

STATE
versus
INNOCENT JAIRO

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 19 September 2016, 20 and 25 October 2016

Assessors: 1. Mr. Gweme
2. Mr. Gonzo

Criminal Trial

F Zachariah, for the state
P Kachdza, for accused pro-deo

CHITAPI J: The accused was indicted on a charge of murder. He first appeared before this court on 19 September, 2016. The trial was postponed to 20 October, 2016 on account of the unavailability of the accused's pro-deo counsel. On 20 October, 2016 the accused pleaded not guilty to the charge. The charge put to him was that he unlawfully caused the death of his wife Nyarai Tandeude by stabbing her in the chest and stomach with a knife thereby inflicting injuries from which the deceased succumbed to her death. The stabbing incident was alleged to have occurred on 30 January, 2015 at Chambati Village, Kenzamba. In charging the accused with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], the State averred that the accused acted with intent to kill or realised a real risk or possibility that his conduct could cause the death of the accused.

When the charge was read to the accused, he confirmed that he had understood it. When the court asked what his plea to the charge was, he said "I admit it". Counsel for the accused then indicated that the accused's response amounted to a plea of guilty which however was at variance with her instructions. Counsel sought leave to consult with the accused and such leave

was granted. After the consultation, the court asked the accused to clarify what he was admitting to the accused then responded as follows: “what I am admitting to is not the intention to kill or the realisation that my actions would cause death.” The court entered a plea of Not Guilty. Defence counsel then tendered a plea of guilty to culpable homicide. The state counsel accepted the tendered plea to the lesser charge but competent verdict of culpable homicide.

Counsel advised the court that a statement of agreed facts had been prepared between them. The statement of agreed facts was produced and marked annexure ‘A’. Its contents are as follows,

“STATEMENT OF AGREED FACTS

1. The accused person is a male adult aged 24 years and resides in Chambati Village, Chief Magonde, Kenzamba.
2. The now deceased person is Nyarai Tandaude, a female adult aged 41 years.
3. Accused was married to the now deceased and were living in Chambati Village together.
4. On the 30th of January 2015, the two lovebirds had an argument over infidelity issues at their homestead. The accused was suspecting that his wife was having an affair with another man from the neighboring village.
5. The now deceased sought refuge at her parents’ homestead in the same village. It was a common thing that the now deceased would routinely leave the matrimonial home after arguments and the accused would go and fetch her after family arbitration.
6. The accused followed as per norm so that they could solve their dispute. He managed to persuade the deceased to return to their matrimonial home without the intervention of the go-between (munyai) as was the case always.
7. On their way about 75 metres from the accused’s in-laws homestead, the two started quarrelling again. The accused in anger stabbed his wife once on the chest and on the stomach as they engaged in a fist fight.
8. The accused fled the scene leaving his wife lying in a pool of blood. She then managed to cry out for help. Her father August Tandaude rushed to the scene and took her home where she later died.
9. Her body was taken to Chinhoyi Provincial Hospital for post mortem examination. Doctor Nyakabau conducted the post mortem and concluded that death was due to **tension haemothorax**. The post mortem report is to be produced as an exhibit.

10. The accused person denies having the intention to kill the now deceased person or having realised that there was a real risk or possibility that his conduct might cause death and then continued to have engaged in that conduct despite the risk or possibility.
11. The accused person tenders a plea of guilty to Culpable Homicide as defined in Section 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] and the State accepts the limited plea”

After the statement of agreed facts had been read into the record, Advocate *Kachidza* for the accused advised the court that she had additions to make to the statement. She read out the addition to the statement and the court recorded the same as follows being an extension to or addition to para 6:

“The accused and the deceased walked away from the in-laws homestead. It then started to rain. The two took shelter under a tree. Whilst sheltering under the tree, the deceased suggested that the accused should sell his phone so that they have money before going back home. The accused who did not have money on him then left the deceased under the tree and went home to collect some money leaving the deceased sheltering from the rain. The deceased needed money to buy provisions for the home.

When the accused returned with the money, he found the deceased in a nearby ditch engaging in some form of sexual activity with a man who ran away. The accused and the deceased started quarrelling. During the quarrel, the deceased accused the accused person of being dull, and not being a man and having an affair. The deceased then assaulted the accused.

