THE STATE
versus
BRIGHTON MUKWACHA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 3, 4 and 8 March 2016

Assessors 1. Mr Chidyausiku
2. Mr Chagugudza

Murder Trial

D.H. Chesa, for the State
T.B. Kativhu, for the Accused

CHITAPI J: The accused was indicted to answer to a charge of murder as defined in s 47 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. When the matter was called, the state counsel Mr *Chesa* informed the court that after an exchange of evidential documents including the accused's defence outline with Mr *Kativhu,* the accused's *pro deo* defence counsel, the accused had tendered a plea of guilty to culpable homicide. The state counsel advised the court that the State was agreeable to have the trial proceed on the lesser charge of culpable homicide.

The prosecutor then applied that the trial be postponed to the following day to enable the preparation and drafting of the altered charge sheet and a statement of agreed facts. The matter with the consent of the defence counsel was accordingly stood down to 4 March, 2016. It should be pointed out that the court having considered the summary of the State case and the accused's defence outline also formed the view that proceeding on a charge of murder would have presented a challenge of perhaps insurmountable proportions for the State. The views of the court notwithstanding, the State is in any case *dominis litis* and was well within its rights to choose what charge to prefer against the accused.

On 4 March, 2016 the trial resumed and a charge of culpable homicide was put to the accused person. It was alleged against him, that on 20 February, 2014 at house number 5125-

110 Street Warren Park D,Harare, the accused unlawfully and negligently caused the death of one Tendai Manyenga by "stabbing him negligently and failing to realize that death may result from his conduct, or realizing that death may result from his conduct, negligently failed to guard against that possibility resulting in injuries from which the said Tendai Manyenga died". The accused pleaded guilty to the charge and Mr *Kativhu,* his defence counsel confirmed the guilty plea. The court entered a plea of guilty.

The statement of agreed facts was produced by consent and read into the record. It was accepted as "Annexure A". Mr *Kativhu* confirmed with the court that the accused fully understood and admitted the agreed facts. He further confirmed that he had fully explained the essential elements of the offence to which the accused had pleaded guilty and that the accused's plea was genuine and understandingly made. In accordance with the confirmations made by Mr *Kativhu* the court was satisfied in terms of the proviso to s 271 (2) (b) of the Criminal Procedure & Evidence Act, [*Chapter 9.07*] ("the Code") that the accused understood the charge, the essential elements of the offence to which he pleaded guilty as well as the acts and for omissions from which the charge arose as set out in the statement of agreed facts, the court formally convicted the accused of culpable homicide in contravention of s49 of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*] as charged.

For completeness of record, the agreed facts which for purposes of this matter form the basis from which the charge arose were stated in the statement of agreed facts as follows:

> "1. The accused person and the deceased resided in the same neighbourhood. The deceased's friend John Silimoyo owed and still owes the accused person US$5.00. The debt arose over a track suit which he bought for his minor daughter from the accused person.
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> 2. On 20 February 2014, and at around 1600 hours, the now deceased and John Silimoyo were consuming alcohol whilst walking around 110 Street, Warren Park D.
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> 3. Accused person was sitting outside his residence at number 5125-110 Street, Warren Park D when he saw the two approaching.
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> 4. On their meeting, a quarrel ensued which later degenerated into a fight between accused person and John Silimoyo. The deceased intervened to assist John Silimoyo in the fight.
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> 5. The accused person tried to escape into his yard but he fell down. The deceased and John Silimoyo caught up with the accused person and the fight continued on the ground.
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> 6. Accused managed to escape and came back armed with a kitchen knife and stabbed deceased just below the left breast and the deceased collapsed.

7. The deceased was rushed to Suburban Hospital where he died on admission.

8. A post mortem examination was carried out by Dr Maurizio Gonzalez, a forensic pathologist who concluded that death was as a result of haemothorax, wound on the heart and chest stab.

9. Accused admits having stabbed the deceased but denies having had the intention to bring about his death. Accused further denies that he realised the possibility that his conduct would result in the death of the deceased.

10. Accused pleads guilty to negligently causing the death of deceased, that is contravening Section 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], and the State accepts the limited plea".

