

THE STATE
versus
TAURAI MUKAMBA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 10 October 2013 and 11 October 2013 and
27 June 2014 & 23 July 2014

ASSESSORS: 1. Mr Musengezi.
2. Mr. Mhandu

D.H Chesa, for the State
T Govera, for the Defence

BHUNU J: The accused is charged with the murder of his 1 ½ year old infant child as defined in s 47 of the Criminal Law codification and reform Act) [*Cap. 9:23*]. He is alleged to have administered poison to the child in the course of an unpleasant domestic brawl with his wife.

The facts leading to the child's death are by and large common cause. The only bone of contention is whether or not the accused deliberately administered poison to the child with the intention of killing him.

The undisputed facts are that the accused was married to the deceased's mother one Sinety Mudukuti residing in Jaji village Chief Nyajina in the Uzumba area. Their marriage had endured for a period of three years. The marriage was blessed with the minor child who met his death when he was now walking and feeding on solids.

On the night of 12 July 20 12 the couple had a protracted misunderstanding concerning his association with another woman with whom he had had a child. The misunderstanding spilled onto the next day with the two failing to resolve their dispute. They ended up agreeing to party ways with the accused determined to hold onto the child. He ordered her to go leaving his child as he insisted that his child was going nowhere. The intervention of relatives was to no avail as the two were determined to end their marriage and party ways.

Sinety then proceeded to the accused's grandmother's homestead one Cecilia Mukamba to bid her farewell. The accused followed her with the now deceased child. At the grandmother's home they continued to haggle and fight over the child. Eventually Cecilia managed to persuade them to go back to their home and live in peace. It was now around 3pm and they were now both hungry and tired from fighting over the child. Upon arrival at home they took a rest in the bedroom.

Before they could take a proper rest the accused's young brother Allen came to announce that his wife's Mother and brother Thomas Mudukuti had arrived at his uncle's homestead. The entourage included Chipu Jambwa and George Zanga. The accused then advised Sinety to go and meet the visitors but objected to her taking the child with her. As a result they again started fighting for the child. During the scuffle the accused managed to snatch the child from Sinety. The accused fled with the child after collecting a bottle of poison from the fowl run. He continued to run away with the child while in possession of the bottle of poison. Sinety chased after him shouting at him not to poison her child. As she ran after the accused she met Allen who also went after the accused. When she failed to catch up with the accused she gave up and decided to go and make a report to the visitors. Allen however continued to chase after the accused.

Sinety testified that the accused had suicidal tendencies as he often threatened to commit suicide. As she ran after him she feared that he would poison himself together with the child. Apart from mere suspicion no one else except the accused and his brother Allen knows what actually happened when Sinety gave up the chase.

As I have already indicated Allen was an eye witness to the tragic events which led to the deceased's death. The story can best be told in his own words. This is what he had to say:

"The accused's wife called me and advised me that my elder brother had gone to take some poison. I then followed him. I found him drinking poison. When I was told this by Sinety I was on my way from the garden.

I followed him and I found him drinking poison. When I enquired he chased me. While he was chasing me he left the bottle containing poison and the child behind while he was chasing me. The accused was with the deceased while he was drinking the poison.

Initially he was holding the deceased as he was drinking the poison. He then took some stones and started chasing me. I do not know how the child eventually took the poison. He was holding the child with his left arm. I was about 3m from him. When I arrived he was holding the bottle and drinking the poison. He then placed the bottle

down and started chasing me. I then rushed home and advised the people. He was following me.”

The accused’s defence is more or less the same as the evidence of Allen. It was his testimony that he wanted to commit suicide because of the serious misunderstanding he had with his in-laws and his wife’s alleged misbehaviour while he was away in South Africa where he worked. He confirmed that Allen chased after him in a bid to restrain him from committing suicide. He then placed the child and the poison on the ground as he chased him away. He vehemently denied ever having poisoned or intended to harm the child in any manner whatsoever. He concluded his evidence in the following tormented mournful words:

“When I placed the child on the ground and threw away the poison bottle the child was about 3 to 4m away from the bottle. At that stage I was much pressed and I could not fore see any risk or possibility of any danger that could result from my conduct. I had no motive to cause the death of my child. Even if I was to die I would have wanted my relatives to remember me through that child.