The accused tried to run away but slipped and fell to the ground. The deceased who was taller, heavier and stronger overpowered the accused. The accused in an attempt to frighten the deceased then armed himself with an okapi knife which he always carried as it had a key ring on which he kept the house keys attached. He then stabbed the deceased indiscriminately without aiming for any part of the deceased’s body.

The accused then also grabbed the knife and the accused believes that he may have caused further injury to the deceased in the process of trying to get his knife back. The accused ran away and took refuge as he was afraid of the outcome. The knife was recovered from the deceased.”

The State counsel admitted the addition to the facts as above stated. The court sought clarification from the defence counsel on the genuineness of the plea because the additional facts appeared to raise a defence of self defence. In particular, the court sought to understand what were the details of the culpa or negligence which the accused was admitting to as would ground a finding of guilt. Defence counsel then submitted that the accused was admitting that his reaction in using the knife was disproportionate to the harm he had suffered. In other words, the accused was admitting that he exceeded the bounds of self- defence. State counsel submitted that she did not have evidence to controvert what the accused was asserting. Asked by the court to

clarify whether or not she agreed that the knife was found in the possession of the deceased, State counsel answered that she again did not have evidence to the contrary. With the acceptance of the additional facts and after clarification by the court, the accused was formally convicted of culpable homicide upon his plea.

Before dealing with mitigation, the court would like to comment on an unsatisfactory feature of how the State has conducted itself in the matter. The additional facts to the agreed facts as outlined by the accused's counsel and accepted by the State counsel left the court wondering as to whether the State's approach to the case was not just perfunctory. The deceased was said to have been left sheltering under a tree when the accused rushed home to get some money. It was raining. In the intervening period the deceased is said to have become involved in sexual acts with another paramour, in a ditch, in the rain or mud. This is what is said to have torched the quarrel between the accused and the deceased. The paramour was not identified and appeared to have torched the quarrel between the accused and the deceased. The paramour appeared to have come from nowhere and disappeared into thin air. The allegations were somewhat inconsistent with para 7 of the Agreed Facts. The deceased was stabbed by the accused only some 75 metres away from her father's homestead from where the accused had collected her. How the deceased would have chosen to engage in a sexual encounter with a unnamed person only 75 metres away from her parents, homestead is difficult to imagine.

In paragraph 8 of the agreed facts, it was alleged that the deceased's cries for help after she was stabbed are what alerted the deceased's father August Tandeude that there was a problem. The place was obviously very near the homestead. In the court's view the State had no reason to accept this bizarre piece of evidence. Evidence to counter or interrogate it was available. The deceased's father and daughter attended upon the deceased on hearing her cries for help. They would have been in a position to shed light on the nature of the dispute which the accused and deceased had had. They could have assisted in indicating the time interval from the moment the deceased and the accused left the homestead to the time she cried out for help. The existence of the ditch where the deceased is said to have engaged in a sexual encounter on a rainy day ought to have been investigated.

Courts are there to dispense justice impartially without fear or favour. Criminal trials are not a game of hide and seek or a boxing ring where parties should employ unjust tactics to win

points. When a case has been presided over by the court, the community or society must remain with a degree of satisfaction that justice has been done. An accused should not be allowed to benefit from an injustice nor should he suffer from it. The fact that the State just accepted absurd and improbable facts has not done justice to this case. The State however is *dominis litis*. The court does not build a case for the State nor a defence for an accused. The State accepted the sequence of events and this left the court's hands tied up. The court will proceed on the basis of agreed facts although it does so with a warning to the State that it should not sacrifice justice for expediency. The primary duty of the prosecutor is to see to it that justice has been done. This is the reason why the prosecutor as much as the accused are allowed to appeal against the decision of this court where they considers that the court has erred. Whilst the prosecution will require to obtain leave to appeal and the accused appeals as of right, the limited or qualified right given to the prosecution is evidence that justice should ultimately emerge the winner in a criminal trial. Unfortunately, the accusatorial nature of our criminal justice system does not afford the judge a role to be involved in plea bargaining. The task is exclusively that of the prosecution. It is only in relation to sentence that the court in terms of s 271 (5) of the Criminal procedure and Evidence Act [*Chapter 9:07*] can question the accused in relation to matters relevant to sentence. Whilst s 271 (4) allows the court to call upon the prosecutor in plea proceedings to present evidence on any aspect of the charge, the powers of the court do not extend to requiring the accused to similarly give evidence.