The court in terms of s 271 (4) (a) of the 'Code' called upon the prosecutor to present evidence of any relevant to prove the fact of the death of the deceased. The prosecutor produced the post mortem report by consent. It was marked as exhibit 1. The post-mortem report was compiled by Dr Mauricio Gonzalez, a forensic pathologist. It shows that he examined the remains of the deceased Tendai Manyenga on 24 February, 2014. The report shows that the deceased was 24 years old, weighed 75 kg and was 174 cm tall. The deceased was apparently healthy and well nourished. The body of the deceased was bleeding from the mouth and had blood on the chest. There was a stab wound 2 cm x 4 cm on the left side of the chest below the breast. The wound pierced the left ventricle. He concluded that the cause of death was haemothorax, wound on the heart and chest a stab. Having satisfied itself that the deceased died from the stab wound caused by the accused, the court asked accused's counsel to address the court in mitigation of sentence. He submitted a written statement in terms of s 27 (4) (b) of the Code. The court accepted the statement in evidence as "Annexure B".

Mr *Kativhu* is his submissions argued for a sentence of community service on the basis that the accused was a first offender who pleaded guilty thus exhibiting remorse and that the deceased was the aggressor. He also cited a number of past decisions of this court on the courts' approach to sentence. He sought to persuade the court to follow those decisions. Basically his argument was that punishment must be blended with a measure of mercy and that its purpose is not to break criminals see *S* v *Sparks & Anor* 1972 (3) SA 396, *S* v *Moyo* HH 63/84; *R* v *Zuze* RLR (incomplete citation) and *R* v *David & Anor* 1964 RLRZ. The court takes note of the points he has made and the *dicta* in those cases.

Mr *Kativhu* further cited the cases of *S* v *Sibanda* HB 102/06 to the effect that prevalence of an offence should not be the overriding factor in sentencing and *S* v *Moyo & Ors* HB 116/06 which outlines certain considerations which should guide the sentencing

court. The court takes the helpful guidelines into account and will not repeat them as they are set out in the submissions. The court was further referred to the cases of *S v Mpofu* 1985 (2) ZLR 285 on the need to keep first offenders out of prison as a general rule and that imprisonment should be resorted to when absolutely essential (see *S* v *Mudzimba* HH150/87*)*. In response to questions from the court, Mr *Kativhu* submitted that the accused was 25 years old and would have been 23 years old when he committed the offence. He emphasized that the unfortunate death of the deceased would not have eventuated but for the deceased's aggression.

Pursuant to s 271 (5) of the Code the court asked the accused certain questions relevant to sentence. He answered the questions under oath. The prosecutor and defence counsel did not have any questions to put to the accused following questions by the court albeit having been given opportunity to put any question.

In answer to questions by the court the accused stated that he was not friends with the deceased although they were neighbours. He, the accused was friends with John Silimoyo who was in turn a friend of the deceased. The accused's parents are deceased and he stays at his late parents' residence (the scene of the offence) with his brothers and sisters. He completed O levels (form 4) in 2007. He is not married and has no children. He survives through vending and operates a vending stall. He got the knife which he used to stab the deceased from the sink which was outside the house. He did not run away to escape the attack upon him by John Silimoyo and the deceased although he could have done so. It never occurred to him to run away from the two attackers. He did not think of using other means of defence other than to use the knife. He does not enjoy a good relationship with the deceased's family and his family is broken. The siblings often quarrel over rental money which is paid by tenants or lodgers at the house. He looks after his two brothers who are mentally challenged but he has a sister who works for a hotel. He was in custody for 10 months before being released on bail.

The prosecutor addressed the court in aggravation. He submitted that the court should take into account that when the incident took place, the accused was sober whilst the deceased and John Silimoyo were drunk. Whilst it could not be concluded with certainty as to what caused or who started the fight, he submitted that the deceased joined the fight after his friend John Silimoyo was on the receiving end from the accused. The accused had a chance to escape from the attack upon him but he instead armed himself with a knife. The facts of

the matter according to the prosecutor were borderline between culpable homicide and murder as defined in s 47 (1) (b) of the Criminal Law (Codification & Reform) Act.

