased that afternoon, driving him past the botanical garden thrice and later taunting him about it. This, coupled with the diary entries he said he had gone through, provoked him into beating up the deceased. There was little if any mention at all, of the said mental defect in the accused's *viva voce* evidence. It only features in the defence outline and closing submissions. These cannot supersede what the accused himself told the court. This is what he, *inter alia*, said to the court:

“I just lost control. I just felt anger...My mind was just gone at the moment. I just mentally lost it. I did not realise I was hitting him. I didn't know what I was doing. I struck him once.”

Curiously, the accused then said that they went on to argue about what was in the diaries, after he had struck the deceased. This suggests he was still in control of his senses. He was able to pursue the subject-matter of the quarrel between them. His anger had not completely unhinged his mind.

We have, in the circumstances, to determine accused's criminal liability in the light of what he pleaded in the alternative, being provocation. We are not at all persuaded that he suffered from the kind of mental defect envisaged in s 227 of the Criminal Law Code, entitling him to a special verdict in terms of s 29 of the Mental Health Act. Apart from the fact that the procedure leading to such a verdict was not followed, the evidence adduced in that regard woefully fell short.

Provocation is provided for in s 239 of the Criminal Law Code in the following terms:

“(1) If, after being provoked, a person does or omits to do anything 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 he or she 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 facts of this matter, again, do not persuade us that the alternative partial defence of provocation should be upheld. Looking at the events of the day in question, as narrated by the accused, we fail to see how provocation aids him. If we accept that the accused was made to drive past the botanical garden and later taunted about it, we do not see how that infuriated him so much that he had to grab a baseball bat of the dimensions shown to the court and hit the deceased. The baseball bat was not lying next to the accused. He had to leave the deceased alone for a while whilst he went to fetch it from the main bedroom. He walked back to where the deceased was, and directed his blow on the head, albeit on the side of the head, according to the accused. He went on to strangle the deceased. Realising that the deceased was now motionless, he carried him to the bedroom, where he tucked him in bed.

The entries in the accused's mother's diaries related to her strained marriage with the deceased. These were events that took place some years ago. Even if some of the events could

have been recent, they were not as recent as that day, a day before or even a month before. The accused's mother had passed on two years ago. It appears the quarrels between the deceased and his wife were known. Intervention of close and mature relatives could have been sought. Assaulting the deceased two years after the passing on of his (accused's) mother hardly passes the test for provocation. It is significant to note that the accused did not peruse those diaries that day. He indicated that he had seen them some months before. So, it was not a sudden outburst of anger triggered by reading the diaries just before the assault. The accused had read the diaries, knew of their contents all along, and resented the deceased. The scenario is more consistent with someone seething with a desire for revenge than spontaneous provocation. It is a far cry from the numerous cases that have come before the courts where provocation justified reduction of murder to culpable homicide. See *S v Nangani* 1982 (1) ZLR 150 (S), *S v Ncube* SC 14/87, *S v Gambanga* 1998 (1) ZLR 364 (S), *S v Ngwanda* HH 30/06.

We are not convinced however, that the facts of this matter, considered cumulatively, reflect an actual intention to kill the deceased. The manner in which the assault was committed has already been described. Motivated most probably by pent-up anger and resentment, the accused struck the deceased in the manner alleged. He certainly realised that there is a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

In the result, the accused is found guilty of murder with constructive intent, as defined in s 47 (1)(b) of the Criminal Law Code.

SENTENCE

In a criminal trial, following the conviction of an accused person, the court is now enjoined to hand down a sentencing judgment, in terms of the Criminal Procedure (Sentencing Guidelines) Regulations, Statutory Instrument 146 of 2023 ("the Guidelines").

In the instant case, the accused has been convicted of murder, as defined in s 47(1)(b) of the Criminal Law Code. The circumstances in which the murder was committed are detailed above, in the main judgment.

The State and the defence have filed submissions in aggravation and mitigation of sentence. As pointed out in the submissions by both parties, it has not been possible to bring persons affected by the crime to give evidence. The closest person related to the accused, his brother Ryan Thomas, is resident in the United Kingdom. His mother is deceased, as indicated in the main judgment. The accused has, up to the time of his conviction, led a single life. The court has therefore largely relied on the submissions made on behalf of the accused by his

defence counsel. These submissions were informed mainly by instructions given to counsel by the accused. Equally so, the court has relied on the submissions made in aggravation on behalf of the State by its counsel.

Before delving into the specific details highlighted in the submissions, the law on the applicable sentence must be briefly set out. This is provided for in the Criminal Law Code, which must be read with the Guidelines. As correctly pointed out in the submissions, the Guidelines are not meant to supplant the principal legislative provisions on the appropriate sentence. For murder, these provisions are found in s 47(4) of the Criminal Law Code, which reads:

“(4) A person convicted of murder shall be liable—
(a) subject to sections 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], to death, imprisonment for life or imprisonment for any definite period of not less than twenty years, if the crime was committed in aggravating circumstances as provided in subsection (2) or (3); or
(b) in any other case to imprisonment for any definite period.”

