

THE STATE
versus
TINEI MAZUVA

HIGH COURT OF ZIMBABWE
MUZOFA J
CHINHOYI, 30 May & 5 June 2024

Assessors 1. *Mr Mutombwa*
 2. *Mr Kamanga*

Criminal Trial

K. Teveraishe, for the State
M. Magama, for the accused

MUZOFA J: The State accepted the limited plea to culpable homicide tendered by the accused on the charge of murder preferred against him.

The State and the defence counsel prepared the following statement of agreed facts.

1. The deceased and the accused were not related but both lived in Magunje. The accused resides at Chizavare Village Chief Nematombo. The deceased resided at Madyara Village.
2. On the 6th of January 2024 the deceased and his friend one Liberty Chipazaure proceeded to Magunje Growth Point around 1700 hours to drink some beer. They drank beer at Paramount bar until around 2100 hours. They then left and proceeded to Paradise night club to have more beer. This is where they met the deceased.
3. Around 0200 hours the accused forcibly took beer that the deceased and his colleague were drinking. The accused punched Liberty and an altercation ensued. Liberty walked away.
4. Shortly thereafter the deceased also went outside the night club. The deceased followed, he demanded the cigarette which the deceased was smoking. The deceased did not hand over the cigarette. The accused was not amused. He picked a log and hit the deceased once on the head.

5. The deceased fell down and started frothing. A police report was made. The accused fled from the scene. The police attended the scene and recovered the log used to assault the deceased.
6. The deceased's body was taken to Karoi District Hospital where a post mortem was conducted. The doctor opined that death was due to head injury – internal bleeding.

The statement of agreed facts was read out and marked annexure 1. The defence counsel confirmed that the essential elements of the offence were explained to the accused. Similarly, the statement of agreed facts was read to the accused and he agreed to them. He was satisfied that the plea to culpable homicide was unequivocal.

The State produced by consent, the post mortem report, the accused's confirmed warned and cautioned statement, the sketch plan and the wooden log. The wooden log was 29 centimeters weighing 1.7kgs. The certificates of weight were also produced.

We considered the facts placed before us. According to the statement of agreed facts it appears the accused was the aggressor through and through. However the evidence placed before us did not confirm that position.

The State produced the accused's confirmed warned and cautioned statement. The State did not give serious thought to the evidence borne of the statement. The accused's response to the caution was;

"I admit to the charges levelled against me, I fatally assaulted the deceased with a log once on the head after an altercation arose concerning my cigarette which I was smoking and he asked me and I refused. After refusing to give him the cigarette the deceased together with his other four colleagues started attacking me, the deceased hit me with a log once on the left shoulder, the other one kicked me with a booted foot on the knee. I tried to flee and I then picked the log which had fallen in front of me. I threw the log and it went on to hit the deceased on the head, he went on to sit in front of the shop door which is near the bar, I then fled. I later returned to the bar after 30 minutes. I was then told by the other people in the bar that I had murdered a person. The people tried to catch me, I then ran away"

Since the State chose to produce this evidence it means it accepted the accused's version. Surprising the statement of agreed facts contradicts the accused's version. We noted that there was some prevarication as the State read out the Statement of agreed facts it applied for some alterations from the deceased being the aggressor to the accused. It appears that issue

was unclear. We accept the version in the warned and cautioned statement since the State conceded to that version.

The Statement shows that the accused was under attack and had been assaulted by the deceased and his friends. The deceased was the aggressor who had requested for the cigarette. It appears the accused picked the log and struck the deceased when he was already fleeing from the deceased and friends. He was no longer under attack. His act to strike the deceased was more of revenge and out of anger than an attempt to defend himself.

The weapon he used was a weapon of opportunity, this is what was within his reach. He did not plan on what type of weapon to use. He hit the deceased once on the head. Under the circumstances we find that he would not have had an opportunity to think of which part of the body to strike.

Both the accused and the deceased were intoxicated. The deceased's imbibing started around 1700 hours. He together with his friend moved from one drinking place to another. The offence took place in the early hours of the following morning, they were still drinking. The pettiness of the cause of the altercation shows the extent of their drunkenness. Deceased was killed for a cigarette. We also considered that the deceased was the aggressor and he continued to patronise the accused.

We accordingly convicted the deceased of culpable homicide as defined in s49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

The accused took the witness stand and addressed the court in mitigation. He is aged 23 years, he was drunk, he said he was remorseful and intended to compensate the deceased's family. On hindsight he believed the dispute could have been amicably resolved

Ms Magama for the accused submitted that the accused was intoxicated, this was a Night Club fight that went wrong. Intoxication must be treated as mitigatory we were referred to *State v Gumbo HB 119/18* where the accused was drunk the court took intoxication as mitigatory and imposed a sentence of 5 years imprisonment of which 2 years were conditionally suspended.

A victim impact statement was filed of record. The statement was made by the deceased's paternal uncle. He said the deceased's parents passed on when he was young and he was taken care of by his paternal grandfather. The deceased was a divorcee and had two children aged 14 and 8 years respectively. As the uncle he will take over the responsibility of

these children yet he is now a pensioner which may compromise his ability to fully discharge his responsibilities. Further he indicated that the accused's family did not offer or pay any compensation. He then described how the deceased's death has traumatised him and the whole family. We appreciate the uncle's statement but in cases where the deceased was married and had children the first preference must be the wife if available and then the children. In this case the children's views should have been incorporated. They are the primary people who were impacted by the death of the deceased.

The penal provision provides for a fine up to level 14 and life imprisonment. The court must balance the commonly referred to triad, the accused, the offence and the interest of justice to come up with an appropriate sentence which falls within this range. A sentence must fit both the accused and the offence taking into account the interest of justice.

The accused has been convicted with an offence involving negligence. The court must assess his level of negligence first. The accused was drunk and had been assaulted by the deceased and his friends. He picked whatever weapon and struck the deceased once on the head. The blow was fatal. It resulted in a fracture of the skull leading to internal bleeding. The accused used excessive force simply because he could not tame his anger and need for revenge. The level of negligence was on the high side particularly bearing in mind that he was no longer under attack but he struck the deceased out of anger.

In assessing sentence, we take into account that the accused is a youthful first offender who was intoxicated and had been assaulted. Intoxication diminishes one's capacity to appreciate issues and amicably resolve disputes. In *State v Gunde & Anor H481/23* the accused persons were intoxicated they assaulted the deceased for stepping on their dog. They were aged 24 and 27 respectively, they were sentenced to 7 years imprisonment of which 2 years was conditionally suspended. The accused were the aggressors the Court took into account their youthful ages and that they were intoxicated as mitigatory.

The accused did not suffer a long period of pretrial incarceration. He was in custody for three weeks. Had the period been long the court would have taken that into consideration and reduce the sentence to be imposed see *State v Difiri 2001 (2) ZLR 411 (H)*.

Culpable homicide is a serious offence as it involves loss of life. Life once lost it cannot be regained. However, the court is cognisant that no sentence can bring back life or compensate it. On the other hand the public expects the accused to be punished for the unnecessary loss of life. The justice system should punish yet instil reformation on the accused and also serve as a

warning to the general public. A non-custodial sentence would be inappropriate in the circumstances. This unnecessary loss of life could have been avoided. He used too much force.

In the result the accused is sentenced to 6 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition the accused does not within that period commit an offence involving violence on the person of another for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, the State's legal practitioners

Murisi & Associates, the accused's legal practitioners