The deceased was my only child with Sinety Mudukuti. I do not think there is anyone more aggrieved by the death of my child than myself.”

Despite being subjected to a probing skilful searching cross-examination, the accused was not shaken. He steadfastly stuck to his story which was amply corroborated by the evidence of his brother Allen. Their evidence has a ring of truth. From Sinety’s evidence it is clear that the child must have been terribly hungry and thirsty as the feuding family had not had anything to eat from the previous day. It is therefore probable that when the accused dropped the bottle of poison to chase after Allen, the deceased oblivious of danger, inadvertently took the misfortune to quench his thirsty and hunger with a deadly poison.

While the state and its witnesses have reasonable grounds to suspect that the accused loved his son so much that he intended to take him with him to the next world after committing suicide, there is no cogent evidence establishing that fact beyond reasonable doubt. That being the case, the court is unanimous in its finding that the accused had neither the actual nor legal intention to kill his minor child the now deceased.

That finding is however not sufficient to absolve the accused from all criminal liability. It is clear that the accused had a duty of care towards the deceased. He knew that the poison contained in the bottle was dangerous. Any reasonable man knows that poison must be kept away from the reach of children. Thus the accused was negligent in placing the opened bottle of poison within easy reach of the deceased minor child. His conduct in this

respect was wrongful and culpable. **He is accordingly found guilty of the competent verdict of culpable homicide.**

SENTENCE

The accused was charged with murder but was convicted of the lesser competent verdict of culpable homicide. He negligently left an open bottle of poison within easy reach of his 1½ year old son whilst he chased after his brother who was attempting to dissuade him from committing suicide. In his absence the child reached out and ingested the poison with fatal consequences.

In assessing sentence the court takes into account that the accused is a young first offender of 25 years of age. He has exhibited unquestionable remorse and contrition over his negligent conduct that led to the demise of his dear son. He was employed in South Africa earning R3 600 per month. He has suffered double tragedy through the loss of his job and beloved son. As a result of his misdemeanour he has suffered incarceration for a period of 2 years on remand. The memory of the loss of his son through his own negligence will undoubtedly hound him for the rest of his life.

The many mitigating factors in this case are such that it is wholly undesirable and pointless to punish the accused beyond what he has already endured so far. The courts however take a serious view of offences of this nature. Whenever precious human blood is needlessly shed the courts are inclined to pass stiff and deterrent sentences to avoid recurrence.

Initially the court was inclined to impose the penalty of community service but is now in total agreement with the community service director that the accused is unsuitable for community service because the offence is serious and he has suicidal tendencies. That recommendation is in line with BARTLETT J's remarks in *S v Gumbo* 1995 (1) ZLR 163 at 166D where the learned judge observed that:

“The whole object of community service is to enable the community to benefit by non-serious offenders (those who would otherwise have been sentenced to 12 months' imprisonment with labour or less) being given the opportunity to keep out of prison by doing useful work for the benefit of the community.”

It is self-evident that community service is a form of punishment reserved for trivial offences. An offence involving the unlawful shedding of precious human blood save in exceptional circumstances is always considered serious. The courts will always take a serious

view of the offence whenever sacred human blood is lost. Thus community service in the circumstances of this case will trivialise what is admittedly a very serious offence.

As I have already said the accused has however already atoned for his moral blameworthiness there is no point in punishing him beyond the mental anguish and 2 year incarceration he has already suffered. Any further punishment will be no more than flogging a dead horse. There is nevertheless need to pass a deterrent sentence that will monitor him in future to keep on the narrow and straight path.

The accused is accordingly sentenced to 2 years imprisonment the whole of which is suspended for a period of 5 years on condition the accused does not again within that period commit any offence involving the unlawful killing of a fellow human being.

*The Prosecutor General's Office, the State's legal Practitioners.
Govere Law chambers, the Defence's Legal Practitioners.*