

THE STATE
versus
TINASHE CHATUKUTA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 27 February 2015, 2 & 4 March 2015

Assessors: 1. Mr Rajah
2. Mr Chidawanyika

Criminal Trial

Mrs J Matsikidze, for the State
T Nyakunika, for the defence

HUNGWE J: The accused faces a charge of murder. He denies it.

The facts in this case are largely not in dispute. They may be summarised as follows.

The accused and now deceased were long-time friends from their early school days till the day of the events in issue. On this day, they had done their school home-work. They retired to bed at the accused's residence.

The accused woke up after he felt deceased's manhood probing his anus. He grabbed it and confronted the deceased. The deceased stated something to the effect that he would pay the accused for the abuse. This infuriated the accused all the more. In a fit of rage the accused set upon a vicious attack on the deceased using his bare hands. The assault attracted his mother who slept in a different section of the homestead. She came and called her son to order. This was not before the following injuries were sustained by the now deceased:

- (a) Generalised swelling of the body including the head, neck, arms and trunk;
- (b) Swollen left side of the face, jaw and neck;
- (c) Bruises in the neck muscles;

The subsequent post mortem examination revealed that the head and its internal organs suffered extensive bruising. There was an internal jugular vein with a small leak of blood. There were blood clots to the brain. The chest cavity similarly showed extensive bruising of the lungs and intercostal muscles. There was a total of 150ml of blood which had leaked into the chest cavity. His stomach was swollen by the time the post mortem report was carried out.

The cause of death was stated as cardiopulmonary failure secondary to lung injury sustained during blunt trauma to the lungs. A further contributing factor was the head injury with internal haemorrhage and abdominal injury.

The deceased left the accused's home and walked on his own to his residence. The commotion had attracted fellow students who later came to see him. When he came out to meet his well-wishers, he could hardly stand. After relating to his visitors the events at the accused's residence the deceased asked them to leave. By the next morning he had died.

The accused's defence was one of provocation. He said that upon waking up to the deceased's grotesque sexual predilections he was infuriated to the extreme when the deceased offered to pay him. Not only did this humiliate him but he felt belittled as this offer reduced him to a prostitute. He lost his self-control and assaulted the deceased with his bare hands. He just rained blows onto the deceased's body. He did not mind where these landed. He stated that he was defending his dignity which the deceased had trashed.

In our law provocation can be a partial defence to a charge of murder if the surrounding circumstances of the provocation were such that a reasonable person in the position of the accused would have lost his self-control. It must also be such that in the circumstances an ordinary man would have lost his self-control and acted as the accused did. Put in another way, the provocation must be such that it could reasonably be regarded as sufficient ground for the loss of self-control that led the accused to act against the victim as he did and that it actually caused the accused to lose his self-control. *S v Nangani* 1982 (1) ZLR 150 (SC). The defence of provocation will be upheld if, after being provoked, the accused as a result of provocation does not have the intention or realisation referred to in s 47 or; although the accused has the intention or realisation referred to in s 47 but has completely lost his self-control in circumstances where the provocation was sufficient to make a reasonable person lose his or her self-control. Then in those circumstances, the charge of murder will be reduced to culpable homicide. Section 239 of the Criminal Law (Codification and Reform)

Act, [*Chapter 9:23*].

There is no doubt in our view that an assault in the nature that the accused suffered was the most humiliating one, comparable only to rape. The accused was by this act subjected to an invasion of his person and an attack on his dignity as a person. Such a violation in our view would have invoked a complete loss of self-control in the victim. Where the victim kills his or her abuser, that killing will be justifiably reduced to culpable homicide since, as a result of complete loss of self-control, the victim lacks criminal intent.

In considering what an appropriate verdict ought to be on these facts we took into account the following features.

1. The accused and deceased were good friends. The assault was a direct result of the provocative conduct of the deceased.
2. The deceased used his bare hands in assaulting the deceased.
3. There is no eye witness to the manner in which the assault progressed or how long this took.
4. After the assault, the deceased walked to his residence without any assistance.
5. By about 01h 00 he got up to speak to one witness and her boyfriend to who he described how he had been assaulted at the accused's.

In our assessment of the facts, we find that although the accused had been unduly humiliated by this unnatural sexual attack, he had responded by resorting to excessive violence against his attacker. The accused in our view, as a result of the provocation, failed to realise that his conduct might produce the relevant consequences. In other words the amount of provocation, subjectively viewed so clouded his powers of judgment such that he totally lost his self-control. In our view the accused's reaction was quite understandable although not excusable. As such we find that a reasonable person in the same circumstances which the accused found himself would have realised that by assaulting the deceased indiscriminately serious injury or death might result and would have taken steps to guard against such an eventuality by desisting from such conduct. Therefore, in failing to guard against the conduct the accused was reckless. Whilst it is appreciated that one is entitled to defend oneself from an unlawful attack, where however the means used to repel an attack is clearly excessive, the defence of self-defence will fail. That was not the defence put forward by the accused. His defence was that he did not act intentionally, recklessly or carelessly.

Even accepting that the deceased had no right at law to act as grossly indecently as he did, the accused's reaction must be measured against what a reasonable person in the position of the accused would have done. A victim of sodomy in our view would have taken reasonable steps to report it so that the law takes its course rather than resort to such a murderous attack. He would have thereby avoided taking the law into his own hands and also avoided another unlawful attack. As it is said, two wrongs do not make a right.

In our view there is no basis to hold that the accused had the actual or even legal intention to cause the death of the deceased.

He however, acted negligently by exacting punishment from his attacker with fatal consequences.

He failed to measure up to the standard of a reasonable man in the circumstances in which he found himself. In the circumstances he is found not guilty of murder.

A proper verdict would therefore be one of guilty to culpable homicide as defined in s 49 (1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

National Prosecuting Authority, legal practitioners for the State
Chibaya & Partners, legal practitioners for the accused