

THE STATE**Versus****CARLOS TINASHE CHAPEYAMA**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr P. Damba & Mr M. Ndlovu

BULAWAYO 30 MAY & 3 JUNE 2019

Criminal Trial*Ms S, Ndlovu* for the state*S. Chamunorwa* for the accused

MAKONESE J: The accused is a member of the Zimbabwe Defence Forces. In the early hours of the morning of 1st February 2018 around 0300 hours the accused arrived at house number 1604 New Magwegwe, Bulawayo. He was clad in full military combat gear and was armed with an AK 47 assault rifle with 20 rounds of ammunition. The occupants of the house were awoken by heavy knocks at the back door. The accused demanded that they open the door. He cocked his weapon. The deceased Ashley Phiri asked what the accused wanted at that hour of the morning. The door was opened. A misunderstanding arose between accused and the deceased Ashley Phiri. The accused opened fire killing Ashley Phiri, Ritah Ndlovu and Nkosivumile Ncube instantly. The three deceased persons died from multiple gunshot wounds. A minor child, Chloe Munashe Chapeyama, was shot on the leg, but was fortunate to survive. The accused thereafter turned the firearm on himself and shot himself in a suicide attempt. He sustained near fatal injuries but survived.

The accused now appears in this court facing three counts of murder and one count of attempted murder. The accused denies the charges and states that he had no intention whatsoever to cause the death of the victims. He avers that a combination of excess alcohol consumption and provocation led him to discharge the firearm.

The facts of the matter are largely common cause and not in dispute. It is not disputed that on 31st January 2018 the accused was on day sentry duties from 0800 hours and 18000 hours

at Guinea Fowl camp. He signed for a service rifle, an AK-47 with a folding butt serial number ZA39008 loaded with 20 rounds of ammunition from the arms store. Accused knocked off duty at 1800 hours. He was on standby to commence guard duties the following morning at 0800 hours. He boarded a motor vehicle in Gweru en-route to Bulawayo. The AK 47 rifle was folded and concealed in a small bag. It is common cause that the accused shot and killed the three deceased persons at point blank range and that they died at the hands of the accused. In relation to the fourth count of attempted murder the facts reveal that the victim could not have been spared as the accused discharged the firearm indiscriminately.

The state tendered into the record of proceedings an outline of the state case (exhibit 1) which now forms part of the record. In his defence outline (exhibit 2), the accused contends that at the time of the commission of the offence, he suffered from diminished responsibility or alternatively that he suffered extreme provocation, which coupled with intoxication affected his judgment. He avers that he had a history of suffering from uncontrollable bouts of anger which render him incapable of considering the consequences of his actions before acting and that this contributed to his conduct on the fateful day. By way of a background, the accused stated in his defence outline that he was co-habiting with Ashley Phiri during her lifetime. The couple experienced marital problems arising from the infidelity of the deceased. As a result of these problems, the accused averred that the deceased would at times leave their place of abode to stay with relatives, and at places unknown to the accused for extended periods of time. The accused stated that at all material times he believed that the couple were blessed with two children, namely, Cynthia Makanaka and Chloe Munashe Chapeyama. During the course of their relationship accused alleged that he had discovered that their eldest child Cynthia Makanaka had a birth certificate which indicated that her father was Shingirai Nzuwa. The accused alleges that when he discovered the paternity of Cynthia Makanaka and confronted Ashley Phiri, the deceased had deserted him taking the two minor children with her. For sometime, the accused did not know the whereabouts of the late Ashley Phiri and that of the children. Through investigations, he was able to track her to Bulawayo and re-established contact with the late Ashley Phiri. The accused contends that reconciliation was discussed and arrangements were made for members of the two families to meet. Before the proposed meeting,