The prosecutor further submitted that the accused used severe force when stabbing the deceased and that the stab wound extended to the heart. He also submitted that the accused was a known bully in the area and was an alcohol and drug abuser although this bad behaviour manifested itself after the offence was committed. Prior to committing the offence the accused was God fearing and attended church. The accused skipped bail conditions and was imprisoned and then released and arrangements were made for him to stay with a relative in Masvingo but he caused havoc there as well. The prosecutor advocated for a sentence in the region of 12 years as such a sentence with part suspended would be deterrent and rehabilitative.

The court sought an explanation from the accused as to allegations made by the prosecutor that he had suddenly changed in character from being God fearing into an outright bully. The accused denied the allegations that he was incorrigible and averred that these were lies peddled by his siblings especially his sister who wanted to make sure that the accused remained in prison whilst she enjoyed the rentals from the house.

In the view of the court and after considering all the circumstances surrounding the commission of the offence, the mitigating factors and aggravating features as submitted respectively by the accused's counsel, the prosecutor and those elicited from questions by the court, it is beyond doubt that this is a very bad case of culpable homicide in which the accused's degree of negligence was very high. Indeed, the court is in agreement with the submission by the prosecutor that the circumstances of the commission of the offence make it borderline between murder and culpable homicide.

The starting point in assessing an appropriate sentence is to keep in mind that the right to life is God given and s 48 (1) of the Constitution provides as a fundamental human right that every person has a right to life. That being, life should be jealously safeguarded. It should only be lost by operation of law or natural occurrences. The second point to keep in mind is the seriousness with which the offence of culpable homicide is viewed by the law. In terms of the penalty section under s 49 of the Criminal Law (Codification and Reform) Act, culpable homicide attracts a sentence ranging from life imprisonment or any shorter term or a fine of up to or exceeding level 14. Level 14 is the highest level on the standard scale of fines and is set at USD$5 000.00. The court is allowed in the exercise of its discretion to impose a fine in excess of the highest level or to impose both a fine and imprisonment.

The accused in this case was not cornered. He was indeed the victim of an unlawful attack by John Silimoyo with the deceased joining in. He appreciated that the two assailants were drunk whilst he was sober. The nature of the attack upon the accused did not justify his use of a dangerous weapon. From a reading of the agreed facts, the accused managed to escape from the unlawful assault upon him. He removed from the assailants only to return to attack the deceased after arming himself with a deadly or lethal weapon. The accused clearly allowed his emotions to get the better of him. Whilst it has been argued that the deceased and John Silimoyo were the aggressors, such a conclusion left unqualified is inaccurate. In the court's view, the correct factual analysis is that initially the deceased and John Silimoyo were the aggressors. However once the accused had managed to escape from the assault upon him, he returned armed with a knife and became the aggressor. The accused was the proximate cause of the tragedy. He was in the best position to avert the tragedy. He simply decided to use a dangerous weapon after the assault upon him and not during the assault. The accused instead of putting an end to the assault upon him which he had managed to escape from decided to retaliate in a dangerous fashion. Therefore contrary to the submission by the defence counsel that but for the deceased's aggression, the tragedy could have been avoided, the correct conclusion is that, but for the accused's decision to retaliate after the assault on him had ended and his unnecessary use of a dangerous weapon, the tragedy could have been avoided.

It is a pity that there has been an upsurge in cases of violence resulting in death. People no longer respect the sanctity of human life. If the courts do not curb the unnecessary upsurge in homicide cases by playing their part through passing deterrent sentences where circumstances warrant it, the courts would be failing in their duty. The public needs to have confidence in the criminal justice system. Once society loses confidence in the criminal justice system, a risk of anarchy arises. Persons who unnecessarily and negligently cause the loss of human life must be visited with exemplary sentences so that would be offenders are deterred. If a deterrent sentence is meted out it has the effect of making people think twice before they act. In this case life was needlessly lost because of the accused's self-ego.