Be the above as it may, the State produced two exhibits namely the post mortem report and the okapi knife used by the accused to stab the deceased. The post-mortem report was produced as exh 1 by consent. It is in the form of the abridged version. It was compiled by Doctor Ralph- Marlon Nyakabau on 2 February, 2015 after examining the body of the deceased. The doctor did not carry out an internal examination of the deceased's body. The doctor is a general medical officer. He is not a pathologist. He observed the following injuries on the deceased's body

“Deep, penetrating stab that punctured left lung and sub clavian vessels. Stab wound in the epigastrium with perforated bowel.”

The doctor attributed the cause of death to “Tension Haemothorax”. Exhibit 2 also produced by consent was an okapi knife used by the accused to stab the deceased with. The knife

was not measured in its blade which was missing. The court however did not find the missing blade to be of any great moment because what was material in the final analysis was that the use of the knife resulted in fatal stab wounds which were deep enough to perforate the deceased's left lung and her sub clavian vessels as well as perforated the deceased's bowel. The epigastrium is the upper central region of the abdomen just above the belly button or navel. The sub clavian vessels are located inside the body within the chest area. The deceased died from uncontrolled bleeding inside her thoracic cavity which accumulated blood. A summary of the condition referred to as tension haemothorax was gleaned upon reference to the internet www.trauma.org/index-php accessed on 21 October, 2016. It is a condition which requires urgent management because accumulative blood needs to be drained in the process of treatment and seeking to arrest or control the bleeding.

The defence counsel in mitigation of sentence submitted on behalf of the accused that he was fairly young at 24 years old having been married to the deceased who was 41 years old. The two had been married for 3 years and did not have a child between them although the deceased had 6 children of her own. It was argued that it was the accused who provided for the 6 children. The marriage was described as one of a teenager betrothed to an old woman. The court will accept the age difference as indicative of the fact that the deceased would have been more mature than the accused. However, the accused had at 23 or 24 years accused of age reached an age where he appreciated right from wrong and certainly the fact that a weapon like a knife if used on a human being in the nature of stabbing could cause serious injury if not as in this case, death.

It was submitted that the accused was remorseful and had pleaded guilty. He would forever live with the stigma of having caused the death of another person and in this case his wife. He was said to have been intent on paying compensation although he has no savings nor assets. The court was not altogether clear on how death could be compensated except if the aim was to appease the deceased family as per tradition and custom. The accused's counsel submitted that the accused wanted to pay the deceased's family traditional compensation. The court took note of the overture which however is not something that it can order that it be done. The accused has a terminally ill sister and an aged mother who is 78 years and he has been their provider. He is also HIV positive and requires good nutrition not readily available in prison.

It was submitted that the accused would not likely offend again and that his pre-trial incarceration since his arrest in 2015 be taken into account. The court was urged to exercise a prerogative of mercy, not leniency. Counsel urged the court not to take an arm chair approach to sentence.

State counsel submitted that the accused had been convicted of a serious offence and life was lost. His moral blameworthiness was said to be high because he used a knife to frighten his wife and ended up stabbing her. He fled from the scene instead of rendering assistance. Counsel submitted that domestic disputes should be resolved amicably and violence avoided. She advocated for a deterrent sentence. Counsel referred to the cases of *S v Ncube* HB 162/15 and *S v Sibanda* SC 245/13 in submitting that a custodial sentence in the region of 3 to 4 years effective was called for.

The court considered all the mitigatory and aggravatory circumstances submitted by the defence and State counsels. Although the court expressed its misgiving over the improbability of the agreed facts in relation to what torched the altercation between the accused and the deceased, it will accept that the accused acted under provocation. This is a case of domestic violence. The courts have observed that such cases are on the increase with MAKONESE J remarking in *State v Nqobile Ncube* HB 162/15, a case cited by State counsel that hardly a day passes without the courts being faced with a case of domestic violence in which death has resulted.