and on 31 January 2018 the late Ashley Phiri invited that accused through the “**whats app**” platform, to her place ostensibly to discuss their problems in preparation of the planned meeting. The accused avers that he attempted to seek leave from his superiors at work so that he could attend to the marital issues. He was refused leave of absence. Accused decided to sneak out of his workplace without permission to visit the late Ashley Phiri. He made two visits, one on the 29th January 2018 and then on the 1st of February 2018. On the first visit the accused left his firearm behind and unattended. He was punished by his superiors for his conduct. In respect of the second visit he took a decision to take his firearm with him to avoid detection and possible punishment. The accused alleged that he had no intention to use the firearm in Bulawayo or anywhere else. In the early hours of 1st February 2018 he arrived at the late Ashley Phiri’s residence at Magwegwe. He was intoxicated from consuming copious amounts of alcohol on his way from his base in Gweru to Bulawayo. Upon arrival he knocked at the door. The late Ashley Phiri informed the accused that she did not wish to reconcile with him but that she wanted to tell him in person, that she was no longer interested in the relationship. The accused was told by the late Ashley Phiri not to bother by continuing with the arrangement for the family meeting as she was intent on getting married to someone else. The accused states that at that point the argument became heated, as the late Ashley Phiri’s sisters joined in, insulting the accused. During the course of the argument the accused alleges that he requested that if he late Ashley Phiri no longer wanted to be with him, she would rather give him custody of the minor children. The accused alleges that Ashley Phiri told him in boastful and contemptuous language that he was not the biological father of the two children. He was told that he was incapable of siring children and consequently he could not claim rights over the children. The accused avers that he felt extreme provocation and acting on impulse reached for his firearm and cocked it, while demanding that they open the door. The door was eventually opened and upon entry into the house, accused demanded that Ashley Phiri tell him the biological father of the two children. At that, point Ritah Nkomo told the accused that Ashley Phiri was previously married to two different men, one of whom had fathered Cynthia Makanaka, and that the man who fathered Chloe Munashe Chapeyama was the man she was to marry. The accused alleges that he was enraged and suffered a near blackout as a result of extreme provocation and started firing the weapon resulting in the death of Ashley Phiri, Rita Nkomo and Nkosivumile Ncube. The child, Chloe

was injured in cross-fire. Accused alleges that as a result of the provocation he did not have the time to consider the consequences of his actions. The accused confirms that he turned the gun on himself intending to kill himself. He failed to do so. He sustained serious injuries and is now paraplegic. The accused contends in his defence outline that he did not intend to kill the deceased persons and that he regrets the loss of life. The state tendered into the record (exhibit 3 (b)), **the post mortem report** in respect of **Ashley Phiri** compiled by Dr S. Pesanai following an examination of the remains of the deceased. The cause of death is listed as: (a) severe brain damage; (b) gunshot wounds (head); (c) assault

The post mortem report reveals that the deceased who was aged 21 years at the time sustained very serious injuries. On marks of violence the report shows that the deceased sustained the following injuries

- (a) Gunshot wound (entrance) left eye medial angle. Exit wound right occipital region with compound fracture and brain oozing.
- (b) Gunshot wound entrance right eyeball. Exit wound right occipital temporal region.
- (c) Gunshot wound right chest. Exit left lower abdomen.
- (d) Gunshot wound on the back, entrance located 6cm from back midline, 7cm from scapula bone.
- (e) Gunshot wound right knee. Exit medial part of knee.
- (f) Gunshot wound back of right leg, entrance (3 x 2cm) exit (7 x 5cm). Right to left compound fracture tibia and fibiula, Scalp haematoma, generalized. Fractured parietal, temporal and occipital bone. Fractured right anterior medial and posterior cranial fossae. Severe brain damage, brain oozing from exit wound.

The post mortem report in respect of the second count relates to the deceased **Ritah Nkomo**. It was entered into the record as exhibit 5 (b). It was compiled by Dr S. Pesanai as United Bulawayo Hospitals following an examination of the remains of the deceased. The deceased was aged 23 years. The cause of death is listed as; (a) ruptured heart; (b) gunshot wound (chest); (c) assault.

On marks of violence the report reveals the following injuries:

- (a) Laceration (head frontal region)
- (b) Gunshot wound right anterior forearm
- (c) Gunshot wound right chest, entrance wound located 14cm from the right nipple, 15cm, from the clavicle bone, exit right anterior axillar line located 10cm from right nipple.
- (d) Gunshot wound right chest on the midline, sterno clavicle joint.
- (e) Gunshot wound located 4cm from the scapula bone and 4cm from midline back.
- (f) Gunshot wound located midline back 3cm from scapula bone.
- (g) Gunshot wound buttock located 2cm from hip bone exit wound left mid buttock
- (h) Gunshot wound back of thigh, entrance wound (3 x 1cm)
- (i) Gunshot wound back of thigh. Entrance wound (3 x 1cm) part of projectile recovered. Exit wound right exterior part of thigh, fractured femur.
- (j) Gunshot wound left leg entrance located medial part of leg
- (k) Gunshot wound left thigh entrance (3 x 1cm) exit medial part front(6 x 4cm)
- (l) Chest wound that ruptured the heart and broke it into pieces.

Other injuries observed were scalp haematoma, generalized, fractured parietal, temporal and occipital bone, fractured right anterior medial and posterior cranial fossae. Severe brain damage, brain oozing from exit wound.