The accused's attack upon the deceased can be described as one of great determination involving the use of a lethal or dangerous weapon. The blow with the knife was delivered with determined force upon a dangerous area of the body. The moral heinousness or blameworthiness of the accused was extremely high. The accused whilst he pleaded guilty did not really have a choice. The facts were clear that he acted out of

proportion to the assault perpetrated upon him. Section 254 of the Criminal Law (Codification Reform Act) is very clear that where a person purporting to act in self-defence as provided for in s 253 exceeds the bounds of self-defence by using means which are disproportionate to avert the attack upon him, he will be found guilty of culpable homicide. The court has already observed that there was no justification after the assault upon him for the accused after escaping from the assault to arm himself with the knife and return to the stage. The fact that the accused pleaded guilty should therefore not be overemphasized though it is a relevant consideration.

The accused did not in the court's view express any remorse for his actions. He did not state that he was sorry for nor regretted his conduct. The accused's attitude appears to be that he deserved sympathy because he had been attacked first and was only retaliating. The court will be failing in its duty if it was seen to be encouraging retaliation. The law recognises not retaliation but defending one's self or another within limits set by law. The two concepts are different. Retaliation is inclined towards an eye for an eye doctrine which is not part of our law.

Having made the above observation, comments and conclusions, the court still remains alive to the difficult task which faces it is assessing the appropriate sentence. The accused still remains a member of the society albeit a bad apple because of what he did. He needs to be punished and reformed in the process so that he can reintegrate in the society and lead an exemplary life. Despite the enormity of his conduct and the loss of life which he caused, the court should not be retributive, lest it also ends up falling into the same basket as the accused. Courts should temper justice with mercy and the most appropriate sentence in any given case is one that fits the crime and the offender. The balancing process is a delicate one. Ultimately sentencing is a discretion to be exercised by the Judge in this case and it will invariably please others and disappoint others. What is critical is that the court's discretion has been exercised on justifiable principles.

In assessing sentence, apart from what has been alluded to, the rest of what has been submitted in mitigation on behalf of the accused and the aggravating circumstances submitted by the state though not specifically repeated in the written reasons for sentence have been given due consideration. The conduct of the accused of becoming a bully ex post *facto* the commission of the offence will not influence the assessment of sentence and it is accepted that the accused's conduct was an out of character happenstance. If the accused thereafter decided to behave as an animal, he is doing a disservice to himself. He will

however be punished for the crime for which he has been convicted and not for other unconnected wrongs which he committed.

In passing, it is necessary to comment that the submission by *Kativhu* that the court should consider community service as an appropriate sentence is out rightly rejected as being inappropriate given the objective circumstances of the case and the character of the accused. Community service would trivialise a serious offence. Such a sentence would engender in the public a sense of revulsion. The public interest outweighs the individual interests of the accused in this case.

In the view of this court, given the serious view it has taken of the accused's conduct, only a custodial sentence will be appropriate. The prosecutor has suggested a sentence of 12 years imprisonment with a portion suspended. Mr *Kativhu* relying on *S* v *Robert Nyoni* HB 201/15, a judgement of Makonese J submitted that a sentence of 3 years imprisonment with 1year suspended would be appropriate. Contrary to Mr *Kativhu*'s submission that the facts in *Robert Nyoni's* case and *in casu* are almost similar, the facts are easily distinguishable and most notably, in *Nyoni*'s case, the deceased is the one who first attacked the accused with a beer bottle and the latter retaliated there and then by striking the deceased once with a plank above the right ear. The accused in this case decided to retaliate disproportionately and well after he had managed to make good his escape and he also used a lethal weapon. What the court finds instructive in *Nyoni's* case is the learned Judge's pronouncement that; "*These courts have time and again indicated that members of the public must be reminded that violence has no place in a modern and democratic society as a means of dispute resolution. In cases of this nature imprisonment is the only appropriate sentence*." This court associates itself with the learned Judge's *dicta*

The sentence which this court will impose is hopefully one which will reform the accused, deter others from resorting to violence to resolve disputes and to entrench in the public's mind the fundamental right to life of every person as guaranteed by the Constitution. The court will not suspend any portion of the sentence because if the accused is not reformed into a good citizen by the lengthy sentence which will be imposed, a suspended portion is unlikely to do the trick.

In all the circumstances of this case the accused is sentenced to imprisonment of 9 years.

National Prosecuting Authority, State's legal practitioners
Kantor & Immerman, accused's legal practitioners