Section 47(2) sets out what constitutes aggravating circumstances. It reads:

“(2) In determining an appropriate sentence to be imposed upon a person convicted of murder, and with-out limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstance if—
(a) the murder was committed by the accused in the course of, or in connection with, or as the result of, the commission of any one or more of the following crimes, or of any act constituting an essential element of any such crime (whether or not the accused was also charged with or convicted of such crime)—
(i) an act of insurgency, banditry, sabotage or terrorism; or
(ii) the rape or other sexual assault of the victim; or
(iii) kidnapping or illegal detention, robbery, hijacking, piracy or escaping from lawful custody; or
(iv) unlawful entry into a dwelling house, or malicious damage to property if the property in question was a dwelling house and the damage was effected by the use of fire or explosives; or
(b) the murder was one of two or more murders committed by the accused during the same episode, or was one of a series of two or more murders committed by the accused over any period of time; or
(c) the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim; or
(d) the victim was murdered in a public place or in an aircraft, public passenger transport vehicle or vessel, railway car or other public conveyance by the use of means (such as fire, explosives or the indiscriminate firing of a weapon) that caused or involved a substantial risk of serious injury to by-standers.”

In the instant case, it must first be determined whether the murder falls into the category of aggravating circumstances envisaged in s 47 (2). If it does, the accused will be staring at the sentences prescribed in s 47(4), depending on the degree of aggravation. If not, the court will be guided by the presumptive sentence prescribed in the Guidelines, for murder committed

in mitigating circumstances. The court will carefully consider the factors outlined in s 12 of the Guidelines. In terms of this provision, the court takes into account the characteristics of the offender, the characteristics of the victim, the probability of re-offending, desirability of protecting society or the victim from the offender and the ability of the offender to make restitution.

These factors, it is noted, encapsulate the three-fold approach to sentence, *viz*;

- (a) Gravity of the offence
- (b) Interests of the offender
- (c) Interests of the society

It is often a cumulative consideration of these fundamentals that yields an appropriate sentence.

It is the court's finding that none of the aggravating features listed in s 47(2) of the Criminal Law Code are present in this matter.

In mitigation, the following factors have been considered:-

- The accused did not have actual intention, but constructive intention, when he committed the murder.
- The murder was most probably motivated by pent-up anger and resentment, emanating from the deceased's ill treatment of the accused's mother during her lifetime.
- The accused has a history of depression. This is what has probably made the accused fail to settle down to a normal married life, up to the age of 40.
- The accused is a first offender.
- There is no indication that he will re-offend. This was a bizarre, one-off act of rage which the accused will no doubt regret for the rest of his life.
- Since his release on bail, in July 2021, a period of two and a half years, the accused has suffered the anguish of waiting for the outcome of this trial. This must have worsened his predisposition to depression. This is compounded by the fact that the victim of the murder is a close family member, his own father.

In aggravation, there is no gainsaying the fact that the accused committed a grave crime. It resulted in the needless loss of life. As stated in para 8 of the State's submissions in aggravation:-

"The right to life is adjudged to be the mother of all rights".

The accused subjected the deceased to a brutal, severe blow with a baseball bat on the head. The assault was perpetrated by a strong young man of about 40 years, on an elderly man in his late 60s.

Though accused may have been angered by the deceased's abusive treatment of his mother, it was by no means justification for the violent crime. The upsurge of such crimes is alarming in our society. The home is supposed to be the most peaceful environment where parents and children live in harmony. Unfortunately, stories abound of deadly assaults occurring in such an environment. It is therefore in the interests of society that perpetrators of violent crime, be it in the home or elsewhere, receive appropriate punishment from the courts. Failure to do so will result in society losing confidence in the criminal justice system.

In its submissions, the State has called for a sentence of 20 years imprisonment. The State has however, admitted that none of the aggravating factors listed in s 47(2) of the Criminal Law Code apply in this matter. If these applied, the presumptive sentence would be 20 years imprisonment. If they do not apply, the presumptive sentence would be 15 years imprisonment. The defence has implored the court to lean towards this sentence, instead of the one called upon by the State. The court has a discretion to impose a sentence that is lower or higher than the presumptive sentence, depending on the circumstances of the case. The State has indicated that it has no issues if the sentence sits on the presumptive level i.e. 15 years imprisonment. Taking all factors into account, the court finds no basis for departing from the presumptive penalty.

In the result, the accused is sentenced as follows:-

15 years imprisonment.

*The National Prosecuting Authority, State's legal practitioners
Atherstone & Cook, accused's legal practitioners*