The third **post mortem report** is in respect of the deceased in count 3, **Nkosivumile Ncube**, aged 16 years at the time of her demise. The report was compiled by Dr S. Pesanai at United Bulawayo Hospitals. The cause of death is listed as (a) spinal cord injury; (b) fractured spine T5 – T6; (c) gunshot wound. On marks of violence the report reveals that the deceased sustained the following injuries:

- (a) Gunshot wound right chest (1 x 1cm) located 3cm from right nipple 4cm from clavicle bone 10cm from midline bone. Exit wound base (2 x 1cm), 2cm from midline bone 5cm from scapula bone.

- (b) Gunshot wound entrance (5 x 3cm) located 1cm from midline, 4cm from clavicle bone 2cm from the joint. Exit wound (6 x 4cm) located under the right ear. Scalp haematoma right occipital region. Fractured right medial and anterior cranial fossae right subarchnoid haemorrhage. Multiple ruptured vessels.

The state produced a medical report in respect of count 4. The report by **Dr N. Zvaita** reveals that the child **Chloe Chapeyama** sustained gunshot wounds. The doctor observed two gunshot wounds on both thighs. The injuries were serious. The child could potentially have lost her life. The state tendered a **CID Forensic Ballistics Report**. The report was compiled at CID Homicide, Bulawayo on the 1st of February 2018. The AK 47 rifle was examined and the following findings were made:

- (a) The rifle was functional
- (b) An examination of the chamber and barrel showed some deposits of gunshot residue an indication that the weapon had been fired.
- (c) 19 spent cartridge cases were recovered at the scene
- (d) Some bullet fragments were recovered at the scene
- (e) 6 spent bullets were recovered
- (f) 1 deformed bullet was also recovered

The Forensic Ballistics Report serves to confirm that the AK 47 rifle had been used on the night in question. This fact is admitted by the accused. Nothing more needs to be said more about the ballistic report. A report compiled by a **Psychiatrist** based at Mlondolozhi Special Institution, **Dr N. Mawere** was also tendered into the record. The accused was examined by the Psychiatrist on the 5th September 2018, the 31st October 2018 and on the 30th January 2019. The examination made the following findings.

- (a) There was no clear history of accused's early life, but there were some unusual behavior patterns which a maternal uncle said had been treated by certain prophets.

- (b) There was delinquent behavior in 2016 when accused was detained at army detention barracks after he assaulted a Zimbabwe Republic Police officer and two military police officers. At that time he developed adjustment disorder marked by nightmares and somatisation from which he has recovered.
- (c) The neuro-surgeons confirmed complete paraplegia and noted that accused has pains which could be phantom pains as clinically there is no objective loss of sensation power

In the opinion of the Psychiatrist the accused was not mentally disordered at the time he committed the alleged crime. He had full appreciation of the consequences of his actions. Currently he has symptoms of depression requiring treatment. The Psychiatrist opined that this is consistent with the nature of this crime and the possible outcome of the charges he is facing.

The state led *viva voce* evidence from two witnesses. The first to testify was 81 year old **ESTHER NKOMO**. She testified that she resides at 1604 New Magwegwe, Bulawayo. She knew the deceased Ashley Phiri, Ritah Nkomo and Nkosivumile Ncube during their lifetime as her grandchildren. She knew that accused was co-habiting with the deceased Ashley Phiri at the time of her death. The witness told the court that on the 1st February 2018 she was awoken by the deceased persons who indicated that there was someone knocking at the door. In her own words the witness observed deceased persons crowded in a room. She states that she opened the door and noticed that the accused was dressed in full military fatigue. The accused was brandishing a firearm. At that moment the witness sneaked out of the house intending to alert an aunt who lived nearby. Before she had gone far, she heard gunshots from her residence. The witness could not comment on the accused's state of sobriety. She confirmed that accused and the deceased Ashley Phiri had long standing marital problems. The evidence of this witness was credible. Defence counsel declined to cross-examine this witness.

The second state witness was **JUDITH NKOMO**. She resides at 9053/39 Pumula East, Bulawayo. She was known to the deceased persons during their lifetime as cousins. She knew Chloe Chapeyama as her grand-daughter. She confirmed that on the fateful day she was phoned

by Nkosivumile Ncube (deceased in count 3) indicating that the accused was at their home and had a gun. Before she could get further details, the phone went off and was no longer reachable. The witness stated that she called her brother Ntando Nkomo who also confirmed that he had been informed that accused was at Magwegwe. This witness and Ntando Nkomo proceeded to the scene of the crime. This witness crucially told the court that the accused and the deceased Ashley Phiri were having marital problems prior to this day. The witness clarified that Ashley Phiri had given birth to Cynthia Makanaka while she was still at school. Ashley Phiri remained with her until sometime in 2014 when she eloped to Mutare with the accused. The witness stressed that Cynthia Makanaka had her own biological father, who is not the accused. The accused must have been aware of the paternity of Cynthia Makanaka before the day of the shooting incident. The witness gave her evidence well and was a credible and consistent witness. The state sought and obtained formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07). The evidence of the under listed witnesses as summarized in the outline of the state case was admitted with the consent of defence counsel, namely:

- (i) Ntando Nkomo
- (ii) Pius Lungisani Tshuma
- (iii) Mbekezeli Bhebhe
- (iv) Clemence Mbofana
- (v) Tarisai Gweva
- (vi) Doctor N. Zvaita
- (vii) Doctor S. Pesanai
- (viii) Detective Assistant Inspector Dube, I

The defence opened its case and led oral testimony from the accused **CARLOS TINASHE CHAPEYAMA**. The accused, gave a long narration of his relationship with the deceased Ashley Phiri. The accused portrayed a picture of an unhappy marriage punctuated with conflict. He testified that the relationship deteriorated when he discovered a birth certificate reflecting the father of Cynthia Makanaka as one Shingirai Nzuwa. The accused blames the

deceased Ashley Phiri for having lied that he was the father of Cynthia. On 28th November 2017 Ashley Phiri deserted the accused and sought refuge with her relatives in Bulawayo. The accused states that he was unable to locate Ashley until sometime in January 2018. The accused re-established communication with the deceased Ashley Phiri and on 28 January 2018 they met up in Bulawayo. It is common cause that Ashley Phiri's relatives were not comfortable about the re-engagement and requested that accused to bring his elders to discuss the issue. This never happened. On 1st February 2018, around 0300 hours the accused shot and killed the deceased persons at close range using an AK 47 assault rifle.

Whether the defence of provocation was established

I propose to deal with the defence of provocation as the main defence raised by the accused in this matter. The accused abandoned his perceived defence of diminished responsibility. The other defence that was pursued was intoxication.

In our law and in terms of section 239 of the Criminal Law Codification and Reform Act (Chapter 9:23), provocation is not a full defence on a charge of murder. If it is successfully established the offence of murder is reduced to culpable homicide. In order for this position to be arrived at, the facts must clearly show that the accused was so provoked that he completely lacked the intention to kill the victim.

In his book, *A Guide to Criminal Law*, G. Feltoe sets out what has long been referred to as a two-fold approach. At page 104 G. Feltoe lays down the approach as follows:

“The first rung (subjective)

The question asked is: Did X have the intention to kill? In deciding this the court will take into account the factor of provocation and the effect of provocation on X and all other salient subjective factors (such as the degree of intoxication) which may have affected X's ability to form the requisite intention.

If X did not form the intention to kill he cannot be found guilty of murder but only of culpable homicide. If X did form the intention to kill the court will then proceed to the second rung.

The second rung (objective but with subjective element)

If X intentionally killed his victim, but did so after losing his self- control as a result of the provocation, the court will examine the extent of provocation received and decide whether a reasonable person would have lost his self control faced with that degree of provocation and would have acted in the same manner as X. If the court decides that a reasonable person would have acted in the same manner, murder will be reduced to culpable homicide (i.e X will have a partial defence ...) This partial defence will not apply if it is clear that X did not lose his self control even if “the circumstances the reasonable person would have done so.”

This position of our law was restated in the case of *S v Dzaro* 1996 (2) ZLR 541 at 547C-G. In *S v Gambanga* 1997 (2) ZLR 1 at p 9 CHIDYAUSIKU J (as he then was), commenting on *mens rea*, stated the following:

“In my view, once a person is capable of some control of his action, he becomes capable of forming mens rea and therefore liable in law for his actions. The question of the extent of the self control becomes only relevant for the purpose of sentence.”

In assessing the evidence, and applying the relevant law, this court will be guided by the facts that are common cause and beyond dispute. Prior to this shooting the accused had long standing marital problems with the deceased Ashley Phiri. What triggered the chain of events is clearly the misunderstanding between the accused and Ashley Phiri regarding the paternity of Cynthia Makanaka. Ashley Phiri deserted the accused and reported to her relatives, including Judith Nkomo that she was being physically abused by the accused. Ashley Phiri went to reside in Magwegwe with her sisters. The accused “tracked” Ashley Phiri and discovered that she resided in Bulawayo. On the first occasion of his visit to Bulawayo accused left his service rifle at his base. He gave the reason he carried his firearm on the second visit as his fear that he would be punished if he left the firearm unattended. The accused gave the impression that he proceeded to Bulawayo at the invitation of Ashley Phiri. That version is quickly discredited when one notes that on arrival at Magwegwe accused was not welcome. The deceased Ashley Phiri demanded to know why he had come. If at all Ashley had invited her to the residence this incident would not have arisen at all. The accused admits that as he was knocking at the door and before the door was opened he had cocked his gun. The question to be asked is why the

