

THE STATE
versus
ENGLAM MSIPA

IN THE HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
CHINHOYI, 18 February 2025

Assessors: 1. *Mrs. Mateva*
 2. *Mr. Kamanga*

Criminal Trial

R. Nikisi, for the State
M. James, for the Accused

BACHI MZAWAZI J: This is a stated case whereupon the defence and the State counsels plea bargained from murder to the competent verdict of culpable homicide. This is after the State discovered that the evidence from its two eye witnesses is contradictory, each supporting either side. The facts as summarized in the statement of agreed facts are that the accused who was then employed as an armed security guard stationed at Oliander Mine, Chakari shot and killed the deceased on point blank on the right side of the head. The deceased Prince Mutimukulu an occasional employee of the same company died instantly on the spot. A pathologist affidavit accompanying the post-mortem report stated the cause of death as a gunshot wound which perforated the right-side area of the head exiting through the left upper temporal area of the head.

Accused is said to have shot at three people he had seen carrying sacks who were in the direction where the deceased had gone to relieve himself, assuming they were gold ore thieves, prompting him to aim and shoot straight in their direction. As can be deduced from the stated facts, the accused claims that the deceased was shot with a stray bullet which had not been directly aimed at him. Nothing was mentioned of firing warning shots at these suspected gold thieves. If the story is to be believed no efforts were made to ascertain whether the suspected thieves were indeed thieves or innocent members of the surrounding community. Accused however pleaded guilty to the lesser charge.

Of the documents tendered after the plea recording, exhibit two, the accused's warned and cautioned statement to the police caught the court's eye. A startling revelation was made by the accused to the police which is contrary to the contents of the statement of agreed facts. This document, was produced by consent. Though not confirmed by the court in terms of s113 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] it was not challenged and its production was consented to therefore it is admitted evidence. See, *S v Nkomo & Anor* 1993(2) ZLR131(S).

In the alleged document, accused admits to aiming at, and shooting the deceased as the deceased had stolen his employer's gold ore. He stated that he then fired warning shots after the deceased had already been shot. This in the court's view amounts to an admission of targeting and shooting a human being. Admissions and extra-curiae statements are addressed in section 256 of the Criminal Law Reform and Codification Act [*Chapter 9: 23*] when they have not been challenged like in this instance. Had the court been placed in the picture before trial the limited plea would have been discouraged. The fact that the court is not privy to documentary evidence until their production in court militated against the denial of the then proposed plea.

After posing the contents of exhibit two as juxtaposed to those in the statements of agreed facts to both *Mr Nikisi* for the State and *Ms James* for the defence, the court could not order for a full trial. *Mr Nikisi* had no witness to corroborate the second version disclosed by the accused's warned and cautioned statement. Further, Ms James was also of the view that the horse had already bolted since a plea had been recorded and the court had already had sight of the documentary evidence. Of which they had the right to deny the production of and challenge the unconfirmed extra- curiae statement. We are also of the view that, since a verdict had already been entered on the lesser plea it could have been prejudicial to the accused to convict him on the main charge. If murder had been a competent verdict of culpable homicide then the court would not have hesitated to make a finding to that effect. However the opposite, obtains, culpable homicide is a competent verdict to murder instead.

Accused is found guilty of culpable homicide.

Sentencing Judgment

Be that as it may, the accused as per the statement of agreed facts has been found guilty of culpable homicide. The sentencing regime in cases of this nature usually is in the range of

five years maximum and anything lower. The statutory penalty in section 49 of the Criminal Law Code, stipulates a sentence from a fine to life imprisonment, whilst the sentencing guide pegs the ceiling at 5 years.

In order to arrive at a befitting penalty, the court has assessed all the mitigatory and aggravatory factors against the victim impact statement and the sentencing report. The youthfulness of the accused who was aged twenty-two years at the time of the commission of the offence and his guilty plea have been taken into consideration. He is also a first offender who by pleading guilty to a lesser crime showed contrition.

However, the scale tilts heavily towards the aggravatory circumstances. Firstly, a lethal weapon was used. It was used by a security guard a person who is supposed to have been schooled and or received some training in the use of firearms on civilians. In *S v Gongga* HHC60/24 this court emphasised the need to first fire warning shots up in the air not in the direction of people. We again highlighted in *Gongga*, the need to aim below the knee or to shoot to maim or incapacitate not to kill. In *casu*, either way you look at it, the accused did not observe the above. He was trigger happy therefore grossly negligent. His degree of blameworthiness is on the extreme high end. As a result of his actions life was lost. Innocent blood was wrongly spilt.

In addition, he and his family never assisted in the funeral expenses or burial of the deceased. They did not pay any compensation. They moved on with their lives as if nothing had happened. That showed lack of remorse. This is in the face of the deceased's orphaned family.

The court is mindful of the fact that justice needs to be tempered with mercy and that the penalty should fit both the crime and the offender. See, *S v Rabie* 1975(4) SA855 at 862. In the cases of *S v Holder* 1979(2) SA and *S v van Wyke* 1992 (1) SACR it was emphasized that the interests of the accused should be of paramount consideration. Just as society expects criminals to be punished, it also expects that their mitigating circumstances be of prime consideration in sentencing them. The case of *S v Pistorius* SA CC113 of 2013 where a finding on culpable homicide was made and the accused sentenced to six years before it was overturned by a superior court to a charge of murder with constructive intent, is instructive. See [State v Marata and Another \(76 of 2024\) \[2024\] ZWCHHC 76 \(23 July 2024\)](#)

Having noted that, the accused given his own personal circumstances is sentenced to 6 years imprisonment. 6 months imprisonment is suspended for five years on condition accused does not commit offences involving violence, assaults or murder. Effective 5 ½ years.

Chikwangwani and Tapi Attorneys, accused's legal practitioners.

National Prosecuting Authority, the State's legal practitioners.