Domestic violence should not have a place in today's world. The days of spouses not respecting each other's bodily integrity are gone and should be gone forever. The accused in this case reacted by stabbing the deceased in the heat of the moment. It was accepted by the State that the accused appeared to have been on the receiving end and the deceased was getting the better of him. When one considers the facts of the matter, it was not argued that the accused was cornered and that the only way out of his predicament was to use a weapon, a lethal one for that matter which was in his pockets. There is no doubt that the accused had time to locate the knife and open it before stabbing the deceased indiscriminately. The accused could have sought to escape from the fight. He decided to stand his ground and defend himself using a lethal weapon in circumstances where the deceased was not armed. The deceased had not used a weapon.

Even if the accused was livid with anger at having seen the deceased in what he thought was a compromising position with another man whom he did not identify, the solution did not lie

in fighting especially since he was not sure whether the deceased and the mysterious man had had sexual intercourse but in dialogue. Dialogue was not something foreign to the accused. He had engaged in dialogue with his in-laws when he followed after his wife, the deceased.

The accused's personal circumstances are not out of the ordinary. They are common place. He has dependents and is HIV positive. It was not argued that he suffers from AIDS. HIV is a condition which has become common place and controllable. Whilst prison conditions will be harsh on the accused, sight should not be lost that life was lost. Courts should always emphasize in assessing sentence, the sanctity of human life. Every person has a right to life and this includes wrong doers. Society should not resort to violence as a method of correcting or punishing a wrong. The law should be the paramount and only acceptable method of punishing wrongs lest society slides back to the barbaric error.

Culpable homicide as defined in s 49 of the Criminal Law Codification & Reform Act is a very serious offence and the State counsel correctly so submitted. The punishment for the offence is codified. At its severest, the offence is punished by a sentence of life imprisonment. The punishment cascades downwards to a lesser defined term of imprisonment or a fine up to level 14 or both a term of imprisonment and a fine.

The degree of negligence shown by the accused in any given case is in the main the most important consideration in assessing an appropriate sentence in cases of culpable homicide. The higher the degree of negligence, the higher the moral blameworthiness to be apportioned to the offender. In *casu*, the accused's negligence was of a high degree. It manifested itself in the use of a dangerous weapon, namely an okapi knife which he used indiscriminately upon vulnerable parts of the deceased's body. The accused does not appear to have first sought to scare the deceased with the knife. He just opened its blade and used it. Even if the deceased was of a heavier build, stronger and taller, the use of the knife as described was not called for since the accused was not cornered. The accused allowed his emotions to get the better of him. It is important that people learn to keep their emotions in check or to control them. Emotions are a natural occurrence. Every person is susceptible to emotion. It is because of the universal nature of emotion that it becomes important to learn to exercise self-restraint difficult as such an exercise might be.

Defence counsel whilst admitting that domestic violence was an abhorrent offence submitted that there was no evidence that the accused was given to domestic violence. Indeed the accused is a first offender. First offenders are always treated by the courts with a degree of leniency circumstances of each given case permitting. The court is mindful that the accused is a first offender in this case. Regrettably his first brush with the law for which he was arraigned before the court involved a serious offence of negligently taking away the life of another person.

The court has considered the submissions made in mitigation and aggravation. It has considered the circumstances of the commission of the offence and the personal circumstances of the offender. These have been balanced against the interests of society. The court is of the view that a custodial sentence is called for in his case. However, a portion of the sentence will be suspended so that the accused will remain deterred once he reintegrates into society given his age and the expectation that he will live a trouble free life and establish fruitful and peaceful relationships with other persons. The accused is sentenced as follows taking into account in addition to other factors the fact that he has been in custody since February, 2015.

5 years imprisonment of which 30 months or 2 ½ years imprisonment is suspended for 5 years on condition that within that period, the accused is not convicted of any offence involving the unlawful loss of life of another person or assault for which upon conviction he is sentenced to serve a term of imprisonment without the option of a fine. Effective sentence is therefore 2 ½ years imprisonment.

National Prosecuting Authority, for the State
Kachidza-Advocates Chambers, for the accused (Pro-deo)