accused cocked the gun in the first place if the visit was friendly. Before opening the door, Ester Nkomo says she observed the deceaseds persons huddled in a corner. The accused was brandishing a firearm loaded with 20 rounds of ammunition. According to accused's own version where he discharged the firearm he had engaged it in automatic mode. He fired indiscriminately and sprayed the deceased with bullets. The accused says that he was provoked and lost self control. The question to be asked is would a reasonable person have acted in the manner the accused did? The accused stated categorically that the time he took from the time he cocked the gun to the time he started firing was about 30 minutes. Surely, any reasonable person would have exercised self control. The first witness Esther Nkomo stated that as soon as she sneaked out of the house she heard gunshots.

CONCLUSION

It seems to me that the accused carefully planned this event. He executed his plan. He achieved his objective and in the process killed three persons in cold blood. As regards intoxication, the accused's level of intoxication was not established by his own evidence. He gave the impression that he was drinking alcohol between Gweru and Bulawayo between the hours of 1900 hours and 2300 hours. The accused did not allege that he was so drunk that he could not appreciate what was going on around him. He clearly knew what he was about to do when he left Gweru. He knew what he intended to achieve when he arrived at house number 1604 New Magwegwe. Before the door was opened he had cocked his gun in readiness to carry out his objective. The firearm did not discharge accidentally. The accused had the presence of mind to know that his weapon was on automatic mode. If there was any provocation, his reaction was clearly disproportionate. The court cannot believe the accused's version of events. His version is a well calculated account to avoid criminal responsibility. We reject he accused's defences of provocation and intoxication. We make the specific finding that accused was not provoked to such an extent that he lost self control. In respect of the child Chloe, the accused states that she was caught in cross-fire and that he had no intention to cause her death and should be acquitted on the charge of attempted murder. On the established facts, the accused clearly realised that there was a real risk or possibility that his conduct could bring about the death of the

child but continued to engage in such conduct despite the risk and possibility. The minor child was lucky to have survived.

In the result, we are satisfied that the state succeeded in proving its case in respect of all the counts beyond reasonable doubt.

Accordingly,

1. In respect of count 1 accused is found guilty of murder with actual intent.
2. In respect of count 2, accused is found guilty of murder with actual intent.
3. In respect of count 3, accused is found guilty of murder with actual intent.
4. In respect of count 4, accused is found guilty of attempted murder.

Sentence

This is one of the most horrific cases of murder this court has ever had to contend with. The accused shot the 3 deceased persons with an AK- 47 assault rifle at point blank range. The minor child Chloe Chapeyama could have easily been killed in this terrible episode of domestic violence. The deceased are young females whose lives were cut short in brutal fashion. In assessing an appropriate sentence the court should take into account the fact that the gruesome killing was committed in aggravating circumstances. These aggravating circumstances are that there is more than one murder victim and a minor child was involved. This court has made a finding that this murder was well planned and calculated and therefore there was pre-meditation. In terms of section 47 (4) (b) a person convicted of murder in aggravating circumstances shall be liable to a sentence of death or imprisonment for life or imprisonment for a definite period not less than 20 years. This court has to achieve a delicate balance between delivering justice to the victims, but on the other hand take into cognisance the peculiar medical condition of the accused person. This court observes that the accused is completely paraplegic arising from a gunshot wound that affected his spinal cord. The accused does not have bowel or bladder control. The paraplegic condition is permanent. The accused requires rehabilitation. He is on a special diet. It is common cause that the accused's condition presents huge challenges to the prison system,

which is not designed for persons with his type of disability. It is recommended that prison officials should provide reasonable facilities to cater for accused's needs.

The court must, however, pass a sentence that is fair to the accused person but that does justice to the extent that it must be known that domestic violence has no place in a civilized society. The use of guns in the resolution of matrimonial disputes will not be countenanced by these courts. The sentence we shall pass must serve the ends of justice.

Accordingly, the accused is sentenced as follows:

“All counts are taken as one for purposes of sentence and accused is sentenced to 25 years imprisonment.”

National Prosecuting Authority, state's legal practitioners
Calderwood, Bryce Hendrie & Partners, accused's legal practitioner